



## Special Highways Committee

**Date** Friday 24 July 2015  
**Time** 9.30 a.m.  
**Venue** Committee Room 2, County Hall, Durham

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### Business

#### Part A

1. Apologies for Absence
2. Substitute Members
3. Declarations of interest, if any
4. Definitive Map Modification Order application to register 3 public footpaths through Wharton Park, Durham - Report of Corporate Director, Regeneration and Economic Development (Pages 1 - 26)
5. Such other business, as in the opinion of the Chairman of the meeting, is of sufficient urgency to warrant consideration

**Colette Longbottom**  
Head of Legal and Democratic Services

County Hall  
Durham  
16 July 2015

To: **The Members of the Highways Committee**

Councillor G Bleasdale (Chairman)  
Councillor C Kay (Vice-Chairman)

Councillors J Allen, B Armstrong, D Bell, H Bennett, I Geldard,  
O Gunn, D Hall, D Hicks, K Hopper, O Milburn, S Morrison,  
R Ormerod, J Robinson, J Rowlandson, P Stradling, J Turnbull,  
M Wilkes and R Young



Highways Committee

24 July 2015



**Definitive Map Modification Order  
Application to add footpaths to the  
Definitive Map and Statement**

**Wharton Park, Durham**

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**Joint Report of Ian Thompson, Corporate Director, Regeneration  
and Economic Development and Colette Longbottom, Head of Legal  
and Democratic Services**

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**1.0 PURPOSE OF THE REPORT**

1.1 To consider and determine an application to add footpaths to the Definitive Map and Statement of Public Rights of Way at Wharton Park, Durham.

**2.0 BACKGROUND**

2.1 On 23 January 2015 the County Council was served with notice of an application to register three public footpaths through Wharton Park by Mr P Hayes.

2.2 The three paths, named as paths A, B and C in the application, each start at different entrances to the park and meet at a point in the park just north of the Battery. The start points are behind the public conveniences on North Road (A), the railway station (B), and Framwellgate Peth (C). The paths mainly follow laid out footpaths/walks apart from the northern end of C which crosses a car park, along a vehicle access road and the edge of a grassy area. The paths are shown on the plan at **Document A**.

2.3 Durham County Council is the freehold owner of Wharton Park and its predecessor was Durham City Council until 2009. In January 2014 a lottery grant was awarded for a park restoration project and planning permission was granted in September 2014. The park is closed for a period of 12 months commencing in May 2015. Wharton Park was first developed in 1858.

2.4 The application to record the public footpaths is supported by evidence of usage (17 user evidence questionnaires recording 18 people's use of one or more of the paths), historical documents and photos. The applicant states that his action is prompted by the restoration proposals that include the permanent closure of path A leading from North Road.

- 2.5 Consultations have been carried out with the Local Members, the Ramblers Association, Neighbourhood Services (managers of the land) and the utilities. Responses have been received from the Local Members who do not object to the proposals and from Neighbourhood Services, who do object.

### **3.0 LEGAL FRAMEWORK**

- 3.1 The briefing note attached at **Document B** sets out the legal framework and considerations for modifications to the Definitive Map & Statement. The County Council, as Surveying Authority, has to make a decision in accordance with the law and in particular the provisions of the Wildlife and Countryside Act 1981.
- 3.2 Under the provisions of Section 53 of the Wildlife and Countryside Act 1981, the County Council as Surveying Authority has a duty to keep the Definitive Map and Statement under review and is required to make a Modification Order (Section 53 (3) (c) (i)) on the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows a right of way subsists or is reasonably alleged to subsist.
- 3.3 The Highways Act 1980, Section 31, states that, in the absence of contrary intention, a way may be 'deemed to have been dedicated as a highway', where 'it has been actually enjoyed by the public as of right and without interruption for a full period of 20 years', that period to be calculated retrospectively from the date when the right of public use was brought into question. In this case the submission of the Application by Mr P Hayes on 23 January 2015 would be the date from which the 20 years would be calculated retrospectively i.e. January 1995 to January 2015.

### **4.0 PURPOSE FOR WHICH THE LAND IS HELD**

- 4.1 Before assessing the evidence for this application it is necessary to consider whether the purpose for which the land is held by the County Council may have any implications for the decision. If the public have a legal right of access to paths by virtue of a specific piece of legislation then usage will be 'by right' (or with permission) rather than 'as of right', the latter of which is what is required by Section 31 of the Highways Act 1980 (see para 3.3 above and **Document B**). Legislation that would indicate 'by right' usage of paths would include Section 164 of the Public Health Act 1875 (the 1875 Act) which states that local authorities 'may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever'. Otherwise, unless it could be argued that the statutory presumption can be rebutted in another way, where there is public access to land held by a local authority it will potentially fall under Section 31 of the Highways Act 1980. It might be argued that the purpose for which the land is held might make the local authority incapable of dedicating it as a highway. This could be termed an incompatibility test whereby the existence of a public right of way would unreasonably interfere with the statutory purpose for which the land is held.

## **5.0 DOCUMENTARY EVIDENCE**

5.1 The documentary evidence relevant to this case includes:

- Ownership/appropriation documentation
- Durham City Council Committee minutes
- Old maps
- Photos of signage in Wharton Park

### **5.2 Ownership/appropriation documentation**

The paths in the Application cross land contained in two title numbers, DU315797 and DU315681. Each has a different history of acquisition and appropriation. The extent of the land titles for Wharton Park is shown on the plan at **Document C**. A third title exists (DU315876) but it is not affected by the Application.

