

# HERTFORDSHIRE COUNTY COUNCIL



## Rights of Way Service

Modification Order Decision Report

Thele Avenue, Stanstead Abbots

Author: Helen Denton

Date: 19<sup>th</sup> April 2013

## Application Details

An application has been made to record a footpath between Thele House on Roydon Road and the retirement bungalows on Thele Avenue in Stanstead Abbotts. An extract of the 2010 Definitive Map is attached. It shows where the route is and it is labelled points A to C. Whilst this route is that shown in the application, several of the witnesses also attest to reaching Thele Avenue via point D on the plan. For the purposes of this investigation, both routes will be collectively referred to as the application route.

This application was made by Karen Martin of Stanstead Abbotts on 12<sup>th</sup> September 2012. It was submitted in the prescribed form and included copies of the evidence that it sought to rely upon.

## Description of Route

Stanstead Abbotts is a small village near Ware, in the district of East Herts. The general topography is urban, as the application route joins the main road through the village and a small residential road.

The route that was applied for leads from Roydon Road at point A on the plan (see Plate 1 below) and continues along the driveway and in front of Thele House, which used to be the vicarage. It continues generally south along a surfaced path through the garden of Thele House (see Plate 2), before exiting through a gate onto the square around which the retirement bungalows are built at point C (Plate 3). This square is not recorded as highway maintainable at public expense.



Plate 1

The route that is not subject to the application but which some witnesses attest to

using leads off the application route at point B on the plan and heads in a generally north easterly direction along the surfaced path in the garden of Thele House to the garden gate on Thele Avenue at point D.

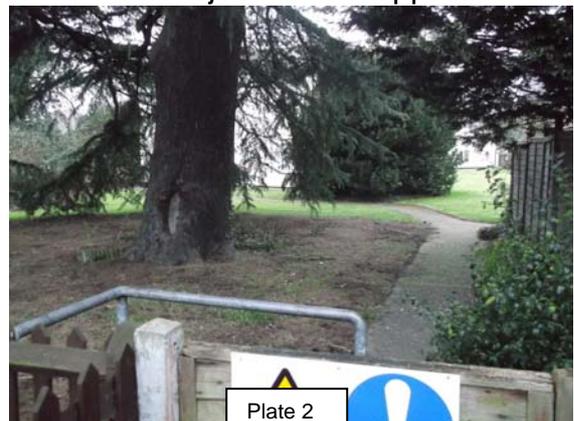


Plate 2



Plate 3

## Documentary Evidence

For each investigation, we check at least 10 primary sources of information. 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/](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

Please note that where there are no records for the document listed, this will just be recorded as "No records found."

## 1. Dury and Andrews' Map

Date: 1766

Ref: HALS - CM26

### 1.1 Why we consider this document important

Dury and Andrews' 1766 county map of Hertfordshire describes itself as 'a *Topographical map of Hartford-Shire, from Actual survey; In which is Expressed all the roads, lanes, churches, noblemen and gentlemen's seats, and every Thing remarkable in the County*'. It is a map made from an original survey, although it is a schematic map (like the London Underground map) rather than one to scale. In this way its level of accuracy does not match modern Ordnance Survey maps, but it is useful evidence for the existence of routes in the 18<sup>th</sup> century. The Planning Inspectorate's *Consistency Guidelines* state that "Overall, the evidential value of the older maps can be significant in helping to determine the location of a way, and can be helpful in determining the status of a route, especially in conjunction with later maps." Dury & Andrews' map shows the basic layout of roads but details like field boundaries were probably decorative. The "explanation" (or legend) lists 'Roads' in 3 categories – "open", "one side enclosed by a Hedge", and "enclosed by Hedges". It does not appear to show routes which, at the time, were thought to be footpaths or bridleways. The map was produced to be sold to members of the public which mean that it is likely the routes shown were both public and publicly maintainable.

### 1.2 What is shown by this document in the area of the application route?

Dury & Andrews shows Stanstead Abbots and the Roydon Road. The Roydon Road is shown adjoined by fields. Neither Thele Avenue, Thele House nor the application route are shown.

### 1.3 Decision

HCC decided that Dury & Andrews' map does not provide any evidence about the application route.

