Planning Inspectorate Reference: ROW/3370218

MILTON KEYNES CITY COUNCIL

STATEMENT OF CASE

The Wildlife & Countryside Act 1981 - Section 53

The Milton Keynes City Council (Stantonbury Footpath 17) Modification Order 2024

THE APPLICATION

1. Milton Keynes City Council received an application under Section 53(5) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement for the area, the effect of which would add a public footpath in the area of Blue Bridge, Milton Keynes ("the Order route").

2. The application was submitted by a member of the Public, Mr Peter Brady, in July 2009.

3. In support of the application, the applicant submitted evidence of use from seventeen witnesses in the form of User Evidence Forms. There is no documentary evidence submitted for this case and relies solely on user evidence.

4. Having regard to all the evidence relating to the application, the Council as the Order Making Authority (OMA) determined to make an Order by adding a footpath. The reasons for making the Order are set out within paragraphs 25-42 of this document.

DESCRIPTION OF THE ROUTE

5. The route travels from a 'Redway' (these are explained in paragraphs 7-8) along an open grassy area close to an underpass which travels under the 'H2 - Millers Way' Grid Road. It travels from the grass into an area of woodland which has the West Coast Mainline Railway track on the western side and the rear fencing of properties on the eastern side. The route follows a clear and well-established natural surface between trees within this wooded area.

6. Approximately 300 metres along this route, it curves around to travel to the east. The route travels away from the West Coast Mainline and has rear garden fencing of adjacent housing on the southern side. The route terminates at a junction with a redway in an area known locally as Railway Walk which follows the former route of a now defunct railway line.

7. The route begins and ends at a junction with a 'Redway'. Redways are a unique feature to Milton Keynes and form a network of shared usage paths generally surfaced in a red tarmac which cross the city.

8. Redways are dedicated by agreement under section 38 of the Highways Act 1980 as 'cycleways' open to public use by means of pedal cycles or on foot only. The claimed route commences and terminates from a Redway which travels through the central area of Blue Bridge.

LANDOWNERSHIP

9. The land over which the Order route runs has no registered landowner shown on HM Land Registry.

10. Site notices regarding this matter which were previously addressed to the landowner and placed at either end of the route in 2010 did not meet with any response.

11. In line with process and to fulfil the requirements as regards serving notice on landowners as set out by paragraph 3 (2)(b)(i) of the Wildlife & Countryside Act, Milton Keynes City Council sought dispensation from the Secretary of State in order to proceed the matter. This dispensation can be provided through paragraph 3(4) of Schedule 15 of the Wildlife and Countryside Act 1981. A letter from the Planning Inspectorate confirms this dispensation was provided on 4th April 2025 (ref PINS 1/79/22) and has been provided as part of the submitted documents accompanying this submission.

12. Further research into the history of the land has since been undertaken. Following the conclusion of this, it is now believed that the land upon which the application route travels is likely to belong to Homes England.

13. The 1910 Finance Act outlines that the landowner at the time was the Radcliffe Trust and the farm the land belonged to, Stacey Hill Farm, formed part of their Wolverton Estate Lands. Land adjacent to the route formed part

of the railway network, the boundary of which however did not appear to ever extend to include the area of the claimed route.

14. The land associated with Stacey Hill Farm, along with other farms within the Radcliffe Trust estate, was sold to the Milton Keynes Development Corporation (MKDC) as the new city of Milton Keynes was begun to be built. An area immediately adjacent to the claimed route was bought by a developer and built upon which became the Blue Bridge estate. The area of the claimed route fell outside of land required for the development of this estate and is therefore presumed to have remained under the ownership of MKDC.

15. The Milton Keynes Development Corporation (Transfer of Property and Dissolution) Order 1992 provided that any remaining assets of the Corporation when it wound up in 1992 were vested within the Commission for the New Towns.

16. The Commission for New Towns was dissolved, with its assets transferring to the newly formed English Partnerships. In 2008 English Partnerships were similarly transferred to Homes and Community Agency (HCA). In 2008 the HCA was rebranded as Homes England which continues to operate as a non-departmental public body.

17. The land around the claimed route is bordered by an area to the west under the ownership of Network Rail (West Coast Mainline). Contact has been made with Network Rail who have confirmed the claimed route does not fall within their ownership boundary.

18. Land Registry records show that several nearby pockets of land previously owned by the Milton Keynes Development Corporation (or its successor bodies) were sold to Milton Keynes City Council. It is therefore reasonable to assume that any remaining adjoining land that was not sold to the Council is likely to have remained in the ownership of MKDC and its successor organisations.

19. In light of this, it would therefore seem likely that this land in question belongs to the successor organisation of Milton Keynes Development Corporation, which today is Homes England. As there has been no sale of the land after 1995 (the date upon which Land Registry were required to record this information), it would explain why the land currently appears as unregistered.

