

<b>Decision maker:</b>	<b>Acting Assistant Director Highways &amp; Transport</b>
<b>Date:</b>	12 April 2019
<b>Title of report:</b>	<b>Wildlife and Countryside Act 1981 Application for Modification Order in the parish of Luston, Reference M243</b>
<b>Report by:</b>	<b>Definitive Map Officer</b>

## **Classification**

Open

## **Key Decision**

This is not a key decision

## **Wards Affected**

Bircher

## **Purpose**

To consider an application under section 53 of the Wildlife and Countryside Act 1981, to record a public footpath from the B4361 road at Lustonbury to footpath Luston LJ25.

## **Recommendation**

**THAT:**

**no order be made under section 53(2)(b) of the Wildlife and Countryside Act, 1981 in consequence of events specified in section 53(3)(b) or section 53(3)(c)(i), to modify the definitive map and statement to record a public footpath along the route A – B – C – D as shown on the plan at Appendix 1**

## **Alternative options**

- 1 There are no alternative options. The Council is carrying out a statutory duty in determining this application under the provisions of section 53 of the Wildlife and Countryside Act 1981. This function is quasi-judicial in nature and therefore the Council's role is to assess the evidence and decide whether the claim meets the appropriate legal tests. If it fails to act appropriately on the evidence discovered, the

Council could face an appeal to the Secretary of State or ultimately a statutory challenge under the provisions of the Act.

## Reasons for recommendations

- 2 The Definitive Map and Statement are conclusive legal records of the status, position and width of public rights of way. Herefordshire Council has a duty under section 53 of the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review. The Council must make orders to modify the Map and Statement where evidence is discovered which in conjunction with the other available evidence shows that:
  - a period of time has expired during which enjoyment of a way by the public raises a presumption that it has been dedicated as a public path [Section 53 (3)(b)].
  - a right of way which is not shown subsists or is reasonably alleged to subsist [Section 53 (3)(c)(i)].
  - a highway which is shown ought to be shown as a highway of a different description [Section 53 (3)(c)(ii)].
  - there is no public right of way over any land shown as a highway of any description [Section 53 (3)(c)(iii)].
- 3 Following detailed investigation into this application, insufficient evidence has been found of use of the route by the public to raise a presumption that it has been dedicated as a public path, nor has sufficient evidence been found to demonstrate that that public footpath rights subsist or can be reasonably alleged to subsist over the proposed route.

## Key considerations

- 4 On 26th March 2001, several members of the public made applications to Herefordshire Council to add a footpath at Lustonbury, Luston, to the Definitive Map and Statement (as shown A – B – C – D on the plan at Figure 1). On 28th March of the same year, Roger and Gill Onions also submitted an application for the same path, closely followed by a further application on 2nd April, and a third application 1st May, who also applied for the same path.
- 5 In support of the application, the applicants provided copies of the following documents in evidence:
  - 1:10560 O.S. Map 1<sup>st</sup> Edition 1885
  - 1:10560 O.S. Map, circa 1930
  - 1:10560 O.S. Map, circa 1950
  - 1:10560 O.S. Map Provisional Edition Sheet SO46SE, circa 1963
  - 1:2500 O.S. Map, circa 1886
  - 1:2500 O.S. Map circa 1903/4
  - Map from Royal Commission Historic Monuments NW Herefordshire volume, 1934 – derived from the 1928 edition 1:2500 O.S. map.
  - The applicants also provided seven user evidence forms covering periods of use between three to eighteen years.
- 6 The documentary evidence investigated includes a range of nineteenth century maps, tithe maps, 1910 Finance Act records, large-scale Ordnance Survey plans, and submissions from the parish council for the preparation of the first Definitive Map. In addition, seven user evidence forms were submitted with the original application and

three further users came forward during the investigation. Four users were interviewed.

