

## Highways Committee

### Definitive Map of Public Rights of Way



### Definitive Map Modification Order Application

### To delete part of Cassop cum Quarrington Footpath no 29

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### Joint Report of Colette Longbottom, Head of Legal and Democratic Services

### and Ian Thompson, Corporate Director of Regeneration and Economic Development

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#### 1.0 Purpose of the Report

- 1.1 To consider an application to delete part of Cassop cum Quarrington Public Footpath no 29 from the Definitive Map and Statement.

#### 2.0 General background

- 2.1 An application to delete part of Cassop cum Quarrington Public Footpath no 29 was submitted to Durham County Council on 25 April 2011 by Messrs Philip and Andrew Johnson of Quarrington Farm who have farmed the land since 1982. The section of the footpath subject of the application is shown at **Document A**.
- 2.2 Submitted with the application were a series of 11 letters and attachments between the applicants and the County Council for the period between 3 August 2010 and 19 February 2011. Additional supporting documents have also been provided including a supporting letter from the CLA (Country Land and Business Association), Ordnance Survey plans from 1857 to 2002, aerial photography from 1944, 10 witness statements and a commentary about the survey carried out prior to the publication of County Durham's first Definitive Map and Statement in 1952.
- 2.3 The section of footpath referred to in the application crosses land in the ownership of Messrs Johnson but also that of Redscape Limited.
- 2.4 Consultations have been carried out with other owners and occupiers of the land over which the path crosses, the local members, the Parish Council and the Ramblers Association. .
- 2.5 The general legal framework and considerations for modifications to the Definitive Map and Statement (DMS) are found in paragraph 3 of this report. 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.

### **3.0 Legal Framework**

- 3.1 Under the provisions of Section 53 of the Wildlife and Countryside Act 1981 (WCA), the County Council as Surveying Authority has a duty to keep the DMS under review by the making of Modification Orders. Section 53(3)(c)(iii) of the WCA, upon which the current application is based, refers to the discovery by the authority of evidence which (when considered with all other relevant evidence available) shows that there is no public right of way over land as shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.
- 3.2 The evidence necessary to demonstrate that a footpath does not exist would have to be relevant to the date when the path was first shown on the Definitive Map which in this case is 1952 when the first DMS for County Durham was published. The survey records for this footpath described in paragraph 4.3 of this report indicate the reason for the path's inclusion was 'unrestricted use for 20 years'.
- 3.3 The starting point for the decision maker is the presumption that the right of way depicted on the DMS exists as shown and as such the evidence needs to be of sufficient substance and cogency to displace the presumption that the DMS is correct. The burden of proof in this regard is firmly on those seeking to demonstrate that a public right of way should not be shown on the DMS.
- 3.3 Further, the evidence presented needs to be new. It cannot be a re-examination of evidence considered at the time the DMS was first surveyed and made.
- 3.4 There is a well established legal maxim that 'once a highway, always a highway'. Any public right of way (as a highway) can only be extinguished through a proper legal process such as a legal order. A path is not extinguished if it falls into disuse.
- 3.5 There is a conclusivity provision relating to the DMS contained in the Wildlife and Countryside Act 1981 (WCA) in Section 56 which states 'where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map.....'

### **4.0 Documentary Evidence**

- 4.1 The earliest known document confirming the status of Cassop cum Quarrington Footpath 29 as a public footpath is a diversion of the path in 1912. An order was made by the Quarter Sessions (Justices of the

Peace) on 14 October 1912 to divert this and other Footpaths to enable an extension to Bowburn Brickworks. The Order and plan are shown at **Document B**. The documentation is held by the County Records Office.

