

Cornwall Council
Environment Service – Countryside Access Team
Statement of Case
Documents required by Planning Inspectorate



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Statement of Case in respect of:

The Cornwall Council (Upgrade of Footpath to Restricted Byway together with the Addition of Restricted Byways at Zelah in the Parish of St Allen) Modification Order 2017

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Statement of Case

Introduction

1. An application was received on 12 December 2013 to modify the definitive map and statement by adding a public bridleway and upgrading Footpath 19 St Allen to bridleway at Zelah. The application was supported by 27 Public Rights of Way evidence forms. Cornwall Council subsequently determined to make an Order in consequence of the application on 21 February 2017. The Order was made on 28 March 2017.
2. The resulting Order added to the definitive map lengths of restricted byway in the Parish of St Allen, shown as routes B-C and D-E on the Order map attached in Appendix A, together with the upgrade of a section of Footpath 19 St Allen to restricted byway, shown as route A-B on the Order map.
3. In making the Order, the Council had regard to the duty as expressed in Paragraph (2) of Section 53 of the 1981 Act:

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the definitive map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the event specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as practicable after the occurrence on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
4. The abovementioned Order was made under section 53(2)(b) because of the occurrence of an event as set out in section 53(3)(c)(i) of the 1981 Act being an event whereby:

“...the discovery by the authority of evidence which – when considered with all other evidence available to them shows – that a right of way which is not shown in the definitive 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...".

And because of the occurrence of an event as set out in section 53(3)(c)(ii) of the 1981 Act being an event whereby:

"...the discovery by the authority of evidence which (when considered with all other evidence available to them shows – that a highway shown in the definitive map and statement as a highway of a particular description ought to be there shown as a highway of a different description...".

5. When considering whether to make an Order under the Wildlife and Countryside Act 1981 Section 53(2)(b) the Council had to be satisfied that an event under section 53(3)(c)(i) and an event under 53(3)(c)(ii) of the 1981 Act had occurred. The Council had to decide whether the available evidence shows that a right of way subsists or is reasonably alleged to subsist over the sections of claimed way shown as routes B-C and D-E on the Order map (the **"reasonable allegation"** test) and the available evidence shows, on the balance of probabilities, that a right of way exists over the section of claimed way shown as route A-B on the Order map (the **"balance of probabilities"** test).
6. The Council made the above Order and at the end of a statutory period for representations and objections, the Order was subject to two outstanding objections. The Council was therefore unable to confirm the Order as an unopposed Order and submitted the opposed Order and the objections to the Planning Inspectorate with a request that the Secretary of State for Environment Food and Rural Affairs confirms the Order.
7. When considering whether to confirm an Order made as a result of the occurrence of an event under Section 53(3)(c)(i) of the 1981 Act the Secretary of State has to decide whether the available evidence shows, on the balance of probabilities, that the Order should be confirmed. This requirement is set out in paragraph 6(1)(a) of Schedule 15 to the 1981 Act.

Grounds for confirming the Order

8. In determining to make the Order the Council was satisfied that an event had occurred under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. Namely, that the available evidence showed the Order routes between B-C and D-E could be reasonably alleged to subsist as highways because they had been dedicated at common law as public carriageways.
9. Furthermore, in determining to make the Order the Council was also satisfied that an event had occurred under 53(3)(c)(ii) of the Wildlife and Countryside Act 1981. Namely, that the available evidence showed that, on the balance of probabilities, the Order route between A-B which is currently recorded as a public footpath should

be recorded as a restricted byway because the evidence indicates that it had been dedicated at common law as a public carriageway.

