

Report to the Executive Director for Place

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickerell (to and from Grafton Avenue, Weymouth)

Choose an item.

Portfolio Holder: Cllr D Walsh, Planning

Local Councillor(s): Cllr Dunseith; Cllr Worth

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Report Status: Public

Brief Summary:

This report considers an application for a Definitive Map Modification Order, based on user evidence, to add a footpath to the Definitive Map and Statement in Chickerell Parish. Following an investigation of the evidence, a recommendation is made to accept the application and make an Order.

Recommendation:

That:

- (a) The application be accepted, and an order made to modify the definitive map and statement of rights of way by adding a footpath from A - B - C - D - E - F - G - A as shown on drawing T615/22/3; and
- (b) If the Order is unopposed, or if all objections are withdrawn, it be confirmed as made by the Council.

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Reason for Recommendation:

- (a) The available evidence shows, on balance, that the claimed right of way subsists or is reasonably alleged to subsist.
- (b) The evidence shows, on balance, that the route claimed should be recorded as a footpath as described. Accordingly, in the absence of objections, Dorset Council can itself confirm the Order without submission to the Planning Inspectorate.

1 Background

Applicant

- 1.1. An application to record a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth), as shown A to B to C to D to E to F to G to A on drawing T615/22/3 (Appendix 1) was made by Mrs Mary Glover, on 25 May 2021.

Description of the route

- 1.2. The route claimed commences at the western end of Grafton Avenue, Weymouth, between property numbers 41 and 42 (Point A). The route runs around the perimeter of a field, for an approximate distance north to south of 300 metres, where a hedge line defines the southern boundary to the field within which the claimed route is contained. A wide gap exists in the hedge where definitive footpath S1/139 passes through. The claimed route continues along the southern boundary before turning north continuing to meet Point A. The entire distance of the claimed route is approximately 940 metres.
- 1.3. The route varies in width between 1-3 metres, and with a grassed surface.

Background to the application

- 1.4. This application was submitted in 2021 as a result of a letter sent to residents from Savills (agents for the landowner) stating that the land 'may have been used without the permission of' the landowner' and sought agreement from the recipients of the letter that direct permission to use the route be accepted, by the signing of a copy letter to this effect, but accepting that this permission could be removed at any point.
- 1.5. A total of 57 completed witness statement forms were submitted between May – December 2021. Additional witness statement forms were submitted in November/December 2022, and also in April 2023.

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- 1.6. Pre-application planning advice (ref P/PAP/2022/00374) is currently being sought from Dorset Council by the developers, CG Fry Ltd., for the erection of 380 dwellings, occupying the field within which the claimed route runs. A Masterplan has been drawn up for the proposed development and is currently being considered by the Council.
- 1.7. Two previous applications have been made for public access on this land.
- 1.8. In 1994 an application to record 3 separate footpaths was received. An Order was made in 1995, but objections were received, and the Planning Inspectorate called a Public Inquiry, resulting in the confirmation of the Order in May 1997. The 3 footpaths were added to the Definitive Map and Statement as S1/139, S16/48, S16/49.
- 1.9. A further application submitted in 2002 sought to add the land as a Village Green. The application was refused due to a lack of continuous use over the Relevant Period because of the Foot & Mouth epidemic in 2000 which prevented public use on all land. The case was later discussed in the High Court and created precedent as to why the time period of Foot and Mouth should be disregarded where the relevant period in any application coincided with these dates.
- 1.10. **Use of Evidence**
The applicant submitted user evidence in support of this application. No historic evidence has been found to exist to support this application.
- 1.11. A full consultation exercise was carried out during December 2022 to January 2023, which included landowners, user groups, local councils, those affected and anyone who had already contacted Dorset Council regarding this application. The Councillors for Chickerell Ward; Cllr Jean Dunseith, and Cllr John Worth, were also consulted. In addition, notices explaining the application were erected on site. Relevant evidence provided is discussed in this report.

2 Law

- 2.1 A summary of the law is contained in Appendix 2

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3 Issue to be decided

- 3.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist (or are reasonably alleged to subsist) on the route claimed, and if so, at what status the route should be recorded. It is not necessary for evidence to be 'beyond reasonable doubt' before a change to the Definitive Map can be made.
- 3.2 Any changes to the Definitive Map must reflect public rights that already exist. Decisions must not be taken for reasons of desirability or suitability. Before an order changing the Definitive Map is made, the Council must be satisfied that public rights have come into being at some time in the past. This might be demonstrated by documentary evidence and/or witness evidence.
- 3.3 Historical documentary evidence and user evidence has been examined to see whether depictions of the route point to it having acquired public rights as a result of deemed dedication in the past. Any such rights are not lost through disuse.
- 3.4 Unless stopped up by due process of law, any rights previously dedicated will still exist even if they are no longer used or needed. It is unlikely that a single map or document will provide sufficient evidence to justify a change to the Definitive Map, the evidence must be assessed holistically. The Council has a duty to record any rights that are found to exist even if they are not those claimed by the applicant.

4 Documentary evidence (Appendix 3) (copies available in the case file RW/T615)

- 4.1 This claimed route is based mainly on user evidence. No documentary evidence was submitted with the application.
- 4.2 Aerial photographs have been examined, which show the existence of the claimed route back to 1972.

Ordnance Survey Maps

- 4.3 The claimed route does not appear on any Ordnance Survey maps examined.

Estate maps

- 4.4 There are no available Estate Maps which showed the claimed route.

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Dorset Council Records

- 4.5 The Weymouth Parish Survey (1952) for this area did not claim a right of way corresponding to the application route, nor was it shown on the Draft Map (1954), Provisional Map (1964), First Definitive Map (1966-67) Revised Draft Map (1974), or the most recently sealed Definitive Map (1989).

Aerial photographs

- 4.6 All available aerial photography held by Dorset Council for this site was examined. The path can be seen on the aerial photographs issued between 1947 – 2020, providing supporting evidence of the existence of the claimed route.
- 4.7 Officer comment: These photographs show the route as a clearly walked line with a worn track evident, in the location as claimed.

Summary of documentary evidence

- 4.8 Aerial photographs are the only documentary evidence discovered which show that the claimed route has existed historically.

5. User evidence (Appendix 4)

Copies available in the case file (RW/T615)

- 5.1 Appendix 4 contains charts showing periods and level of use. Evidence submitted as part of original application T615 in 2021 has been included in this analysis, as well as additional evidence provided as part of the public consultation on this path between 14 December 2022 to 10 February 2023, and subsequently in April 2023.
- 5.2 57 User Witness Evidence statements were submitted to accompany the application for the claimed route in July 2021.
- 5.3 A further 5 User Witness Evidence statements were submitted when investigation of this application began in January 2023.
- 5.4 And in April 2023, an additional 22 witness forms were submitted.
- 5.5 Of the total 80 forms submitted, two were duplicated. From a total of 78 individual users, the use of the claimed route spans a timeframe from 1960 through to 2021.