20. A plan highlighting the areas of land adjacent to the claimed route belonging to the different parties as outlined above can be found in the appendix.

21. Homes England have been contacted and provided with all the information outlined above. It has also been explained to them that this matter has been referred to the Planning Inspectorate for determination. No formal response has been received to date.

STATUTORY PROVISIONS UNDER WHICH THE ORDER WAS MADE

22. Section 53(5) of The Wildlife and Countryside Act 1981 ("the 1981 Act") allows any person to apply to the Local Surveying Authority to seek modification to the Definitive Map & Statement. The Council has a duty to investigate every duly made application it receives. On the discovery of evidence which, when considered with all other relevant evidence available, shows "that a right of way, which is not shown on the map and statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates", the Council must make such modifications to the Definitive Map & Statement as appear required (Section 53 (3) (c)(i)).

23. Section 31(1) of the Highways Act 1980 ("the 1980 Act") 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 there was no intention during that period to dedicate it". The period of twenty years referred to falls to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

24. The order was made by Milton Keynes City Council on the 13th of February 2024.

REASONS FOR MAKING THE ORDER

25. Section 53 of the Wildlife & Countryside Act 1981 requires that, when investigating such applications, the Council must consider "all other relevant evidence available". Due to the nature of this location, there is no documentary evidence available to support the case. This is because the route has only become utilised in more recent decades as Milton Keynes has been built. Aerial photography shows nothing to suggest the route was not open throughout the claimed 20-year period which supports the notion by users that the route used travelled through a wooded area and was accessible from publicly open space at either end.

26. The application is therefore based around contemporary use of the Order Route, the earliest of which began in 1979. The DMMO application date has been taken as being the event which called the route in question, which is 2009. It should be noted there is no evidence of anything else that could be considered a calling into question event during this timeframe. The claimed 20-year period for the purposes of Highways Act Section 31 is therefore taken to be 1989-2009.

27. Seventeen users have provided evidence of usage during the claimed 20-year period. In 1989, nine users claim to have utilised the route and by 2009 the number of users claiming to have utilised the route in this year was seventeen. None of the users suggested there had ever been any signage or physical structures to challenge usage of the route. A summary chart showing the years the route was utilised by individual users can be found in the appendix.

28. Many of the users reported using the route regularly. This ranged from daily usage to a few times a month. This regular usage amongst a reasonable number of users means the OMA take the view that the quality and quantity of usage is at a sufficient level to raise the presumption that the route has become a Public Footpath.

29. Usage of the route has continued through to the present day. In 2025, after the making and advertising of the order, two makeshift piles of logs appeared on the route to the rear of 71 Culbertson Lane. This event could be seen as a second date which calls usage of the route into question. This would create a potential second 20-year usage period between 2005-2025.

30. The OMA would submit that the evidence submitted demonstrates that the route became a Public Footpath in 2009, so this second 20-year period is potentially irrelevant. However, two recent user statements were included within the submission to highlight that usage of the route has continued to the current day. This is further evidenced on site by the creation of a short diversionary path by users to bypass the log obstructions, demonstrating the continued use of the claimed route by the public.

31. In summary, the Council concluded that that the applicant had provided credible evidence, which when considered with all other available evidence, showed that a public right of way subsists over the route as claimed.

32. Use was never interrupted, was 'as of right' (without force, secrecy and without permission), and there was no evidence that any landowner, during the relevant 20-year period, showed any intention not to dedicate the Order route as a public right of way on foot.

OBJECTION FOLLOWING PUBLICATION OF THE ORDER

33. Milton Keynes City Council confirms that the necessary consultations were carried out when the order was made. On publication of the order, objections were received from three members of the public which were unable to be resolved. The objections raised can be found within documents submitted within the original submission to the Planning Inspectorate from the OMA.

34. The council acknowledged receipt of the objections in March 2024 and responded to each objector with comments. No further response was

received from two objectors, but a further response was provided by the third objector.

35. The objections raised from all three of the objectors related to matters such as the impact on surrounding properties, safety and the potential for crime and the negative impact on local wildlife.

36. Planning Inspectorate guidance on 'Procedures for considering Objections to Definitive Map and Public Path Orders' sets out in paragraph 6.1.2 that an "Inspector can only consider whether the disputed rights of way do or do not exist. The Inspector cannot consider the suitability of the way for public use or any other effects of confirming an order".

37. The Council take the view that these objections fall outside the criteria as set out within the relevant legislation. Whilst the Council understands and sympathises with the potential concerns and apprehensions raised by the objectors, they are not considered relevant for the purposes of this Order.

38. Detailed comments from Milton Keynes City Council in relation to the specific objections raised can be found within the OMA submission for this order.

39. The Council take the view that if it is accepted that these objections are to be considered irrelevant (as set out by Planning Inspectorate guidance), then the order should be confirmed.