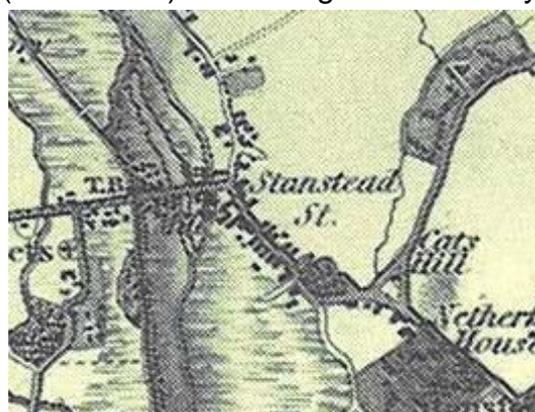
## 2. Bryant's Map

Date: 1822

Ref: HALS - CM88

### 2.1 Why we consider this document important

Andrew Bryant's 1822 map of Hertfordshire was again drawn from an original survey. Its depiction is much more accurate (like an Ordnance Survey map) rather than being schematic. This may be due to survey equipment (theodolites) becoming commercially available in the 1790s. The "explanation" (or legend) lists "Turnpike and Mail Roads", "Good Cross or Driving Roads" and "Lanes & Bridleways". It is unlikely that it shows routes which, at the time, were thought to be footpaths. Like Dury and Andrews' map, Bryant's map was sold to members of the public and cost 3-4 guineas. The commercial nature of the map means that routes shown are usually public and publicly maintainable, unless there is strong contemporary evidence which shows that routes are private.



### 2.2 What is shown by this document in the area of the application route?

Bryant shows the Roydon Road as well as the fields and properties on the eastern side of it where Thele Avenue now lies. The detail is not sufficient to determine whether the old vicarage is shown. The map predates the construction of Thele Avenue. The application route is not shown.

### 2.3 Decision

HCC decided that Bryant's map does not provide any evidence about the application route.

## **3. Stanstead Abbots Tithe Map and Tithe Apportionment**

Date:	Map	1840	Ref:	HALS DSA4/97/2
	Award	1839	Ref:	HALS DSA4/97/1

### 3.1 Why we consider these documents important

A 'tithe' was literally a 'tenth' of the produce of the land and was paid in kind to finance the Church (crops were stored in 'tithe barns'). The tithe surveys were carried out under the Tithe Commutation Act of 1836 to reform this system to an easier money payment. Maps were drawn up to show the titheable land in order to assess the amount of money to be paid.

In 1837 the Act was amended to allow maps produced to be either 1<sup>st</sup> class or 2<sup>nd</sup> class. They did not have to be made from an original survey. 1<sup>st</sup> class maps are legal evidence of all matters which they portray, and were signed and sealed by the commissioners. They had to be at a scale of at least 3 chains to the inch. 2<sup>nd</sup> class maps were evidence only of those facts of direct relevance to tithe commutation, and are often at 6 chains to the inch. Both 1<sup>st</sup> and 2<sup>nd</sup> class maps have been accepted by the courts as evidence. Unfortunately the proposed convention of signs and symbols to be used, which included Bridle Roads and Footpaths, was not strictly adhered to.

The tithe process received a high level of publicity. This ensured the documents were an accurate record of the agricultural landscape at this period of history. Therefore, although the process was not directly concerned with rights of way, inferences can be drawn from tithe documents regarding the existence of public rights. Non-titheable land deemed to be unproductive could be excluded from the process. No tithe was therefore payable on roads and so it was in the interest of the landowners for these to be shown correctly. With corroborative evidence highways that are coloured yellow or sienna can indicate public status. Footpaths and bridleways are not often shown on tithe maps as they did not generally affect the productivity of land and so the calculation of tithe rent.

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

Roydon Road is shown on the tithe map, but neither Thele Avenue nor the retirement bungalows have been built. The application route is not shown, but Thele House, along with the garden through which the application route passes, is shown. It is shown as one plot numbered 259. The accompanying award described this plot as being the vicarage in the ownership of the Reverend Thomas Fielde and



the occupation of Reverend J W Thomas.

### 3.3 Decision

HCC decided that the tithe documents do not provide any evidence about the application route.

## **4. Highway Diversion/Extinguishment Records**

No records have been found.

