

# HERTFORDSHIRE COUNTY COUNCIL



## Rights of Way Service

### Reasons for the Decision

St Johns Well Lane to Lower Kings Road, Berkhamsted

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Date 12<sup>th</sup> November 2013

### Application Details

In 1996, a number of user evidence forms were submitted to the County Council relating to two routes between Lower Kings Road, the High Street and St Johns Well Lane in Berkhamsted. Although the County Council does not have an application to accompany the user evidence forms, it has a duty to investigate the evidence received. An extract of the 2010 Definitive Map is attached. It shows where the 'user evidence' routes are, labelled Points 1 to 5 on the Investigation Plan ('the IP'). For ease of reference these are called the 'application routes' below.

### Description of Route

Berkhamsted is a town within the Dacorum district of Hertfordshire just to the north of the A41 between Hemel Hempstead and Tring. The application routes are situated in the centre of the town between the High Street to the south and the River Bulbourne to the north. Footpath 27 runs to the north of the applications routes, mainly to the south of the River. The application routes join Lower Kings Road to the east and St Johns Well Lane to the west and cross the Waitrose supermarket building and car park.

The application routes start from the access to the St Johns Well Lane car park (point 1 on the IP) and continue into the Waitrose car park (point 2 on the IP) and continue south east to Lower Kings Road, adjacent to 36a and 40 Lower Kings Road (point 3 on the IP). Part of the application route joins the north west – south east route at point 2 on the IP and continues south west through what is now the Waitrose building to join the High Street at point 4 on the IP. The application routes are obstructed by walls and development associated with the Waitrose building (since 1996) at various points along the routes.

Footpath 27 is currently recorded on the Definitive Map on a route which is currently not available for use due to a garden wall and fencing at St Johns Well Lane. The Definitive Map shows the footpath running through the garden of number 4 St Johns Well Lane. Footpath 27 is currently overgrown on the edge of St Johns Well Lane car park and is crossed by the footbridge from the car park to the north side of the Canal. Footpath 27 is recorded around the edge of the Waitrose car park and then along the River bed for a short distance before crossing gardens at Kings Court to exit onto Lower Kings Road. The depiction of Footpath 27 on the Definitive Map differs to the written description of the footpath in the Definitive Statement. The Statement describes the footpath as "Starts a few yards S of first bend in Lower Kings Road. Proceeds 15 yards W, then NW, past Bulbourne Factory with R Bulbourne on N side thence north-west into St Johns Well Lane between two pairs of cottages." (the route between the two pairs of cottages is marked by point 6 on the IP). The statement has remained unchanged since the 1<sup>st</sup> Definitive Map in 1953.

### Documentary Evidence

For each investigation, we usually check at least 10 primary sources of information for any historic evidence relating to the application route. These documents are either available 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/](http://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.

You will find each document 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

Even though no application has been received the County Council has a duty to investigate the evidence supplied. This evidence (see section 5) relates to use with vehicles. The circumstances given by legislation (see section 6) under which a vehicular public right of way can be recorded are very limited. As the investigation of all documents will not assist in this case, the following historical documents have not been looked at.:

**Dury and Andrews Map, 1766 – Ref: HALS – CM26**

**Bryant's Map, 1822 – Ref: HALS – CM88**

**Tithe documents – Ref: HALS**

**Inclosure documents – Ref: HALS**

**Inland Revenue documents – Ref: HALS**

**Railway/Canal Plans - : HALS**

**Highway diversion/extinguishment – Ref: HALS**

#### 1. Ordnance Survey maps

Date: 1877 - 1972                      Ref: ROW (Landmark data)

##### **1.1 Why we consider these documents important**

The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20<sup>th</sup> century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the

disclaimer which has been added to all editions since the 2<sup>nd</sup> edition maps (circa 1897/8 in Hertfordshire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

## **1.2 What is shown by these documents in the area of the application route?**

### 1877 – 1878 (1<sup>st</sup> edition)

The High Street and St Johns Well Lane are shown and annotated on the Map to the south west of the River Bulbourne. The towpath and the Grand Junction Canal are also shown and annotated. Lower Kings Road is not shown.

There is a route shown between the cottages on St Johns Well Lane, just north east of point 1 on the IP which is depicted by parallel lines. This appears to be part of the route of Footpath 27 as described in the Definitive Statement. The route between the cottages appears to be either fenced or gated at the south eastern end of the cottage gardens (point 6 on the IP). To the south of the cottages there is a route from St Johns Well Lane (point 1 on the IP) which runs south east along the rear of the properties on the High Street. However, it appears that this route is also either gated or fenced at St Johns Well Lane and it is not shown as a through route.

The application routes are not shown. However, the map shows a small section of footpath 27 as described in the Definitive Statement.

### 1898 (2<sup>nd</sup> edition)

This edition of the OS Map shows Lower Kings Road and the London and North Western Railway line to the north of the Canal. The land east of St Johns Well Lane (now the car park) has an annotation 'Nursery' which probably applies to buildings to the south. The access route from St Johns Well Lane along the rear of the properties on the High Street is no longer shown and there does not appear to be any access from Lower Kings Road at point 3 on the IP, nor does there appear to be any access from the High Street at point 4 on the IP. The application routes are not shown.

Like the earlier map, there is a route shown by parallel lines from the cottages on St Johns Well Lane to point 6 on the IP. However, an adjoining route is not shown crossing the land which is now St Johns Well Lane car park.

### 1925

This edition of the OS map shows greater development at the eastern end of the application routes (near point 3 on the IP), to the south of the River. The buildings are annotated *Bulbourne Factory (Clothing)*. There is a wide access leading from Lower Kings Road (point 3 on the IP) around the north of the factory buildings. This route leads to other buildings on the south side of the River near point 2 on the IP. However this route does not appear to continue either south west towards the High Street (point 4 on the IP) or south west towards St Johns Well Lane (point 1 on the IP).

Immediately to the east of the property boundary of No. 4 St Johns Well Lane on the south side of the River, there is a line of tree features depicted on the Map. The extent of the trees is shown with a pecked line parallel to the River. It is not likely that this feature on the Map relates to Footpath 27. There is still an indication of a narrow route at point 6 on the IP, between the cottages on St Johns Well Lane.

1937 - 39

The route between the pairs of cottages on the Lane is still shown gated or fenced and appears to also provide an access from the rear of No's 3 and 4 St Johns Well Lane. There does not appear to be an open access from St Johns Well Lane (point 1 on the IP) to the land which is now St Johns Well Lane car park. The wide access from Lower Kings Road (point 3 on the IP) is still shown, providing a route around the north side of the factory buildings and west towards St Johns Well Lane car park (points 3 to 5 on the IP). There is a route which may extend south towards the High Street but this starts from a point between points 2 and 5 on the IP. There is no through route from Point 2 to the High Street at point 4 on the IP.

1972

St Johns Well Lane car park is annotated 'Car Park'. Like the 1925 Map, there is a pecked line parallel to the River between No. 4 St Johns Well Lane and the eastern edge of the car park (point 5 on the IP). There is a wide access to the car park from St Johns Well Lane at point 1 on the IP. There appears to be access from the High Street at approximately point 4 on the IP between property numbers 254 and 250e, extending north east towards point 2 on the IP. The route between points 3 and 2 on the IP appears wider in part around the northern edge of the factory buildings than it has been shown on previous editions of the OS map.

**1.3 Decision**

HCC decided that the OS maps provide no clear evidence that the application routes existed. The application route between points 3 to 2 on the IP has been shown since 1925. Access to the application route at point 1 on the IP has only been consistently available since 1972 – as the access to St Johns Well Lane car park. The 1972 map possibly shows the application route between points 4 and 2 on the IP however, it is not clear. There has been no clear access shown between points 1 and 3 on the IP at any time.

2. Fieldpath Maps

Date: 1930 - 1969

Ref: HALS Offacc/12/06 box 1  
CP/68/6/13

**2.1 Why we consider these documents important**

These maps are helpful in demonstrating which paths were in use in the Berkhamsted area and district at specific times (1930 and 1969). However they provide limited evidence in terms of status as the depictions on the maps do not differentiate between footpaths or bridleways etc. Whilst the information in the maps and surveys is not a legal record of public rights (unlike the Definitive Map), they are a good record of the local reputation of paths as public at the time of the survey.

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

Two editions of the Fieldpath Map of Berkhamsted Ashridge and District were produced. The first of these was in 1930, the second in 1969. Not a lot is known about the process for compilation of the Maps.

### 1930

The 1930 Fieldpath Map of Berkhamsted, Ashridge and District was compiled by the Berkhamsted Citizens Association and was produced on an Ordnance Survey map at a scale of six inches to a mile. The OS basemap has similarities to the 1925 edition considered above.

Lower Kings Road, St Johns Well Lane the River and the Canal are shown and annotated on the basemap. The map shows paths which are hand drawn and annotated in pink pen, however there is no key on the map. Part of the application route from Lower Kings Road can be seen on the basemap (points 3 to 2 on the IP) but neither the application routes nor footpath 27 is shown in pink. A path is shown in pink to the north west of the application routes, crossing the footbridge at the north end of St Johns Well Lane and continuing north west along the Canal towpath before heading north under the railway lines in a subway.

### 1969

This Map has the same title as the earlier map. This Map includes a key which shows major roads coloured yellow. Roads, tracks and footpaths are depicted by solid red lines and disputed paths are depicted by red pecked lines. The category of disputed paths implies that there was some consultation with landowners in the preparation of the Map. There is no information about how this Map was compiled. The published scale of the map is three inches to a mile which is a greater scale than the earlier Fieldpath map.

The Map shows the High Street in yellow which appears to indicate main roads. Lower Kings Road and St Johns Well Lane are shown on the map but are not annotated and are not coloured. The River is also not annotated. The application routes and footpath 27 are not shown on the Map.

## **2.3 Decision**

HCC decided that the Fieldpath Maps do not provide any evidence that the application routes were considered to be either public or disputed paths at the times when the Maps were compiled. The pink path shown on the 1930 Map leading north from St John's Well Lane as described from the 1930 map is not shown at all on the 1969 map.

## 3. Definitive Map Records

The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement to show and describe the public rights of way in the county. The Map is conclusive evidence of what it shows, but is without prejudice to what is not shown.

The process resulting in today's Definitive Map and Statement consists of several stages which are dealt with below:

- a) the Parish Survey
- b) the Draft Map, Provisional Map and first Map and Statement (1953)
- c) the Special Review (following the Countryside Act 1968)

### 3a Definitive Map Records – Berkhamsted Parish Survey

Date: 1951 Ref: ROW

#### **3a.1 Why we consider these documents important**

Under the National Parks and Access to the Countryside Act 1949 the county was required to show all public paths which were defined as “footpaths”, “bridleways” and “roads used as public paths”. This last term was never properly defined and has resulted in much confusion ever since. There was no requirement to record public vehicular highways.

In Hertfordshire each parish carried out a survey of the paths which were believed to be public. Sometimes additional surveys were carried out by the Ramblers’ Association or the Youth Hostel Association; or comments were made by them on the parish’s survey. The surveys once completed were sent to the County Council for collating and publishing as the Draft Map.

### **3a.2 What is shown by these documents in the area of the application route?**

The High Street and the Canal are shown in the Parish Survey Map with buildings between them, to the west of Lower Kings Road. There are no routes shown in the area of the application routes apart from footpath 27 which is annotated on the map.

Footpath 27 runs between Lower kings Road and St Johns Well Lane and is described in the draft statement as: *‘F.P. starts a few yards S of first bend in Lower Kings Road. Proceeds 15 yards W, then N.W. past Bulbourne Factory with R. Bulbourne on N. side thence N.W. into St. Johns Well Lane between two pairs of cottages.’* However, the map appears to show the footpath joining St Johns Well Lane to the south of the cottages.

### **3a.3 Decision**

HCC decided that the depiction of Footpath 27 in the Parish Survey shows similarities to the application routes between points 1 and 3 on the IP. The 1926 Ordnance Survey Map was used as the base map for the Parish Survey. The Parish Survey does not provide any evidence relating to the application route between points 4 and 2 on the IP.