RELEVANT CASE LAW

40. A relevant piece of case law relates to "Bagshaw and Norton" which was later approved within "Emery". This relates to the tests required to be applied when considering Section 53 (3) (c) (i) of the 1981 Wildlife and Countryside Act. This section of legislation specifies that an Order should be made on 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.

41. The tests set out within the High Court of "Bagshaw and Norton" have become known as Test A and Test B and are outlined below: -

    - Test A- Does a right of way subsist on the balance of probabilities?

    - Test B- Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

42. The OMA would submit in this case that Test A has been met as there is clear evidence in favour of the application and no credible evidence to the contrary.

CONCLUSION

43. With regard to the above, the Council considered that the evidence is sufficient to conclude that use of the Order route has been used 'as of right' and without interruption for a full 20-year period. There has been no evidence provided to a show a lack of intention to dedicate the way as a public right of way on foot by any landowner during the relevant 20-year period.

44. Milton Keynes City Council therefore concludes that the presumption of dedication has not been rebutted and that pedestrian rights subsist along the route on the balance of probabilities.

45. Milton Keynes City Council therefore respectfully requests the Inspector to confirm this Order as made.

APPENDIX

Land Ownerships Plan

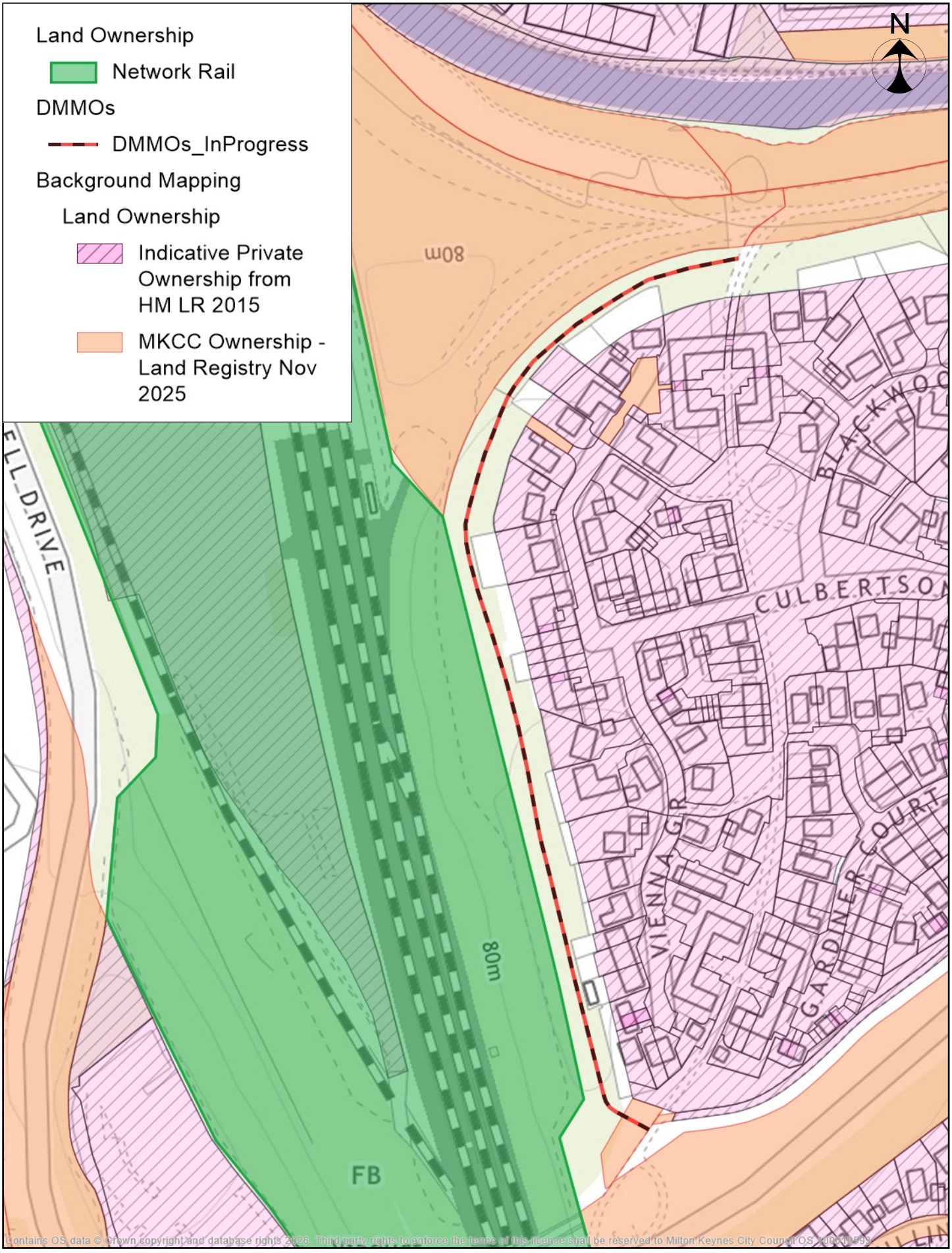
User Evidence Summary Chart

R. v. Secretary of State for the Environment, ex p. Bagshaw and Norton Case Notes

Land Ownership

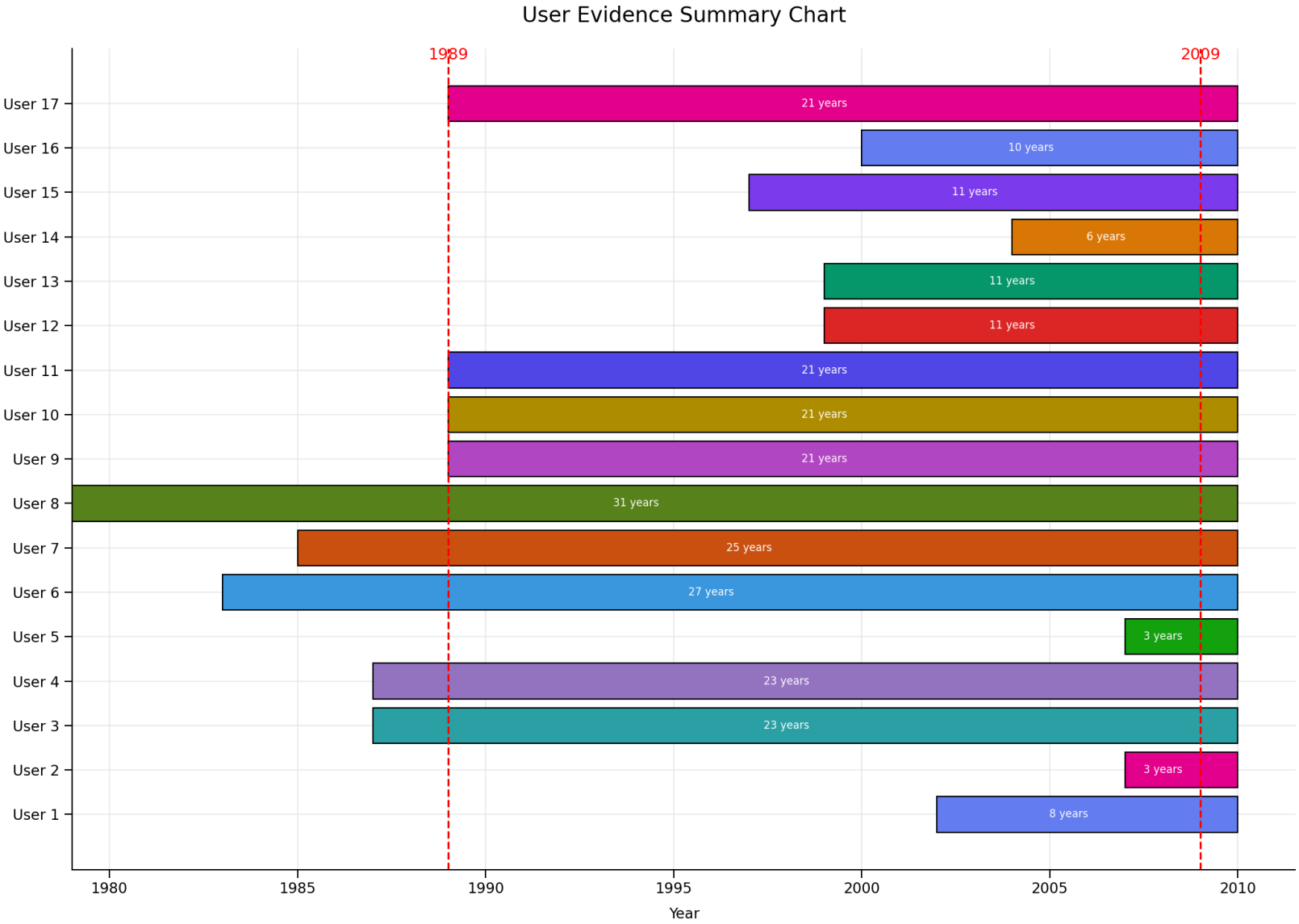
Blue Bridge

Milton Keynes City Council



Map Produced on: 04 February 2026
By: Katherine Robbins

Scale: 1:2000 on A4 page


User Evidence Summary Chart
1989
2009
User 17
User 16
User 15
User 14
User 13
User 12
User 11
User 10
User 9
User 8
User 7
User 6
User 5
User 4
User 3
User 2
User 1
21 years
10 years
11 years
6 years
11 years
11 years
21 years
21 years
21 years
31 years
25 years
27 years
3 years
23 years
23 years
3 years
8 years
1980
1985
1990
1995
2000
2005
2010
Year

Refusal to modify definitive maps—upheld by Secretary of State—section 53(3)(c) of the Wildlife and Countryside Act 1981—whether a right of way subsisted—whether it was reasonable to allege that a right of way subsisted—evaluation of available evidence—evidence necessary to establish that a right of way was reasonably alleged to subsist was less than that for establishing a right did subsist—Secretary of State did not apply the correct test.

