

Highways Committee

24 July 2015



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

Wharton Park, Durham

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

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supported by evidence of usage (17 user evidence questionnaires recording 18 people's use of one or more of the paths), historical documents and photos.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

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

Contact:	Audrey Christie	Tel: 03000 265332
	Laura Renaudon	Tel: 03000 269886

Implications

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

	Contents
A	<i>Definitive Map Modification Order Application</i>
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>
C	<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>
D	<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>
E	<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>
F	<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>
G	<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>
H	<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>
J	<i>Ordnance Survey County Series Maps: 25" to the mile 1856-7 (1st Edition) 1896 (2nd Edition) 1919 (3rd Edition) 1939 (4th Edition) 1:10,000 scale 1979</i>
K	<i>2015 Photographs of Wharton Park paths, entrances, gates and signs</i>
L	<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>

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