

Name of meeting: Planning sub-committee (Huddersfield Area)

Date: 17 May 2018

Title of report: Applications for a definitive map modification order to add public footpaths to the definitive map and statement, Clayton Fields, Edgerton. (Application references 30, 31, 184, 185 & 186). Application for a definitive map modification order to vary the recorded width of recorded public footpath Huddersfield 345 (part) (Application reference 187)

Purpose of report: **Members are asked to consider** the evidence and decide on any requisite modification of the definitive map and statement of public rights of way. Applications have been received for definitive map modification orders to record public footpaths and to amend the width recorded for part of an existing recorded public footpath.

Members are asked to make a decision on making an order and forwarding any order made to the Secretary of State, if opposed.

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 Council's Forward Plan (key decisions and private reports?)	Not applicable If yes also give date it was registered
The Decision - Is it eligible for call in by Scrutiny?	No – council committee
Date signed off by <u>Director</u> & name	Karl Battersby 8 May 2018
Is it also signed off by the Acting Service Director for Financial Management, IT, Risk and Performance?	James Anderson on behalf of Eamonn Croston 4 May 2018
Is it also signed off by the Service Director (Legal Governance and Commissioning)?	Julie Muscroft 8 May 2018
Cabinet member portfolio	N/A

Electoral wards affected: Greenhead

Ward councillors consulted: Cllrs. Patterson, Sokhal, Ullah.

Public or private: Public

1. Summary

- 1.1 The council has received seven applications under the Wildlife & Countryside Act 1981 to modify the definitive map and statement of public rights of way (“DMS”) by order, affecting land at Clayton Fields. There are six applications to add a public footpath to the formal record and one to record a greater width for a footpath that is already formally recorded. Changes to the definitive map and statement of this kind are called definitive map modification orders (“DMMO”). App E shows the seven DMMO application plans and a composite of these routes.
- 1.2 The existence of the seven Clayton Fields DMMO applications was brought to sub-committee’s attention at the August and October 2017 meetings, when an application to stop up the claimed footpaths and create alternative routes was reported for a decision on making an order under section 257 of the Town & Country Planning Act 1990 (“TCPA”), in line with the planning consents for residential development of the Clayton Fields site.
- 1.3 The sub-committee has also already made a decision on one of the DMMO applications (DMMO ref: 183) in February 2018. Mr Magee, who is the applicant for two of the DMMO applications (ref 30 & 31), has made representations to the Secretary of State at DEFRA (“SoS”) asking him to direct the council to determine those two DMMO applications (No decision on direction from the SoS to date, decision on these applications).
- 1.4 Sub-committee authorised officers to make an order to extinguish routes at Clayton Fields and provide alternatives under section 257 of the Town & Country Planning Act 1990. The detail of that authority was affected by the sub-committee decision on DMMO 183 and may be further affected by the decision on the other 6 DMMO applications at Clayton Fields further to this report.
- 1.5 Officers have now received legal advice that the council determine the seven DMMO applications before proceeding with a s257 order. i.e. that the council decides whether or not the making of a DMMO order would be warranted or not, in the case of each DMMO application claiming public rights of way.
- 1.6 As noted in the report to February 2018 sub-committee, officers bring DMMO applications to sub-committee at this time, for the 6 outstanding Clayton Fields DMMO applications.
- 1.7 The claimed routes lie within land at Clayton Fields that was registered as a town and village green (“TVG”) in April 1997, further to an application to Kirklees council. Two of the six DMMO applications were received in 1996, but were not

progressed. The TVG registration was quashed by decision of the Supreme Court in February 2014, a press summary issued by the court is appended at App B.