10. Section 67 of the Natural Environment and Rural Communities Act 2006 extinguished all existing public rights of way for mechanically propelled vehicles unless the way qualified under one or more exceptions. In the event the claimed routes do not qualify as excepted ways, subsection 70(1) of the NERC Act 2006 provided for ways to be recorded as restricted byways in the definitive map and statement. In this instance, because none of the five exceptions in subsection 67(2) were met, so an Order was made to amend the definitive map and statement by upgrading A-B from footpath to restricted byway and adding two sections of restricted byway B-C and D-E.
11. The Council also determined that, if the Order was opposed, then it should be submitted to the Planning Inspectorate on behalf of Secretary of State for confirmation. In making this decision, the Council confirmed that it considered that the "balance of probabilities test" for section A-B had been met and also indicated that it was satisfied that the "balance of probabilities" test for B-C and D-E had been met. No evidence has been submitted to the Council since the decision to make the Order which has caused the Council to amend that opinion.

Dedication at Common Law

12. Section 32 of the Highways Act 1980 sets out that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto.
13. As part of the process of determining this matter Cornwall Council has undertaken extensive documentary research. In this case Cornwall Council has placed particular weight on evidence found in the incremental value duty records of the Finance Act 1910 supported by evidence from the tithe survey and definitive map record. Copies of these documents can be found in Appendix B.
14. Finance Act records point to the fact that the claimed route was considered to be a public highway, because it was excluded from the surrounding hereditaments on the valuation map.
15. On the tithe survey the claimed route between A-B-C and D-E followed a clearly defined lane bounded by adjacent fields on both sides depicted no differently from other highways to which it links at this location that are now designated as carriageways on the list of streets except in respect of it being ascribed an apportionment number which describes the ways as 'Roads and Waste' in the apportionment records.

16. By recording section A-B on the Order map as a 'Cart Road used as a Footpath' (CRF) on their survey, Perranzabuloe Parish Council did not intend to record a cul-de-sac path, but considered St Allen Parish Council would include the remaining part of the Order route in the adjoining parish on the definitive map. This was made apparent in the schedule that accompanied the parish survey which indicated the path extended as far as the 'Zelah Trunk Road' which is what they identified the ultimate destination of the path to be.
17. It is therefore considered that documentary sources provide evidence of the reputation of a way of such a character that gives rise at common law to the presumption of dedication and that on the balance of probabilities, the whole of the claimed route (A-B-C and D-E) was dedicated as a public carriageway at an unknown date in the past. No evidence has been discovered which indicates that public rights along the way have subsequently been stopped up.

Dedication under Section 31 Highways Act 1980

18. The Council's report also evaluated evidence of recent use of the claimed ways submitted in support of the application to modify the definitive map and statement. It concluded that this evidence indicated that a highway of public footpath status was reasonably alleged to subsist over routes B-C and D-E on the Order map. This also satisfies the test for an 'event' in section Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981.

Enjoyment By the Public

19. The first part of section 31(1) of the Highways Act states that:
"Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway
20. Attributes that convey the characteristics of a route sufficient to define it as a 'highway' include a determination that it is open to the public at large, the public use must be as of right, that right is primarily for passage, and the right of passage must follow a defined route. In considering the extent to which these key criteria are met the evidence is evaluated under two broad headings:

i) The Nature of the Way

- a) In determining to make the Order and submit the opposed Order to the Secretary of State for confirmation, the Council gives specific consideration to the nature of the ways. Evidence from historical maps and aerial photographs show the ways described followed clearly defined tracks, and they have not been over an area where the public has wandered at

large. This documentary evidence can be found at Appendix C to this Statement.

- b) The user evidence indicates that the ways have been enjoyed by walkers mainly for recreational purposes.
- c) The character of the ways has to be such that use of it would give rise at common law to a presumption of dedication. Therefore the land could not be land to which members of the public are prevented from gaining access by statute. There is no known statute that prevents members of the public from having access to the land.
- d) It is also submitted that the physical characteristics of the ways are such that a right of way could be established. In this instance the available evidence indicates that the way followed a clearly defined lane, used in a private capacity by motorised vehicles, at least in part, bounded on both sides by grass verges.

