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Countryside and Rights of Way Panel

Friday 23 June 2023
10:00
Oak Room, County Buildings, Stafford

The meeting will be webcast live and archived for 12 months. It can be viewed at the following link: https://staffordshire.public-i.tv/core/portal/home

John Tradewell
Deputy Chief Executive and Director for Corporate Services
15 June 2023

Agenda

1. **S53 Application for Addition of a Public Footpath From Corporation Street to Gaol Square** (Pages 1 - 40)

Membership	
Jak Abrahams	Paul Snape
Philip Hudson	Jill Waring
Robert Pritchard	Mark Winnington (Chair)
David Smith	

Notes for Members of the Press and Public

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RE: RE. PROPOSED RIGHT OF WAY BETWEEN GAOL SQUARE AND CORPORATION STREET, STAFFORD

OBJECTION

On behalf of the Midlands Partnership NHS Foundation Trust

INTRODUCTION

1. This is the response on behalf of the Midlands Partnership Foundation NHS Trust ("**the Trust**") to the invitation sent by Staffordshire County Council ("**the Council**"), by letter of 24 November 2022. The invitation is to comment on an application for an order under section 53 of the Wildlife and Countryside Act 1981 ("**the 1981 Act**") designating a footpath running from Corporation Street to Gaol Square under reference LG648G ("**the Proposed Order**")

2. The Proposed Order flows from an application dated 1997. The Trust's primary position is that the Council should decline to determine that application because the effluxion of time means that it cannot do so fairly. Anyone seeking to oppose the order (as the Trust does) will inevitably be treated unfairly.

3. Further, or in the alternative, the Council should not make the Proposed Order because the case in support is not made out on the facts. In particular:

   (a) The 20-year period relied on to establish a statutory dedication of a right or way is not established because:

      (1) For the majority of that period, the Trust Land (as defined below) benefitted from Crown Immunity.

      (2) The evidence of user relied on is use "by right" rather than use "as of right".

(b) The evidence in support of user is inconsistent.

(c) The proposed route was stopped up, where it crosses the Trust Land, at least as early as 1994.

(d) The evidence in support of the application is, in general, problematic.

FACTUAL BACKGROUND

4. The Trust is the freehold owner of St George's Hospital, Corporation Street, Stafford ST16 3SR ("**the Trust Land**").

5. In 1997 a Mr Martin Reay made an application under section 53 of the Wildlife and Countryside Act 1981 ("**the 1981 Act**") to register a public right of way (likely a footpath) from Gaol Square to Corporation Street ("**the Proposed Order Route**"). The route will cross the Trust Land and other land formerly owned by the Trust. The application was made to the Highways Authority, Staffordshire County Council ("**the Council**")

6. For an unknown reason the application was not decided in 1997. On 24 November 2022 the Council informed the Trust that it now intends to determine the application.

7. The application appears to rely on the assertion that the Proposed Order Route was used by the public "as of right" for at least twenty years between 1977 and 1997.

LAW

Amending the Definitive Map

Duty to maintain Definitive Map and Statements

8. NCC must maintain a "Definitive Map" and "Definitive Statement" which, respectively, depict and list all public rights of way within its jurisdiction [**Wildlife and Countryside Act 1981, s. 53**]. The Definitive Map and Statement

must be kept under "continuous review" and NCC is empowered to modify it by order [**s. 53(2)**].

Amending Definitive Map and Statements

9. Where, *inter alia*, an authority discovers evidence which, when considered with all other relevant evidence available shows:

   (a) That a right of way that is not included in the map or statement subsists or is reasonably alleged to subsist whether as a public path, byway, or as Byway Open to All Traffic (BOAT); [**53(3)(c)(i)**] or

   (b) That a highway shown on the Map and Statement as a highway of a particular description should, in fact, be shown as a highway of a different description; [**53(3)(c)(ii)**] or

   (c) A route shown on the map is, in fact, not a public right of way. [**53(3)(iii)**]

   The authority must make an order to amend the Definitive Map and Statement accordingly.

10. Where the order is subject to challenge, the Secretary of State must appoint an inspector to consider the matter at an inquiry. The test for whether the inspector will confirm the order is the (higher) one of "balance of probabilities".

11. The purpose of an inquiry under Schedule 15 of the 1981 Act, such as this one, is to determine whether a right of way <u>does exist</u>, not whether it <u>should exist</u>. This means that questions of the desirability of the Order Route in general are not relevant to this inquiry [**Planning Inspectorate, Rights of Way Advice Note 9, §6.2.3**]

Dedication of Rights of Way

12. A highway may require adding to the Definitive Map and Statement if a right of way has come into being through dedication.

13. There are two ways in which a public right of way can be created (***R. v Secretary of State for Wales Ex p. Emery*** **[1998] 4 All E.R. 367**):

    (a) At common law, by an act of dedication by the owner of land over which the way passes.

    (b) Under statute, by deemed dedication arising by reason of enjoyment by the public as of right and without interruption for 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate [**Highways Act 1980 s.31**].

Statutory Dedication

14. Section 31 of the Highways Act 1980 provides (so far as relevant):

> (1) 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 unless there is sufficient evidence that there was no intention during that period to dedicate it.
>
> …
>
> (2) 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, whether by a notice such as is mentioned in subsection (3) below or otherwise.
>
> (3) Where the owner of the land over which any such way as aforesaid passes—

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st of January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

…

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land, and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, declarations in valid form made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

(i) within the relevant number of years from the date of the deposit, or

(ii) within the relevant number of years from the date on which any previous declaration was last lodged under this section.

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

…

15. The question of whether the Order Route was used "as of right" is an objective one. This means that the decision-maker must ask themselves whether the Order Route was used in such a way as would suggest to the reasonable landowner

that the users believed themselves to be exercising a public right. Use as "as a public right" is described as "without force, without stealth, and without licence" (*nec vi, nec clam, nec precario*) [***R (Sunningwell Parish Council) v Oxfordshire County Council*** **[2000] 1 A.C. 335; [1999] 3 W.L.R. 160**].