- 1.8 The 1996 DMMO applications and the TVG application were prompted by a planning application in 1996 for development of the land from the owner George Haigh & Co Ltd. Mr Hardy (joint DMMO applicant in 1996, now deceased) described this in a telephone conversation with the PROW officer on 5 August 2011. This appears to have set in motion a train of events and public awareness leading to applications affecting the land.
- 1.9 The council received DMMO application 30 (at App A, with application plan) dated 14 September 1996 for an order to modify the definitive map and statement of public rights of way to record a public footpath from Edgerton Road to Huddersfield footpath 345 behind 55 George Avenue, also shown on plans at App E.
- 1.10 The council received DMMO application 31 (at App A, with application plan) dated 22 September 1996 for an order to modify the definitive map and statement of public rights of way to record a public footpath from Edgerton Road towards Queens Drive, also shown on plans at App E.
- 1.11 The council received DMMO application 184 (at App A, with application plan) dated 21 October 2014 for an order to modify the definitive map and statement of public rights of way to record a public footpath from point D on Edgerton Road to point B on Queens Road, also shown on plans at App E.
- 1.12 The council received DMMO application 185 (at App A, with application plan) dated 21 October 2014 for an order to modify the definitive map and statement of public rights of way to record a public footpath from point D on Edgerton Road to point C on Huddersfield footpath 345 behind 55 George Avenue, also shown on plans at App E.
- 1.13 The council received DMMO application 186 (at App A, with application plan) dated 17 November 2014 for an order to modify the definitive map and statement of public rights of way to record a public footpath from point A on Huddersfield public footpath 345 by the footbridge over the Clayton Dike to point E on Deveron Grove, also shown on plans at App E.
- 1.14 The council received DMMO application 187 (at App A, with application plan) dated 28 November 2014 for an order to modify the definitive map and statement of public rights of way to vary the particulars (seeking recording of a greater width) for Huddersfield public footpath 345 from point F at the junction of Huddersfield public footpath 345 with Edgerton Road to point G at the junction of Huddersfield public footpath 345 with St Patrick's School access behind 69 George Avenue, also shown on plans at App E.

- 1.15 The Clayton Fields land is north of Edgerton Road.
- 1.16 The council has also received user evidence forms. These forms are generally used by witnesses to describe their personal knowledge and experience of routes. This user evidence is appended as a summary and time line at App C. Further submissions are also at App C.
- 1.17 The council has received witness (user evidence) forms relating to these applications ("UEF"). These describe use, predominantly on foot, variously between 1950 and 2014, as at the time of the application. The timeline of user witness evidence and their plans are at App C.
- 1.18 The council as surveying authority for public rights of way has sought comment and evidence from the landowner Paddico (267) Ltd, which is also the joint applicant for the s257 order, as well as from the council as landowner (application routes north of Clayton Dike).
- 1.19 A Land Registry title plan and register record showing current ownership is at App D.
- 1.20 The council's landholding is shown at App D.
- 1.21 The council is yet to receive any written evidential submissions from landowner Paddico (267).
- 1.22 Officer photos taken in 2011 & 2014 are appended at App G.
- 1.23 At the time of the earlier DMMO applications (ref 30 & 31), the land was owned by George Haigh & Co Ltd, who subsequently sold it to Paddico (267) in 2004. Mr Haigh opposed the TVG registration of his land at the time of the council's consideration of the TVG application. The company's completed landowner evidence form WCA10 of 27 September 1996 is appended at App H. It notes little except denying the existence of the rights of way claimed, and stating that investigations continue. Land Registry titles for Haigh are also appended at App H.
- 1.24 There is significant and lengthy debate and dispute about the land and its use and the meaning of this use in the KC local land charges TVG file, listed as a background document. George Haigh & Co Ltd disputed the public use in various ways and submissions, including statutory declarations; the council's relevant committee decided to register the land as a TVG after considering the evidence and arguments.
- 1.25 The DMMO 184, 185, 186 & 187 applicant has submitted montages of claimed routes (App F), as well as user and other personal evidence. He has stated that some application routes are indicative. Other aerial photos are also appended at App F. Officers highlight that these colour aerial photos are all after 1996.

- 1.26 The council should identify a date when the use of the route was brought into question.
- 1.27 Officers understand that the potential development of the site led to the application to register a TVG and two applications to record footpaths across the site (refs 30 & 31).
- 1.28 It may be considered that some earlier action prior to the 1996 and 2014 applications brought the use of the way by the public into question, and choosing an earlier date may be appropriate regarding any section 31 consideration of the date from which to work out the relevant user period for consideration of statutory presumption. It may be that this would be clarified only after more detailed examination of the evidence, such as in cross-examination at public inquiry, were one to take place.
- 1.29 The council has to determine the definitive map modification order applications. The council must consider the available evidence, before reaching a decision on making any requisite order(s) to modify the definitive map and statement. If the council makes an order, it must be advertised and notice given, with a period for formal objections to be made. If opposed, it would have to be submitted to the Secretary of State at DEFRA to determine.
- 1.30 Whatever the nature of the application, the council must decide what, if any, rights have been shown to satisfy the relevant test(s). This means that the council may make a different order or none at all, after appropriate consideration of the available evidence.
- 1.31 The evidence, whether for or against the application and any recording of any public right of way, is to be noted and considered.
- 1.32 When considering additions to the definitive map and statement of public rights of way, the council must make an order
- 1.32.1 If a public right of way is shown to subsist on the balance of probabilities, or
- 1.32.2 if the right of way is shown to be reasonably alleged to subsist.
- 1.33 When considering a modification of the width recorded, the council must make a decision on order-making on the balance of probabilities.

