

<b>REPORT TITLE</b>	<b>MONKS' FERRY SLIPWAY BIRKENHEAD</b>
<b>REPORT OF</b>	<b>MANAGING DIRECTOR FOR DELIVERY</b>

**REPORT SUMMARY**

Wirral Borough Council is designated as the Surveying Authority pursuant to the Wildlife and Countryside Act 1981 ("the 1981 Act") with responsibilities for the maintenance of the Definitive Map of Rights of Way within the Borough. As Surveying Authority the Council has received an application under the Wildlife and Countryside Act 1981 section 53(5) from Richard Buxton Environmental and Public Law dated 15 July 2015 on behalf of members of the Mersey Charter-boat owners and other users of the Monks' Ferry Slipway.

The application seeks an order to modify the Definitive Map to show a public footpath from the public highway on the car park at Monks' Ferry, Alabama Way, Birkenhead, Merseyside, CH41, down the slipway as far as the low-water mark.

The land subject to the application is in the ownership of the Council

The application claims that the slipway and its access to the public highway has been actually enjoyed by pedestrian members of the public as of right and without interruption for a full period of 20 years and as such should be deemed to have been dedicated as a public footpath. They have provided evidence in support of their application

The Council contests this application and has provided evidence in support of this objection

Having carefully considered the evidence from both parties the Surveying Authority recommends that the Council refuse the application for the reasons set out in the report. The Committee is requested to consider the evidence, and the recommendations, and determine the application.

**RECOMMENDATION/S**

**(1) That the application under s53(5) Wildlife and Countryside Act 1981 ("the 1981 Act") from Richard Buxton Environmental and Public Law dated 15 July 2015 on behalf of members of the Mersey Charter-boat owners and other users of the Monks' Ferry Slipway for an order under subsection 53(2) to modify the Definitive Map be refused for the following reasons:**

**A) As required by s31(1) Highways Act 1980, for the reasons set out in the report, the applicant has failed to demonstrate:**

- Use of the slipway as a way by the public for a full 20 year period,
- Use of the slipway without interruption,
- Use of the slipway “as of right” which means not secretly or by force or by the licence or permission of the owner from time to time given.

**B) That pursuant to Section 53(3)(c)(i) Wildlife and Countryside Act 1981 the applicant has failed to provide evidence which (when considered with all other relevant evidence available to the Council) shows 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.**

**C). That pursuant to Section 53(3)(b) Wildlife and Countryside Act 1981, 20 years use as of right has not been demonstrated on the balance of probabilities. Therefore there is no presumption that the way has been dedicated as a public path.**

**(2)That the application under Common Law be refused as there is no inference of dedication of the slipway as a way at Common Law and further that the use was not “as of right” at Common Law.**

## SUPPORTING INFORMATION

### 1.0 REASON/S FOR RECOMMENDATION/S

- 1.1. To determine the application

### 2.0 OTHER OPTIONS CONSIDERED

- 2.1. None

### 3.0 BACKGROUND INFORMATION

- 3.1 The application is made in accordance with Schedule 14 to the 1981 Act and the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. The Highways Act 1980 s31 (1) and (9) apply. The committee's attention is drawn to Appendix 1 to this Report which clearly sets out the legislative background to this application and the factors which the Committee should take into account in determining this application. (Application is attached as Appendix 2 to this report).
- 3.2 The application claims that the slipway and its access to the public highway has been actually enjoyed by pedestrian members of the public as of right and without interruption for a full period of 20 years and as such should be deemed to have been dedicated as a public footpath. As set down in s31(2) of the Highways Act 1980 the 20 year period is calculated backward from the date when the right of the public to use the way is brought into question. The application is dated 15 July 2015 but was preceded by a letter stating the applicants' intention to submit the application. This letter was dated 26 June 2015 which is therefore the date on which the right of the public to use the right of way is brought into question, and the 20 year period runs back from that date to 25 June 1995.
- 3.3 The application claims that the public involved include members of the public going to and from charter boats and members of the general public enjoying views of the River Mersey and its shipping and of Liverpool.
- 3.4 As Surveying Authority the Council has a duty to keep the Definitive Map and Statement under review. As regards every definitive map and statement, the Surveying Authority shall:
  - (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in s53, of the 1993 Act, subsection (3); and
  - (b) as from that date, keep the map and statement under continuous review and as soon as reasonably 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.

The events referred to in subsection 3 include:

- (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows
- (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.

