

From: Maria McLauchlan (Public Rights of Way Officer – Definition Team)

To: Public Rights of Way & Access Service Manager

Subject: Claimed footpath running from Woodchurch Road to Appledore Road, circular route, and link with footpath by Tenterden Golf Club at Tenterden

File Ref: PROW/AS/C426 District: Ashford

Summary: To seek delegated authority to make an Order to modify the Definitive Map and Statement by adding a footpath running from public footpath AB12 to another point on public footpath AB12, as a circular walk.
To seek delegated authority to decline to make an Order to modify the Definitive Map and Statement by adding a footpath link with the footpath by Tenterden Golf Club.

FOR DECISION

Introduction

1. The County Council is the Surveying Authority for Kent and is responsible for producing a Definitive Map and Statement of Public Rights of Way. The current Definitive Map and Statement were published on 31st May 2013. Under the Wildlife and Countryside Act 1981, the County Council is under an obligation to keep the Map and Statement under continuous review.

Procedure

2. The Countryside Access Improvement Plan, Operational Management document (2013) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date and ensuring that the status and alignment of all PROW are correct in accordance with statutory duties by:
 - a) Investigating and determining all claims in accordance with the statement of priorities
 - b) Investigating and determining anomalies in accordance with statement of priorities
 - c) Processing applications to change PROW in accordance with policy and statement of priorities.
 - d) Ensuring all changes are covered by a formal Order

Definitive Map modification cases will normally be investigated in the order in which applications are received, except in any of the following circumstances, where a case may be investigated sooner:

- Where it will satisfy one or more of the relevant key principles set out in paragraphs 4.14 – 4.25 of the CAIP Operational Management document,
- Where the physical existence of the claimed route is threatened by development,

- Where investigation of a case would involve substantially the same evidence as a route currently under investigation or about to be investigated.
3. The investigation of this particular issue has been carried out in accordance with the report to the Sub-Committee in February 1990, which outlined the procedures to be used for sources of evidence and the legal tests to be applied.

Legal Tests

4. (a) Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, 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 or a restricted byway or, subject to section 54A, a Byway Open to All Traffic, it shall, by Order, make such modifications to the Map and Statement as appear requisite.

(b) Section 31 of the Highways Act 1980 states that “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 been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”. 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.

(c) Alternatively, a public right of way may be established over a shorter period of time under Common Law. In *Mann v. Brodie* (1885), Lord Blackburn considered that where the public had used a route “for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was”, i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

The Case

5. A plan showing the claimed route is included at **Appendix A** to this report and a detailed description of the case can be found in **Appendix B**. An analysis of the user evidence can be found at **Appendix C**. All other documents and correspondence can be found on the case file which accompanies this report at **Appendix D**.

Investigation

6. Investigations have included the inspection of County Council records and documents available from other sources.
7. I have considered all the evidence available. The documentary evidence and the results of the legal tests applied are set out and examined in **Appendix B**.

Conclusion

- Investigations have been carried out in accordance with procedures and proper legal tests have been applied to the evidence gathered during the investigation. The result of the investigation is that a public right of way is reasonably alleged to subsist on the balance of probabilities.

Recommendation

- I recommend that the County Council makes an Order to modify the Definitive Map and Statement by adding a footpath running from public footpath AB12 to another point on public footpath AB12, as a circular walk, at Tenterden, as shown approximately on the plan at **Appendix A** (precise route to be surveyed for accuracy).
I further recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by adding a footpath link with the footpath by Tenterden Golf Club.



Signature

Public Rights of Way and Access Service Manager, Environment Planning and Enforcement

Date 3 August 2020

Background Documents:

- APPENDIX A – Plan showing the claimed route and extract from the Definitive Map, sheet 076 (TQ83SE)
- APPENDIX B – Main report
- APPENDIX C – Summary of user evidence in support of the application
- APPENDIX D – Case file

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Case Title: Claimed footpath running from Woodchurch Road to Appledore Road, circular route, and link with footpath by Tenterden Golf Club at Tenterden

Ref: PROW/AS/C426

APPLICANT'S SUBMISSION

10. The application has been made by local resident, Samantha Reed ("the applicant"). The applicant has applied for an Order under Section 53(5) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement for the area by adding a public footpath running from Woodchurch Road to Appledore Road, circular route ("the claimed route"), and link with footpath by Tenterden Golf Club at Tenterden ("the claimed spur").
11. In line with the priorities as set out in paragraph 2 above, it was agreed that investigation of this case should be accelerated as the physical existence of the claimed route was threatened by development.
12. In support of the application, the applicant has provided 10 evidence forms from people who claim to have used the route and a letter from a former resident whose family owned a construction company that built 5 of the houses on Woodchurch Road which back on to the land over which the claimed route runs.