R. v. Secretary of State for the Environment, ex p. Bagshaw and Norton (Queen's Bench Division, Owen J., April 28, 1994)[1]

An application for judicial review was made by Mr Bagshaw regarding a decision of the Secretary of State for the Environment dated February 11, 1992 refusing to direct Devon County Council to make an order modifying its definitive map by adding as a public footpath a highway in the parish of Dartmoor Forest.

The applicant's case was that user evidence of a former mine track indicated that it was used by the public as of right and without interruption until 1982 and this gave rise to a presumption of dedication.

Mrs Norton sought judicial review of a decision of the Secretary of State for the Environment dated January 6, 1992 refusing to direct Suffolk County Council to make an order modifying the definitive map by adding a by-way open to all traffic to the county's definitive map for the parish of Polstead.

Again, the applicant relied on user evidence. In addition she relied upon documentary evidence, the Layham Tithe Map 1841, Greenwood's Map 1824/5, Bryant's Map 1826 and the Ordnance Survey 6" Maps of 1884, 1904 and 1927. She also relied on a copy of a Sale Plan for Pope's Green Farm dated 1877. Connected to the submission on the documentary evidence was a contention that it was illogical for the public part of Pope's Green Lane effectively to form a cul-de-sac. Mr Laurence argued that a public right of way could not end in a cul-de-sac except in very limited circumstances which did not exist in the present case and accordingly the Secretary of State was not entitled to conclude, or at least could not reasonably conclude, that it was not reasonable to allege the existence of a right of way.

OWEN J. said that at the time of giving their decision the County Council clearly had in mind the decision of McPherson J. in *R. v. The Isle of Wight County Council, ex p. O'Keefe*.[2] Mr Laurence, for Mr Bagshaw, sought to place some gloss upon that decision and in particular pointed out that *Rubinstein v. Secretary of State of the Environment* had since been overruled: see *R. v. Secretary of State for the Environment, ex p. Simms and Burrows*.[3] He also pointed out that *O'Keefe* itself had been held probably to have been wrongly decided albeit for quite other reasons: *R. v. Cornwall County Council, ex p. Huntingdon*.[4] The court was also referred to a decision given by Owen J. in 1993, *R. v. Secretary of State for Environment, ex p. Smith and Deller*.[5] That was said to bear on the proper interpretation of "subsist or is reasonably alleged to subsist" in section 53(3)(c)(i) of the 1981 Act. However, that decision, which was concerned with other matters, did not assist one way or the other with the instant case. However, there was no reason not to accept the judgment of McPherson J. that an order should not be made lightly. That statement, however, did not assist the respondent. More to the point, it was to be noted that in the County Council's decision it was stated that:

> "The evidence of use from 1955 is thus completely irreconcilable and makes it difficult to be satisfied that a public right of way is reasonably alleged to exist."

[1] *Mr G. Laurence Q.C.* (Godlove Pearlman, Leeds). *Mr J. Hobson and R. Taylor* (the Treasury Solicitors).
[2] (1990) 59 P. & C.R. 283.
[3] [1991] 2 Q.B. 354.
[4] [1993] 3 All E.R. 556 and [1994] 1 All E.R. 694.
[5] May 26, 1993, Q.B.D., CO/1128/91.

It was on that irreconcilability and the respondent's attitude to it that Mr Laurence rested the main part of his case.

The Secretary of State (Mr Laurence said) started his conclusions (at paragraph 6) by stating the correct consideration, namely:

> "Whether the evidence shows that a right of way exists or is reasonably alleged to exist."

The Secretary of State then proceeded to deal with an argument based upon section 31 of the Highways Act 1980. He summarised it by saying that:

> "There is a statutory presumption that a right of way has been dedicated to the public where it has been used for at least 20 years without interruption unless there is sufficient evidence that there was no intention during that period to so dedicate."

He then set out certain conflicting evidence and continued (in paragraph 8):

> "In the Secretary of State's opinion, on a balance of probabilities, the most likely date for the locking of the access gate and the painting of 'private' on it is 1982, as he finds the detailed evidence of Captain Cross the most convincing."

It was necessary to appreciate that the assessment of Captain Cross's evidence was by reading statements and not by any examination or assessment of him as a witness. Paragraph 8 continued:

> "If 1982 is taken as the date when the right of the public to use the path was first questioned, then the evidence of use between 1962–82 (and indeed since 1955) is contradictory. The Secretary of State agrees with the County Council that the evidence of use from those who claim unimpeded use as of right is balanced by the amount of evidence supporting the claims of the tenants of the Slade Newtake (the Coakers) and the Hexworthy Newtake (the Mudges) that walkers were challenged and there never was a right of way over the track. In these circumstances, the Secretary of State agrees with the County Council that the evidence is *irreconcilable and as such no right of way can reasonably be alleged to subsist, on the basis that unimpeded public use of the route ceased in 1982*."