2. Information required to take a decision

- 2.1 Members are asked to consider the report, the available evidence for and against the recording of public rights, and decide what order(s), if any, to make.
- 2.2 It is the council's statutory duty to maintain the definitive map and statement and make any requisite orders.

- 2.3 Guidance for members is appended (Appendix 1).
- 2.4 The application is made under the Wildlife & Countryside Act 1981.
- 2.5 The council should consider the available evidence and determine whether to make an order to modify the record of public rights of way when it is requisite in accordance with section 53 of the Wildlife & Countryside Act 1981.
- 2.6 The statutory provision in Section 53(3)(b) (WCA81), requires the Surveying Authority (Kirklees Council) to modify the Definitive Map and Statement following: *“the expiration in relation to any way in the area to which the map relates of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway.”*
- 2.7 Section 53 (3) c (i) requires the council to make an order to modify the definitive map when evidence is discovered which 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;”*.
- 2.8 Unrecorded public rights of way may come into being in a number of different ways, such as a result of a legal event such as a creation or diversion. Further, Section 53(3)(b) of the 1981 Act requires the Council to modify the Definitive Map and Statement on expiration of any period of public use if it can be shown that the public have used the path for a sufficient length of time to raise a presumption that the path has been dedicated as a public path. This presumption, detailed in the Highways Act 1980 section 31, states *“where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 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”*. In identifying a relevant 20 year period for the purpose of section 31, we have to work retrospectively from this date of challenge.
- 2.9 The 20 year period to consider is taken to run back from the date when the use of the path was first “brought into question”, whether by a notice or otherwise (HA Section 31 (2)). Section 69 of The Natural Environment and Rural Communities Act 2006 (NERC) clarified that the submission of an application to modify the Definitive Map was sufficient to call the use of the route into question by inserting subsections 7A and 7B into Section 31 HA 1980.

- 2.10 Section 31 states that only ways that are capable of being public highways are able to be considered under the statutory test.
- 2.11 The Committee must consider whether there is sufficient evidence to raise the presumption of dedication. The standard of proof for a final decision is the civil one, that is, the balance of probabilities. If disputed, an order confirmation decision by the SoS would be made solely on the balance of probabilities. Members must initially weigh up the evidence and decide if, on balance, it is reasonable to allege that there is a public right of way. If the presumption is raised, the onus is then on the landowner to show evidence that there was no intention on his/her part to dedicate. This must be by some overt act on the part of the landowner to show the public at large that there was no such intention.
- 2.12 Such evidence relied upon may consist of notices or barriers, or by locking of the way on one day in the year, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration under HA Section 31 (6) to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit.
- 2.13 “Intention to dedicate” was considered in *Godmanchester, R (on the application of Godmanchester Town Council) (Appellants) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent)* [2007] UKHL 28, which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgment, Lord Hoffmann approved the obiter dicta in the ruling of Denning LJ in *Fairey v Southampton County Council* [1956] who held “*in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path....that he had no intention to dedicate*”.
- 2.14 Lord Hoffmann held that “*upon the true construction of Section 31(1), ‘intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the owner’s intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to ‘disabuse’ [him] of the notion that the way was a public highway*”.
- 2.15 For a landowner to benefit from the proviso to s31(1) there must be ‘sufficient evidence’ that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must

have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify action which will be regarded as “sufficient evidence”, they are not exhaustive; s31 (2) speaks of the right being brought into question by notice “or otherwise”.

