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## **1. Documentary evidence**

- 1.1. In addition to completed user evidence statement forms (UEFs or WCA8s), the application to modify the Definitive Map and Statement (DMS) was accompanied by a limited quantity of documentary evidence, In particular the survey schedule from 1950 and an extract from the Netherthong Inclosure (or Enclosure) Map of 1829.<sup>1</sup>
- 1.2. The applicant also subsequently submitted redacted correspondence between various parties, generally relating to disputes regarding gates at point from 2018 onwards. Documents were previously disclosed in response to a Freedom of Information request. Additional material also includes a County Council memo from the 1950s regarding widths proposed to be recorded in the DMS. Objectors to the proposal have also referred to various correspondence with the Council over recent years, regarding the gates at A, the width of the route, and other matters. The disclosed documents are included at item 18 in appendix D.
- 1.3. Other documentary evidence available to officers has also been taken into consideration, including Ordnance Survey maps and other township, inclosure tithe maps, additional documents relating to the development and review of the DMS, and photographic evidence. The available documentary evidence will be considered first, generally in chronological order.

### **Netherthong Inclosure Map of 1829 and Township Map of 1831**

- 1.4. The application was accompanied by a low-quality extract from the map accompany the Netherthong Inclosure Award. A higher quality copy has since been located. In response to the informal consultation exercise, a member of the public has also supplied an extract from a township map of 1831. The original map is understood to be in private ownership.<sup>2</sup> The township map shows the newly enclosed land as per the Inclosure Map, as well as old (pre-existing) enclosures within the Township of Netherthong. These documents are found at items 1a / 1b and 2a /2b in appendix D.
- 1.5. The application was not accompanied by an extract from the Inclosure Award itself. Due to lockdown, it has not been possible to inspect the award as West Yorkshire Archive Service searchrooms are currently closed. However, there is no indication from either map that the route itself was included in the award.

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<sup>1</sup> The statutes providing for the enclosure of land use the spelling inclosure. That spelling has been used throughout the report to refer to the legal process of converting common land into private property and in relation to documents produced as part of that process. The word 'enclosure' is used in this document to routes or areas of land that have been marked off by boundaries.

<sup>2</sup> The township map of 1831 is in private ownership and is unlikely to have been taken into consideration at the time the DMS was developed in the 1950s or reviewed in the 1970s. It is therefore considered 'new' evidence for the purpose of this investigation.

- 1.6. The 1829 and 1831 maps show small areas of newly enclosed land abutting the north and south of an enclosed route at point A. This is likely to be enclosure of areas of waste alongside an earlier public road (now public Wolfstones Road). The 1831 map shows in green the old (pre-existing) enclosures to north and south of an enclosed road leading to buildings in the general vicinity of the house at Wolfstones Heights Farm. This enclosed road clearly predates the inclosure award. The Inclosure map itself does not show the whole route, but shows the part abutting the modern Wolfstones Road coloured sepia, in common with other public and private roads.
- 1.7. The 1831 township map depicts a 'foot road' by means of a pecked line alongside field boundaries between points B and where the path crosses the boundary at point E to run along the north side of the field boundaries in the direction of Netherthong. The depiction of the route is consistent with the public footpath and enclosed driveway depicted later on OS maps and on the definitive map as footpath Holmfirth 60.
- 1.8. The 1829 and particularly the 1831 map do not *directly* confirm the existence of a public footpath along any part of the route under scrutiny, but the depiction is consistent with the existence of a public right of way on foot at that time. The 1831 map depicts the existence of an enclosed route from the farm to point A considerably wider than the currently recorded approximately 1.2m and gives no indication that the whole width between boundaries would not have been available for public use at that time. The map gives no suggestion of a wider enclosed route continuing between points B and E, although it does not necessarily follow that anyone using B-E would have walked very closely alongside the field boundary wall to the north.

### **Netherthong Tithe Map (1850)**

- 1.9. The Tithe Map of 1850 (item 3 in appendix D) shows the route in a very similar manner to the 1831 Township Map. The map shows an enclosed route from a pecked line from B-E annotated 'foot road'. The map was not directly concerned with public rights of way. However, the depiction of a foot road leading into an enclosed track is consistent with the later recording of a public right of way on foot. Part A-B is again depicted as an enclosed route of width significantly greater than the 1.2m / 4ft currently recorded and the map gives no indication that any public rights would only have been confined to part of the available width.

### **Conclusions regarding Inclosure / Township / Tithe Maps**

- 1.10. While not being conclusive evidence of the existence or lateral extent of public rights of way, the maps of 1829, 1831 and 1850 collectively depict an enclosed road and connecting field edge footpath. The field edge footpath B-E is consistent with the public footpath recorded in the 1950s. The maps do not provide conclusive evidence that the boundaries of A-B were set out with reference to the highway, so the fence-to-fence presumption may not apply. However, there is no indication that any public rights that might have then

existed at or prior to the dates of preparation of those maps would not have extended over the whole enclosed road A-B.

### **Ordnance Survey Maps**

**1:10560 1<sup>st</sup> Edition six-inch. Yorkshire Sheet 272. Surveyed 1850-51, published 1854. (The '1854 map')**

**1:2500 County Series 1st Edition Yorkshire [West Riding] Sheet CCLXXII.2. Surveyed 1888, published 1893. (The '1893 map')**

**1:2500 County Series 1st Revision Yorkshire [West Riding] Sheet CCLXXII.2. Surveyed 1888, revised 1904, published 1906. (The '1906 map')**

**1:2500 County Series 2nd Revision Yorkshire [West Riding] Sheet CCLXXII.2. Surveyed 1888, revised 1929 published 1931 (the '1931 map')**

**1:2500 National Grid series 1st Edition SE1209. Published 1964.**

- 1.11. The route in question is shown on successive Ordnance Survey maps published since 1854. Large scale OS maps are evidence of the physical existence, at the time of survey, of the features shown thereon. They do not record public rights of way. Nonetheless, they may provide useful supportive evidence of the physical existence of any ways depicted, or of their absence. Enlarged extracts of maps published in 1854, 1893, 1906, 1931 and 1963 are located at items 4 to 8 in appendix D.
- 1.12. The maps depict an enclosed route from point A towards point B, passing to north and south of various buildings at 'Wolfstones'. Maps published up to 1931 consistently show a pecked line commencing at point B and continuing in an easterly direction, along the north side of several enclosed fields, to point E. At point E the pecked line switches to the north side of the field boundary. This is typical of a field edge footpath and is consistent with the depiction of a 'foot road' in the 1831 township map and 1850 tithe map. A single pecked line following a field boundary is a well-understood cartographic convention indicating a field edge path.
- 1.13. None of the maps published between 1893 and 1964 indicate any feature at or near point A that might indicate the existence of a gate or similar structure. The 1931 map shows a broken line to the south of A-A2 and across the route at B, suggesting there were no solid boundary features at time of re-survey in 1929. None of the County Series maps give any suggestion that any public right of way over A-B would have been confined to a width narrower than the whole width between buildings or wall / fences. The maps given no indication of an enclosed track between B and D, the depiction being of a field edge footpath.
- 1.14. Parcel numbers shown on the 1931 map, and boundaries between the fields shown are referred to in the 'walking schedule' produced in 1950 as part of the survey of public rights of way under the National Parks and Access to the Countryside Act 1949. See item 9 in appendix D, discussed below.

- 1.15. The National Grid series OS map published in 1964 (the '1964 map') (item 8 in appendix D) post-dates the survey of public rights of way under the 1949 Act. The map clearly indicates that the field edge footpath between B and D shown on earlier maps, had been replaced by an enclosed track, annotated as such. Between point D and E, the route of Holmfirth 60 was still depicted by means of a pecked line. Measured from the map, there is a clear space of between 3.6 and 4.6 metres between the depicted boundary features. The new boundary on the south side is B-D is consistent with position of fencing shown in more recent photos and does not appear to have changed appreciably to this day. There is nothing to indicate that only part of the space between the boundaries would have been available / used by the public.
- 1.16. The 1964 map is marked with solid lines across the line of the track at points B and D. This is consistent with boundary features existing in those locations, e.g., walls or fences. This does not preclude there having also been stiles or wicket gates as noted in the survey of the route in 1950. (See below). There is nothing to suggest the existence of boundary features such as gates, or other structures at points A or C.

