

## Special Highways Committee

31 January 2013



### Proposed Definitive Map Modification Order to add a footpath to the Definitive Map and Statement

Hamsterley Mill, B6310 to High  
Hamsterley Road

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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 a proposal to modify the Definitive Map and Statement of Public Rights of Way.

#### 2.0 Background

- 2.1 In February 2012 the Rights of Way team was alerted by local residents about the obstruction of this path by tree cuttings, a wooden fence and stacked up paving slabs which had been removed from the surface of the path by the owner of the land.
- 2.2 The path is 29 metres long and follows in a north – south direction from the stub of the cul de sac of High Hamsterley Road between nos 17 and 20 to join the B6310. The path crosses a grassed area between these 2 properties before reaching 9 steps with a handrail leading up to the B6310. Prior to February 2012 where the path crossed the grassed area it was constructed with a double line of paving slabs, being 1.2 metres wide. The location is shown on the plan at **Document A**.
- 2.3 The proposal to record the path as a public footpath has been supported by evidence of usage. 106 people have completed user evidence questionnaires detailing their use of the path over a period of time. The oldest recollection dating to the early 1950's. Formal Statements have been taken from 11 of these path users. These statements and a summary of the forms are attached at **Document B**.
- 2.4 The path crosses land which is part of 17 High Hamsterley Road and has been in its current ownership since 1992. The owner has been consulted and indicates that she objects to the registration of the path as public footpath. Her submissions are shown in **Document C**.

- 2.5 In addition to the owner, consultations have been carried out with Local Members, the Ramblers Association and the utilities. Responses have been received from the utilities who do not object to the proposals. No other responses have been received to the consultation

### **3.0 Legal Framework**

- 3.1 The briefing note attached at **Document D** 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. The evidence 'discovered' by the County Council in this case is the evidence of use of the path submitted by the public.
- 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 obstruction of the path in February 2012 is considered an interruption to usage sufficient to bring the right of public use into question. The owner also states that the path was obstructed in 1992. The 20 year period must be calculated retrospectively from one of these dates. This is discussed further in the report.

### **4.0 Evidence of use**

- 4.1 In total, 106 people have provided evidence of pedestrian use of the route spanning the period from the early 1950's to present. Of these users 49 people state they have used the path for the 20 years from 1992 – 2012 and 12 people from 1972 – 1992. Of the total users 89 people are from the main Hamsterley Mill estate, 14 from Parklands and 3 who live elsewhere locally. Some users have mentioned that they have cycled the route but it is considered that the presence of the steps would not make it possible for the whole route to be cycled so it would not be possible to acquire rights for cyclists.
- 4.2 The evidence of usage consistently describes that the footpath was open and available right up until February 2012. None of the users recall any obstructions up until then nor that anyone had been given permission or been challenged in any way.

- 4.3 Usage of the route can be divided into those using it for leisure to gain access to walks along the Derwent Walk and Hamsterley Hall area and those using it for the specific purpose of reaching the bus stops and the post box on the A694. The latter utility usage only includes those on the Parklands estate.
- 4.4 The users who were interviewed by Officers and provided Statements were unclear as to when the paving slabs or handrail were placed in the path. The most elderly witness (no. 44) who has lived on the estate since the late 1940's believes that the steps were constructed on instruction from Lord Gort (a previous landowner) around 1960.

## 5.0 Documentary Evidence

- 5.1 Little can be gleaned from maps and documents predating the building of the Hamsterley Mill estate, as prior to the building of the estate (bulk built in 1960's) the land was fields and woodlands. The parcel of land over which the path passes resulted from the laying out of the estate. The parcel of land is consistently shown on modern maps, including that shown at Document A, as a rectangular strip, however, nothing can be deduced from these as to the status of the path.
- 5.2 The Hamsterley Mill Residents Association appear to have been actively interested in local footpaths and have provided copies of AGM minutes relating to maintenance they have carried out on the footpath. In the minutes from their April 1994 AGM it is reported that they had replaced the handrail on the path over the previous year and at the April 1990 AGM that an all weather footpath had been laid. It is likely that this refers to the paving slabs. The 1990 works followed an item in the 1988 minutes where it was noted that their request to Derwentside District Council for an all weather path had been turned down. 'The reason given is that this work would conflict with the Council's present policy which is to use all the available resources on the repair of existing paths and roads'. These minutes are shown in **Document E**.