## **5. Stanstead Abbots Inclosure Records**

Date:	Map	1865	Ref	HALS QS E/62
	Award	1871	Ref	HALS QS E/62

### 5.1 Why we consider these documents important

Enclosure was the process of physically changing the landscape to benefit the development of modern farming practices as technology improved. It was popular from the late medieval period to the 19<sup>th</sup> century and carried out on a parish-by-parish basis. As it changed the layout and size of fields it also changed the routes of roads and rights of way.

Inclosure was the legal process of carrying out the physical changes. It could be carried out by agreement, but where this was not possible an Act of Parliament was needed to grant the powers to make the desired changes. Through time such Acts became more popular than agreements. Prior to 1801 these powers were granted to each parish individually by private Acts of Parliament. In 1801 the first General Act was passed which could be used by any parish. Further General Acts were passed in 1836 and 1845. However, private Acts continued to be obtained if the required powers were not granted by the General Acts. They are important evidence to show us what could and could not be done and if available they should be read in conjunction with the award and map, which recorded the inclosure process.

The award is the written record of the changes that were made. It lists the lands that were given to each landowner, the roads and rights of way that were stopped up and those that were set out, or created. The map (which was not legally required until 1845) shows pictorially the changes made.

As inclosure was a detailed legal process with powers granted by Parliament, it can give us conclusive evidence of a right of way.

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

The map does not cover the area over which the application route lies.

### 5.3 Decision

HCC decided that the inclosure documents do not provide any evidence about the application route.

## **6. Railway and Canal Plans**

There are no railway or canal plans affecting the land over which the application route runs.

## 7. Inland Revenue Documents

Date: 1910 Ref: HALS IR1/329, IR2/69/1

### 7.1 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 30<sup>th</sup> April 1909, a survey was carried out assessing each piece of land. The OS 2<sup>nd</sup> 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.

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



Roydon Road is shown with a plot on its eastern side annotated "vicarage" on the OS basemap, although the map predates the construction of Thele Avenue and the retirement bungalows. The basemap does show a footpath running from the north-west to the south-east on the outside of the vicarage's eastern boundary. This is likely to be the path currently recorded on the Definitive Map as Stanstead Abbots Footpath 8A.

The plot labelled as being the vicarage is numbered 200, which is shown in the accompanying Inland Revenue reference book as being "house, garden, premises, vicarage" in the occupation of Grace, G and the ownership of the Parish Trustees. There was no deduction for public rights of way crossing the property.

### 7.3 Decision

HCC decided that the Inland Revenue documents do not provide any evidence about the application route.

## **8. Highways Maintenance Records**

Date: 2012 Ref: RoW

### 8.1 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.

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

The current Hertfordshire Gazetteer shows that the square around which the retirement bungalows are built is not considered highway maintainable at public expense. The application route at point D does meet highway that is maintainable at public expense. No part of the application route is recorded on the Gazetteer.

### 8.3 Decision

HCC decided that the highway maintenance documents do not provide any evidence about the existence or otherwise of the application route.

## **9. 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)

## **9a Definitive Map Records – Stanstead Abbots Parish Survey**

Date: 1953 Ref: RoW

### 9a.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.

### 9a.2 What is shown by these documents in the area of the application route?

The Parish Survey map shows Footpath 8a in its entirety, although it is named Footpath 8. The statement records that it “Commences from Cappell Lane at Junction with F.P.6 thence S.E. across F.P.7 to Roydon Road opposite Almshouses”. The application route is not shown nor referred to.

### 9a.3 Decision

HCC decided that the Parish Survey documents do not provide any evidence about the application route.

## **9b Definitive Map Records – Draft, Provisional and First Definitive Map**

Date: 1953 Ref: RoW

### 9b.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.

#### 9b.2 What is shown by these documents in the area of the application route?

No objections were made to the absence of the application route on the draft Definitive Map.

#### 9b.3 Decision

HCC decided that the Draft and Provisional Definitive Map documents do not provide any evidence about the application route.

### **9c Definitive Map Records - Special Review**

Date: 1968

Ref: RoW

#### 9c.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.

#### 9c.2 What is shown by these documents in the area of the application route?

The Special Review used the 1938 edition of the Ordnance Survey map as a basemap (see section 10 below). During the Special Review Footpath 12 on the south side of Roydon Road was extended west from its termination point opposite the southern end of Footpath 8a to the junction with Bridleway 19. The application route appears not to have been considered at all.

