STAFFORDSHIRE COUNTY COUNCIL

COUNTRYSIDE AND RIGHTS OF WAY PANEL

APPLICATION FOR AN ORDER UNDER THE WILDLIFE AND COUNTRYSIDE ACT 1981 TO MODIFY THE DEFINITIVE MAP AND STATEMENT BY THE ADDITION OF A PUBLIC FOOTPATH FROM STRETTON TO THE HIGHWAY TO THE EAST OF BICKFORD GRANGE FARM

ADDENDUM REPORT

For Meeting of the Panel on 24 March 2023

(A) This is an Addendum Report to Staffordshire County Council's Countryside and Rights of Way Panel ("the Panel") in connection with a review of its decision made on 16 July 2021 to order modification of the Definitive Map and Statement of Public Rights of Way ("the DMS") pursuant to the provisions of the Wildlife and Countryside Act 1981 ("the 1981 Act").

(B) The review arises from an undertaking given to the High Court by the Council which is noted in Appendix 1 to the Order of Mrs. Justice Lang DBE ("Lang J") dated 1 December 2022.

(C) The Addendum Report has been drafted by William Webster who acted for the Council in the Judicial Review proceedings in the High Court ("the JR claim").

(D) A bundle of documents is attached to the Addendum Report and the page numbers referred to below are to pages within this bundle. The claimed public

right of way is shown on the plan at p.2 running between points A-B-C (red line).

Preliminary

1. The Council received an application from a Mr. Martin Reay ("Mr. Reay") pursuant to the 1981 Act for an order to modify the DMS by the addition of a public footpath from Stretton to the highway to the East of Bickford Grange Farm ("the claimed footpath").

2. Objections were received from Piers Monckton and the Somerford Home Farm Partnership who own most of the land across which the claimed footpath runs. Some of that land has since been transferred to Mr Monckton's son, Oliver Monckton, who has been made aware of the current position and who has been invited to submit any comments but has not done so.

3. An officer's report ("OR") dated 21 March 2021 was prepared for the Panel. It recommended that an order be made to add the claimed footpath to the DMS as the evidence submitted by Mr. Reay and the evidence discovered by the Council was sufficient to show that the claimed footpath (which was not shown on the DMS) was reasonably alleged to subsist along the route marked A-B-C on the plan attached at p.1. This plan was later refined by the plan attached at p.2 which was produced for the Judicial Review proceedings by the Council's Spatial Mapping Team on which a number of points of interest have been plotted on current OS base mapping.

4. On 16 July 2021 the Panel resolved to make the Order as recommended in the OR.

5. The Objectors' claim for judicial review was issued on 13 October 2021. As a result the Council deferred the making of a modification order pending the determination of the judicial review claim.

6. The Objectors required the court's permission to bring a judicial review claim which it normally only gives if it considers that there are arguable grounds having a realistic prospect of success. To avoid unnecessary duplication the court directed in this instance that there should be what is known as a "rolled-up hearing" which meant that if permission to apply was granted, the court would determine the substantive claim on the same occasion.

7. The rolled-up hearing was initially listed in June 2022 but had to be relisted for a 3-day hearing on 1-3 November 2022. In the event, by her order dated 1 December 2022, Mrs Justice Lang DBE ("Lang J") refused the objectors permission to apply for judicial review and awarded the Council 80% of their costs with a payment on account of £47,000 to be made within 6 weeks of the order.

8. The order dated 1 December 2022 will be found at pp.3-4. The Council's undertaking at Appendix 1 to the order is at pp.5-6.

9. On 7 December 2022 the objectors applied to the Court of Appeal for permission to appeal (including an interim order suspending compliance with the undertaking mentioned below pending the final outcome of the appeal). It should be noted that the objectors were not seeking to challenge wholesale the various limbs of their case which were rejected by Lang J. Instead, the appeal issue focused on the legal effect of a declaration of the non-existence of public rights made by order of Staffordshire Quarter Sessions ("SQS") on 5 November 1965 under the National Parks and Access to Countryside Act 1949 ("the 1949 Act"). The 1949 Act was repealed by the 1981 Act. The order made by SQS was unknown to the Panel when it made its decision.

10. The application for permission to appeal to the Court of Appeal was refused by the Rt. Hon. Lord Justice Warby ("Warby L.J") by order dated 22 February 2023 which will be referred to later (the order will be found at pp.51-53).