## 6.0 Objections/Rebuttal Evidence

- 6.1 The owner has provided information about the footpath and the land it crosses and considers that the path cannot have acquired public footpath rights. Her submissions include the following and are found in **Document C**
- 6.2 She confirms that she bought the land in March 1992 and there was no physical footpath denoted on any plans when she bought it. She says that at that time the land was very wild and overgrown and that there was no concrete path or handrail. The steps were obscured by overgrown bushes. She states that in 1992 she cleared the land and erected fencing along her boundary. However, at that time she was informed by an enforcement officer from the Council that she could not have her fence in this position because of the footpath. She therefore moved it back. This alteration of the fence line is confirmed by the builder from that time. The original fence was in place for 3-4 days. She also states that between 1998 and 2000 the Hamsterley Mill Residents Association arranged for the laying of the concrete slabs, the widening/opening of the steps and installation of a handrail, without

consideration of her as owner. She includes a recent letter from the previous owner of her property stating that when she lived there (pre 1992) there was not a concrete path in place.

Response

*The ownership of the land is a matter of public record and is not therefore in dispute. The owner indicates that in 1992 there were steps leading from the B6310 onto the land although it is suggested that the land was very overgrown. The evidence of obstruction of the footpath in 1992 appears to conflict with the user evidence as none of the users can recall any such obstruction at that time.. Although the owner asserts that the obstruction existed for 3-4 days, it is surprising that, having regard to the regularity of the usage put forward, no one has any direct recollections of the route being obstructed or closed at that time. In any case the owner indicates that she moved her fence so that it was along her boundary rather than specifically for the purpose of blocking the footpath which would be necessary to be considered an interruption to usage. There is also a conflict of evidence as to the laying of the concrete slabs as the owner states these were laid between 1998 and 2000 together with the installation of a handrail. The former owner of 17 High Hamsterley Road (until 1992) also recalls that there was not a concrete path while she was resident and also comments that the grassed area had always been kept well mown by her husband. However, the minutes of the Residents Association AGM of April 1994 indicate that the slabs were laid in the previous year, 1993/4, and the April 1990 minutes that a handrail was replaced 1989/90. In terms of whether a public right of way has been established the exact timings of the laying of concrete slabs and replacement of the handrail are not crucial but do seem to reflect that there was demand for such facilities due to usage of the path and did not lead to any objection by the owner until recently. These issues can only be resolved at a Public Inquiry where the competing evidence will be tested.*

- 6.3 A copy of an 'Abstract of Title' for 17 High Hamsterley Road from 1959 is provided that reads'...conveyed unto the Purchasers.....all that piece of land.....AND TOGETHER with right of way for the Purchasers.....on foot and with or without horses carts and other carriages including mechanically propelled vehicles over and along the road or roads leading from the said piece of land to the public highway from Newcastle upon Tyne to Shotley Bridge for access to and egress from the said piece of land from and to the said public highway

Response

*The title document relates to the sale of the property in 1959. If it was a common clause for all the properties in Hamsterley Mill it could have functioned as an easement. Although the roads on the estate were adopted by the County Council as publicly maintainable highways in 1987, that would not extinguish the private easement which would effectively co-exist from that time onwards with the public highway rights. However, the easement did not encompass a right to use all the roads on the estate, just those necessary to reach the A694 and crucially, it only relates to a right of way to gain access from the property to the A694 (Newcastle Shotley Bridge road) so could never have related to the footpath as this was never a 'road' but a 'grass verge'.*

- 6.4 From the Abstract of Title a restrictive covenant was imposed on the sale of plots to the effect that the purchasers 'would not use the grass verge in front of the site for any other purpose than as a grass verge and will not do or permit or suffer anything to be done to prevent or interfere with the maintenance as such by them'.

Response

*The restrictive covenant makes specific reference to the use made by the purchaser of the grass verge. The purchaser's own use of the verge would not affect how any other persons may use the verge nor prevent the acquisition of public rights. The covenant appears to be concerned with ensuring that the verges remain as grassed areas.*

- 6.5 The main road into Hamsterley Mill Estate had a Private Road sign erected on it for the period 1949 -1987 when the estate roads were adopted. Prior to 1987 the footpath would therefore not have run from a highway to another highway. Use during the period 1972 – 92 was not by the public at large and the 12 people who had used the path for this full period were from an exclusive group ie the residents. In the period post 1987 the Hamsterley Mill Residents Association had had requests declined by Derwentside District Council to provide the path as an all weather surface (1988 AGM mins) and to replace the handrail (1994 AGM mins).