### **Conclusions regarding Ordnance Survey maps**

- 1.17. The depiction of the route in successive large-scale OS maps is consistent with physical existence of field edge footpath that continue along (within) an enclosed access road. The maps do not provide direct evidence of the existence or extent of public rights but are consistent with the existence of a field edge public footpath that continued along an enclosed access road.
- 1.18. The later map provides evidence that part of the field footpath from B-D had become a wider enclosed track by the early 1960s. It is possible that the boundary to the south side was set out with reference to the highway and a fence-to-fence presumption may thus apply. However, this is inconclusive. As an alternative, the map provides evidence of the provision of a wider route which the public were able to use, consistent with dedication and acceptance of public rights over a greater width.
- 1.19. When an enclosed route is shown on maps, there is nothing to indicated that any public rights that might have come into existence, or people using the route on foot, would have been confined to only part of the apparently available width.
- 1.20. Successive maps give no indication of any features across the route at point A that might suggest the presence of gates or similar structures. While various maps indicate such features at field boundaries, the 1964 map suggest no such features at point C.

## **Records relating to the development of the first Definitive Map and Statement under Part IV of the National Parks and Access to the Countryside Act 1949**

### **Survey Schedule (Walking Schedule)**

- 1.21. The development of the first DMS under the 1949 Act commenced with a survey by the West Riding County Council (WRCC) of paths over which public rights of way were alleged to subsist. Information about paths in Holmfirth was furnished Holmfirth Urban District Council ('the UDC'). A map would have been submitted to the County Council, accompanied by schedules describing the various paths, dated December 1951. The map for the Holmfirth district appears not to have survived. The survey schedule (otherwise the 'walking schedule') corresponding with the path later recorded as footpath Holmfirth 60 is found at item 9 in appendix D.
- 1.22. The 'walking schedule' for path 240 (later numbered as Holmfirth 60) described the route as a footpath, starting at 'Footpath 239 N. of Netherthong Reservoir'. (NB 'Footpath 239' is now numbered footpath Holmfirth 58.) The destination was given as Netherthong Road. The path was surveyed in September 1950. The reason for believing the path to be public was recorded as 'Uninterrupted user by public for 50 years'.
- 1.23. The schedule records concise information about various features found along the path including gates gaps and stiles between various fields. The description should be read in conjunction with the parcel numbers recorded on the 1931 Ordnance Survey map - see item 7 in appendix D. The field boundaries referred to, where relevant to the current claim, have been indicated by letters B, C, D and E on the plan at Item 1 in appendix B.
- 1.24. The description given was: "Fieldgate 504-515, Stile 515 leading into Ox Lane, Gap Ox Lane to 84. Fieldgate 84-82. Stile 82-1315. Wicket gate 1315-1332. Stile 1332-1333, 1333 into C.R.B leading into Wolfstones Road".
- 1.25. The location of the 'stile 82-1315' was point E, as indicated on the plan at item 1 in appendix B. The 'wicket gate 1315-1332' was point D. The 'stile 1332-1333' was at point C. On leaving field 1333 (at point B) the route entered the cart road between the property now called Wolfstones Heights Farm and Wolfstones Road. There was no mention, in an otherwise detailed description of the path of any stiles, gates or other structures at the junction with Wolfstones Road (point A).
- 1.26. The description 'C.R.B' for the length between B and C is an abbreviation of Carriage Road Bridleway. This was a term used on some schedules as a non-statutory description for a type of 'Road Used as a Public Path' (RUPP). RUPPs were to be included on the Definitive Map. The term CRB was included in Ministry-approved guidance from the Commons, Open Spaces and Footpaths Preservation Society as a symbol to be used when marking maps as part of the survey. This was to indicate a 'Public Carriage or Cart Road or Green (unmetalled) Lane' mainly used as a bridleway. However, it appears



likely in this case the surveyor mis-applied the term to imply a private cart road over which there was also a public bridleway, or simply as shorthand than for the physical appearance of the way, rather than in the sense of a RUPP. That the route was also described as a 'footpath' indicates the latter explanation is more likely.

- 1.27. The schedule described the average width and general condition of the path in the following manner: "*3ft. to Carriage Road Bridleway leading to Wolfstones Road. Condition fair. Natural Surface to C.R.B, then metalled*". No specific width was suggested for the part A-B. However, the description as a 'carriage road' under 'width' would suggest that a public right of way was alleged to have existed over the whole width of a way that was physically wide enough for use with the vehicles. The description and suggested width of the rest of path Holmfirth 60 (including B-E) is consistent with the way having been at that time a field edge footpath. This is also consistent with its depiction on the 1931 OS map.

### **Draft, Provisional and Definitive Maps and Statements and associated documents**

- 1.28. The survey maps and schedules were supplied to the WRCC who then prepared the Draft Map and Statement. An extract from the Draft Map is included at item 10 in appendix D. <sup>3</sup> The Draft Map and Statement showed all the public footpaths, bridleways and 'roads used as public paths' that subsisted, or were reasonably alleged to subsist, at the 'relevant date', being 22<sup>nd</sup> September 1952. The Draft Statement would have contained details as to the approximate width of path Holmfirth 60 and any limitations such as gates or stiles, such limitations also being indicated on the Draft Map.
- 1.29. There is no record of any objection or representation having been made relating to the depiction of Path 60 in the Draft Map and Statement. As a result, the route was included in the same manner in a Provisional and finally Definitive Map and Statement. Extracts from the first Definitive Map and Statement ('relevant date' 22 September 1952 and otherwise referred to as the '1952 Definitive Map and Statement') are included at items 11 and 12 in appendix D.
- 1.30. The width of path 60 was recorded in the 1952 Statement as approximately 4ft along its whole length. Importantly, it must be recognised that the recorded width is stated as *approximate* and does not preclude parts of the path having been narrower, and parts wider than 4ft. It is highly *unlikely* that public rights were confined to a uniform and strict 4ft width along the whole length of the route. It is common for actual widths to vary considerably according to the terrain, surface condition and other physical characteristics. There is no

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<sup>3</sup> The Council does not currently possess a copy of the 1952 Draft Statement. A copy *may* be held by West Yorkshire Archive Service at Wakefield. Due to lockdown officers have not been able to inspect this document, however it is not considered necessary to do so to determine this application.

indication as to where within physical boundaries (e.g., for A-B) any such 4ft public footpath might have been positioned. The width of approximately 4ft does not accord with the description of 'CRB width' given in the 'walking schedule' in respect of A-B.

- 1.31. Section 32(4) of the National Parks and Access to the Countryside Act 1949 (since repealed) provided that "A definitive map and statement shall be conclusive as to the particulars contained therein..." also that "...particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at the relevant date..." However, this does not preclude the subsequent discovery of evidence that might suggest that public rights extended over a greater width than approximately 4ft or that if actually limited to a narrower width, that rights might have subsequently come into existence over a greater width.
- 1.32. The Definitive Statement also includes in the 'general' column (i.e., likely to be considered as limitations or conditions), various items of furniture, including 3 stiles, 2 field gates and 1 wicket gate. The positions of these structures were indicated on the Definitive Map and are consistent with structures described on the walking schedule of 1950. There were no structures recorded at / or in the vicinity of, point A. This is without prejudice to the possible existence of additional limitations or conditions, although the evidence does not support the existence of additional limitations.
- 1.33. Although there were no objections to the recording of all parts of Holmfirth 60 as approximately 4ft wide, this does not accord with the description of 'CRB width' in the walking schedule in relation to A-B.
- 1.34. The context in which objections were made (or not made) has been considered further, particularly in the light of the discovery of County Council memos and correspondence that relate to the widths of paths to be recorded in the statement.

### **County Council Memos and correspondence following publication of the Draft Map and Statement**

#### **Memo from (signed by) WRCC County Engineer and Surveyor to Clerk of the County Council. 2nd December 1954**

- 1.35. Various public rights of way in the Holmfirth Urban District were described in the walking schedules with greater widths than the approximately 4ft understood to have been recorded in the draft statement. However, a very large number of objections were submitted by Holmfirth UDC to the initially recorded width and / or status. In almost all cases it was asserted that footpaths recorded in the draft statement as having widths greater than approximately 4ft, were actually only 4ft wide. No evidence appears to have been provided to support such assertions.