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- 5.6 One of the witnesses has been discounted as it is stated that permission was given to this person to use the path, in association with the witness' activity of keeping horses on the land.
- 5.7 The landowner has submitted Statutory Declarations under Section 31(6) of the Highways Act 1980 (indicating that no acceptance of further public rights of way exist over the land in question) in September 1997; August 2003, October 2009, February 2020, May 2021. The date of September 1997 is taken to be the 'bringing into question' of the path for public use, making the 'relevant period of use' the 20 years' between 1977-1997
- 5.8 Three of the witnesses whose use fell within the 'Relevant Period' are discounted because they were less than 10 years old at this time. (It is considered that use by a person over 10 years of age would be reliable, but younger persons may not have a sufficiently good recall of events.)
- 5.9 A total of 27 witnesses provided evidence of use which was not within the 'Relevant Period of Use' and cannot therefore be considered.
- 5.10 The total number of witnesses which provided evidence of use during the 'Relevant Period' is therefore reduced to 49 individuals. The period of use by these 49 individuals ranges between 2 years up to the full 20 years each, and varies between a couple of times a day, to a couple of times a month.
- 5.11 The Chart of Use (Appendix 4) illustrates a continuous use 'As of Right' of the claimed route over the full 20 year period, by the 48 witnesses.
- 5.12 17 individuals used the path daily in the time period they used the route.
- 5.13 14 individuals used the path on a weekly basis in the time period they used the route.
- 5.14 10 individuals used the path on a monthly basis in the time period they used the route.
- 5.15 8 individuals used the path less frequently: bi-monthly or a few times a year in the time period they used the route.
- 5.16 Interviews with nine of the 49 witnesses (those who had used the path most frequently) were undertaken during May 2023 to confirm the evidence supplied on the Form E witness form.

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- 5.17 Questions were specifically asked about the users' recollection of notices placed around the field during 1977-1997, and of fencing, gates, stiles which may have prevented access onto the path.
- 5.18 These points were discussed at length with the witnesses, and many of them deny that any notices were in existence during their use of the perimeter path during the Relevant Period; the only notices mentioned by some of the witnesses referred to a 'Keep to the Public Rights of Way' sign. These notices were in fact placed on the land in 2002 when the application for a Village Green was submitted to the Council. This post-dates the Relevant Period of Use under consideration. Witnesses all stated that they continued to use the perimeter route as well as the cross field routes 'as they had always done'
- 5.19 Similarly, the points regarding fencing and other barriers during the period 1977-1997 were discussed at length with the witnesses. Three of the witnesses do recall a temporary, make-shift wooden panel which was placed over the Grafton Avenue access point to prevent the shire horses (which were kept in the field for a period of approximately six years) from escaping. One witness recalls that a wire fence was placed over this access point, but that it was not in place very long because this fence would be regularly broken (either by livestock or people: there is no evidence of either), allowing full unimpeded access onto the field by the users.
- 5.20 The issue of fencing was considered in February 1995 when the cross field paths were the subject of the Rights of Way sub-committee meeting. Witness evidence presented at the meeting supports the fact that a stile was in place at the end of Grafton Avenue, and that from circa 1980 a gate was located here.
- 5.21 Officer comment: On balance, taking into consideration the witness evidence from application T615 and from the 1994 application, it would appear that the existence of a stile/gate at the entrance into the field from Grafton Avenue was not a deterrent for users of all the paths in the field and no 'force' to enter the field and use the paths is reported to have been used by the witnesses. In contrast, the landowners state that the fencing surrounding the field required continuous replacement after it was broken down.

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- 5.22 Officer comment: It is not clear which sections of the field the landowners are referring to in this context, nor is it clear whether this fencing was broken down by users or by the animals kept in the field. It is however clear from witness evidence that during the 1980s when shire horses were kept in the field, they were continually escaping from the field, onto Grafton Avenue itself, indicating that any fencing was not securely fixed.
- 5.23 Six of the witnesses interviewed recalled there being horses and/or sheep in the field during the relevant period. However, comments were made that these animals did not stay for any length of time in this field because no barriers existed to prevent them escaping. A tenant of the field May 1985 to September 1993, Mrs Snook, was given permission to keep horses in the field and states that fencing was damaged at 'regular intervals', but again, the locations of this alleged damaged fencing are not provided.
- 5.24 The landowners' submitted evidence suggests that use of the claimed route by the 49 witnesses cannot be 'As of Right' because 'fencing was present in the field', which would have caused the users to 'force' entry onto the claimed route by breaking through this fencing.
- 5.25 Officer comment: The comments made in paragraphs 5.21 and 5.22 are also applicable to the above.
- 5.26 The landowner evidence ref. 'Exhibit B' refers to anecdotal knowledge of the field by Vic Cooke who was the land agent up until 1975. His memory of the entrance at Grafton Avenue up until 1975 is that it was 'gated'.
- 5.27 The landowner evidence ref. 'Exhibit C' is dated 03-03-1997. This is a file note from the land agent at the time relating to his conversation with Mrs Snook. This evidence sets out that she was regularly repairing fencing to safeguard her horses, but that she does not have any evidence of cost of these repairs. It is not clear which sections of the fencing she was repairing; her tenancy extended to the southern section down to Radipole Lane.
- 5.28 Officer comment: The Relevant Period considered in this case is 1977-1997. There is no other evidence submitted relating to the alleged fencing at Grafton Avenue which predates the evidence provided by Mrs Snook (ie the period 1977-1985). The witnesses maintain that no fencing (other than the temporary fencing noted in paragraph 5.19) was in place during the period under examination (1977-1997).