Response

*There is no direct evidence provided that a Private Road sign existed and in any case the sign could certainly not be interpreted to relate to the footpath as it is not a road. It is also doubtful that such a sign would have been sufficient to demonstrate a lack of an intention to dedicate by the landowner for all classes of public right because of its ambiguity: the words could merely be interpreted as showing an intention to deny the existence of a carriageway. However, its existence would appear to be consistent with the right of way referred to in the title of 17 High Hamsterley Road. It is not accepted that the lack of adoption of High Hamsterley Road prior to 1987 is in itself sufficient to indicate that the footpath prior to this date could not have acquired public rights because of a lack of 'public' termination points. The B6310 has been a public highway for longer than the Hamsterley Mill estate has existed and use of the estate roads, over and beyond any rights to reach the A694, even by residents would have established public rights. Evidence of Derwentside District Council declining to carry out footpath works is not sufficient to be interpreted that footpath rights do not exist. It is likely to represent a pragmatic response to a request for works that the Council had no statutory responsibility for as the former Derwentside District Council was not the Highway Authority.*

## **7.0 Recommendations and Reasons**

- 7.1 It is Officers' view that there is sufficient evidence that a public right of way on foot is reasonably alleged to subsist on the basis of acquisition by statutory deemed dedication under Section 31 of the Highways Act 1980 whether the date of interruption is taken as 2012 when tree branches and other items were placed across the path or in 1992 when the owner states that she placed fencing across it.

This is because the most contemporary 20 year period (1992-2012) includes evidence of continuous use by 52 people and the earlier period (1972-1992) by 11 people.

- 7.2 It is accepted that the footpath has steps and a handrail and was paved with concrete slabs, the latter having been removed in February 2012. Although there is a conflict in evidence as to the dates of repairs or new works, the essential issue is whether the claimed way was used by members of the public as of right over the relevant 20 year period rather than the existence or otherwise of the paving slabs and handrail at any given time. However, their existence does tend to suggest that the path was used. There does not however appear to be a dispute that the steps were constructed, possibly in the 1960's.
- 7.3 There is a conflict of evidence as to the 1992 fencing works. If it is accepted that the path was blocked for a few days, it appears that the motive for the proposed fencing was to realign the property's boundary rather than to prevent use of the footpath. Indeed at the time of moving into the property in 1992 the owner indicates that the steps were obscured by overgrown bushes and the land wild and unkempt. For the purposes of Section 31 of the Highways Act 1980 it is considered that the 1992 actions stated by the owner are not sufficiently clear to amount to either an interruption or a lack of intention to dedicate the path. It is accepted that the actions of the landowner in February 2012 in blocking the path would be sufficient to demonstrate a lack of intention to dedicate. However, if it is the case that the fencing works were undertaken in 1992 and that the intention of the landowner in doing so was to obstruct or prevent public access, then there would be a break in the continuity of the user evidence such that as of February 2012 when the footpath was obstructed by the landowner, a full 20 years had not elapsed.

This issue is something which is only likely to become clear in the context of a Public Inquiry (assuming that the owner objects to any Order which may be made by the Council, thereby necessitating the holding of a Public Inquiry). However, it is not necessary for Members to reach a firm conclusion one way or the other on the issues of whether the path was in fact blocked in 1992 or what was the intention of the owner in doing so at this stage because firstly, it is sufficient if Members are satisfied that the path is no more than *reasonably alleged* to exist as a public right of way (which is a lower threshold test to be met than whether there is sufficient evidence to establish that the right of way *does* exist) and secondly, there is ample evidence of user as of right over the 20 year period immediately preceding 1992 i.e. 1972 – 1992. Therefore, even if it is considered that there was an interruption adequate for Section 31 of the Highways Act 1980 in 1992, the Modification Order should still be made.

- 7.4 It is considered that there is insufficient evidence contained in the Abstract of Title to support the assertion that the Hamsterley Mill Estate was entirely a private estate and use of all the roads by all residents was by virtue of a right of way granted by Lord Gort, until the roads were adopted in 1987. However, even if that were the case, the private rights of way (easements) granted did not relate to the claimed footpath. Nor is it accepted that a public right of way could not be acquired, over land connected at one end to one of these roads.

- 7.4 In conclusion, on the balance of probabilities, taking into account the above matters, it is considered that sufficient evidence exists for a presumption of dedication under the provisions of Section 31 of the highways Act 1980 and at common law. It can be reasonably alleged that a public footpath subsists either on the basis of 20 years usage as of right for the period between 1972 - 1992 or between 1992 - 2012. Accordingly the requirements of Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 have been fulfilled.
- 7.5 It is therefore recommended that a Modification Order be made under the Wildlife and Countryside Act 1981 to add a public footpath along the route shown in Document A to the Definitive Map and Statement

#### **Attached Documents**

<b>Document A</b>	Plan showing location of the footpath
<b>Document B</b>	Summary of user evidence forms and more detailed statements from 11 people
<b>Document C</b>	Submissions made by owner
<b>Document D</b>	Briefing Note for Committee on Definitive Map Modification Orders
<b>Document E</b>	Minutes of Hamsterley Mill Residents Association Minutes from 1988, 1990 and 1994

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## **Appendix 1: 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** – 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 legal process by which changes are made to the Definitive Map and Statement. If the Modification Order is made and the landowner objects, there will be a need for the Secretary of State to hold a Public Inquiry at which all parties will have an opportunity to be heard and produce evidence, in order to inform the decision whether or not to confirm the Order.