ii) The Nature of the Use

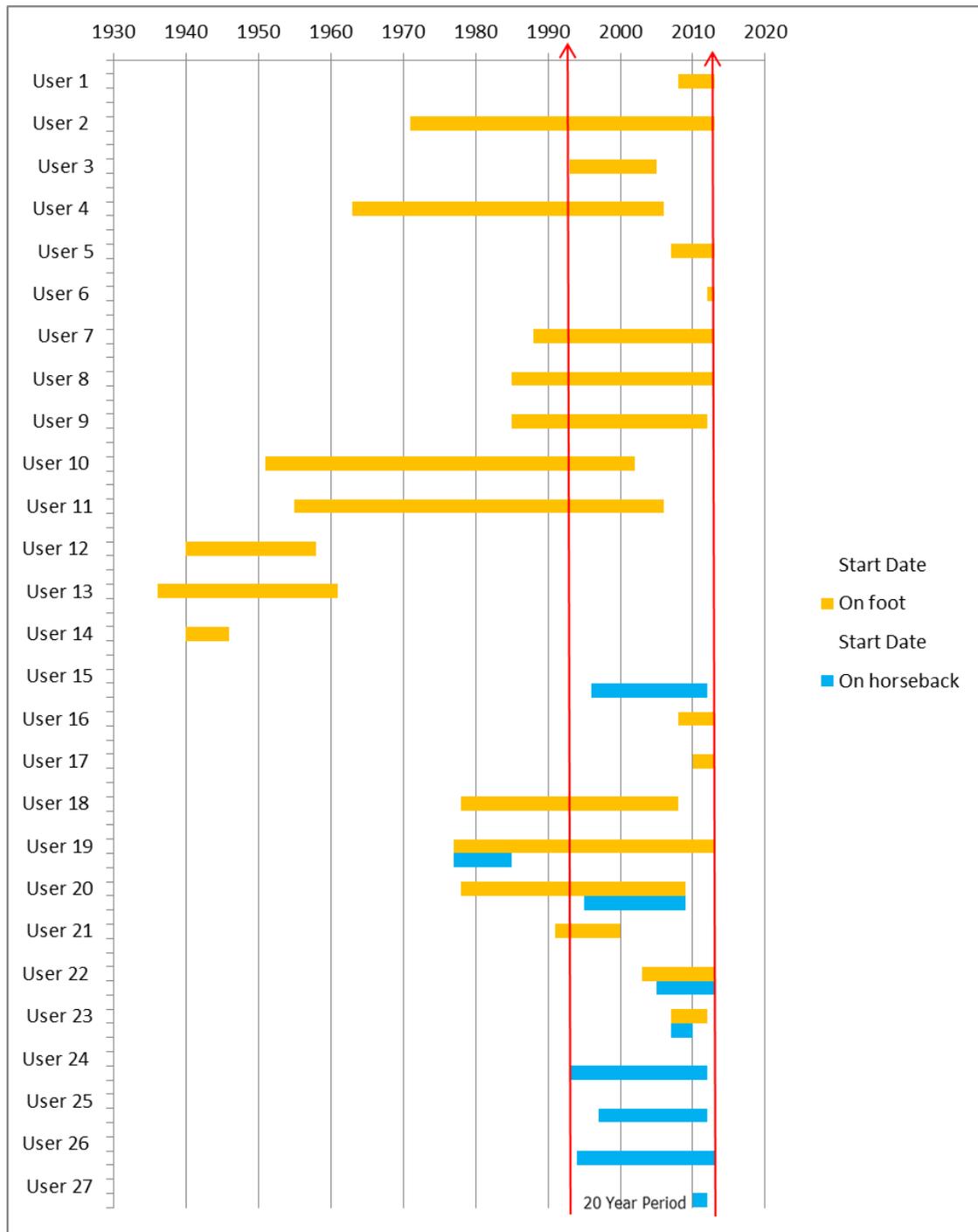
- a) The ways must have been actually enjoyed – the available evidence indicates that the ways have been enjoyed by pedestrian users on foot between 1936 and 2013.
- b) Use of the ways must have been by the public – the available evidence indicates that witnesses who claimed they had used the paths during the relevant period lived in Zelah, or other surrounding areas in St Allen CP, as well as a proportion of witnesses who lived outside the parish in Cornwall. The distribution of users of the path indicates that use was by the public at large.
- c) Use of the ways must have been as of right – in other words the use of the ways must have been without force, secrecy or permission. The available evidence indicates that use of the ways had been as of right for a full 20 year period prior to the date when rights were called in question, so between 1993 and 2013 on routes B-C and D-E on the Order map. There is no evidence presented to the Council that any of the users used the paths with force or secrecy during the relevant periods. The evidence indicated no witness had used the routes in exercise of a private right, or by permission from the landowner during the relevant period.
- d) Use of the ways must have been without interruption – in other words the use of the ways by the public must have been exercisable over the entire period. The available evidence indicates that there that there has been no interruption to the use of the ways between the relevant dates.
- e) Use of the way must have been for a full period of 20 years. From the available evidence the Council was satisfied that use of the routes had covered a 20 year period as required by