#### **4.0 FINANCIAL IMPLICATIONS**

- 4.1 If the application is refused there will be financial implications in either replacing the damaged bollard or in removing the existing bollard base and sealing the gap with new rails attached to the existing gate post and the fencing.
- 4.2 If the application is approved it would be necessary to improve the surface by possibly resurfacing it. Also a regular cleansing schedule would need to be introduced to ensure that the surface was free from deposited material from the river and detritus from tidal action.

#### **5.0 LEGAL IMPLICATIONS**

- 5.1 The legal issues relating to consideration of the evidence are set out in Appendix 1 to this report and Members attention is specifically drawn to the contents of that Appendix. Consideration of this matter must be in accordance with the legislation and guidance set out in that Appendix.

#### **6.0 RESOURCE IMPLICATIONS: ICT, STAFFING AND ASSETS**

#### **7.0 RELEVANT RISKS**

7.1 The slipway is not currently maintained for public use and there is a risk that anyone accessing it and using it for leisure purposes may suffer injury from falling or slipping

#### **8.0 ENGAGEMENT/CONSULTATION**

Interviews have been held with the members of the public who claim to use the slipway for leisure purposes.

#### **9.0 THE APPLICATION**

- 9.1 The basis of the application is that the Monks Ferry slipway and its access to the public highway has been actually enjoyed by pedestrian members of the public as of right and without interruption for a full period of 20 years and as such should be deemed to have been dedicated as a public footpath.
- 9.2 The application goes on to state that, “as established by unchallenged evidence in a recent planning appeal, (reference APP/W4325/W/14/3000737), this access has continued for more than 20 years to the knowledge of the Council but without permission and that at no time during the 20-year period has there been any notice

inconsistent with the dedication of the way as a public footpath, nor is there any other evidence to negate the intention to dedicate the way as a public footpath. No signs in respect of pedestrian use and no barrier preventing pedestrian use have been erected.”

- 9.3 The application refers to an email from the Council to the applicant dated 30 June 2015 from the Council in respect of the applicants notice of intent to make the application which stated that "the slipway is separated from the highway by a locked gate and also a damaged bollard". The application states that the email referred to above fails to record the fact that the gate has at all times had a gap which easily permits pedestrian access.
- 9.4 The application claims that the Council as owner has at all times had full capacity to dedicate a way over that land as a public footpath.

## **10.0 LEGAL ISSUES WHEN CONSIDERING THE EVIDENCE**

- 10.1 The legal issues relating to consideration of the evidence are set out in Appendix 1 to this report and the committees attention is specifically drawn to the contents of that Appendix. Consideration of this matter must be in accordance with the legislation and guidance set out in that Appendix.

## **11.0 EVIDENCE FROM THE APPLICANT**

- 11.1 A copy of the Application is annexed as Appendix 2 to this report and the accompanying witness statements are at Appendix 3. Nine witness statements have been provided by the applicant in support of the application from:

George Collings  
Stephen Dalton  
Tom Dalton  
Colin Evans  
Gary Flint  
Huw Williams  
Stan Dickinson  
Kevin McKie  
Statement and letter from Nigel Mercer to Wirral Borough Council

- 11.2 Three of these witness statements contain evidence from people who claim to have used the slipway personally. The evidence from these witnesses:

Stan Dickinson  
Kevin McKie  
Nigel Mercer  
is considered below at paragraph 8.3.2

- 11.3 The other six statements are from charter boat operators who, for a various length of time from 1990 onwards have operated charter boats which they claim to have moored at Monks Ferry Slipway to board and off-load passengers to their boats. The numbers of passengers vary between each of the charter boat operators as does the frequency of the moorings.

11.4 These six statements all state that “typically the passengers would walk from and to a motor vehicle parked in Monks Ferry car park”, that “there was never a barrier that prevented its use by pedestrians” and that “this pedestrian use of the slipway was carried out openly, without force and without seeking or being given permission” These witnesses themselves have actually only used the slipway to moor of boats over a period rather than use of the slipway as a right of way. These statements do not provide any evidence of the witnesses having actually used the slipway personally as a public right of way for a full 20 year period, as of right and without interruption.

The statements do not provide detail on the important issue of how the slipway was accessed or exited at its landward (fence line) side. On that basis the evidence is to be given less weight than evidence from those who did actually use the slipway to access the boats

11.5 There are no witness statements submitted in the application in support of these six witness statements from any of the passengers who are claimed in these statements to have actually used the slipway as a public right of way to board or exit from the boats.