Description of route

13. The claimed route (shown on the plan at **Appendix A**) commences on public footpath AB12, approximately 13 metres south of its connection with Woodchurch Road and runs generally around the perimeter of the fields to reconnect with public footpath AB12, approximately 114 metres south of its connection with Woodchurch Road. The claimed spur runs from a point on the eastern side of the claimed route and heads east north-east for approximately 110 metres to connect with Woodchurch Road, almost opposite public footpath AB43 by Tenterden Golf Club.

DOCUMENTARY EVIDENCE

The Wildlife and Countryside Act 1981 requires that, when investigating such applications, the County Council must consider 'all other relevant evidence available'. I have therefore interrogated the following documentary evidence:

Tithe Map (circa 1840)

14. Tithe Maps were produced by the Tithe Commissioners, under the 1836 Tithe Commutation Act, to record all parcels of land that generated titheable produce. The Tithe Maps were concerned solely with identifying titheable land but nonetheless can sometimes provide useful supporting evidence about public rights of way.
15. In this case, the Tithe Map for Tenterden, dated 1843, does not show the claimed route or the claimed spur.

First Edition Ordnance Survey (“OS”) 1:2500 Map and Book of Reference (circa 1860)

16. The First Edition 25” OS Maps and accompanying Area Reference Books were produced by Ordnance Survey in an effort to map the entire country at 1:2500 scale. They were essentially topographical surveys and were not concerned with landownership and rights but do provide useful information as to the existence of the routes on the ground at that time.
17. The black and white County Series First Edition OS Map was checked and does not show the claimed route. Accordingly, it was not considered necessary to check the coloured First Edition OS Map and accompanying reference book held at The British Library. The 2nd, 3rd and 4th Editions also do not show the claimed route or the claimed spur.

Finance Act 1910 and Valuer’s Field Book

18. The Finance Act 1910 Maps and Valuer’s Field Books were documents which recorded the value of land holdings. The Act provided for the levying of a tax upon the incremental value of the land, and between 1910 and 1920 (when it was repealed), the whole country was surveyed in order to produce a comprehensive record of the site value of all land. Individual (private) land holdings were shown on the map in different colour wash with boundaries marked and hereditament numbers accorded to different parcels. The Valuer’s Field Books recorded details about every parcel of land and listed categories for which a reduction in the amount of tax payable on the land holding could be sought. One such category was for public rights of way admitted to exist at the time by the landowner.
19. The Finance Act map was not checked due to the 3rd Edition OS Map not showing the claimed route or the claimed spur on its base mapping.

Parish Map (1950)

20. In consequence of the National Parks and Access to the Countryside Act 1949, County Councils were required to undertake a survey of ‘*all lands in their area over which a right of way... [was] alleged to subsist*’ and then to prepare a draft map showing on it those footpaths, bridleways and roads used as public paths which the County Council as Surveying Authority considered to be public rights of way. In practice, the initial surveys were undertaken by the Parish Councils who were required to call a Parish Meeting to consider the information to be provided and who then submitted maps and statements showing the alleged rights of way within their parish.
21. The Parish Map for Tenterden does not show the claimed route or the claimed spur as ways marked for inclusion.

Draft Map (1952)

22. Following consultation with the District Councils, the County Council then prepared a Draft Map from the information contained in the Parish Map.
23. The Draft Map for Tenterden also does not show the claimed route or the claimed spur as ways marked for inclusion.

Provisional Map (1952)

24. The Provisional Map for Tenterden with a relevant date of 1 December 1952 does not show the claimed route or the claimed spur. There was opportunity for landowners, lessees and tenants to object to this map and no objections were received to their omission.

Definitive Map (Relevant date 1st December 1952)

25. The National Parks and Access to the Countryside Act (1949) required County Councils to survey all land over which a Public Right of Way was alleged to subsist and prepare a map showing these routes. The first Definitive Map and Statement of Public Rights of Way for the County of Kent was published with a relevant date of 1st December 1952.

26. The original Definitive Map for the County of Kent did not include the claimed route or the claimed spur.

Review of survey (1970)

27. Following the publication of the Definitive Map in 1952, the County Council, under the National Parks and Access to the Countryside Act 1949, had a duty to produce a revision of the original map. Consequently, and following broad consultation, the County Council published a Draft Revised Map with a relevant date of 1st October 1970.

28. The Draft Revised Map of 1970 did not include the claimed route the claimed spur as ones to be included in the revision.

Definitive Map (Relevant date 1st April 1987)

29. The 1987 Definitive Map of Public Rights of Way did not show the claimed route or the claimed spur.

Definitive Map (Relevant date 31/5/13)

30. The current Definitive Map of Public Rights of Way does not show the claimed route or the claimed spur.

Highways and Landowner Statements (Deposits)

31. Section 31(6) of the 1980 Act enables a landowner to deposit a statement and map, followed by a declaration, with the County Council, acknowledging any existing public rights of way across their land at the same time as declaring that they have no intention to dedicate any further ways to the public. Section 15A of the Commons Act 2006 enables a landowner to deposit a landowner statement and map with the County Council, declaring they wish to bring to an end any period during which persons may have indulged as of right in lawful sports and pastimes on the whole or any part of the land referenced on the map.