statute and that the frequency of use during that period was sufficient.

21. Evidence of use is comprised of 27 public path user forms. Forms completed in support of the application can be found at Appendix D to this Statement. A list of the names of witnesses who submitted evidence is provided below.

1		15	
2		16	
3		17	
4		18	
5		19	
6		20	
7		21	
8		22	
9		23	
10		24	
11		25	
12		26	
13		27	
14			

22. The bar chart below shows evidence of use on foot contained in the forms over the period indicated for routes shown as B-C & D-E on the Order Map.

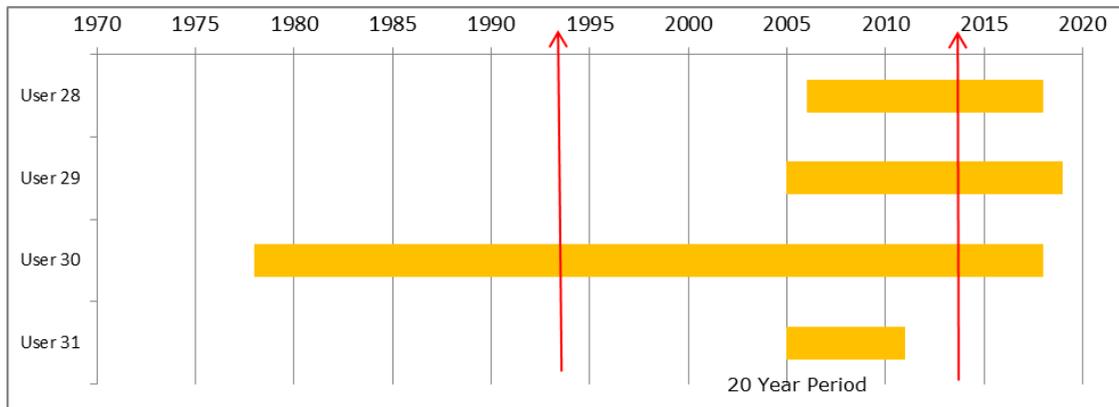


23. In total 22 witnesses have used route for varying lengths of time with 11 claiming to have used it in excess of 20 years on foot. Use of the way has continued at least up until the time evidence forms were submitted with the application in 2013. A total of 3 witnesses (12, 13 & 14) claimed use exclusively outside the period of 20 years prior to the date rights were brought into question.