- 2.16 Dedication of a public path at Common Law should also be considered. The main principles of establishing a highway under common law are:
 - 2.16.1 Use by the public should be as of right; without force, secrecy or permission.
 - 2.16.2 The landowner should know of the use but do nothing to prevent it. No minimum period of use is required (unlike the statutory process where a minimum of 20 years is required).
 - 2.16.3 The more intensive and open the use and the greater the evidence of owners knowledge and acquiescence the shorter the period required to raise a presumption that the way has been dedicated.
 - 2.16.4 Each case is judged on the facts available.
 - 2.16.5 The onus of proof lies with the person making the claim to show that there was use and that the owner knew of it and did nothing to stop it.
- 2.17 In considering the addition of unrecorded footpaths, there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw, and clarified in the case of R v Secretary of State for Wales ex parte Emery.
 - 2.17.1 Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.
 - 2.17.2 Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.
- 2.18 If the council resolved to make an order adding a public right of way only on the basis of Test B, members may note that the public rights of way provisions of the Deregulation Act 2015, which are yet to come into force, will remove Test B, so any such authorised order could only be made prior to commencement of any such relevant provisions.
- 2.19 The test for varying the statement to record a different width is on the balance of probabilities.

- 2.20 Section 32 of the Highways Act 1980 states “*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.*” Whether determination is by the Inspectors appointed by the Secretary of state, the highest courts or the council as surveying authority for public rights of way, it is appropriate and correct for those deciding such matters to consider documents that form part of the available evidence, and to decide the weight of that evidence in reaching a decision.
- 2.21 Government guidance to local authorities is contained in DEFRA’S Rights of Way Circular 1/09, version 2
- 2.22 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69304/pb13553-rowcircular1-09-091103.pdf
- 2.23 Members are advised that if a definitive map modification order is made, which then attracts objections which are not withdrawn, then the council would have to forward it to the Secretary of State at DEFRA for determination. The DMMO consistency guidelines, are issued to the Secretary of State’s inspectors in the planning inspectorate
- 2.24 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517495/Full_version_February_2016_consistency_guides_2_.pdf
- 2.25 DMMO applications 184, 185, 186 & 187 were received by the council in 2014. Clayton Fields had been de-registered as a TVG and there were concerns about loss of the land to the public and development of the site.
- 2.26 As well as the TVG application, local residents Mr Magee and Mr Hardy (deceased) had also made two applications to the council for orders to record public footpaths across Clayton Fields. These applications (refs 30 & 31) were held in abeyance, although there appears to be some dispute or confusion over whether this was at the behest of the applicant(s) or the council at the time. (KC legal note and PROW note at App W).

- 2.27 The user evidence for application 30 identifies use by 8 witnesses over Clayton Fields land. (see App C).
- 2.28 The user evidence for application 31 identifies use by 10 witnesses over Clayton Fields land. (see App C).
- 2.29 The user evidence for application 184 identifies use by 8 witnesses over Clayton Fields land. (see App C).
- 2.30 The user evidence for application 185 identifies use by 30 witnesses over Clayton Fields land. (see App C).
- 2.31 The user evidence for application 186 identifies use by 17 witnesses over Clayton Fields land. (see App C).
- 2.32 The user evidence for application 187 identifies use by 2 witnesses over land at the western edge of Clayton Fields land. (see App C).
- 2.33 Users noted seeing others and described use on foot, for the purposes of walking, recreation, photography, jogging, dog walking, shopping, dentists, travel to school etc. Such use would be appear open, notorious and of a nature similar to that expected of public rights of way. Some limited cycle use is also described.
- 2.34 The submitted user evidence overall demonstrates regular and frequent use over the land over many years by the public. App C shows summarised WCA8 user evidence.
- 2.35 During the years that the land was registered as a TVG, 1997 – 2014, the public would have had the right to access the land and use it for recreation purposes. This is sometimes referred to as there being an implied permission. In other words, the public use during those years of registration is not “without permission” (i.e. the use is not “*nec precario*” to use the Latin legal term). This public recreational use, prior to and since TVG registration, included walking across the site as shown in the evidence forms across the seven DMMO applications and within the TVG application.
- 2.36 The Newhaven and Barkas Supreme Court decisions linked above relate and refer to the questions of ‘as of right’, ‘by right’, and ‘implied permission’ .
- 2.37 <http://www.bailii.org/uk/cases/UKSC/2015/7.html> Newhaven [2015] UKSC 7