It was not necessary to read the whole of paragraph 9 of the Secretary of State's letter. Reliance was placed, however, on the use of the words "counter-balanced by" when referring to the evidence, and criticism was also made of the last words of that paragraph:

> "... the Secretary of State considers that the evidence of unimpeded public use of the track as of right is insufficient to indicate that a presumed dedication as a public right of way had occurred."

Mr Laurence also took exception to paragraph 11 which stated:

> "Accordingly, after taking into account all representations received, and for the reasons given above, the Secretary of State considers that there is not sufficient evidence to support your claim that a public footpath exists. ..."

On behalf of Mr Bagshaw, Mr Laurence argued that the respondent applied the wrong test.

As regards Mrs Norton's application, from paragraph 6 of the Secretary of State's decision letter it could be seen that the County Council in rejecting the application, first had not accepted:

> "... that it is illogical that cul-de-sac routes may exist in the country ..."

taking the

> "... view that the continuation of such routes cannot be assumed and that the evidential tests required under the 1981 Act must be met to show that, *on a balance of probabilities, public rights do exist.*"

The Secretary of State's conclusions were set out in paragraphs 7, 8, 9 and 10. Mrs Norton's claim was that he had applied an incorrect test to the evidence before him.

Paragraph 7 started by saying:

> "The Secretary of State has carefully considered all the representations and documentary evidence submitted by yourself and by the County Council. He takes the view that, whilst surveying authorities are required to take into consideration all other relevant evidence available to them concerning the status of a right of way the subject of a request for a modification order, the onus is upon the applicant to provide evidence to support the claim."

It was accepted that that was a clear and accurate statement of the law. The letter continued:

> "He notes that the user evidence submitted in support of a presumption of dedication is limited to four persons claiming 20 years of vehicular use as of right; he must weigh this against the statements from the landowner, supported by 115 signed forms and the Layham and Polstead Parish Councils, indicating the use of the route has been on a permissive basis and that active steps to prevent a presumption of dedication arising have been taken. The Secretary of State concludes that the user evidence you have submitted does not, in itself, convince him that a presumption of dedication has arisen for the use of a route as a byway."

Whilst accepting that decision letters were not to be construed as if they were statutes, Mr Laurence argued that the tenor of the last sentence and especially "convince him that a presumption of dedication has arisen" indicated that a wrong test had been applied. He also took exception to the last sentence in the paragraph which read:

> "Essentially, therefore, he considers that the case must turn on whether sufficient documentary evidence has been adduced to support the claim that a byway exists along the claimed route."

Mr Laurence said that that clearly indicated that a wrong test had been applied.

It was not necessary to cite the whole of paragraph 8. Of that Mr Laurence said, again conceding that the letter was not to be construed strictly as if a statute, it nevertheless indicated by its use of "conclusive proof" on two occasions, "conclusive" on one occasion and "inconclusive" on one occasion, that the wrong test was in the mind of the Secretary of State.

Paragraph 9 was criticised by Mr Laurence on the basis that it rejected his argument, that it was a "legal principle" with strictly limited exceptions of which there was no evidence in the case that cul-de-sac routes could not exist in the countryside. The letter stated:

> "Whilst accepting that cul-de-sac routes may be unusual in the countryside, they are by no means unprecedented and he sees no reason why routes cannot continue over private land on a permissive basis, as appears to be the case here."

Mr Laurence criticised paragraph 10 as showing that the incorrect test was applied. Paragraph 10 read:

> "After careful consideration of all the representations before him, the Secretary of State considers that you have provided insufficient evidence to show that, on balance of probability, *there is a byway* along the claimed route."

Both applications raised the question of what was the right test to be applied. Whilst Mrs Norton's case contains an added allegation that the respondent had erred in law by not accepting the proposition that a right of way ending in a cul-de-sac could not, save with exceptions which did not exist, exist in law, each application turned on a decision as to the proper approach of the Secretary of State when he was considering paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981.

In general terms, by section 53 of the Wildlife and Countryside Act 1981 the Council was required to maintain a definitive map of its area. The definitive map will show the various "byways open to all traffic", "public paths" and "rights of way". By subsection (2) the Council was required to make modifications of that map as soon as reasonably practicable after "an occurrence". Subsection (3) lists the types of activating occurrence. At (c) of that subsection it was provided that:

> "(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—
>
> (i) 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 to which this Part applies."

shall be such an occurrence. By subsection (5) of that section:

> "Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3)."

Each applicant claimed to be acting under subsection (5). There was no dispute as to that.

It was also common ground that by subsection (5) of Schedule 14 "shall have effect as to the making and determination of applications under this subsection". By paragraph 3 of that Schedule, the authority was required to investigate the matter stated in the application, consult (if necessary) other local authorities and then decide whether or not to make the order sought. The Councils had done so.

