

HERTFORDSHIRE COUNTY COUNCIL



Rights of Way Service

Modification Order Application
Reasons for the Decision

“Lakeside Path” at Aldenham Country Park

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Application Details

An application has been made to HCC's Rights of Way Service, to record a public footpath in the parishes of Aldenham and Elstree & Borehamwood which are in the Hertsmere district; south Hertfordshire. An extract of the 2010 Definitive Map is attached, labelled "Investigation Plan" ("IP"). It shows where the route is and it is labelled Point 1 to Point 8.

This application was made by the Aldenham Country Park Trust Ltd on 23rd July 2013 under covering letter setting out the reasons for the application with a copy of the Memorandum and Articles of Association of Aldenham Country Park Trust Limited. The application form was submitted in the prescribed form and was supported by the following documents:

- Maps showing the application route alone and the application route in relation to other recorded public rights of way
- Photographs of the application route
- 41 completed user evidence forms

Description of Route

The Aldenham Reservoir is located on the boundary of the parishes of Aldenham and Elstree & Borehamwood, in the district of Hertsmere. This is south Hertfordshire between the urban areas of Bushey and Elstree, north of the M1 motorway. The Reservoir is situated within Aldenham Country Park. The land at the edge of the Reservoir, over which the application route runs, is flat and generally wooded.

HCC Rural Estates department held the tenancy for the Reservoir and adjoining land between December 1973 and December 2015.

The application route starts at the north west corner of the Reservoir at a junction with Aldenham footpath 52 (point 1 on the IP) and entrance to the "100 Aker Wood" and runs around the west and south sides of the Reservoir to join Elstree & Borehamwood footpath 5 at point 8 on the IP, on the north side of the A411 Watford Road.

The application route between points 1 and 2 on the IP crosses a grassed area with picnic tables, adjacent to the Aldenham Country Park car park.

There is no obvious width of the route between points 1 and 2 as it crosses an open area. At point 2, the application route enters woodland and follows a surfaced path past a children's play area. The width of the application route at this point is approximately 3 metres although this increases to approximately 4 metres approaching the carved fallen tree at point 3 on the IP.

The application route continues south along the lakeside path with a width of approximately 4 metres, past an information board referring to the South Bay before turning west. The width widens to between 6 and 7 metres approaching point 4 which is a junction with a path leading back to the Country Park facilities and car park.

Between points 4 and 5, the application route runs between fences approximately 3.5 metres apart. This is on the west side of the animal enclosure. The application route continues to follow the lakeside path east, passing a Lakeside Woodland information board, to the

footbridge at point 6 on the IP. The width of the application route between points 5 and 6 is approximately 4 metres.

The application route runs south between points 6 and 7 towards Watford Road. At point 7 the application route is approximately 5 metres wide, however the application route between points 7 and 8 is the narrowest part of the route (2 – 3 metres wide), running between the Reservoir and Watford Road.

The application route joins Elstree & Borehamwood footpath 5 at point 8 on the IP located next to information boards about the Reservoir and the Country Park and access to/from Watford Road via a kissing gate.

Documentary Evidence

For each investigation, we check at least 10 primary sources of information for any historic evidence relating to the application route. You can view the documents listed below at Hertfordshire Archives and Local Studies (HALS) or at the Rights of Way Service (ROW). The documents are listed below with a reference number (if it has one) and where you can find it.

For further information contact:

Hertfordshire Archive and Local Studies (HALS) -
01438 737333 (or 01923 471333 from area codes 01923 and 020)

www.hertsdirect.org/services/leisculture/heritage1/hals/

Rights of Way Service (RoW) - 01992 555279 to make an appointment.

If you would like more information about documents and how they are important in investigating public rights of way, please go to the Planning Inspectorate's website and view their Guidance Booklet for Definitive Map Orders: Consistency Guidelines. See <http://www.planningportal.gov.uk/planning/countryside/rightsofway/rightsofway> which also gives details about related articles and case law.

Where the document shows information relevant to the area of the application route, it is listed with the following information:

- The Document's name, date and where it can be found (location and reference)
- Why we consider the document important when making our decision
- What is shown by the document in the area of the application route
- Investigating Officer's comments

Please note that where there is no evidence found relating to the application route, this has just been recorded as "no evidence found..." or where there are no records for the document listed, this has been recorded as "No records found."

1. Dury and Andrews Map, 1766 – Ref: HALS – CM26

No evidence found relating to the application route. The map does not show Aldenham Reservoir; the land is shown as 'Pasture, enclosed by hedges'.

2. Aldenham Inclosure records, 1803 – Ref: QS/E/2 & 3

No evidence found relating to the application route. Aldenham Reservoir is shown.

3. Bryant's Map, 1822 – Ref: HALS – CM88

No evidence found relating to the application route. Aldenham Reservoir is shown and labelled 'Reservoir' but is shown only as water.