16. While the use must be by "the public" this should not be construed too widely. It is sufficient, for the purposes of dedication, that only local residents use the Order Route [**Wildlife and Countryside Act 1981 – Definitive Map Orders: Consistency Guidelines, §§§5.2.12-14]**

17. There will be no deemed dedication where there is "sufficient evidence" that the owner had no "intention" of dedicating the way during the 20-year period. The owner's "intention" must be objectively ascertained. It is what users of the way would reasonably have understood the intention to be. The term "sufficient evidence" requires evidence of some overt acts on the part of the owner such as to come to the attention of the public who used the way and demonstrate to them that he had no such intention; it is not sufficient for a landowner simply to give evidence that they had not so intended. This intention does not have to be manifested throughout the whole 20-year period, but merely at some point during it [***R. (Godmanchester Town Council) v Secretary of State for the Environment Food and Rural Affairs [2008] 1 A.C. 221***].

18. The meaning of the statutory term "brought into question" was provided by Lord Denning in ***Fairey v Southampton CC*** **[1956] 2 Q.B. 439 [1956] 3 W.L.R. 354 at 456:**

> *… I think that in order for the right of the public to have been "brought into question" the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be appraised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path.*

Common Law Dedication

19. Common law dedication may be described as a "legal fiction". The decision maker is not required to look for an explicit act of dedication by a landowner. Rather, to consider whether the most likely explanation for the public's use of the route in question is some form of dedication **[*Slough BC v SSEFRA* [2018] EWHC 1963 (Admin), at 11]**.

20. There is not, for common law dedication, a minimum length or level of usage. Indeed, dedication may be deemed "after user of very few years." **[*Slough*, at 12-13, 20]**.

21. Common law dedication can be express (as where land is dedicated as a highway within a deed of transfer or a s.106 planning obligation, for example), or implied. An implied dedication can occur where there is sufficient evidence of user as of right by the public to create a presumption that a dedication has occurred, and where that presumption is not rebutted [***Turner v Walsh (1881) 6 App. Cas. 636***]. The failure of a landowner to indicate that there is no dedication, by stopping up the route in question, is material (albeit not determinative) to a finding of dedication **[*Slough*, §13]**.

22. When considering whether a way has been dedicated as a highway, the decision-maker is required to take into account, *inter alia*, "any map, plan, or history of the locality or any other relevant document tendered in evidence". It is for the decision-maker to determine what weight they give to such evidence but relevant considerations when determining weight include, *inter alia*, "the antiquity of the document, the status of the person[s] by whom it was compiled, and the purpose for which it was made or compiled" [**Highways Act 1980, s. 32**]

23. The proper approach is to "look at the whole of the evidence of user available to see whether it was properly attributable to dedication" **[*Slough*, §16].**

24. There is no "minimum level" of use required for presumed dedication. It is sufficient that there has been some use (whether by the same or different people) for a period of 20 years **[Wildlife and Countryside Act 1981 – Definitive Map Orders: Consistency Guidelines, §§§5.2.15-20].**

"As of right" vs "by right"

25. The Supreme Court, in ***R (Barkas) v North Yorkshire CC*** **[2014] UKSC 31 [2015] A.C. 195 at 20-21 (**Per Lord Neuberger PSC, with whom the other members of the court agreed on this point**)** drew a distinction between use "as of right" and use "by right":

> *In the present case, the council's argument is that it acquired and has always held the field pursuant to section 12(1) of the 1985 Act and its statutory predecessors, so the field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the field for recreational purposes, and, accordingly, there can be no question of any "inhabitants of the locality" having indulged in "lawful sports and pastimes" "as of right", as they have done so "of right" or "by right". In other words, the argument is that members of the public have been using the field for recreational purposes lawfully or precario, and the 20-year period referred to in section 15(2) of the 2006 Act has not even started to run - and indeed it could not do so unless and until the council lawfully ceased to hold the field under section 12(1) of the 1985 Act.*
>
> *In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In Sunningwell [2000] 1 AC 335, 352H – 353A, Lord Hoffmann indicated that whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the council would have regarded the presence of members of the public on the field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the field was being held and maintained by the council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.*

Sovereign Immunity

26. Sovereign immunity is the presumption, at common law, that an Act of Parliament does not bind the Crown unless the contrary is explicitly stated. [***Lord Advocate v Dumbarton District Council*** **[1990] 2 AC 580; [1989] 3 WLR 1346;** ***R (Black) v Secretary of State for Justice*** **[2017] UKSC 81**]

27. The 1980 Act makes specific provision, however, for application to the Crown in certain cases. Section 237 provides:

28. Section 327 of the 1980 Act provides:

> (1) The provisions of this section apply in relation to any land belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or belonging to the Duchy of Cornwall, or belonging to a government department, or held in trust for Her Majesty for the purposes of a government department.
>
> (2) The appropriate authority in relation to any land and a highway authority may agree that any provisions of this Act specified in the agreement shall apply to that land and, while the agreement is in force, those provisions shall apply to that land accordingly, subject however to the terms of the agreement.
>
> (3) Any such agreement as is mentioned in subsection (2) above may contain such consequential and incidental provisions, including provisions of a financial character, as appear to the appropriate authority to be necessary or equitable, but provisions of a financial character shall not be included in an agreement made by a government department without approval of the Treasury.
>
> (4) In this section "the appropriate authority" means—
>
> > (a) in the case of land belonging to Her Majesty in right of the Crown, the Crown Estate Commissioners or other government department having the management of the land in question;
> >
> > (b) in the case of land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor of that Duchy;

(c) in the case of land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints;

(d) in the case of land belonging to a government department or held in trust for Her Majesty for the purposes of a government department, that department;

and, if any question arises as to what authority is the appropriate authority in relation to any land, that question shall be referred to the Treasury, whose decision shall be final.

29. By contrast, it has always been possible at common law to establish highway rights against the Crown [***R (Newhaven Port and Properties Ltd v East Sussex CC*** **[2015] A.C. 1547**].

SUBMISSIONS

It Is Not Possible To Conduct A Fair Procedure

The Requirement for Fairness

30. The substantial amount of time that has passed since the application was made means that it is not possible for the Council to determine. Consequently, it is not possible, as the matter currently stands, for the Council to exercise its section 53 power lawfully. The Council should, therefore, decline to determine the instant application (although it may invite a further, up to date, application).

31. The Council's committee (which, as the Officer's Report acknowledges, is acting in a "quasi-judicial capacity" [**Panel Report, 1/4**]) has a common law duty to conduct a fair procedure [***Cooper v Wandsworth Board of Works*** **(1863) 14 CB (NS) 180;** ***Osborn v Parole Board*** **[2013] UKSC 61**]. Central to the duty of fairness is the principle of "equality of arms". All parties with an interest in this matter must have an equal chance to make their case. It is a breach of the duty of fairness to conduct an administrative process in such a way that certain interested parties enjoy an advantage over others.

32. In ***R (Doody). v. Secretary of State for the Home Department*** **[1994] 1 A.C. 531** Lord Mustill set out the common law requirement for fairness:

> *What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.*

33. This duty will also apply to any inspector seised of an inquiry (should the Council make an order and that order be subject to an objection).

The Impact of the Effluxion of Time

34. Given the amount of time that has elapsed since the application, however, it is not clear how any objector can be treated fairly (either at the order stage or the inquiry stage). In particular:

    (a) It appears that several of the individuals who provided evidence are no longer alive or can't be located. This means that their evidence can't be clarified or tested.

(b) The Officer's Report relies on evidence from organisations (such as "The Foundation NHS Trust") that no longer exist, or exist in a substantially modified form.

(c) Objectors to the application are at a disadvantage compared with the promotors. The promotors were able to gather evidence contemporaneously. The objectors, if they are to present evidence, must attempt to gather evidence of events that happened (at the latest) 26 years ago. There is, consequently, no equality of arms between the interested parties.

35. Moreover, the effect of determining this application after the delay (of more than 20 years), as if it had been made recently, has the effect of "freezing time" for the purpose of section 31, for two decades. This means that, for the last 20 years, the rights of the relevant landowners under section 31(3)-(6) have been removed. For any landowner who is a natural person, this would appear to be an interference their right under Article 1 of the First Protocol of the European Convention on Human Rights. Property rights are also protected at common law (such protections apply regardless of whether the proprietor is a natural or legal person)

36. The 1981 Act does not appear to envision that section 53 applications will be determined after such a delay. Paragraph 3 of Schedule 14 to the 1981 Act provides that authorities must determine applications under section 53 "as soon as reasonably practicable". It goes on, however, to provide for a mechanism by which, should an authority fail to determine an application within one year then the applicant may apply to the Secretary of State (who can direct the authority to determine the application by a specified date). There does not appear to have been any such application or direction in the instant case.

37. The Council must, therefore, weigh the fact that it cannot determine the application fairly against its statutory obligation to determine the application as

soon as reasonably practicable. Given that there has been no Schedule 14 application, there does not appear to be any harm flowing from the failure to determine the application whereas (as set out above) considerable harm would likely flow from proceeding with the determination. In this context the proper course would be for the Council to invite an updated application.

38. Any determination of the application as it stands may well be unlawful. Even if the Council were to determine the application, it would arguably be impossible to conduct a fair inquiry so the order could not be confirmed by the Secretary of State.

39. Alternatively, and at the very least, little or no weight can be assigned to the evidence forms because that evidence cannot be tested (and, as argued below, gives some cause to be doubted).

The "20-Year Test" Is Not Met: Crown Immunity

40. The doctrine of Crown Immunity applies to the 1980 Act (and there is no indication that the provisions of section 327 have been utilised in this case). This means that, for the period that some or all of the land over which the Proposed Order Route passes was owned by the state, the provisions of the 1980 Act (particularly section 31) did not apply.

41. The Trust Land was owned by the state between around 1978 and 1994. During this period, therefore, section 31 did not apply to that land. The period in which the land benefitted from Crown Immunity cannot count towards any calculation of the statutory period under section 31.

42. It is important to note that crown immunity can bear on section 31 in respect of both:

    (a) The date at which that provision is relied on as the basis for an order under section 53 (in this case, the date of the application – 1997); and

(b) Each date in the preceding 20-year period required to establish a public right of way under section 31. Section 31 confers rights and, in effect, obligations, on landowners. It presumes that landowners who do not intend to dedicate their land to public use will make some sort of statement of this (either be making a statement or deposit under sub-sections 4-6 or else exhibiting a "contrary intention" in some other way). This, in effect, imposes a burden on landowners, whose land is crossed by the public, to make some sort of positive expression of their opposition to it becoming a right of way. Where Crown Immunity applies, it is as though no such burden has been imposed. For this reason, no year in which a piece of land benefitted from Crown Immunity can be counted towards the 20-year period.

43. In the instant case it is accepted that, at the date of the application, the Trust Land did not benefit from Crown Immunity. However, the Trust Land did benefit from Crown Immunity, however, for approximately 17 of the 20 years relied on to establish the period required by section 31. During the period in which the Trust Land benefitted from Crown Immunity, section 31 cannot have imposed any burden on the landowner. It follows, therefore, that the landowner's failure to exhibit a contrary intention during this period cannot be taken into account for the purpose of an order under sub-sections 2 or 3. Consequently, it is not possible to establish the requisite 20-year period leading up to the application and

44. While it is accepted that Crown Immunity does not bear on the establishment of a right of way at common law, it is noted that

The "20-Year Test" Is Not Met: Permissive Use

45. At the outset, it is noted that it is difficult for the Trust to make this point with full effectiveness because it is not possible to fully explore the evidence given by the various witnesses. This is an example of the unfairness of the process

imposed upon the landowners by the Council's decision to determine the instant application nearly three decades after it was made. In the event that the Council does not accept the Trust's earlier submission (and declines to determine this application) these disadvantages remain a material consideration that the Council must take into account when making its decision.

46. The user evidence demonstrates that:

(a) At least one of the witnesses worked for the landowner at the time they used the Proposed Order Route.

(b) The Route, where it crosses the Trust Land, appears to be crossing an area that is part of the landscaping around, and provides access to, the hospital.

47. For these reasons, the instant case seems to fall within the four corners of *Barkas* case:

(a) For at least part of the relevant period, the Route was on land which had a dedicated public function (namely the hospital). The hospital and, inevitably, its environs and site, were open to the public because they were facilities designed to benefit the public. This means that any member of the public who crossed the hospital site for the purpose of receiving care, visiting patients, or related uses did so 'by right" rather than "as of right". The test in section 31 is, therefore, not met.

(b) Moreover, if any of the individuals who gave evidence were employees of the hospital then they would have had a licence to cross the site in order to access their workplace. This point is more difficult because we do not know how many of the witnesses were employees of the hospital and it is impossible to explore the point with them. This, in itself, is a reason to reduce the weight placed on the evidence forms.

48. The use of the Proposed Order Route "by right" (rather than "as of right") cannot contribute towards the use for the 20-year period required to establish a right of way under section 31.

Lack of Consistency as to Width

49. The table summarising the evidence lists the various responses as to the width of the alleged footpath as anything from "between one and two meters" to the width of a full two-lane carriageway with footpaths at the side. This raises a number of reasons to doubt the application:

    (a) The sheer variety of the answers given suggests there was not a consistent public understanding of what actually constituted the right of way.

    (b) Some of the answers are clearly impossible. For example, there is at least one section of route (that adjoining Corporation Street) where the route would have crossed barriers. A copy of a 1994 plan accompanies this objection.

    (c) There is likely no way to explore these discrepancies with the witnesses because the evidence as given more than a quarter of a century ago.

50. This leads to two conclusions:

    (a) The wide variety of different answers is another reason to reduce the weight placed on the evidence forms.

    (b) Given that there is no consistent evidence as to the width of the path (and the assertions of a wider route are clearly fanciful), if the Council is minded to grant the application then it must adopt the narrowest possible route because this is the only version of the route that is supported by all of the evidence.

The Route Was Stopped Up

51. The Proposed Order Route is currently stopped up where it crosses the Trust Land. As the appended plan (drafted for the sale of land formerly owned by the Trust's predecessor in 1994) shows, the route was stopped up at least as far back as 1994.

52. This is evidence of a "contrary intention" for the purposes of section 31. The Officer's Report does not appear to have considered this point. Where, during the 20-year period relied on, the landowner has evidenced an intention contrary to that of dedicating the land as a public right of way, there can be no statutory dedication. Evidence of such an intention also weighs against any argument for implied dedication based on common law.

Further Evidential Problems

53. There are a number of further evidential problems which are not addressed in the Officer's Report:

    (a) The Report records Brian Phillips' evidence that "the managers of St Georges asked the public not to use the route for a period of time" [**2/23**]. The Officer appears to dismiss this on the basis that the public continued to use the Route. This misunderstands the law. The landowner merely needs to express a "contrary intention" it is not necessary from them to succeed in preventing members of the public from using the route. If the Council accepts Brian Phillips' evidence (as the Officer appears to) then it must conclude that the section 31 test is not met.

    (b) The Officer's Report notes that, in various letters (all written around 2005), Pritchard and Associates committed to dedicating a public footpath across land that it appears to have been developing. The Report failed, however, to note that:

(1) The letters say nothing about the route of the proposed dedication and whether it matches that of the Proposed Order Route;

(2) In a letter of 26 September 2005, Pritchard and Associates made it clear that its position was, at the time of writing, there was no public footpath across the site it was developing.

The most that can be taken from the Pritchard correspondence, therefore, is that the developer believed there was no extant footpath, either by statutory or common law dedication (which there would have been had the statutory test been met by 1997) but was committed to dedicating one along some unspecified route in the future.

54. It is, in general, not clear what weight can be placed on the correspondence cited, given that it was, itself, occurring around eight years after the application and concerns matters well in the path and, in parts, is from entities that no longer exist. In this context it seems difficult to justify placing anything but the most minimal weight on that correspondence.

CONCLUSIONS

55. For the reasons set out above, the Council cannot determine this application fairly and should, consequently, decline to determine it at all. If, however, the Council nevertheless decides to determine the application, it should be refused.

56. In the light of the above discussion, it is not clear that there is any positive evidence for the dedication of the Proposed Order Route on which the Council can place anything but the most minimal weight:

(a) For the majority of the 20-year period relied on to establish a statutory dedication under section 31, the Trust Land benefitted from Crown Immunity. The required 20-year period is, therefore, not made out.

(b) The user evidence forms contain contradictions, cannot be clarified or tested, and may be written by individuals enjoying a licence to cross the Midland Trust land as part of their employment (and therefore their use was not "as of right").

(c) The correspondence does not contain evidence of statutory or common law dedication and, indeed, evidences various landowners' positions that, while they are amenable to the dedication of a footpath in the further, they do not believe one has already been dedicated and do not necessarily support the Proposed Order Route.

57. By contrast, there appears to be positive evidence in the evidence forms (to the extent that these can be relied on) that there was no statutory dedication:

(a) Brian Phillips gives evidence that the managers of St Georges asked the public not to cross their land for a period.

(b) Sheila Needs gives evidence that she crossed the land with permission but that the permission was not "official" (it's not clear what she means by this);

(c) G Reay gives evidence that the route was blocked by a "gate near the town centre";

(d) The 1994 sale plan evidences that the Proposed Order Route was stopped up at least from 1994

(e) Given that the Trust land was used for a public purpose under statutory authority for at least some of the period between 1977 and 1997, this was not use "as of right".

(f) In any case, the period in which the Trust land benefited from Crown Immunity cannot count towards the section 31 calculation.

58. In the light of this, it appears that the Council should not be satisfied that a right of way along the Proposed Order Route. Should the matter go to an inquiry, it seems difficult to see how the case for the Route can be made out on the balance of probabilities.

SAM FOWLES

Cornerstone Barristers

13 January 2022

RE. PROPOSED RIGHT OF WAY BETWEEN GAOL SQUARE AND CORPORATION STREET, STAFFORD

SECOND OBJECTION

On behalf of the Midlands Partnership NHS Foundation Trust

Introduction

1. This is the second objection on behalf of the Midland Partnership Foundation NHS Trust ("**the Trust**") to Staffordshire County Council's ("**the Council**"), proposal to make an order under section 53 of the Wildlife and Countryside Act 1981 ("**the 1981 Act**") designating a footpath running from Corporation Street to Gaol Square under reference LG648G ("**the Proposed Order**")

2. In response to the Trust's first objection, dated 13 January 2023 ("**the First Objection**"), the Council produced a further report, which is undated ("**the Second Report**). This objection responds to the Second Report. The Trust continues to oppose the Proposed Order.

3. To aid comprehension of these submissions the following should be noted:

   (a) These submissions are not made by "Cornerstone Barristers". They are made by the Trust and drafted on its behalf by counsel.

   (b) The numbers in the margin do not denote separate points (as the Second Report appears to suggest). They are paragraph numbers for ease of reference (this is standard practice in administrative and legal drafting). Each separate issue in these submissions is signposted by a heading or sub-heading.

4. The background to this issue is set out in detail in the First Objection and is not repeated here.

The Test for Common Law Dedication

5. The First Report proceeded entirely on the basis of the statutory test. The Second Report pivots to the common law test (which was not mentioned at all in the First Report). The Second Report thus sets out an entirely new legal basis for the Proposed Order. This was not fully addressed by the First Objection.

6. While the Council must consider the status of the proposed footpath as a whole, there are particular difficulties with the application of the common law test to land held by a public body such as the Trust and the Trust's predecessors in title (see below at paragraph 12).

The Law

7. The Second Report construes the common law test as essentially identical to the statutory test but without the 20-year requirement. This is an erroneous approach. At the outset, it does not make sense to suggest that the common law test is, in effect, a lower bar than the statutory test. If this were the case then there would have been no need for Parliament to legislate. Parliament cannot have intended to impose a statutory test that sets a higher bar than the common law test and also leave the common law test intact because to do so would be to pass a statute which is, in practice, entirely irrelevant.

8. More specifically, the common law test requires a particular approach which differs from that of the statutory test:

   (a) The decision-maker must determine whether, objectively speaking, the evidence indicates that all of the relevant landowners have dedicated the Proposed Route for public use.

(b) The dedication is a "legal fiction" (the Second Report rejects this phrase but it is the one adopted by the Court of Appeal [***Jones v Bates*** **[1938] 2 All ER 237**]). It is not necessary for the decision-maker (here, the Council) to find an actual dedication. Rather, they must determine whether a dedication is the best explanation for the treatment of the Proposed Route by both the users and the landowner.

(c) Evidence of use is relevant but not conclusive. Where, under the statutory test, a right of way may be established simply by proving 20 years of use "as of right", the common law test requires a more holistic analysis.

(d) Great weight should be given to any evidence of a contrary intention by the landowner. "A single act of interruption by the owner is of much more weight upon the question of intention, than many acts of enjoyment" [***Mann v Brodie*** **(1885) 10 App. Cas. 378**].

(e) Since the 20-year period is not relevant to the common law test, events which occur <u>after</u> the end of the 20-year period can also be material considerations. In particular, the stopping up of a route by a landowner after the relevant date is material evidence that there was no intention to dedicate the route.

Applying the law to the facts

9. First, even if given full weight (which, for the reasons set out below, it should not) the user evidence forms are not conclusive evidence of dedication for the purposes of the common law test. The Second Report appears (erroneously) to adopt it as such.

10. Second, greater weight should be given to the evidence of acts of interruption. In particular:

(a) **The 1994 sale plan which shows the Proposed Route as stopped up.** The Second Report dismisses this evidence on the basis that it does not cohere with the user evidence. For the reasons set out below the Second Report is wrong to do so.

(b) **The evidence that an employee of the Trust (or its predecessor(s) in title) instructed users to stop using the route.** The Second Report dismisses this evidence on the basis that (a) it is hearsay and (b) the date on which it occurred is not recorded. However:

(1) All of the user evidence is hearsay because it is likely not possible to substantiate it with live evidence. It is not unusual for hearsay evidence to be relied on in cases like this, but the decision-maker is required to look holistically at the evidence to determine what weight should be afforded. Hearsay that accords with the decision-maker's preferred outcome cannot be treated more favourably than hearsay that does not. In this context, the report accords with the evidence of the Proposed Route being stopped up sometime before 1994 and with the other evidence indicating that there was no intention to dedicate;

(2) The fact that there is no date given for the instruction does not necessarily reduce the weight that should be placed on the report. The user reports are, in general, relatively vague in relation to dates. It is not fair to reduce the weight placed on evidence that weighs against dedication if the same approach is not taken to evidence weighing for dedication. Moreover, the common law test does not require an act of interruption to occur within a specified period. The instruction is, therefore, of relevance regardless of the date on which it was given.

(c) **The evidence of a gate placed across the route.** The Second Report dismisses this on the basis that it was not locked. This discloses an error of law. An act of interruption does not need to be effective in order to evidence

a contrary intention. It is the intention, not whether it was carried out to full effect, which carries weight in rebutting the suggestion that a dedication has occurred.

11. Unlike under the statutory test, weight must also be given to events which occurred after 1997. In particular:

    (a) The Proposed Route was stopped up and has remained so for a substantial period of time.

    (b) The correspondence from landowners cited in First Report indicates that the landowners are open to dedicating a highway in the future but have not yet done so. There is no evidence that any highway was dedicated after the date of the correspondence cited. This is evidence that, while some future dedication was considered by some (but not all) of the landowners, no such dedication had yet taken place (contrary to the implications of the Second Report).

The Trust Land As Owned By A Public Body

12. If an order is to be made on the basis of the common law then the Council must determine that each relevant landowner dedicated a right of way over their land (even if that dedication is only imputed). Such a determination cannot be made in respect of the Trust or its predecessors in title because, as public bodies with an explicit and specific statutory purpose, they did not have the power to dedicate a footpath [***Slough BC v SSEFRA*** **[2018] EWHC 1963 (Admin)].**

13. There is, therefore, no legal basis on which it is possible for the Council to make the order.

14. This is a complete answer to the proposal to make the order but, for completeness, the Trust's other objections are set out below.

"Non-Relevant" User Evidence

15. After the Second Report was promulgated the Trust requested sight of the full evidence base. This included a number of evidence forms labelled "non-relevant". These were primarily forms which did not record 20 years of use. These forms are, however, relevant to the common law test, particularly as several record evidence of contrary intention and/or throw doubt on the evidence in favour of dedication. In particular:

    (a) At some point between 1987 and 1997, signage or equivalent was in place on the Proposed Route which indicated that the route was not a right of way;

    (b) At a public meeting in the 1980s, a senior officer of one of the landowners gave people permission to cross some or all of the relevant land (which suggests permissive use);

    (c) The route used by members of the public to cross the land was not consistent.

16. This evidence does not appear to have been taken into account in either the First or Second Reports.

The Weight Given To The Evidence Forms

17. The argument given in the Second Report (which, somewhat concerningly, is represented as "the Council's" position, suggesting that the Council may have already made up its mind) relies on giving full weight to the evidence forms. This is problematic for a number of reasons:

18. First, the Second Report treats the fact that the forms have been signed as a complete answer to any questioning of their weight. This is a flawed approach. A statement of truth (and it should be noted that the "statement of truth" on the evidence forms does not confirm to the requirements of the civil procedure rules – although that is not mandatory in this context – and is not sufficient for a statutory declaration) is just one of many factors that must be considered when determining what weight to accord to evidence.

19. Second, the Second Report discounts other material considerations on the basis that the statements are signed. In particular, it does not appear to consider the fact that it is unlikely to be possible to question the makers of the statements (and, even if it were, they would be relying on recollections from, in some cases, more than half a century ago). It is not, therefore, possible for the decision-making committee to test the evidence contained in the evidence forms (should they wish to do so) and, if this matter were to go to an inquiry, it would not be possible for the inspector and parties to test that evidence.

20. Third, the Second Report dismisses the inconsistencies in the evidence forms, apparently on no other basis than that they are signed. In particular, the Second Report dismisses the (quite substantial) variation in the different accounts of the width of the path on the basis that a synthesis can be reached. This misses the point. The question (in relation to the weight to be accorded) not whether a synthesis may be reached (by, in effect, inferring from evidence that is more than a quarter of a century old) but whether the inconsistency in the forms should reduce the weight placed on them. Given that it seems unlikely to be possible to ask the various witnesses to explain the discrepancies, the weight placed on that evidence must be reduced.

21. Fourth, the Second Report dismisses contrary evidence on the basis that it does not cohere with the evidence forms. As a result, it does not undertake a proper evaluation of the evidence. For example, the plans submitted by the Trust, which show that the Proposed Route was stopped up in 1994 (if not before), are

contemporaneous and verified by signatures and seals. This should arguably carry at least as much weight as the evidence forms. If this application was being heard in 1997 or thereabouts then one would expect to have the opportunity to ask those who submitted evidence forms to comment on the submitted plans. It is not unreasonable to wonder whether someone who has given evidence relating to a 20-year (or longer) period would have overlooked a short interruption to the route. The passage of time, however, means that it is not possible to explore this issue.

Fair Process

22. The requirements for fairness are more stringent in the case of an inquiry than at the initial decision-maker stage. The Council must, however, be aware that it is taking the decision which may be challenged at an inquiry. The question of whether a fair inquiry can be held is, therefore, relevant to the Council's decision.

23. I take each of the Second Report's arguments in turn:

It is not unusual to determine an application after a long period of time.

24. This claim is entirely un-evidenced. A search has not revealed any other instance of an application that was determined until 26 years after it was made. Indeed, a long delay would run entirely contrary to parliament's intention, which is to have the application determined "as soon as reasonably practicable" [**1981 Act, Sch. 14, Para. 13**]).

It would be unfair to discount existing evidence.

25. The existing evidence cannot be considered fairly (for the reasons set out in the First Objection). The unfairness of not considering the application must be balanced against the unfairness of considering it. The Second Report did not, at

any point, conduct such a balance. The First Objection sets out how, in the Trust's submission, such a balance should fall.

The opportunity to comment on the application now negates the disadvantage caused by the passage of time.

26. This cannot be right. Objectors cannot properly test the evidence collected in 1997 nor gather contemporaneous rebuttal evidence. The fact that the Trust was consulted in 2022 does nothing to mitigate this.

Landowners were given an opportunity to respond to the application in 1999.

27. This claim is contrary to the evidence. The applicant is required to notify landowners so that they may make submissions [**sch. 14, para. 2(1)**]. In the instant case, the Council's own evidence base shows that the applicant (in 1997) only notified "Staffs Health Authority". There is, therefore, no evidence that majority of landowners (including the Trust's predecessor in title) were not, therefore, consulted in 1999.

28. The Second Report refers to the Foundation Trust letter dated 14 October 1998. It is not clear whether the Second Report takes this letter as evidence that a consultation was carried out. It is not at all clear that this letter relates to a consultation on the 1997 application. In particular:

    (a) It does not make reference to or append any consultation form (which, it is claimed, was sent to landowners). If the letter was a response to a form-based consultation then it might be expected to return the form.

    (b) It is dated nearly a year after the instant application. Assuming a standard 28-day response period, it is not clear why the Council would wait 11 months before sending out the landowner forms.

(c) The plan attached to the letter indicates a different route to that in the application.

(d) The language of the letter (particularly in the context of the above) appears to refer to the creation of a new footpath rather than the recognition of an existing footpath (i.e., the writer states that they will "support" a footpath, not that they accept or acknowledge that one exists).