- 1.36. The practice of district councils applying for blanket reductions in recorded widths, to below the widths described in the survey schedules that they themselves initially provided, appears to have been widespread within the West Riding. By contrast, the author is not aware any examples of similar objections, to increase the recorded width, where the draft Statement recorded a lesser width than that suggested in a walking schedule. In this case, no objection was received from Holmfirth UDC to the recording of a width of approximately 4 feet for the whole length of path 60.
- 1.37. The applicant for the DMMO supplied a redacted copy of a County Council memo (the '1954 Memo') which formed part of discussions between the county clerk and county surveyor's departments, and with the district councils, regarding the widths that should be recorded the Statement. The unredacted memo is included at item 13 in appendix D. <sup>4</sup>
- 1.38. The 1954 Memo refers to a discussion between an 'assistant' and two named individuals (possibly in the clerk's office) and requested confirmation of 'agreement' reached regarding the making of amendments to the draft Map and Statement to reduce the recorded widths. It was suggested that where footpaths were recorded in the draft statement with widths greater than six feet the width should be changed to 4ft, this being considered a 'normal width for a footpath'. Similarly, the memo indicated that all bridleways recorded as greater than 10ft should recorded at a standard width of 8ft. The memo went on to confirm that this was "*in order to define the liability of the highway authority [wi]thin the limits of way which in some cases are 20, 30, [??] and sometimes more feet between fences.*" The proposed approach appears to have had no regard for whether the public's rights in such cases might actually extend over a greater width. A blanket approach was being proposed. This approach is highly questionable.
- 1.39. Following on from this memo and further discussions, objections to the draft map and statement were received from most, if not all district councils in the West Riding, indicating reduced widths (and in many cases reductions in status', as described earlier).
- 1.40. It has not been possibly to investigate either Holmfirth UDC or the County Council's records due to Covid-19 restrictions / lockdown. However, officers are aware of correspondence between another district council (Ripponden UDC) and the WRCC that refers to similar blanket changes. Those requested changes were stated to have arisen out of discussions with the County Engineer and Surveyors Department regarding the "*...upon the implications of the excessive width previously included*". This suggests the approach being encouraged by WRCC was to deliberately under-record widths to reduce maintenance liabilities. See memo at item 14 in appendix D.

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<sup>4</sup> The original memo is found within the WRCC Clerks Department files, held by WYAS at Wakefield. It was discovered by a British Horse Society researcher and a photograph supplied to Kirklees Council.

1.41. Although Footpath Holmfirth 60 was only ever recorded at *approximately* 4ft wide along its whole length, given the apparent attitude to the recording of greater widths (and encouragement by the County Council for district councils to object to the recording of greater widths), it is of no surprise there was no objection to the recording of a width of approximately 4ft for the whole of Holmfirth 60.

### **Review of the Definitive Map**

- 1.42. A review of the Definitive Map commenced in the late 1970s, with a Draft Revision Map being produced late in 1979 and placed on deposit for public inspection in 1980. An extract of the Draft Revision Map is included at item 16 in appendix D. Holmfirth 60 was shown and described in a similar manner to the first DMS. The annotation 'WG' (for wicket gate) on the map at point C was absent. There were no objections or representations made in respect of footpath Holmfirth 60. The review was formally abandoned following the introduction of new procedures under the 1981 Act for keeping the DMS under continuous review and the making of individual DMMOs. The Modified Definitive Map published in 1985 included the path as per the Draft Revision Map. The Modified (1985) Statement still made reference to a wicket gate. A metric width of approximately 1.2m was recorded, alongside] an imperial width of approx.4ft. <sup>5</sup> Extracts from the Modified (1985) Definitive Map and Statement are included at items 3a and 3b in appendix B. The route shown is generally within the boundary of the track, as shown in generalised form on the base mapping.
- 1.43. It is unclear whether or not the removal of the annotation WG indicated re-dedication without such a limitation as it remained in the modified statement. However, no one who submitted user evidence, or any other witnesses, recalled the existence of such a gate, so its absence by the late 1970s is considered likely. It is reasonable to presume that the removal of the annotation 'WG' was intentional, and the retention in the Draft Review Statement was accidental. It would be appropriate to remove the reference in the Statement to this limitation.

### **Conclusions regarding the preparation and review of the definitive map.**

- 1.44. It is apparent from the walking schedule of 1950 that A-B followed a vehicle width route, without any gates or stiles at point A. Although Holmfirth 60 was only recorded in the Statement as approximately 4ft wide along its whole length, analysis of other documentation and memos relating to the definitive map process indicates a concern at County Council level with limiting liabilities

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<sup>5</sup> The Council's 'working copy' statement is based on the 1985 Statement but retyped into a database. The words approximate in relations to lengths and widths have not been included, nor have the imperial measurements. This may give the impression that the width recorded is exactly 1.2m – it is not. The map and statement have not been modified since 1985 and so the details in the 'as published' Statement at item 16 in appendix D are those which apply.

by recording widths were often less than the actual legal width or status of many routes. Also, a degree of collusion with parishes / district councils to ensure that happened. This lack of concern for recording the actual legal width of wider routes casts doubt on the accuracy of the recording of a width of approximately 4ft for the part A-B. This weakens the reliance that may be placed on the Statement as evidence of the actual legal width.

- 1.45. Various documents indicate the existence of a stile at points B and C as well as a wicket gate at point D, along a field edge footpath. The width of approximately 4ft recorded in the 1952 Statement for B-E is plausible.
- 1.46. There is no evidence of any structures having existed at point A. The review and modified definitive maps and statements are not consistent regarding the continued recording of a wicket gate, which may have been no longer extant by the late 1970s.
- 1.47. Although the 1952 and now 1985 Statements do provide legally conclusive evidence of the details of the public right of way recorded on the map, this does not preclude a public footpath extending over a greater width at the relevant dates of 1952 and 1985. Or having subsequently been established, or rededicated without e.g., a wicket gate or other structures. The evidence suggests it is wholly plausible that the extent of the public footpath over A-B was greater in 1950 than subsequently recorded in the statement.
- 1.48. It is also more likely than not that the continued recording of a 'wicket gate' in the 'general' column of the modified Statement was an error and it would be appropriate to vary the particulars recorded in the Statement to remove this.

## **Photographs and aerial photographs**

### **Aerial photographs**

- 1.49. Aerial photographs, taken at various dates between 2000 and 2018, are included in appendix B. <sup>6</sup> These show the route between point A at Wolfstones Road and point E at Brown Hill, both before and during the carrying out of various developments. The earliest available air photo dates from only five years after the current owner is understood to have purchased Wolfstones Heights Farm. Although parts of the driveway (A-B1) are obscured by vegetation in most of the photos, where this can be seen there is no indication of any features that would have limited public use to any particular width or position within the driveway. This observation is consistent with other available photographs of the route taken from 2007 onwards, included at item 2 in appendix B.

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<sup>6</sup> It is recognised that various works were carried out to land and buildings abutting the south side of the driveway in the period 2015 to 2017, particular due to a fire at the property. However, there are, regrettably, no available aerial photographs taken in the period between 2012 and 2018.

- 1.50. The eastern part of the route between approx. B1 and E can be clearly seen in all aerial photos. In all photographs this part of the route is seen bounded on the south side by fencing, running all the way to point E (cf the 1964 map showing the enclosed track ending at point D). The field boundary wall to the north is clearly shown in all photos except a short length removed by 2018. This part of the route is seen to have a grass surface. Worn lines of variable width and position can be seen within the enclosed corridor; these are not consistent between, not simply a narrow strip on northern side as might be expected if pedestrian use had been confined to that part as objectors have claimed.
- 1.51. Successive aerial photographs give no indication of any stored items, structures, vehicles etc. along any part of the route, with the exception of a feature seen on the north side of the route near point A in 2000.<sup>7</sup>
- 1.52. Aerial photos from 2000 and 2002 also show small areas consistent with bare earth or stone near points B1 and C, but no indication of that use of the way would have prevented.
- 1.53. Successive aerial photos give no indication of any structures across the way, although only the part from B1 to E is clear of overhanging vegetation. Aerial photos from 2006 onwards do clearly show a structure consistent with a gate, east of point E (i.e., not on the route). This structure is also seen in a photo from 2007 taken from ground level. Whereas there are no such structures visible at points B1, C or D.