4. Tithe map for Aldenham, 1839/40 – Ref: HALS – DSA4/3/1 & DSA3/27/1b

No record – the map and award do not cover the area of land where the Reservoir is situated. It is likely that the Reservoir is shown in the Tithe documents for **Whitchurch, 1838 – Ref: National Archives –IR29/21/49 and IR 30/21/49**, however these documents are not held by HALS and were not inspected.

5. London and Midland Junction Railway plans, 1861 – Ref: HALS R155-7

No evidence found relating to the application route. A railway linking Edgware and Hitchin was proposed, running through Aldenham Reservoir, but was never built.

6. Watford Fieldpaths Association Map, 1938 – Ref: ROW

No evidence found relating to the application route.

7. Definitive Map Records, 1953+ – Ref: ROW

No evidence found relating to the application route.

8. Ordnance Survey maps, 1883 – 1970 – Ref: HALS/ROW

No evidence found relating to the application route. Footpaths Aldenham 54, Elstree & Borehamwood 1 and 5 are shown.

9. Highways Maintenance Records, 2006 & 2015 – Ref: ROW

No evidence found relating to the application route. The application route is not recorded on the List of Streets

10. Highway Diversion/Extinguishment Records

No records found.

11. Canal Plans

Not inspected.

12. Inland Revenue Documents

Date: 1910 Ref: HALS IR1/493

12.1 Why we consider these documents important

The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. In order to ascertain the value of all land as at 30th April 1909, a survey was carried out assessing each piece of land. The OS 2nd Edition Plans (usually from 1898) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or 'hereditament' number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist, but are unlikely to be good evidence that rights of way do not exist.

Where a route is shown uncoloured on the plans and excluded from the taxable land this provides very strong evidence of it being public highway. Usually this will be of vehicular status unless there is other contemporary evidence to indicate otherwise. Where footpaths and bridleways cross privately owned land these may be recorded as a reduction to the tax. However, where routes cross large hereditaments it can be difficult to establish which route is considered to be the right of way without additional details.

12.2 What is shown by these documents in the area of the application route?

The Inland Revenue documents held at HALS are the working copies which the valuation officers annotated at the time of the survey. The OS base map shows and labels geographical features in the area.

The land at the edge of the Reservoir is shown uncoloured on the plan. The Reservoir is coloured blue. There is no hereditament number on either the Reservoir or the immediate surrounding uncoloured land. This land is not braced to any surrounding hereditament. The Reservoir label on the basemap reads "Aldenham Reservoir (Grand Junction Canal Company)".

The surrounding roads, Watford Road, Dagger Lane and Aldenham Road are all uncoloured which generally indicates that they were considered to be public roads and not subject to tax.

Whilst the Finance Act required a full valuation of all land in the country, some land obviously would not be taxable and was exempt. In addition to public highway this included land owned and occupied by canal companies. It appears that with the exception of Watford Road the uncoloured land surrounding the Reservoir, over which the application route runs, was exempt from tax as it was owned by the Grand Junction Canal Company at that time (in addition to the label on the OS basemap, there are references in the current title register to the Grand Junction Canal Company dating from the 1920's-30's).

12.3 Decision

HCC decided that this document provides no evidence relating to the application route.

13. Aerial Photographs

Date: 1973 - 2010

Ref: ROW/HALS

13.1 Why we consider these documents important

Aerial photographs may confirm the physical existence of a route at the time the photographs were taken. They may also provide evidence relating to any physical features on the route such as signs or structures. Greater evidential value may be placed on aerial photographs where the date and time at which the photographs were taken is known and an accurate record of the position and orientation in relation to the relevant route is provided. An aerial photograph cannot provide evidence of what rights might exist over a route; it can only provide evidence that a route and its physical characteristics existed on the ground at the date the photograph was taken.

13.2 What the documents show

1973 – The car park is shown on the north west side of the Reservoir but the land on the west and south sides of the Reservoir is thickly wooded. The land crossed by the application route between points 1 and 2 is visible but there is no obvious route crossing it.

1980 – Like the previous photo, the land surrounding the Reservoir is thickly wooded but the route (which is now between fences) between points 4 and 5 is shown. The land crossed by the application route between points 1 and 2 is visible but there is no obvious route crossing it.

1990 – A small section of the application route south of point 2 and west of point 3 is visible through the trees. The application route between points 4 and 5 and continuing east towards point 6 is shown more clearly than on the earlier photographs. The application route between points 7 and 8 is also clearly shown, indicating that the application route had been surfaced by 1990.

2000 – Sections of the surfaced application route are visible but not to the extent of the 1990 photograph as the trees appear thicker.

2010 – The trees appear a little thinner in this photograph but the surfacing of the application route is not so clear. Sections of the application route between points 2 and 5 and between points 7 and 8 are still shown.

13.3 Decision

HCC decided that the aerial photographs provide supporting evidence of the physical existence of different parts of the application route – the clearest record being the 1990 photograph due to the trees being sparser and the surfacing on the application route. However, like the OS maps, the photographs are not capable of providing evidence of highway status.