The undertaking noted in Appendix 1 to the Judge's Order

11. In the course of the hearing Lang J invited the Council to consider whether it would be appropriate for the Panel to review its decision to make a modification order in view of the new evidence and submissions which had post-dated its order.

12. Lang J invited the writer to consider whether the principle established in the planning law context in the case of *R (Kides) v South Cambridgeshire District Counsel* [2002] EWCA Civ 1370 (per Jonathan Parker L.J at [126]) should be applied by way of analogy to the present statutory context. The principle is that where an officer is about to issue a decision and becomes aware of a new material consideration, he can only safely proceed if he has referred the decision back to the Council in order that it might be reconsidered with the application in mind.

13. The writer deferred to Lang J on this and in order to avoid the risk of a quashing order and costs and a reconsideration of its decision by the Panel, instructions were taken and the writer was able to offer an undertaking on behalf of the Council (which was accepted by the court) in the form contained in Appendix 1 to the order (see pp.5-6).

14. Put shortly, the undertaking requires the Council to refer the application for a modification order to the Panel in order that its decision may be reviewed in light of (i) the further evidence and submissions which emerged in the course of the judicial review claim; (ii) the findings of the court; and (iii) any later representations or objections received by the Council from interested parties.

15. The procedure involved in referring the decision back to the Panel required the Council (i) to inform interested parties that the decision would be reviewed by the Panel on a date to be fixed no later than 28 April 2023; (ii) to provide an Addendum Report in draft form only which would be sent to interested parties as soon as it was available and in any event no later than 1 February 2023; (iii) to publicise the fact that the draft Addendum Report would be available for inspection by members of the public at the Council's offices; (iv) to ensure that arrangements were made and properly publicised which

enabled members of the public to submit representations and objections to the draft Addendum Report before 1 March 2023; and (v) to finalise the Addendum Report before 31 March 2023 when it would be submitted to members of the Panel and would also be available for inspection at the Council's offices and online on the Council's website. In the event, the Addendum Report was finalised on 13 March 2023 in readiness for the meeting of the Panel on 24 March 2023.

16. The undertaking requires the Panel to conduct its review on the basis of the Addendum Report and any further representations or objections which have been made either in writing and/or orally at the review meeting. It is also necessary that the date of the review meeting should be advertised in the press and online (as it has been) and that interested parties have been informed in writing of the date of the meeting.

17. Although it is the Panel's normal practice not to hear representations in-person it is accepted in this instance that the terms of the undertaking give rise to a legitimate expectation that objectors wishing to be heard in-person will be allowed to make oral representations to the Panel. How this will be accomplished in practice is obviously a matter for the discretion of the Chair and the Panel who will no doubt wish to ensure that the time available is used as efficiently as possible, especially where written representations have already been lodged by that party before the meeting.

18. It needs to be emphasised that, in the view of the writer, the Panel is not starting from scratch as if its earlier decision had not been made. The object of the review is for the Panel to consider its original decision on the application in light of the new material considerations brought before the Panel (which have been summarised in the Addendum report) in order that it may determine whether the original decision continues to be justified or should be rescinded.

19. Lang J put the matter in this way, namely that once the Panel has reconsidered its earlier decision on the basis of the new material this step will effectively supersede the decision of 16 July 2021 with the result that there is

no purpose in further consideration of the decision of 16 July 2021 beyond, as she put it,

"the ruling which I have already given that there is no proper legal basis for this court to intervene to prevent the statutory procedure under Schedule 15 to the 1981 Act from taking its course."

20. As appears later, it is the recommendation of the writer that the original decision continues to be justified in the light of the new evidence even though the Council accepts that elements of the original officer's report were flawed. However, whilst the Panel is not bound to accept the writer's recommendation on how the application for a modification order should be dealt it would still need to demonstrate that proper grounds exist in order to show why that recommendation should not be followed.

The legal framework against which the application for a modification order must be judged

21. The modification order process is, by section 53(2)(a) of the 1981 Act, premised by the discovery of any one of the events mentioned in section 53(3) one of which (namely section 53(3)(c)(i)) is the discovery by the Council of evidence which (when considered with all other relevant evidence available to the Council) showed that a right of way not shown on the DMS:

"… **subsists or is reasonably alleged to subsist** over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path …"

22. Pursuant to Schedule 14, para 3(1)(a) of the 1981 Act, it is the duty of the Panel to investigate matters contained in the application which involves a consideration of the evidence said to justify the inclusion of the claimed path in the DMS.