### **Conclusions regarding aerial photographs**

- 1.54. The aerial photographs provide strong evidence of the availability of an enclosed route, varying between approx. 2.8 and 4.2 m between boundaries; the exact route used by any individual walking within those boundaries may have varied, but this does not mean that a consistent way had not been used overall. The aerial photographs support the user evidence that suggests a way of 3-4 metres had been available. While this evidence is not conclusive evidence that way visible was actually used by the public, it is strongly indicative that such a way was physically available between 2000 and 2018.

### **Other Photographs**

- 1.55. Various photographs taken between 2007 and 2020 are included at item 2 in appendix B.<sup>8</sup> These have been annotated to indicate locations and key

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<sup>7</sup> This observation is at odds with claims by objectors that various items, vehicles etc had been placed along the south side of the route making it unavailable.

<sup>8</sup> The set of photographs at item 1 include photos of gates at point A and B taken on 13 Feb 2007 during a survey of the whole Kirklees PROW network. Any structures found were recorded and photographed, regardless of whether they were formally authorised or recorded. See also 'Furniture Photograph Reports' at items 12 and 13 in appendix B.

features. Google Street View photos of point A are included at items 10 and 11 in appendix B.

- 1.56. As well as the route itself, the photos indicate various changes to boundary structures such as walls and fences and alterations to construction of various buildings, particularly to north and south of A-B.
- 1.57. Photographs show well-defined enclosed route extending all the way from A-B, consistent with the aerial photographs.<sup>9</sup> A-B1 can be seen to have an asphalt surface, with B-1 C being predominantly earth / grass.
- 1.58. With the exception of a limited quantity of building materials on the north side of the route near in 2014, and gates in situ at various locations, no other obstructions can be seen, and there are no parked vehicles, trailers or similar items present in any photos.
- 1.59. It is apparent from the photos that work had been carried to structures alongside the track, particularly in a period 2014/5-1017 – however there are no available pictures illustrating the impact that that work may have had on the availability of any part of the route.
- 1.60. Prior to photos from September 2020 onwards that show fence posts and netting within the driveway, there is no indication from photographs that pedestrians were confined to any particular part of the available width.
- 1.61. Various photos show a pair of security gates at point A. All available photographs, with the exception of photograph 32, taken at dusk on 24 Sep 2018, show these gates in open position. Photo no. 4 from June 2014 and the Google Street View photos from July 2009 and May 2011 indicate a stile comprised of stone flags leading off the direct route near point A. Later photos from 2018 onwards indicate the arrangement had been altered by the formation of a squeeze stile around a gatepost when a wall was built along the south side of the route, indicating a minor change in the route that might have been used if the main gates were shut.
- 1.62. Various photographs also indicate a pair of wooden gates at point B, including a pedestrian gate on the north side. The appears to have since been relocated to at or near point A3 (see photo 18). There is no indication of any gates or other structures at other locations – e.g., at points C and D where a stile and a wicket gate had been recorded, nor any stile at point B.

### **Conclusions regarding other photographs**

- 1.63. Available photographs are consistent with user evidence which describes the whole available width of 3-4 metres having been available and used, from point

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<sup>9</sup> The walls and fences on the south side are not actual continuous- there is a gap between A3 and B where there is access to the area in front of the house.

A all the way to point E. Photographs do not support the suggestion by objectors that only part of the width (on the north side) was generally available due to the presence of various stored items.

## **2. User evidence**

- 2.1. The existence of a public footpath along the route in question is not in doubt. The main question regards the lateral extent of that right of way, also, if of a narrower width than the whole width between physical boundaries, where within that corridor the public right of way may sit. The user evidence is of assistance when considering these questions. Users generally described the way available / used as being over the whole width between boundaries, a width of 3-4 m being a common description.
- 2.2. Should the evidence as a whole show that the way originally recorded was indeed only confined to a narrower width of 1.2 metres, as asserted by the landowner, this does not preclude the possibility that public rights over an additional width have subsequently come into existence. There may also have been re-dedication without certain limitations currently recorded in the Definitive Map and Statement. In light of this, the user evidence has been analysed in the context of the tests under section 31 of the Highways Act 1980 and in respect of dedication at common law.
- 2.3. The application was supported by user evidence forms (UEFs) completed by 14 individuals who all indicated use or availability of a width greater than the width of approximately 1.2m currently recorded in the Statement. Additional user evidence was received following the informal consultation in Autumn 2020, in which specific questions were asked regarding the width available and actually used.
- 2.4. The majority of those who submitted evidence appear to be as members of the public rather than visitors or exercising a private right of way. All public use described was on foot. Users generally described use of the route for leisure or recreation, including walking or running. This included use for organised group walks and use by a running group. There are frequent references to use of the route as part of a walk / run to the trig point (triangulation pillar) at Wolfstones Height, a short distance to the west.
- 2.5. Frequency and periods of use are indicated the chart at item 2 in appendix A. Other items in appendix A included summaries of the descriptions given of widths available / used and other relevant evidence including descriptions of gates and stiles.

### **Section 31 Highways Act 1980**

- 2.6. For a way to have been presumed to have been dedicated under section 31, a number of elements must be satisfied. These are set out in the section itself:



2.7. “Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

2.8. The key elements required by this section are considered in turn below.

### **Date of bringing into question**

2.9. The full period of 20 years user required under s31 Highways Act 1980 is calculated retrospectively from the date of bring into question.

2.10. In order for the right of the public to have been brought into question the right must be challenged by some means sufficient to bring it home to the public that there right to use the way is being challenged.

2.11. In absence of an earlier action, the making of an application to modify the Definitive Map and Statement would have brought any unrecorded public rights into question.

2.12. The application was made on 30 September 2020. This was in response to the fencing off of the majority width of the driveway (A to A3) on or shortly before 6<sup>th</sup> September 2020, also preventing access via the bypass stile. Mr Scanlon, as agent for the landowner immediately contacted the Council to advise of this work being carried out. The fencing off of part of the available width would have brought any public rights into question. Therefore the 20-year period to be considered under section 31 is September 2000 to September 2020.

### **Alternative possible dates for bringing into question.**

2.13. Earlier possible dates for the bring into question of public rights over the greater width have also been considered. It should be borne in mind that the mere existence of a public footpath along the route has not been brought into question and is not itself in doubt. Doubt has only been raised regarding the existence of rights extending over a width greater than approximately 4ft or 1.2 metres and / or in relation to the exact position of any public right of way if only of a lesser width.

### **April 2020**

2.14. In Spring 2020 the pair of electric gates at point A were closed with the apparent intention of discouraging use of the public right of way during the first coronavirus lockdown, with use of an alternative permissive route (the already constructed proposed diversion route). This action is documented in discussions between a Strategic Director of the Council and the landowner’s agent from mid-April 2020 onwards. This also resulted in a complaint from the

Ramblers in May 2020 and threat of legal action by PNFS.<sup>10</sup> There is no indication that the bypass stile near point A had been closed off. This action appears to have been motivated by a genuine and understandable fear of a risk to the health of the residents during early stage of the pandemic, and increased use of Holmfirth 60 by the public during lockdown; there is no indication that users of the way would have perceived that their right to use a greater width than approx. 1.2m was being challenged. This action is not considered to have brought public rights over the greater width of the route into question.

### **August 2018**

- 2.15. It is documented that a PNFS Inspector observed the electric gates automatically closing at dusk - at 9.20pm on 6 August 2018.<sup>11</sup> Following the gates again being closed at dusk on 24 September 2018<sup>12</sup>, PNFS served notice on the Council, under section 130A of the Highways Act 1980, for it to take action to secure the removal of unauthorised security gates.<sup>13</sup> There is no indication of complaint from the public in general or any indication that the public in general perceived the gates being closed as a challenge to the existence of rights over the greater width. The existence of a public footpath in general has never been in doubt. Provision had long been made for pedestrians to bypass the (unauthorised) gates. This would in any case have required members of the public to enter and travel along the greater width of the driveway near point A. Thus, it is considered that the closing of the security gates at dusk in August 2018 would not have brought rights over the wider width of the route into question.