14. Contemporary Evidence of Use

14.1 Why we consider the evidence important

Evidence is generally provided through the completion of evidence questionnaires by users and from information provided by the owner of the land. User evidence may support historic evidence of a right of way. However, where there is no historic evidence of a route it is possible for a public right of way to come into existence if it can be shown that members of the public have used it 'as of right' without interruption (usually) for a period of 20 years. In order for the public's use of a route to have been 'as of right' it must have been:

- **without force** (e.g. not breaking down a fence to access the route)
- **without secrecy** (e.g. not just using the route when landowners were away)
- **without permission** (i.e. not having the permission of the landowner).

Unless there is historic evidence of rights as well, legislation requires there to be evidence of 20 years' use which ends with a 'date of challenge' (section 31 of the Highways Act 1980). The 'date of challenge' is the date at which the landowner challenges the use of the route e.g. by putting up a notice. Where there is no evidence that use has been challenged, section 31(7B) of the Highways Act 1980 specifies that the date of application should be used as the end of the 20 year period.

Under common law a right of way can also come into existence in less than 20 years if it can be shown that there was dedication of the route by the landowner and acceptance of the route by the public.

Under Section 31, after a period of 20 years use, it is presumed that a right of way has come into existence. Where a landowner can produce evidence to show that they have taken steps to prevent the accrual of new public rights of way through use of a route by the public, no such right will be dedicated. Such steps must be overt and make the public aware of the landowner's intentions. They can include placing and maintaining notices on site stating that the route is not public or that it is used with permission; by erecting and locking gates; or by telling people seen using the route that it is not public, etc.

In addition to placing notices on site, section 31(6) of the Highways Act 1980 (following on from the Rights of Way Act 1932) allows landowners to deposit a map and statement with the County Council showing the public rights of way across their land. Following this, declarations need to be made regularly to the effect that no additional ways have since been dedicated. It should be noted that making such deposits and declarations will not affect pre-existing rights.

Below is a summary of the evidence we have received, including a table showing the information provided in the user evidence forms.

14.2 Summary of Evidence

Landowner evidence

No section 31(6) deposit has been made in relation to the land crossed by the application route.

The landowner provided comments on the application in two documents dated 17 February 2016 and 4 March 2016. The landowner acknowledges that "It appears that this [Lakeside Walk] has been used by the public and it is this path which the [Aldenham Country Park] Trust seek to record on the Definitive Map." They continue however, that at common law, the tenant under a lease cannot dedicate a public right of way without the concurrence of the freeholder. They state that in this instance there is no evidence that the predecessor freeholder consented to any dedication of a right of way and there is no evidence that they had actual knowledge of use by the public.

The landowner also notes that HCC's "historic position" is that a public right of way cannot have been acquired since the use of the path was permissive, The landowner refers to documents in support of this position:

- a letter dated 12 June 1992 from the Head of Countryside and Community (as tenant of land including the Reservoir) to the then owner of the Reservoir stating "The general public has permissive access to much of the land surrounding the reservoir"
- an email dated 25 February 2015 from the Senior Rural Estate Officer at HCC (as tenant of land including the Reservoir) to the agent for the then owner of the Reservoir stating "It is my view that users of the path around the reservoir have done so under the licence of the Country Park in conjunction with their use of the park"
- the lease dated 21 January 1974 between British Waterways Board and Hertfordshire County Council.

The landowner concludes that “at common law, the Trust cannot discharge the burden of showing that the Council, as tenant, had capacity to dedicate a public right of way. Additionally, under the Highways Act 1980, the statutory presumption of dedication is rebutted.” Use permitted by a tenant without the consent of the freeholder cannot bind the land in perpetuity.

An earlier email of 21 December 2015 from the agent for the then landowner to HCC Rights of Way Service refers to a clause in the lease permitting use of the Property only for recreational purposes as part of the Aldenham Country Park, thereby demonstrating that use is with permission.

The landowner considers that Rural Estates consistent position (as tenant of land including the Reservoir) has been that the public’s use of the Lakeside Walk is permissive and not “as of right”. The landowner refers to the various notices in the park which invite the public to use the path, as well as other notices relating to the behaviour of children, dogs, litter, BBQs and fires. User was permitted only insofar as the public complied with HCC’s rules and was therefore revocable.

In response to a request by the Rights of Way Service, further comments were made by the landowner in relation to the case of *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs, 2008*. The landowner submitted that in 2008, the House of Lords considered what was “sufficient evidence” of an intention not to dedicate, in relation to a statutory presumption of dedication under section 31 Highways Act 1980. The landowner summarised the decision of the House of Lords:

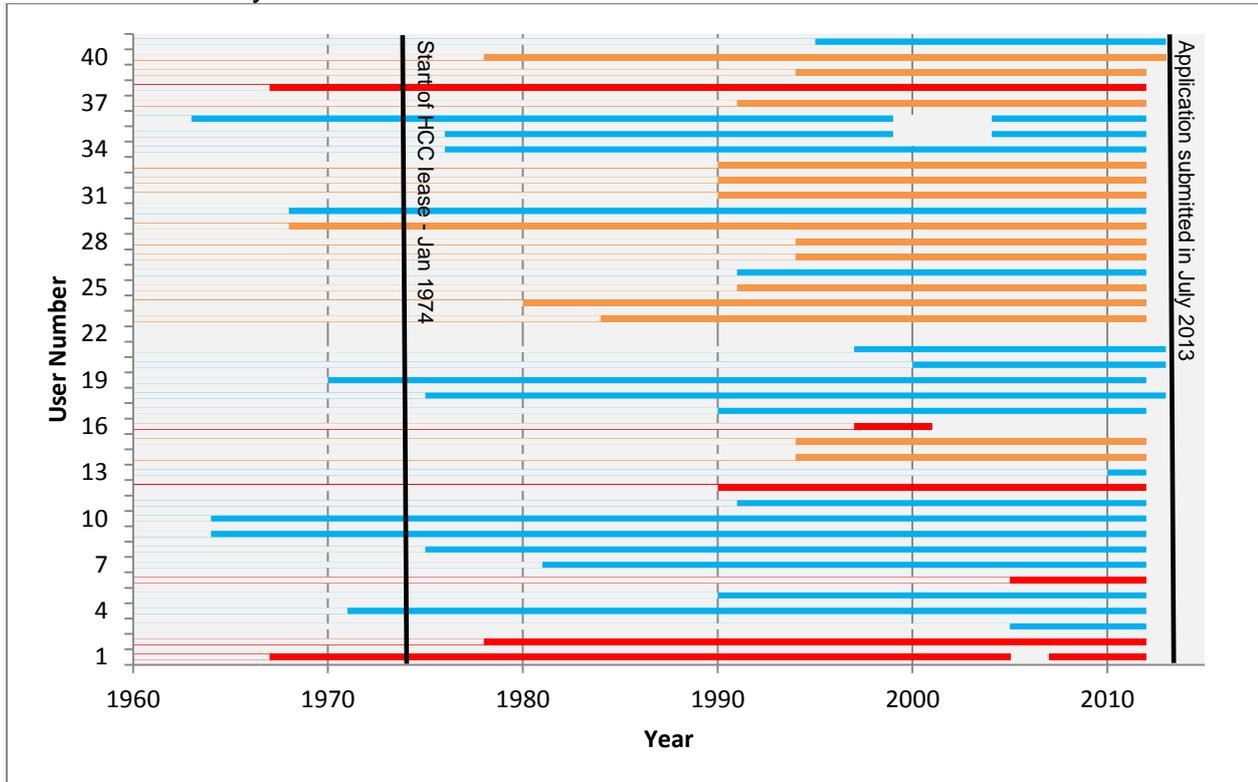
- There must be overt acts on the part of the landowner such as to show the public at large that he had no intention to dedicate
- The landowner must take steps to disabuse those persons of any belief that there was a public right of way
- This is to be assessed objectively in the context of the reasonable man and what users reasonably would have believed the landowner’s intention to be
- Evidence does not need to be written evidence and can include oral evidence (e.g. challenges to use)
- Whether evidence is sufficient is a fact-specific question to be decided on a case-by-case basis.

In relation to these points, the landowner submits that

- In consequence of leasing the land to HCC, it was clearly communicated to the users of the land that the land was under the control and management of the Council and not the freeholder. This was therefore an “overt act”.
- The users of the land were disabused of any notion that they could assert rights against the freeholder since it was sufficiently communicated to them that users were there solely because of HCC’s control and management and because the land formed part of a park.
- The House of Lords made it clear that “overt acts” do not have to consist of permissive/prohibitory notices or other direct challenges to users.
- The landowner had no intention to dedicate any rights of way and their only intention was to transfer the control and management of the park to HCC by way of the lease. HCC Rural Estates (as tenant) had no capacity to dedicate rights of way and no consent to do so from the landowner.

User evidence:

This is a summary chart of all the user evidence received:



Key:

- Yearly ■
- Monthly ■
- Weekly ■

User	Type of use	Period of use		Frequency of use	Width	Obstruction	Comments
1	Foot	1967	2012	Yearly	6' 6" to 22' 11"	No	Not 2005 - 2007 Ref to gates erected within the last 10 years - location not specified Refers to start of route by playing area. Used only western route from FP52 and Watford Road and not the route around the southern edge of the Reservoir
2	Foot	1978	2012	Yearly	2m to 4m	No	Ref to a wooden bridge - location not specified Starts from car park - used whole route
3	Foot	2005	2012	Monthly	3m to 4m	No	Ref to wooden bridge, marked on map Starts from sailing