- 2.38 <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2014/31.html> Barkas [2014] UKSC 31
- 2.39 If the public was accessing the land by right and if their use of the land as a TVG was indistinguishable from their use walking from A to B, (and potentially along other claimed footpaths in the other DMMO applications affecting this land) then the use during the period of TVG registration would not be as of right (without force, secrecy or permission, or *nec clam, nec vi, nec precario*) and such use during that period would not lead to the establishment of a public right of way.
- 2.40 The registration of the TVG was effectively quashed by the Supreme Court due to an administrative technicality regarding the application form and the definition of certain words; it did not question the use of the land by the public which led to the application and registration as a TVG.
- 2.41 Such use of the land by the public, including walking across it on various routes, may be considered to have been brought into question at the time of the 1996 Haigh outline planning application, concern about the land and its use was subsequently apparent across a significant number of people, and the TVG application and the DMMO applications 30 & 31 were made.
- 2.42 Although it is noted that the earlier DMMO applications (ref 30 & 31) were not for the same route as the 2014 applications also before sub-committee, they all refer to access to and across the same site within the same ownership, and the threat to the public continuing such use, and identify a recognition by a significant number of people that there was a question of their use of the land.
- 2.43 If the right of the public to use the claimed footpaths was brought into question as a result of the planning application, TVG process and/or the concerns about the land that gave rise to the earlier DMMO applications, then the relevant 20 year period to be considered under section 31 of the Highways Act 1980 may be considered to be 1976 – 1996. If so, use of the route and blockage of the land by Paddico (267) Ltd in the recent years before the 2014 applications were made would not affect the date when use of the way was brought into question.
- 2.44 The 8 user evidence forms completed for application ref 30 include 8 witnesses who give evidence of use within that timeframe 1976 - 1996.
- 2.45 The 10 user evidence forms completed for application ref 31 include 10 witnesses who give evidence of use within that timeframe 1976 - 1996.

- 2.46 The 8 user evidence forms completed for application ref 184 include 7 witnesses who give evidence of use within that timeframe 1976 - 1996.
- 2.47 The 30 user evidence forms completed for application ref 185 include 19 witnesses who give evidence of use within that timeframe 1976 - 1996.
- 2.48 The 17 user evidence forms completed for application ref 186 include 6 witnesses who give evidence of use within that timeframe 1976 - 1996.
- 2.49 The 2 user evidence forms completed for application ref 187 include 1 witness who give evidence of use within that timeframe 1976 - 1996.
- 2.50 User of less than twenty years by individuals may also be considered, as it provides evidence of public use, which may support and corroborate evidence of longer user, and/or be added to user by other people over other years.
- 2.51 A summary of the TVG witness evidence is appended at App K. This evidence, although not specific to specific application routes, is indicative of the use by the public of land at Clayton Fields for walking up to 1996 – a majority describing walking under the “use of land” column.
- 2.52 A statutory declaration by George Haigh & Co’s solicitor (App L) during the TVG process noted at paragraph 15.5: *“Furthermore the rights claimed by local residents in support of this application are more consistent with public rights of way, i.e. rights to pass and repass along a footpath, than ‘as of right’ use of the land as a town or village green.”*
- 2.53 Clarification would appear to be supported by appended photos taken by Kirklees officers (e.g. in 2011 and 2014 at App G), before more recent groundworks disturbed the surface over much of the site.
- 2.54 Members of the public are not expected to be cartographic experts when completing applications or evidence forms, and when marking up the routes they describe on provided template plans. It appears reasonable to take the clarification on the alignment of the claimed routes into account, when considering the alignment for any route that may satisfy the tests for making an order to record a public footpath.
- 2.55 The current landowner, Paddico (267) Ltd has not accepted that public rights subsist across the land, and has not submitted any evidence relating to the

existence of any alleged public rights. As previously reported to sub-committee, Paddico submitted an application under section 257 TCPA 1990 to extinguish any public rights claimed to subsist over the land (and provide alternative routes) to enable them to progress with sale and development of the site, along with the joint s257 applicant, the proposed developer Seddon Developments, which is looking to purchase and develop the site in accordance with planning consent for the site.

