Definitive Map and Statement Modification Order Application

Long Row, South Tyneside

Objector's Submissions

Note: These submissions should be read with the bundle (**the Bundle**) submitted herewith. Where page references are given below they are to pages of the Bundle .

1. Introductory These submissions are made on behalf of owners of property at Long Row potentially affected by the DMMO application on whose behalf [redacted] provided a "Response on behalf of the owners and occupiers of 30-66 Long Row" dated 13 January 2023.[1] (**the Objector**). They are made with the permission of South Tyneside Council (**the council**) which is the surveying authority under the Wildlife and Countryside Act 1981 (**the 1981 Act**) charged with keeping its definitive map and statement (**DMS**) up to date.

2. Overview of the facts and issues An application was made on 29 July 2022 to add a public path (**the claimed footpath**) to the DMS. The applicants, the Friends of Market Dock Pathway (**the Applicant**) made their application (**the Application**) acting under section 53(5) of the 1981 Act. The council responded by asking Mr Robin Carr (**Mr Carr**) of Robin Carr Associates to write a report (**the Carr Report**) on the Application. Mr Carr did so on 29 March 2023. He recommended that the council should make an

[1] Included as Appendix RC14 (together with Appendices) to Mr Carr's Report at pp 348-352 and 353-496.

order adding the claimed footpath to the DMS. The Carr Report has 14 Appendices marked RC1 to RC14. The Appendices run to nearly 500 pages. Appendix RC1 (**RC1**) is a plan, based on OS mapping, which is appended hereto for ease of reference. RC1 shows the claimed footpath between points A (**point A**) and B (**point B**) marked thereon. See also those same points on the plans at pp 1.0, 2.0, 3.0 and 4.0 of the Bundle.

3. These submissions address the question whether Mr Carr was right to advise as he did. They respectfully conclude that he was not right to do so, whilst acknowledging that he did not have the benefit of the evidence (now comprised in the Bundle) which the Objector has prepared since Mr Carr prepared the Carr Report (**the New Evidence**). It is submitted that the New Evidence establishes incontrovertibly that it was impossible to use the whole of the claimed path for passage except in two more or less equal periods:

(A) The First Period: from a date in late 1998 or early 1999 to May 2007; and

(B) The Second Period: from August 2008 to December 2016

making a maximum total of about 17 years.

4. (1) Before the beginning of the First Period, a section of the claimed path lying south of point A was still covered by sea water (see pp 1.3, 2.4-2.15). (The sea was filled in and the surface of the old dock raised between late 1998 and early 1999). Between the end of the First Period in May 2007 and the beginning of the Second Period in August 2008, the claimed path was entirely barred to public passage over most of its length between points A and X1 on the plan at page 3.0. (See pp 3.1-3.6 and 3.9, 3.10 and 3.12).

(2) During the First Period, therefore, passage along the whole of the claimed path was possible, but for about 15 months after the end of the First Period (i.e. May 2007 – August 2008) it was not, because passage between points A and X1 was impossible.

(3) From the beginning of the Second Period (August 2008) to the end of the Second Period (December 2016), passage along the whole of the claimed path was again possible but again ceased to be so in December 2016, between points A and X2. (For the situation on the ground between points A and X2 in December 2016, see for example pp 4.1-4.5). See also the 6 witness statements in section 4 of the Bundle (and the attachments thereto) at pp 4.11, 4.13, 4.24, 4.30, 4.40 and 4.46. Not only was the claimed path barred from December 2016 between A and X2, the fencing was later (i.e. in September 2017) extended to point B so that the public ceased from that time to have access to any of the claimed path. X1 and X2 are different points; the claimed path was blocked at X1 during the 2007-08 closure and at X2, some 10m to the south, in December 2016.

(4) 9/10 months after December 2016, i.e. in September 2017, passage ceased to be possible along any of the claimed path A-B. See for example the statement of [redacted] at pp 4.24-4.29 and the statement of [redacted] at pp 4.40-4.41.

5. The fact that most of the claimed path (i.e. A-X1) was barred to public passage between May 2007 and August 2008 is fatal to the Application insofar as based on section 31 of the Highways Act 1980 (**the 1980 Act**) (as to which see further below). The barring of the claimed path in that period is also fatal to the Application insofar as the Application is based on the concept of dedication at common law. The plans, aerial photographs and statements contained within the Bundle demonstrate *inter alia* that (as pointed out above) there was at most a total of 17 years of public use but that this was not a continuous such

period because it was interrupted for about 15-16 months between May 2007 and August 2008. Mr Carr speculated at paragraph 9.13 of the Carr Report[2] that "access in some form or other was maintained" to permit public passage along the claimed path during the dock clearance works which took place in the late 1990s and the subsequent development which took place in 2007/2008. There is however a photograph dated 15 May 1998 in the Bundle at pp 1.3, 2.4-2.15 which shows the sea still not filled in. Consequently the whole of the claimed path only became usable at some time after that date. (There is a photograph dated 19 March 1999 at p 2.2 showing the sea by then filled in). Photographs in section 3 of the Bundle and accompanying statements confirm that the development site was enclosed by hoarding between May 2007 and August 2008. Photographs in section 4 of the bundle show that the development was again enclosed, this time by heras fencing, in December 2016. Consequently a claim under section 31 cannot succeed. See further below.