- 7 The nineteenth century county maps and the Old-Series 1" Ordnance Survey map do not show the claimed route. The First and Second Edition and Second Revision large-scale Ordnance Survey plans from the late 1880s to 1928 show most of the claimed route as a footpath, but these documents carry the disclaimer that the showing of any road, track or path is not evidence of a right of way. The 1910 Finance Act records show most of the claimed route on the Ordnance Survey base-mapping and there is a deduction for "public rights of way or user" over the affected plot, but this plot covers a large area (over 373 Acres) and is crossed by many other paths marked on the Ordnance Survey mapping, and it is not possible to say whether any of the deduction allowed was attributable to the claimed path.
- 8 The 1950s parish council submissions to record rights of way on the first Definitive Map showed section B – C – D of the claimed route, but the termination onto the main road was to the east of the current claim. The route claimed by the parish was objected to and was not recorded on the Draft, Provisional or subsequent Definitive Maps. The documentary evidence is considered insufficient to demonstrate the existence of public rights over the claimed route.
- 9 From the available user evidence, there is insufficient evidence of use by the public at large from which to establish a statutory presumption of dedication of the claimed route under section 31 of the Highways Act 1980, and neither is there sufficient evidence from which to infer a dedication of the route at common law.
- 10 As a result of investigating this application, insufficient evidence has been found to satisfy the tests set out in sections 53(3)(b) or 53(3)(c)(i) of the 1981 Wildlife and Countryside Act, and no order should be made to record a footpath along the route A – B – C – D, whether along the route originally claimed or along the route described by users at interview.

## **Community impact**

- 18 Not a relevant consideration under section 53 of the Wildlife and Countryside Act. There is considered to be no community impact.

## **Equality duty**

- 19 Not a relevant consideration under section 53 of the Wildlife and Countryside Act. There are considered to be no equalities implications.

## **Financial implications**

- 20 The council cannot take financial considerations into account in determining Definitive Map applications under section 53 of the 1981 Act. The determination must solely be based on whether or not public rights subsist on the basis set out above.

## **Legal implications**

- 21 The legal framework requiring the Council to keep the Definitive Map and Statement under continuous review and make modifications is set out in Section 53 of the Wildlife and Countryside Act 1981 ("the Act") and is more particularly set out above in paragraphs 1 and 2 of this report. As detailed above, the function is one that is quasi-

judicial in nature and the Council must assess the evidence and make a determination on whether the claim meets the legal tests. In this case the tests are under Sections 53(3)(b) and 53(3)(c)(i); namely, whether a period of time has expired during which enjoyment of the way by the public raises a presumption that it has been dedicated as a public path, and whether a right of way subsists or can reasonably be alleged to subsist. The evidence discovered is considered insufficient to meet either of these tests.

- 22 If the Council refuses an application to make an order the applicant has a right of appeal to the Secretary of State under Schedule 14 of the 1981 Act.

## **Risk management**

- 25 Given the outcome of the initial consultations on this application, it is unlikely that the decision not to make an order would receive objections from the affected landowners. However, the applicants may appeal to the Secretary of State against the decision who may then direct the Council to make an order if he considers that the evidence is sufficient to meet the legal tests. This is part of the normal, legal procedure for dealing with applications under section 53 of the 1981 Act. If the Council fails to act appropriately, it could face challenge via appeal to the Secretary of State or through the statutory review process in the Act.