							club. Used whole route
4	Foot	1971	2012	Monthly	2m to 4m	No	Ref to bridge No reference to parking, coming from Harrow. Used whole route
5	Foot	1990	2012	Monthly	2m to 4m	No	No reference to parking, coming from Borehamwood. Used whole route
6	Foot	2005	2012	Yearly	4 - 6 feet	No	Refers to returning to car park. Used whole route
7	Foot	1981	2012	Monthly	2- 5m	No	Starts and finishes at car park. Used whole route
8	Foot	1975	2012	Monthly	3 metres	No	Recent access is via car park. Used whole route
9	Foot	1964	2012	Monthly	2 metres	No	Every week day 1974-84 Bridge marked onto plan Refers to returning to car park. User whole route
10	Foot	1964	2012	Monthly	2 metres	No	Bridge marked onto plan Sometimes uses route from the car park. Used whole route
11	Foot	1991	2012	Monthly	2 metres	No	Ref to bridge Accesses route via fields leading to sailing club. Used whole route
12	Foot and bicycle	1990	2012	Yearly	2 to 3m	No	Sometimes joins route from car park. Used whole route
13	Foot, horse & bicycle	2010	2012	Monthly	3 to 7 metres	No	Ref to bridge Starts at car park. Used whole route
14	Foot	1994	2012	Weekly	2 to 7 metres	No	No reference to parking, coming from Elstree. Used whole route
15	Foot	1994	2012	Weekly	2 to 7 metres	No	Ref to sign saying 'lakeside walk' location not specified No reference to parking, coming from Elstree. Used whole route
16	Foot	1997	2001	Yearly	3 metres	No	Access from car park
17	Foot	1990	2012	Monthly	1 to 6m	No	Used with children on bicycles 2000-

							2012 Accesses route from ACP car park and opposite Fisheries. Used whole route
18	Foot and bicycle	1975	2013	Monthly	2 metres	No	Ref to bridges Starts and finishes at car park. Used whole route
19	Foot	1970	2012	Monthly	2 metres	No	Ref to structures over stream and dam Usually starts in car park. Used whole route
20	Foot	2000	2013	Monthly	2 (metres)	No	Ref to structures Access from Watford Road.
21	Foot	1997	2013	Monthly	2 metres	No	Ref to bridges over stream Uses car park. Used whole route
22	Foot	Unknown		Monthly	2 metres	No	Ref to bridges over stream gates Refers to returning back to car park. Used whole route
23	Foot	1984	2012	Weekly	2 metres	No	Ref to wooden bridge over stream Accesses route via sailing club. Used whole route
24	Foot	1980	2012	Weekly	2 metres +	No	Ref to a bridge Accesses route via sailing club. Used whole route
25	Foot	1991	2012	Weekly	8ft to 12ft	Yes - fallen tree, possible to go around it	Ref to small bridge over stream into lake No reference to parking, coming from Elstree. Used whole route
26	Foot	1991	2012	Monthly	2 to 4m	No	Ref to small bridge over stream No reference to parking, coming from Elstree. Used whole route
27	Foot	1994	2012	Weekly	2 metres	No	Believes bridge to facilitate crossing a wet path Accesses route via public footpaths. Used whole route
28	Foot	1994	2012	Weekly	2 metres	No	Ref to small bridge Accesses route via public footpaths. Used whole route
29	Foot	1968	2012	Weekly	2 to 7 metres	Yes - when the dam was	Accesses route via public footpaths.

						being repaired	Used whole route
30	Foot	1968	2012	Monthly	2 to 7 metres	Yes - when the dam was being repaired	Walks from Elstree village and accesses route via boat house. Used whole route
31	Foot	1990	2012	Weekly +	4 metres	No	Accesses route off Aldenham Road via stile. Used whole route
32	Foot	1990	2012	Weekly	4 metres	No	Accesses route via entrance opposite Fisheries. Used whole route
33	Foot	1990	2012	Weekly	3 metres	No	Usually accesses route via stile by yacht club. Used whole route
34	Foot	1976	2012	Monthly	2 to 5 metres	No	Not used 1999-2004 Fallen trees have caused minor diversions Normally uses car park. Used whole route
35	Foot	1976	2012	Monthly	2 to 5 metres	No	Not used 1999-2004 Painted from points around the lake Fallen trees have caused minor diversions Has accessed route from FP52, opposite Fisheries and by sailing club. Used whole route
36	Foot	1963	2012	Monthly	8 feet	No	Ref to small wooden bridge over stream Access from car park
37	Foot	1991	2012	Yearly	2 to 7 metres	No	Ref to bridge Refers to leaving the right of way (FP52). Used whole route. Coming from Radlett
38	Foot	1967	2012	Yearly	6'6" to 22'11"	No	Small wooden bridge on w side of Reservoir. Refers to car park but map indicates access via FP52, coming from Radlett. Used only western route from FP52 and Watford Road
39	Foot	1994	2012	Weekly	2 to 7 metres	No	Small wooden bridge on w side of Reservoir. No reference to parking, coming from Elstree.

							Used whole route
40	Foot	1978	2013	Weekly	2 to 4 metres	Yes - renewing of part of dam around 2000	The path on the S side was only 1m until it was improved in the 1980s Accesses route via both ACP car park and opposite Fisheries. Used whole route
41	Foot	1995	2013	Monthly	2 metres	No	No reference to parking. Used whole route, coming from Borehamwood

A total of 41 user evidence forms were submitted with the application. These relate to evidence dating from 1963 until the application was made in 2013 which includes use prior to HCC's lease and use during the period of the lease. The user evidence summarised above relates to members of the public who have used the application route primarily on foot.