DU315797 (to be referred to as the “old park”) was originally leased to the City Council in 1914 with an express covenant that it was to be kept and maintained as public walks and pleasure grounds. A recital to the lease recorded that this use was to be according to the provisions contained in the Public Health Act 1875 (which can only sensibly mean section 164, referred to above at paragraph 4.1). As far as can be ascertained there is no further record of the City Council resolving to use the land in any other particular way nor is there any evidence that the Park is or has been used for other purposes. This land was sold to the City Council in 1932 where the conveyance and agreement for sale describe the land as a ‘public park’. Although there were no further covenants to continue using the land in this way there was an ‘overage’ clause to the effect that the seller was entitled to half the net profits from the subsequent sale or lease for any other future land use. Although the 1932 conveyance would have brought the 1914 lease to an end it is not considered that it would have changed the purpose for which the land was held. The Council was already in possession of the land and its use was to continue. It is considered that the paths through the ‘old park’ would therefore be in accordance with the provisions of Section 164 of the 1875 Act. This includes all of paths A and B and about a third of path C.

DU315681 (to be referred to as the “new park”) was acquired by the County Council (along with other land at Aykley Heads) in 1942 and later in 1946 was conveyed to the City Council. This latter conveyance included a covenant by the City Council that the land would not be used otherwise than as a public open space or burial ground or for road improvement purposes. Leaving aside the road improvements (Framwellgate Peth) this suggests that the land was to be held by the Council under Section 10 of the Open Spaces Act 1906. However, there is no direct reference to this legislation in any of the ownership documents. All that can be concluded is that the City Council was under a duty to hold the land to allow its enjoyment by the public as open space (or for a burial ground) and no other purpose.

### **5.3 Durham City Council Committee minutes**

Various City of Durham Park Committee minutes make reference to public access and its management. These have been researched and the most relevant minutes are noted below in chronological order.

21 December 1943 mentions an action to close the park each night. Further minutes following this note closing the entrance fronting the railway station (B), and arranging to replace gates removed from the North Road entrances (includes A).

13 February 1944 make reference to the provision of a gate at the station entrance but this to be kept closed.

18 April 1944 states that the City Engineer was to arrange for the erection of a notice board indicating Public Park (and the facilities in the park) at the lower entrance to the park (facing the County Hospital). (This is likely to be the entrance to Path A).

21 September 1948 makes reference to an agreement dated 4 August 1920 between the City Council and railway company, regarding the approach into the park from the railway station (B). This is also referenced in September 1979 minutes where it is stated that the City Council and the Rail Property Board had reviewed the wayleave annual fee.

19 April 1955 minutes refer to ‘...public access to Wharton Park from Framwellgate Peth being preserved’.

#### 5.4 **Old maps**

The earliest Ordnance Survey map for the area dates from 1856 which precedes the development of Wharton Park. The further County series edition maps of 1896, 1919 and 1939 show the development of the park and by the time of the 1978 map the park’s path/road layout had developed as is shown on up to date maps. The maps show that Path A was fully laid out by the time of the 1939 map (only part is on the 1919 map), Path B was laid out at some point between 1939 and 1978 and similarly the majority of Path C (the A691 improvement scheme appears to have created the Framwellgate Peth entrance in the early 1970s).

#### 5.5 **Photos of signage in Wharton Park**

There are various signs at the entrances to the park, of which photographs are found in the background papers to this report. The signs include Welcome messages, information about the park’s vehicular gate opening/closing times, the Council’s liability to visitors, telephone contact numbers etc. Within the park and close to path C in the car park there are notices about parking restrictions and reference to it being a public place for the purposes of dealing with alcohol consumption. There are no signs at the park entrances indicating any destinations beyond the park’s boundaries apart from a ‘Railway Station’ sign on Path B pointing down the steps to the station.

### 6.0 **EVIDENCE OF USE**

6.1 A summary of the evidence of usage provided with the Application is shown at **Document D**. There are 18 people who have provided evidence of use of the paths in the Application. In the 20 years prior to 2015 there were 10 people (Attfield x 2, Conlong, Gosling, Hayes, Ramsden, Reed, Taylor, Wardle and Wright) who demonstrate 20 years or more usage of one or more of the paths.

1 (Taylor) of these used A only to access the park. Of the remaining 9 no. x 20 year users there is evidence of people traversing the park as a through route ie 9 have used A with C (North Road to Framwellgate Peth), 6 have used A with B (North Road to railway station), and 2 used B with C (Railway Station to Framwellgate Peth).

## **7.0 OBJECTION**

7.1 Neighbourhood Services object to the proposal. They state that, as a park, the land is already protected for public access and they require flexibility as to how it is managed. The existence of public rights of way would place a significant burden, taking into account the delivery of events and activities for the benefit of the community and local residents.

## **8.0 ASSESSMENT OF THE EVIDENCE AND OBJECTION**

8.1 The evidence and objection need to be tested against the criteria laid out in Section 31 of the Highways Act 1980 and a determination to make an order if it is considered that public footpaths subsist or are reasonably alleged to subsist. The relevant 20 year period to be assessed is January 1995 to January 2015.

### **8.2 Ownership/appropriation documentation – Assessment**

The ownership status of the land is crucial in determining this Application. As described at 5.2 the two titles affected have been appropriated by the Council for different purposes. It is considered that the old park was appropriated to Section 164 of the Public Health Act 1875 by virtue of the 1914 lease and as described this purpose has continued and remains through to the present day. This would mean that the use of the alleged public paths in the old park would be unlikely to be 'as of right' and instead with permission (or 'by right'). The use of the paths provided by the owners has already been conferred on the public by the statutory purpose for which the land is held. Therefore it appears that the Application paths within the old park can be declined merely by reference to the statutory purpose for which the land is held, because the requirements of section 31 cannot be met. The land is held for the purpose of providing public walks, and therefore the use for that purpose has been with the landowner's permission (albeit permission that the landowner has a duty to give) rather than in the assertion of a different right.