The rights have landowners have not been infringed because the relevant period is 20 years before the 1997 not 20 years after, and/or it is in the public interest to determine the application.

29. The Proposed Order relies on the common law test. This means that the 20-year period is not relevant. Events that happened after the statutory period may be as material as those which occurred before or during the period.

30. Landowners enjoy rights over their property at common law. The 1981 Act creates a statutory route to abridge those rights, as does the common law. At the same time, however, both the statute and the common law give landlords the right to avoid such abridgement, namely by an act which demonstrates that they do not consent to the creation of a footpath (such as by erecting signs, erecting a barrier, or otherwise blocking the route).

31. In determining this application 26 years after it was made, the Council proposes to effectively freeze time in 1997 for the purposes of the common law test. This means that, from 1997-2023, any act by a landowner which indicates a contrary intention will (it appears) be treated as having no effect. The Council thus proposes to, in practice, remove those rights from landowners over the period 1997-2023.

32. The Council must, therefore, either:

(a) Decline to determine the application on the basis that it cannot do so fairly and to do so is a disproportionate interference with the property rights of landowners; or

(b) Give equal weight to events which occurred after 1997 (in which case the application must be refused because the events since 1997 demonstrate a clear intention not to dedicate a footpath).

Overall conclusion on the fairness point

33. The Second Report concludes that it would be "neglectful of law" not to determine the application. This is not a test that is recognised in public law and appears to be entirely invented.

34. There is no need to comment on the legal test to be applied to determine whether the Council should proceed even if it cannot conduct a fair procedure because the Second Report does not get that far. Rather, it (wrongly) rejects out of hand the contention that the procedure could possibly be unfair. The Trust's submissions on the proportionality test therefore remain unchanged from the First Objection.

35. The Second Report did not engage at all with the fact that there does not appear to be any public desire for this application to be determined. If an applicant wants to ensure an application is determined, then the process in Schedule 14 is open to them from 12 months after the date of the application. In this case, despite the Council delaying its decision for more than a quarter of a century, the applicants have not made a Schedule 14 application. There does not, therefore, appear to be any pressing need to determine the application that would outweigh the unfairness of doing so.

Conclusion

36. For the reasons set out above the Council is asked not to make the Proposed Order

SAM FOWLES

Cornerstone Barristers

9 June 2023

Points Raised in the Objection to the Second Report by the Trust – Response by David Adkins, Legal Officer, SCC - 14/06/23

The points raised in the objection to the second report are duly noted and are responded to below. The full submission by the Trust is also attached and for ease of reference the points correspond to those in the objection**.**

5. It is correct that the second report "pivots" to the common law test and it is also correct that this was not mentioned in the first report.
6. The Trust maintains that the Common Law test presents "particular difficulties" to land held by a public body such as the Trust and its predecessors in title.

- However, this is typically only the case if the claimed public rights were to conflict with the duties of that public body – which in this case they do not.

7. The Trust states that the report suggests that the Common Law test is a lower bar and essentially identical to the statutory test, but without the 20-year requirement.

   For clarity this was not the intention and can be seen by further scrutiny of the report. The fact that the same 20-year period is maintained – as if this were to be tested under statute – demonstrates that any inference of a lower bar is not intended.

8. The Trust states that the evidence must show that all the relevant landowners have dedicated the alleged route for public use. The 20-year period which would be taken as the relevant period under statue is maintained confirming that there has been no evidence of an intention *not* to dedicate.

   Officers do consider that a *dedication* is the best explanation of the evidence when everything is taken together.

   Officers maintain that any evidence of contrary intention by the landowner *not to dedicate* the alleged route is indeed significant however in the present matter there is not sufficient evidence.

   While officers agree that a set period – such as 20-years – is not critical to the common law test, this period of time has been upheld as a significant period of time and therefore of good probity. The application was made at a particular date giving evidence between particular dates – officers noted that there was a significant period

of time within these dates that was sufficient to say that a claim under common law could be made.

If such a significant period of time can be identified, then any events of non-intention beyond that date can be discounted – it has been held that as little as 18 months may in some cases be sufficient to succeed on the common law test.

9. The second report does indeed give greater exposition to the user evidence forms as they make up the greater part of the evidence – and while they may not indeed be conclusive their combined weight cannot be disregarded.

10. (a) The 1994 sale plan which is held to show the route was stopped up has limited relevance to the application. Firstly, it is not a statutory declaration which landowners can make to protect against the creation of new rights of way by *user.* Secondly whatever it shows was clearly not translated to the ground as there is no reference to such a stopping up/ obstruction in the user evidence. As this is a claim based on *user* evidence then the report is not wrong to dismiss this point.

(b) The point about a landowner instructing people not to use the route is dismissed because it was anecdotal – that is it is not a first-hand signed witness statement. As such it has little probity, second hand information is problematic to verify and its appearance in the evidence is also incidental. Who instructed who, when were they instructed and what exact areas did this instruction relate to?

(b)(1) Officers disagree that "all of the user evidence is hearsay". These are signed and detailed witness statements, they are not anecdotal and do not relate to any third party. Even if all the user evidence was indeed hearsay – which it is not – then a signed witness statement by the user relating to his own evidence would still outweigh any reference to third party within that evidence. And we have numerous signed statements and only incidental anecdotal evidence.

(b)(2) Officers hold that the date is important and where this is missing it does reduce the weight of any evidence. If it is not dated, then it is impossible to say where it fell within any set time frame.

With incidental references the date is even more important – and critically the question has to be why it does not reappear in the user evidence.

The user statements are not particularly vague in relation to dates, there are several indicators within them of the date the route was used, and the forms are dated and signed.

(c) Officers hold that the imposition of the gate is not necessarily an act of interruption, a locked gate would indeed be an act of interruption – even if users were climbing over it, it would still be an act of interruption – that would be indisputable.

However, an unlocked gate is an entirely different proposition, and there was no associated and prohibitive signage, as such the very best we can say of it is that there may have been a *future* intention to lock it and cause an act of interruption, but that this was never carried out.