24. Despite describing the route claimed clearly on their user evidence forms, two witnesses (8 & 10) did not mark the map accompanying their statement to illustrate the route they had used and their evidence should carry less weight as a consequence.
25. The maps of fourteen witnesses do not show that they have used the route between points D-E on the Order map. However, among those that do include this section use has been both frequent and ranged over a period in excess of 20 years.
26. Frequency of use among the remainder of witnesses varies, but of the 27 witnesses, 3 (12, 13 & 18) claim to have used it on an approximately weekly basis while another 3 witnesses (19, 20 & 22) claim to have used it more frequently than that, up to twice a week, or more often. A further 4 witnesses (1, 5, 10 & 23) have used it at least once in every two weeks, while the rest have used it less frequently. In conjunction with the evidence of the numbers of witnesses, use on foot has been demonstrated to be substantial and continuous.
27. An additional 4 users have submitted evidence forms to the Council since the Order was made. Although not considered as part of the Council's decision to make the Order, this evidence is considered relevant in that it shows use continued up until the present in 2019. Forms were completed by the following named users and can be found at Appendix E to this statement.

28		30	
29		31	

28. The bar chart below shows additional evidence of use contained in the extra forms submitted after the Order was made over the period indicated for the route shown as B-C & D-E on the Order Map.



29. Frequency of use among the additional witnesses varies from a few occasions annually to 20 times a year.
30. Taking the number of witnesses together with how often they used it use of the way on foot has been demonstrated to be substantial and continuous.

Date when the Right was Brought into Question

31. Section 31(2) of the Highways Act 1980 continues:

"The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question,"

32. For the purposes of Section 31 of the Highways Act 1980, it is considered that public use on foot was brought into question by an earth bank obstructing the claimed way in 2013.

Evidence of a Lack of Intention to Dedicate

33. The second part of Section 31(1) of the Highways Act 1980 continues,

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

34. Prior to 2013 one landowner claims to have maintained locked gates and told users who asked that the way was private, but failed to provide details to show dates when this happened, or pinpoint the exact location of the gates that were locked. In their user evidence forms none of the witnesses report coming across a locked gate, or being told that the way was private, so on the part of the landowner there does not appear to have been sufficient overt action by way of a contemporaneous act such as erecting a notice, locking a gate, or lodging a declaration under Section 31(6) of the Highways Act 1980 to

bring to the attention of the public their contrary intention to dedicate a right of way.

35. Insufficient evidence was provided to show that the landowners did not intend to dedicate a public footpath during the period over which use has been reported 1936 to 2013. The Council therefore considers that the necessary evidence to negate the evidence of use during the relevant 20 year period has not been discovered.

Consideration of Points Raised in Objections to the Order

36. Two Objections were received from _____ and _____. Following a period of resolution neither was withdrawn. Outstanding letters of objection are attached at Appendix F.
37. In a letter of objection dated 5 April 2017 _____, the owners of the land over which the Order route between B-C passes objected to the confirmation of the Order on twelve grounds indicating that they disagreed with the argument that had been put forward by the Council in determining to make the Order. However the objector did not put forward any new evidence that the Council had not previously considered.
38. The first ground for objection was that short lengths of footpath in the parish of St Allen, such as Footpath 19 St Allen, shown between points A-B on the Order map, are not unusual but were intended to connect cottages to council roads.
39. The second ground for objection identified that the route between B-C on the Order map has never been a public road, but was historically a private estate track.
40. The third ground for objection indicated that when Zelah Lane Farm purchased the land crossed by section B-C on the Order map from Trewithan Estate, the maps registered with the title did not show any continuous track, or path, along the route.
41. The fourth ground for objection reported that at the time Zelah Lane Farm rented and purchased the land 30 years ago, the lane was blocked by fences, gates and fallen trees and was therefore impassable, even by tractor.
42. The fifth ground for objection pointed out that from Soloman's Junction to point C on the Order map the track is subject to continuous agricultural use and accessed daily by farm machinery, tractors, suppliers lorries and volatile livestock. Allowing public access exposes the farm to unreasonable risk.
43. The sixth ground for objection noted the area is a Farm Isolation Unit used for bull fattening where aspects of safety have to be considered. A right of way will expose the landowner to loss of security,

biosecurity, and restrict their right of use without restriction or interruption.