The same possibly cannot be said for the new park. Its use by the public as open space might not be sufficient to suggest that use of paths was 'by right'. Using the land as open space is a very broad description and with no reference to the specific use of laid out paths. It might however be argued that any ways over open space land, as well as that provided by Section 164 of the Public Health Act 1875, provide a specific statutory purpose for the Council as landowner and in order to manage the land it would be unreasonably constrained if public rights of way were to exist over the land. This reflects the objection from Neighbourhood Services to the Application.

For the section of path C in the new park it is therefore necessary to consider the other evidence.

### 8.3 **Durham City Council Committee minutes – Assessment**

The City Council minutes indicate that it had sought to exercise control of how it manages the park's public access although the minutes do not date from the relevant 20 year period. The minutes discovered do not alter the assessment at 7.2 for the paths through the old park.

Focussing on the new park and the part of path C passing through it, the only relevant minute is from 19 April 1955 which refers to '...public access to Wharton Park from Framwellgate Peth being preserved'. This would suggest that access had already been taking place and was to be kept. It would support longevity in usage (> 20 years) from Framwellgate Peth into the park. However, it cannot necessarily be deduced that this access was the same route as that which is contained within the Application being considered. There is no obvious route shown on any of the maps prior to the A691 improvement scheme.

### 8.4 **Old maps– Assessment**

The old maps confirm the physical existence of the laid out paths as the park has developed. In particular they confirm the laid out character of the paths in the old park which would be consistent with the purposes for which it is considered that the land is held (Section 164 of the Public Health Act 1875). When assessing the 20 year relevant period a comparison of the most recent OS map (**Document C**) with the 1978 map shows that there have not been any physical changes to the road/path layout since that time. The old maps confirm the physical existence of the paths.

### 8.5 **Photos of signage in Wharton Park– Assessment**

It is accepted that there have been signs at various entry points and within the park with various messages to welcome users, give information and deal with issues of managing the public (car parking, alcohol etc). Some of these can be referenced to the City Council's minutes (see 5.3). There is no signage to indicate any further away destinations beyond the park. The Railway Station signage indicates somewhere outside the park but is located within the park and not at an entry point.

It is considered that the signs do not particularly assist in the determination of the Application. The Applicant indicates his view that they lead to the conclusion that the paths are public rights of way, however, it is argued that they are consistent with the old park's 1875 Act purpose and even the 'public open space' purpose of the new park. They indicate the management of the land in keeping with its statutory purposes which could be considered to be incompatible with the existence of public rights of way.

### 8.6 **User evidence – Assessment**

In view of the ownership status of the paths in the old park it is considered that this is 'by right' and so cannot result in the acquisition of a public right of way.

Looking at the use of the part of C in the new park there are 9 people who have used path C over the 20 years, 1995 to 2015. (Adfield x 2, Conlong, Gosling, Hayes P, Ramsden, Reed, Wardle and Wright).

The level of usage evidenced on path C (and the paths in the old park) contained in the Application is not particularly extensive. However, the test to be considered to make a Modification Order under Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 allows for an Order to be made where a public right of way is **reasonably** alleged to subsist. It is only at the confirmation stage, which does not have to be considered now, that the decision maker has to be satisfied that a public right of way subsists (the balance of probabilities test). As it stands, with the evidence of use provided, it is not considered that this later confirmation test is satisfied. However, this would not be an appropriate reason for not making an Order for the part of C in the new park.

## 9.0 RECOMMENDATION AND REASONS

9.1 It is the officers' view that a public right of way is reasonably alleged to subsist along that part of path C that crosses the new park as it might fulfil the criteria laid down in Section 31 of the Highways Act 1980. The situation is different for the paths in the old park (A, B and the rest of C) for which it is considered that use of these paths is 'by right' rather than 'as of right' which is required under the 1980 Act. This is due to it being considered that the land in question has been held for the purposes of Section 164 of the Public Health Act 1875 and the paths provided consistently with, and in furtherance of, that statutory purpose.

9.2 It is recommended that a Definitive Map Modification Order is made under the Wildlife and Countryside Act 1981 to add the section of path C in the new park to the Definitive Map and Statement. This path is shown in **Document E**.

### Attached Documents

<b>Document A</b>	Plan showing location of the footpaths contained in the Definitive Map Modification Order
<b>Document B</b>	Briefing Note – Legal Framework for Definitive Map Modification Orders
<b>Document C</b>	Plan showing the extent of the title numbers DU315876, DU315797 and DU315681
<b>Document D</b>	Summary of evidence of use of the paths
<b>Document E</b>	Plan showing section of Path C in the new park

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## **Implications**

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**Finance** – Not applicable to the decision

**Staffing** – Not applicable to the decision

**Risk** – Not applicable to the decision

**Equality and Diversity / Public Sector Equality Duty** – Not applicable to the decision

**Accommodation** – Not applicable to the decision

**Crime and Disorder** – Not applicable to the decision

**Human Rights** – No Human Rights are affected by the decision, which is to record any public rights over the land that may already exist. The County Council, as Surveying Authority, has to make a decision in accordance with the law and in particular the provisions of the Wildlife and Countryside Act 1981. Given these legal criteria, a decision must reflect this legislation despite any other rights of individuals.

**Consultation** – As detailed in paragraph 2.5 of the report

**Procurement** – Not applicable to the decision

**Disability Issues** – Not applicable to the decision

**Legal Implications** – A Modification Order is the appropriate legal process by which changes are made to the Definitive Map and Statement. If an Order is made, the County Council must subsequently decide whether to confirm it. If no Order is made, the Applicant has the right of appeal to the Secretary of State who may direct the County Council to make an Order.

# Background papers

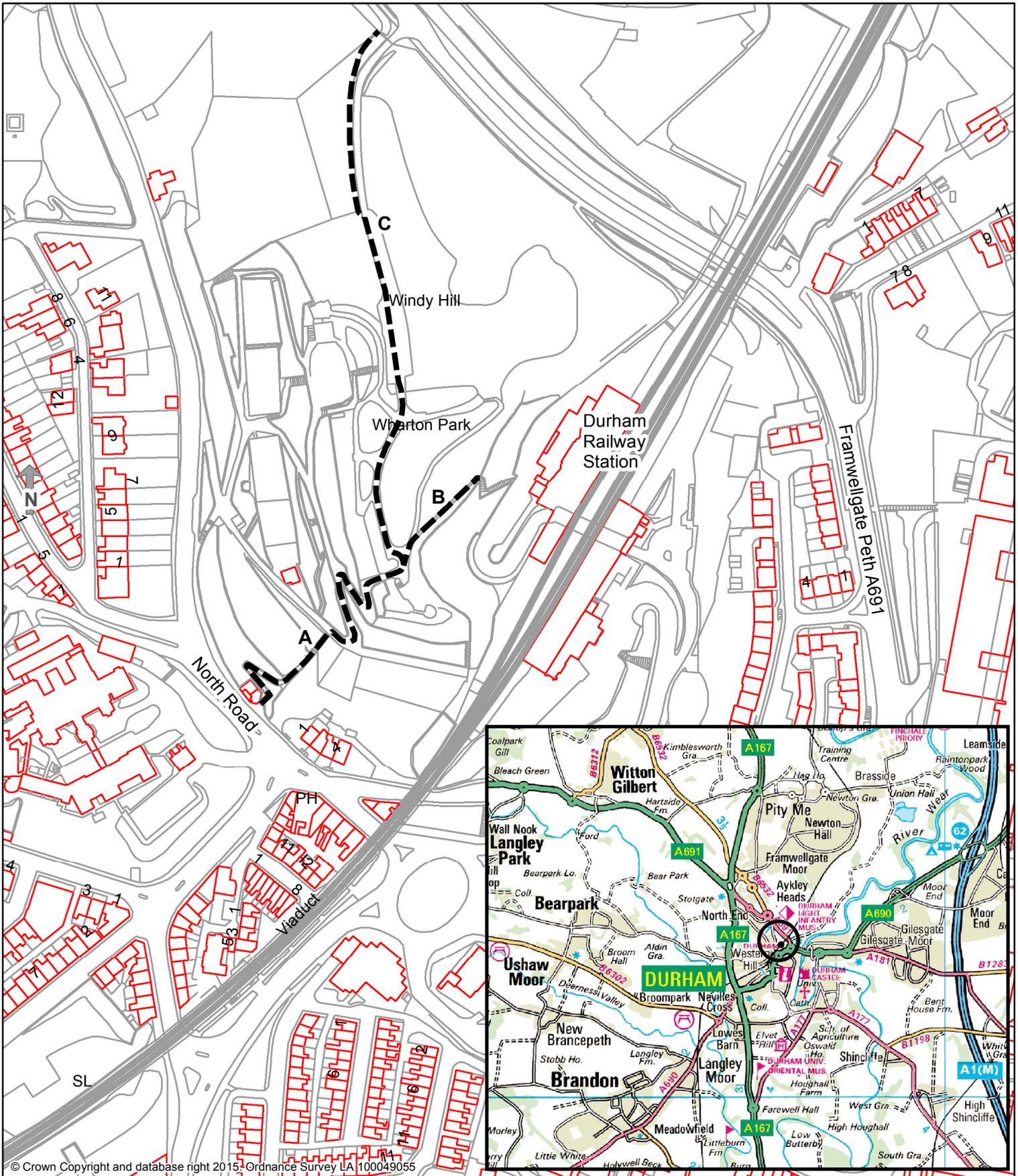
Highways Committee – 24 July 2015

## Definitive Map Modification Order Application to add footpaths to the Definitive Map and Statement

Wharton Park, Durham

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<b>A</b>	<i>Definitive Map Modification Order Application</i>
<b>B</b>	<i>Land Registry: Register of title and title plan for DU315797 Register of title and title plan for DU315786 Register of title and title plan for DU315681</i>
<b>C</b>	<i>Lease of 17 December 1914 from Mrs Darwin to The City of Durham Council of Wharton Park Transcript of Lease of 17 December 1914</i>
<b>D</b>	<i>Agreement of 4 March 1932 between Squadron-Leader C.J.W. Darwin and another and The City of Durham Council for sale of land known as No.4 Parkside, and Wharton Park</i>
<b>E</b>	<i>Conveyance of 30 April 1932 between Squadron-Leader C.J.W. Darwin and another and The City of Durham Council of the Wharton Park and No.4 Parkside Transcript of Conveyance of 30 April 1932</i>
<b>F</b>	<i>1945 Abstract of Title to freehold property known as Aykley Heads Estate in or near the City of Durham belonging to the County Council of Durham</i>
<b>G</b>	<i>Conveyance of 4 July 1946 between The County Council of Durham and the City of Durham Corporation of freehold land situate at Framwelgate in the City of Durham, comprising in the whole 4.922 acres or thereabouts. Transcript of Conveyance of 4 July 1946</i>
<b>H</b>	<i>Summary of actions and copy of relevant City Council minutes for the Parks Committee, and Amenities and Leisure Committee (formerly the Recreation and Amenities Committee)</i>
<b>J</b>	<i>Ordnance Survey County Series Maps: 25" to the mile 1856-7 (1<sup>st</sup> Edition)                                   1896 (2<sup>nd</sup> Edition)                                   1919 (3<sup>rd</sup> Edition)                                   1939 (4<sup>th</sup> Edition) 1:10,000 scale 1979</i>
<b>K</b>	<i>2015 Photographs of Wharton Park paths, entrances, gates and signs</i>
<b>L</b>	<i>City of Durham Council documents concerning the tenancy of the park keeper's house (Wharton Park House): Statement of Mr Tommy Punton, dated 9 February 2015; Letter of 4 February 2002 concerning Service Tenancy Agreement for Wharton Park House (financial and personal details redacted);</i>