#### 9c.3 Decision

HCC decided that the Special Review documents do not provide any evidence about the application route.

## 10. Ordnance Survey maps

Date: 1880, 1989, 1920-1, 1938-9, 1973

Ref: HALS

### 10.1 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) states that the representation of any track or way is no evidence of a public right of way.

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

The first edition OS map shows Thele House (described as the Vicarage) and a double pecked line following the north east boundary of that property and its neighbours which could be Footpath 8a. Neither Thele Avenue nor the retirement bungalows were built at that time, and that area of land is shown as fields. The 1898 and 1920-1 editions show the local area in the same way, but now annotating the double pecked line as "F.P.". The 1938 and 1973 editions show Thele Avenue for the first time, but not the retirement bungalows. None of the editions show the application route.

### 10.3 Investigating officer's comments

HCC decided that at the time the OS maps were surveyed the application route was not a topographical feature capable of being surveyed.

## **Conclusion on historical evidence**

HCC decided that the historical evidence provides no evidence that the application route existed or that it was a public highway. Therefore, this application must be assessed on the basis of the contemporary evidence of use below.

## **11. Contemporary evidence of use**

### 11.1 Why we consider the evidence important

#### *Evidence of use*

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'. 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. 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. However, 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.

User evidence is generally provided through the completion of evidence questionnaires. Below is a table summarising the forms we have received.

#### *Landowner's evidence*

Landowners can take steps to prevent the accrual of new public rights of way through use of a route by the public. 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 would not affect pre-existing rights.

#### 11.2 What is shown by the evidence in the area of the route?

The witness evidence can be summarised as follows:

User No.	Years of use	Frequ-ency	Type of use	Used A-C or A-D	Additional information
1	2006-2011 (5 yrs)	daily	foot	A-D	Enters route at point D from Thele Avenue/FP 8a, rather than from bungalows.
2	1995-2011 (16 yrs)	weekly	foot	A-D	Old sign on gate saying right of way to pedestrians. New signs on gate to Thele House since 2011.
3	1970-2011 (41 yrs)	Twice weekly	foot	A-D	The vicar used to permit people to use the route when Thele House was the vicarage.
4	2003-2011 (8 yrs)	daily	foot	A-C	Sign on gate saying "access for residents of bungalows only" always present.

					Given permission to use route by council and Riversmead Housing Association when moved into property. Path blocked when Thele House sold.
5	2010-2011 (1 yr)	daily	foot	A-C	Notice on gate to path saying "pathway for residents of Sheltered Houses in Thele Avenue". Recent building work prevented use of route.
6	2010-2011 (1 yr)	daily	foot	A-C	There has always been a right of way for the bungalows. The gates were locked in February 2011 when Thele House was sold.
7	-	monthly	foot	A-D	
8	-	daily	foot	A-C	Gates have been in place for approximately 4 years.
9	2011-2011 (0 yrs)	daily	foot	A-C	HCC sign said "access for bungalows only". They were turned away by workmen and the gates were locked when the building work began.
10	1976-2011 (35 yrs)	daily	foot	A-C	Gate near bungalows had notice saying "access for bungalow residents only". There has always been a gate on the route.
11	1990-2011 (21 yrs)	weekly	foot	A-D	Refers to a gate on the route.
12	1984-2011 (27 yrs)	daily	foot	A-C	Given permission to use the route by the council.
13	1975-2007 (32 yrs)	daily	foot	A-D	Refers to gates which were left open.
14	-	daily	foot	Not clear	Signs granted permission for the right of way. The new signs say there is no right of way.

The application route is wholly within the title of Thele House. Prior to its purchase by the current landowner in December 2010 there appears to have been an acknowledged route (whether public or private) for the residents of the retirement bungalows. Several witnesses refer to a notice to that effect on a gate to Thele House, near point C. There are no indications of when that notice was erected, but it seems to have been there for many years. The gate does not appear ever to have been locked and passing by it was never difficult. Since Thele House was sold another gate was erected at point C by the current owner. This gate has been locked, preventing access. Signs on the gate warn people of the fact that it is a building site and that they should not enter.