23. Section 32 of the Highways Act 1980 prescribes the evidence which may be received for the purposes of determining questions relating to the dedication of highways. For these purposes, the Panel may take into consideration <u>any</u> map, plan or history of the locality or other relevant document which is

tendered in evidence to demonstrate whether or not a highway existed at a particular point in time.

24. The fact that the claimed footpath may have fallen into disuse (for whatever reason) cannot remove the legal status of the land as a public highway until such time as it has been lawfully stopped up or diverted. The rule is “once a highway, always a highway”.

25. The Council’s approach to new evidence said to justify modification of the DMS should be in conformity with the guidance of the Court of Appeal in *R (Roxlena Ltd) v Cumbia County Council* [2019] EWCA Civ 1639 at [52] where it was held that the order-making part of the process is less intense than the approach to be applied at the stage of confirmation where disputed evidence can be thoroughly tested at an Inquiry. It was said in *Roxlena* [52-53] that the “margin of appreciation” in such cases is a generous one and that the Council’s duty to ‘investigate’ under Sched.14, para 3(1)(a) did not require it to investigate a particular matter in greater depth and detail than it reasonably judged to be necessary.

26. By virtue of Schedule 15, para 7, of the 1981 Act, before a modification order takes effect in an opposed case it must be confirmed by the Secretary of State who is able to appoint an Inspector to hold an Inquiry or to hear representations.

27. Provision is made in Schedule 15, para 12, that, after an order has taken effect (i.e. once it has been confirmed by the Secretary of State), an aggrieved person is still permitted to apply to the High Court within 6 weeks of the publication of any notice (and we are dealing here with notices of final decisions on orders made – per Schedule 15, para 15).

28. It follows that the Panel is required to do no more than make a reasonable judgment on the evidence placed before it. Put another way, the question for the Panel is whether it is reasonable to allege that the claimed footpath exists. It is not its task to decide whether, on the balance of probabilities, the claimed footpath exists as this would anticipate the outcome of an Inspector’s

consideration of the evidence presented to him (or her) and tested at an Inquiry.

Overview of the judicial review claim

29. A fuller analysis of the new evidence and the submissions of the objectors will be dealt with later. However, the judicial review claim ultimately failed because the Objectors were unable to overcome the principle that judicial review is a remedy of last resort and the jurisdiction will not normally be exercised where alternative remedies are available and have not been exhausted.

30. Exceptionally, judicial review proceedings were successfully invoked in *R v Wiltshire County Council, ex parte Nettlecome Ltd* [1998] JPL 707 in a case where the modification order was found to have been "plainly erroneous" and ought to be quashed. Dyson J considered at 395B-C that the discretion to intervene

> "should be exercised cautiously, and only in clear cases where there has been a plain error of law. In any case where the position was uncertain, and especially where the issues raised involved questions of fact, it is most unlikely that it would be appropriate to exercise the court's discretion in favour of granting relief".

31. It was the view of Lang J that the Objectors' judicial review claim was not an exceptional case where the Court should intervene so as to allow a judicial review to proceed part way through the statutory process. As she put it at [37]:

> "There are factual issues to be examined and determined. The parties are likely to obtain further evidence to address those factual issues in the course of preparation for an Inquiry. Further, I am not persuaded that there is any serious error of law in the Council's resolution which gives rise to a compelling need for the Court to intervene in the public interest at this stage ...".

32. Lang J also helpfully noted that challenges to reports in the present context engage the principles that apply to challenges to reports of planning officers. It follows that such reports are not to be read with undue rigor but with reasonable benevolence. In such cases the question is whether, on a fair

reading of the report as a whole, the officer has misled the members on a matter bearing on the decision so that, but for the flawed advice it was given, the Panel's decision would or might have been different. Minor or inconsequential errors may be excused: see [41-42].

33. A transcript of the judgment of Lang J will be found at pp.7-35.

Original officer's report

34. The writer does not propose to deal comprehensively with the evidence or the Objectors' representations at the stage of the officer's report on 21 March 2021. Suffice it to say that the evidence said to justify a modification order at this stage comprised:

(i) Evidence of Orders made by Justices of the Peace ("JPs") in 1827 and by Quarter Sessions under the 1773 and 1815 Highway Acts (which included provision for stopping up orders) which it was claimed supported the claimed footpath between points A-B on the plans at pp.1-2.

(ii) Finance Act 1910 material which it was claimed supported the claimed footpath between points B-C on the plans at pp.1-2.

(iii) The Penkridge Parish survey records pre-dating the first DMS which it was claimed also supported the claimed footpath between points B-C on the plans at pp.1-2.

