APPENDIX 2

Application No. MA/5/259

Application to add two footpaths between Bexton Lane and Bexton Footpath 1 and Knutsford Footpath 6

LEGAL BACKGROUND AND CASE LAW

1. Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires that the Council shall keep the Definitive Map and Statement under continuous review and make such modifications to the Map and Statement as appear requisite in consequence of the occurrence of certain events:-
    a. "53 (c) The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows;
    b. (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to section 54A a byway open to all traffic"

2. The evidence can consist of documentary/historical evidence or user evidence or a mixture of both. All the evidence must be evaluated and weighed, and a conclusion reached whether, on the 'balance of probabilities' the rights subsist. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.

3. Where the evidence in support of the application is user evidence, section 31(1) of the Highways Act 1980 applies. This states; "Where a way……has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

4. S31 also requires that the public use of the route during the 20 year period was uninterrupted, and the use was made "as of right", that is without force secrecy and without permission of the landowner.

5. For public rights to have come into being through long use as stated above, a twenty year period must be identified during which time use can be established. Where no challenge to the use has occurred, this period can be taken as the twenty years immediately prior to the date of the application. In this case, the application was made in 2020. Which would make a claim period of 2000-2020 to satisfy the 20 year rule. However, this period is supplanted by previous dates where the public rights appear and were brought into question.

6. There appears to have been a challenge to the public status of the route in 2002 as a consequence of a publication dating, it is thought, to be 2000. A leaflet showing the parish paths was created by the former Cheshire County Council (the "CCC"). The CCC had published and distributed the map in 2000 showing the route A-B-C as a public footpath. The publication and the status of the route was questioned in correspondence sent by the Peak and Northern Footpath Society in 2002 and the CCC accepted they had made an error by including a path that was then not a recorded public right of way. The error was communicated to the Parish Council at the same date. This is arguably a point of challenge bringing the rights of the public into question. This suggests a statutory period of user may have arisen between the period 1982 to 2002.

7. Public rights can also be established under Common Law based on evidence of public use and there is no requirement for a period of twenty years. Establishing rights under common law relies on there being an owner with capacity to dedicate or evidence that there was no capacity to dedicate. In the absence of knowing who the owner was, satisfactory evidence of user by the public would establish rights.

8. In the case of*, R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs (2007),* the House of Lords considered the proviso in section 31(1) of the Highways Act 1980:

"…unless there is sufficient evidence that there was no intention during that period to dedicate it".

The proviso means that presumed dedication of a way can be rebutted if there is sufficient evidence that there was no intention to dedicate the way, during the relevant twenty year period. What is regarded as 'sufficient evidence' will vary from case to case. The Lords addressed the issue of whether the "intention" in section 31(1) had to be communicated to those using the way, at the time of use, or whether an intention held by the landowner but not revealed to anybody could constitute "sufficient evidence". The Lords also considered whether use of the phrase "during that period" in the proviso, meant during the whole of that period. The House of Lords held that a landowner had to communicate his intention to the public in some way to satisfy the requirement of the proviso. It was also held that the lack of intention to dedicate means "at some point during that period", it does not have to be continuously demonstrated throughout the whole twenty year period

9. In this matter the status of ownership is relevant to the successful application of S31 of the HA80. Some land held by Network Rail may be exempt from the presumption of the statutory test. With land held by Network Rail this claim requires the railway bridge is excepted from the provision of S31 of the HA80 by the British Transport Commission Act 1949 section 55 relating to operational land held by the railway. In this case, the question is whether the bridge relates to the use of the main railway or as it appears, provides for an easement to cross the rail line. The question is also whether the bridge

provides for a pre construction right of way. British Transport Commission v Westmorland County Council (HL)(1957) 2 All ER 353 [1958] AC 126 sets out that if such use by the public is not incompatible with the objects prescribed by the Act then the commissioners would have the power of dedication. The documentary evidence suggests that the railway bridge was provided as an easement.

10. In addition to all of the above, there is a provision under Section 31(6) of the 1980 Act that permits a landowner to make a deposit to protect the land from the acquisition of public rights. The deposit requires a statement and plan to be deposited with the relevant local authority. To be effective the statement is then backed up by the submission of a statutory declaration which sets out the lack of intention by the landowner to dedicate any public rights. The lack of the second part and the intended symmetry of the 2 parts has been discussed in the context of the case of Godmanchester (above), such that the lack of a declaration does not rebut the lack of intention to dedicate. There has also been a discussion on the effect of a deposit bringing into question the rights of the public which suggests that the deposit would challenge the rights of the public but the lack of a second part would not provide the evidence of the lack of intention to dedicate.

11. In this case, the previous landowner had submitted a statement under S31(6) of the 1980 Act in 2007 but failed to submit a second part, declaration, within 10 years of the statement. For the purposes of this claim, it is proposed that the first deposit brings into question the path(s) therefore the relevant period for the purposes of a statutory period of user would be 1987 to 2007.

12. Section 80 of the Highways Act 1959 abolished the ancient duty to maintenance of highways by the inhabitants at large and so highways prior to the Act which were maintained by highway authorities, or the inhabitants were then maintained at public expense. The same Act repealed section 23 of the Highways Act 1835 and introduced a procedure for adoption at public expense any new highways. (the 59 Act was repealed by the 80 Act) Currently the situation is that an expressly created path are maintainable except when the path maintenance rets with another body or person, it was created by a parish council under section 30 of the 80 Act or it was dedicated after 1949 and observed one of the legal processes set out under the 59/80 Act. Paths that came into existence after the 1959 Act through long usage are not publicly maintained unless a procedure was or will be undertaken. No other law provides for the duty to publicly maintain. A way added by a DMMO is therefore only public maintainable if it can be shown to have come into existence prior to the 1959 Act. This includes a path that is upgraded to a different status, the liability to maintain to the higher status is not imposed on the authority, although maintenance may be carried out.

13. The Human Rights Act is also of relevance. Whilst article 1 to the first protocol (peaceful enjoyment of property) and article 8 (right to respect for family, private life and home) are engaged, it is important to note that these rights are qualified, not absolute, which means that they can be interfered with in so far as such interference is in accordance with domestic law and is necessary in a

democratic society for the protection of the rights and freedoms of others. It is considered that any interference occasioned by the making of a Modification Order is both in accordance with domestic law (the Wildlife and Countryside Act 1981) and is in the public interest as it is necessary in a democratic society for the protection of the rights and freedoms of others, namely the public who wish to use the way. Should Members resolve that a Modification Order be made in accordance with highways legislation, this is merely the start of the legal process. Once a Modification Order is made, it must be publicised, and any person will have an opportunity to formally object to it. Should objections be received, the Modification Order would have to be referred to the Secretary of State who may hold a Public Inquiry before deciding upon whether or not to confirm the Modification Order

14. Please note that the Council will not disclose the user evidence forms that form part of the background documentation at this stage in the process. The Council considers that the information provided within the user evidence documentation is exempt information under s1&2 Schedule 12A Local Government Act 1972, as amended.

15. Under the Wildlife and Countryside Act 1981, there is no such statutory right prior to an Order having been made - persons affected are entitled to the information in the event that an Order is made following the Committee decision.

16. Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the Local Authority to confirm the Order itself and may lead to a hearing or Public Inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources.