

**Name of Meeting:** Planning Sub-Committee (Heavy Woollen Area)

**Date:** 09/11/2023

**Title of Report:** Application for a Definitive Map Modification Order (DMMO) to record a public right of way from definitive public footpath KIR55/10 at Upper High Fields to Woodsome Road at Farnley Tyas, Kirkburton, on the Definitive Map and Statement

**Purpose of Report:** Members are asked to consider the relevant available evidence and determine the application for a DMMO made under section 53(5) of the Wildlife & Countryside Act 1981 to record a public right of way from definitive public footpath KIR55/10 at Upper High Fields to Woodsome Road at Farnley Tyas, Kirkburton on the Definitive Map and Statement.

Members are asked to take a decision on making a DMMO and its confirmation and give full reasons for the decision made.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	Not applicable
Key Decision - Is it in the <u>Council's Forward Plan (key decisions and private reports)?</u>	Not applicable
The Decision - Is it eligible for call in by Scrutiny?	No – non-executive power rests with Council committee
Date signed off by <u>Strategic Director</u> & name	David Shepherd – 10 October 2023
Is it also signed off by the Service Director for Finance?	James Anderson on behalf of Isabel Brittain – 10 October 2023
Is it also signed off by the Service Director for Legal Governance and Commissioning?	Julie Muscroft – 10 October 2023
Cabinet member <a href="#">portfolio</a>	Not applicable

**Electoral wards affected:** Kirkburton

**Ward councillors consulted:** Kirkburton Cllrs: Bill Armer, Richard Smith, John Taylor

**Public or private:** Public

**Has GDPR been considered?** Yes. Personal data and biographical information that could identify a person has been removed.

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## Summary

1. In April 2019, Kirklees Council received an application (reference DMMO S14217) under [section 53 of the Wildlife & Countryside Act 1981](#) (the 1981 Act) to record a public footpath through Farnley Bank Wood, leading from definitive public footpath Kirkburton 55/10 at Upper High Fields to Woodsome Road, Farnley Tyas, (the application route) on the Definitive Map and Statement (DMS). The applicant provided thirty-four (34) user evidence forms and other evidence in support of the application. The Secretary of State has directed that Kirklees Council must determine the application by 11 August 2021.
2. The available evidence has been investigated under [section 31\(1\) of the Highways Act 1980](#) (the 1980 Act) for the presumed dedication of a public footpath. The public right to use the application route was first brought into question in 2012 by a section 31(6) landowner Deposit/Declaration. The relevant twenty-year period for analysing the user evidence is therefore 1992 to 2012. A second relevant period of 1988 to 2008 has also been investigated as a landowner has indicated, but not provided sufficient evidence that, a sign was erected in 2008.
3. The quantity and quality of the user evidence is sufficient to demonstrate public use and enjoyment of the application route, as of right, and without interruption during both relevant periods. No sufficient evidence of a lack of intention to dedicate a public right of way during the relevant periods has been submitted. Officers therefore consider that it is reasonable to allege that the application route subsists as a public footpath and should be recorded on the Definitive Map and Statement.
4. Accordingly, Members are asked to consider the documentary, landowner, and user evidence presented, consultation responses, and the Officers recommendations and reasons, and decide whether to make a Definitive Map Modification Order and the Councils stance on its confirmation. Factors such as suitability or desirability, safety or maintenance, privacy, or landownership, are 'other matters' that cannot be considered under s53 of the 1981 Act.

5. Officers recommend that a Definitive Map Modification Order (an Order) is duly made under [section 53\(3\)\(c\)\(i\) of the 1981 Act](#) to record a public footpath leading from definitive public footpath Kirkburton 55/10 at Upper High Fields through Farnley Bank Wood to Woodsome Road, Farnley Tyas, on the Definitive Map and Statement (DMS).
6. Officers also recommend that, should any Order be opposed, and the matter referred to the Planning Inspectorate for determination by either written representations, public hearing, or public inquiry, the Council should support confirmation of any Order.

## Information Required to Take a Decision

### Application

7. On the 4 April 2019, the applicant submitted an application ([DMMO S14217](#)) to Kirklees Council (the Council) under [s53\(5\) of the Wildlife and Countryside Act 1981](#) (the 1981 Act) to modify [West Yorkshire County Council Definitive Map and Statement for the Kirklees Area](#) (DMS), as shown in **Figures 1** and **2**.
8. The application, as shown by the dashed lines on annotated **Figure 3**, seeks to record a public footpath between definitive public footpath Kirkburton 55/10 at Upper High Fields through Farnley Bank Wood past Farnley Tyas Bowling Club (the Club) to Woodsome Road public highway, Farnley Tyas.
9. A public footpath is defined in [section 66 of the 1981 Act](#) as:  
  
*“... a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road”.*
10. The application was properly made in April 2019 under the requirements of [Schedule 14 of the 1981 Act](#). The requisite certificate of service of notice was submitted in April 2019 confirming that notice of the application had been served on two landowners.

11. The application was submitted shortly after a boundary fence was erected across the full width of Farnley Bank Wood in January 2019 near the Club, which prevented any passage. See **Figure 4**.
12. The submission gave as evidence thirty-four (34) User Evidence Statement forms (UEFs) from wholly or largely local people, a letter from the Secretary of Farnley Tyas Community Group, copies of Email correspondence with landowner 1, and photos of the application route.
13. The Officer considered other evidence including Ordnance Survey (OS maps), aerial photos, officer photos, KC records, Email correspondence and a s31(6) landowner deposit.
14. A consultation was carried out in October and November 2021 inviting any evidence from the public, Ward Members, the Parish Council, user groups, landowners, and any occupiers.

### **Planning Inspectorate Direction**

15. Following a representation by the applicant, the Council was directed on 12 August 2020 by the Planning Inspectorate, on behalf of the Secretary of State for Environment, Food, and Rural Affairs, (decision reference [FPS/Z4718/14D/16](#)) pursuant to paragraph 3(2) of Schedule 14 of 1981 Act), to determine the Schedule 14 application (our reference DMMO S14217) no later than **11 August 2021**.

### **Character of Application Route**

16. The application route starts at the junction with definitive public footpath Kirkburton 55 at Upper High Fields (approx. SE 1675 1344) just on the woodland side of a stile. It leads south-westerly and follows a narrow-wooded ridge for over half a kilometre, then joins an access road to Farnley Tyas Bowling Club for approximately 10m, and terminates at the junction with Woodsome Road public carriageway, Farnley Tyas (approx. SE 1650 1290) and nearest postcode HD4 6UE. Farnley Tyas is a small rural village located 3

miles southeast of Huddersfield. The physical characteristics of the application route are shown in the photos in **Figure 5**.

17. The surface of the route through the woodland is earth, leaf litter and grass within a natural habitat of deciduous mature woodland, tree canopy, shrub understorey and ground flora.
18. The route through the woodland is reported by users to be of varying width (approx. 0.5m to 2m) and averaging between 1 and 1.5m. Where the route is coextensive with the access road to the Club, it is surfaced with tarmac for vehicle use (approx. 4m in width). There are no dwellings along the route itself.
19. Aerial photographs dated in 2006 and 2012 shows the access to the Club as shown in **Figure 6**. However, the application route through the woodland lies underneath the continuous tree canopy of Farnley Bank Wood, is not particularly visible.

## Statutory Provisions

### Wildlife & Countryside Act 1981

20. [Schedule 14, Paragraph 3 of the 1981 Act](#) sets out that as soon as reasonably practicable after receiving a valid application the Council shall investigate the application and decide whether or not to make a DMMO (an Order).
21. [Section 53\(3\)\(c\)\(i\) of the 1981 Act](#) provides that the Council has a statutory duty to make an Order upon the discovery of evidence which, when considered with all other relevant evidence available, shows:  
  
*“that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic”*
22. As was made clear by case law, section 53(3)(c)(i) involves two tests at the schedule 14 stage:
  - Test A: Does a right of way subsist? This requires clear evidence in favour of the appellant and no credible evidence to the contrary.
  - Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the Council should find that a public right of way has been reasonably alleged to subsist.
23. The available evidence submitted in support of DMMO S14217 will therefore be determined according to Test B – is it reasonable to allege that a public right of way subsists. If so the Council has a duty to make an Order.
24. Confirmation of an Order is based on the ‘balance of probabilities’ (not beyond all reasonable doubt as is the case in criminal law) or Test A.



## Highways Act 1980

25. The relevant provision, in relation to the dedication of a public right of way based on user evidence, is found in [section 31\(1\) of the 1980 Act](#). The legislation sets out that where a way has been 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 a lack of intention to dedicate.
26. Under section 31(2) of the 1980 Act, the period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.
27. There is no legal interpretation of the term 'the public' as used in section 31(1). It is not taken to mean the public in its widest sense. Use wholly or largely by local people may be use by the public.
28. There is no statutory minimum level of use required to show sufficient use to raise a presumption of dedication, but it must have been by a sufficient number of people to show that it was use by 'the public', which may vary from case to case as guided by the Government's [Definitive Map Consistency Guidelines](#).
29. The terms 'as of right', means the use must have been 'without force, without secrecy and without permission'. Force might include breaking locks, cutting wire, passing over through or around a blockage. The use must have been open and in a manner that a person rightfully entitled would have used it that is not with secrecy. If there is express (e.g., clear, and specific) permission, then use is not 'as of right'. The issue of toleration or acquiescence and doing nothing about it, is consistent with use being 'as of right'.
30. The presumed dedication under s31(1) of the 1980 Act is rebuttable, by proof that the landowner had a lack of intention to dedicate. The burden of proof rests with the landowner to show that there is sufficient evidence to demonstrate there was no intention to dedicate. In relation to signage, proof that the landowner has erected and maintained notices visible to path users inconsistent with dedication is required under [s31\(3\) of the 1980 Act](#).

31. The test is whether a reasonable user of the path would understand that the landowner was not intending to dedicate a public right of way. There must have been some overt acts by the landowner to show the public at large that the landowner had no intention to dedicate whether by notice or otherwise (e.g., notices, signs, barriers, obstructions, charging, closing, indicating use by permission only).
32. Private land signage can imply that the public are being discouraged from using a route, but technically such a landowner's sign would be correct as there is 'private land'. In itself, such a sign is not considered to go far enough to communicate a lack of intention to dedication. A public right of way can be defined as the public's right to pass and repass over a strip of land, more often than not, land in private ownership. Furthermore, caselaw dictates that private land signage in itself, is not 'documentary evidence that would inevitably defeat the claim'.
33. Alternatively, user evidence can be considered at common law, which requires evidence of public use over a period of time to contribute to a justifiable conclusion of implied dedication by the landowner(s) based on their actions.
34. [Section 32 of the 1980 Act](#) requires a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, to take into consideration any plan, or history of the locality or other document which is tendered in evidence. Each document shall be applied evidential weight justified by the circumstances, such as the antiquity of the document, the purpose and status of the document, and the custody in which it has been kept and produced.

## **Guidance for Members**

35. General guidance for Council members is provided at **Appendix A**. In summary, Members are asked to decide if a DMMO (an Order) should be made. This requires consideration of all available evidence (user, landowner, documentary/historic, other) including the consultation and the Officer recommendations.

36. It is the Council's statutory duty to keep the Definitive Map and Statement (DMS) up to date and make any requisite Orders where necessary based on the discovery of evidence. After considering the evidence and the relevant criteria, members have three options:
- i. The first option for members is for the Council to make an Order to modify the DMS based on the Officer's recommendation
  - ii. The second option for members is for the Council to make an Order to modify the DMS based on members' interpretation of the evidence
  - iii. The third option is for members to turn down the application.
37. The likelihood or otherwise of any Order attracting opposition should form no part of the decision. In addition, factors such as suitability or desirability, safety or maintenance, privacy, or landownership, are 'other matters' that cannot be considered or taken into account under s53 of the 1981 Act.
38. Should the committee choose options (i) or (ii), members are also requested to consider the Council's stance regarding confirmation of any opposed Order. It may actively support confirmation of its own Order, or alternatively take a neutral stance.

## Documentary Evidence Evaluation

### Applicant's Photos

39. The applicant provided as evidence in support of the application, several photos of the application route taken in 2010, 2013 and 2015, as shown in **Figure 7**. The photos show a well-worn earth or grass path through the wood, with views cross Woodsome Road to Castle Hill in the background.

### Letter from Farnley Tyas Community Group

40. The applicant provided as evidence in support of the application, a letter from the Secretary of Farnley Tyas Community Group (on behalf of that group) dated 4 April 2019 as shown in **Figure 8**, which stated:

*"This footpath stretches from Kirklees PROW number KIR/55/10 to the centre of the village exiting alongside The Bowling Club on Woodsome Road and has been in continuous use by residents for a number of decades. It is an extremely popular footpath, used on a daily basis, linking Field Lane KIR/222/10, KIR/55/10, and the centre of the village in a short circular route and is especially popular with residents with younger children and residents with elderly dogs. The added attraction of this footpath is the safety aspect as there are no roads to cross along the route."*

### Applicants Copies of Email Correspondence with Landowner 1

41. The applicant provided as evidence in support of the application a number of Email correspondences between the applicant, and also the Secretary of Farnley Tyas Community Group and landowner 1, which demonstrates that landowner 1 was aware of the public use of the route in 2010 and 2013, see **Figure 9**.
42. In the Email dated 17 December 2013 landowner 1 is corresponding with the Secretary of Farnley Tyas Community Group about the tree and woodland maintenance. The applicant has replied to this Email saying that they "walk every day through "club" woods along the footpath at the top".

43. In an Email dated 12 May 2010 to landowner 1, the applicant makes reports about trees in the bowling club woods saying that they “*walk the dog there every day*”. In the same Email chain dated 17 May 2010, landowner 1 “*thanks*” the applicant for their report.

### **Ordnance Survey (OS) Maps**

44. Officers looked at OS maps published dated 1893, 1906, 1916, 1932, 1968. The land has always been woodland. The wooded block entitled ‘Farnley Bank Wood’ is shown on all of these maps. The application route through Farnley Bank Woods is not shown on any OS map, but that does not mean it did or did not exist. See **Figure 10**.
45. The 1916 Yorkshire CCLX.8 OS Map 1 to 25000 also shown in **Figure 10**, depicts a double pecked line route from Woodsome Road to the Club. The 1932 Yorkshire CCLX.8 OS Map 1 to 25000 depicts a double pecked line annotated with F.P. (meaning footpath) from Woodsome Road to the Club which is on the same alignment as the application route from point B to C. A boundary is also depicted adjacent to the footpath representing a fence or a change of surface indicating that there may not have been a route through the woodland from the Club at this time. Subsequent OS maps from 1968 1 to 25000 show a track or road bounded by solid lines indicating a fence or a change of surface from Woodsome Road to the Club.
46. These OS maps show that Farnley Bank Wood at the Club end, may have been accessible over the footpath to the Club from Woodsome Road decades ago. However, whilst OS maps are generally taken to be a reliable indication of the physical features present on the date of the survey and therefore corroborate the existence of routes, they provide no confirmation of public rights over the route.

### **KC Path Files**

47. The Council’s path files for Kirkburton 55 public footpath has one record relating to a “private ground” sign in 1991 reported by a member of the public

as being “in a wood”, which according to the 6 figure grid reference provided places it approximately on the land lying between Woodsome Road and Farnley Bank Wood, see **Figure 11**. This is outside the relevant period of 1992 to 2012 but within the relevant period 1988 and 2008 discussed below. It may also provide some additional context to landowner 1’s evidence about any ‘private’ signage, years ago.

## User Evidence Evaluation

48. Thirty-four (34) user evidence forms were submitted to the Council. The user evidence has been evaluated on the submissions from 30 (thirty) members of the public. This is because 3 (three) users (UEFs 16, 17, 18) were considered to have a type of private right and as such their evidence cannot be included as evidence for public use. Another 1 (one) user (UEF 7) used the route on only two (2) occasions and did not indicate their period of use. The user evidence is summarised in **Figure 12** and has been analysed under section 31 of the 1980 Act.
49. There are two current landowners. Landowner 1 has “*owned and occupied the land for over 50 years*”. Landowner 2 purchased land from landowner 1 in 2018 including a section of Farnley Bank Wood and including the access road to the Club. A summary of the landowners’ evidence is shown in **Figure 13**.

## Bringing into Question

### 2019 – Fence

50. In an email dated 11 March 2019 between a KC PROW Officer and landowner 1, which discussed the application DMMO S14217, landowner 1 referred to having:
- “... recently placed a boundary fence up within this private area of woodland to divide the ownership boundary because various areas of the Estate have been sold.”*
51. Users described a fence (post and wire topped with barbed wire) erected between November 2018 and January 2019 across the width of Farnley Bank Wood at the Club. The applicant stated the fence was erected on 10 January 2019. Many users stated they regularly used the route on foot up to this point when passage was prevented. The erection of the boundary fence in 2019 was the overt act by landowner 1 that directly brought use of the route into question

resulting in the submission of the DMMO S14217 application and creates a relevant period of 1999 to 2019.

## **2019/2018 - Signs**

52. In a Landowner/Occupier Statement Form dated 19 October 2021, landowner 1 stated that the woodland has signs up saying:

*“Private No public right of way’ at ‘both ends of the woodland’, which were replaced ‘when they were vandalised’ and stating: “they have been there many, many years”.*

53. Landowner 1 attached a plan of the positions of the signs as shown in **Figure 14**. Photos of signs at both ends of the route were taken in 2019 or 2021 by Officers and can be found in **Figure 15**. Any photos of signage at the same location and previous to 2019 have not been submitted.
54. Although landowner 2 stated in their landowner statement form that they had not erected any notices, their signage is present on site as of February 2019. It says, *“Private No right of way No horses”* erected near point B at the Club end of the application route.’ **See Figure 15**.
55. *“Private No public right of way”* signage is currently present at both ends of the application route. Sixteen (16) users referred to signage as shown in **Figure 16**. Users variously referred to the dates of signage and its wording. Fourteen (14) users referred to signs erected recently, last year, or in 2018/9. Three (3) users referred to recent signs that say, *“no right of way’ or ‘private no right of way’*. One user referred to a *“sign fixed to tree at bowling club section of walk 2016, more signs 2018 at each end of walk”*. Three (3) users referred to a *“private”* sign that used to be there implying before 2018/19 but specify no dates. A relevant period of 1998 to 2018 may therefore be applicable.
56. However, Landowner 1 has not submitted any further evidence of any ‘private’ signage erected before 2018. It can be noted that the Council’s path files for Kirkburton 55 public footpath has one record relating to a “private ground” sign in 1991 reported by a member of the public as being ‘in a wood’, which



according to the 6 figure grid reference provided places it approximately on the land lying between Woodsome Road and Farnley Bank Wood. Nonetheless, case law dictates that 'private' or 'private land' signage in itself, is not documentary evidence that would inevitably defeat the 'claim'. This is because it does not go far enough in itself to demonstrate or communicate a lack of intention to dedicate. For example, a public right of way can be defined as the public's right to pass and repass over a strip of land and that land is more often than not, land in private ownership.

### **2012 - Section 31(6) Landowner Deposit/Declaration**

57. In the Landowner/Occupier Statement Form dated 15 November 2021, landowner 2 referred to the submission of the 31(6) landowner deposit/declaration in 2012/2013 by the previous landowner.
58. In November 2012, landowner 1 submitted a [section 31\(6\) landowner deposit \(plan and statement\)](#) under the 1980 Act to the Council, see **Figure 17**. This was followed by the submission of an associated s31(6) landowner declaration in January 2013. The s31(6) landowner deposit/declaration acknowledged any existing public rights of way across their land at the same time as declared that they as landowner had no intention to dedicate any further routes to the public – this includes the land in question at Farnley Bank Wood. Such a deposit brings public use of the way into question but has no retrospective effect.

### **Relevant Periods**

59. The relevant periods of 1999 to 2019 and 1998 to 2018 are therefore rebutted, and the new relevant period to consider user evidence is between **1992 to 2012**. However, landowner 1 has indicated the presence of permissive signs since 2008, which would create an earlier relevant period of **1988 to 2008**, nevertheless the claim lacks substantive supporting evidence and is discussed in detail under the heading 'Evidence of a Lack of Intention to Dedicate a Public Right of Way' below. Nevertheless, a relevant period of 1988 to 2008 has also been considered.

## A Way

60. Users described and drew (on the map) the application route starting at Upper High Fields where it joins definitive public footpath Kirkburton 55/10, through Farnley Bank Wood, and terminating at Farnley Tyas Bowling Club access road where it joins Woodsome Road public highway.
61. Users described the application route through the woodland as varying in width between 0.5m and 2m (averaging between 1 and 1.5m), or a single track/footpath.
62. Users described the surface of the application route as earth or grass. All users (except one who did not complete the question) reported that the application route followed the same line throughout their use.
63. Where specified, users commonly referred to the application route as "*Farnley Bank footpath*" or "*Farnley Bank Woods footpath*" or "*Bowling Club Woods footpath*" or "*the ridge walk*". A letter from Farnley Tyas Community Group also refers to it as the "*Farnley Bank footpath*".

## Evidence of Use during Relevant Period

64. The user evidence summary shows public use of the application route on foot started mainly from the 1970/80s although one person indicated their use started in 1953.
65. As shown in **Figure 18**, at the start of the relevant period 1992 to 2012, 10 (ten) users stated they were using the route on foot. At the end of the same relevant period 23 (twenty-three) users stated they were using the route on foot.
66. In relation to the frequency of the public's use, 4 (four) used it daily, 5 (five) used it weekly, 2 (two) used monthly, 3 (three) used it weekly or monthly, 6 (six) used it every few months and 3 (three) used it yearly or occasionally. It is collective use during the 20 year relevant period that is important.

### **Actually enjoyed**

67. All 23 (twenty-three) users described their use on foot. No user described their use by horse, cycle, or vehicle. Users described the purpose of their use on foot, for walking/ dog walking/ for leisure. Users described seeing others who were also on foot - walking/ dog walking/ running/ with children/ for leisure.
68. Users also described the application route a part of circular walk, linking Field Lane to definitive public footpath KIR/55/10 to the top of the village and back. It is also referred to as a convenient, safe, pleasant circular walk, without the need to walk on a busy, dangerous road.

### **By the public**

69. Having discounted any private type of use, the user evidence shows all users were using the route as members of the public and were all wholly or largely local people. There are no dwellings along the application route and as such, no user described exercising private rights for access to their dwellings.
70. Part of the application route is described as a beating line for Farnley game shoot (October to January) and walked for pest control out of season.

### **Without interruption**

71. One user mentioned they had “... *met members of the landowner’s family and nothing was ever said about not being allowed to walk the route.*”
72. No user indicated that their use was interrupted, or described ever being challenged or stopped or being turned back or being told the route was not public by landowners during the relevant period. However, landowner 1 has stated they challenged public use, see paragraph 85.

### **As of right - without force**

73. Users do not describe any barriers, fences, impassable stiles, locked gates, building materials obstructions had ever been present on the route in question, to forced open and causing users to turn back during the relevant period.

### **As of right - without secrecy**

74. For use to be as of right it must be open and of such a nature that if any landowner would have been aware that the way was being used had they chosen to look, and so had been in a position to object. There is no evidence to suggest that there were any attempts to conceal public use of the route during the relevant period. Indeed, the landowner evidence shows that they were aware of use by the public.

### **As of right – without permission**

75. The user evidence shows that no user ever asked for permission and no user was ever given permission to use the route during the relevant period. In a Landowner/Occupier Statement Form dated 19 October 2021, landowner 1 stated that no user had asked for, nor had been given, permission to use the application route.
76. Although outside the relevant period of 1992 to 2012, in emails dated 10 and 16 September 2014 between an Officer and landowner 1 the subject of permissive routes was discussed. Landowner 1 was seeking advice about how to notify the Council about 'permissive footpath/bridleways' on their land. Farnley Bank Woods is not mentioned, because the advice sought was in general terms. The Officer advised
- “You may wish simply to put up signs stating that use of the way(s) in question is by permission of the landowner. Unless you follow certain procedures [and referring to the s31(6) deposit], it is generally more important that you inform the users (the public at large) that their use is permissive and ensure that they would be aware of that fact”*
77. This correspondence is after the relevant period 1992 to 2012 ended, and therefore is not relevant to presumed dedication during that period, but it does provide some context on the subject of any permissive routes.
78. Although also outside the relevant period 1992 to 2012, four users (UEFs 19, 20, 21, 22) whose use started between 2014 and 2016, believed the claimed

route was 'permissive', but they did not state ever asking for or being given permission to use it. On the 17 February 2022, an Officer contacted three of the four users indicated with a view to gathering further information. One user responded on the 19 February 2022 saying that they were told by long standing residents that the route through the woods was a permissive footpath, and when they first followed the route, they saw that a permissive path did exist through the woods from KIR/55/10 over the stile and left into the woods.

79. When questioned further by Officers, the same user mentioned that Councillor Armer had said the route was permissive at a community meeting. On the 20 June 2022, the Officer followed up with Councillor Armer who said:

*... "My personal view is that some people in the local community have misunderstood the meaning of "permissive" and think that it is equivalent to a public right of way. I have only ever spoken about this path in general terms at a normal meeting of the Farnley Tyas Community Group...". "I have never referred to this path as being permissive, but may have expressed a personal opinion that it could well be a PROW. I have never thought the path to be permissive, and had I thought so would not have supported any moves to have it designated as a PROW."*

80. Permission in relation to use being 'as of right', should there be any evidence of express (e.g., clear, and specific) permission, then use is not 'as of right'. A public right of way and a permissive way are mutually exclusive. A simple definition of a permissive path one where the landowner has granted permission for the route to be used by the public, but they also have the right to withdraw that permission if they choose.
81. Officers therefore do not consider that use of the application route was with any express permission. Furthermore, no user asked for nor was given permission, which concurs with the landowner's evidence that no user asked for nor was given permission. Use of the application route by the public is therefore considered to be 'as of right' meaning, without force, without secrecy and without permission.

82. As a result, the user evidence raises a presumption that the application route has been dedicated as a public footpath. It is a rebuttable presumption and therefore the Council must consider if there is sufficient evidence that there was no intention during the relevant period to dedicate the application route as a public right of way.

### **Evidence of Lack of Intention to Dedicate a Public Right of Way**

83. In a letter dated 25 April 2019, landowner 2 wrote to the applicant that they:

*“purchased the land in question in 2018 and therefore has no knowledge of the use of the route by the public prior to that date” and “... has no objection to an amendment to the definitive map and creation of a footpath along the section indicated...”.*

84. In a Landowner/Occupier Statement Form dated 15 November 2021, landowner 2, stated that they are not aware they have stopped anyone using the application route nor made it impassable, no one has asked them for permission and no permission has been given to anyone, and that no obstructions, signs or notices have been erected.

85. In a Landowner/Occupier Statement Form dated 19 October 2021, landowner 1 stated they had verbally challenged public use of the route by:

*“pointed them to the ‘private property’ signage and have asked them to leave”.*

86. However, landowner 1 did not specify any dates for such challenges on that form. As such, Officers consider there is not sufficient proof that such a verbal challenge brought the public's use of the route into question, including no 'event' date, and therefore there can be no associated relevant period.

87. In the email dated 11 March 2019, between a KC PROW Officer and landowner 1, which discussed the application DMMO S14217, landowner 1 stated:

*“...We have placed signage there since 2008, initially for permissive access, more recently private” (See **Figure 13**).*

88. Landowner 1 detailed that signage stating the application route was a permissive footpath was erected in 2008, which is within the relevant period of 1992 to 2012. Such signage has no retrospective effect, but in turn would create a further alternative relevant period 1988 to 2008.
89. The issue is that the landowner has not submitted any further evidence (e.g., no photographs or equivalent evidence) of any 'permissive' signage erected in 2008 or any 'private' or 'private land' signage erected since between 2008 and 2019. The only evidence are the photos of the signage taken by Officers in 2019 and 2021, as shown in **Figure 15**.
90. In addition, the other issue is that no user indicated any signage specifically about permissive access. Therefore, there appears to be some inconsistencies in the evidence (landowner and user) surrounding signage, dates, and wording. As noted in paras 30 to 32, the burden of proof rests with the landowner to show that there is sufficient evidence to demonstrate there was no intention to dedicate. In relation to signage, proof that the landowner has erected and maintained notices visible to path users inconsistent with dedication is required (s31(3) of the 1980 Act).
91. On the 17 February 2022, Officers asked landowner 1 for further evidence of permissive access signage and details of when this change to private signage occurred, but none has been submitted. Officers therefore consider that the evidence submitted on the landowner's signage (permissive or private) is not sufficient proof of a lack of intention to dedicate.
92. Consequently, there is insufficient evidence indicating a lack of intention to dedicate the application route as a public footpath over the relevant period of 1992 to 2012 to rebut the presumption that it has been so dedicated.

### **Conclusion (1992 - 2012 Relevant Period)**

93. The evidence of public use considered above is sufficient to raise the presumption that the application route has been dedicated as a public footpath under section 31 of the 1980 Act. The Officer considers that the presumption is

not rebutted by the opposing evidence and an Order should be made based on a reasonable allegation that the way subsists.

### **Alternative Relevant Period 1988 to 2008**

94. On the other hand, if the landowner's evidence on signage from 2008 is considered sufficient to demonstrate a lack of intention to dedicate then the test for presumed dedication would revert to an earlier 1988 to 2008 relevant period.
95. The user evidence has therefore been evaluated for the relevant period of use 1988 to 2008 under the provisions of s31(1) for presumed dedication, as follows.
96. As shown in **Figure 19**, at the start of the relevant period 1988 to 2008, 6 (six) users reported they were using the route on foot. At the end of the same relevant period 19 (nineteen) users reported they were using the route on foot.
97. In relation to the frequency of the public's use, 1 (one) used it daily, 4 (four) used it weekly, 2 (two) used it monthly, 3 (three) used it weekly or monthly, 6 (six) used it every few months and 3 (three) used it yearly or occasionally. It is collective use during the 20 year relevant period that is important.

### **Conclusion (1988 - 2008 Relevant Period)**

98. This level and frequency of use demonstrates that the application route is reasonably alleged to have subsisted for 20 years or more before the erection of signage in 2008. Use was 'as of right', without force, without secrecy and without permission. No evidence has been provided about a lack of intention to dedicate prior to 2008. Therefore, the statutory test for presumed dedication is satisfied and not rebutted. during the relevant period 1988 to 2008, and an Order should be duly made based on a reasonable allegation that the way subsists.



## **Implications for the Council**

### **Working with People**

99. Not applicable.

### **Working with Partners**

100. The Officer has engaged with the public, Councillors, landowners, occupiers, the Parish Council, and user groups when gathering and investigating the evidence connected with this application.

### **Placed based Working**

101. Not applicable.

### **Climate Change and Air Quality**

102. Work to ensure that the public rights of way network are correctly recorded on the Definitive Map and Statement and are available for use may encourage a modal shift towards use of more sustainable forms of transport. This is consistent with Council's response to the declared Climate Emergency, the Kirklees Walking and Cycling Strategic Framework, and Council commitments to action on air quality.

### **Improving Outcomes for Children**

103. Not applicable.

### **Other (e.g., Legal/Financial or Human Resources)**

104. The Council has a statutory duty to maintain the formal record of public rights of way and to respond to applications and discovery of evidence of unrecorded public rights of way and any other modifications that should be made to the legal record.

105. The Council must make a decision regarding the DMMO application and make an Order if required further to section 53 of the Wildlife and Countryside Act 1981.
106. Any person may make a duly made objection or representation to an Order modifying the Definitive Map and Statement. If objections are made and not withdrawn, any Order made must be forwarded to the Secretary of State and most likely be considered by an appointed Planning Inspector, who may or may not confirm the Order.
107. The financial costs associated with the making or confirmation of an Order or associated with referral of an opposed Order to the Secretary of State would be met from existing budgets and should not be taken into account when considering the evidence regarding the status of the paths in question.
108. If an Order is made and that order is confirmed on the basis of presumed dedication under section 31 of the 1980 Act, as recommended by the Officer, the public footpath will not be a highway maintenance at public expense as it came into existence through public use after [section 38 of the Highways Act, 1959](#), came into operation.
109. The Members should be aware that the presence of fence across a recorded public right of way without a suitable method of crossing, would be an unlawful obstruction which would lead to appropriate enforcement action.

## **Consultation**

### **Consultation letters and site/website notices**

110. On the 29 October 2021, Officers conducted a 28-day consultation with the public, landowners/occupiers, user groups, Kirkburton Parish Council and Kirkburton Ward Members. The consultees were invited to provide any comments and/or evidence by 29 November 2021. Consultees were also asked to provide responses to a specific set of questions.

111. Public notice of the consultation was provided on the Councils website under [Changes to the Definitive Map and Statement](#) and titled 'Farnley Bank Wood 217, Farnley Tyas'. Notices were displayed at either end of the application route as shown in **Figure 20**. Consultees were given the option to respond via email, letter, or telephone.

### **Consultation responses**

112. Consultation responses were received from both landowners, 2 (two) members of the public, one (1) community group, one user group, 2 (two) Councillors and the applicant. See **Figure 21** for a summary of those consulted and any responses.