6. Mr Carr (rightly) did not suggest that the claim could succeed at common law if use was interrupted in 2007/2008. In other words, he (rightly) did not suggest that use as of right in either of the First Period or Second Period would have been enough by itself to support a dedication at common law. Moreover,

(1) He did not consider three important House of Lords decisions (discussed below) which demonstrate that it is almost impossible to discharge the burden, which the doctrine of dedication at common law requires, of proving that a landowner actually

[2] Paragraph 9.13 reads: "There could be no doubt that the clearance of the shipyard and dock site, and the subsequent redevelopment of the site must have had some impact on use of the Application route. It is however rarely mentioned within the user evidence, and this may be indicative that access in some form or other was maintained whilst the development was undertaken".

intended to dedicate a route as a public footpath, where some other reasonable explanation for the public use (such as that the objector tolerated the use) is available;

(2) He referred to the Objector's arguments based on lack of capacity to dedicate, but gave them scant consideration on their merits. Those arguments are, it is submitted, themselves unanswerable.

7. The defects of Mr Carr's analysis mentioned in paragraphs 5 and 6 above are further elaborated below. First, however, these submissions address (i) the statutory framework applicable where, as here, an application is made to add a new public footpath to the DMS on the basis that the public has used the path being claimed for a period and (ii) the key cases relevant to that framework.

8. <u>The statutory framework: section 53 of the 1981 Act and section 31 of the 1980 Act.</u>

These provide where material and with some emphasis in bold as follows:

<u>Section 53 of the 1981 Act</u>

Duty to keep definitive map and statement under continuous review

53(1) In this Part "definitive map and statement", in relation to any area, means, subject to section 57(3)

(a) The latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or

(b) Where no such map and statement have been so prepared, the original definitive map and statement prepared for that are under section 32 of that Act; or

(c) Where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).

53(2) As regards every definitive map and statement, the surveying authority shall –

(a) As soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) As from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

53(3) the events referred to in subsection (2) are as follows -

... (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 such that the land over which the right subsists is a public path or, subject to section 54A a byway open to all traffic.

53(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more evens falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

53(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).

Section 31 of the 1980 Act

31(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.

(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.

(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 period 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.

9. Detailed consideration A key provision in section 53 is paragraph (c)(i) of subsection (3) (highlighted above). That introduces what may be called the "reasonably alleged to subsist" test abbreviated here as the RATS test. It is easier to discharge the RATS test than the more stringent "subsists" test with which it is bracketed in paragraph (c)(i) of section 53(3). (The "subsists" test is also highlighted above). The RATS test is more easily satisfied than the "subsists" test is because it is easier to show that evidence of public use is sufficient to make it "reasonable to allege" that a public right of way subsists than it is to prove that the self-same evidence is sufficient to prove, on the balance of probabilities, that the claimed right of way actually does subsist. The classic example of the RATS test in action arises where there is a material conflict of fact i.e. a conflict (which the council as order making authority (OMA) cannot be expected to resolve) between (i) the evidence adduced on behalf of the public in support of an application (such as the Application made by the Applicant in the present case); and (ii) the evidence adduced in opposition to such an application on behalf of the affected landowner.

10. At first blush, there is such a conflict here because the Applicant has supported its application by reference to a number of "user evidence forms" (**UEFs**) which members

of the public have filled in. These UEFs attest (with only one or two exceptions) to uninterrupted public use of the claimed path during the relevant period of use, whereas the Objector claims that there was a 15-16 month such interruption, in the middle of the relevant period, between May 2007 and August 2008. The conflict is not however a material conflict. A material conflict is one which can only be resolved at a public inquiry where (in order to resolve the conflict) (i) witnesses for the public can give evidence and be cross-examined by the Objector's representative and (ii) witnesses for the objector can likewise give evidence and be cross-examined by the public's representative, thus enabling the inspector to reach a conclusion which side is right.

11. In the present case, however, no material conflict arises, because the New Evidence, contained in the Bundle at section 3 (pp 3.0 to 3.26) shows that there was a 15-16 month period between May 2007 and August 2008 when major building works, straddling the claimed path, were in progress, which works were at all times surrounded by a hoarding crossing the claimed path at points A and X1. Those users who claimed uninterrupted public use (and the vast majority did) must therefore either (i) have forgotten that there had been a period in 2007/2008 when members of the public could not and did not use the claimed path between those points or (ii) have been careless in filling in their forms or (iii) have been deliberately misleading. The Application must fail on account of this substantial interruption. The RATS test is not satisfied because there is incontrovertible evidence that use of the claimed path between points A and B was impossible because the claimed path was barred to public passage between points A and X1 in the 15-16 month period between May 2007 and August 2008.