- 4.2 It was not until 1952, following the National Parks and Access to the Countryside Act 1949, that County Durham first published a Definitive Map and Statement (DMS) as a statutory requirement of this legislation. Cassop cum Quarrington Footpath 29 has been depicted on all of Durham's DMS since that time.
- 4.3 Prior to the publication of the first DMS on 1 November 1952 a survey of all paths was carried out, normally by Parish Councils and often in conjunction with the County Surveyor. The survey normally indicated information including a path's start and finish point, a description of the route, its stiles and gates and other information such as why the path is considered public. For Cassop cum Quarrington Fp 29, it was considered to be public due to 'Unrestricted use for 20 years'. This is shown at **Document C**.
- 4.3 The paths included in the survey were carried forward to the 1952 DMS, unless they had been successfully challenged when the 'draft' and 'provisional' maps were produced for consultation prior to the DMS's final publication; landowners being able to object to both these stages of the consultation. There are no records indicating that there was ever any objection to the depiction of Cassop cum Quarrington Fp 29 on the DMS at either of these stages. The DMS from 1952 are shown at **Document D**.
- 4.4 Cassop cum Quarrington Fp 29 was consistently shown on all of the reviews of the DMS carried out under the 1949 Act. These occurred in 1957, 1962 and 1967.
- 4.5 Following a change in legislation, the Countryside Act 1968, Durham County Council carried out a further review of the County's DMS in 1979. Cassop cum Quarrington Fp 29 was shown on this DMS but it appears that a small realignment of the path took place, for no apparent reason, and accordingly, this is considered to be an administrative error. The path continued to cross through the same two fields, currently being an arable field of Messrs Johnson and a rough grazing field tenanted by Redscape. The 1979 DMS are found at **Document E**.
- 4.6 Cassop cum Quarrington Footpath 29 has continued to exist on the 1979 DMS line until the present day and including on the latest 'consolidated' DMS for the County published in 2010. In 2000 the County did endeavour to commence a Modification Order to adjust the line, in order to correct the administrative error from 1979, but this was resisted by Messrs Johnson who preferred their viewpoint that another

route (on an adjoining owners' land) and used by the public is the correct line of the footpath (referred to as the railway cutting route).

- 4.7 It is important to note that the current application for consideration is not an application to realign the footpath to its pre 1979 location but an application to delete or extinguish it altogether. Furthermore, the existence of an additional footpath along the railway cutting route is an entirely separate matter

## **5.0 Consultation Responses**

- 5.1 Consultation responses are found in **Document F**. The local members, Redscape Limited and the Ramblers have objected to the application whilst the Parish Council has stated that it is unable to make a judgement.

## **6.0 The case put forward by the applicants**

- 6.1 The applicant has submitted the following evidence/reasons which are found in **Document G** and include the following:
- a *Lack of use since 1982*  
Since 1982 no member of the public has ever used the footpath and no one claims to have done so.
  - b *Use of another route - the railway cutting*  
Since at least 1982 people have used the alternative railway cutting route of which there is evidence in support of it having acquired public footpath status. The applicant goes further to state that this is the route that the Council agrees Footpath 29 should follow and that this is also the view of the Parish Council. The applicants state that they have been advised by the County Council that there is no public footpath over the route of Cassop cum Quarrington Footpath 29.
  - c *Taking land out of agricultural production*  
The footpath would take at least 300sqm out of agricultural production which could be more sensibly and productively directed at producing food.
  - d *Errors due to 1952 survey drawn onto 1923 map*  
A letter from the CLA supporting the position that the 1952 survey, having been drawn onto a 1923 map which indicated buildings no longer in existence introduced errors in the Definitive Map.
  - e *The lack of a footpath on OS maps*  
Ordnance Survey maps dated 1857 to 2002
  - f *Lack of a visible footpath on 1944 aerial photo*  
Aerial photograph from 1944 which shows no evidence of a route used by the general public

- g *Witness statements indicating a lack of use of a footpath*  
10 witness statements which include recollections between the 1930's to present. The witnesses state that they have never seen anyone use any path through the Johnsons' field nor any evidence such as footprints.
- h *Further errors due to 1952 survey drawn onto 1923 map*  
It is suggested that the path shown on the survey plan existed between around 1923 until some time before 1951 (the OS map from this date does not depict a footpath) but in any case there is no evidence that this was used by the general public who in any case had the use of the nearby railway cutting route.

## 7.0 Response to the applicants' case

- a *Lack of use since 1982*  
Statements about whether the path has been used since 1982 are not relevant to the issue of whether the path exists or not. The test for deleting a path requires an assessment of the evidence relating to the situation as of 1952 i.e. when the path was first recorded as a public right of way.
- b *Use of another route - the railway cutting*  
It is accepted that there is another route 'the railway cutting' used by pedestrians nearby. The applicants have sustained their view that this is indeed the route of footpath 29 and suggest that this is agreed by the County and Parish Councils. The County Council has never agreed this and has on several occasions explained in writing as well as in person to the applicants that the railway cutting route is a separate issue which does not have any bearing on consideration of whether Footpath 29 exists. The Council has also apologised to the applicants on several occasions for the erroneous wording of a letter to them of 18 May 2000 which stated that 'there is no public footpath over the route' and has re-iterated the conclusivity provision of the DMS set out at paragraph 3.5 of this report. Despite this, the applicants continue to place reliance upon the erroneous letter from May 2000. The Parish Council's most recent position is set out in para 5.1 and **Document F**.
- c *Taking land out of agricultural production*  
The effect of a footpath on agricultural production is not a pertinent point when considering whether a public footpath exists.
- d *Errors due to 1952 survey drawn onto 1923 map*  
The CLA letter makes what is considered to be a general point that errors can occur due to the use of out of date maps. It states that doubt is cast upon whether the surveyor had walked the path at all as the features mentioned in the survey of 1952 were not present on the ground at that time. It is possible that the 1923 map used was the