35. The officer's report dated 21 March 2021 was prepared for the Panel which recommended that a modification order be made on the basis of the above documentary evidence and a resolution was passed to this effect by the Panel at its meeting on 16 July 2021.

Evidence obtained after the Panel resolved to make a modification order

36. The Objectors instructed Michael Rocks MRICS, a Chartered Land Surveyor, to provide mapping evidence and his report is dated 20 October 2021. The Objectors also instructed Robin Carr (who provides consultancy services in relation to public rights of way) to provide a report dated 14 April 2022 which

he revised on 11 May 2022. These reports and the documents and plans that accompanied them filled a lever arch file in the judicial review claim and run to 270 pages.

37. In response to the expert evidence of Messrs. Rocks and Carr, the Council instructed Ms Shona Frost to provide expert evidence. Ms. Frost is employed by the Council as a Team Leader in their Spatial Mapping Team which comprises part of the Council's Communities and Families' Directorate. Shona Frost (who is an army-trained cartographer) is a Fellow of the Royal Geographic Society and a Chartered Geographer and is also a member of the British Cartographic Society. Ms Frost put in two witness statements in the judicial review claim dated 12 May 2022 and 25 May 2022. She is responsible for the plan at p.2 which was attached to her second statement at SF/1. This was an agreed plan which was useful in plotting, on current OS base mapping, all the main points shown on the various historic documents and, as was its purpose, it was used for elucidating most of the issues arising in the judicial review claim.

38. The Council and the Objectors agreed that the court should admit and consider the above-mentioned expert evidence.

The documentary and other evidence <u>now</u> relied on to justify the making of a modification order

Orders made by the Justices in 1827 and by Quarter Sessions under the 1773 and 1815 Highway Acts

39. The documents at pp.36-40 are material under this head. They are supportive of the claimed footpath between points A-B on the plans at pp.1-2.

40. The first in time comprises the decisions of two JPs at a special session held in Stretton on 3 December 1827. See p.36 which is a transcript of the 1827 order.

41. By virtue of the Highways Acts of 1773 and 1815 two or more JPs were invested with powers to direct that ways be widened, enlarged, diverted and

turned and stopped up. There was a right to appeal by anyone “injured or aggrieved” to the Court of Quarter Sessions.

42. The orders made by the JPs are shown by reference to the plan at p.37 which is dated 1827 and accompanied the decision of the JPs. The orders involved the stopping up of the various ways (highways, bridleway and footways) marked blue on the plan on the ground that they were said to be “useless and unnecessary”. See under “N.B” at the top of the plan.

43. On the plan at p.2 the Council’s Spatial Mapping Team have reproduced the 1827 plan on a modern OS base. The annotations in blue on p.2 correspond with the markings on the 1827 plan. It will be noted that there are three point Ks on the 1827 plan which are marked K1, K2 and K3 on p.2. In short, the blue lines are stopped up ways, the red line is a new way and the brown lines are ways which remained unaltered.

44. On a closer examination of a relevant section of the actual plan at pp.39-40 it will be seen that between points C-B-K there is a blue line within which there is a narrower brown line. These points have been annotated on the plan at p.2.

45. It follows that the brown line between C-B-K (this is point K1 on the plan at p.2) falls within a way coloured blue which is to be stopped up. However, if reference is made to the bottom of the JPs order on p.36 it is said:

> (But subject to a right of footway from the point marked C to the point marked K on the said plan).

46. As the JPs had no power to create or reserve a new right of way the only sensible inference which can be drawn from the words in brackets quoted in para 45 above is that the JPs did not intend to stop up the “right of footway” between points C-K on the 1827 plan and that the stopping up order extended only to vehicular and equestrian traffic between these points.

47. At p.38 there is what is described as “Reference to Plan” with which the 1827 plan had to be read. It provides measurements for the highways that have

been stopped up and the replacement ways (new or existing), showing in yards the differences between the two.

48. The document at p.38 (i) shows (highlighted) that the length of a "footway" between **point J** "leading to Bigford and Whiston" ('B/W') is 4,787 yards; and (ii) that the footway coloured yellow on the 1827 plan between **point K** again 'leading to [B/W]' is 4,077 yards (i.e. being some 710 yards less). The settlements of B/W can be seen on the plan at p.2.

49. It will be seen on the 1827 plan at p.37 that the northern-most point J (there are two point Js on this plan) is at the end of the blue line marked for stopping up and that northern-most point K (K3) is the end of the yellow line which was not stopped up. Both paths ending at these points are said on the 1827 plan to continue to the settlements of "Bigford & Whiston" ("B/W"). Bigford has since been renamed as Bickford.

50. Point K3 on the 1827 plan is marked point B on the plans at pp.1-2. This is now agreed by the Objectors.

51. The 1827 order made by the JPs was confirmed by an order made by the Court at Quarter Sessions in 1828. See transcript of Quarter Sessions order at p.41. The 1828 order merely confirmed the 1827 order. It listed the ways that were to be stopped up but there was no mention of the footpath (the so-called "right of footway") which the 1827 order stated was to be kept open. Unlike the 1827 order, the 1828 order was not accompanied by any map or reasoned decision. Neither of these orders was ever challenged on appeal.

52. It may be presumed by law that the correct procedures were followed by the JPs in 1827 and at the 1828 Quarter Sessions. Unchallenged decisions of longstanding will normally be upheld. In *R. (Noble Organisation Ltd) v Thanet DC* [2005] EWCA Civ 782 at [42] Auld L.J reiterated the principle that administrative acts are valid unless and until quashed by a court in the time available for challenge, otherwise such acts are valid notwithstanding that the reasoning on which they are based may have been flawed. In the result, it is far too late to be attacking any lack of *vires* in the case of the 1827-28 orders.

53. It follows that the 1827 order and its accompanying plan are, in the writer's view, supportive of the claimed footpath between points A-B and it would still be reasonable for the Panel to arrive at this conclusion. It will be recalled that the Panel is required to do no more than make a reasonable judgment on the evidence placed before it.

54. The submissions made by the Objectors in relation to the 1827 and 1828 orders and the findings of Lang J will be dealt with later.

The gap of 300m-340m between points B-B1 on the plan at p.2

55. At p.42 the Council's Spatial Mapping Team have produced a plan on a modern OS base showing: (i) the line between points I-J-J on the 1827 plan (which was stopped up under the 1827 order), and (ii) the line between points C-K3 on the 1827 plan.

56. The plan at p.42 also shows the local network of various public rights of way. The green line runs between points A-B as shown on the plan at p.2 or between points C-K3 on the 1827 plan.

57. The plan at p.42 shows an assumed continuation line between the second point J and P1 which is where the two footpaths are thought by Ms Frost to have merged before the 1827 order (which stopped up the line between points I-J-J) to form a single continuous footpath running all the way to the villages of B/W.

58. The plan at p.43 shows the same as that shown on the plan at p.42 but is laid on an OS mapping base from circa 1880 where a footpath is shown to run along the green line to the settlements of B/W.

59. On both plans at pp.42-43 there is a line between points B1-C which is intended to delineate the footpath disclosed in the Finance Act 1910 ("FA 1910") material to which reference is made below.

60. In the view of the writer it seems obvious that, by 1827, two footpaths ran between Stretton and B/W and the JPs must have decided that one path was unnecessary and should be stopped up and that the other would be

preserved. It also seems likely that without the path shown on the 1827 plan to be “subject to a right of footway” between C-K3 there may well have been no alternative footpath between Stretton and B/W.

61. The merged yellow/green line shown on the plan on p.42 after point B running north to B/W and the green line shown on the plan at p.43 follow the same alignment as a footpath shown in (and would have pre-dated) the circa 1880 and 1902 OS base mapping.

62. Shona Frost advises that no OS maps were produced for the area in question before 1880. It follows that as the 1827 map ended at point B (or K3) on the plan at p.2, there is an unmapped gap between points B-P1-B1 in the period 1827 and 1880. The existence of a gap is important as Ms Frost says that the claimed footpath actually ran on the ground between B1-C which is supported by reference to the 1902 OS base mapping.

63. The Council accordingly accepts that it is not in possession of a plan showing a surveyed line between 1827 and 1880 showing a footpath running between points B-P1-B1 although the alignment of a footpath running between these between the circa 1880 and the 1902 OS mapping is unchanged.

64. Ms Frost, for the Council, accepts that there is a gap of approximately 300m between points B-P1-B1 which is not supported by any evidence in the form of an OS map or otherwise showing a footpath running between these points before the 1880 and 1902 OS maps. Michael Rocks for the Objectors says that the gap is 340m. In the result, the Objectors say that the mapping evidence does not extend to the entirety of the claimed footpath between points A-B-C on pp.1-2.

65. The question is whether it is reasonable for the Panel to find, on the basis of Shona Frost’s evidence as an expert cartographer, that there is likely to have been a continuous footpath running between points B-P1-B1 in the period 1827 and 1880? The writer considers that it is and no evidence has been brought forward by the Objectors which contradicts this possibility.

66. It is the view of Ms Frost (and she dealt with this in her written evidence in the judicial review proceedings) that footpath lines shown on OS plans in the context of open countryside do not, without an obvious reason, usually alter their alignment between one revision of an OS map and the next. Development or radical revisions in field layout might be reasons for this but, as far as she can judge, nothing of the kind has occurred in this instance between the points B-P1-B1 since the first published OS map for the area which was in the 1880s.

67. Ms Frost also points out that mapping underwent massive changes prior to 1880. By around the mid-1800s the demand for accurate, large scale maps was enormous. The development of the railways contributed to this. For instance, the Ordnance Survey Act 1841 conferred a right on OS surveyors to enter land to fix boundaries. Further, from the 1840s the OS concentrated on the Great Britain "County Series" and a start was made on mapping the whole country, county by county, at six inches to the mile (1:10,560).

68. Ms Frost says that it is not without interest that it was only in 1854 that twenty five-inch maps were introduced with a scale of 1:2500 and the later six-inch maps were based on these maps. By the 1890s the first edition of the two scales were completed with a second edition completed in the 1890s and 1900s. Meanwhile, publication of the one-inch to the mile series for Great Britain was completed in 1891. In addition, new technology employed by surveyors operating in this field meant that, by the mid-to-late 1800s, the detail shown in the later maps would have been much improved from that shown in the OS maps in the mid-1800s. The enormous contrast between the 1827 map and the circa 1880 OS base mapping is a clear example of the qualitative gulf between the earlier and later maps of the 1800s.

69. In Ms Frost's view, the presence of a footpath running along the same alignment of the green line shown on the circa 1880 OS map (see p.43) suggests quite strongly that a footpath had in fact pre-existed the survey which led to the circa 1880 OS map. On any footing, she says that the green line on the plan at p.43 is an obvious connecting path between Stretton and the villages of B/W. In her view, there was, in all probability, a track on the

ground between points B-P1-B1 otherwise the OS surveyor would not have noted it on the circa 1880 OS map which is likely to have been the first OS map for the area.

70. One also needs to remember that the 1827 plan (p.37) shows that the footpath at K3 continued to B/W where the distance is measured on the "Reference to Plan" document at p.38. It also seems highly unlikely that a footway between Stretton would come to an end in the middle of open countryside or that its alignment would have radically altered without good reason between 1827 and the OS mapping in 1880.

71. The Panel must therefore decide whether it is reasonable to conclude (and in the view of the writer it would be) that Ms Frost is right when she says that in her view the presence of a footpath running along the same alignment of the green line shown on the circa 1880 OS map (see p.43) indicates "quite strongly" (as she puts it in para 28 of her second witness statement) that a footpath must have pre-existed the survey which followed the same alignment as that shown on the 1880 OS map.

72. Ms Frost's evidence in relation to the explanation of the gap between points B-P1-B1 would clearly be relevant admissible evidence as an aid to the meaning of the 1827 plan (p.37) in showing the likely off plan alignment of the path running from K3 to the settlements of B/W. Put another way, if the footpath running between points B-P1-B1 did not follow the alignment shown by the green line on p.43 then where else would it have run?

The Finance Act 1910 material

73. The original report suggests that this material supported the claimed footpath between points B-C on the plans at 1-2. This is no longer the case. In view of the discovery of an unmapped gap between B-P1-B1 the material under this head can only be advanced to support the claimed footpath between points B1-C and not B-C.

74. The documents under this head concern the records generated in 1913 for the purposes of the Finance Act 1910 ("the FA 1910"). This Act introduced a tax

on land known as Increment Value Duty. Landowners were able to apply for a reduction in the tax payable where their land was crossed by public rights of way.

75. It is generally accepted that documents and plans produced under the FA 1910 can provide good evidence regarding the status of a way crossing land.

76. The tax was levied on the increase in site value of land between its valuation as at 30 April 1909 and its sale or other transfer. Deductions were allowed for, amongst other things, the amount by which the gross value of the land would be diminished if the land were sold subject to any public rights of way (section 25).