Evidence of use of the application route prior to the 1974 lease has been provided by 9 users (1, 4, 9, 10, 19, 29, 30, 36 & 38) – two yearly, six monthly and one weekly and all on foot. This use covered the period 1963 to 1974.

Three users (Users 12, 13 and 18) have provided evidence of use of the application route on bicycle as well as on foot. User 13 also provided evidence of use of the application route for two years on horseback. Of the 41 users, fourteen have provided evidence of weekly use, twenty users provided evidence of monthly use and six users provided evidence of yearly use. One user (User 22) did not specify the years in which they used the application route.

36 users provided evidence of use of the whole of the application route. Two users (Users 1 and 38) walked between footpath 52 and Watford Road only (points 1 to 7 on the IP) and the evidence forms of three users (Users 16, 20 and 36) indicate that they joined the application route between points 1 and 2 on the IP rather than from footpath 52. It is therefore not clear whether they used the northern most section of the application route adjacent to the car park.

None of the users have provided evidence of having been given permission to use the application route or having been challenged whilst using it. No evidence of notices on the application route has been provided by the users although User 15 refers to a sign indicating the 'lakeside walk'. There are various signs and information boards around the Reservoir referring to the lakeside walk. HCC Rural Estates (as tenant) has provided photographs of the signage which they state was already in place at various points around the Reservoir in 2010/2011 and Officers recall signage on site consistently over the last 30 years. The 'lakeside walk' and other signs present on the application route are referred to by the landowner as evidence of the permissive use of the route which was, at the time, was under control of HCC as tenant.

Most of the users referred to the existence of a small wooden bridge crossing the stream on the west side of the Reservoir (point 6 on the IP) which appears to have been in place since at least the 1960's and replaced in approximately 2002. The position of the footbridge is described in the application form. User 1 refers to a gate on the application route although

the evidence is not clear where the gate is. There is a kissing gate at the junction between Watford Road and footpath 5 around point 8 on the IP.

Four users (Users 25, 29, 30 and 40) refer to obstructions on the application route – repairs to the Dam in approximately 2000 (not on the application route) and fallen trees. However the users were not prevented or deterred from using the application route at those times.

The application form describes the application route as being 3 metres in width along the majority of the path and 2 metres where the path runs between Watford Road and the Reservoir (points 7 – 8 on the IP), if not wider in places. The width of the application route is generally estimated in the user evidence forms to be between 2 metres and 7 metres. The physical width of the application route has been measured between 2 metres and 7 metres.

Following the consultation, 9 responses were received, including the landowner. The responses included evidence supporting the application such as photographs of the Reservoir and details of advertised walks including parts of the application route, additional evidence of use and legal submissions stating that use of the route had been by permission. The remainder made no comment on the application.

14.3 Decision

Section 31 of the HA 1980 states that for public rights to accrue over a route there should be evidence of use ‘as of right’ (i.e. without force, secrecy or permission) over a period not less than 20 years.

The majority of the application route crosses land which was leased to HCC by the British Waterways Board in 1974 (the remaining short sections being within Aldenham Country Park). By clause 2(4) of the lease, HCC covenants “to use the demised premises only as and for recreational purposes as part of the Aldenham Country Park”. Therefore, HCC’s ‘acquisition’ of leasehold rights was specifically by reference to a particular purpose. There is no evidence to suggest that HCC has ‘appropriated’ the land for another purpose and, in any event, the same would have been likely to be outside the terms of the lease. Furthermore, it is relevant to note that HCC would not have been capable of granting an easement or right of way that extended beyond the duration of the lease itself.

The purpose for which HCC held the land (or a right over the land) is highly relevant, as confirmed by the Supreme Court in *R (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31, which concerned land subject to a village green application held by the local authority for recreational purposes pursuant to a statutory power. By reference to that purpose, the Supreme Court held that the public’s use was ‘by right’ rather than ‘as of right’. In *Barkas*, Lord Neuberger stated:

“12. The basic issue which the appeal raises is a short one: where land is provided and maintained by a local authority pursuant to section 12(1) of the Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes “as of right” within the meaning of section 15(2)(a) of the Commons Act 2006?

...

20. In the present case, the council’s argument is that it acquired and has always held the field pursuant to section 12(1) of the 1985 Act and its statutory predecessors, so the field has been held for public recreational purposes;

consequently, members of the public have always had the statutory right to use the field for recreational purposes, and, accordingly, there can be no question of any “inhabitants of the locality” having indulged in “lawful sports and pastimes” “as of right”, as they have done so “of right” or “by right”. In other words, the argument is that members of the public have been using the field for recreational purposes lawfully or precario, and the 20-year period referred to in section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the council lawfully ceased to hold the field under section 12(1) of the 1985 Act.