Footpath 27 is shown on a different route to how it is currently recorded on the Definitive Map. The Parish survey shows the footpath circumventing the Factory buildings on the south side of the River and passing to the south of the cottages (nos. 1-4 St Johns Well Lane) and joining St Johns Well Lane. The route is described as joining St Johns Well Lane between two pairs of cottages. The footpath on the Map does not match the written description.

### 3b Definitive Map Records – Draft, Provisional and First Definitive Map

Date: 1953 - 1954 Ref: ROW

#### **3b.1 Why we consider these documents important**

The parish surveys were collated into the Draft Map and Statement. Notices were published advertising that the Draft Map and Statement had been produced so that the public (including landowners) could object to what was included or to what was omitted. Hearings were held to consider these objections and recommendations were made based on the evidence presented.

The Draft Map and Statement was amended following the hearings to produce the Provisional Map and Statement. As before, notice of the production of the Provisional Map and Statement was advertised but this time only landowners, lessees and tenants could

apply to the crown court to amend the map – the public could not. The map and statement were then amended to reflect the court's finding.

Please note that these records vary across the county as a full sequence of Draft Map and then Provisional Map has not always been kept.

After the amendments to the Provisional Map and Statement were made, the First Definitive Map and Statement for Hertfordshire was produced. The Map and Statement together provide conclusive evidence of the existence of those public rights of way shown at the 'relevant date' of 1953; i.e. the information shown was correct at that date.

### **3b.2 What is shown by these documents in the area of the application route?**

The Draft Map and 1<sup>st</sup> Definitive Map documents do not contain any objections relating either to the application routes or to Footpath 27.

The Draft and 1<sup>st</sup> Definitive Map record Footpath 27 on a similar route as in the Parish Survey. There are minor differences in the depiction of the footpath: The Draft Map shows the footpath running through the north edge of the Bulbourne Factory building whereas the Parish Survey depicted the footpath circumventing the Factory building. The 1<sup>st</sup> Definitive Map also shows the footpath through the Factory building and along the River bed for a distance to the east of St Johns Well Lane. However, the written description of Footpath 27 did not change between the Parish Survey and 1<sup>st</sup> Definitive Map.

### **3b.3 Decision**

HCC decided that the Draft Map and 1<sup>st</sup> Definitive Map do show similarities to the application routes generally between points 1 and 3 on the IP, though differ to the application routes across St Johns Well Lane car park. The route recorded on the Draft Map and 1<sup>st</sup> Definitive Map is very similar to the application route between points 2 and 3 on the IP. These documents do not provide any evidence relating to the application route between points 4 and 2 on the IP.

The junction of Footpath 27 with St Johns Well Lane has been drawn between the gap in the buildings to the south of the cottages rather than being shown running between No's 2 and 3 St Johns Well Lane as described in the statement. The statement for Footpath 27 was not altered during this time.

## 3c Definitive Map Records - Special Review

Date: 1984 Ref: ROW

### **3c.1 Why we consider these documents important**

The Countryside Act 1968 created the new designation right of way to be recorded - a "byway open to all traffic". This was the first time that vehicular rights were recorded on the Definitive Map. It also required county councils to carry out a Special Review to reclassify all "roads used as public paths" as either "footpaths", "bridleways" or "byways open to all traffic". In Hertfordshire the Special Review was started in 1977. This was later extended to include all the amendments to the network made by diversions since the first Definitive Map. It also showed if applications had been made to add or amend details of routes. Copies of the Special Review Draft Map showing all these changes were published, inviting objections from

the public. Due to the number of objections received and not resolved, the Secretary of State ordered the abandonment of the Special Review in Hertfordshire in 1984. The Definitive Map and Statement was amended to show all changes which did not have outstanding objections, and these were shown on the Definitive Map and Statement produced in 1986.

### **3c.2 What is shown by these documents in the area of the application route?**

There is no reference to the application routes in the Special Review documents.