	<i>Report Executive Summary of 22 August 2007 concerning Service Tenancy for Wharton Park House (financial and personal details redacted); Service Tenancy Agreement of 24 March 2008 with respect to Wharton Park House, Wharton Park in the City of Durham (financial and personal details redacted)</i>
<b>M</b>	<i>Extract of Durham Rail Station Travel Plan (date unknown)</i>
<b>N</b>	<i>1910 Finance Act Field Book entry for land at Wharton Park</i>
<b>O</b>	<i>Consultation responses from the Local Members and Neighbourhood Services. May/June 2015</i>
<b>P</b>	<i>Response by the Applicant, Mr P Hayes, to draft Committee report. 3 July 2015.</i>



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**Definitive Map  
Modification Order  
Application  
Durham  
Wharton Park**

Footpaths included  
in the application



Scale 1: 20,000  
(background map)

Produced: 10 June 2015

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## **BRIEFING NOTE FOR THE HIGHWAYS COMMITTEE**

### **Public Rights of Way - Modification of the Definitive Map**

The following briefing sets out the legal framework and considerations for modifications to the Definitive Map.

#### **WILDLIFE AND COUNTRYSIDE ACT 1981**

The Wildlife & Countryside Act 1981 places a duty upon the County Council as the 'Surveying Authority' to keep the Definitive Map under continuous review and make Modification Orders in consequence of:

Section 53(3)(b) - 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.

Section 53(3)(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;
- (ii) that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description; or
- (iii) that there is no public right of way over land as shown in the map and statement as a highway of any description, or other particulars contained in the map and statement require modification.

Section 53(5) - any person may apply to the Authority for an order which makes such modifications as appear to the Authority to be requisite in consequence of the occurrence of one or more events falling within 53(3), (b) or (c).

Modification Orders made under the above provisions are published and notices served upon owners and occupiers of land affected. Any objections or representations to the Order are considered by an inspector appointed by the Secretary of State for the Environment, Food & Rural Affairs to determine the matter, usually after a public inquiry. Applicants under Section 53(5) may appeal to the Secretary of State if the Council decide not to make an Order.

Before deciding to make a modification order the Council has a duty to investigate the matter. This may involve interviewing witnesses, archive research etc. and will seek to clarify any serious discrepancies in the evidence. The landowner should be given the opportunity to produce evidence and comment upon other evidence.

The Highways Committee, when considering whether to make a Modification Order, are acting in a quasi-judicial role and must ensure the principles of natural justice are complied with. The Committee must only look at relevant evidence and apply the relevant legal test.

The Committee's officers have a duty to inform the Committee of the legal criteria and the weight to be given to the evidence.

However, the Committee does not need to follow the formal practices of a public inquiry or a court.

In considering a Modification Order the Committee is not altering public rights. The Definitive Map records public rights, it does not create or alter them. The question is what public rights exist, not what rights the Council, landowners or the public would like to have. Lawful public rights may have languished unused or been obstructed for years, nonetheless they are rights. Conversely if a right of way is shown on the Map and Statement, but is proved not to exist then the error must be remedied and the way deleted. Modification Orders are not concerned with the suitability for use of the rights alleged. If there is a question of whether a path or way is suitable for its legal status or that a particular way is desirable for any reason, then other procedures exist to create, extinguish, divert or regulate use - but such procedures are under different powers and should be considered separately.

### **HIGHWAYS ACT 1980 SECTION 31 Presumed Dedication**

The effect of S31 is, very broadly, that in certain circumstances 20 years' public use of a way can lead to the deemed dedication of that way as a highway unless there is evidence of a contrary intention. To understand the operation of the section it is necessary to examine its precise wording. This begins as follows:

- (1) Where a way over any land other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication has been actually enjoyed by the public as of right and without interruption for a full period of 20 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.
- (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by a notice such as is mentioned in subsection (3) below or otherwise.
- (3) Where the owner of the land over which any such way as aforesaid passes:
  - (a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and
  - (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected;

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

- (4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain

such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

- (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes.
- (9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.
- (10) Nothing in this section or section 32 below affects section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement).
- (11) For the purpose of this section 'land' includes land covered with water.

### **HIGHWAYS ACT 1980 SECTION 32**

#### **Evidence of dedication of way as highway**

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.

### **MORE ON SECTION 31**

To establish the presumed dedication of a right of way under S31, it is necessary to show that the following **all** apply:

- (a) The nature of the way was not such that dedication could not be presumed at common law.
- (b) The public at large must have used the way.
- (c) The use must have been over a period of at least 20 years without effective interruption.
- (d) The use must be 'as of right'; that is, without force, without secrecy and without permission.
- (e) That 20-year period must have ended with an act that brought into question the public's right to use the way.
- (f) The landowner is not able to demonstrate he had no intention to dedicate the way.

- (g) In the case of land held for public or statutory purposes, the person in possession of it should be capable of dedicating a highway without causing incompatibility with those purposes.

### **'A way over land'**

The section applies to any way, i.e. a footpath, a bridleway or a carriageway. 'Land' is defined as including land covered by water. Thus the section can apply to the acquisition of a right of way through a ford or along a causeway covered in water at some stage of the tide.

### **"Other than a way of such a character that its use could not give rise at common law to any presumption of dedication"**

An example would be a way the use of which was a criminal offence, eg to walk along a motorway except for the purpose of obtaining assistance.

Similarly, in the case of land held for some public or statutory purpose where dedication would be incompatible with that purpose.