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- 5.29 'Exhibit D' from the landowners includes a file note from the land agent (S Knowles) dated 1st February 1997 which describes an inspection of the entrance points to the field, and notes 'forced entry through barbed wire fencing at end of Grafton Avenue'. A letter dated 18 April 1997 includes photographs which purport to show damage to fencing. The photographs are not annotated, so it is difficult to determine which parts of the field they relate to, although it would appear that photograph 9 (top of page marked 8/9) is the entrance from Grafton Avenue. This photograph shows a structure which may be a stile to the left of the barbed wire fencing.
- 5.30 Evidence from a Dorset (County) Council ranger responsible for maintenance of public rights of way at the time relates to a complaint, dated 24.09.2003, that 'the gate at the end of Grafton Avenue' had been 'damaged'. The ranger duly undertook to arrange repairs to the gate.
- 5.31 Officer Report: If the structure shown in photograph 9 is a stile, this accords with the evidence considered in the 1994 application and would indicate an access into the field, with which the users acquiesced to access the paths in the field. However, the ranger's file note provides evidence that a gate did in fact exist at this location and was in place in 2003.
- 5.32 The landowners have provided documentary evidence which illustrates that notices were placed in the field over various time periods. Exhibit D shows a photograph of 'Private Keep Out' signs, some of which are broken, dated 1997, and extensive records of checking and replacement of signage dating from 2003 in Exhibit E. This latter evidence relates to notices placed during the time of the Village Green application in 2002 and post-dates the Relevant Period of Use under consideration in this application (T615).
- 5.33 Referring to the 1994 application, a Definitive Map Modification Order (DMMO) was made on 2nd October 1995, against which an objection was made. The application was referred to the Planning Inspectorate who held a Public Inquiry to determine the matter. The Inspector confirmed the order on 22nd May 1997.
- 5.34 Officer comment: Taking into consideration the sub-committee report in 1995, it would appear that the timespan of use considered for the 1994 application was 1973-1993, which is a very similar period of time to application T615.

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- 5.35 The committee report relating to the village green application in 2003 makes reference to the 1997 Public Inquiry, during which the issue of the 'Keep Out' signs were considered. It is apparent that these signs were placed during the time of the Public Inquiry itself, which post-dates the Relevant Period for the T615 application.
- 5.36 Officer comment: There is a conflict in evidence between the landowners and the witnesses regarding notices and fencing. Not all of the witnesses recall there was any fencing or notices; whereas the landowners are adamant that fencing and notices were in place at all times, and had to be regularly checked and replaced where necessary. There is no evidence submitted by the landowners to indicate the locations of this fencing and any notices. The photograph from Exhibit D appears to show a stile or gate at the Grafton Avenue entrance. It is reasonable for an allegation to be made that public rights existed during the relevant period of 1977-1997.
- 5.37 Officer comment: The evidence presented to the Inspector at the Public Inquiry included witness detail about stiles, fencing, notices and signs, to enable a consideration of the issue of 'as of right'. The Inspector confirmed the Order after due consideration. The Inspector was unable to draw any conclusions regarding the alleged notices because it was unclear from the evidence where these notices were posted, and for how long they might have been in place. The 1997 Inspector's decision adds weight to the assertion of a reasonable allegation that public rights exist over the T615 claimed route because he considered the 'as of right' issue relating to the same alleged fencing and notices on the site.
- 5.38 During the witness interviews in May 2023, specific questions regarding use of the perimeter path (as well as use of the definitive footpaths) were posed. Every one of the witnesses was clear that they would use both the perimeter path as well as the definitive footpaths for a variety of walks. There was no indication to the public that the cross field routes were the definitive paths. Many of the witnesses emphatically state that their preferred use of the paths was the perimeter path because it provided a longer walk, and allowed better opportunities to observe and enjoy the abundant wildlife in and around the field.

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- 5.39 Officer comment: Exhibit E (summary of MK evidence) acknowledges use of the perimeter path at paragraph 10.5. An email dated 24 November 2015 from MK notes that “in the main, dog walkers **continue** (author’s emphasis) to walk the perimeters of the fields rather than the public footpaths”.

Notwithstanding that the above agent’s evidence relates to a time beyond the ‘relevant period’ under consideration in this case, the language that use ‘continues’ implies that this has been observed on previous occasions (although it is not clear in which time periods). It is therefore clear that the landowners were aware that the perimeter path was used by the public.

Summary of user evidence

- 5.40 Evidence of use on foot between 1977 to 1997 is of sufficient number and frequency of use for a reasonable allegation to be made that public rights exist on foot.
- 5.41 In recent years (beyond the ‘relevant period’, ie during 2020), users have stated that fencing and notices were placed on the land by the landowner to prevent access onto the claimed route from the respective back gardens of various properties which back onto the field in which the claimed route is located, and also during the time of the Village Green application in 2002, notices were placed in the field. This is corroborated by the landowner evidence with dates of notice checking.
- 5.42 The available evidence relating to the relevant period suggests on balance that use by 49 users during the 20 year period of 1977 to 1997 was without force, without secrecy, and without permission, ie user was ‘as of right’.
- 5.43 There is no substantive landowner evidence to show the location of fencing and notices between 1977-1997 at the Grafton Avenue entrance. Exhibit B refers to Vic Cooke’s knowledge of the land between 1971-1976 where he notes a gate was located at the Grafton Avenue entrance. His stated visit to the site in January 1995 notes that fencing was damaged ‘by vandals’. Exhibit D dated 18 April 1997 includes a photograph which appears to show a stile or gate to the side of the fencing, which accords with the witness evidence considered in the 1994 application. The Dorset Council ranger dealt with a complaint in 2003 regarding a ‘damaged gate’ at the end of Grafton Avenue. Based on this evidence, it is a reasonable allegation that the public used the gate/stile to access the claimed perimeter path in the field.

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5.44 There are many similarities in public use between the perimeter path and the three 1994 claimed footpaths. The 1994 application was based on user evidence over a similar timeframe to application T615. The issue of notices and fencing were all discussed at the sub-committee meeting, and the subsequent Public Inquiry held to consider the 1994 application; which resulted in confirmation of the Order by the Planning Inspectorate recognising that ‘on the balance of probabilities’ public rights had been shown to exist over the claimed routes.

6.0 Landowner correspondence (copies available in the case file RW/T615).

6.1 The landowners for the site in which the claimed route is located were contacted as part of the public consultation. A lawyer representing the landowners communicated with the Council to put forwards objections as to why the landowners did not consider the use of the claimed route to be ‘as of right’. Documents were submitted to include statements from the land managers/owners. These submissions are in the case file RW/T615 and analysed below.

6.2 A statement submitted by the landowners (dated 6-7 April 2023), in response to the public consultation on this application, confirmed that the land has been in the ‘same beneficial ownership since 1971’. Land Registry documents identified that from February 2007 the land was in the ownership of the present owners: Dorset Land Holdings Ltd, and Chaffeys Land Ltd.