There is a change shown in the way footpath 27 is depicted on the Map. The footpath is shown following the River bed from Lower Kings Road before continuing adjacent to the River to St Johns Well Lane. The footpath does not join the Lane between two pairs of cottages but to the north side of no. 4 St Johns Well Lane. No reason could be found as to why the map had been altered and the Statement remained unchanged.

### **3c.3 Decision**

HCC decided that the Special Review does not provide any evidence relating to the application routes.

The Statement for Footpath 27 remains unchanged but the route of the footpath is shown quite differently to the 1<sup>st</sup> Definitive Map at its junctions with both Lower Kings Road and St Johns Well Lane.

## 4. Aerial Photography

Date: 1970 - 1990

Ref: ROW

### **4.1 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.

### **4.2 What is shown by these documents in the area of the application route?**

1970s (scale unknown): Lower Kings Road is distinguishable on the photo because of the bend in the Road. The River, Canal and Railway line are also easily identified. St Johns Well Lane can be identified by the course of the River. It is not possible to say from the photo whether the application routes were fully available for use when the photograph was taken but the photograph shows the access to St Johns Well Lane car park at point 1 on the IP. There is no specific route set out between points 1 and 5 on the IP however, there does appear to be a route approximately between points 2 and 4 on the IP.

1980 (scale 1:2,500): This photo shows both the car parks (St Johns Well Lane and what is now Waitrose car park) in use. It is clear that the access to the car park at point 1 on the IP was wide without any barriers. It is clear that it was possible to use the application route between points 1 and 5 on the IP. There is a route clearly shown from point 3 on the IP running around the north side of the car park towards point 5 on the IP. There is also a route

shown from point 2 running south towards point 4 on the IP, however it is not clear from the photograph whether access was available to the High Street at point 4 on the IP. It is not clear from the photograph whether the application route at point 5 (allowing access between the car parks) was available in 1980. There is a path shown between the rear of the cottages on St Johns Well Lane and approximately point 6 on the IP however, it is not clear whether access was available to the path at point 6 on the IP.

1990 (scale 1:2,500): This photograph does not show as much of the application routes as the earlier photograph as trees and vegetation obscure parts of the application routes. The access to St Johns Well Lane car park is shown (point 1 on the IP). Although there is no discernable route shown on the photograph crossing St Johns Well Lane car park, it appears that access between points 1 and 5 was available. Trees on the photograph at point 5 on the IP obscure the application route. Likewise, trees at point 3 on the IP obscure the application route from Lower Kings Road. The photograph does not show a route between points 3 and 5 on the IP. There are trees and shadows from buildings to the south of point 2 on the IP and so it is not possible to say whether the photograph shows the application route between points 2 and 4 on the IP.

### **4.3 Decision**

HCC decided that the aerial photographs show that the access to St Johns Well Lane car park has been wide and without a barrier in 1980 and 1990. The photographs indicate a route between points 2 and 4 and between points 3 and 5 on the IP. However, it is not clear from the photographs whether there were any barriers or signs which might have made the whole of the application routes difficult to use. Points 3, 4 and 5 particularly, are unclear.

A path between point 6 on the IP and the cottages on St Johns Well Lane is visible on the 1980 photograph however, it cannot be determined from the photograph whether the path was available or whether it had any structures on it.

## **5. Highways Maintenance Records**

Date: May 2006

Ref: ROW

### **5.1 Why we consider these documents important**

Maintenance of a route by the public is strong evidence that it is a public highway. However it is important not to confuse 'maintainable' (i.e. duty to maintain) with maintained (i.e. works done). It should also be noted that lack of maintenance of a route does not necessarily mean a route is not highway.

The Highways Act of 1555 provided that parishes and their inhabitants had the responsibility for maintaining all existing public highways. The physical work was to be done by the inhabitants and each parish had to provide an unpaid parish surveyor who was obliged to keep a detailed account of public monies expended. This situation remained largely unchanged until the 1835 Highways Act, which allowed parishes to combine into larger groups for maintenance purposes. The Highways Act of 1862 allowed parishes to combine into Highway Districts under Highway Boards and after 1878 Highway Boards could amalgamate with Rural Sanitary Authorities. The Local Government Act of 1888 introduced elected County Councils, which took over "main" roads, while after the Local Government Act

1894 new Rural District Councils took over all other roads. Responsibility for maintenance of these roads was handed over to the County Councils in 1929.