### **May 2019**

- 2.16. There was further correspondence with the landowner's agent in May 2019 following a theft at the property. By that time, it is apparent that the agent had become aware of the recorded width. He stated that it was his client's intention to close one gate leaf, while still allowing a gap of greater than 1.2m. That was the first point that the landowner or their agent appears to have taken the view that the public right of way might not extend over the whole available width of the driveway. However, this information appears to have been employed as a strategy to retain a security gate at point A to restrict vehicular access along the driveway; there is no indication of any action having been taken that would

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<sup>10</sup> The landowner's agent later arranged for one gate leaf to remain open (this was done in June 2020). The agent was clearly aware by that point of the recorded width and what width the Council might and might not be a strong position to enforce. See documents at item 18 in Appendix D

<sup>11</sup> Report from PNFS at item 20 in appendix D

<sup>12</sup> Second report from PNFS at item 21 in appendix D. Includes a photo showing the electric gates closed at dusk.

<sup>13</sup> This was resolved through the landowners agreeing to keep the electric security gates open. No further action legal was taken to secure their removal. See notice to PNFS at item 22 in appendix D

have disabused pedestrians of the notion that public rights extended over a greater width. In any case, no action was taken to alter the operation of the gates to allow only one leaf to be closed and the other to remain open, until June 2020. Nor was this intention communicated to the public. This stated intention did not bring any public rights into question.

### **November 2000**

2.17. Council files contain a response to an enquiry in late 2000 from the Holme Valley Parish Council. This refers to the stile alongside the gates and to a signpost.<sup>14</sup> The exact nature of this enquiry or what prompted it is unclear. However, there is little suggestion that the public's right to use a greater width might have been brought into question in 2000, for the same reasons given above.

### **'A Way'**

2.18. All user witnesses who completed UEFs indicated that the application route had always followed the same course and had not been altered.

2.19. The user evidence is consistent with photographic and map evidence discussed above that indicates the availability of a consistent well-defined route, following the enclosed driveway and following field boundaries or an enclosed track to point E.

2.20. The only variation from this well-defined route may have been in the vicinity of point A where, in addition to the well-defined driveway, there has been a stile on the southern side allowing pedestrian user to bypass the gates, if found closed. It is apparent from photographs that the alignment that bypass route that might have been used altered around 2015-2017 due to the construction of a boundary wall and creation of a narrow squeeze stile around the southernmost gatepost. However, the bypass route would not have been used, or more latterly available, if the gates were in open position. I.e., when most use was likely to have taken place. It may also be reasonably characterised as exercise of a common law right to deviate from the existing public right of way that is recognised to exist, but which had been possibly unlawfully obstructed by the closed electric gate(s).

### **'...Actually enjoyed'**

2.21. All fourteen individuals who initially completed evidence forms actually used the route themselves and described the route as having a width greater than the approximately 1.2m currently recorded. 10 user witnesses indicated they had used the way over the full 20-year period from 2000. Much documented user commenced in the mid-1970s, with some use commencing in the early 1960s.

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<sup>14</sup> Objectors to the application have also referred to enquiries '15 or 20 years ago' from the Council or the parish council which resulted in no action.

Most use was described as monthly or every few months, with some weekly use. People generally described the way available and used as between 3 and 4 metres wide, or between 8 and 13 feet. Many people specifically referred to the route having been narrowed only recently, with a greater width previously available and actually used.

- 2.22. In response to the informal consultation exercise, 11 additional people, who had not indicated any use of the way that might be considered 'private' in nature, described use over the 20-year period. All those individuals described use of a route wider than the approx. 1.2m currently recorded. The consultation specifically asked various questions about the width available and actually used, where within the available width they walked, and if the width changed over time. In general, the width described as used by those who responded was the full width of the track, or with similar widths to those mentioned in the earlier evidence forms. Several people indicated you could 'walk where you wanted' or described walking up the centre of the track. A number of people also specifically described walking the route in the company of others or in groups, so did not always use the path in single file.
- 2.23. In addition, several people who expressed strong support for the separate proposed diversion and against the claim, described personal use of a narrower width, although two appear to acknowledge the available width had been narrowed.
- 2.24. Three objectors did claim that public use had been confined to the northernmost 1.2 metres and that the southern side of the driveway and had been unavailable due to the presence of various stored items, vehicles etc. and building work at various times. This claim is somewhat at odds with other evidence, including user evidence and photographic evidence. This is explored further below under 'interruption'.
- 2.25. Specific comments made regarding the width previously available or used are included at items 4 and 5 in appendix A. <sup>15</sup>

#### **'...by the public'**

- 2.26. All those who completed evidence forms and the overwhelming majority of those who responded to the consultation were using the route as members of the public and not in exercise of private rights, or e.g., as visitors or employees. A small number of people who responded to the informal consultation had used the way in connection with premises accessed from it. It is considered that

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<sup>15</sup> These comments are anonymised and may presented in be in random order to avoid individual witnesses being identified by third parties at this stage. Should an Order be made and advertised, the documents considered (including user evidence) would then be available for public inspection. This includes the identities of user witnesses. This is in line with various Information Tribunal decisions regarding user evidence, and paragraph 8 of Schedule 15 of the Wildlife and Countryside Act 1981.

there was significant use by the public at large throughout and before the 20-year period.

**‘... without interruption’**

- 2.27. Interruption means actual and physical stopping of the enjoyment of the public use of the way by the landowner or someone acting lawfully on his behalf. Use of the way does not need to have been constant. Any interruption must have been with the intention of preventing public use of the way, and not for some other purpose such as the parking of vehicles or the carrying out of building work.
- 2.28. The overwhelming majority of people who supplied evidence of use of a greater width indicated gave no indication that use of any part of the way had been interrupted, prior to the physical narrowing of part of the route in early September 2020. One person did refer to a pile of soil on the grass part (i.e., east of B1) which was ‘cleared within days’. Several other people did refer to building works having taken place in recent years, in one case the person noting ‘that pedestrian access was always available’.
- 2.29. It is evident that some building works have taken place, particularly the reconstruction following a fire of the part of the house abutting the south side of the driveway near A2 That might have temporarily impacted on use of the full width of the driveway somewhere in the period 2014 to 2017, however such building work would not have constituted an ‘interruption’ of enjoyment for the purposes of s31.
- 2.30. Three objectors to the application did comment in detail regarding the unavailability of the southern side of the driveway due to building works, scaffolding and the parking of vehicles, while a strip along the northern side of the driveway had always remained available for public use. Objectors also asserted that the southern side of the grass surfaced track between point B1 and E had been unavailable due to the use of that side for the parking of agricultural vehicles, trailers etc and the storage of items such as feeding troughs. However, use for those purposes is not supported from available photographs and aerial photographs (2000 onwards). In any case there no indication that any such things were placed on the southern side of the route with the intention of preventing use by the public.
- 2.31. It is evident that electric gates had been in situ prior to and during the relevant 20-year period. However, these appear to have generally only been closed during hours of darkness, apparently as a security measure and did not prevent public enjoyment route as a whole.
- 2.32. In some circumstances, the closing and locking of gates might be considered an interruption to enjoyment of the way. However, given that the pedestrian provision was actively provided to the south of the gates at point A leading into the greater width of the driveway, it is unlikely that such an action could be said

to be with the intention of preventing public use of the greater width of the route in general.

**'... as of right'**

2.33. User 'as of right' that might give rise to a presumption of dedication must have been *nec vi* (without force), *nec clam* (without secrecy) and *nec precario* (without permission).

**'...without force'**

2.34. There is no suggestion in the available evidence that users of the route in question used any force in order to secure passage along any part of the way.

**'... without secrecy'**

2.35. For use to be as of right it must be open and of such a nature that any landowner would have been aware that the way (or the greater width, in this case) was being used, had they chosen to look, and so had been in a position to object.

2.36. Again, there is no indication that any use been with secrecy. The route also passes immediately adjacent to the dwelling at Wolfstones Heights Farm and along the driveway serving the property and user of the route would have been clearly visible to the owner of the property.

**'...Without permission'**

2.37. No users of the way who provided evidence that indicated that they had either sought or been granted permission to use any part of the way in question. Nor is there any evidence from other parties to suggest that that any use was with permission, express or implied. There is no evidence of any signs or notices having been erected indicating that use of the greater width was with permission, although in 2020 notices were erected indicating use of the alternative (proposed diversion) route was only permissive.