6.3 In summary, the landowners’ objections are that:

a) cross field paths were claimed in 1994; the claimed route was not included or mentioned by the witnesses and should have been;

b) there were always fences and gates preventing access by the public;

c) there were always horses in the field up to 1971;

d) notices were always placed around the field – witness evidence must be discredited because they state there were no notices;

e) bringing into question must date back to 1960 – based on previous landowner evidence

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- 6.4 The submitted statement continues to explain that the landowners had never intended any part of the land to be for public use but acknowledge that the paths recognised following the 1997 public inquiry are accepted as the only form of public access on the land.
- 6.5 1) *“The 1994 application did not include this perimeter path, therefore this application should be dismissed”*
- 6.6 The landowners have retrieved from their records the file containing the evidence for the original 1994 application to record the claimed footpaths and note that this application did not mention the path subject of the T615 application.
- 6.7 Officer comment: Each DMMO application is considered on its own merits. The Witness Evidence Form (Form E) seeks answers to questions about the ‘application route’. The public completing this form would therefore have read this and answered accordingly in relation to the claimed route.
- 6.8 Officer comment: In respect of the landowners’ consideration that the lack of mention of the path now claimed during investigations into the 1994 application should now render the T615 application *ultra vires*, the comment above applies.
- 6.9 2) *“Fencing remained in place around the field up to 1997 which served to prevent access into the field from Grafton Avenue”*.
- 6.10 Officer comment: This fencing is stated to have been placed to contain either horses or sheep within in the field but does not provide specific locations. Many of the witnesses claim not to have seen fencing at the Grafton Avenue entrance, and there is sufficient evidence to show that public use continued in the field by many people over the 20 year period and beyond. Indeed, the landowners’ own evidence (Exhibit E) makes specific reference to seeing people walk around the field. Evidence from Exhibit B, and from the 1994 application witness evidence, confirms a stile or gate was in place at the end of Grafton Avenue.

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- 6.11 3) *"Horses were always in the field"*.
- 6.12 Officer comment: Witnesses have confirmed that horses were not kept in the field continuously. Indeed there is good evidence to suggest that because the fencing was not secure, horses (in particular cart horses kept in the field by a company from Sherborne) regularly escaped from the field, causing neighbours in Grafton Avenue to call the Police at times to ensure the horses did not escape onto the busy Radipole Lane at the east end of Grafton Avenue. Subsequently, these horses were removed from the field. Evidence also suggests that horses were grazed in the field at certain times, coming from the stables at the southern end of the fields (where the police station is now located). It is not therefore categoric that animals were kept in the field continuously, nor that they all grazed the northern end of the field.
- 6.13 4) *"Notices were placed, regularly checked, and replaced as necessary by agents for the landowners"*.
- 6.14 Officer comment: Photographs were provided by the landowners to show different notices, and the locations where these were placed. However, these notices relate to circa 2002 when the Village Green application was submitted, and 2020 when the letters from Savills were sent to residents. There is no evidence submitted to show notices at the Grafton Avenue entrance to the field during the relevant period 1976-1997.
- 6.15 5) *"Many of the witnesses claimed not to have seen any fencing or notices, and their evidence should therefore be discounted"*.
- Officer comment: As noted above, there is a lack of clarity as to where the fencing and notices were located during the entire relevant period.
- 6.16 The landowners claim that between 1971-2022, the land was properly maintained with all boundary fencing and notices replaced when damaged.
- 6.17 The landowners are relying on the previous tenant (Vic Cooke - who knew the land from 1960-1976) to evidence the issue of boundary fencing and site notices. Mr Cooke has stated in documents that he regularly checked boundaries and secured them as and when necessary, between 1971-1976.
- 6.18 Officer comment: There is scant evidence to show which areas of the field were fenced during the period of Vic Cooke's management, and the only notice mentioned was located on Radipole Lane.

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6.19 6) *The use of the claimed route was brought into question from 1960. The landowner at the time took action to prevent public use by placing signs around the site.*

6.20 Officer comment: As above, the only sign mentioned in Vic Cooke's evidence is the notice placed on Radipole Lane. The landowners have not provided any other evidence to support this single letter which provides scant information regarding signs/fencing.

This is not considered evidence of sufficient weight to defeat the application for the claimed route.

7.0 **Consultation responses and other correspondence** (copies available in the case file RW/T615).

7.1 A small number of communications were received in response to the public consultation.

7.2 The Ramblers representative provided comment that she had no evidence of this path on any documentary evidence available to her.

7.3 No correspondence was received from Local Councillors in respect of the claimed route.

7.4 The solicitor acting for the landowners provided a thorough analysis of the actions of the landowners during the Relevant Period, accompanied by documentary evidence by way of statements, emails, and photographs. Section 6 discusses this submitted evidence.

8. Analysis of the evidence

Evidence of public use of the claimed route spans a timeframe from 1960 up to the present day. However, the Relevant (20 year) Period for this case is taken to be 1977-1997 which accounts for the Highways Act s.31(6) Statements and Declarations lodged by the landowners commencing in 1997, as well as evidence regarding fencing/notices in place on the land.

The user evidence put forward supports the claim that the route has been dedicated as a public right of way. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

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8.1 Analysis of the evidence under Section 31, Highways Act 1980

For Section 31 of the Highways Act to give rise to a presumption of dedication, the following criteria must be satisfied:

- The physical nature of the path must be such that it is capable of being a right of way at common law
- The use must be brought into question i.e. disputed or challenged in some way (see para 8.5)
- Use must have taken place without interruption for a period of 20 years immediately prior to the date the right was brought into question
- Use must be 'as of right' i.e. without force, without secrecy and without permission
- Use must be by the public at large
- There must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed

Physical nature of the route

8.2 The route claimed is capable of being a public right of way at common law, given that it follows a well-defined route around the perimeter of a field.

8.3 A number of definitive footpaths surround the path, from the north and south, and there are cross field definitive footpaths which all link with the claimed route.

8.4 There is access to the field through a gap in the hedge, leading off Grafton Avenue. This access/egress point appears to have been in place from around 1970 where there is evidence that a stile/gate was in place. The public accepted this entry/exit point in their use of the now definitive footpaths (S16/48 &49) prior to 1997. These definitive footpaths are waymarked from this access point. S16/48 runs north from the claimed route, and S16/49 runs west from the access point across the field, joining into path S1/139 to the south.

8.5 The field in which the claimed perimeter route is located is bounded by established hedgerows. Gaps in this hedge to the north and to the south lead to waymarked definitive footpaths.

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8.6 Witnesses interviewed all stated that they have used the perimeter path for the period of use stated on their witness forms, as well as using the cross field paths. In other words, their use of the perimeter path was not solely as a means of avoiding the crop or ploughed surfaces of the definitive routes which occurred from time to time.