### **Limitations or conditions**

The public's right to use a way may be subject to limitations or conditions. For example, the landowner may have a right to erect and maintain a stile or gate to prevent movement of stock. If the public freely uses a way subject to such a limitation during the qualifying period, the right of way is held to have been dedicated subject to the limitation. But once the way has been dedicated, no further limitation can be imposed other than by statutory means, such as the authorisation of a stile under Section 147 of the Highways Act.

### **"Actually enjoyed"**

There must have been sufficient use of the way for the required period. This will be a matter of fact to be determined in each case. The motive in using the way is irrelevant. It will accordingly be sufficient if the sole purpose of the use was recreation.

### **"By the public"**

Use must be by the public at large. It is not sufficient if the use has been merely by a class of the public, such as the employees of a particular employer, customers of a particular business or tenants of a particular landlord.

### **"As of right"**

This means that the use must have been as if a right of way existed. There will be no deemed dedication if the landowner can show that the use was by his permission, or that the use had entailed force. Use must also be 'open', i.e. it must have been such that the landowner could have challenged it if he wished.

Inherent within the requirement of use as of right is the notion that there must have been acquiescence by the landowner. (Acquiescence should not be interpreted as permission but clearly there can have been no acquiescence if the user was by force or if it was

undetected). The onus is not on the user to show that the landowner acquiesced; it is on the landowner to show that he did not.

Use will not be 'as of right' if the use is consistent with the statutory purpose for which the land is held. For example, section 164 of the Public Health Act 1875 allows a local authority to lay out "public walks and pleasure grounds". Any use of such public walks for walking will therefore be pursuant to the public's statutory right to use them for that purpose, rather than as trespassers, and will not be capable of bringing home to the landowner that any different right is being asserted.

### **"Without interruption"**

"Interruption" means "actual and physical stopping of the enjoyment" of the public's use of the way by the landowner or someone acting lawfully on his behalf, eg an employee acting in the course of his employment. The words do not refer to interruption of use; there is no requirement that the use must have been constant, although it must have been sufficient to satisfy the requirement that the way was "actually enjoyed".

The interruption must be with intent to prevent public use of the way. It will not be sufficient if the interruption is shown to have been for some other purpose, eg to prevent cattle straying.

### **"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 opening words of Section 31 create a presumption that a way has become a highway, the class of highway (footpath, bridleway or carriageway) depending on the use made of the way. However the above words emphasise that they create no more than a presumption which is rebuttable by evidence of a contrary intention.

The landowner must show sufficient evidence that there has been no intention to dedicate. This is often demonstrated by overt acts directed at users. However such acts are not strictly necessary if there is other sufficient contemporaneous evidence of a lack of intention.

A common method of showing a contrary intention is by a notice with such words as "Private road (or Private path), no public right of way" sometimes followed by a reference to the legislation current when the notice was erected. Section 31(3) confirms that such a notice, erected so as to be visible to users of the way, will be sufficient evidence of an intention that the way is not intended to be dedicated.

### **"The period of 20 years ... is to be calculated retrospectively from the date when the right of the public to use the way is brought into question"**

It might be thought that the 20-year period would start when use began, but this is not how the Act operates. The period is 20 years calculated backwards from the date when the right of the public to use the way is "brought into question" by the landowner (or his agent) doing some act that challenges the public's right to use the way. So the 20-year period of use has no fixed starting point, only a fixed finishing point.

### **Bringing the right to use the way into question**

Acts that would bring the public's right to use the way into question include the following:

- (a) Locking a gate, so as to prevent public use.
- (b) Putting up a notice denying the existence of a right of way.
- (c) Physically preventing a walker from proceeding along a path.
- (d) Bringing an action for trespass (for damages or for an injunction to prohibit future use).
- (e) Seeking a declaration from the court that the way is not public.
- (f) Opposing an application for a definitive map modification order that adds the way to the definitive map or lodging an objection to such an order.

In *Owen v Buckinghamshire CC (1957)* it was held that the ploughing-up of a path was not sufficient to bring the right of the public to use the path into question.

The effect of a notice denying right of way status should be noted. If after, say 10 years' use of a path a landowner puts up such a notice, this rebuts any presumption of dedication and even if the public uses the path for a further 10 years, no right of way will arise by virtue of the Act.

It should also be appreciated that in some instances an act which brings the right of the public to use a way into question could also be considered an act which demonstrates a lack of intention to dedicate.

### **Incapacity to Dedicate**

Any dedication will be ineffective if the person in possession of the land does not have the capacity to dedicate a highway. A landowner may be able to show title would preclude dedication e.g. lessees, the Church, Charities prior to 1993. Certain public bodies operating within specific statutory provisions do not have capacity and implied dedication will not arise if the existence of a public right of way would be incompatible with the purposes of a corporation or other body or person in possession of land for public or certain statutory purposes. The question whether the power to dedicate is incompatible with the owner's statutory objects is a question of fact and is to be assessed by reference to what can reasonably be foreseen.