**'... Full period of 20 years.'**

2.38. As earlier possible dates on which any public right of way over the 'greater width' might have been brought into question have been discounted, the period of 20 years to be considered is September 2000 to September 2020.

2.39. There is strong evidence use of the greater width of the route, by the public, over the full period of 20 years up to September 2020. It is also noted that *if* rights over the greater width were brought into question by earlier acts, such as the shutting of the electric gates in spring 2020 or reports of closure at dusk in August / September 2018, this would have little impact on the assessment of the user evidence, which extends as far back as the 1960s.

## **Contrary intention**

- 2.40. The presumption described above may be rebutted where there is sufficient evidence that the landowner did not intend to dedicate a public right of way. There must have been some overt acts on the part of the landowner to show the public at large that the landowner had no intention to dedicate. The test is whether a reasonable user of the path would understand that the landowner was intending to disabuse the users of the notion that the way (or in the case, the whole available width of the way in question) was a public highway.
- 2.41. There is no indication from the user evidence that anyone was challenged when using any particular part of the route in question. Although several objectors have indicated that the public's rights *were* confined to a 1.2m wide strip along the northern side of the route, there is no suggestion that any action was taken to challenge people observed to be using other parts of the route. It being instead argued that the southern side of the route was not used as it was unavailable. However, any temporary parking of vehicles or storing of building materials or other items on part of the greater width, that is claimed to have taken place, would not have had the effect of demonstrating a contrary intention.

## **Conclusions regarding presumed dedication under s.31 Highways Act 190 over a greater width than that currently recorded**

- 2.42. There is ample evidence of pedestrian use (singly and in groups) , by the public, as of right, for a full period of 20 years to September 2020. The use described extended across the full available width of the driveway from point A to Wolfstones Heights Farm and continuing over the full width between walls and fences to point E at Brown Hill. There is no strong evidence of interruption of use of the way with the intention of preventing public access to the full available width, use was without permission. There is no clear evidence of any lack of intention to dedicate having been demonstrated by the landowner prior to the first week in September 2020.
- 2.43. Notwithstanding that a public right of way of a lesser width is certain to exist over part of the available width, the evidence is sufficient to satisfy the requirement of section 31 Highways Act 1980. A public right of way on foot is deemed to have been dedicated over the whole width of the driveway and the enclosed continuation to point E by September 2020.
- 2.44. It is further noted that the evidence is sufficient to conclude that a public right of way on foot actually subsists over the whole width, rather than there just being a reasonable allegation that such rights exist.
- 2.45. The route is currently recorded as a public footpath, albeit with a width of only approx. 1.2m or 4ft, with limitations recorded in the Statement. Several further issues arise. Any presumed dedication under s31 of a greater width than currently recorded may be subject to additional limitations or conditions. Further, that the evidence may show that dedication over a greater width may

have been without additional limitations, or that the evidence may show that various limitations previously recorded may have been absent over the qualifying 20-year period. That might have led to re-dedication without such limitations. These possibilities are considered in detail below when looking at evidence regarding gates, stiles and other structures.

### **Common Law**

2.46. A public right of way may come into existence at common law through dedication by the landowner and acceptance by the public. There may be express dedication (rarely) or implied. Dedication may be inferred from public use, as of right, over an undefined period of time, or through overt acts on the part of the landowner that demonstrate an intention to dedicate. There is no presumption of dedication and the burden of proof is on the person asserting there has been such dedication.

### **Capacity to dedicate**

2.47. Dedication at common law also requires there to be a person with the legal capacity to dedicate. This would be the freeholder of the land and not just a tenant or lessee. Where there is mortgage, it is likely that mortgagee (lenders) consent would be required for dedication of a public right of way. This does not apply to presumption of dedication under s31.

### **Mortgages**

2.48. The ownership of Wolfstones Heights Farm has been researched and details discovered of various transfers from 1903 onwards. The property was subject to mortgages or other charges in the periods 29 January 1932 to 20 June 1941, 12 March 1953 to 17 July 1954, and from 22 Feb 1961. It is known that there was a mortgage still in place in on 24<sup>th</sup> June 1970, although it is not clear when this charge was removed. It is assumed that the term would have been no longer than 25 years – i.e., to February 1976, the property being sold again in 1978. The property then remained in the same ownership until September 1995, although the property was mortgaged in September 1993. The purchase of the property by the current owner in 1995 was without a mortgage, although the property was again subject to a mortgage from 18 January 2010. This was still in place in September 2020.

2.49. Dedication at common law might not have been possible during those periods when mortgages were in place. However, there would have been legal capacity to dedicate prior to 1932. The landowner would also have had legal capacity to dedicate a public right of way during various subsequent periods when the property was not mortgaged. In particular between 1976 and 1993, and 1995 and 2010.

### **Use of a greater width by the public**

2.50. The western part of the route has been depicted on maps in a similar manner since at least the late 1820s if not earlier, with the eastern part previously



shown as a field edge path. There have been ample periods over which there may have been public use of the whole available width from which dedication may be inferred. The walking schedule from 1950 described 'uninterrupted user by public for 50 years.', i.e., including long periods when no mortgage was in place.

- 2.51. The eastern part of the route is shown on the 1964 OS map as walled or fenced on its southern side between B and D. (This alteration may have followed a change in ownership in 1961). The making available of a wider defined width of 3-4m between B and D may have taken place during a period in which the freeholder had no capacity to dedicate without the mortgagee's explicit consent. (Photographic evidence indicates D-E had been fenced on the south side by 2000). However, there is ample evidence from user witnesses of use of a greater width along the whole route from the early 1960s onwards right through to 2020.
- 2.52. From c.1976 through to 2010 (during which period it is assumed the landowner had capacity to dedicate - excepting September 1993 to September 1995), there is, collectively, evidence of user from 19 members of the public of the whole route from A-E. The majority of users described the route available and actually used as being the whole width between the boundaries, typically 3-4 metres, or similar measurements in feet. It may be inferred that the successive landowners did intend to dedicate a public footpath over the whole available width. This use also demonstrates acceptance of dedication by the public.
- 2.53. Ignoring any earlier evidence suggesting earlier dedication of a route wider than 4ft, there is ample evidence of public use on foot over a width greater than 1.2m covering periods when the landowner did have the legal capacity to dedicate, from which it may be inferred that the landowner did intend to dedicate a public footpath of greater width than 1.2m

### **Conclusions regarding dedication at common law**

- 2.54. There is no doubt that a public right of way on foot existed along the route by 1952, although recorded at a lesser width than the full width between boundaries. There is nothing to suggest that there could not have been dedication of public rights over the whole available width of A-B in the period to 1932, the route apparently having existed in the same form for at least a century.
- 2.55. There were various periods from 1932 onwards when the landowner may not have capacity to dedicate due to mortgages being in place. This includes the period when it is likely that B-D became fenced on the south side. However there also long periods (particularly 1976-2010) when dedication would have been possible. There is also ample evidence of use over such periods of a greater width by the public (the whole width between boundaries) from which dedication might be inferred.

### **Evidence regarding limitations (gates and stiles etc.)**

- 2.56. The evidence discussed above indicates dedication of a public footpath over a greater width than the approximately 1.2m currently recorded. (Presumed under section 31 or inferred at common law). Any dedication (or re-dedication) might be subject to various limitations or conditions, or without conditions that previously existed. Attention should also be given to the limitations that are currently recorded in the statement and those that might now actually exist.
- 2.57. References made by user witnesses and consultees the presence or absence of stiles or gates at various location are summarised in items 6 to 8 in appendix A. In general, there were descriptions of witnesses noting the existence gates / a stile at point A, and gate / a gate / fence at point B (or C) and a stile at point E, but no reference to any structure at point D. Occasional reference was made to a gate having been put in place at point A4 in recent years.