21. In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no question of user “as of right” can arise. In *Sunningwell* [2000] 1 AC 335, 352H-353A, Lord Hoffmann indicated that whether user was “as of right” should be judged by “how the matter would have appeared to the owner of the land”, a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the council would have regarded the presence of members of the public on the field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the field was being held and maintained by the council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.

...

23. It is worth expanding on this. Section 12(1) of the 1985 Act and its statutory predecessors bestow a power on a local (housing) authority to devote land such as the field for public recreational use (albeit subject to the consent of the minister or Secretary of State), at any rate until the land is removed from the ambit of that section. Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct. Of course, a local authority would be entitled to place conditions on such use – such as on the times of day the land could be accessed or used, the type of sports which could be played and when and where, and the terms on which children or dogs could come onto the land. Similarly, the local authority would clearly be entitled to withdraw the licence permanently or temporarily. Thus, if and when it lawfully is able, and decides, to devote the land to some other statutorily permitted use, the local authority may permanently withdraw the licence; and if, for instance, when the land is still held under section 12(1), the local authority wants to hold a midsummer fair to which the public will be charged an entrance fee, it could temporarily withdraw the licence.

24. I agree with Lord Carnwath JSC that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how,

at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land “as of right”, simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights.”

The reasoning in *Barkas* was explained further in *R (oao Goodman) v SSEFRA* [2016] 1 PC&R 8 as follows:

*“31. In my view what is clear from these passages and the complementary concurring judgment of Lord Carnwath is a focus on the power pursuant to which the land was held by the local authority so as to understand whether that power comprehended recreational use by the public. This also underpinned the disapproval and departure from the House of Lords’ decision in *R (oao Beresford) v Sunderland City Council* [2004] 1 AC 889 on the question of statutory authority. When the power under which the authority holds the land comprehends recreational use as a purpose then recreational use by the public will be “by right”, not “as of right”. I am however unable to detect in these passages any support for the proposition that appropriation pursuant to Section 122 of the 1972 Act from one power and purpose to another can be inferred from the authority’s manner of dealing with or managing the land. Lord Justice Sullivan’s conclusions in paragraph 37 and Lord Neuberger’s conclusions in paragraphs 21 to 24 are focused on the power under which the land was held and whether it conferred a statutory right to be on the land using it for recreation. That is a wholly different proposition from the suggestion that an authority can – through management actions – be inferred to have appropriated the land from being held under one power to another...”*

HCC considers that a number of principles to be derived from *Barkas* fall to be applied with regards to the footpath application at Aldenham.

First, although HCC did not hold the Reservoir land pursuant to an express statutory purpose, the lease provides HCC with a clear limitation as to its own usage (i.e. “*only as and for recreational purposes as part of the Aldenham Country Park*”, as described above with reference to clause 2(4) of the lease). Therefore, it would be contrary to that clear limitation for HCC to have purported to grant more than that which it had itself.

Second, the terms of the lease (i.e. “*only as and for recreational purposes as part of the Aldenham Country Park*”), clearly comprehended permissive recreational use by the public.

Third, the public used the application route subject to clear signage placing restrictions on their use around the Reservoir and in the Country Park. Such restrictions included opening times, control of dogs etc. In this regard, it is also relevant to note that a number of the users also refer to use of the Aldenham Country Park car park to access the application route, for

which there is a charge. HCC considers both to be persuasive evidence of the public's use having been permissive, by reference to a publicly based licence.

Fourth, when taken together, the evidence suggests that the publicly based licence to use the application route could have been withdrawn either temporarily or permanently. To use the example from *Barkas*, HCC considers that when the land was still held under the lease members of the public are likely to have accepted that if HCC had wanted to hold a midsummer fair to which the public would be charged an entrance fee, HCC could temporarily have withdrawn the licence. Furthermore, had the landowner (or HCC) determined the lease then it is likely that the public's permissive right to use the application route and Country Park would have also been withdrawn or the terms of the public's use altered.

Finally, it follows from the above, that the *Sunningwell* analysis of judging whether the user was "as of right" by "how the matter would have appeared to the owner of the land" (which is a question to be assessed objectively), would in the present case lead to the same conclusion, i.e. that a reasonable local authority in the position of HCC would have regarded the presence of members of the public on the land, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant a publicly based licence to be on the land (granted by HCC out of – and subject to – its own lease). Thus, while the public would not have been exercising a statutory right to be on the land and to use it for these activities, they would nevertheless have been exercising a permissive right to do so given that the application route formed part of a wider area being held and maintained by HCC for recreational purposes pursuant to clause 2(4) of the lease. This assessment is also supported by the contemporaneous correspondence between HCC and the various owners of the land that is summarised at section 14.2 above, under the heading "Landowner evidence".

Therefore, HCC considers that, as was the case in *Barkas*, use of the application route during the period that the land was leased (1974 – 2015) was "by right" rather than "as of right"

As such, it is not necessary to consider whether or not there was an intention to dedicate a public right of way under section 31 of the Highways Act 1980 because on HCC's analysis, the public has used the route "by right".