12. There is another reason why, as the Objector would submit, the RATS test is not satisfied in the present case. That depends on seeing how section 31(1) of the 1980 Act (quoted in paragraph 8 above) works. It will be noted that that subsection contains at the end a

proviso: "unless there is sufficient evidence that there was no intention during that period to dedicate it" (**the Proviso**). In addition, subsection (1) provides that to be qualifying use, the claimed "way" must be "actually enjoyed by the public" and (2) must be so enjoyed "without interruption (3) for a full period of 20 years". Plainly, points (1) and (3) were not satisfied in the present case, for between May 2007 and August 2008 there was no actual enjoyment by the public nor was there use of the claimed path for the "full period" of 20 years but only for at the most about 17 years as demonstrated in paragraph 3 above.

13. As to point (2), it should be noted that when the hoarding was erected around the construction site in about May 2007, blocking the claimed path at points A and X1 on the plan at page 3.0, the effect of that was not merely to interrupt public use. The erection of the hoarding would have operated to "bring into question" the public's right to use the claimed path within the meaning of section 31(2). See paragraph 8 above for section 31(2). In addition, the erection of the hoarding operated as sufficient evidence of lack of intention to dedicate so as to satisfy the Proviso and thus also to bring into question the public right and so to stop time running under section 31(1) altogether. See the *Godmanchester* case at the end of paragraph [37] where Lord Hoffmann recognised that "barring the way, permanently or once a year", would be "sufficient to negative an intention to dedicate [so as to satisfy the Proviso]" and also to "bring the right into question" and thus to stop time running.

14. These are all overwhelmingly strong reasons to conclude that the events of 2007/2008 operated, as a matter of law, to defeat the Application and that those events would have done so even if use of the claimed path (as a whole) had begun 20 years before December

2016[3] (i.e. in December 1996 or earlier). The fact was, however, that it was not until sometime after May 1998 that the sea was filled in and so the period of public use was on any view substantially less than the 20 years required for a deemed dedication under section 31(1), even if the interruption which occurred in 2007/2008 is completely ignored.

15. The *Emery* and *Roxlena* cases in the context of section 31. Mr Carr relies on these cases at paragraphs 9.16 and 9.17 where he states as follows:-

"9.16 Notwithstanding the above, there are clear conflicts in the evidence provided by the Applicants and the Objectors. In *R v Secretary of State for Wales ex parte Emery* [1998] it was held that where there is such a conflict of apparently credible evidence, and a public right of way is reasonably alleged to subsist, an Order should be made to allow that evidence to be tested through the Order making process. This would apply in this case.

9.17 Furthermore, and more recently, the Court of Appeal has in *R(Roxlena Ltd) v Cumbria County Council* [2019] held that the consideration of evidence at this stage of the process was "*necessarily less intense*" than at confirmation stage of the Order process. The evidence might or might not be satisfactorily sustained when the Order comes to be confirmed but that does not mean an Order cannot be lawfully made at this juncture. This judgement applies to circumstances such as this case."

16. The Objector would accept that at the order-making stage consideration of the available evidence is ordinarily less intense than at the subsequent confirmation stage. However, the council has (with respect correctly) thought it right in this case to allow the Objector to supplement the evidence available to Mr Carr (see now the contents of the Bundle) and to entertain submissions on that evidence from the Objector. The combination of the

[3] In December 2016 the public right was again brought into question for the purposes of section 31(2) and has remained so since. See paragraph 4(3) above and the references to the evidence in section 4 of the Bundle there given.

New Evidence and these submissions permits a more "intense" consideration of the available evidence than would otherwise have been possible. With the benefit of that evidence, it is clear that the evidence of those users who apparently assert that they have used the claimed route without interruption is wrong. It is incontrovertibly clear from the photographs that major works were in progress on the construction site (identified by the red line in the plan at p 3.0) both in July 2007 (pp 3.1, 3.2, 3.4 and 3.9-3.12) and also in Jan 2008 (pp 3.6-3.8). These photos also show barring of the claimed path at points A and X1 by hoarding in July 2007 and Jan 2008. (The witness statements in section 4 of the Bundle show the same thing happening in December 2016 and onwards to September 2017, between the points A and X2).

17. In the *Emery* case [1998] 4 All ER 367 at 377f Roch LJ (in a passage quoted with approval by Lindblom LJ in *Roxlena* [2019] EWCA Civ 1639 at [37]) says:

> "Where there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s31(6) of the 1980 Act (deposit of a map and statement by the landowner and the lodgement of a statutory declaration and the absence of proof of contrary intention) then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists".

18. Roch LJ went on to confirm at p 379e that the RATS test would not be satisfied where the available documentary evidence was such that

> "... a reasonable person would say that the allegation that a right of way subsists was not reasonable because it [sc the allegation] would be <u>bound to fail</u>". (Emphasis supplied).