## **Consultees**

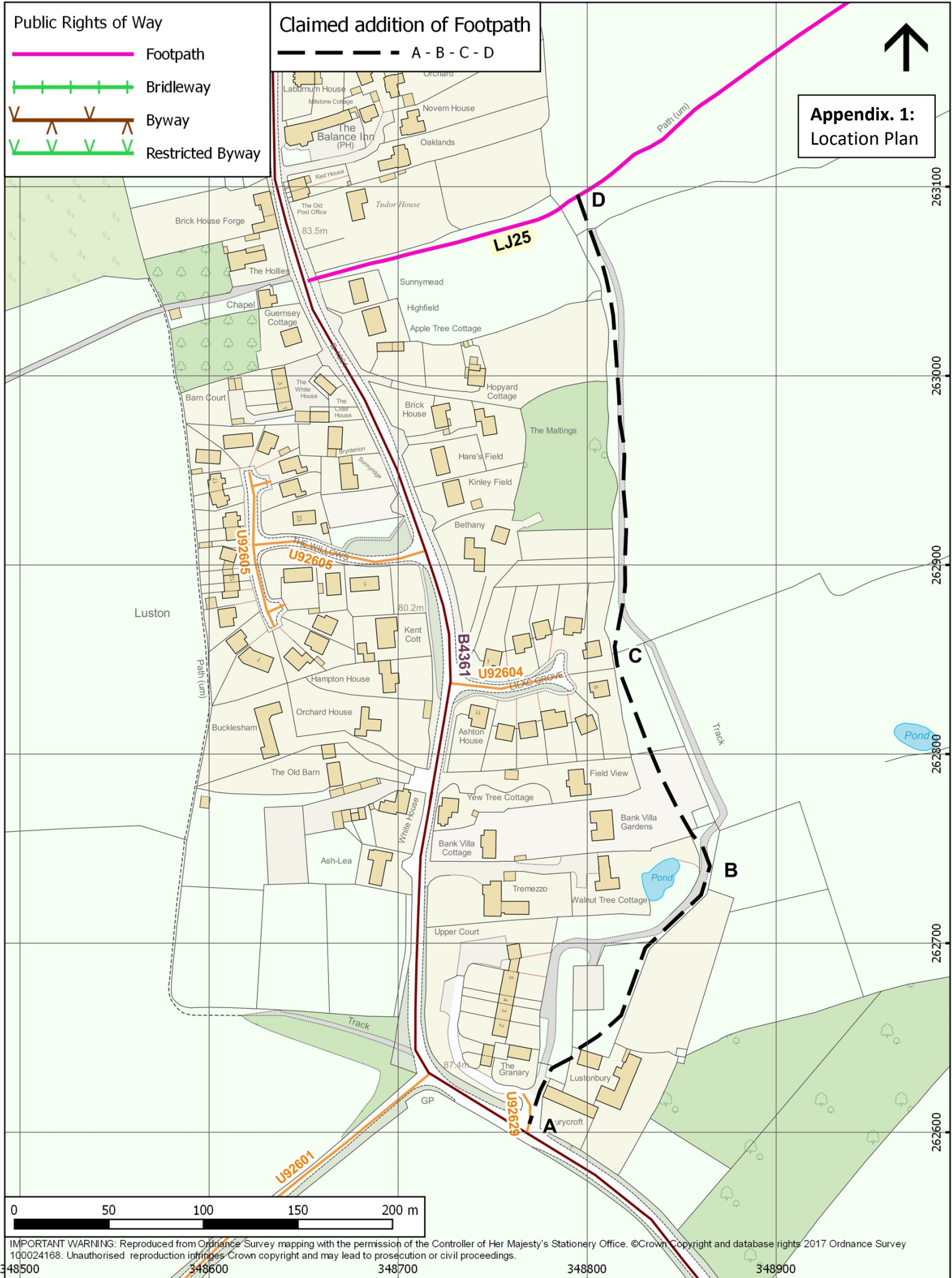
- 27 The Luston Group Parish Council and the local Herefordshire Councillor Sebastian Bowen were consulted and sent a copy of the draft report on 8th January 2019. The owners and occupiers of land adjoining or crossed by the claimed route were also consulted at the same time. The Parish Council responded that they “...*agreed with the evidence and noted that the path is used at the discretion of the local landowner(s).*” Cllr. Bowen responded by telephone, saying that he was disappointed by the draft recommendation not to make an order as he thought it would be a useful route for the village, but he did not have any additional evidence relating to use of the route. None of the other consultees added any new evidence to support the existence of the claimed route. Some of the adjoining landowners said they believed the route to be public but gave no further evidence to support this, whilst others stated that they did not regard the route as public. The owner (who owns most of the land crossed by the route) stated that to his knowledge section A – B of the route had been obstructed by buildings and walls from 1955 to 2000.

## **Appendices**

Appendix 1– Plan of Claimed Route (attached)

## **Background papers**

- Research Report to the Director of Economy, Communities & Corporate, reference: M243



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