113. The consultation elicited responses from users and user groups that supported the applicant's case.

114. Both landowners submitted a landowner/occupier statement form. The main landowner 1 does not support the claim for public rights over the route and as already mentioned, their evidence relates to the lack of intention to dedicate in relation to permissive signage and private signage, and to lesser extent challenging use. Landowner 2 appears to be neutral having previously had no objection to the recording of a footpath on the DMS.

115. Landowner 1 also responded on 29 November 2021 that:

*"The Estate - and its successor - has provided many permissive routes. This benefit will be lost if landholders are to be discouraged in this way."*

116. On the 6 November 2021, one user who had previously submitted a UEF, commented that:

*"....my understanding is that it was used by people residing at Hunters Nab and by people making their way to work at Farnley Mill and Storthes Hall Hospital."*

117. Huddersfield Rucksack Club responded on 23 November 2021 that:

*"I have asked our members about this claimed path and no one has knowledge of it. Though there was some comment that it could be a useful addition to the network. However, I do walk footpath KIR/55/10 regularly and would not like to see this route compromised".* Officers followed up and the reference to 'route compromise' clarified by the respondent to mean if the *'landowner decided to try and close one path and open the other.'*

118. In an Email on the 29 November 2021 the applicant resent images of Email correspondence with the landowner 1 submitted with the DMMO S14217 application and also submitted an additional Email and stated this was:

*"...evidence regarding permission given to walk through here in the past...."*

The additional Email is from landowner 1 to Farnley Tyas Community Group dated 27 December 2013. It mentions a walk to be held on 15 February 2014 where:

*"people can walk/drive down Field Lane (the public bridleway), park up at Westroyd and walk down to Stock Dove Wood".*

Farnley Bank Wood is not mentioned, but the applicant stated that:

*"Stock Dove Wood is accessed by walking along Farnley Bank".*

119. On the 3 March 2022, the Officer followed up with the applicant to ask what they had meant by 'permission' in the email, because the applicant had not referred to 'permission' previously. In summary, the applicant replied that they did not mean landowner 1 had given 'permission' as such, they meant the route was used in the full knowledge of the landowner 1 and they had no objection to the public using it and it had been that way for over 30yrs.
120. Officers consider that this email correspondence does not in itself represent an express 'permission' for the applicant or members of Farnley Tyas Community Group to walk through Farnley Bank Wood – and any use by these parties is considered to be 'as of right'. Officers also consider that in itself this correspondence does not indicate in itself the application route was a permissive path.

## Response from Parish Council

121. Kirkburton Parish Council were invited to respond to the informal consultation. No response has been received from them.

## Response from Councillors

122. Councillor Armer responded on 28 October 2021 that:

*“I have never used this path, so cannot comment, but am well aware of the local community's efforts to establish the way. I will liaise with my local contact, but I assume that you will already have communicated with her since she has played a leading role in this.”*

123. Officers responded that they were in touch with the applicant.

124. Councillor Smith responded on 28 October 2021 that:

*“I'm not aware of anything, but is it your intention to extend this to community groups/ village associations who are made up of people who live locally and often use this area, so would be well placed to comment?”*

125. Officers responded that the consultation included the landowners / occupiers, user groups, the Parish Council and the wider public. A notice and plan (map) would also be placed on the KC website.

## Next Steps & Timelines

126. As soon as reasonably practicable after determining the application, Schedule 14(3)(3) requires the Council to give notice of their decision by serving a copy of it on the applicant and any landowner/occupier. If the Council decide not to make an Order, the applicant may appeal the decision to the Secretary of State within 28 days after service of notice under Schedule 14(4) of the 1981 Act. The process is usually delegated to a Planning Inspectorate who will consider the appeal and may direct the Council to make an Order.

127. If an Order is made, it will be processed under [Schedule 15 of the 1981 Act](#). This schedule provides that before making an Order, the Council shall formally consult with every local authority whose area includes the area in which the Order relates. The Order will be made in the prescribed form as set out in [The Wildlife and Countryside \(Definitive Maps and Statements\) Regulations 1983](#) and does not take effect until it is confirmed. On making an Order, the Council shall give public notice in the prescribed form for a forty-two (42 day) period during which representations or objections may be duly made.
128. The public notice is published in a local newspaper, displayed at both ends of the way affected by the Order, at Council offices, and served on every relevant owner/occupier, local authority affected by the Order, and user groups and statutory consultees.
129. If the Order is unopposed, it may be confirmed by the Council. On the other hand, an opposed Order must be submitted to the Planning Inspectorate who may determine the Order via written representations, public hearing, or public inquiry. The Order may be modified, unconfirmed, or confirmed as made. A final decision is similarly given public notice for a 28-day period.
130. Further information on the process and timelines is provided in these documents:
- [A Guide to Definitive Map and Changes to Public Rights of Way \(2008 Revision\)](#)
- [Guidance on Procedures for Considering Objections to Definitive Map and Public Path Orders html - GOV.UK \(www.gov.uk\)](#)

## **Officer Recommendations & Reasons**

### **Make a DMMO**

131. Based on an overall assessment of the user evidence, landowner evidence and other evidence, Officers considers that it is reasonably alleged that the application route from definitive public footpath Kirkburton 55/10 at Upper High Fields through Farnley Bank Wood to Woodsome Road, Farnley Tyas, subsists

as a public footpath during the relevant period 1992 to 2012, based on presumed dedication under section 31 of the 1980 Act, which is not rebutted by sufficient evidence of a lack of intention to dedicate.