32. Together, the deposit of the map and statement with any subsequent declarations is, 'in the absence of proof of contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional ways as highways' and to prevent registration of a village green. In order to remain effective, the 1980 Act requires that any declaration be renewed within every 20 years (formerly 10 years and amended by *The Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013*).

33. In this case a Deposit (reference 07/19), covering the land over which the claimed route and the claimed spur runs, was lodged with the County Council on 21st June 2019 and was followed up with a Declaration on 21st October 2019. Notices were posted on site on 4th July 2019.

Other documentary evidence – Aerial photographs

34. Aerial photographs from 1990, 2000, 2003, 2006, 2009, 2012 and 2015 were viewed. A worn route on the approximate alignment of the claimed route is visible on all the aerial photographs, although the quality of some makes it more difficult to distinguish in parts. The route visible is similar to that claimed, running around the perimeter of the fields, though it is not the exact alignment as that on the application map on the western side. There does not appear to be a visible worn track on the alignment of the claimed spur on the aerial photographs.

CONSULTATIONS

35. Consultations have been carried out as required.

County Member and Borough Councillors

35a. County Member, Mike Hill, and Ashford Borough Councillor, Callum Knowles, was consulted but no responses were received.

Ashford Borough Council

35b. Ashford Borough responded that it had no evidence either way regarding the claimed route or the claimed spur.

Tenterden Parish Council

35c. Tenterden Parish Council supports the application. Several of its councillors have walked the claimed route for over 16 years and one for over 30 years. The Parish Council also confirmed that it was aware of several residents in the area who claim to have been walking the claimed route as far back as the 1960s.

User Groups

35d. The Ramblers, Open Spaces Society and British Horse Society were consulted. The representative for the Ramblers provided an appraisal of the claimed route and the claimed spur but did not offer any evidence. No other responses were received.

USER EVIDENCE

36. In support of the application, 10 initial user evidence forms were submitted. Each witness was subsequently offered a face to face interview with 8 in total being conducted. One witness, who was unable to meet, completed a full user evidence form themselves. There was evidence from 12 people in total. This evidence is summarised at **Appendix C**. Use of the claimed route appears to go back as far as the early 1960s and it has been used by half of the witnesses for the last 20 years at least. However, it was evident that no one had used the claimed spur on a regular basis.
37. Use by the witnesses is frequent, varying from more than once a day to monthly. The route is used for recreational purposes with all witnesses walking dogs on it, but also using it for general walking, recreation, exercise, bird and nature watching. No one has asked for or been given permission to use the claimed route. One witness answered this question to the affirmative on the initial user evidence form but did not know the landowner. It is therefore presumed this was an error (they were not interviewed). Two others who had also answered 'yes' to permission on the initial user evidence form rectified this at interview. One has permission only to take off and land their hot air balloon in the field, so not relevant to the claimed route, and the other stated at interview that she did not know the landowner, and therefore could not have asked for permission.
38. No one has been challenged whilst using the claimed route. A number of witnesses stated they had access from the rear of their properties onto the field and the path. This was confirmed by a previous resident whose family owned the construction company that built 5 of the houses on Woodchurch Road. One couple also stated they had permission to use the land for taking off in their hot air balloon and they have an arrangement with the tenant farmer to let his sheep into their orchard.
39. One couple mentioned they saw a notice that the tenant farmer had erected on the claimed path which stated it was not the footpath. No other witnesses saw this and the couple who did mentioned that it would only have been visible from one direction. A different couple recalled there being a fence erected briefly, more than 20 years ago, but which could be walked around. One witness recalled seeing a map recently showing the land and stating that routes other than the public footpath are prohibited.

LANDOWNERSHIP

40. The land over which the claimed route and the claimed spur runs is owned by Carol Daniel and Shaoul Birshan. Miss Daniel stated that the land, which has been used for sheep grazing, had been in her family since 1960 and that there had never been any mention of such a footpath on the land. She has seen people using the claimed route on foot over the years when she visited the land, and in response to the question "Have you, or others, ever stopped or turned back anyone using the route, or made it known to them that the route was not public?" she responded 'Yes' but did not provide any further details. Miss Daniel confirmed that she had never been asked for or given permission to anyone to use the claimed route, except for the tenant farmer.
41. Miss Daniel stated that 'Private Property' notices were erected "probably prior to 1989 when she was not the main manager, which were torn down", and notices that were erected by Countryside Property between 2004-2009 (approximately) were also torn down. She tried, but failed, to replace them circa 2009-2011. These were located at either end, and along, the central public footpath. A gate which leads onto Woodchurch Road has had a padlock, but she was unable to give dates.