By paragraph 4 of the Schedule, on refusal the applicant may serve notice of appeal on the Secretary of State and the authority. If he considers that an order should be made the Secretary of State "shall give to the authority such directions as appear to be necessary for that purpose." It had been pointed out, rightly, that Schedule 15 had no relevance in the instant case since no order had been made. The common question which was raised by the two applications was the construction of section 53(3)(c)(i).

It was necessary to give some meaning to all the words used. Accordingly, there had to be a difference between showing "that a right of way which is not shown in the map and statement subsists" and showing that a right of way which was not shown in the map and statement "is reasonably alleged to subsist". Accordingly the questions for the Council and subsequently for the Secretary of State were: did the evidence produced by the claimant together with all the other evidence available show that either:

(a) a right of way subsisted (test "A"), or

(b) it was reasonable to allege that a right of way subsisted (test "B").

To answer either question had to involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it would be necessary to show that on a balance of probabilities the right did exist. For the second possibility to be shown it would be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

The first of those possibilities did not apply. Accordingly the question which was for decision by the Councils and also by the Secretary of State was whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence available to the Council.

The question was not: was it reasonable for the claimant so to allege?—since the claimant was not to be the judge of that. At this stage the authority was to be the judge. At a later stage it was to be the Secretary of State. Even less was it for the court to be the judge of that. Subject to an allegation of *Wednesbury* unreasonableness, which might have been in part alleged here (although in the end it was not), the decision of the Secretary of State had to be final if he had asked himself the right question.

The wording of the section indicated, that the evidence necessary to establish that a right of way was reasonably alleged to subsist over land had to be less than that which was necessary to establish that a right did subsist. Indeed, bearing in mind the structure of the Act, that seemed to be clear. That structure was, in that respect, that an application under section 53(3)(c)(i), if upheld, would be followed by an order, consequent upon which, after an objection, there might be some form of inquiry with either confirmation or a refusal to confirm.

If the evidence were merely that a claimant had on a limited number of occasions not been stopped when using the way, such an allegation that a right of way subsisted might well not be reasonable. In this connection the words of Parke B. in *Poole v. Huskinson* (1843) 11 *Meeson & Wellsby* 827 were relevant. There Parke B. said at p. 61:

> "... that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment."

If, however, as probably was so in each of the cases, there were to be conflicting evidence which could only be tested or evaluated by cross-examination, an order would seem likely to be appropriate. Again, in *Moser v. Ambleside Urban District Council*, a case which was cited by Mr Laurence, Pollock M.R. said of the evidence in that case:

> "It is also to be remembered that he (the Trial Judge) had the great advantage of seeing the witnesses."

Atkin L.J. also dealt with the apparent necessity to weigh and judge the evidence when he said:

> "In a right of way case such as this, no doubt a very great deal of importance must be attached to the fact that the learned judge heard a vast amount of oral testimony, and was able to judge the value of that evidence by observing the persons who gave it, and in a case where the oldest inhabitants are the persons who are the most valuable and the most able witnesses it obviously is a great advantage to see exactly how the old gentlemen and the old ladies do deport themselves in the witness box, because the judge is able to tell in that way whether he can rely upon their testimony or whether he cannot."

Mr Hobson argued that "if the decision-maker accepts the evidence of the objectors, which he may do without rejecting the evidence of the claimants as untruthful, he is entitled to conclude that the right of way cannot reasonably be alleged to exist". However, that could not be an answer in Mr Bagshaw's case since the conflict was said to be irreconcilable, at least on paper, and there would then seem to be only one way to resolve that conflict.

If, on the other hand, the evidence were to be wholly documentary it might be possible, satisfactorily and reliably, to evaluate that evidence without any necessity for a hearing, and in those circumstances answer the question whether a reasonable person could reasonably allege a right of way to subsist. In argument Mr Laurence did not wish to accept that proposition and argued that inquiries frequently led

to the discovery of yet more unknown evidence which might affect the answer to the question. That might be true. However, as the question which had to be answered was: "Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way", it would be difficult to take into account unknown evidence.

Whether an allegation was reasonable or not would, no doubt, depend on a number of circumstances and he (Owen J.) was certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user was conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to be reasonable to allege such a right. He said that because it might be reasonable to reject the evidence on the one side when it was solely on paper, and the reasonableness of that rejection might be confirmed or destroyed by seeing the witnesses at the inquiry.

Returning to the reasons given by the Secretary of State, in respect of Mr Bagshaw, it was argued on his behalf that the respondent had applied the wrong test. Purporting to find that the evidence was balanced or counterbalanced by evidence adduced on behalf of the objectors indicated that the wrong test was used. Such a balance might indicate that test (A) was not satisfied; it could not show that test (B) was not satisfied. Indeed it was argued that it was in such situations that it was reasonable to make the allegation.