Bringing into question the right of the public to use the path

- a. Filing of a Deposit of Statement and Map under the Highways Act 1980, Section 31(6) is sufficient evidence to show that the landowner had no intention to dedicate.
 - b. The evidence of a lack of intention to dedicate does not affect the use before the date when use of the route was first brought into question.
 - c. Presumed dedication may be claimed under the Highways Act 1980.
 - d. This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied by a sufficient period of public use without force, secrecy or permission and the acquiescence of those landowners in that use. This is needed to meet the two requirements for the dedication of a highway – that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as turning people back, putting up a physical barrier or erecting notices stating that the route is not a public right of way of the type being claimed.
- 8.7 Five s.31 (Highways Act 1980) Declarations have been deposited with the Council. These are dated 1997, 2003, 2009, 2020, and 2021.
- 8.8 The 1997 Declaration has the effect of bringing into question the rights of the public to use the land other than to utilise the footpaths recorded on the definitive map and statement.

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickerell (to and from Grafton Avenue, Weymouth)

- 8.9 The land is in the joint ownership of Dorset Land Limited, and Chaffeys Land Limited.
- 8.10 Solicitors acting for the owners have submitted a statement, the main elements of which relate to:
- Individual users having insufficient use over time (ie less than 20 years each)
 - Individual users not exercising use of the path 'As of Right'
 - Doubt as to the credibility of a number of the witness statements
 - Doubt as to the whether witnesses were truthful in their awareness of notices on site advising of the non-public nature of the field, other than the recognised definitive footpaths.
- 8.11 Some of the witnesses have stated that temporary insecure fencing was in place across the Grafton Avenue entrance to stop animals escaping from the field. However, they all state that they have never been physically prevented from accessing the path in the field.
- 8.12 The formal bringing into question of the use of the claimed route is the s.31 declaration dated 1997, giving a relevant period of use of 1977-1997.

Twenty years use without interruption

- 8.13 Based on analysis of the user evidence from the completed witness evidence forms, together with the interviews in person with individual witnesses, it would appear that there has been no interruption to public use during the qualifying 20-year period 1977-1997.

Without force, secrecy or permission

- 8.14 There is no evidence by the witnesses to suggest that the route has ever been used by force. Evidence has been presented to show that a stile/gate was in place in the 1970s, and witness evidence states that temporary, insecure fencing was placed across the Grafton Avenue entrance to prevent animals escaping. This 'fencing' is reported to have been so insecure that animals escaped the field. Landowner evidence maintains that fencing was placed in the field (but does not specify the locations of this fencing) to prevent the escape of the livestock in that field.

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickerell (to and from Grafton Avenue, Weymouth)

- 8.15 All the witness evidence (written and verbal) states that the route has always been available for use by the public, with the insecure temporary fencing not creating a barrier to use of the field.
- 8.16 There is no evidence to suggest that use of the route has ever been because of a landowner's permission (other than one discounted witness who kept horses in the field occasionally).

Use by the public

- 8.17 Use must be of a volume that is capable of coming to the attention of the landowner, and should be public and not, for example, solely by the tenants or employees of a particular landowner or business.
- 8.18 Evidence has been submitted from 78 witnesses stating that use of the claimed route has continued from 1960 to the present day. Of these 78 individuals, 49 have used the claimed route during the years of the defined relevant period (1977-1997). It is clear that these individuals comprise 'the wider public'. Their combined use over the 20 year period satisfies the legal test.
- 8.19 The applicant states that the volume of people using this path continues to the present day and has not reduced since the application was submitted to the Council in 2021.
- 8.20 The relevant period of use (1977-1997) has been exceeded in years, both prior to and beyond the dates, confirmed by evidence submitted with the claim, and during the consultation period of 14 December 2022 to 10 February 2023.
- 8.21 Landowner evidence shows that the agent(s) for the landowner were aware of the use by the public when the land was checked by the agent from 1997 onwards, resulting in signage being erected on the land.

Conclusions under Section 31, Highways Act 1980

- 8.22 It is considered that the requirements of Section 31 have been satisfied in this case and that the public have been using the route 'as of right' for a full period of twenty years between 1977 and 1997. Evidence of use began in 1960, through to 2021 when the application was submitted and as mentioned earlier, the use continues to the present day, providing longevity of use, clear acceptance of the route by the public, and a lack of acknowledgement of any challenge to use.

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- 8.23 The landowners state in their submitted evidence at consultation that: *“All evidence provided by the Owners, in particular that set out in the preceding section clearly shows that there has never been any intention to dedicate the Application Route, or any part of the Land, at any point during their ownership starting in 1971. Exhibit B (Vic Cooke’s letter) also evidences that the Owners’ predecessors in title had no intention to dedicate the Land in the period starting in the early 1960s to 1971 (and probably also prior to then although no earlier evidence is held).*
- 8.24 Lord Hoffman’s case (R (on the application of Godmanchester Town Council) (Appellants) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other action) and R (on the application of Drain) (Appellant) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other action (2007) on the matter of determining use ‘as of right’ was cited by the landowner’s solicitor, where they quote that *‘Lord Hoffman held that “in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate”*. The solicitor identifies that *‘In this case there is ample evidence to show just that’ And that “intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the owner’s intention to be.”* (landowner solicitor’s emphasis).
- 8.25 Officer comment: In the above judgement, Lord Hoffman opines that *“what matters is the impression given to members of the public”*, and cites the case of Barraclough v Johnson (1838) 8 Ad & E 99, 105, where judge Littledale J said:

"A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not."

Lord Hoffman also cites Denning LJ who opined that *“...in order for the right of the public to have been 'brought into question', the landowner must challenge it by some means **sufficient to bring it home to the public** that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the*

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

public to use the path. When he does so, the public may meet the challenge.'

8.26 No evidence has been provided to confirm that secure fencing was in place during the relevant period of use. A stile or gate is a recognised structure often placed at the start of a path. Boarding placed across the entrance to the field could have been easily moved/knocked down (as evidenced when the horses escaped from the field). Witnesses state that they freely accessed the field to use the perimeter path. The impression given to the members of the public would therefore be that there was no challenge to their use of the route. The challenge to use the route was therefore not 'sufficient to bring it home to the public' that they should not be using it.

8.27 The period of use for application T615 is very similar to the 1994 application for which the Inspector ultimately determined to confirm the DMMO.

There is a disparity in that all of the 9 witnesses who were interviewed subsequent to the submission of the Form E User Evidence forms, and prior to the decision making of this application, and who were asked the specific question about whether any notices were in place, all categorically confirmed that they had not seen any notices which advised the path was not public. Only more recently when signs stating 'keep to the public footpaths' were erected in the field, did they recall notices of this nature.