44. The seventh ground for objection considered it was important that rights of way did not restrict the agricultural and industrial sectors in Cornwall as these employ people, provide food and maintain the working rural countryside and landscape.
45. The eighth ground for objection reported that from Soloman's Junction to point B on the Order map there has been no attempt to clear the track. Because the route has been inaccessible to the public, this part of the way has enjoyed significant conservation benefits making it a protected wildlife corridor of considerable environmental value. In addition to fox, badger and other small mammals, several species of bats are reported in the habitat.
46. The ninth ground for objection suggested that historically, the route was possibly a mine track used for hauling minerals out of Tolroggan.
47. The tenth ground for objection pointed to alternative surfaced roads in the immediate vicinity that will have fulfilled the purpose of providing public access in the area and there will have therefore been no reason for using the route between points B-C on the order map.
48. The eleventh ground for objection identified the way between points D-E on the Order map is already a council highway used by all types of vehicle. Furthermore, this part of the Order route links to Bridleway 1 St Allen which will be extinguished in some versions of plans produced by Highways England for a project to make the A30 a dual carriageway.
49. The twelfth ground for objection claimed the Ordnance Survey maps referred to merely show farm lanes as tracks, not as public rights of way, which is why they are not on the definitive map and were never included by the parish council.
50. The view of Cornwall Council is that the objection does not address issues that are relevant to the confirmation of the Order for the following reasons.
51. Concerning the first ground for objection public rights of way usually provide connectivity between other highways. Access between private properties and public highways is normally via a private right of access where no public right of way exists to provide that access. It is unusual for a public right of way to exist merely to provide an access for a private property owner to get to the public highway.
52. Concerning the second ground for objection the section between A-B on the Order map (now known as Footpath 19 St Allen) is a recorded public footpath that was included in the original definitive map and statement for the then Truro Rural District area as a cart road used mainly as a footpath (CRF 71 in Perranzabuloe). This route terminated

on the original map and statement at the old parish boundary between Perranzabuloe and St Allen (point B on the Order map). Perranzabuloe Parish Council who initiated the claim that resulted in CRF 71 being recorded in the original map and statement would not have deliberately claimed a cul-de-sac, but understood the right of way continued to 'Zelah Trunk Road' which they identified as the ultimate destination of the path in the schedule that accompanied their parish survey.

53. Concerning the third ground for objection references to private rights contained and described in deeds, title registers, or indentures and any of these, are considered to have little or no bearing on the existence of public rights of way. The fact that a track is not shown on the plan that accompanied the registered title does not preclude the possibility that public rights might also exist over it. Many public paths follow farm accommodation lanes over which public and private rights coincide.
54. Concerning the fourth ground for objection the objection provides no evidence to verify the claim that the way was blocked by fences, gates and fallen trees 30 years ago, nor indicates whether these represented a physical obstruction to users. Of 27 witnesses who provided evidence of use, none mentions that their use of the way was ever challenged by way of signs or notices and there were no reports of obstructions in the form of locked gates, fences, or other means until an earth bank appeared in 2013.
55. Guidance makes it clear that the only relevant grounds for representations or objections are those that are based on evidence of the existence or non-existence of public rights. Representations or objections to a definitive map modification order adding or upgrading a way to the map which concern privacy, suitability, desirability, damage to the environment, the safety of users or landowners, are not considered to be relevant to the question of public rights of way exist. Therefore concerns about the impact of the Order on land use (Ground 7), agricultural practices, risk, dangers to the public, security of premises, biosecurity (Grounds 5 & 6) and wildlife (Ground 8) cannot be considered because they are not relevant to the question of establishing public rights.
56. The history provided of the track between B-C on the Order map (Grounds 9 & 10) and the conclusion drawn from these assertions that this section of the Order route has never been a public road is speculation and not supported by the available evidence. In its Statement of Reasons accompanying the Order, Cornwall Council set out the key documentary sources that had been consulted and examined the evidence that public carriageway rights had existed historically and this was also supported by recent evidence of use on foot.
57. Concerning the eleventh ground for objection there is no dispute that the section between points D-E on the Order map is subject to use by utility vehicles to access private residences, but it is not currently

recorded as a public highway either on the definitive map, or list of streets maintainable at the public expense. The future impact of proposals to improve the A30 on Bridleway 1 St Allen and to which this section of restricted byway connects are not relevant matters that need to be considered in the confirmation of this Order as they do not relate to it.