### **Structures at / near point A.**

- 2.58. There is no indication from the documents relating the development of the DMS that there were any gates or other structure in place at or near point A at the date of survey in 1950 or the relevant date of the first Definitive Map (1952). By contrast structures described in the walking schedule as existing at various other locations were annotated on the Definitive Map and subsequently recorded in the Statement.
- 2.59. Similarly, no additional structures e.g., gates or a stile at point A are indicated in the Modified DMS (Relevant Date 1985).
- 2.60. Gates across the whole width of the way at point A are unauthorised. This would apply even if the evidence was *not* found sufficient to show, on balance of probabilities, the existence of public rights over the whole available. In that situation a 1.2m wide gap would be required to be retained.
- 2.61. The automated gates within the driveway at point A, accompanied by a stile leading off the line of the driveway, were described by an objector as having been in place prior to the purchase of the property by the current owner in 1995. It was asserted by the same person that the gates and adjacent stile may have been installed c1989.
- 2.62. This physical arrangement or security gates and a stile is mentioned in the letter to Holme Valley Parish Council in 2000 – see paragraph 2.17 above. Objectors have thus suggested that the gates were thus closed with permission of the Council. However, it is more likely that officers exercised discretion and took no action at that time as gates were generally open and the provision of a stile alongside would allow the gates to be easily bypassed if found to be closed.
- 2.63. There is very limited evidence to support the early existence of a gate or similar structure near point A. The Township Map of 1831 shows a line across the way a short distance east of point A. This might suggest a gate, although it is not

certain and may simply relate to the awarded parcels of land north and south of the route. The first edition 6" OS map sheet (surveyed 1850-51, published 1854) shows two lines across the way in a similar location to the 1831 map and again not at point A. However, the tithe map of 1850 shows no such features. Later OS maps do not show any such features across the route between points A and B.

- 2.64. Many of those who completed user evidence forms (or responded to the consultation) referred to gates and / or stiles at point A. However, several people did not mention gates or other structures at that location, or if they did, noted that gates were always or normally open. Reference was made to the availability of the pedestrian bypass route around the gates if they were found closed / locked.
- 2.65. There are several references to the gates having been found closed during lockdown in 2020. That action by the landowner was also confirmed in correspondence with council officers in Spring 2020. <sup>16</sup>
- 2.66. There are some references to a pedestrian gate alongside a vehicle gate, although that description does not match available photograph evidence.
- 2.67. Some user witnesses also observed that the stile lead into the area of the driveway that was fenced off in September 2020.
- 2.68. It appears to have been common practice for the unauthorised electric gates to have been automatically closed at dusk, but with provision for pedestrians to bypass them. As the gates were unauthorised obstructions of the recorded public right of way, use of the bypass route can be characterised as users exercising a common light right to deviate to avoid an obstruction rather than suggesting dedication of an additional public right of way. Use via the stile would not have been necessary when the gates were open.
- 2.69. The stile arrangement, consisting of a chicane of slabs leading off the south side of the driveway was altered between 2014 and 2017 when a wall was built alongside the southern side of the driveway, as seen in later photos (see item 2 in appendix B). Any route used to bypass the gates has not been consistent over the 20 years between 2000 and 2020.

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<sup>16</sup> It is documented in correspondence between various parties that Council officers were aware that the landowner had closed the gates at point A during the earlier part of the first lockdown in 2020 and objectors have argued that this action had been authorised by a Director of the Council. It is noted that the landowner had closed the gates to discourage use of the existing public right of way, apparently due to perceived risk to residents from increased public use of the way by local people taking exercise. There is no indication this action was with the intention of preventing further public rights being established. Any tolerance of this action by the Council was in the context of the pandemic and prior to it becoming clear that there was no legal basis for the temporary closure of PROW on public health grounds. By May 2020 the landowner had agreed to make arrangements for the northernmost gate leaf to be opened. See material at item 18 in appendix D.

- 2.70. Objectors also indicated that the stile was not always in the form seen now and had not always been open or passable during the period of possession by the current owner. It is apparent that there had been a change to the arrangement, although it is unclear as to what points in time the stile had been unavailable.<sup>17</sup>
- 2.71. Action regarding the gates was only taken in 2018 after the PNFS inspector observed the gates closing at dusk. Following the action by PNFS in 2018 (service on the council of notice for removal of obstruction), the landowner agreed for the gates to be fixed in the open position. That would have blocked the access to and from the squeeze stile then in place. That arrangement persisted until March / April 2020 when the gates were closed during the first lockdown. This is documented in the material at item 18 in appendix D.

### **Conclusions regarding structures at point A**

- 2.72. There is no documentary or map evidence for the existence of any structures having existed at point A prior to the development of the first definitive map. While there is some evidence from early maps of structures east of point A, these do not appear on later maps.
- 2.73. It is evident that electric gates and a stile (the latter leading off the line of the driveway) existed by 2000, perhaps as early as 1989. However, gates were not authorised and cannot be recorded as a limitation on the public right of way that is recognized to exist. Prior to Spring 2020 the electric gates only appear to have been closed during hours of darkness, for the purpose of security, and without the intention of preventing pedestrian use of the recognised public right of way or the greater width of the driveway.
- 2.74. A stile had long existed in some form allowing users to bypass the electric gates if found closed (normally only after dark). This was altered somewhere in the period 2015-2017 when a wall was erected along the southern side of the driveway. The bypass route was slightly changed to route users more closely around the southernmost gate pillar. Use of a route via any stile near A is considered deviation to avoid an obstruction in an existing recognised PROW and any stile should not be recorded as a limitation.

### **Structures on the eastern part of the route (points B, C, D)**

- 2.75. The 1950 walking schedule walking described stiles at points B and C and a wicket gate at point D. This is consistent with a footpath passing through a series of enclosed fields. These structures were annotated on the first Definitive Map and listed in the Statement. Successive maps up to the 1930s show the same arrangement of fields, with a footpath following the northern edge.

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<sup>17</sup> Clarification regarding such comments has been sought, but at time of writing no substantive response has been received regarding most assertions.

- 2.76. The 1964 OS maps shows an enclosed track between points B and D, with solid lines indicating boundary features at points B and D only. There is no indication of such a feature at point C where a stile had been recorded.
- 2.77. The Modified (1985) Definitive Map is annotated to show stiles at points B and C. The annotation 'WG' for the wicket gate at point D was not shown. However, the modified statement did the record stiles and wicket gate as per the first definitive map. It is unclear if this was simply an error, however user witnesses make no reference to such a structure.
- 2.78. Users (including respondents to the consultation) did not describe any stiles on the eastern part of the route with the exception of a stile at point E (still extant).
- 2.79. Some users described a gate or gates at either point B or point C (i.e., where stiles are recorded). One user described gates at point C having been erected 'in the last 25 years or so'. The applicant mentioned the existence of a field gate at point C when he first used the path. Others also noted that gates had been removed, with one person indicating a gate at point A3 (near the house).
- 2.80. While there is some inconsistency in the descriptions of the exact locations evidence is generally consistent in describing on one gate or set of gates, either at point B or C. There is no indication from witnesses of a structure having been in place at point D. This suggesting that may have been removed some decades ago and certainly prior to 2000.
- 2.81. Aerial photographs from 2000 onwards give no indication of any structures being in situ at points C or D, (Point B is obscured).
- 2.82. Photographs taken from 2007 onwards given no indication of any structures in situ at points C or D, with a pair of wooden gates at point B. These are seen as open in a number of photos, and there is no suggestion that gates were locked. There is no indication of any stiles being in place. The gates at B were relocated c2020 to near point A3, the wide leaf now remaining as at the end of the currently fenced in area.
- 2.83. Persons associated with associated with Wolfstones Heights Farm (since 1995) described the existence of the structures at point B, but made no mention of other structures at e.g., points C and D. This description given was of a makeshift fence / farm gate with posts that could be removed to allow access with vehicles. There was a pedestrian gate on the northern side. These structures were reported as being unlocked, and already in place in 1995. A pair of gates seen in photographs from 2007 onwards is presumably a later replacement, although it is not clear exactly when the gates were replaced / improved. However, for at least the majority of the of the 20-year period 2000-2020 there were a pair of unlocked gates at point B.