The landowner's solicitors contacted the County Council on 14<sup>th</sup> January and 25<sup>th</sup> February 2013 having received redacted copies of the user evidence forms. They assessed the contents of the forms, but did not provide any further information relating to their client's treatment of the land since his purchase.

### 11.3 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 over a period not less than 20 years. Such evidence of use raises a presumption that public rights have been dedicated by the landowner, unless the landowner can show that he had no intention to dedicate the route during the period in question. Section 31(2) states that the 20 year period is calculated retrospectively from the date of challenge.

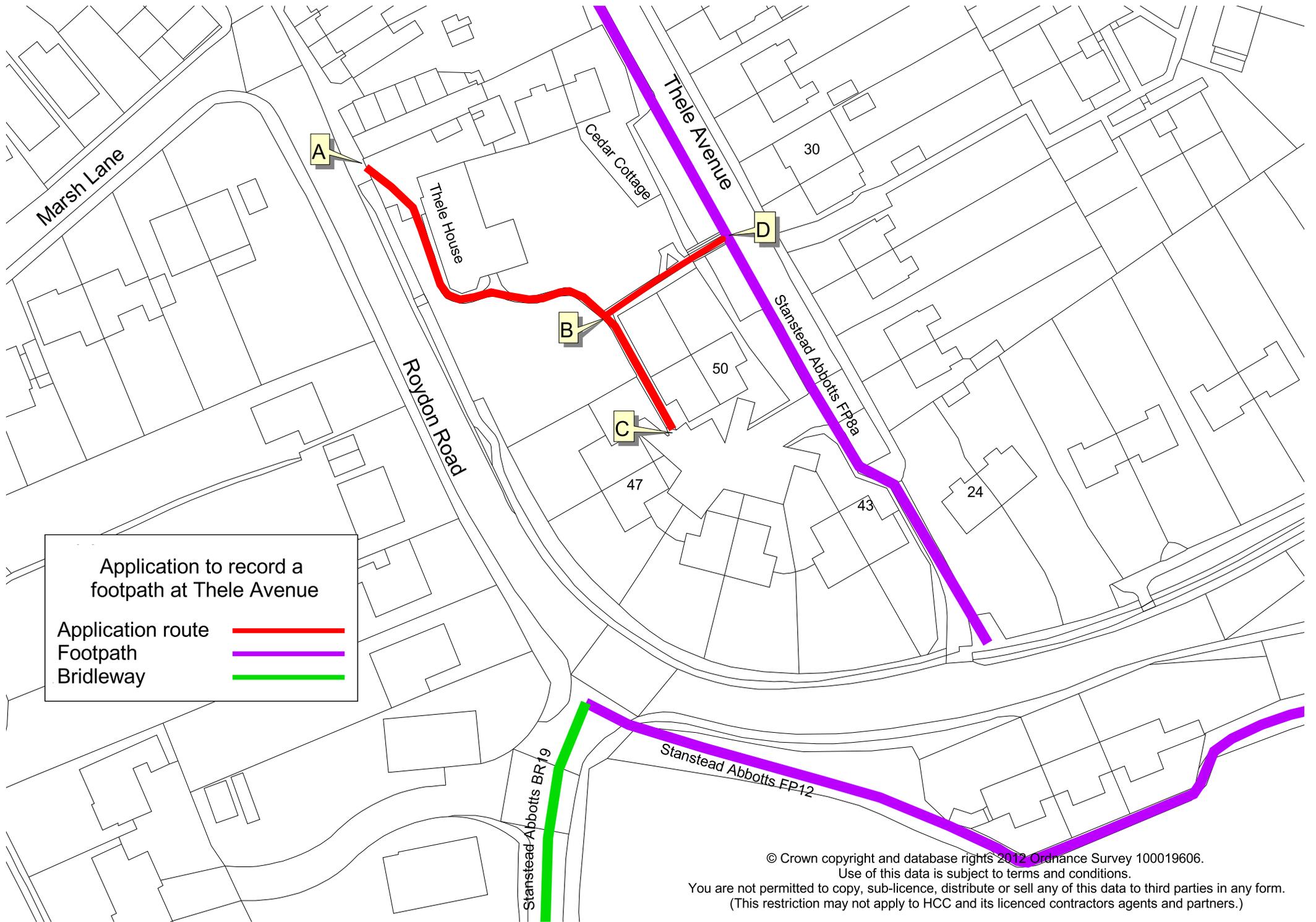
Many witnesses refer to a long-standing gate and sign at point C indicating that use of the route was for bungalow residents only. This may form a date of challenge but HCC considers that there is insufficient evidence to establish the date at which the sign was erected. In comparison, the date at which the current landowner locked the gate at point C can be firmly dated to 2011. HCC therefore decided that 2011 should be used as the date of challenge. As the date of challenge for this case is 2011 the relevant period of use is 1991-2011.

