

Reasons for Portsmouth City Council to object to THE PORTSMOUTH CITY COUNCIL (NO.1 - THE CAMBER (ADDITION OF A RESTRICTED BYWAY)) DEFINITIVE MAP MODIFICATION ORDER 2022

1. Portsmouth City Council hereby OBJECTS to THE PORTSMOUTH CITY COUNCIL (NO.1 - THE CAMBER (ADDITION OF A RESTRICTED BYWAY)) DEFINITIVE MAP MODIFICATION ORDER 2022 on the following 2 grounds. If Ground 1 succeeds, there will be no need to consider Ground 2. The Council will, of course, expand on these grounds at a public inquiry.

Ground 1 - Statutory Conflict

2. The allegation of a right of way by prescription is precluded from succeeding by the operation of The Portsmouth (Camber Dock and Flathouse Wharf) Harbour Revision Order 1990 ("the 1990 HRO") and The Portsmouth (Camber Dock) Harbour Revision Order 1995 ("the 1995 HRO"), that require Portsmouth City Council ("the Council") to maintain a working public port in the applicable terms of the Harbours, Docks, and Piers Clauses Act 1847. The Council has a number of powers to facilitate and assist with that duty arising from the above legislation.
3. Those statutes (setting aside prior statutes for the time being) must be read in the context of s.31(8) Highways Act 1980, which excludes the operation of s.31(1) Highways Act 1980 by virtue of the conflict between the alleged public right of way and the Council's statutory duties in relation to the operation of the harbour.
4. The rule in s.31(8) reflects the common law rule that dedication may not occur where this would conflict with the exercise of a statutory duty.
5. Dedication is prohibited, whether by statutory presumption or common law, because it would conflict with the Council's duty to keep the Camber open as a functioning port, which entails the unencumbered performance of harbour operations, including but not limited to:
 - a. The placement of goods on the quayside for the loading and unloading of vessels, which must be done without the risk of allegations of obstructing the highway;
 - b. The placement and storage of goods on the quayside for convenience of port business, which must be possible without the risk of allegations of obstructing the highway;
 - c. The positioning of vehicles and equipment on the quayside to facilitate the movement of goods and passengers on and off vessels, which must be done without the risk of allegations of obstructing the highway;
 - d. The removal of obstructions upon the quayside and keeping it clear for the use of vessels, which could reasonably include persons purporting to enjoy the use of a right of way;

- e. The ability to undertake maintenance to moored vessels of a nature that requires the public to be kept a safe distance away and at the convenience of maritime users, without the need to seek formal temporary orders permitting stopping-up or diversion;
 - f. The Council has the power to allocate areas for parking, and to erect fencing, which would be compromised by a right of way;
 - g. The Council has the power to set apart and appropriate "any part of the undertakings for the exclusive or preferential use and accommodation of any particular trade, activity, person, vessel or class of vessels, or goods subject to such terms, condition and regulations as the Council think fit", which cannot be reconciled with a right of way open to all within the undertaking.
 - h. The Council has the power to develop warehouses and other buildings, as well as cranes and weighing machines and other equipment associated with goods passing through the port.
6. The above operations are some important (non-exhaustive) examples of how the Camber dock undertaking needs to be able to operate to be regarded as a working port. The duty to maintain the Camber as a working port is an enduring one (s.33 Harbours, Docks, and Piers Clauses Act 1847, as applied to the Camber through article 3 of both the 1990 HRO and the 1995 HRO) and the Council's powers in exercising those functions must be preserved for future application without encumbrance.
7. This issue of statutory conflict was considered in *British Transport Commission v Westmorland County Council* [1958] A.C. 126. The House of Lords held in that case that the question of incompatibility is one of fact, the test being whether at the date when the question is considered by (in this instance) the Planning Inspector, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertakers' statutory duties. In the Council's view there is such a likelihood, meaning that no right way can be considered at the Camber. Subsequent relevant case law has also considered statutory conflict and will be relied upon in support of the Council's case.
8. In practice, unencumbered discharge of the Council's duty to maintain the port safeguards its long use and the local maritime businesses in this unique area. The Council is concerned that these businesses could be lost if a right of way is granted, and it is right to say that these businesses also provide valuable rental income to the Council.

Ground 2 - Evidence of User Insufficient for Restricted Byway

9. The Council submits that the applicants' evidence of user is insufficient to justify the confirmation of the Order for a restricted byway for 3 reasons:

- a. Firstly, the use cannot be said to be continuous for the period of 20 years prior to the construction of the Ben Ainsley Racing building in 2014;
- b. Secondly, the use of the public was not 'as of right' due to the exercise of control by the Council;
- c. Thirdly, the Council contends that the evidence suggests a width of 3 metres is arguably excessive (given the user evidence is predominantly of pedestrian use) but much more appropriate to the use evidenced than the applicant's claimed 10 metres.