most up to date available at the time of the survey. We know that there was not a 1939 map covering the whole of the footpath and the 1951 map provided by the applicant has a copyright date of 1952 so may not have been available at the time of the survey which took place during the summer of 1952. The letter does not however comment specifically on this particular case and offers little more than a repetition of the facts as presented to the author and very general observations on some of the difficulties with the DMS that can be experienced nationally. In the circumstances, little weight can be afforded to the letter in the assessment of the current application.

e *The lack of a footpath on OS maps*

The Ordnance Survey (OS) maps span the period 1857 to 2002 and depict the change in landuse in the area. Some caution should be taken with OS maps as they depict what is visible on the ground and information on them does not per se indicate the status of any paths that may be depicted. Little of significance can be gleaned from the 19<sup>th</sup> century maps as we know from the 1912 diversion order referred to at paragraph 4.1 of this report that the paths in the vicinity of the brickworks were re aligned. The 1919 and 1923 maps appear to support the view that the diversion in 1912 had taken place on the ground as the footpath is depicted on these maps. For the 1939 map the OS only produced a sheet showing the southern part of the path (a complete set of these maps was never produced for the whole County) but this still depicted the 1912 diversion route. The more contemporary maps from 1951 onwards gradually do not show the footpath. The 1951 map shows the western end of it (through what is now Redscape's field) but not through the field now farmed by the Johnsons. From the 1960's onwards the maps do not show the path through either of the fields, although in the 1960's and 1980's, a path is shown following the southern boundary of the two fields. It would therefore appear that the path was no longer visible to the OS surveyors during these more contemporary surveys. However, public rights of way still exist even if the OS does not show them as visible features. The fact that a public footpath may fall into disuse at any time does not alter its status as a public footpath.

f *Lack of a visible footpath on 1944 aerial photo*

The aerial photograph from 1944 most clearly shows the Johnson's field whereas there is cloud obscuring Redscape's. It is accepted that a trodden path is not visible through the field although this, like the OS maps, cannot demonstrate that a public right of way does not exist. The photo merely shows that a path is not visible on the ground in 1944.

g *Witness statements indicating a lack of use of a footpath*

The 10 witness statements provide recollections of the footpath and surrounding area since the 1930's. The witnesses are mainly those who have walked in the area and/or played on the nearby railway cutting as children while 2 have specifically done farm work - 1 helping

his father to work the field now owned by Johnsons between 1952 and 56, the other working this or nearby fields between 1953 and 1970. They state that from 'the track' (locally known as Ramsey's Drive or otherwise as Bridleway no 38), or in doing farm work nearby, they never saw anyone using any paths in the field now farmed by Johnsons nor any evidence such as footprints. As the path was first registered in 1952, the relevant period under consideration is the 20 years immediately preceding this (see para 3.2 of this report). There are 6 witnesses who have evidence directly relating to this period as follows:

1930's	1 witness (Laing T)
1940's	3 witnesses (Gardiner, Hall and Laing JH) for this whole decade 2 others from the mid to late 1940's onwards (Robinson S and Sinderson)
1950-2	3 witnesses (Gardiner, Hall, Robinson S and Sinderson).

Although these witnesses do state that they cannot remember the footpath ever being used, with the exception of Mr T Laing, they do not cover the whole period of 1932 – 1952. There is therefore a significant gap in evidence for the 1930s with Mr T Laing being the only witness who can provide evidence from that decade. Furthermore, all of the witnesses (except Mr T Laing) were children for the whole of the relevant period and Mr T Laing was himself only 6 years old at the start of the relevant period in 1932. In the circumstances, it is considered that only limited weight can be attached to the recollections of such young children. Given the ages of the witnesses and the lack of evidence from the 1930s, it is not considered that sufficient evidence has been produced by the applicants to displace the presumption that the footpath exists, based upon 20 years use as of right prior to 1952. In any event, the witness evidence may be seen as irrelevant because the 1912 diversion informs us that a public footpath existed as of that date and a lack of use could not cause the public footpath to lose its status. This would only be possible by means of a legal event such as a diversion or closure order. The witness statements are therefore not considered to be of sufficient substance and cogency in themselves to displace the presumption that the footpath exists. Any evidence about usage in the period after 1952 is not relevant to a consideration of whether the path already existed in 1952. Further, or in the alternative, the footpath existed as of 1912 and no stopping up, extinguishment or diversion Order has been produced by the applicants, nor is any such order known to exist.