11.6 In addition the applicant has submitted an email dated 26 April 2016 together with photographs and a plan. (The email and attachments are appended as Appendix 4). The applicant raises the following issues:

(i) The Council’s definition of the “damaged” bollard. They contend that the bollard has been cut down as opposed to being damaged and attach photographs both dated 10 February 2016 (referenced 10/2/1 and 10/2/2 in Appendix 4).

(ii) They state that it would be wrong to claim that the bollard at the top of the slipway is damaged until there is clarification as to why the bollards were installed in the area.

(iii) They claim that the permanent boat moorings on the slipway demonstrates the use of the slipway by the chartered boat operators. They attach photograph ref 26/4/3 which shows the boat moorings and an old map ref 26/4/4 ( See Appendix 6).

(iv) They question whether the purpose of the gate at the top of the slipway was to stop boats launching rather than use of the slipway by the chartered boat companies for fishing expeditions. They rely on photographs ref 26/4/5 dated 1987 and 26/4/6 dated 1989 to support this point.

## **12.0 EVIDENCE FROM THE COUNCIL**

12.1 The Council as Landowner have submitted a witness statement setting out its views on the application. The statement is from Neil Thomas, Team Leader – Highway Assets in Highway Management (Appendix 5 to this report).

12.2 The statement refers to a bollard, seen on the accompanying photographs of the Monks Ferry Slipway (Appendix 6) which was erected by Merseyside Development Corporation during their regeneration of the area in the mid-1990s. Mr. Thomas states that the bollard was positioned so as to fill the gap between the fenceline to

the retaining wall parallel to the south side of the slipway and the short fenceline at the top of the slipway immediately to the south of the gate.

12.3 The earliest photograph showing the bollard is dcp\_2108 which is time stamped as 29th November 2002. A later inspection photograph (DSC05236) from March 2012 shows the bollard in place, whereas photograph birkenhead\_monks\_ferry\_03\_09\_2013 shows the bollard reduced to the bottom-most segment. Mr. Thomas states that the bollard was removed at some time between March 2012 and September 2013.

12.4 Mr. Thomas confirms that the Council did not remove the bollard nor would its removal have been caused by environmental processes such as wave damage. He further states that the Council has never accepted that Monks Ferry Slipway is a public right of way.

12.5 With regards to the applicant's email of 26 April 2016 ( see paragraph 5.6 above), Mark Wardle, Assistant Engineer, Highways Management – Coast Protection has made the following responses in an email dated 29 April 2016 (attached, with accompanying photographs, as Appendix 7 to this report)

(i) With regards to the damaged bollard, he reiterates that the Council has produced evidence of the bollards in different states over various time periods (see 6.3 above and Appendix 6 to this report). He agrees with the applicant that the bollards have been "cut down" by segments. He states that the bollard in question was constructed in segments and the weakest points would be the joints between those segments. An act of vandalism would likely result in a segment or number of segments being removed in one piece. He visited the area at low water on the 29th April and found bollard segments discarded on the foreshore adjacent to the slipway. He states that photos referenced 29/4/1 and 29/4/2 (see Appendix 6) clearly show discarded segments of bollard. He further states that if the Council had intended to afford passage to the slipway through the aperture left by the removal of the bollard, the lowest section would also have been removed so as to avoid a trip hazard. He states that to his knowledge the Council has never issued an order to have the bollards shortened.

(ii) Mr Wardle states that, looking at the attachments forwarded by the applicant (see Appendix 4), the mooring points shown on the archive map ref 26/4/4 are alongside a graving dock or on a slipway further to the north than the Monks Ferry slipway, which is shown far right on the plan. The photo from 1989 ref 26/4/6 purporting to show 'civic improvements to the area but not a gate' doesn't actually show the slipway but rather the higher level car park. The photo ref 26/4/5 dated 1987 appears to be taken from the junction of Church Street and Ivy Street and also doesn't show the slipway.

(ii) With regards to the moorings on the slipway, Mr. Wardle submits as evidence a copy of an order that was issued on the 18th May 1998 (ref 29/4/7) that asks for 20 no. 'small bollards' to be manufactured and placed at Monks Ferry slipway. He believes these are the boat moorings referred to by the applicant. The incident details on the order state 'Safety issue for rescue services'. This order was sent on the same day as another order for Monks Ferry (ref 29/4/8) asking for the painting of hatching and text reading "Emergency Access Keep Clear". He states

that this would indicate that the slipway was intended for emergency use only by rescue services.