(Here the photographs taken in July 2007 and Jan 2008 included in the Bundle at section 3, together with those produced by Mr Good at p 3.15, 3.16, read with his statement at pp

3.13, 3.14, constitute documentary evidence of the kind contemplated by Roch LJ in that passage). The passage goes on at p 379f as follows:

> "But where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner has no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication". (Emphasis supplied).[4]

19. Mr Carr ignores the examples given by Roch LJ of instances where the RATS test would not be satisfied, presumably because the evidence before him included only a relatively small part of that now adduced. In addition, however, he fairly observed at paragraph 9.7 of the Carr Report that the evidence of use of the claimed path in the 1990s was minimal. See also paragraph 9.8 where he says of the witnesses that "they are sufficient in number to meet any sufficiency test from 2000[5] onwards". He did not, however, have the benefit of the photos at pp 1.1-1.8 and 2.4-2.15 showing that in the period 1996-May 1998 a section of the claimed path still traversed open water. It is not clear (as previously mentioned) by what precise date that section was subsequently filled in so that it would have been possible thereafter to use the entirety of the claimed path.[6] The report of [redacted] at pp 2.4-2.15 puts the earliest date at some time between "late 1998 and

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[4] Both this and the preceding passage are also cited with approval by Lindblom LJ in *Roxlena* (at [41]).

[5] The clear implication is that there are only a very few witnesses who claim use of the claimed path before 2000. That is not surprising: part of the claimed path was in the *sea* until the sea was filled in by an unknown date between the photographs of May 2008 and March 2009 referred to in paragraph 5 above.

[6] The sea had been filled in by 19 March 1999 - p 2.19.

March 1999". The importance of the non-availability of the entirety of the claimed path until after May 1998 and before March 1999 is that until the "sea-gap" was filled in, qualifying use could not commence. The evidence is absolutely clear that from December 2016 onwards the construction site edged red on page 4.0 was fenced on all sides. So, on any view, and as pointed out above (paragraph 14) fewer than 20 years use of the claimed path as a whole can have occurred even if the interruption between May 2007 and August 2008 is ignored.

20. Dedication at common law. Mr Carr thought that the public's use of the claimed path might have spanned two possible 20 year periods: 1996-2016 and 1998-2018 (see paragraph 9.7 of the Carr Report), but it is now clear that the right to use the claimed path was brought into question in December 2016. Mr Carr had much less information about the events of 1996-1999, 2007-2008 and 2016-2017 than the Bundle now provides, but even so he was correctly apprehensive that those who filled in evidence forms were too few in number for their evidence to be more than (what Lord Hoffmann in *Sunningwell* called) "trivial and sporadic"[7] in the early years of the 20 year period and so not sufficient to bring home to the landowner that a right of way was being asserted. Mr Carr was rightly concerned that it might be impossible to satisfy the RATS test in relation to that early period. Although he did not ask himself the question in this way, it is clear that he was concerned that the evidence of use before 2000 was so slight that it was insufficient in the early years of both the two 20 year periods he was considering[8] to support the RATS test. He accordingly considered whether it might be possible, in the alternative to reliance on section 31(1), to justify the making of an order by reference to the doctrine of

[7] See per Lord Hoffmann in *Sunningwell* at p 357D-E: "It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right".
[8] Viz 1996-2016 and 1998-2018.

common law dedication. That doctrine, whilst also requiring proof of uninterrupted use as of right, does not always depend on such use being shown to have endured for 20 years. (As to which, see further below.)

21. It is submitted that, on the facts of the case as they are now known to be, the making of an order based on that doctrine cannot be justified for three[9] main reasons, the first of which is that it is now clearly demonstrated that the claimed public use was not without interruption.[10] It will be recalled[11] that Mr Carr was prepared to assume that use might have continued throughout the development which took place in the period 2007/2008, but, as has been demonstrated above, the evidence in section 3 of the Bundle conclusively shows that that assumption is unsustainable. The Objector submits that even if that were not so, the doctrine would not be in play. (The points to be made in support of that submission have already been adverted to in paragraph 6 above. They are considered further below and are the second and third of the three reasons why the making of an order based on common law dedication cannot be justified).

22. The doctrine of common law dedication involves a palpable fiction. It requires the person (P) who alleges that a path has been dedicated at common law as a public highway:[12]

    (i) To prove uninterrupted public use as of right over a period (which need not necessarily, depending on the circumstances, be as much as 20 years); and

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[9] The second and third reasons are discussed in paragraphs 22-31 below.
[10] Baron Parke in a famous passage in *Poole v Huskinson* (1843) 11 M&W 827 said this: "a single act of interruption by the owner is of much more weight, on a question of intention, than many acts of enjoyment".
[11] See paragraph 9.13 of the Carr Report quoted in footnote 3 above.
[12] The expression public highway of course includes a case like the present involving a public footpath.

(ii) To satisfy the decision-maker that he or she can properly infer, merely from the fact of such use, that the landowner (or landowners, if more than one) must have actually intended to dedicate the claimed route as a public footpath.