Under the Highways Act 1835 pre-existing highways continued to be maintained at public expense. Any highways established after that date needed to be 'adopted' to show they were liable for repair at public expense. Highway Boards accounts from this period can provide evidence of a route being maintained and is therefore strong indication of public highway. Most routes referred to in this manner are now part of the county's road network.

A "List of Streets" of the highways maintainable at public expense is required under the Highways Act 1980. This list is held by the County Council as part of the Hertfordshire Roads Gazetteer, which is itself part of the Hertfordshire Roads Management Database. There are no rules or regulations about what information is required, or how it is to be presented or amended. It is a list of what is maintainable, not necessarily what is maintained.

## **5.2 What is shown by these documents in the area of the application route?**

The application routes were not recorded in the List of Streets in May 2006, immediately prior to the commencement of the Natural Environment and Rural Communities Act 2006 ('NERC'). The application routes have not been recorded in the List of Streets since May 2006.

Highway records show that the section of the application route from point 3 towards point 2 (adjacent to 36a Lower Kings Road) is not maintainable at public expense. There are no records relating to the remainder of the application routes.

## **5.3 Decision**

HCC decided that the application routes were not recorded in the List of Streets immediately prior to the commencement of NERC. For further details, please see section 7 below.

## 6. Contemporary Evidence of Use

### **6.1 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 summary of the evidence we have received, including a table showing the information provided in the user evidence forms.

## **6.2 Summary of Evidence**

Prior to the Investigation Report being published, there was no correspondence on file from the landowners containing evidence relating to the applications routes. The landowner has not made any section 31(6) deposits for the land crossed by the application routes.

Land Registry information relating to a plot west of Lower Kings Road on the south side of the River contains a plan from an 1898 conveyance. The plan shows a route similar to the application route between points 3 and 5 on the IP. The plan labels the route as an Occupation Road. The title register describes a private right of access over the Occupation Road which is described extending from St Johns Well Lane to Lower Kings Road.



The landowner has confirmed that they have no evidence relating to the application routes and what evidence there is of an obstruction and signage is referred to in the User Evidence Forms.

The 1898 conveyance from Land Registry does not provide any evidence of public rights as the Occupation Road was referred to as conferring a private right of access on the purchasers of the plot of land. It does provide evidence that a route of some description was available between St Johns Well Lane and Lower Kings Road in 1898.

Seven of the eight User Evidence Forms state that there was an obstruction (a pile of earth/rubble) to the application routes near St Johns Well Lane, approximately in the mid to late 1980's. The precise location of the obstruction is unclear. It is also unclear whether the obstruction was a deliberate attempt by the landowner to prevent the routes being used. Two users considered the obstruction to be illegal dumping or fly tipping and the evidence varies on whether the obstruction prevented use for any period of time – User 6 drove over it and User 3 was still able to use the route on motorcycle. It does not appear from the evidence that the obstruction was on the route for very long or interrupted much of its use.

The users refer to signs which appear to have been in place at Lower Kings Road approximately in the mid 1980's. These are described as saying 'Access Only' and 'Private Drive'. These signs were only referred to by Users 2 and 7. User 7 was unsure of whether the 'Private Drive' notice applied to the application routes but it did reduce their use 'considerably'. User 2 also refers to a sign saying 'No Access' which is described as unauthorised, however it is not clear where this sign was located.

The dates of the user evidence forms (signed between January and March 1996) coincide with the building of the Waitrose supermarket which opened in late 1996. The Waitrose building obstructs the application routes between points 2 and 4 on the IP. If 1996 is considered as the date when the public's right to use the applications routes was challenged, then the relevant 20 year period (which is calculated retrospectively) during which public rights could be acquired is 1976 - 1996.

### **6.3 Decision**

HCC decided that the location of the signs at Lower Kings Road (referred to by Users 2 and 7) is unclear and have not been maintained. The location of the obstruction referred to by seven of the eight users is also unclear and was possibly fly tipping rather than a deliberate attempt by the landowner to prevent the application routes being used. The application routes were obstructed by the erection of the Waitrose building in late 1996. This appears to be the event which prevented and/or challenged use of application routes.

The period during which public rights may have been acquired on the application routes is the 20 year period retrospective from the time that the public's right to use the application routes was challenged (i.e. when the Waitrose building obstructed the routes). The relevant period in this case is 1976 – 1996:

On foot – Users 3, 4, and 5 each used the application routes for the full period of 20 years. Two users (Users 1 and 6) can be paired together to make a further 20 years use. This means that there are a total of 4 users who have provided evidence for use of the application routes on foot for the full 20 year period. This use was daily for only one user, monthly for only two users and occasional for the fourth user.

With vehicle – Users 4 and 5 also provided evidence for use of the application routes for the full 20 year period with vehicle. Two users (Users 2 and 6) can be paired together to make a further 20 years use. This means that there are a total of 3 users who have provided evidence for use of the application routes with vehicle for the full 20 year period. This use was daily for one user, occasional for the second user and unspecified for the third user.

Overall, HCC decided that the user evidence was insufficient to show that the application routes had acquired public rights through use.

## **7. The effect of the Natural Environment and Rural Communities Act 2006 ('NERC').**

As user evidence was provided for vehicular use by the public of the application routes NERC was considered.

Section 67(1) of NERC came into force on 2<sup>nd</sup> May 2006. NERC provides for the automatic extinguishment of any unrecorded right of way for mechanically propelled vehicles ("MPVs") which immediately before commencement of the section:

- (a) was not shown in a definitive map and statement; or
- (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway

unless one of the exceptions set out in section 67(2) or 67(3) applied.

The section 67(2) exceptions (in summary) are as follows:

- that the way was mainly used by MPVs in the 5 years ending with the commencement of NERC
- that the way was shown on the LOS as a highway maintainable at public expense immediately before 2/5/06
- that the way was created expressly for MPVs
- that the way was built for use by MPVs
- that the way was created by MPV use prior to 1 December 1930

The section 67(3) exceptions (in summary) are as follows:

- that an application had been made under section 53(5) of the Wildlife and Countryside Act 1981 for a Byway Open to All Traffic (BOAT) and had not been investigated
- that a decision had been already made for a BOAT on the application before 2/5/06
- that a person with an interest in land had made a BOAT application and used the way with MPVs immediately before 2/5/06 because it was necessary in order to gain access to that land

The application routes are not shown on the Definitive Map and Statement as a BOAT and therefore rights for MPVs have been extinguished under section 67(1) unless one of the exceptions in NERC applies.

HCC decided that section 67 of NERC extinguished vehicular rights by the public on the application routes as none of the exceptions listed above apply.

### **Additional Evidence Submitted after consultation**

Seven responses were received following the public consultation. None of these provided any evidence indicating the existence of the application routes. However the responses did raise various points which are summarised below.

#### Other matters raised in the consultation

During the planning process for the Waitrose development, there was a proposal to extinguish footpath 27 as it was not usable as shown on the Definitive Map. A suggestion was made that rather than extinguish the footpath completely, it be re-routed alongside the River. A path was constructed as part of the Waitrose development but no formal diversion order was made. The route from St Johns Well Lane to Lower Kings Road was used as a 'rat run' when the High Street was congested. The development and associated planning conditions made this impossible.

The proposal to re-position footpath 27 was welcomed as it is currently recorded along (in part) the Riverbed and through a private garden. It was suggested that the canal towpath would be a suitable route for the footpath to take to the north east of St Johns Well Lane.

Reference to the effect of NERC in section 7 of the report raised questions as to the existence of private vehicular rights of access. In cases where NERC may have affected private vehicular rights, members of the public are strongly advised to seek independent legal advice.

### **Conclusion**

HCC decided that a modification order should not be made to record a route between St Johns Well Lane and Lower Kings Road and the High St, as shown on the IP. This decision was made after consideration of all the evidence available as referred to in this report together with all of the relevant legislation. HCC considered that there was insufficient evidence to reasonably allege the existence of a right of way on the application routes, nor had a right of way come into existence under common law.