8.28 Consequently, if the public was not aware of any notices, and did not have to use force to enter the field (for instance by breaking a fence/cutting a wire fence), then the users cannot reasonably be expected to 'understand (what) the owner's intention' was, in similar manner to the footpaths added in 1997, the Order for which was confirmed by the Planning Inspectorate.

All the witnesses which were interviewed had very clear memories of their time using the path in the 1970s. There is no requirement by an applicant of a certain path to also identify any other routes which may have been used in the same vicinity.

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

Analysis of the evidence under common law

- 8.29 This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for.
- 8.30 This may be by an express act of dedication, or it may be implied by a sufficient period of public use without force, secrecy or permission and the acquiescence of those landowners in that use. This is needed to meet the two requirements for the dedication of a highway – that is dedication and public acceptance of that way by use.
- 8.31 The length of time that is required to demonstrate sufficient user is not fixed under common law and depends on the facts of the case.
- 8.32 The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as turning people back, putting up a physical barrier or erecting notices stating that the route is not a public right of way of the type being claimed.

Conclusions under common law

- 8.33 There is evidence from which a deemed dedication at common law can be inferred. A stile/fence at the Grafton Avenue entrance was in place; one piece of landowner evidence has been submitted of a broken 'Private Keep Out' notice during the relevant period although its location is unclear; the public at large have used the claimed route in sufficient number and over a sufficient time period for them to have accepted the route as public; agents acting for the landowner claim to have observed the public using the perimeter route, but no actions were taken to turn people away.

9. Financial Implications

Any financial implications arising from this application are not material considerations and should not be taken into account in determining the matter.

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickerell (to and from Grafton Avenue, Weymouth)

10 Climate Implications

Any climate implications arising from this application are not material considerations and should not be taken into account in determining the matter.

11 Well-being and Health Implications

Any well-being and health implications arising from this application are not material considerations and should not be taken into account in determining the matter.

12 Other Implications

None

13 Risk Assessment

HAVING CONSIDERED: the risks associated with this decision; the level of risk has been identified as:

Current Risk: LOW

Residual Risk: LOW

14 Equalities Impact Assessment

An Equalities Impact Assessment is not a material consideration in considering this application.

15 Conclusions

15.1 In deciding whether or not it is appropriate to make an order, it must be considered whether public rights subsist or are reasonably alleged to subsist on this route. There is a conflict of evidence, but on the balance of probability it is considered that there is sufficient evidence to show that public rights can be reasonably alleged to subsist.

15.2 Aerial photography shows the existence of the entire claimed route from 1947 through to the aerial photos taken in 2017.

15.3 The user evidence in the form of witness statements confirms continuous use from 1960 through to the date of the Schedule 14 application, February 2021.

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

- 15.4 Therefore, the recommendation is that an Order is made to add the claimed route to the Definitive Map and Statement as a Footpath.
- 15.5 If no objections are received to the Order, the Council may itself confirm the Order.
- 15.6 If objections are received to the Order, the Council must submit the application to the Planning Inspectorate, with the objections, for it to determine the outcome of the application.

16 Appendices

1 Drawing T615/22/3

2 Law

3 Documentary evidence

Extracts from key documents:

- 1947 Aerial Photograph
- 1972 Aerial Photograph
- 1997 Aerial Photograph
- 2002 Aerial Photograph – flown by UK Photography

4 Charts to show periods and level of use from witness evidence

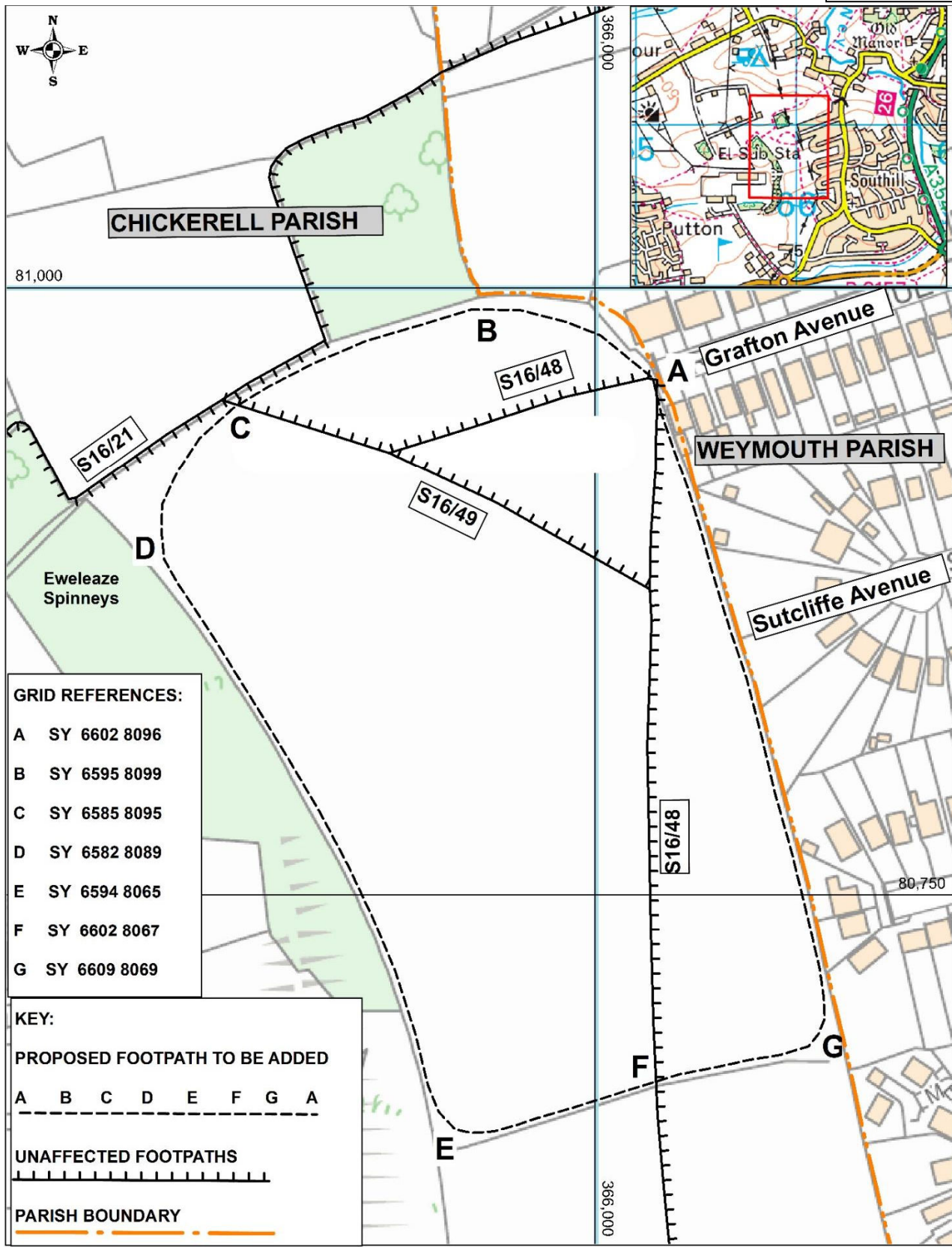
17 Background Papers

The file of the Executive Director, Place (ref. RW/T520).