23. Moreover, if such uninterrupted use is proved, but the relevant period of proved use is less than 20 years, there will usually need to be something special in the circumstances to justify inferring therefrom an actual intention to dedicate. There is nothing special in the circumstances of the present case, and Mr Carr does not suggest that there is.[13]

24. The law on common law dedication has been authoritatively articulated in three cases: *Folkestone Corporation v Brockman*,[14] *Ex parte Sunningwell*[15] and *R (Godmanchester Town Council) v SSEFRA*.[16] The first of these involved a footpath which the public had uninterruptedly used as of right for 80 (sic) years.[17] The justices nevertheless refused to infer the landowner must have intended to dedicate the path as a public right of way. The House of Lords held that the justices had been entitled to refuse to do so. There was no presumption that after a long-enough period of use as of right a dedication was the only explanation.[18] The House of Lords explained how the law had evolved in this way in the subsequent cases of *Sunningwell* and *Godmanchester*. In the first of these cases the Respondent unsuccessfully argued that when the public's use could be explained by the

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[13] See paragraph 27 below for a typical example of a case where it is proper to infer an actual intention to dedicate on the basis of a period of use shorter (and perhaps much shorter) than 20 years.
[14] [1914] AC 338 in the headnote at p 339.
[15] [2000] 1 AC 335.
[16] [2008] AC 221.
[17] See [1914] AC 338 at p 339.
[18] It was this case which led access campaigners to despair of ever achieving a common law dedication and finally led to the enactment of the Rights of Way 1932 (the predecessor of section 31).

toleration of the landowner, that amounted to an implied permission.[19] If that were the position, it was argued, the public's use would not have been "as of right": it would instead be "by right" and so the claim to register the glebe as a TVG must fail. In rejecting the Respondent landowner's argument, Lord Hoffmann explained how, in highway cases, the landowner's toleration was nevertheless potentially still relevant. He discussed the matter in relation to *Folkestone v Brockman* in two passages at pp 353B-D and 358B-C and F-H.

25. The two passages read as follows:

> "353 The difficulty in the case of public rights of way was that, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated such use: see *Folkestone Corporation v. Brockman* [1914] AC 338. On this point the law on public rights of way differed not only from Scottish law but also from that applicable to private easements. This made the outcome of cases on public rights of way very unpredictable and was one of the reasons for the passing of the Rights of Way Act 1932, of which section 1(1) provided:
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> > "Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ...""

> "358 Miss Cameron's third and final point was that the use of the glebe was not as of right because it was attributable to neighbourly toleration by successive rectors and the board.
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> ...
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> That, she said, was inconsistent with the user having been as of right. In my view, that proposition is fallacious. As one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right: see also per Dillon

[19] See Miss Cameron QC's argument as reported at [2000] 1 AC 345C: "A proper inference by implication is that the rector permitted use of the glebe while it was his property and that, when the inspector referred to tolerance, he had that in mind". See also the argument of Leading Counsel for the Appellant as reported at p 346 E-F: "Tolerance should be equated with acquiescence, not permission". Lord Hoffmann accepted that submission at p 358F in relation to "as of right" i.e. tolerated use is not impliedly permitted. See the second passage cited in paragraph 25 below.

LJ in *Mills v Silver* [1991] Ch 271, 281. When proof of a public right of way required a finding of actual dedication, the jury were entitled to find that such user was referable to toleration rather than dedication: *Folkestone Corporation v Brockman* [1914] AC 338. But this did not mean that the user had not been as of right. It was a finding that there had been no dedication despite the user having been as of right. The purpose of the Act of 1932 was to make it unnecessary to infer an actual dedication and, in the absence of specific rebutting evidence, to treat user as of right as sufficient to establish the public right.

26. *Folkestone v Brockman* sounded the death-knell for the vast majority of claims based on common law dedication, because (as the quoted passages show) in most such cases the landowner's toleration would be a more probable explanation for the public use having taken place than that the landowner actually intended to dedicate a public right of way. After all, what landowner actually intends to dedicate? Lord Hoffmann returned to the theme in *Godmanchester.*[20] See in particular paragraphs [6] and [29] from his speech which encapsulate and develop the same point he had made in *Sunningwell.*[21] They read as follows:

"[6] As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that any of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of landowners over many years are more likely explanations. In *Jones v Bates* [1938] 4 All ER 237, 244 Scott LJ said that actual dedication was "often a pure legal fiction [which] put on the affirmant of the public right an artificial onus which was often fatal to his success". In *Jaques v Secretary of State for the environment* [1995] JPL 1031, 1037 Laws J called it an "Alice in Wonderland requirement"." (Emphasis supplied).

"[29] I do not understand why, if Dyson J is right in saying that "intention" in section 31(1) refers to the landowner's actual state of mind, it would be rare for a tribunal of fact to find evidence of lack of intention unless there was proof of overt and contemporaneous acts. Who better to give evidence of the owner's state of mind than the owner himself? It is true that if he was asserting some improbable state of mind, one might look for corroboration. But there is nothing improbable in not

[20] Lord Hope [59], Baroness Hale [72] and Lord Neuberger [77] expressly agreed with his speech.