### **13.0 ADDITIONAL EVIDENCE**

13.1 In addition the Investigating Officers for the Surveying Authority have taken photographs of the site as it currently stands showing the bottom segment of the bollard only dated 4th August 2015. They have found a photograph using Google Maps which is dated October 2008 which shows the bollard in place. (Appendix 7 to this report, ref AE/1).

13.2 On 20 October 2016 the applicant submitted to the Council an Assets of Community Value Nomination Form (Appendix 10 to this report). The details of this application are not relevant to the Definitive Map application before the Committee, however the Nomination Form appended photographs of the slipway and car park at 'Annex 3 to the Form'. When looking at these undated photographs the bollard, at almost full height, can clearly be seen on the first photograph, whilst on the second photograph it can be seen in its current state, with just the bottom section in situ.

13.3 The Investigating Officers have taken measurements of the fence line and the current gap in the fence. The fence / railings are 1.12m high on each side of the gap. The railings to the top right of the slipway appear to be higher than that along the top of the slipway as the railings are erected on slightly higher land. The gap in the fencing at the top of the slipway is 240mm/ 9" at the top and 300mm/12" at the bottom. They have also estimated the height of the bollard which was in place between the gap in the fence line from at least 2002 – 2012 as being 1.2 metres.

13.4 The Surveying Authority understand that the bollard was erected by Merseyside Development Corporation in the mid 1990's at the time of construction of the promenade at Monks Ferry. The Surveying Authority has not been able to identify the exact date the bollard was erected.

13.5 The fence line along the top of the slipway includes a locked gate which is fronted by a notice on the road which reads "Emergency Access Keep Clear" (as shown in Appendix 7 photograph ref. AE/2). This access is used by emergency services for rescue purposes. Keys are held by the emergency services and by relevant Council officers.

### **14.0 CONSIDERATION OF THE EVIDENCE**

14.1 As set out in Appendix 1 to this report, to succeed the applicant must prove

- Use of the slipway as a way by the public for a full 20 year period
- Use of the slipway without interruption
- Use of the slipway "as of right" which means not secretly or by force or by the licence or permission of the owner from time to time given

14.2 In considering whether or not to approve the application for the right of way to be added to the Definitive Map, Members must consider;

- A) Has a right of way been shown to subsist on the balance of probability or
- B) has a right of way been reasonably alleged to subsist?

### 14.3 Witness Statements from the applicant

- 14.3.1 Only three of the witness statements submitted with the application (Appendix 3) are considered to have significant evidential relevance. The remaining six statements refer to witnesses mooring boats on the slipway over periods in excess of 20 years rather than using the slipway personally as a way over that period. These six statements all state that “typically the passengers would walk from and to a motor vehicle parked in Monks Ferry car park”, that “there was never a barrier that prevented its use by pedestrians” and that “this pedestrian use of the slipway was carried out openly, without force and without seeking or being given permission” These statements are not supported by evidence from the passengers who are alleged to have actually used the slipway as a right of way. They do not provide detail on the important issue of how the slipway was accessed or exited at its landward (fence line) side. On that basis the evidence in these six statements is to be given less weight than evidence from those who used the slipway in person.
- 14.3.2 Consideration must be given to the remaining three witness statements from Mr. Stan Dickson, Mr. Kevin McKie and Mr. Nigel Mercer (Appendix 3) who each refer to personal use of the slipway as a way.

1. Stan Dickson, states that he used the slipway to board vessels between 1992 and 2005. He states that since then he has moored boats at the slipway for passengers to board and offload. However, as the relevant 20 year period runs retrospectively, only use as from 25 June 1995 is relevant for this application. (The date the right of the public to use the way was brought into question was 26 June 2015). Therefore Mr. Dickson can only demonstrate 10 years use within that 20 year period. However it is possible to consider use of a way by different persons, each for periods of less than 20 years, where taken together they total a continuous 20 years or more. Therefore this statement may contribute to a finding that the use has been for a period of 20 years. The statement does not provide detail on the important issue of how the slipway was accessed or exited at its landward (fence line) side.

From 2005 Mr. Dickson has used the slipway to moor boats rather than use of the slipway as a way. The statement says that “typically the passengers would walk from and to a motor vehicle parked in Monks Ferry car park”, that “there was never a barrier that prevented its use by pedestrians” and that “this pedestrian use of the slipway was carried out openly, without force and without seeking or being given permission” There are no witness statements submitted in support of this witness statement from any of the passengers who are claimed to have actually used the slipway as a public right of way to board or exit from the boats since 2005. The statement does not provide detail on the important issue of how the slipway was accessed or exited at its landward (fence line) side by the alleged users.