77. The following is stated in HMG's "Wildlife and Countryside Act 1981 – Definitive Map Orders: Consistency Guidelines" (updated 27 January 2022):

> 11.2.4. An early part of the valuation process was the completion of a 'Form 4' by the landowner. This form asked whether the relevant unit of land ownership (these were known as 'hereditaments') was subject to any public rights of way or any public rights of user. Information from Form 4 was copied into Field Books in the District Valuation Office before the valuers went into the field to inspect and assess the hereditaments. In these books, and in other forms such as Form 36, sent back to landowners with the provisional valuation, and Form 37, the office copy of Form 36, the distinct categories were run together into 'public rights of way or user'. Information from the Field Books (which are kept in the National Archive at Kew), including deductions in value for 'public rights of way or user', was copied into the relevant columns in the Valuation Books, which are normally now found in Local Record Offices. Working plans (see below at 11.7), sometimes with detailed annotations, were completed in the field and the final record plans, which normally show only hereditament boundaries, were compiled from them.
>
> 11.2.5. Although direct evidence of the acknowledgment by a landowner of a public right of way from an entry on a Form 4 may be considered to be very strong, the vast majority of them were destroyed after the transcription of their information into the Field Books. However, evidence of the existence of a public way across a hereditament may be deduced from, for example, a Field Book entry showing a deduction under 'public rights of way or user', with further clear hand-written details, such as use of the words 'public footpath'. The position of such a way may be shown by annotations on the working plans or

written information in the Field Book. But where hereditaments were large and crossed by numerous paths it may not be possible to conclude from written information that a particular route was referred to. Even where field plans are annotated, and paths marked as 'public', it may be unclear when and by whom annotations were made. Evidence from Field Books and plans may provide good evidence of the reputation of a way as public, but care should be exercised when drawing conclusions from material not known to be provided directly by or on the authority of the landowner.

78. The Council is in possession of some of the FA 1910 records under hereditament reference 610 (H610). These records (the Field Book and Plan) were retrieved from the Public Record Office at Kew.

79. The documents relied on under this head are to be found at pp.44-47.

80. The H610 land (along with other hereditaments) is shown marked 610 (and edged red) on the plan at p.44 which is based on the 1903 revision to the 1902 OS base mapping. The plan is annotated and points B1-C show a footpath crossing two fields which continues across a third field ending at the highway at point D to the south of Whiston.

81. In the Field Book record for H610 on p.45 there is a red dot in the margin of the left hand page against which has been written, under the section "Fixed Charges, Easements, Common Rights and Restrictions", the words "Public right of road over 3 fields". On the opposite page, again alongside the red dot in the margin, has been written "Public path across fields as on Ord.Map". Alongside the bottom red dot on the same page there is a reference to a "footpath" against which there is an attributed value of "£20 ".

82. In the same Field Book for H610 on p.46 one can see a red dot in the margin on the right hand page alongside which one sees a single red dot alongside which, against the words in the form, "Public Rights of Way or User" there is the sum of "£20" which has not been adjusted by the valuer. £20 was no trivial sum in those days. The inspection date is noted to have taken place on 24 November 1913 when (as the writer found by making a search online) the purchasing power of £20 would have been approximately £2,000 at today's rates.

83. As the claimed path between points B1-C crosses two fields and the same footpath ending at point D crosses a third field, this is consistent with the Field Book entry to a “Public right of road over 3 fields”.

84. The Objectors argue that three fields other than the above-mentioned three fields identified on the plan on p.44 might also have justified a deduction for the Increment Value Duty in relation to the H610 land. Ms Frost was asked to show the competing path claimed by the Objectors running across three other fields and she did so at points P-Q-R-T-U on the map produced by Ms Frost at p.47 (see also plan at p.2). If reference is made to this map and to the annotated map at p.44 one sees that there are admittedly three fields running between points P-Q-R-T-U but, in the case of the H610 land which is edged red on the map at p.47, the right of way crosses only one field within the H610 land, i.e. between points P-Q-R. It is clearer on the map on p.44.

85. The March 2021 report admittedly refers to 3 footpaths in H610 which might well be true. The officer was, however, in error when she said that “tax relief was granted for footpath**s** that crossed the plots referred to” (see para 25 in her report). This is because the Field Book entries refer only to a “Public right of road over 3 fields” or to a “Public path across fields as on Ord.Map” in the singular which plainly crossed the three fields as shown on p.44, all within H610 which, as the FA 1910 records show, gave rise to the tax relief (in the singular).