HCC also assessed whether, prior to HCC's lease in 1974, there has been sufficient evidence of use to demonstrate that a right of way subsists or is reasonably alleged to subsist, on the application route between points 1 - 8 on the Investigation Plan. HCC decided that use of the application route prior to 1974 is insufficient to show 20 years use 'as of right':

- Nine users provided evidence of use of the application over a period of 11 years prior to 1974.
- Users 1 and 38 did not provide evidence of use of the full application route and User 36 indicated that they joined the application route between points 1 and 2 on the Investigation Plan rather than from footpath 52.
- The evidence of Users 9, 10, 19 & 36 indicate that they used the Aldenham Country Park car park to access the application route.

Conclusion

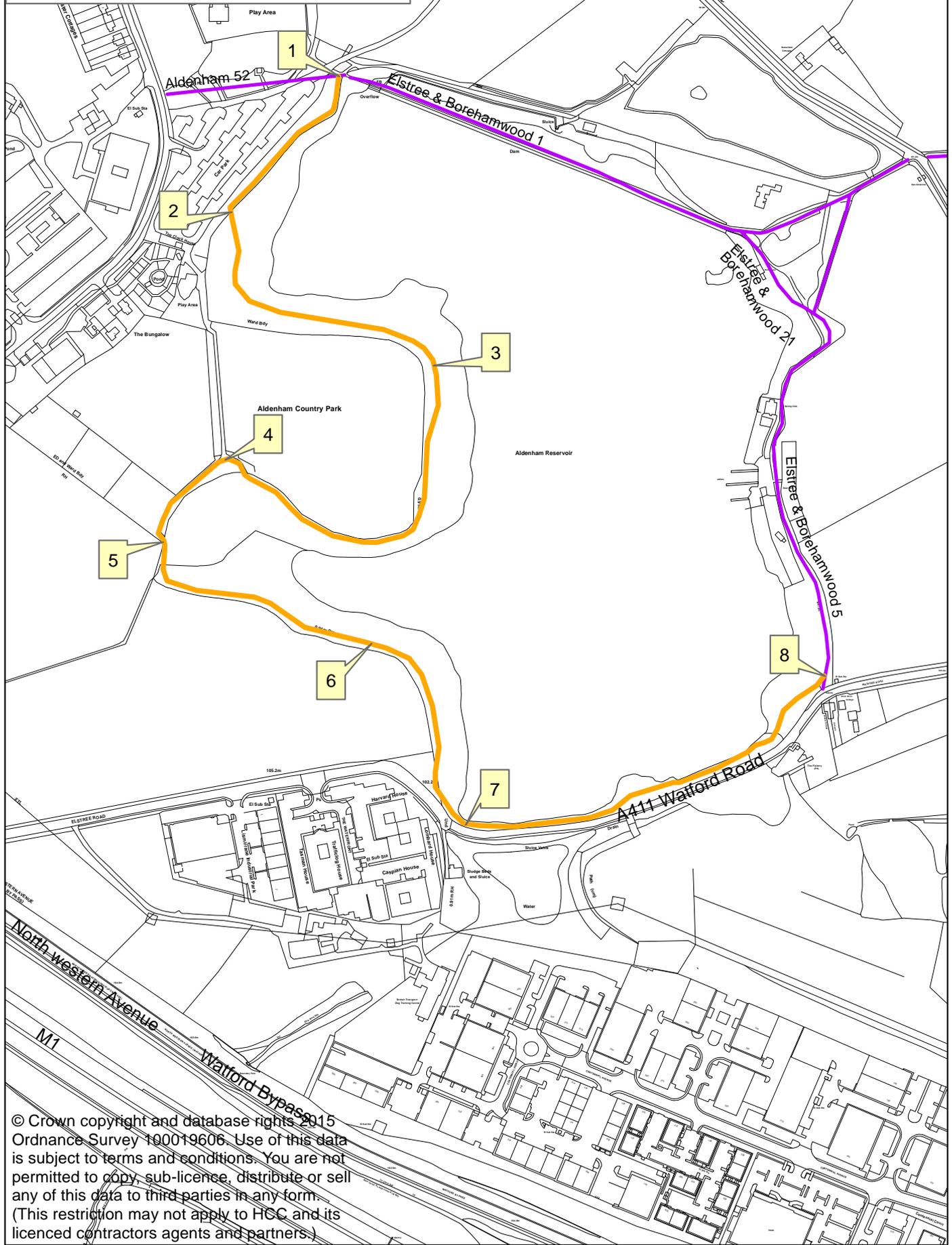
Following an assessment of this evidence HCC has decided that:

- use of the application route between 1974 and 2015 was 'by right' by virtue of the 1974 lease and therefore no order will be made for the application route
- prior to 1974, there is insufficient evidence that public rights had accrued on the application route under section 31 of the HA 1980
- there is insufficient evidence that the application route could be reasonably alleged to subsist or has been acquired under common law.

Investigation Plan (HTM/205/MOD)
'Lakeside Walk' Aldenham Country Park

Application Route (1 - 8) 
Public footpath 

Scale 1:5,000 



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