2. Kevin McKie states that he started using the slipway to get on and off charter boats from 1991 to 2012 and since then has moored a charter boat on the slipway when he claims passengers have used the slipway to board and leave the boat. The period from 1991 – 2012 demonstrates personal use of the slipway for a period of over 20 years. However, as the relevant 20 year period runs retrospectively, only use as from 25 June 1995 is relevant for this application. (The date the right of the public to use the way was brought into question was 26 June 2015). Therefore Mr. Dickson can only demonstrate 17 years use within that 20 year period. It is possible

to consider use of a way by different persons, each for periods of less than 20 years, where taken together they total a continuous 20 years or more. Therefore this statement may contribute to a finding that the use has been for a period of 20 years.

3. Mr Mckie was interviewed by Cecilia Rathe, Senior Solicitor and Investigating Officer, on 10 February 2016. Mr. Mckie confirmed the contents of his statement. He explained that he had personally used the Monks Ferry slipway to access fishing boats approximately once a month during the period 1991 - 2012. From 2013 he had boarded and offloaded passengers to his own fishing boat but had not used the slipway personally since 2013.

Mr. Mckie was questioned about the size of the current gap in the fence line at the top of the slipway and how the slipway was currently accessed by his passengers. He stated that they get through the gap, stepping on the lower section of the bollard, and passing any fishing equipment over the top.

Mr. McKie was shown the photographs from the Council's witness which show a bollard in place between the gap from 2002 – 2012 and was asked how he had personally accessed the slipway during that period. He replied that the bollard wasn't very high, only about to his hip level, and that he stepped on to the bollard, over the remaining gap in the fence and onto the slipway. He said he would pass his fishing equipment over the top before doing this.

4. Nigel Mercer states that he has used the slipway since 1990 to gain access to fishing charter boats as a member of initially the Apollo Fishing Club (1990 – 2005) and then the Houlihans Sea Angling Club (2005 to date). This therefore establishes 20 years user of the slipway within the relevant 20 year period from 25 June 1995 – 26 June 2015.

Mr. Mercer was interviewed by the Investigating officer, Cecilia Rathe on 10 February 2016. Mr. Mercer stated that he used the slipway about 18 times a year to gain access to charter boats. He was asked how he currently accessed the slipway to gain access to the boats. He replied that he "squeezed through" the gap between the fence line or climbed over the fence.

Mr. Mercer was shown the photographs from the Council's witness which show a bollard in place between the gap from 2002 – 2012 and was asked how he had personally accessed the slipway during that period. He stated that he had "gone over the fence."

Mr. Mercer further stated that at no time were there any notices or signs in place on or near the slipway saying No Access to the slipway or that the slipway was Private.

He also referred to the fact that he was aware that charity swimmers used the slipway on occasion after completing swims from Egremont beach to the slipway. He stated he was aware of hundreds of anglers using the slipway on a regular basis, and that had access been unavailable the anglers would have taken this up with the Council at an earlier stage. He said that the slipway had been used by anglers for as long as he could remember.

Mr. Mercer further stated that although he was disabled he could still access the slipway.

## **14.4 Witness Statements from the Council**

- 14.4.1 The Council has stated that a bollard was erected by Merseyside Development Corporation during their regeneration of the area in the mid-1990s. They have provided photographic evidence which shows the bollard in position from 2002 – 2012. (Appendix 5).
- 14.4.2 The bollard was positioned so as to significantly fill the gap which existed along the boundary line created by a metal fence and an emergency access gate between the slipway and the car park and the public path. This is supported by the findings of the Investigating Officers as to the size of the bollard and the size of the gap in the fenceline (see 7.3 above).
- 14.4.3 The photographic evidence shows that this bollard was largely removed, leaving just the base of the bollard, at some time between March 2012 and September 2013. Mr. Thomas states (Appendix 5) that the bollard was not removed by the Council, and that the current state of the bollard would not be due to environmental damage.
- 14.4.4 The evidence from Mr. Wardle in his email dated 29 April 2016 further supports the Council's position that the Council did not remove the segments of the bollards. Mr. Wardle has provided photographs (Appendix 7) of damaged sections of a bollard on the foreshore at Monks Ferry and he claims that this was the result of vandalism and the segments were subsequently discarded on the foreshore.

## **14.5 The Application documents**

- 14.5.1 The application refers to “unchallenged evidence” in a recent planning appeal, (reference APP/W4325/W/14/3000737) that this access has continued for more than 20 years to the knowledge of the Council but without permission and that at no time during the 20-year period has there been any notice inconsistent with the dedication of the way as a public footpath, nor is there any other evidence to negate the intention to dedicate the way as a public footpath. No signs in respect of pedestrian use and no barrier preventing pedestrian use have been erected.
- 14.5.2 As set out in a summary of the Inspectors findings on this matter (Appendix 9 to this report) the evidence was challenged by the Council during the course of the appeal although the matter was not considered in any detail by the Inspector as it was not relevant to the Planning Appeal. At the subsequent High Court appeal against the Inspectors decision, one of the grounds for the appeal was that the Inspector had failed adequately to address the adverse impact of the proposed development on charter-boat operators. In the High Court decision on 6 May 2016 Mrs. Justice Lang found that there had been no error of law in the Inspector's approach to the consideration of this particular matter (The Inspectors decision was however quashed on other grounds not relevant to the consideration of this application for a modification of the Definitive Map).

## **15.0 INVESTIGATION CONCLUSIONS**

- 15.1 As set out in Appendix 1 to this report (“Legal Issues”), when considering whether a right of way subsists in an application under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 the discovery by the authority of evidence which (when

considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists (Test A) or is reasonably alleged to subsist (Test B) over land will lead to the right of way being added to the Definitive Map

### **Conclusion relating to Test A**

15.1.1 As set out in Appendix 1 “Legal Issues”, in accordance with s31(1) Highways Act 1980, to succeed in this application to have the Definitive Map amended by the addition of a new right of way over the Monks Ferry slipway, the applicant must prove all of the following:

- Use of the slipway as a way by the public for a full 20 year period
- Use of the slipway without interruption
- Use of the slipway “as of right” which means not secretly or by force or by the licence or permission of the owner from time to time given

15.1.2 When considering Test A (i.e. whether a right of way has been shown to subsist on the balance of probability), clear evidence in favour of the appellant is required and no credible evidence to the contrary.

15.1.3 There is evidence in the application from the witness Mr. Mercer, that he has used the slipway for pedestrian access for the required 20 year period. This 20 year user is supported by the evidence of Mr. McKie of personal use of 17 years from 1995 – 2012 during the relevant period 20 year period (being June 1995-June 2015) and Mr. Dickson of personal use of the slipway for a 10 year period during the relevant 20 years (between 1995 and 2005). It is also supported by the statement of Mr. Dickson of personal use for a ten year period from 1995 - 2005

15.1.4 There are six statements from charter boat operators who, for various lengths of time from 1990 onwards, have operated charter boats which they claim to have moored at Monks Ferry Slipway to board and off-load passengers to their boats. . These six statements all state that “typically the passengers would walk from and to a motor vehicle parked in Monks Ferry car park” and that “this pedestrian use of the slipway was carried out openly, without force and without seeking or being given permission” These statements do not provide any evidence of the witnesses having used the slipway personally. The statements all say that “there was never a barrier that prevented use by pedestrians” This however conflicts with the incontrovertible evidence set out in 8.1.5 below. The statements do not provide detail on the important issue of how the slipway was accessed or exited at its landward (fence line) side by the passengers. On that basis the evidence has been given less weight than evidence from those who did use the slipway in person

15.1.5 There is clear, credible and incontrovertible evidence from the Council, supported by photographs and confirmed by Mr. McKie and Mr. Mercer when interviewed, that a bollard was in existence at the fence line at the top of the slipway, between the slipway and the car park and the public path, from at least 29 November 2002 to March 2012. The bollard was positioned, and was of such a size, as to fill the gap which otherwise would have existed along the boundary line created by the metal fence and the emergency access gate.

15.1.6 Having regard to the evidence in the witness statements provided by the applicants in support of their application (Appendix 3), supplemented by the responses from Mr. Mckie and Mr. Mercer when interviewed, and the Council's evidence (Appendices 5-7), it is therefore considered that;

1. Whilst the bollard was in place from at least November 2002 to March 2012 access to / egress from the slipway had to be by climbing over the bollard or the fence. This conclusion is supported by the evidence from both Mr. McKie and Mr. Mercer who accepted when interviewed that the bollard was there during that period and either it or the fence had to be climbed to gain access to or egress from the slipway. Mr. Mckie said that he stepped onto the bollard and over the remaining gap in the fence during that period, and Mr. Mercer said that he had "gone over the fence" during that period. Therefore the use of the slipway as a way is not "as of right" as the use has been by force, as defined in the Planning Inspectorate's "Definitive Map Orders: Consistency Guidelines" paragraph 5.22 (see Appendix 9) that "Force would include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a locked gate" or, as in the current circumstances, a bollard. The requirements of s31(1) Highways Act are not therefore met.

and / or

2. The presence of the bollard interrupted the use of the alleged right of way from November 2002 – March 2012 and that the requirements of s31(1) Highways Act are not therefore met

and/or

3. The presence of the bollard from November 2002 to March 2012 prevented the accrual of 20 years use of the slipway as a way from 25 June 1995 (retrospectively from 26 June 2015). The requirements of s31(1) Highways Act are not therefore met.

4. That the evidence produced by Mr. Wardle in his email dated 29/4/2016 (Appendix 6) supports a reasonable conclusion that

- the segments of the bollard were removed at some time after March 2012 by persons unknown and that the segments were probably subsequently discarded on the foreshore
- it is reasonable to conclude that this was an act of vandalism rather than an act by the Council as it is reasonable to conclude that the Council would have removed the whole of the bollard rather than leaving a segment which could be a tripping hazard and would be in breach of the Council's duty of care to highway users.

It should be noted that this conclusion does not detract from the finding in 9.1.6.1 above that the presence of the bollard prior to it being cut down, whether by vandalism or otherwise, prevented the use of the slipway "as of right" between 2002 – 2012, but rather it adds to the picture of use being forcible by demonstrating forcible use since 2012. As stated in the Planning Inspectorate's Guidelines at paragraph 5.22, force can include "the breaking of locks, cutting of wire" or in this case the probable vandalism of the bollard by persons unknown.

5. The contents of the applicant's email dated 26 April 2016 set out in paragraph 1.6 of Appendix 2 to this report (Consideration of the Evidence) does not provide any

clear evidence in favour of the applicant and the Council has provided credible evidence to the contrary as set out in paragraph 5.5 and 9.1.5 above.

6. Intention to dedicate is presumed once use as of right and without interruption is established. On the facts it is considered that neither use as of right nor without interruption has been established. Therefore intention by the Council to dedicate the slipway as a right of way cannot be presumed. Further, the presence of the bollard from November 2002 to March 2012 is clearly indicative of a lack of intention to dedicate the route as a way as the bollard effectively closed off the route, meaning that any access to the alleged way was by the use of force.

### **Conclusion under Test B**

- 15.2 When considering whether a right of way has been reasonably alleged to subsist (Test B), if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
- 15.2.1 Whilst there is some conflict of credible evidence, for the reasons set out under test A above, the fact that the bollard was in place between November 2002 to March 2012 is incontrovertible evidence that a way cannot be reasonably alleged to subsist as 20 year user of the Monks Ferry Slipway as a way, as of right and without interruption, was simply not possible, the presence of the bollard between 2002 and 2012 is a clear demonstration of a lack of intention to dedicate.

### **Conclusion under s53(3)(b) Wildlife and Countryside Act**

- 15.3 As set out in Appendix 1 to this report, when considering an application under S53 (3)(b) of the Wildlife and Countryside Act 1981 the Council must consider the expiration of a period (20 years) such that the enjoyment of the public of the way during that period raises a presumption that the way has been dedicated as a public path. The matter is to be approached by reference to a balance of probabilities test.
- 15.3.1 For the reasons set out in 9.1.6 above, on the balance of probabilities, there is no presumption that the way has been dedicated as a public path.

### **Conclusion at Common Law**

- 15.4 The applicant in addition relies on an inferred dedication of a right of way at Common Law. The presence of the bollard from 2002 to 2012 and the locking of the emergency gate defeats the necessary inference of dedication of the slipway as a right of way at Common Law.
- 15.4.1 Further, or alternatively, there is no particular period of usage for such a dedication to be inferred at Common Law, therefore 20 years usage need not be demonstrated. However Common Law still requires the applicant to prove that the use was “as of right”. On the facts of this matter the presence of the bollard from 2002 – 2012 would mean that the users of the claimed route could only have accessed the claimed route by force, and that therefore the use was not “as of right”.