Following an assessment of the witness evidence HCC decided that there is no presumption that public rights have accrued under section 31 of the HA 1980. Of the 14 user evidence forms presented with the application, only four witnesses used the route for the full 20 year period of 1991-2011. Of these four, two witnesses used the application route to the retirement bungalows between points A-C, and two used the route to Thele Avenue between points A-D. Therefore, whilst there are 4 periods of 20 years use between points A-B, there are only 2 between points B-C and 2 between points B-D. HCC therefore decided that there is insufficient evidence of 20 years' use of the application route during the relevant period of 1991-2011.

Furthermore, a total of six witnesses (3 of which can demonstrate 20 years' use) refer to the long-term existence of notices allowing access along the route for residents of the retirement bungalows only, or to having been granted permission to use the route by the council or the housing association. Of the four witnesses with 20 years' use of the route, two lived in the retirement bungalows. HCC decided that their use of the route was with permission and therefore not as of right.

### **Decision**

HCC decided that on the basis of the above that there is insufficient evidence to make a modification order under section 53 of the WCA1981.



© Crown copyright and database rights 2012 Ordnance Survey 100019606.  
Use of this data is subject to terms and conditions.  
You are not permitted to copy, sub-licence, distribute or sell any of this data to third parties in any form.  
(This restriction may not apply to HCC and its licenced contractors agents and partners.)

## How Do We Make a Decision?

In every case, we research a standard set of documents, which are listed in the investigation report. We also request that any additional evidence available to our consultees (landowners, parish council, applicant, users etc.) is also sent to us for consideration. The evidence we have received and investigated will then be considered at meeting (“the decision meeting”). At the decision meeting we look at all the evidence available, both documentary and from contemporary witnesses such as users and landowners. It is important to understand that if the evidence shows that a right of way was established say 100 years ago and has not subsequently been stopped up by legal order, it still exists - even if there is witness evidence about the route now being blocked.

The County Council's position is completely impartial when we start investigating. During our investigation, we look for information that will help us to determine the following questions at the decision meeting:

- Does the route physically exist?  
*If it does, when did it come into existence, where does it start and end, how wide is it and what evidence is there of the existence of limitations e.g. gates etc.*
- Does it have highway rights?  
*If it is a highway, is it carriageway, bridleway or footpath?  
Does the route under investigation join with other highways of the same or higher status (unless there is evidence that it is a cul de sac route)?  
Is there evidence that the position or status of the route differs from the application? If so this will need to be highlighted in the investigation report and/or decision.  
What evidence is there for liability for public maintenance?*
- Have the landowners taken any steps to prevent dedication?  
*If so, when did this occur and is it corroborated by other contemporary evidence?*
- Where the application route is based solely on user evidence, has use been challenged?

## What sort of evidence is considered?

### Documentary evidence

Historic routes can be established through documentary evidence. Investigation of a standard set of documents is usually sufficient for us to make a decision. Additional documents may also be included, for instance where these have been submitted by the applicant or other interested parties. Occasionally further investigation may be required where there is insufficient evidence to make a decision.

### Witness evidence

Routes can be established solely through evidence of use, so any evidence received from people familiar with the area or who have used the alleged route is considered.

Evidence of use can raise a “presumption of dedication” as described in section 31 of the Highways Act 1980. For this to happen use must be shown to have occurred for 20 years prior to the date of challenge. The 20 years’ user has to be without force, secrecy or permission. It is counted back from the date users are challenged using an alleged route. Evidence of a challenge could include when users were asked to turn

back or a structure blocked the route. Where there is no evidence that use has been challenged, section 31 of the Highways Act 1980 specifies that the date of application should be used as the end of the 20 year period.