### **Presumed Dedication at Common Law**

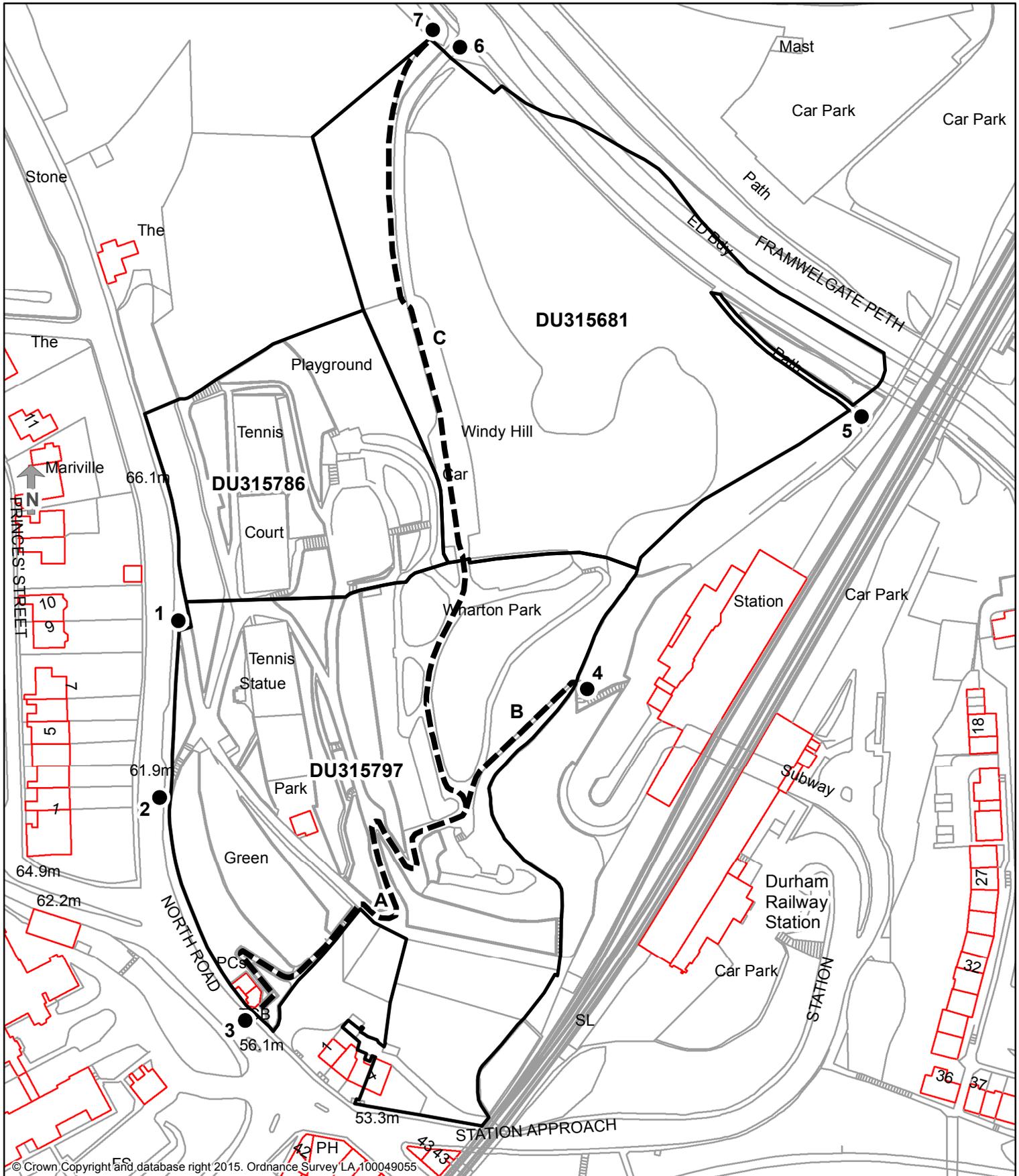
The provisions of Section 31 of the Highways Act 1980 do not supersede the principles of implied dedication at common law. Indeed Section 31 (9) expressly preserves these principles.

At common law a landowner must have an intention to dedicate a right of way over his land. Public user may be evidence from which that intention may be inferred. However mere tolerance will not be sufficient.

It is for the claimant to prove that it can be inferred from the landowner's conduct that he actually dedicated the route as a public right of way.

The length of time necessary to demonstrate sufficient use will depend on the circumstances. Generally the more intensive and open the use of the route by the public, the shorter the period that will be necessary to raise an inference. In one case, 18 months was held to be sufficient.

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- Access Points**
- 1 : North Road vehicle entrance
  - 2 : North Road historic pedestrian entrance
  - 3 : North Road pedestrian entrance adj. to toilets
  - 4 : Railway Station pedestrian entrance
  - 5 : Railway Station footpath (outside Park)
  - 6 : Framwellgate Peth vehicle entrance
  - 7 : Framwellgate Peth gap (pedestrian)

Scale 1: 1750

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Footpaths included in the application **Page 21** — —