Further, finding that the evidence was irreconcilable and "*as such*" no right of way could reasonably be alleged to exist indicated that the wrong test was applied. Stating that the evidence was "insufficient to indicate that a resumed dedication had occurred" also indicated that a wrong test was applied.

His (Owen J.'s) judgment was that those words, even construed favourably for the respondent, did indicate that the wrong test was applied.

In those circumstances, without indicating any further what the answer should be, he found that the respondent had erred in law in such a manner as to make it necessary to quash the respondent's decision and require him to ask the right question in proper exercise of his powers.

Mrs Norton: Here it was argued:

(a) that the respondent had applied the wrong test and;

(b) that in any event the respondent's decision was one which no reasonable person properly directing himself as to the law could have reached.

As to the first argument, the use of "conclusive proof" even when construed strongly in favour of the respondent, so indicated. The statement in paragraph 10 that Mrs Norton had "provided insufficient evidence to show that, on the balance of probability, there was a by-way along the claimed route", seemed to emphasise that since the question to be asked was, whether the evidence showed that on a balance of probability it was *reasonable to allege* a by-way along the claimed route. Accordingly, it seemed that again the respondent had erred in law and should be required to consider the matter afresh asking the right question.

In the course of opening the case, and in the skeleton argument, Mr Laurence had sought to argue that the respondent and the Council were also in error in law in their rejection of what had been called the "cul-de-sac point". There was a track which led from Layham to the U8512. The U8512 was undoubtedly a highway. The road from Layham to a point marked "E" on the map was also a highway—the U8504. The track continued but no right of way for vehicular traffic was shown on that track. The argument placed before the authority and before the Secretary of State was that if the map

was right, the right of way ended as a cul-de-sac at "E", and that as a right of way leading to a cul-de-sac in that place could not have come into existence, the right of way must have continued along the track to join the two undoubted highways.

It was suggested that the reason for the whole track not being shown as a by-way on the map was probably an administrative error caused by the fact that two authorities were involved with their boundaries meeting at the point marked "E". Relying upon *Eyre v. New Forest Highway Board*[6] and *Att.-Gen. v. Antrobus*,[7] Mr Laurence sought to argue that as a legal principle here "you must find a right of way as the track leads from one public place to another public place, and you cannot have a right of way to what is a cul-de-sac unless it be in a town." However, it was abundantly clear from the judgments in *Moser v. The Ambleside Urban District Council* that there was no such rule of law. Pollock M.R. at p. 119 declared:

> "I find it difficult to accept as true *in all cases* that you must find a right of way from one public place to another public place, and that you cannot have a right of way to what is a cul-de-sac unless it be in a town. I do not think that is what was intended, and I do not think if that is what was intended that that is correct. It seems to me that there may be a number of cases in which the public need to go to a particular point, and there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the *terminus ad quem* to which the right of access is granted."

Atkin L.J. in the same case said:

> "It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me to be too large a proposition."

Sargant L.J. expressed similar doubts. Of course, that which Mr Laurence urged might be factual evidence, possibly in some circumstances strong evidence upon which it might be reasonably to make an allegation. Further than that, he was not required to go and he would not. Suffice it to say that he did not regard the respondent as having been in error of law over the matter.

Comment. Section 53 rather strangely imposes a duty on the local authority to make a modification order, not only when the relevant evidence shows the alleged right of way to subsist, but also where it is "reasonably alleged to subsist." The second pre-condition is very different from the first, and as this case reveals, means that the Council must act, even where it is not itself convinced on the balance of probabilities that the right exists, if it is at least reasonably arguable. Of course, once a modification order is made, this is not the end of the matter, as the owner of the land or other aggrieved persons can then make objections. This suggests that the intention of the Act is that, once a prima facie case is made, the modification should go through unless it is challenged. This does put the Council in a rather awkward position, as they must make a modification order even if they are not themselves convinced, as long as they consider that it has been reasonably alleged that the right exists. Even where the modification order is opposed and the order has to be confirmed by the Secretary of State, the wording of section 53 would still suggest that the Secretary of State is equally under a duty to confirm the order, if the right of way is reasonably alleged to exist.

As Owen J. emphasises, whether or not the allegation is "reasonable" is a matter of judgment for the local authority (and in turn the Secretary of State). However in coming to such a judgment, the authority must address themselves correctly in law. From the Secretary of State's decision letter, it seems clear that the wrong approach was taken and the Secretary of State considered that the applicant was acting reasonably in alleging that the right existed. On the other hand Owen J. also made clear that there is no presumption that a right of way cannot result in a cul-de-sac and that it must lead from one public place to another public place. Of course in certain circumstances the proximity of two rights of way will be strong evidence that they are connected but this will not always be the case. Certainly it would generally go against the interests of ramblers, if such a rule were established, as it might prevent rights of way

[6] 36 J.P. 517.
[7] [1905] 2 Ch. 188; 69 J.P. 141.