h *Further errors due to 1952 survey drawn onto 1923 map*

It is thought likely that the 1952 survey was depicted on the most up to date OS map available at that time as described at paragraph 7.0d of this report. However, even if that is not so, no error was introduced by use of an older map as the footpath route is that of the 1912 diversion and as depicted on the 1919 OS map. If the surveyor had meant to draw the path on the nearby railway cutting then this would have been

evident in the description contained on the survey sheet accompanying the map which makes no reference to the path following along the railway. It would have been necessary for an order or other legal event to have taken place for the footpath to have ceased to exist as of 1952 and no such records have been produced by the applicants.

## **8.0 Recommendations and Reasons**

- 8.1 The relevant test in considering whether the footpath should be deleted lies in Section 53(3)(c)(iii) of the WCA which requires the discovery of evidence that there is no public right of way over the land. This is the test that must be applied to the determination of the current application and specifically, that in 1952 the footpath had been erroneously recorded on the DMS.
- 8.2 There is a presumption that the right of way depicted on the DMS exists as shown and as such the evidence needs to be of sufficient substance and cogency to displace the presumption that the DMS is correct. The burden of proof is firmly on those seeking to demonstrate that a public right of way should not be shown on the DMS.
- 8.3 The applicant has submitted evidence and reasons why it is said a footpath does not exist. The main thrust being that the footpath is not shown on certain OS maps and the 1944 aerial photography, there is evidence from local people about a lack of usage of the path and that errors occurred in 1952 when the footpath was first recorded on the DMS.
- 8.4 The 1912 diversion order and the DMS history for Cassop cum Quarrington Fp 29 all point to a public footpath existing. There is no evidence that in 1952 when the first DMS for County Durham was published that there was any query or dispute about the path's existence despite opportunities for objections to be lodged at that time. The Witness evidence submitted by the applicants is not sufficient to displace the presumption in favour of the existence of the footpath (see paragraph 3.3 of this report). Further, or in the alternative, bearing in mind the legal maxim 'once a highway, always a highway' as described in paragraph 3.4 no evidence of a legal event such as a closure or a diversion of the footpath having taken place since 1912 has been produced by the applicants or is known to exist. It is accepted that in 1979 a minor realignment of the footpath occurred, however, this is a different issue to that which arises with this deletion application and in any case has been previously resisted by the applicants.
- 8.5 On balance it is considered that in 1952 Cassop cum Quarrington Footpath 29 already existed and was correctly depicted on the DMS. The 1912 diversion order indicates the existence of a public footpath and in the 1952 survey the reason for the path's inclusion as a public footpath was 'unrestricted use for 20 years'. In order to displace the presumption that a public footpath existed in 1952 evidence of greater



weight would need to be presented such as an order extinguishing or diverting the path. No such evidence is known to exist. Issues such as a lack of use or not being depicted on OS maps cannot cause an already existing public footpath to be extinguished or lost.

- 8.6 In conclusion, it is considered that the applicants have not submitted sufficient evidence to rebut the presumption that Cassop cum Quarrington Footpath 29 exists.
- 8.7 It is recommended that the application to delete part of Cassop cum Quarrington Footpath 29 be refused for the reasons set out in this report.

#### Background Papers

F:\Rights of Way\Modification Orders\Cassop applications\Delete part of Fp 29

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#### List of attached documents

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|-------------------|--|
| <b>Document A</b> | Copy of Definitive Map showing section of Cassop Footpath no 29 subject to the Definitive Map Modification Order Application |
| <b>Document B</b> | Copy of 1912 Diversion Order and plan  |
| <b>Document C</b> | 1952 Survey sheets and map - prior to the publication of 1952 Definitive Map and Statement                                   |
| <b>Document D</b> | 1952 Definitive Map and Statement  |
| <b>Document E</b> | 1979 Definitive Map and Statement  |
| <b>Document F</b> | Applicants' submissions in support of Definitive Map Modification Order  |
| <b>Document G</b> | Responses to consultation  |

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## **Appendix 1: Implications**

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### **Finance**

Not applicable to the decision

### **Staffing**

None

### **Equality and Diversity**

None

### **Accommodation**

None

### **Crime and disorder**

None

### **Sustainability**

None

### **Human rights**

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.

### **Localities and Rurality**

None

### **Young people**

None

### **Consultation**

As described in paragraph 5 of the report

### **Health**

None