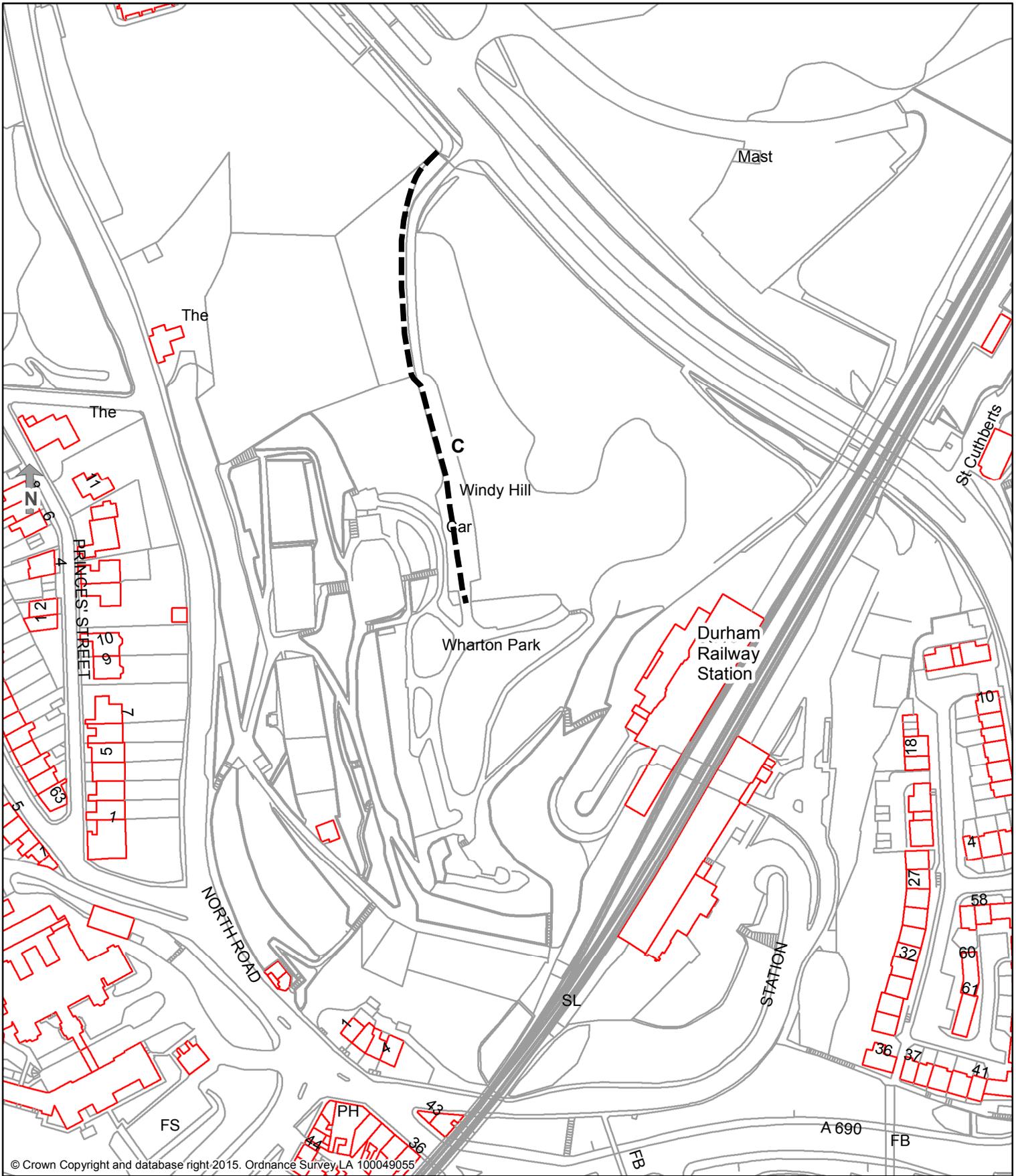
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# Summary of user evidence

## Wharton Park DMMO application - User evidence provided - summarised by DCC ROW

Title	Surname	Forename	Path A				Path A & B		Path A & C		Path C & B			Ever encountered locked gates at...		Ever encountered a notice limited or forbidding access to A, B, or C?	Comments...
			Purpose of use	Yrs of use	No. of yrs	Used to access/exit park?	Used A & B? (North Rd to Station)	Used A, C & C? (North Rd to F.Path)	Used C & B? (F.Path to Station)	North Rd entrance to Path A?	Station entrance to Path B?	F.Path entrance (posts) to Path C?					
1	Rev & Mrs Attfield		Through route (to visit DLI on Sundays alternate weeks)	1970 to 1980 & 1995 to present	10 & 20	Y	Y	N	Y	-	N	N	N	N	N	Closure would prevent access to Battery	
2	Ms Conlong	Anna	Used to access station	1986 to present	29	-	Y	Y	Y	-	N	N	N	N	N	Seriously inconvenienced if closed	
3	Mrs Coppock	Fleur	Used as exit after using park	2000? to present	10	Y	Y	Y	Y	Y	N	N	N	N	N	V.sorry if path closed. Prob not visit park as much	
4	Ms Duffy	Lucy	Used to visit park & to access station	2011 to present	4	Y	Y	Y	N	-	N	N	N	N	N	Significant loss if removed	
5	Mr Ford	George	Used as access to park	2000 to present	15	Y	Y	N	N	-	N	-	-	N	N		
6	Mr Gosling	David	Used as access to park & as through route	1969 to present	46	Y	Y	N	Y	Y	N	N	N	N	N		
7	Mr Hayes	John	Station to relatives' home	2007 to present	8	Y	Y	Y	Y	-	N	N	N	N	N	Clearly a well used path in a park	
8	Mr Hayes	Peter	Used to access station & as through route	1993 to present	22	Y	Y	Y	Y	-	N	N	N	N	N	Well used route	
9	Mr Hird	Richard	Through route (County Hall to city)	1984 to 2004	30	Y	Y	N	Y	-	N	N	N	N	N	Should remain available for future public use	
10	Mr Humphries	Graeme	Used to access park & station	1999 to present	16	Y	Y	Y	Y	-	N	N	N	N	N		
11	Ms Ibbott	Linda	Used to access park	2004 to present	10	Y	Y	-	-	-	-	-	-	-	-		
12	Dr Ibbott	J Martin	Used to access park	2004 to present	10	Y	Y	-	-	-	-	-	-	-	-		
13	Mr Ramsden	David	Used to access station & park	1957 to present	58	Y	Y	Y	Y	-	N	N	N	N	N		
14	Mr Reed	Malcolm	Used to access station & park	1960 to present	55	Y	Y	Y	Y	-	N	N	N	N	N	Unacceptable severance of paths	
15	Ms Tayler	Janet	Used to access park	1975 to present	40	Y	Y	N	N	-	N	N	N	N	N	Obvious point of entry to park from city centre	
16	Mrs Wardle	Belinda	Used to access park & as through route	1978 to present	37	Y	Y	Y	Y	-	N	N	N	N	N		
17	Mr Roger	Wright	Used as part of running route	1975? to present	40	Y	Y	Y	Y	Y	N	N	N	N	N		

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**Footpath C  
(New Park section)**

Footpath route  
 - - - - -

Scale 1: 2,000

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