[21] See the passages at pp 353 and 358 in *Sunningwell* cited in paragraph 25 above.

having an intention to dedicate. It is the conclusion that the owner did intend to dedicate which is improbable: a "pure legal fiction", an "Alice in Wonderland requirement". (Emphasis supplied).

27. The four passages from *Sunningwell* and *Godmanchester* cited above are significant for two reasons. First, they explain why the Rights of Way Act 1932 was passed. Section 1 of that Act is materially identical to section 31(1) of the 1980 Act. Those sections did away with the common law requirement of proving intention to dedicate. Instead, a dedication would be deemed to have taken place[22] provided the path had, without interruption, been actually used as of right for the full period of 20 years. The common law's superadded requirement of the public needing to prove, from long use as of right, an actual intention to dedicate on the part of the landowner, was abolished. Although the 1932 Act and section 31(9) of the 1980 Act[23] retain the possibility of relying on the common law as a means of proving dedication, in practice that is reserved for cases where the period of claimed use is less than 20 years but the circumstances are such that it is clear the landowner must have intended to dedicate. That possibility is far removed from the current case.

28. Second, directly relevant to the present case, is the fact that Mr Carr entirely overlooked *Folkestone v Brockman*, *Sunningwell* and *Godmanchester*[24] in his consideration of intention to dedicate for the purposes of common law dedication, when considering common law dedication as an alternative reason for his advice to the council that the

[22] Subject to the Proviso, discussed in paragraphs 12 and 13 above.
[23] See, for section 31(9), paragraph 8 above.
[24] He did refer to [33] and [37] of *Godmanchester* at his paragraphs 9.5, 9.20 and 9.21 of the Carr Report, but that was in connection with different points. Paragraphs [6] and [29] of *Godmanchester* are ignored for the important guidance they give on the difficulty of proving an actual intention to dedicate.

RATS test was satisfied. In the present case, it has been pointed out above that there were two periods of actual use:

(i) From the filling-in of the sea between May 1998 and March 1999 to May 2007 and

(ii) August 2008 to December 2016.

Between May 2007 and August 2008, hoardings barred the claimed path between A and X1. From December 2016 onwards, heras fencing did so, between the points A and X2. The erection of these barriers in both periods was entirely at odds with a finding that the landowner can have had an actual intention to dedicate in either period. (See the passage from *Poole & Huskinson* cited in paragraph 21 above). To the extent that there was public use during either or both of these periods, the relevant landowner's subsequent fencing actions (i.e. in May 2007 and in December 2016) were wholly inconsistent with the relevant landowner previously having had an intention to dedicate the claimed path as a public right of way.

29. Lack of capacity to dedicate. On common law dedication, the Objector also relies on the facts and legal analysis contained in the "Response on behalf of the owners and occupiers of 30-66 Long Row" dated 13 January 2023 (included at appendix RC14 to Mr Carr's Report).[25] It is trite law that if a landowner lacks power to dedicate a public right of way over his land, because the land is in mortgage or leased or both – both of which pertained in the period 2008-16 - he cannot be regarded as possessing the requisite intention to dedicate which the law requires. You cannot form a valid intention to do an act which you lack power to carry out. No doubt a landowner as mortgagor and his lender as

[25] See, in particular, Mr Carr's Report at pp 349 to 351. The submissions there set forth address the legal position in the period 2008-2016.

mortgagee can together agree to dedicate a public right of way across the mortgaged land, even though the dedication of such a right of way would devalue the security, but absent evidence of any such agreement (and there is none here)[26] the existence of a mortgage during any period of use relied on as supporting or inference of an actual intention to dedicate, is fatal to the inference.

30. Similarly with a lease. A landlord (L) who grants a lease to a tenant (T) the right to possession of the land, thereby confers on T the right to exclusive possession of the land. Where L parts with possession of the land by granting a lease of it, L has no power in law to encumber the tenanted land by dedicating a public right of way thereover. The tenant, T, for his part, may have power to encumber the tenanted land (provided he has not covenanted in the lease not to do so), but such an encumbrance can only endure for the term of the lease and so cannot have effect once the lease has come to an end. It therefore lacks power to dedicate a public right of way across the tenanted land because dedication of a public right of way endures for ever[27] (once a highway, always a highway) and T lacks the power to dedicate such a permanent right. Unless, therefore, L and T jointly agree to dedicate a public right of way, T by himself has no power to form an operative intention to dedicate such a right.[28] There is no evidence of any such agreement in the present case and Mr Carr does not suggest the contrary.

31. On the face of it, therefore, it appears on the evidence in their submissions on lack of capacity to dedicate included at RC14, to be clearly established that the relevant

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[26] Mr Carr does not suggest there is such evidence.
[27] Unless the highway is subsequently stopped up under statutory powers.
[28] The fact that land is leased/tenanted does not operate as a bar to a deemed dedication under section 31(1). Subsection (4), quoted in paragraph 8 above, confers an express power on the landlord to take steps on the tenanted land (notwithstanding the tenancy) to prevent a deemed dedication from occurring.

landowners (whether freehold or leasehold) lacked legal capacity to dedicate a public right of way over such part of the claimed path as was at any time in mortgage or tenanted (which was the case during the whole of the period 2008 – 2016) during the periods of public use with which those submissions are concerned.