## **Conclusions regarding structures at B, C, D**

- 2.84. The first DMS recorded structures at points B, C, and D. The existence of stiles and a wicket gate is supported by the walking schedule. However, the structures on the eastern part of the route have been altered at various times.
- 2.85. Taken collectively there is strong evidence that the only structures in place on the eastern part of the route (B-E), since at least 2000, would have been a gate or gates at point B (with no stile). As no gates have been authorised on the existing public right of way, a gate cannot be included as limitation on the existing public footpath.
- 2.86. The wicket gate indicated at point D is not indicated on the 1978 Draft Review Map or the Modified Definitive Map, although remains in the Statement. It is considered that this is likely to have disappeared by the late 1970s and is not described by any witnesses. Any stile at point C also appears to have been removed several decades ago, and certainly has not been in place since at least 2000.
- 2.87. It is likely that there has been dedication / rededication of a public right of way over the full available width between boundaries, without previously recorded limitations at points B, C or D. Due to the existence of the existing recorded public right of way, it would not be appropriate to record, as limitations, gates over the whole width. However, it would be appropriate to record as a limitation 1.2m wide gap at point B, with an additional gate alongside.

## **3. Overall conclusions**

### **Historical documentary evidence**

- 3.1. Historical documentary evidence in the form of maps from 1829, 1831, and 1850, and Ordnance Survey maps through to 1931 clearly indicate the route in question in the form of an enclosed lane serving what is now Wolfstones Heights farm, (section A-B), continuing as a field edge footpath towards Netherthong (including section B-E). The maps do not provide direct evidence of the existence of public rights (though the existence of a public footpath along the route is not itself in doubt). Nor do they clearly indicate that the boundaries of A-B were set out with reference to the highway. Nonetheless, it is apparent that the route existed in more or less the same form since at least the 1820s and there is no indication that any public rights that existed did not extend over the whole available width of A-B.
- 3.2. The OS map of 1964 indicates that the field edge footpath east of point B became an enclosed track by the early 1960s.
- 3.3. Records relating to the development of the definitive map indicate that part A-B was considered by a surveyor as being of greater width ('C R B' width), with no indication that use was confined to any particular width within the boundaries. Although the whole length of path Holmfirth 60 was recorded as being

approximately 4ft wide, there is evidence from other documents and memos relating to the process of development of the map and statement that the County and District Council were not concerned with recording accurate widths. This significantly lessens the reliance that may be placed on the widths recorded in the Statements accompanying the 1952 and 1985 Definitive Maps.

- 3.4. Analysis of the current Definitive Map and Statement indicates a discrepancy between the map and the statement in that the annotation WG for wicket gate previously indicated on the first Definitive Map had been removed from the current Definitive Map but remains recorded in the current Statement. It is likely that that structure was no longer extant, and the Statement should be modified to remove reference to this limitation.

### **Aerial and other photographs**

- 3.5. Available aerial photographs taken between 2000 and 2018 provide strong evidence of the availability of an enclosed route, varying between approx. 3 and 4 metres between boundaries. The aerial photographs are consistent with the evidence from users regarding the width of the way that was claimed to have been available / used. While the aerial photographs are not conclusive evidence that way visible was actually used by the public, they strongly indicate that such a way was physically available between 2000 and 2018. The parts of the route visible in successive aerial photographs are noted to have been clear of obstructions such as vehicles, farming equipment, building materials etc.
- 3.6. Available photographs taken between 2017 and 2020 are consistent with user evidence which describes the whole available width of 3-4 metres having been available and used, from point A all the way to point E. Photographs do not support the suggestion by objectors that only part of the width (on the north side) was generally available due to the presence of various stored items.

### **Section 31 Highways Act 1980**

- 3.7. There is ample evidence of pedestrian use (singly and in groups), by the public, as of right, for a full period of 20 years to September 2020. (Date of bringing into question for the purposes of section 31 Highways Act 1980 due to fencing off of part width of the driveway to Wolfstones Heights Farm). The use described extended across the full available width of the driveway from point A to Wolfstones Heights Farm and continuing over the full width between walls and fences to point E at Brown Hill. There is no strong evidence of interruption of use of the way with the intention of preventing public access to the full available width. Use was without permission. There is no clear evidence of any lack of intention to dedicate having been demonstrated by the landowner prior to the first week in September 2020.
- 3.8. Notwithstanding that a public right of way of a lesser width is certain to exist over part of the available width, the evidence is sufficient to satisfy the requirement of section 31 Highways Act 1980. A public right of way on foot is

deemed to have been dedicated over the whole width of the driveway and enclosed continuation to point E to September 2020.

- 3.9. It is further noted that the evidence is sufficient to conclude that a public right of way on foot actually subsists over the whole width, rather than there just being a reasonable allegation that such rights exist.

### **Dedication under Common Law**

- 3.10. There is no doubt that a public right of way on foot existed along the route by 1952, although recorded at a lesser width than the full width between boundaries. There is nothing to suggest that there could not have been dedication of public rights under common law over the whole available width of A-B in the period to 1932, the route apparently having existed in the same form for at least a century.
- 3.11. There were various periods from 1932 onwards when the landowner may not have capacity to dedicate due to mortgages being in place. This includes the period when it is likely that B-D became fenced on the south side. However there also long periods (particularly 1976-2010) when common law dedication would have been possible. There is also ample evidence of use over such periods of a greater width by the public (the whole width between boundaries) from which dedication might be inferred.

### **Structures at Point A**

- 3.12. There is no documentary or map evidence for the existence of any structures having existed at point A prior to the development of the first definitive map. While there is some evidence from early maps of structures east of point A, these do not appear on later maps.
- 3.13. It is evident that electric gates and a stile (the latter leading off the line of the driveway) existed by 2000, perhaps as early as 1989. The closing of electric gates is not considered to have brought the rights over the greater width of the driveway into question as they could easily be bypassed. The gates on an existing PROW have never been formally authorised and cannot be recorded as a limitation on the public right of way that is recognized to exist.
- 3.14. Prior to Spring 2020 the electric gates only appear to have been closed during hours of darkness for the purpose of security and not to prevent pedestrian use of the recognised public right of way or the greater width of the driveway.
- 3.15. A stile had long existed in some form allowing users to bypass the electric gates if found closed (normally only after dark). This was altered somewhere in the period 2015-2017 and the bypass route changed. Use of a route via any stile near A is considered deviation to avoid an obstruction in an existing recognised PROW and any stile should not be recorded as a limitation.



## **Structures at B, C, D**

- 3.16. The first DMS recorded structures at points B, C, and D. The existence of stiles and a wicket gate is supported by the walking schedule. However, the structures on the eastern part of the route have been altered at various times.
- 3.17. Taken collectively there is strong evidence that the only structures in place on the eastern part of the route (B-E), since at least 2000, would have been a gate or gates at point B (with no stile). As no gates have been authorised on the existing public right of way, a gate cannot be included as limitation on the existing public footpath.
- 3.18. The wicket gate indicated at point D is not indicated on the 1978 Draft Review Map or the Modified Definitive Map, although remains in the Statement. It is considered that this is likely to have disappeared by the late 1970s and is not described by any witnesses. Any stiles at point C also appears to have been removed several decades ago, and certainly has not been in place since at least 2000.
- 3.19. It is likely that there has been dedication / rededication of a public right of way over the full available width between boundaries, without previously recorded limitations at points B, C or D. Due to the existence of the existing recorded public right of way, it would not be appropriate to record, as limitations, gates over the whole width. However, it would be appropriate to record as a limitation a 1.2m wide gap at point B, with an additional gate alongside.

## **Concluding remarks**

- 3.20. Overall, there is good evidence that the width of A-B was under recorded when recorded in the first (1952) Definitive Statement at approximately 4 feet and in the Modified (1985) Statement at approximately 4ft / 1.2m. The actual width is more likely to have historically been the full available width between boundaries.
- 3.21. This conclusion does not apply to the part B-E which was an unenclosed field edge path until the 1950s. However, the evidence shows that this route was subsequently fenced to the south side to point D by the early 1950s and was fully enclosed to point E by 2000 at the latest.
- 3.22. There is plentiful evidence of the full available width of 3-4m having been available and used by the public over the full 20-year period 2000-2020 that would satisfy the requirements of section 31 Highways Act 1980. With evidence of use of a wider width than 1.2m over longer periods that would support inferred dedication at common law. Assertions that the only part that was available and used was a 1.2 m wide strip on the north side is not supported by other evidence. Accordingly, the Map and Statement should be modified accordingly to record a greater width, being the full available width between physical boundaries, varying between 3 and 4 metres, with changes to recorded limitations at points B, C and D as described above.