132. Officers therefore recommend that a Definitive Map Modification Order (an Order) is made under sections 53(3)(c)(i) of the 1981 Act, to record a public footpath on the Definitive Map and Statement (DMS) leading from definitive public footpath Kirkburton 55/10 at Upper High Fields (point A on the draft map in **Figure 22**) through Farnley Bank Wood to Woodsome Road, Farnley Tyas (point C on the draft map in **Figure 22**).
133. The draft map shows the indicative route. Any Order plan would show a route with a higher level of precision. The indicative width of the route varies along its length through the woodland averaging 1 to 1.5m. Any Order would also accurately record the width with a higher level of precision. At the access road, the route would be over the full width boundary to boundary.
134. The Council can confirm the Order providing it does not elicit any objections during the formal public notice period. Confirmation of an Order is based on the 'balance of probabilities' (not beyond all reasonable doubt as is the case in criminal law) or Test A in relation to 53(3)(c)(i) of the 1981 Act.

## **DMMO Confirmation**

135. Officers also recommend that, should the Order be opposed, and the matter referred to the Planning Inspectorate for determination, the Council should support confirmation of the Order by either written representations, public hearing, or public inquiry. Confirmation of the Order would record on the DMS the application route for use by the public on foot. However, if new evidence becomes available that changes the assessment of the user evidence, such that, the application route is not considered to subsist on the balance of probabilities, the Council should take a neutral stance in relation to confirmation of the Order.

## **Contact Officer**

136. Deborah Stephenson, Assistant Definitive Map Officer

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## **Background Papers and History of Decisions**

137. This report is accompanied by the following appendices:

**Appendix A Guidance to Members**

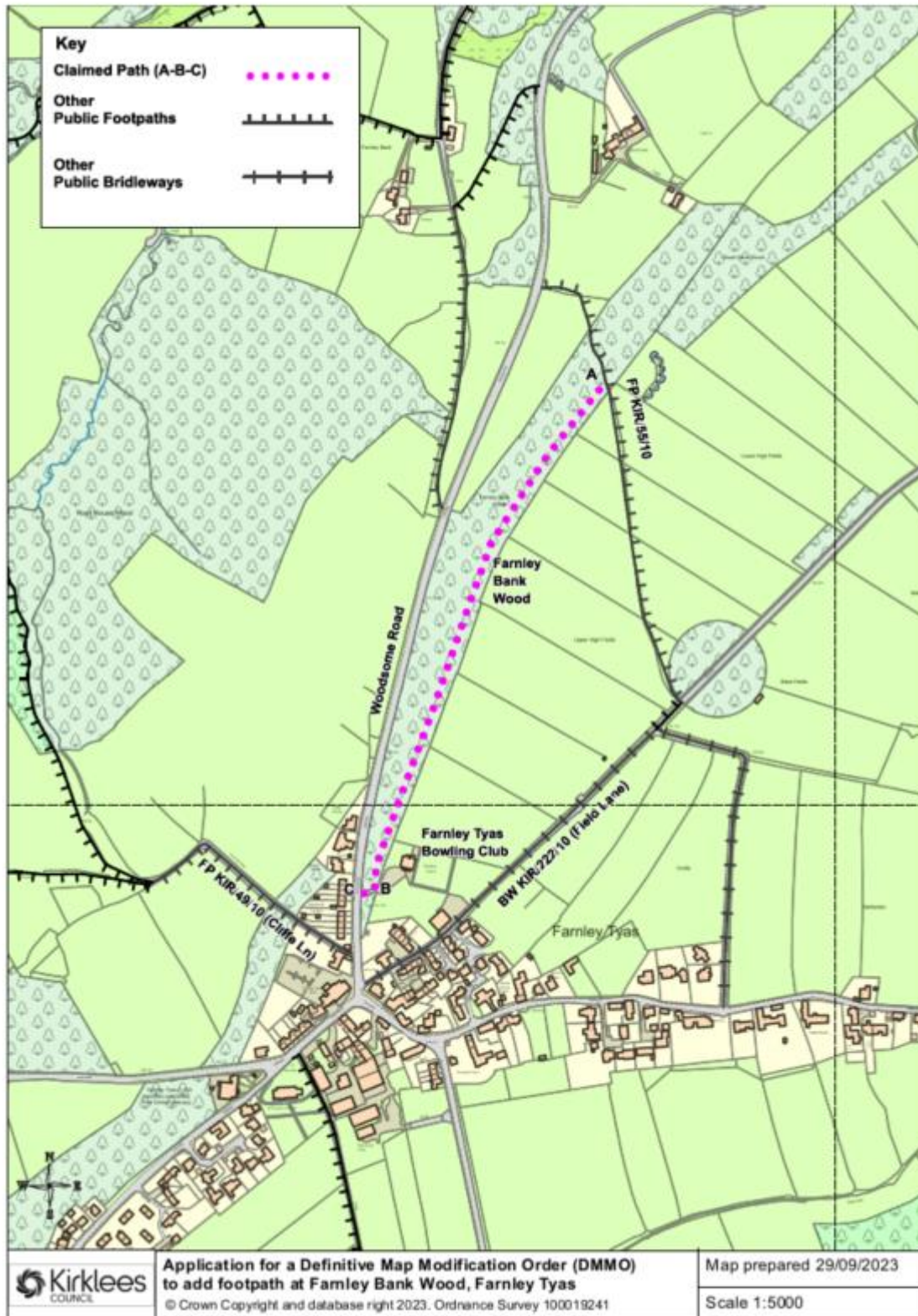
**Appendix B Figures and Photos**

## **Service Director Responsible**

138. Highways and Streetscene; Environment & Climate Change Directorate



Figure 1: Draft map - Public footpath to recommended to be added (A-C)



Map shows the indicative route