32. Mr Carr's account of this lack of capacity issue is, with respect, seriously inadequate because he does not engage with the merits of the argument as advanced in the January 2023 "Response" or say why it is acceptable not to do so. See paragraph 10.4 of the Carr Report where he acknowledges that lack of capacity to dedicate can "amount to a complete bar to dedication being inferred under the common law", but then goes on to say that "[whether it does amount to such a bar] very much depends on the facts of the individual case". He implies that those facts cannot properly be investigated as part of the process of deciding whether the RATS test is satisfied but gives no reason for not engaging with the submissions advanced in the January 2023 Response, which were based on copious documentary evidence of the relevant facts and included in RC14. It is respectfully submitted that these submissions (see paragraphs 29-31 above which build on that Response document) are unanswered by the Carr Report, are unanswerable, and provide a further reason why the claimed path cannot reasonably be alleged to have become a public right of way under the doctrine of common law dedication in the period from 2008 to 2016 when the landowner lacked capacity to dedicate.

33. <u>The abandoned English Coastal Path</u> The Objector mentions for completeness the plans for the claimed path to form part of the England Coast Path (**ECP**) referred to in the Carr Report at paragraph 7.5 as an "aspirational trail". Mr Carr refers to some of the relevant documents as being included in RC13 at pp 305-347. He fairly acknowledges that although "at one point … it was proposed that the England Coastal Path would be routed along the line of the Application Route, the path was later "rerouted to avoid the disputed

path"" and the documents "do not provide evidence of the existence of a public right of way although they are to some degree supportive". (See paragraphs 7.4, 7.5 of the Carr Report). It is obvious that Mr Carr (correctly) does not consider the ECP material to be by itself sufficient to satisfy the RATS test.

34. Mr Carr briefly returns to the question of the ECP (still in the context of his consideration of common law dedication) at his paragraph 10. He refers at paragraph 10.2 to

"Factors which may be considered to be in favour of inferring dedication may include:

a) The route being made physically available as a walkway as part of the site development [which had taken place in 2007/2008] (see Google Earth images [App 2 pg 5]); and
b) The original plan, and publication of plans etc [App 13 pg 305-347] for the Application Route to form part of the England Coast Path along with signage to that effect".

35. . Mr Carr goes on to say at paragraph 10.3 [i] that these facts and matters will have been "in the knowledge of and with the acquiescence of the landowner" and [ii] "there is no evidence of any steps being taken to prevent the establishment of public rights, yet, [iii] there is evidence of use of the route by the general public, as of right, for up to 20 years prior to it being blocked off between 2016 and 2018". (Emphasis supplied). It is a matter of public record that the ECP was not designated at this location until July 2018; even the publication of plans prior to designation did not occur until 2017. Therefore the existence of the ECP should not be considered a relevant factor in an analysis of the landowner's intention to dedicate prior to 2017

36. It is notable that Mr Carr is considering the possibility of a common law dedication on the basis of use of the claimed path for "up to 20 [uninterrupted] years": "up to" because, on his own account of the matter, there was "minimal" public use on the evidence in the

1990s. Moreover, he is also proceeding on the basis that the relevant date of bringing into question public use might have been as late as 2018.

37. The New Evidence, however, makes clear, as the photographs conclusively demonstrate:

(i) that use of the entire claimed path cannot have begun before May 1998 (when the sea had not yet been filled in);

(ii) that use of the entire claimed path was comprehensively interrupted between May 2007 and August 2008; and

(iii) that although use of the entire claimed path resumed in August 2008, it was brought to an end in December 2016 (2018 is clearly not a possible end point).

38. Consequently, instead of one continuous period of "up to" 20 years postulated by Mr Carr, the New Evidence establishes that there were merely two separate i.e. non-continuous periods of something over 8 years each. It would be extremely unlikely that a common law dedication might have been established (or might be "reasonably alleged to have been established") by reason of use as of right for the 8.4 years of public use August 2008 - December 2016, and Mr Carr rightly did not consider that possibility. Neither did he deal properly with lack of capacity to dedicate in that period (see above, paragraphs 29-32) nor consider at all the more probable explanations for use (especially toleration or goodwill) mentioned by Lord Hoffmann in *Godmanchester* at [6].[29] In any event, the erection of heras fencing around the site in December 2016, which the New Evidence establishes, was clearly inconsistent with there having been any actual intention to dedicate preceding that time. From all of which it follows that, even had Mr Carr considered the possibility (which he did not), that at some time between August 2008 and

[29] See paragraph 26 above.

December 2016 the relevant landowner had conceived an actual intention to dedicate, they had no capacity to give effect to such intention. This was a classic case where toleration or goodwill were more likely explanations for public use between 2008 to 2016, as held in *Godmanchester*.