42. Mr Birshan also stated he had no knowledge of any such claimed footpath or easement and that no right of way had been given. Neither landowner lives in the local area. There is currently a planning application (reference 19/01788/AS) to develop the land. With housing planned for the western side of public footpath AB12 and a country park to be created on its eastern side. As stated in paragraph 33 above, the landowners have lodged a Deposit (reference 07/19), covering the land over which the claimed route and the claimed spur runs on 21st June 2019.
43. DAC Beachcroft LLP object to the claim on behalf of the landowners. They consider that use of the claimed route was brought into question in June 2019 when the landowners lodged the Deposit, reference 07/19, with the County Council. DAC Beachcroft LLP provided their own analysis of the user evidence based on the redacted copies of the forms submitted with the application. They consider that only 4 of those who completed the 10 forms submitted have claimed use on or before June 1999 and that the earliest use after that date is 2005. In addition, they state that “there are no users who claimed to be using the route on 21 June 1999 but had stopped using the route before the claim was made.” DAC Beachcroft LLP further highlight that 3 of the witnesses who have used the claimed route for the 20-year period stated that this was with permission and therefore, as only 1 witness has used the claimed route for over 20 years, this is insufficient to come to the attention of the landowner. They also note that the plans accompanying the evidence forms have been pre-drawn and so cannot be relied upon.
44. In considering the redacted interview forms, DAC Beachcroft LLP note that 3 witnesses access the claimed route from the rear of their properties, which was not shown on any of the plans that accompanied the application. Therefore, they consider “the evidence that has been submitted cannot be relied upon as proving, on the balance of probabilities, that a sufficient number of members of the public used the route as claimed.” DAC Beachcroft LLP also consider the descriptions of the route taken by 3 of the interviewees indicates they were not following the claimed route as they refer to generally following the field edges and one refers to walking along the backs of houses in Appledore Road. They assert this brings into doubt the veracity of the evidence submitted.
45. DAC Beachcroft LLP contend that some use has been with force. A fence was erected between the backs of properties on Woodchurch Road and the backs of properties in Appledore Road which cut across the western half of the claimed route and would have prevented use at the time. It is not stated when this fence was erected but reference is made to photographs taken in 2007 showing the fencing. Reference is also made to a hawthorn hedge which they consider would have hindered use of the claimed path. DAC Beachcroft LLP also maintain that numerous signs have been erected asking people to keep to the existing footpath and/or informing the public that the land was private property. Countryside Properties, who had an option to acquire the land, regularly erected notices between 2004 and 2009. After this, the landowner and/or the tenant farmer also erected notices. All notices that were erected over the years were repeatedly removed, destroyed or defaced. DAC Beachcroft also maintain that the landowners made clear to anyone who was on the land that it was private property and had instructed the tenant farmer to do the same. Since 2013 employees from Wates Developments have also done the same.
46. In summary, DAC Beachcroft LLP contend that there is insufficient evidence to suggest that, on the balance of probabilities, the claimed route was used by sufficient members of the public continuously for 20 years, prior to 2019 when the Deposit was lodged with the County Council, such that the use could reasonably be expected to have come to the attention of the landowner. In addition, the route used has varied on its course and has also been used by force.

STATUTE AND LEGAL TESTS

47. Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, 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 or a restricted byway or, subject to section 54A, a Byway Open to All Traffic, it shall, by Order, make such modifications to the Map and Statement as appear requisite
48. Section 31 of the Highways Act 1980 states that ‘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 been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it’. 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.
49. Alternatively, a public right of way may be established over a shorter period of time under Common Law. In the case of **Mann v. Brodie**¹, Lord Blackburn considered that where the public had used a route ‘*for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of their belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was*’, i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

¹ (1885) 10 App Cas 378

CONCLUSION

50. As there is little mapping or documentary evidence in support, the application rests solely on user evidence. Hence, in determining whether a right of way is reasonably alleged to subsist, it is necessary to have regard to the provisions contained within section 31 of the Highways Act 1980 (outlined above).

The 'date of challenge'

51. The first step is to identify the date upon which the right of the public to use the route was first brought into question ('the date of challenge'). There is no precise definition of what constitutes 'bringing into question' the public's right to use a particular route, but generally speaking the public's right is brought into question when there is some sort of overt and identifiable challenge to such use, for example, by way of the erection of a notice telling the public to 'keep out' or the locking of a gate to physically prevent access.

52. In this case, there does not appear to be any evidence that the use of the claimed route has ever been challenged in any way. The Deposit was lodged on 21st June 2019 for which notices were posted on site on 4th July 2019. If the lodging of the Deposit is to be taken as the date of challenge, this would mean the 20-year period to be June 1999-June 2019. However, if the Deposit is considered to show an intention not to dedicate any further public rights of way on the land (rather than a challenge), then the date of the application would be the date of challenge, as prescribed in section 69 of the Natural Environment and Rural Communities Act 2006. As there is only one-month difference in these periods I have taken June/July 2019 as the date of challenge and have considered very carefully the 20-year period between 1999 and 2019 ('the material period') in this investigation.