2.56 Members are reminded of the test described at 2.17.2 above for making an order where the two sides may have credible evidence but there is not incontrovertible evidence to show that no public way subsists.

2.57 None of the user evidence forms describes equestrian use by witnesses. For the pre-1997 period, there is negligible evidence of bicycle use of the routes. This would appear insufficient to be indicative of the existence of public bridleway or restrictive byway rights.

2.58 No evidence has been submitted describing motor vehicular use.

2.59 Ordnance Survey plans showing the land over the years are appended at App X (1893 - 2014). These are not demonstrative of public rights of way but indicate the physical nature of the site over the years. The physical existence of any particular route through the site is not clear from these OS plans, however this does not mean that a route did not exist or that a public right of way could not exist. It is worth noting that there used to be a house at Queens Road between numbers 12 and 15, which appears on some OS mapping but is not on the 1972 and subsequent maps.

2.60 After considering the evidence and the relevant criteria members have a number of options.

2.61 The first option for members is to refuse the applications and to decide that the council should not make any order.

2.62 The second option for members is to conclude the evidence is sufficient for the council to make an order, or orders, to modify the definitive map and statement, to reflect unrecorded rights, and either confirm it or forward it to the Secretary of State if it is opposed.

3. Implications for the Council

3.1 Early Intervention and Prevention (EIP)

- 3.1.1 Providing better facilities for physical activity works towards local and national aims of healthy living.

3.2 Economic Resilience (ER)

- 3.2.1 There is an indirect impact of a welcoming environment which helps promote and retain inward investment

3.3 Improving Outcomes for Children

- 3.3.1 See 3.1.1

3.4 Reducing demand of services

- 3.4.1 See 3.5.

3.5 Other (e.g. Legal/Financial or Human Resources)

- 3.5.1 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 and mistakenly recorded public rights of way.
- 3.5.2 The Council must make a decision regarding the order application and any appropriate PROW status of this route, making any order that is requisite further to Wildlife & Countryside Act 1981, e.g. section 53. In accordance with the Council's delegation scheme, this is a decision for the sub-committee.
- 3.5.3 Any person may make an objection or representation to an order modifying the definitive map and statement. If objections are not withdrawn, any order made would be forwarded to the Secretary of state at DEFRA, and likely considered by an inspector appointed by the Secretary of State, who may or may not confirm the order.

4 Consultees and their opinions

- 4.1 Ward members have been informed about the public footpath claims and have been informed of the report being brought to sub-committee.
- 4.2 Officers have contacted the landowner, statutory and local user groups.
- 4.3 Officers have contacted the council's PRP and allotments teams as land managers for the council's land.
- 4.4 Officers would update members on further relevant evidence, before sub-committee decision.

5 Next steps

- 5.1 If an order is made, it will be advertised on site and in the local newspaper. All owners and occupiers will receive a copy of the order as well as other statutory consultees. Anyone may submit written objections to the order during the relevant notice period.
- 5.2 If no one makes an objection the Council could confirm the order. If objections are made, and not withdrawn, the order has to be referred to Secretary of State DEFRA, who will decide if the order should be confirmed. This usually involves appointing an inspector to consider the evidence from all parties at a public inquiry, hearing or by exchange of correspondence.
- 5.3 If the Council decides that there is no order to be made, then the applicant may appeal by way of representations to the Secretary of State who may direct the Council to make an order. [WCA 1981, Schedule 14, 3 (4)]. The applicant has 28 days to appeal after notice is served by the council of its refusal decision.
- 5.4 In this case, legal advice has been received that suggests the council determine the DMMO applications before progressing a s257 order, already authorised by sub-committee decision, which is the subject of a further report for any appropriate amendment. Officers' report to sub-committee on the Clayton Fields authority to make a s257 order under the Town & Country Planning Act 1990 is to follow consideration of this report.

6. Officer recommendations

- 6.1 **Officers recommend that** members choose option 2 at paragraph 2.62 and decide that the evidence is sufficient to authorise the Service Director, Legal, Governance and Commissioning to make a definitive map modification order ("DMMO") to record public footpaths as shown on appended plan App Z, under section 53 (3) c (i) of the Wildlife & Countryside Act 1981, but not to make any modification under s 53 (3) c (iii) regarding the recorded width of Huddersfield footpath 345.
- 6.2 **Officers further recommend that** if further to the recommendation at 6.1 above, an order is made, members authorise the Service Director, Legal, Governance and Commissioning to confirm the order or if opposed, to submit it to the Secretary of State at DEFRA to determine.