39. Summary of the Objector's submissions. In the circumstances of this case as now revealed by the New Evidence, it is clear that if an order were made, there is no prospect that it would be confirmed. In the words of Roch LJ in *Emery* at p 379e and f (quoted in paragraph 18 above) the allegation that there was a right of way "would be bound to fail" and "the documentary evidence must inevitably defeat the claim". Consequently it is not reasonable to allege that a right of way along the alignment of the claimed path subsists between points A and B. The RATS test is not satisfied. It is respectfully submitted that the council would err in law if it made an order. If it were nevertheless to do so, the Inspector at the resulting inquiry would be bound to refuse to confirm the order.[30] Accordingly, the Objector asks that the council do refuse the Application by declining to make an order under section 53(2) of the 1981 Act adding the claimed path to the DMS.

[redacted]

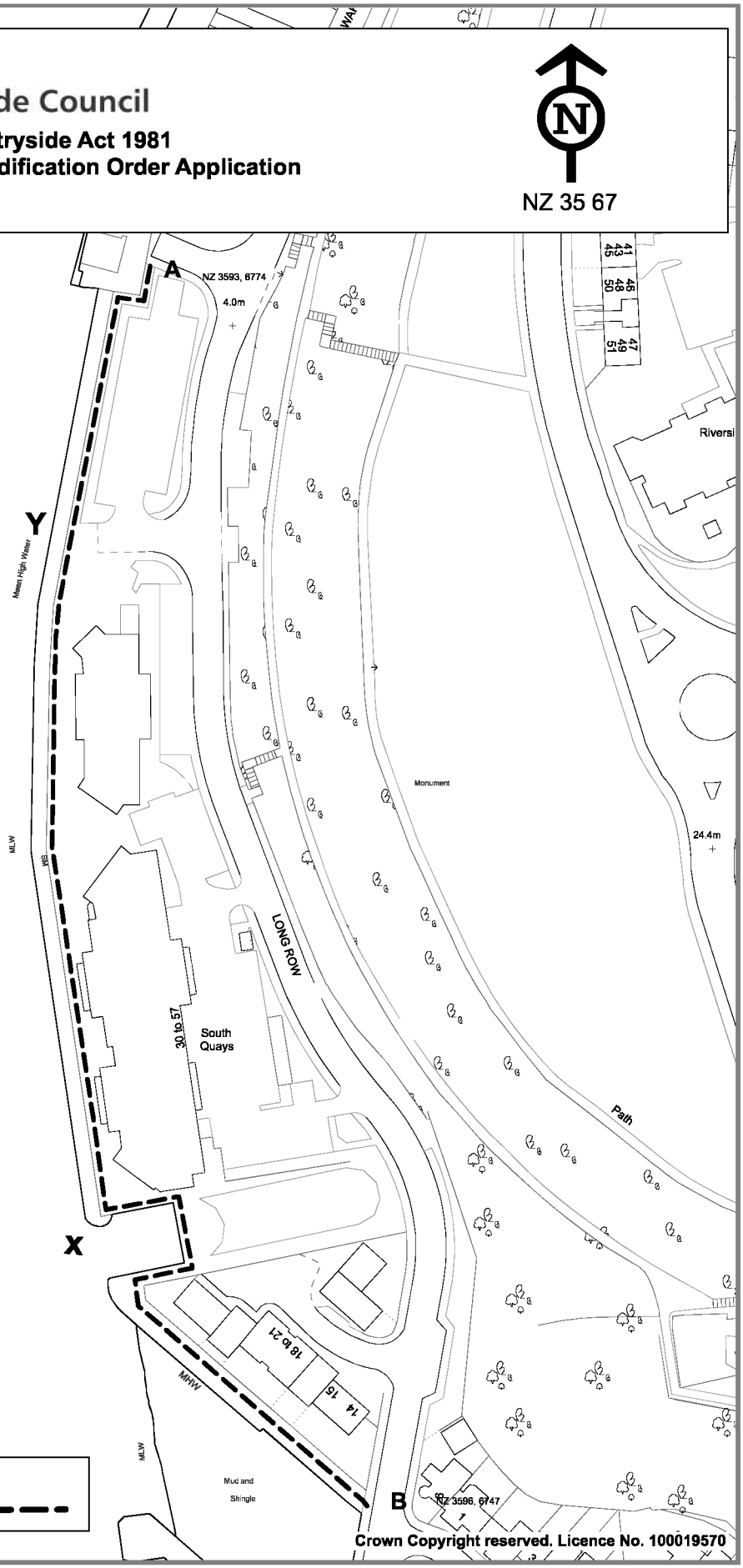
25 October 2023

[30] [The Objector would justifiably seek payment of its costs under paragraph 10A of Schedule 15 to the 1981 Act].

South Tyneside Council

Wildlife and Countryside Act 1981
Definitive Map Modification Order Application
S21 - Long Row
Scale 1:1250

NZ 35 67



KEY

Path to be added: - - - - - -