Uninterrupted use 'as of right' and for a full period of 20 years

53. For use to have been 'as of right', it must have taken place without force, without secrecy and without permission².

54. In relation to the length of use, the claimed route has been used on foot from 1999 to 2019 (the material period) and for a number of years before that, going as far back as the early 1960's. There was no evidence that people had used the claimed spur on a regular basis. There appears to be conflicting evidence that use of the claimed route has been interrupted during this period. The landowners stated they erected a fence across part of the field and provided photographs showing parts of this. However, only one couple stated there was a fence, over 20 years ago, and that it did not prevent their use. It therefore appears that the fence did not interrupt use by any of the witnesses. The landowner also suggests that a hawthorn hedge which cuts across the claimed route would also have hindered its use. However, a series of aerial photographs all appear to show a worn track on the approximate alignment of the claimed path, indicating that access was possible. In addition, there is some conflict of evidence that use has been by force. The landowner states that the fencing was broken down and that use after that was by force. There is no evidence that it was one of the witnesses who had broken down any fencing, nor that the fencing ever prevented use by the public. Use has taken place at all reasonable times and therefore not in secret. One couple stated they have permission to use the land for taking off in their hot air balloon, but no one asked for or was ever given permission to use the claimed route. This is confirmed by the landowner. Therefore, the evidence indicates that use of the claimed route (but not the claimed spur) has been uninterrupted and 'as of right' for a full period of 20 years.

² *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council* [1999] 3 WLR 160

Quantity and quality of use

55. There is no precise definition set out in statute as to the quantity of user evidence required in order to satisfy the tests for presumed dedication. This will invariably depend upon the particular circumstances of each case; for example, in a rural setting away from any significant place of public resort, use is likely to be far less frequent than a path serving a functional link within an urban area and thus the quantity of user evidence required to show that presumed dedication has occurred is likely to be lower.
56. In this case, evidence of use has been provided by 12 witnesses. This number is considered to be a representative sample of the overall amount of use that would have taken place on the claimed route over the years. Five of these witnesses (two are couples from the same household) live in Woodchurch Road which backs onto the land concerned; one witness lives in Woodchurch Road, but on the opposite side of the road. As such, the landowner contends that “the evidence that has been submitted cannot be relied upon as proving, on the balance of probabilities, that a sufficient number of members of the public used the route *as claimed* [County Council emphasis].” The 5 witnesses whose houses back onto the land have either rear or side access onto the land. One couple state they have legal access (a private easement) onto footpath AB12, which is where they access the claimed route from. One couple have a side gate which they sometimes use to access the land before reaching the claimed route. The fifth witness whose house backs onto the claimed route usually accesses the claimed route from where AB12 commences on Woodchurch Road. Seven of the witnesses do not have that alternative possible access. Therefore, although access onto the claimed route is possible from the rear or sides of some of the witnesses’ properties, it is generally accessed as claimed from either the north or south points from footpath AB12.
57. To satisfy section 31 of the 1980 Act the user must have been of a single defined route as confirmed by Lord Oliver in the *Brotherton*³ case: “*a public right on land depends upon proof of public user over an exactly demonstrated course*”. This is further confirmed by Ross Crail⁴ a Barrister writing in the *Rights of Way Law Review* “*If people have crossed land in the same general direction but by varying routes, their user cannot be aggregated and attributed to a single route*”. In this case, the claimed route is a single defined route (as evidenced by the series of aerial photographs) which runs from a point on one highway (footpath AB12) to another point on that same highway. Therefore, the County Council is satisfied that section 31 of the 1980 Act is satisfied in this case.
58. The landowner contends that there is insufficient evidence to suggest that, on the balance of probabilities, the claimed route was used by sufficient members of the public continuously for 20 years, prior to 2019, such that the use could reasonably be expected to have come to the attention of the landowner. However, 6 of the 12 witnesses have used it for the full 20-year period (not every user has to have used it *throughout* the material period). In addition, the high frequency of use by these witnesses is such that a landowner visiting the land on a regular basis would most likely have been aware of use of the claimed route. Indeed, the landowner stated she had challenged some people over the years, so she was clearly aware of public use of the claimed route. Although the County Council accepts that these challenges were probably made, the landowner was not able to provide details of whom or when people were challenged. On balance, therefore, the County Council considers there is sufficient evidence in terms of quantity and quality of use of the claimed route. However, the evidence also indicates there has been insufficient use of the claimed spur.