Evidence can also be given to us from people familiar with the area, such as landowners. This can include whether or not they are aware that people use the alleged route and what steps, if any, they have ever taken to encourage or discourage people from using it. Landowners can do this for example by closing the way or erecting notices which clearly indicate that no public right of way exists. Further, under the Highways Act 1980, a landowner may make a declaration to the highway authority together with a map and statement showing those ways which he or she agrees are highways.

As with the documentary evidence, we study all the information provided to come to a conclusion which will be given in our decision letter which is sent to everyone who was consulted about the application.

### **What happens at the decision meeting?**

At the decision meeting, all the documentary evidence is considered as a whole to build a picture of the history of the area. The case officer, Definitive Map Team Leader and a solicitor attend the decision meeting. Each piece of evidence available is assessed on the “balance of probability” (not “beyond all reasonable doubt”). If a document covers the area of the alleged route, but it is not possible to make a decision about the existence of rights, this is noted as “no evidence”. Where there is no standard document, such as a railway plan, for the area in question this is noted as “no record”. We then know what evidence was considered, and our decision on it.

A conclusion will then be reached by looking at all the evidence together, and a decision will be made as to whether or not to make an order to add the route to the Definitive Map and Statement under the Wildlife and Countryside Act 1981 (“WCA”). Relevant case law is taken into account when we make our decision.

Under section 53 of the WCA where a route is currently recorded, the evidence will need to be assessed as to whether its status is correct, or any details about the route need to be changed.

Alternatively, where there is no route currently recorded, an order can only be made if:

- the evidence shows a right of way has been established through use (“raising the presumption that the way has been dedicated”); or
- through the evidence showing either:
  - that **the right of way subsists** - in this case it will be necessary to show that on the balance of probabilities the right does exist, or
  - that **it is reasonable to allege that a right of way subsists** - in this case, it will be necessary to show that a reasonable person, having considered all the evidence available, could reasonably allege a right of way to subsist

These two tests were identified in the case of *R v Secretary of State for the Environment ex parte Norton and Bagshaw*, and accepted in the case of *R v Secretary of State for Wales ex parte Emery*.

If the evidence shows carriageway rights, or if the application is for a byway open to all traffic, the Natural Environment and Rural Communities Act 2006 has to be applied. This will affect the order we make. This is because this Act extinguished rights for mechanically propelled vehicles unless one of the exemptions set out in the Act applies. These exemptions include whether the application was properly made before 1<sup>st</sup> January 2005, if the route was recorded on the County Council's List of Streets on 2<sup>nd</sup> May 2006, whether the route was used by mechanically propelled vehicles prior to 1930 or whether the route was created or constructed for vehicular use. The Government's Directgov website ([http://www.direct.gov.uk/en/Environmentandgreenerliving/Greenertravel/Enjoyingthecountryside/DG\\_187666](http://www.direct.gov.uk/en/Environmentandgreenerliving/Greenertravel/Enjoyingthecountryside/DG_187666)) contains useful information about this.

It is also possible for a public right of way to be established at common law. This requires the use of the way and the actions of the landowner to have been of such a nature that dedication of the way can be presumed to have occurred. Dedication can occur in less than 20 years where use is sufficient and obvious to the owner that it is happening.

If the decision is to make an order to add the route to the Definitive Map and Statement, it is possible that the order may be different from the application in terms of the location of the route or its status. This is because the decision is made on the evidence found during the investigation, which may differ from the application.

Details of the evidence and our conclusions about what it shows are explained in the decision report/letter which we send to everyone who was consulted prior to our decision meeting (i.e. applicant, landowners, district and parish councils and user groups).

### **Other information**

The law is strict about what we can and cannot consider when examining evidence. We know that people can feel strongly about issues like the suitability of a route, the possible impact on personal privacy and damage to wildlife and habitat. These are some of the issues we are not by law allowed to consider. This is because the modification order process is purely evidential and is concerned only with whether or not a public right of way exists. However, if we decide that a route should be added to the Definite Map, we try to work with people to address their concerns. The Planning Inspectorate has published guidance about what we can consider when we make our decision. You can find out more from the Planning Inspectorate via the Planning Portal website (<http://www.planningportal.gov.uk/planning/countryside/rightsofway/rightsofway> or 0117 372 6372). The relevant document is "Advice Note 7" in the Rights of Way section. This website also has information about how we should interpret evidence.