## Further considerations

15.5 For the purpose of completeness, reference should be made to other comments made in the application document and during witness interviews. These points are dealt with below:-

- In the application documents, the applicants state that “as established by unchallenged evidence in a recent planning appeal” (reference APP/W4325/W/14/3000737)” the “access to the slipway has continued for more than 20 years to the knowledge of the Council but without permission”. The Planning appeal related to an application for development on the car park at Alabama Way, Birkenhead immediately adjacent to the slipway. As set out in a summary of the Inspector’s findings on this matter (attached at Appendix 8) the evidence was challenged during the course of the appeal. In paragraph 65 of the summary of the Appeal decision the Planning Inspector states “Although the charter boat operators make use of the slipway, their right to do so has been questioned by the Appellant.” The summary also states in paragraph 65 that the Council “has explained that the slipway is not open to the public, that there are no recorded permit holders, and that it is intended for use by the Council, emergency services and Government agencies”. The summary further states that whilst “private rights of way could be established if there was evidence of uninterrupted use over a period of 20 years, that is not a matter for consideration as part of this appeal”. Therefore continued use of the slipway for more than 20 years to the knowledge of the Council but without permission has not, and indeed cannot, be established by evidence submitted as part of a planning appeal.
- The application states that “the gate” has at all times had a gap which easily permits pedestrian access. The gate is located at the top of the slipway and forms part of the fence line. The gate is for emergency access to the slipway only, and is kept locked at all times other than when needed for such an emergency or to enable particular events to take place (see further below for examples). It is clear that there has never been a gap in the gate itself.
- The application states that the slipway has been used by “members of the general public enjoying views of the River Mersey and its shipping and of Liverpool”. However no witness statements have been provided in support of this claimed use. The Investigating officers have found that whilst there have been times when the general public have been allowed access to the slipway for various events on the River Mersey this has been with the permission of the Council and the gates at the top of the slipway have been opened by the council to enable such access.
- The applicant is correct in stating that there has not been any notice inconsistent with dedication as a footpath nor any signs erected in respect of pedestrian use. However the evidence from the Council by way of the statement and photographic evidence, for the reasons set out in this Conclusion, means that a presumption of dedication as a right of way does not arise.
- The applicant is incorrect in stating that no barrier preventing pedestrian use has been erected. The bollard which the Council says was erected in the mid 1990’s, and which photographic evidence shows was in place from November 2002 – March 2012, was clearly a barrier intended to prevent pedestrian use. It may be that the bollard was used due to the difference in height line between the railings

on the right of the slipway and the railings at the top of the slipway, but there is no clear evidence to support this. However it is clear from the statements from Mr. McKie when interviewed by the Investigating Officer that the bollard did act as a barrier which was climbed over to gain access to the slipway.

- The witness statements of Mr. Huw Williams and Mr. George Collings refer to use of the slipway for medical emergencies. On these occasions the emergency gate would have been opened by a key holder, and therefore such use of the slipway would be by permission.
- The application does not contain evidence from any persons who have used the slipway as anglers (Mr. Mercer referred to such use in his interview).
- The application does not contain evidence relating to use of the slipway for swimming events (Mr. Mercer referred to such use in his interview) The Investigating Officers have made enquiries and it would appear that the emergency access gate had been opened by a key holder to enable access to the slipway and the safe operation of this event. This use was therefore with permission.
- It may also be arguable that the frequency of use of the alleged right of way as claimed in the witness statements in support of the application fails to meet the requirements set out in the case of R (Lewis) v Redcar and Cleveland Borough Council (2010). In the Court of Appeal Lord Justice Dyson reiterated that “...no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (i.e the 20 year period) the user is enough at any rate to carry to the mind of a reasonable person the fact that a continuous right to enjoyment is being asserted”.

## 9.0 EQUALITY IMPLICATIONS

- (a) Yes and impact review is attached – (*insert appropriate hyperlink*).

<https://www.wirral.gov.uk/my-services/community-and-living/equality-diversity-cohesion/equality-impact-assessments/eias-april-2014/eias-regeneration-envir>

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## APPENDICES

- 1) Legal Issues relating to Monks Ferry Definitive Map Application
- 2) Application from Richard Buxton Solicitors
- 3) Applicants Witness Statements
- 4) Email from Richard Buxton Solicitors with photographs
- 5) Statement from Neil Thomas with photographs
- 6) Email from Mark Wardle with photographs and engineer order

- 7) Additional photographs 4/8/1-2 dated 4/8/2015 and AE/1 and AE/2 dated October 2008
- 8) Extract from Planning Appeal Decision APP/W4325/W/14/3000737
- 9) Extract from Definitive Map Guidance 2013
- 10) Assets of Community Value Nomination Form dated 20 October 2016

**REFERENCE MATERIAL**

No reference material has been used in the preparation of this report.

**SUBJECT HISTORY (last 3 years)**

<b>Council Meeting</b>	<b>Date</b>