58. Concerning the twelfth ground for objection the question of whether a right of way exists can only be determined by consideration of the relevant available evidence. Ordnance Survey maps were included in the Council's evidence as a means of showing that the way existed as a physical entity over time, but the officer report identified that they say nothing about the reputation of the way as public, or its status. For that determination the Order making authority has relied on evidence contained in the incremental value duty records of the Finance Act 1910 supported by evidence from the tithe survey and definitive map record.
59. In a letter of objection dated 9 May 2017 _____, who indicated they own land adjoining the Order route objected to the Order on two grounds indicating that they disagreed with the argument that had been put forward by the Council in determining to make the Order. However the objector did not put forward any new evidence that the Council had not previously considered.
60. The first ground for objection was that when they purchased their property Bowling Green Barn from the Trewithen Estate in 1997 they had no right of way to use the lane and were required as a condition contained in the deeds to build a permanent stone hedge on the west side of their field where previously a gate provided access to the lane.
61. The second ground for objection identified they have horses grazing in an adjacent field, so for privacy and security reasons they would not wish the general public to have access down the lane.
62. The view of Cornwall Council is that the objection does not address issues that are relevant to the confirmation of the Order for the following reasons.
63. Concerning the first ground for objection references to private rights contained and described in deeds, title registers, or indentures and any of these, are considered to have little or no bearing on the existence of public rights of way.
64. Concerning the second ground for objection guidance makes it clear that the only relevant grounds for representations or objections are those that are based on evidence of the existence or non-existence of public rights. Representations or objections to a definitive map modification order adding or upgrading a way to the map which concern privacy, suitability, desirability, damage to the environment, the safety of users or landowners, are not considered to be relevant to the question of public rights of way exist. Therefore concerns about privacy

and security cannot be considered because they are not relevant to the question of establishing public rights.

65. An objection must show that the landowner had no intention of dedicating the land, and had taken steps to prevent the accrual of public rights. There are various means of doing this, such as: lodging a statutory declaration with the County Council of negative intention to dedicate land under Section 31(6) of the Highways Act 1980; physical restraint in the form of locked gates, fences or barriers; verbal restraint; stopping of users of the way; erecting notices denying that public rights of way exist; allowing access by permission only; or by any other means to prevent public rights from accruing. Although the landowner provided a statement indicating that people were challenged, no witness reported this and on balance the Council considers this is insufficient evidence of action taken to demonstrate they had no intention of dedicating the land.

Summary

66. In regard to the ways depicted between points A-C and D-E on the Order map, Cornwall Council is satisfied its original determination that the Order be made and that the Order, if opposed, be submitted to the Secretary of State for confirmation was based on a reasonable interpretation of the available evidence and also satisfies the tests laid out in Section 53 of the Wildlife and Countryside Act 1981. There was nothing that was raised in the contents of the objection to the Order that causes Cornwall Council to consider that the Order should not be confirmed.
67. The Council considers the available evidence indicates that, on the balance of probabilities public carriageway rights exist over A-B-C and D-E on the Order map. These have been established by inference of dedication at common law taking into account that Section 32 of the Highways Act 1980 permits a court or tribunal to take maps, plans and other documents into account before determining whether a way has been dedicated as a highway. It is therefore considered that the Order to modify the definitive map and statement by upgrading a section of footpath to restricted byway and add two sections of restricted byway to the definitive map and statement should be confirmed.