³ *Attorney-General ex rel. Yorkshire Derwent Trust Ltd v Brotherton* (1992) 1AC 425 at page 434

⁴ Ross Crail, *Barrister Rights of Way Law Review* February 2006, section 9.2 page 2

Evidence of non-intention to dedicate

59. Even if all the legal tests relating to quality and quantity of use have been met, a public right of way cannot come into being where there is evidence that the landowner demonstrated a lack of intention to dedicate the claimed route. This lack of intention must be communicated to the users of the claimed route, as confirmed by Lord Hoffman in the **Godmanchester**⁵ case: *'I think that upon the true construction of s 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, 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... to 'disabuse [him]' of the notion that the way was a public highway'*.
60. In this case there is insufficient evidence that the landowner has demonstrated a lack of intention to dedicate the claimed route and the claimed spur until the lodging of the Deposit, which coincides with the application being submitted. Although the landowner has stated she has challenged some people, there are no details. Those witnesses who have provided evidence of use were not challenged. Nor would this particular action have been evident to the *general* public. Notices must be clear, unambiguous and specifically refer the user to the claimed route. The landowner states that notices have been erected over the years stating: 'Private Property'. This does not mean there cannot be public rights of way also crossing that land; one public footpath (AB12) already does. The fact that the land is privately owned is not relevant to the claim. Countryside Properties are said to have erected notices, but there are no details provided as to what those notices said or where they were located. A notice stating: 'Please stay on the footpath' was located only on public footpath AB12 and would not have been seen by users unless they accessed the land from the kissing gate on which the notice was placed. The notice stating: 'Public Right of Way over route shown as pink only. Public use of any other route is forbidden' was erected after the route had already been called into question.

Whether a right of way is 'reasonably alleged to subsist'

61. The tests contained in section 31 of the Highways Act 1980 (set out above) are to be considered in conjunction with the requirement in section 53 of the Wildlife and Countryside Act 1981 that a right of way must be shown to 'subsist' or is 'reasonably alleged to subsist'. This issue was considered in the case of **Norton and Bagshaw**⁶, in which the judge distinguished between the two tests to be applied and stated that in deciding whether or not to make a Definitive Map Modification Order the question to be asked is thus: *'does the evidence produced by the claimant together with all the other evidence available show that either (a) a right of way subsists? [known as 'test A'], or (b) is it reasonable to allege that a right of way subsists? [known as 'test B']*. The test to be applied is not therefore whether it is reasonable for the claimant to allege that a right exists, but rather whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.
62. This approach was subsequently affirmed in the **Emery**⁷ case, in which the judge said this: *'where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years... then the allegation that the right of way subsists is reasonable'*.

⁵ *R (Godmanchester) v Secretary of State for the Environment* [2007] 4 All ER 273 at page 284

⁶ *R v Secretary of State for the Environment, ex parte Norton and Bagshaw* (1994) 68 P&CR 404 at page 408

⁷ *R v Secretary of State for Wales, ex parte Emery* [1998] 2 All ER 367 at page 379

63. In the present case the applicant has provided credible evidence, which when considered with all other available evidence, shows that it is reasonable to allege that a public right of way subsists on the balance of probabilities over the claimed route but not the claimed spur. It is noted that the plans on which the users marked the route they had used had been pre-drawn on the initial user evidence forms and that some users marked their starting points from the rear of their properties. This does not mean that those forms should be considered invalid. It can be very difficult to accurately draw some routes on a paper map, which is why the Records of Personal Interview also ask for a written description. Those users who were interviewed re-drew the route they had used on a separate plan. In this particular case, it is considered absolute accuracy of the drawing of the claimed route on the plans is not essential due to the nature of the route. On the ground, the claimed route is remarkably evident.

64. It was also held in the **Emery** case that where there is user evidence which conflicts with the landowner's evidence, that the proper procedure for testing this evidence would be via a public inquiry following the making of an Order.

Common Law

65. The provisions of section 31 of the 1980 Act do not supersede the principles of inferred dedication at common law. Even where the tests under section 31 of the 1980 Act are considered to apply, there is still merit in considering common law.

66. Halsbury's Laws of England Vol.21 paragraphs 65-86 states "*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance...An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;...At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred*"

67. There is no significant evidence of the claimed route or the claimed spur on historical mapping. The claimed route is essentially a circular recreational route created in the main by local dog walkers (but also used for other purposes). Therefore, there is insufficient evidence to suggest dedication at Common law.

Width

68. DEFRA Circular 1/09, paragraphs 4.16 and 5.13, Welsh Office Circular 5/93, Annex B, paragraph 18, relating to definitive map modification orders and Annex C, paragraph 9, relating to public path and rail crossing orders, state that the width of a path should be included in the order schedule.

69. In addition, determination of the width will, if not defined by any inclosure award, physical boundary or statute, be based on evidence, or, where there is no such clear evidence, the type of user and what is reasonable. Circumstances, such as the nature of the surface and other physical features, may dictate what may be considered reasonable. In the absence of evidence to the contrary, the width recorded should be sufficient to enable two users to pass comfortably, occasional pinch points excepted. This width may well be greater than the width of the "trodden path". Apart from specific instances such as the reinstatement of a right of way after ploughing under Schedule 12A to the Highways Act 1980, there are no statutory widths for rights of way.

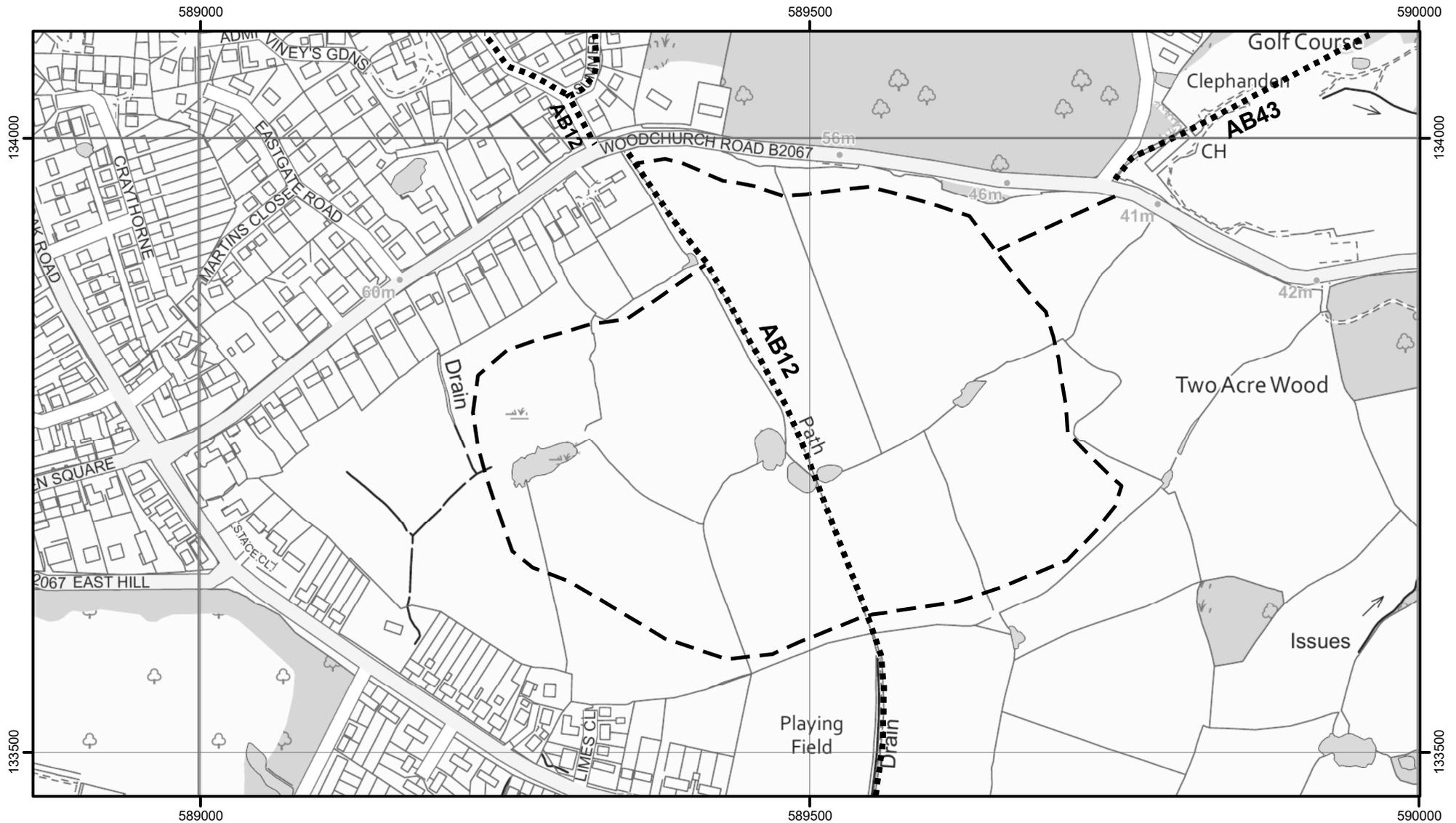
70. In *Eyre v. New Forest Highways Board (1892)*, it was held that a 'reasonable' width should be enough for the public to 'pass along' the route, i.e. to meet and cross within the confines of the legal right, though no measurement was given. Ridley J., in *Ford v. Harrow (1903)*, expressed his opinion that 4 or 5 feet would be adequate.

71. In this case, most of the claimed route is clearly visible as a reasonably wide path, bordered either side by ant hills for a large portion of its length. There are some narrower points where the claimed route passes through hedged boundaries. On this basis, it is suggested that the available width of the route is measured more accurately when a GPS survey is undertaken to determine the precise alignment of the claimed route.

RECOMMENDATION

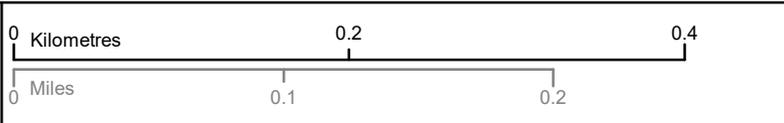
72. I therefore recommend that the County Council makes an Order to modify the Definitive Map and Statement by adding a footpath running from public footpath AB12 to another point on public footpath AB12, as a circular walk, as shown between the points A-B-C-D on the plan at **Appendix A**.

I further recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by adding a footpath link with the footpath by Tenterden Golf Club, as shown between the points B-E on the plan at **Appendix A**.



Key
--- Claimed route
..... Unaffected Routes

Wildlife & Countryside Act 1981
Claimed public footpath running from Woodchurch Road to Appledore Road circular route and link with footpath by Tenterden Golf Club at Tenterden



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Created by: MMcL Checked by: Reference: PROW/AS/C426

Claimed Public footpath running from Woodchurch Road to Appledore Road, circular route and link with footpath by Tenterden Golf Club (PROW/AS/C426)

Users	Years																				Date started													
	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07		08	09	10	11	12	13	14	15	16	17	18	19	20
	20-year period																																	
Burton, John																																		
Debling, John																																		1985
Debling, Rosalynd																																		1985
Forster, James																																		1978
Green, Roland																																		
Greaves, Adrian																																		1986
Greaves, Debbie																																		1986
King, Maureen																																		Early 1960s
Macdonald, Rodney																																		
Parkin, Russel																																		
Reed, Samantha																																		
Waterman, Dawn																																		
	20-year period																																	

Claimed Public footpath running from Woodchurch Road to Appledore Road, circular route and link with footpath by Tenterden Golf Club (PROW/AS/C426)

NAME	DATES WAY USED	BY WHAT MEANS	REGULARITY OF USE	REASON FOR USE	CHALLENGES / PERMISSIONS / OBSTRUCTIONS / RESTRICTIONS / NOTICES	ADDITIONAL INFORMATION
Burton, John (Interview)	2006-2020	On foot	2006-2018 daily 2018-2020 3-4 times a week	Dog walking, general walking, fitness, recreation, birdwatching, nature, photography	About 4 years ago, the tenant farmer erected sign on the claimed route stating it was not the footpath but only visibly if walking clockwise	
Debling, John (Interview)	1985-2020	On foot	1985-1988 twice weekly 1988-2002 weekly 2002-2010 twice weekly 2010-2020 3 times a week	Recreation, blackberry picking, dog walking, nature watching, tobogganing with the children, exercise, educating children	More than 20 years ago a fence was erected briefly but we could go around it	Has entrance into field from rear of property
Debling, Rosalyn (Interview)	1985-2020	On foot	1985-1988 twice weekly 1988-2002 weekly 2002-2010 twice weekly 2010-2020 3 times a week	Recreation, blackberry picking, dog walking, nature watching, tobogganing with the children, exercise, educating children	More than 20 years ago a fence was erected briefly but we could go around it	Has entrance into field from rear of property
Forster, James (Interview)	1978-1990; 2015-2020	On foot	1978-1990 weekly 2015-2020 monthly	Recreational, dog walking, general walking, tobogganing with the children	Map showing the land and stating routes other than the public footpath are prohibited (words to that effect) [Deposit notice]	
Greaves, Adrian (Interview)	1986-2020	On foot	1986-1995 daily 1995-2005 twice a day 2005-2010 daily 2010-2020 3 times a week	Dog walking, collecting mushrooms, family walking, enjoy the scenery	None	Has a private easement from property to access the claimed path. Has permission to use the land for taking off in hot air balloon. Has an arrangement with the tenant farmer to let his sheep into their orchard. Knows the landowner. Provided a leaflet "Limes Land Tenterden – A short history of Tenterden's Limes Land, formally Gallows Green"
Greaves, Debbie (Interview)	1986-2020	On foot	1986-1995 daily 1995-2005 twice a day 2005-2010 daily 2010-2020 3 times a week	Dog walking, collecting mushrooms, family walking, enjoy the scenery	None	See above (Adrian Greaves)
Reed, Samantha (Interview)	2006-2020	On foot	Twice weekly	Dog walking, general walking, taking photos, wildlife watching, exercise	None	
Waterman, Dawn (Interview)	2006-2020	On foot	2006-2018 daily 2018-2020 3-4 times a week	Dog walking, general walking, fitness, recreation, birdwatching, nature, photography	About 4 years ago, the tenant farmer erected sign on the claimed route stating it was not the footpath but only visibly if walking clockwise	
Parkin, Russel (Self-completed record)	1992-2020	On foot	Weekly	Dog walking	Stile to get into the area	
Green, Roland (Initial UEF)	2012-2020	On foot	Daily	Dog walking	Swing gate at Woodchurch Road. 2012 - 2019	
King, Maureen (Initial UEF)	Early 1960's- 1974 1980-2019	On foot	Daily to weekly	Playing, dog walking, family walking, admiring the views	None but thought it was with landowner permission	
Macdonald, Rodney (Initial UEF)	2005-2019	On foot	Daily	Dog walking, fitness, scenery	None	
Blain, Linda (letter)						Family owned the construction company that built 5 houses on Woodchurch Road. Always a gate to the rear of Carina and Briarley