Evidence of 20 years' continuous use not made out

10. The construction of the Ben Ainsley Racing building in 2014 called into question the existence of a right of way, which the applicants say encroached upon the alleged route.
11. The Council submits that prior to 2014 continuous use was most notably interrupted by the position of a crane operated in pursuance of the port's statutory functions, and obstruction has occurred thereafter. This obstructed the route from the quayside edge.
12. A chain-link fence was used to cordon off the area over which boats and items were hoisted by the crane. There are photographs of workmen cleaning boats within a chain-link fence with yellow hatching painted on the ground. Breaks in usage in this fashion were recurrent and more than de minimis.
13. Banksmen were employed to keep the public at a safe distance during the crane operation, interrupting use by the public for so long as was required for a particular manoeuvre. This was a recurring operation.
14. Moveable barriers were erected by the agent of the Harbour Master in order to undertake crane lifting by berthed barges lifting items onto the short in the area of the alleged route.
15. In the present day a mobile crane is employed, the use of which is not compatible with a right of way and would constitute an obstruction of a restricted byway by a mechanically propelled vehicle. To this day, the beams or sleepers that the previous, fixed crane was sited on lie behind low chain-link fences, obstructing public access (although a determined member of the public could climb over the fence and the beams/sleepers).
16. The above are non-exhaustive examples of interruption of use demonstrating that use by the public has not been continuous. User evidence acknowledges interruptions in this fashion.

Use by the public not 'as of right'

17. The Council openly exercises control over access to the Camber in a manner incompatible with an inference of dedication as a public right of way. The building of the Ben Ainsley Racing building in 2014 would be a prime example of the public being excluded from the claimed route.
18. Prior to that, the placement of a crane along the alleged route excluded the public from that part of it. The Council has not acquiesced in the public's use of the claimed route and has obstructed the alleged route in a fashion consistent with the primacy of the port function when necessary or desirable. Description of access as a right of way would be a misnomer; the public were not using the alleged route 'as of right', because the right in question would be to pass and repass along the whole claimed length without hindrance, which the Council has frustrated through the placement of physical obstructions.
19. Moveable barriers were erected by the agent of the Harbour Master in order to undertake the crane lifting by berthed barges lifting items onto the shore in the area of the alleged route, representing a clear revocation of permissive access.
20. An immovable, drop-down barrier marked 'STOP', like those seen at a railway crossing, was also used at the quayside to control access. If the barrier were open, members of the public were not restricted from entering the quayside from East Street, but the clear implication from the barrier being closed was that access was not permitted to that area of the quayside at that time. This form of control was not challenged by the public.
21. It has never been the Council's aspiration to bar the public from the whole of the Camber quayside totally or indefinitely. Rather, the public are and have historically been excluded from areas for periods of time the Council views as operationally necessary or desirable. Indeed, banksmen were employed to keep the public at a safe distance from crane lifting area by verbal instruction. Consequently, public access has been challenged, limited and controlled during times of operation of the crane pursuant to port functions. Access at other times is therefore at the Council's permission and not capable of being construed as pursuant to a right of way.
22. The above are non-exhaustive examples of use by the public being other than 'as of right'. User evidence acknowledges compliance with the instructions of the Harbour Master's Agent.

Width of the right of way and relationship with evidence of user

23. The Council acknowledges "reasonable" evidence of use by bicycle but does not consider it to be compelling; it is apparent bicycle use is not as prevalent as the widespread use on foot. Nonetheless, the Council has been directed to make an order in relation to a Restricted Byway, the minimum width of which is accepted in practice to be 3 metres. Given the lack of compelling evidence of bicycle use (and without prejudice to the first ground of objection), the Council considers that the evidence would indicate a width sufficient to serve pedestrians with occasional bicycle use (if the latter can be demonstrated as a sufficient form of user at all), to be most appropriate.
24. The applicants asserted a restricted byway of 10 metres' width, but the Council contends that this is excessive in relation to the evidence of pedestrian use and limited evidence of bicycle use. If the Inspector is minded to confirm the order for a Restricted Byway, the Council submits that 3 metres is a strip of reasonable width, consistent with the Council's previous decision of 17 July 2018 in relation to the application.
25. It appears logical that the width is measured from the quayside for the most part as the user evidence emphasises views of the water as a motivation for walking at the Camber, notwithstanding that the applicants have alleged the route on the western edge of the Camber to be set back from the quayside, reflecting the more probable desire line.

Concluding remarks

26. The contents of the above grounds are not intended to be exhaustive and the Council will, of course, give further details at the public inquiry.
27. The Council leases land at the Camber to businesses. Its representations should be understood to encompass its interests as the Harbour Authority, Highways Authority and landowner.
28. The contents of the above grounds are consistent with the Council's position expressed in the report to the Cabinet Member for Traffic and Transportation on 17 July 2017.

DATE: ___FRIDAY 27 MAY _____ 2022

A handwritten signature in black ink, appearing to read 'Peter Baulf', written over a dotted horizontal line.

Signed: _____

Peter Baulf, City Solicitor, for and on behalf of Portsmouth City Council