11. Officers maintain that events occurring after 1997 may be discounted – if a set period as significant as the original 20-year period is considered under common law then anything beyond that period – that is future acts of non-intention to dedicate - can be discounted. Officers hold that a significant enough period of time has been measured in the evidence for this application.

(a) The stopping up which the plan is alleged to show did not prevent use of the route on the ground as evidenced by the *user* statements. Even if it was physically stopped up after 1997 and thereafter made inaccessible, we still have a 20-year period of user access.

(b) The landowner correspondence that suggests a dedicated route was being considered is only evidence of that – there is no indication that this would have been on the same line as the claimed route.

12. The question of dedication by each relevant landowner is visible from the user evidence. The fact that the Trust and its predecessors in title were public bodies with a statutory purpose does not dimmish the probity of the evidence *provided* that the alleged route does not conflict with that statutory purpose.

13. As such there is legal basis for the Council to make an Order as the alleged route does not conflict with the statutory purpose.

15. The non-relevant user evidence forms are held by the Trust to indicate an intention not to dedicate, however the details within them are not adequately referenced or dated.

In addition, the route used was consistent in the user evidence forms to eliminate any doubt on this point.

17. Officers can only reaffirm that they are neutral in these matters and the word "position" was intended to be meant as the position Officers have arrived at after analysis of the evidence.

18. The main evidence available to us are the user evidence forms and the fact that they are signed statements of the evidence is sufficient for their consideration and probity.

19. It is accepted that given the passage of time that it is not realistically possible to test the evidence, however this is not held to be a significant problem to the application.

20. It is accepted that due to point 20 it is not possible to ask witnesses to explain any discrepancies in the user evidence forms, however officers maintain that these discrepancies are not material to the alleged route and where width is concerned this would typically differ between users. The line of the alleged route is more critical than the width, minor discrepancies in the width are not detrimental to the claim.

21. The Trust maintains the probity of the 1994 stopping up document, however as already stated despite its signatures and seals it is not something that detracts from the user evidence. The claim is based on user evidence and if the route was *not* stopped up on the ground, and no one knew of it, then it has little relevance.

22. The Trust maintains that any decision is open to be challenged at an inquiry and cite that given the passage of time a fair inquiry would not be possible. Although mindful of this the Council can do no more than take the advice of the Planning Inspector should this issue arise, dependant on the outcome of the Panel.

24. It is accepted that determining the matter 26 years after it was made is not ideal and officers can only reiterate that the Council has a significant backlog of applications to determine, and this is being addressed.

25. The point that the existing evidence cannot be considered fairly is somewhat problematic. The evidence stands as it is, and while it may not be possible to test it due to the passage of time, this fact applies to many applications and in the present matter all parties.

26. It is reasonable to believe that a public body would have a greater ability to keep and retrieve records/information than individual *users* and as such if the Trust is sure of its position, then it is reasonable to believe that the necessary evidence would be readily available to them.

Between the consultation of the Trust in 2022 and the CROW Panel in June 2023, (along with a requested deferral that was granted), Officers feel there was a reasonable timeframe for the necessary details, if any, to be located.

27. The initial consultation cited for 1999 is an informal process that is undertaken as an information gathering exercise with the hope of identifying any issues or concerns early on - and where possible resolving them ahead of the more formal stages.

Although officers at the time will have consulted all relevant landowners as is standard practice the more critical point is that landowners are also given the opportunity to comment at the draft report stage. Therefore, in the unlikely event that any landowner was missed during the initial consultation stage they would still be consulted on the draft report.

Again, the initial consultation back in 1999 is largely a fact-finding exercise, the more detailed consultation takes place once the report has been drafted and the landowners have sight of it.

In this case the Trust have had a number of months to consider the reports, the Council took note of their response over Crown Immunity and redrafted and then recirculated a fresh report. Further time was granted by deferring the matter from the CROW Panel meeting in May and so Officers believe that sufficient time has been granted for both consideration and response.

28. For clarity the Foundation Trust letter referred to is only evidence of communication between the Trust and the Council on that matter at that time. It is likely that this referred to a possible alternative route which was being considered for dedication at the time, and as such it is not material to the claim. It is impossible to confirm anything in relation to the missing landowner response form - however the fact that the Trust has since responded very fully to the two reports demonstrates that a consultation has now been carried out.

29. Officers feel that the rights of landowners have not been infringed in this matter, although a set time frame is not essential under the common law test, officers have maintained the previously established 20-year time frame as there is insufficient evidence of an intention not to dedicate the route during this period. With a significant period of time like this at the point of application any subsequent events of an intention *not to dedicate* can be discounted.

30. Officers agree that various options are available to landowners to demonstrate an intention not to dedicate, however at the point of application there was not definitive evidence of this.

31. Officers are not freezing time by discounting events that happened after 1997, rather they are considering the evidence over a considerable period of time, in this case 20-years, although it is accepted that this can be a much shorter period under common law. If a route can be shown to

have existed during this period by *user* then it already subsists. Events occurring after this do not detract from this, it is up to the CROW Panel to assess the evidence to establish whether the route did and does subsist. The Council is not removing the rights of landowners between 1997-2023, as it is the evidence that shows the route subsisted prior to this time.

32.(a) Officers believe the application can be determined fairly given the above and (b) even if there was a clear intention not to dedicate the route after 1997 it does not detract from any route that subsisted through *user* prior to this time. The application presents evidence that appears to show that such a route subsists.

33. Officers maintain that it would be "neglectful of law" not to determine the application, be it under common law, there is still a case to answer.

34. On the contention that the procedure is unfair officers can only reiterate that sufficient consultations have been carried out despite the passage of time and that detailed evidence has been received from all the relevant parties.

35. The lack of any "public desire" for the application to be determined is not relevant to the need for it to be determined. For clarity the application was directed on by the Secretary of State in 2020.

36. The Trust asks the Council not to make the said Order, however the decision can only be made on the evidence as it stands, and whether the Panel are minded to accept it or not.

END