Date: 01 November 2023

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereall (to and from Grafton Avenue, Weymouth)

APPENDIX 1



DORSET COUNCIL (A FOOTPATH AT EWEELEAZE SPINNEYS, CHICKEREALL (LEADING TO AND FROM GRAFTON AVENUE, WEYMOUTH))

DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2023

Ref: T615/22/3
Date: 09/11/2023
Drawn by: BT
Scale: 1:2000 at A4
Cent X: 365,953
Cent Y: 80,861

© Crown copyright and database rights 2023
 OS 0100060963. Aerial Photography ©
 UKPerspectives 2002 & © Getmapping 2005, 2009
 & 2014, © Getmapping Plc and Bluesky International
 Limited (2017 onwards)

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickerell (to and from Grafton Avenue, Weymouth)

LAW

General

Wildlife and Countryside Act 1981

- 1.1 Section 53 of the Wildlife and Countryside Act 1981 requires that the Council keep the definitive map and statement under continuous review and in certain circumstances to modify them. These circumstances include the discovery of evidence which shows that a right of way not shown in the definitive map and statement subsists or is reasonably alleged to subsist.
- 1.2 Section 53 of the Act also allows any person to apply to the Council for an order to modify the definitive map and statement of public rights of way in consequence of the occurrence of certain events. One such event would be the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way not shown on the definitive map and statement subsists.
- 1.3 The Council must take into account all relevant evidence. They cannot take into account any irrelevant considerations such as desirability, suitability and safety.
- 1.4 For an application to add a right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows either:
 - (a) that a right of way subsists or
 - (b) that it is reasonably alleged to subsist.

The evidence necessary to satisfy (b) is less than that necessary to satisfy (a).
- 1.5 An order to add a route can be confirmed only if, on the balance of probability, it is shown that the route as described does exist.
- 1.6 For an application to change the status of an existing right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows that it ought to be recorded with that different status.
- 1.7 The confirmation test for an order to change the status of an existing right of way is that same as the test to make that order.
- 1.8 An order to add a right of way and change the status of an existing

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

right of way as part of the same route should only be made if the balance of the evidence shows that the new route exists and the existing route should be recorded with a different status.

- 1.9 Where an objection has been made to an order, the Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the Council can itself confirm the order, provided that the criterion for confirmation is met.
- 2 Highways Act 1980
- 2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought in to question.
- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.
 - (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
 - (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- 2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.
- 2.3 Section 31(3) of the Highways Act 1980 says that where a land owner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public right of way.

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2.4 Section 31 (6) of the Highways Act 1980 permits landowners to deposit with the Council a map and statement indicating what ways over the land (if any) he admits to having been dedicated as highways. A statutory declaration can be made at intervals of not more than 20 years stating no additional ways have been dedicated since the date of the deposit. In the absence of proof to the contrary, this is sufficient to establish that no further ways have been dedicated. Prior to the Highways Act 1980 a similar facility was available under the Rights of Way Act 1932 and the Highways Act 1959.

2.5 Section 32 of the Highways Act 1980 says that the Council must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.

3 Human Rights Act 1998

3.1 The criteria for definitive map modification orders are strictly limited to matters of fact and evidence. In all cases the evidence will show that the event (section 53) has already taken place. The legislation confers no discretion on a surveying authority or the Secretary of State to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it. In such situations where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Planning Inspectorate's recommended approach is to turn away any human rights representations.

3.2 A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by Section 6.2 of the Human Rights Act 1998 even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (section 3 Human Rights Act 1998).

4 Finance Act 1910

4.1 The Finance Act 1910 required the Commissioners of Inland Revenue to cause a valuation of "all land in the United Kingdom" and plans were prepared identifying the different areas of valuation. In arriving at these valuations certain deductions were allowed, including deductions for the existence of public rights of way.

4.2 Public 'fenced' roads were generally excluded from the valuation. Where public rights passed through, for example a large field and were

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickerell (to and from Grafton Avenue, Weymouth)

unfenced, they would be included in the valuation and a deduction would be made in respect of the public right of way.

5 National Parks and Access to the Countryside Act 1949

- 5.1 The National Parks and Access to the Countryside Act 1949 required the County Council as “Surveying Authority” to compile the record of the public rights of way network and the District and Parish Councils were consulted to provide the County Council with information for the purposes of the survey.

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DOCUMENTARY EVIDENCE CONSIDERED



1947 Aerial Photograph

Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

1972 aerial photograph



Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

1997 aerial photograph



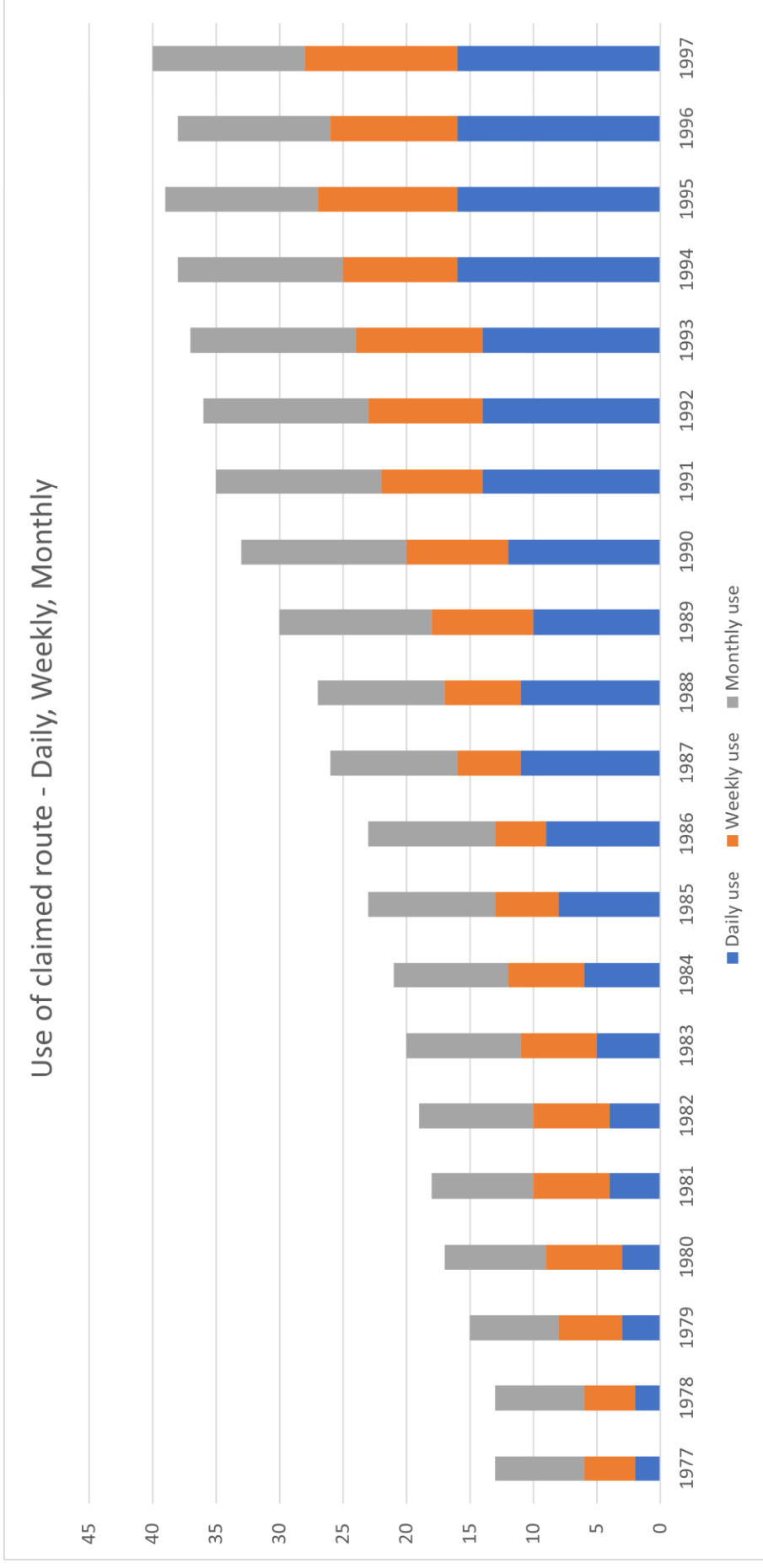
Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

2002 aerial photograph



Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickkerell (to and from Grafton Avenue, Weymouth)

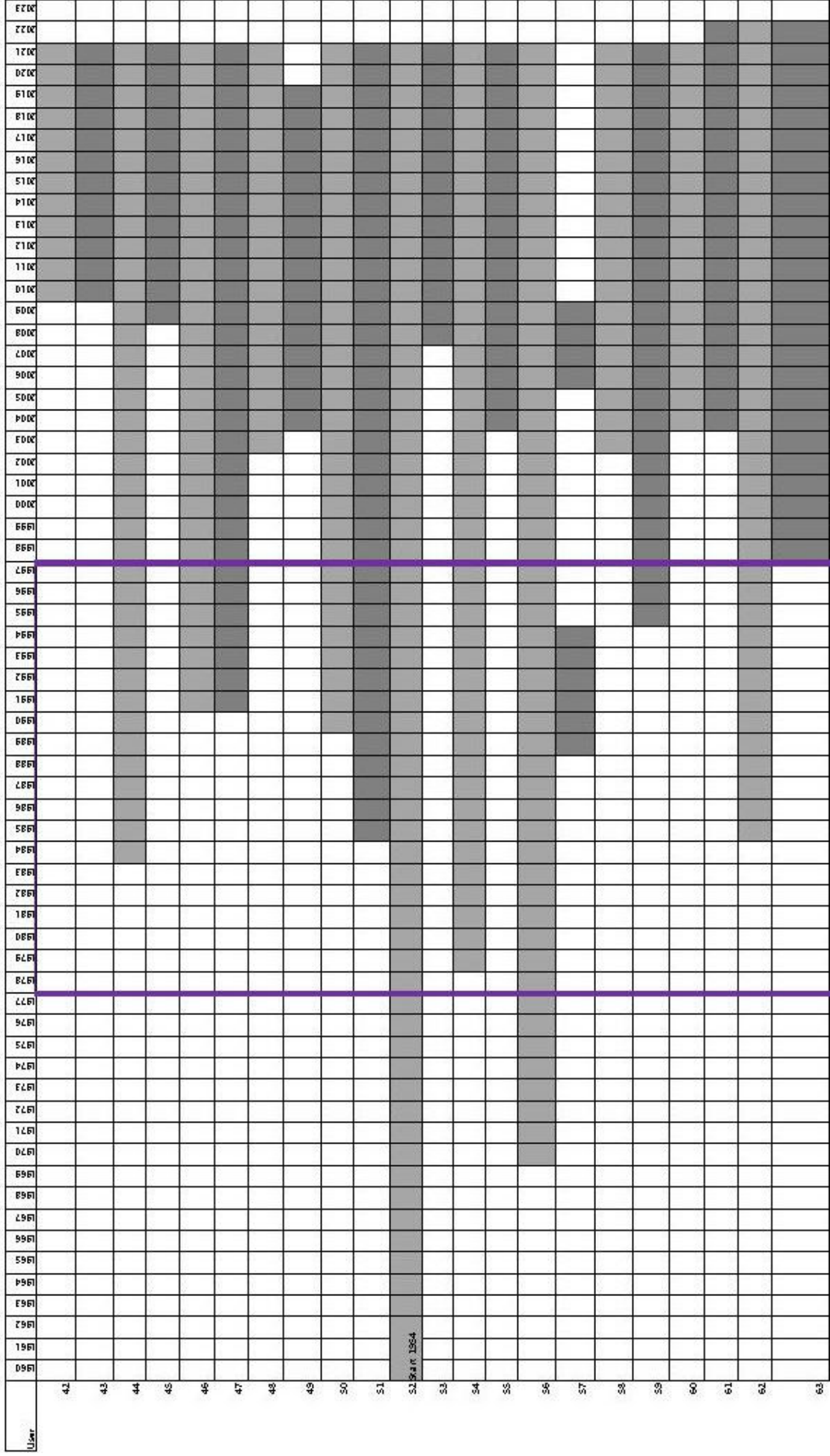
Frequency of Use within the Relevant Period 1977-1997



Definitive Map Modification Order Application to add a footpath at Eweleaze Spinneys, Chickereil (to and from Grafton Avenue, Weymouth)

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Recommendations accepted:

Signed:

.....*V Penny*.....

Date:.....6 November 2023... ..

Vanessa Penny

Definitive Map Team Manager

Spatial Planning