Reasons

- 6.3 There is significant evidence regarding public use of the route over a period of some decades.

- 6.4 There appears to be sufficient evidence to raise a reasonable allegation that public rights of way subsist over the routes identified and clarified over the land at Clayton Fields shown in the plan at App Z.
- 6.5 There has been no submission by the current landowners in this investigation to the council to dispute the existence of public rights over the land relating to the evidence from users.
- 6.6 There is clearly a conflict of evidence in the council's possession. The history of Clayton Fields is lengthy, complex and has been subject to test in the Supreme Court already. There is no incontrovertible evidence adduced that a public right of way cannot be reasonably alleged to subsist in relation to the application 183. If an order is made and opposed then the Secretary of State may consider it appropriate to call for a public inquiry to assess the evidence, with witnesses giving evidence in person and open to cross examination, allowing for a more detailed examination if required. Although taking the matter of TVG to the Supreme Court in 2014, the current landowner has yet to offer evidence or legal argument during this investigation to dispute the existence of public rights of way.
- 6.7 In the circumstances it appears reasonable to conclude that a reasonable allegation has been made that public rights of way subsist. The appropriate status should be reflected in any order made.
- 6.8 In conclusion, officers consider that there is sufficient evidence to consider that an Order to modify the Definitive Map and Statement should be made to record public footpaths under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 over the Clayton Fields land as shown in appended plan at App Z.
- 6.9 Officers consider that there is insufficient evidence to support the making of an order for the increased width of footpath Huddersfield 345.
- 6.10 If an order is made and objections made which are not withdrawn, it must be forwarded to the Secretary of State to make a decision. In that event, a public inquiry may be considered to be the preferred process to assist in a final determination of this matter, allowing for evidence to be given in person, where it would be open to cross-examination.

6.11 Section 53 (3) c (i) requires the council to make an order to modify the definitive map when evidence is discovered which 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;*”. Officers consider that this test is satisfied.

6.12 Officers consider that there is insufficient evidence before the council to merit recording a greater width for the 187 application route of footpath 345, under section 53 (3) c (iii) of the 1981 Act. Although members of the public may have enjoyed a greater width, there is a paucity of evidence before members. Although not relevant to consideration of this matter, officers would note that the intention of the landholder is to dedicate additional width as part of a public path order for the site, as already subject to the sub-committee’s decision of October 2017. Such inclusion would improve protection of route Huddersfield 345.

7. Cabinet portfolio holder’s recommendations

7.1 Not applicable

8. Contact officer

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9. Background Papers and History of Decisions

9.1 872/1/MOD/30 & 31 & 184 & 185 & 186 & 187

9.2 KC Land Charges TVG file (KMC-VG2) (2 files)

9.3 Appendices

<https://democracy.kirklees.gov.uk/ecSDDisplay.aspx?NAME=SD1547&ID=1547&RPID=505182253>

9.3.1 Appendix 1 – guidance for members.

9.3.2 App A – DMMO application form & plan (12)

9.3.3 App B – Supreme Court press summaries (2)

9.3.4 App C – User evidence summary & plans (16)

9.3.5 App D – Land ownership plans. (3)

9.3.6 App E – application plans for the seven DMMO applications. (3)

9.3.7 App F – Aerial photos 1949 and 2000-2009 and applicant’s montage submissions (10)

- 9.3.8 App G - Officer 'claimed routes' photos 2011 and 2014
- 9.3.9 App H – George Haigh & Co Ltd documents including LR title (3)
- 9.3.10 App K - TVG witness evidence summary (describes walking) and plan
- 9.3.11 App L – Stat Dec of G Haigh & Co's solicitor
- 9.3.12 App W – Legal service and PROW file note on application s 30 & 31.
(2)
- 9.3.13 App X – Ordnance Survey plans 1893-2014 (6)
- 9.3.14 App Y – Route of previous DMMO decision for application 183
- 9.3.15 App Z – Proposed addition plan for the officer recommendation

10. Service Director responsible

- 10.1 Joanne Bartholomew, Service Director, Commercial, Regulatory & Operational Services