86. The officer continued the error when she said at para 27 that the valuers granted tax relief for the path**s** that crossed the land. The officer also says in error that the footpath shown in the FA 1910 material appears to be one of the footpath**s** shown on the plan between points B-C see para 29). The officer was of course relying on the map showing a line running between B-C whereas, as the Council now accepts, the Field Book entries are in fact concerned only with a single footpath running across the three fields between points B1-C-D.

87. In truth none of these errors really mattered as the FA 1910 material discloses (i) that the Field Book for the H610 land was concerned with a

single path crossing 3 identified fields within H610, (ii) that within H610 tax relief was only claimed for this single path, and (iii) that although there may have been footpaths elsewhere within H610, the path relied on by the claimants between points P-Q-R-T-U could not possibly be relevant as that right of way crossed only a single field within H610. In short, as the FA 1910 tax relief applied only to land comprised within H610 it is hard to see how the entry in the Field Book can be said to apply to the footpath running between points P-Q-R-T-U on p.47 (as the Objectors are contending for).

88. As with the 1827-28 material (i.e. covering only points A-B of the claimed footpath between points A-B-C) and the evidence of Ms Shona Frost (which deals with the gap between points B-P1-B1 on p.2), the writer considers that it would be reasonable for the Panel to take the FA 1910 material into account in support of the claimed footpath between points B1-C.

The Penkridge Parish survey records

89. It will be recalled that the officer's report asserted that these records supported the claimed footpath between points B-C on the plans at pp.1-2. The Council accepts that this assertion can no longer be supported.

90. It is now known that an order was made by Stafford Quarter Sessions ("SQS") on 5 November 1965 (on an application lodged by the Objectors' grandfather, a Major Monckton) pursuant to section 31(3)(a) of the National Parks and Access to the Countryside Act 1949 Act ("the 1949 Act") which the 1981 Act eventually replaced.

91. The effect of the order was to declare than no public rights of way subsisted over a section of the claimed footpath between points C-B1-P1-P2 which had been included on the provisional map at p.48 (see p.49 for enlargement) but which was subsequently removed as a result of the declaration made by SQS. The points D-C-P1-P2 noted on the map at p.48 were included by Leading Counsel for the Objectors.

92. In practice what has been excluded by the order made by SQS includes the claimed path between points C-B1-P1. By section 31(8) of the 1949 Act the

declaration was deemed to be conclusive of the non-existence of public rights between these points. It should be noted that there is no evidence that the 1827-1828 orders or the documentation arising under the Finance Act 1910 was ever considered at this stage.

93. It must follow that the officer's report was in error in finding that the Penkridge Parish survey cards supported the route of the claimed path between points B-C. This is because the original DMS was prepared with no part of the claimed route on it.

94. In his submissions the Objectors' counsel goes into the initial DMS process in great deal. However, what concerned Lang J was in finding out why, and on what basis, the claimed footpath C-B1-P1-P2 was included on the provisional map in the first place in 1965 and why the Council accepted that no public right of way subsisted between these points. As Lang J puts it, "Was the Council aware of the 1827/1828 Order at that time". The same may be said in relation to the Finance Act 1910 material.

95. What we know about this arises from an exchange of correspondence between the Council and the late Major Monckton in September 1965 (which was only disclosed by the Objectors on the final day of the hearing before Lang J and which she said should have been disclosed at a much earlier stage of the proceedings) that the officer dealing with the matter informed Major Monckton that the Council had insufficient evidence to oppose the application for a declaration the effect of which was to delete what was described as the southern section of FP1046 from the provisional DMS map.

96. In the result, the Council no longer relies on paragraph 81 of the officer's report in which the officer advised that the Penkridge Parish Survey cards (as it was put) "supports part B to C of the alleged route".

97. This leaves one important issue, namely whether, as a matter of law, a negative declaration made in 1965 under 1949 Act precludes reliance on evidence pre-dating the making of the declaration in support of an application to modify the DMS under s.53(3)(c)(i) of the 1981 Act. Lang J deals with this issue in her judgment.

98. The writer's submissions on this point to Lang J (which she preferred to those of the Objectors – see para [70] of her judgment) will be found at pp.53-60. The writer's conclusion was that as a matter of law section 31(8) of the 1949 Act did not survive the repeal of Part IV of the 1949 Act to override the provisions of of section 53(3)(c)(i) of the 1981 Act which would mean that a surveying authority would be able to correct a previously mistaken decision.

The findings of Lang J

99. It will simplify matters if the relevant extracts from her judgment are set out in full. They arise under the heading: "Grounds of Challenge".

Grounds of challenge

Grounds A - D

43. In relation to the southern part of the claimed footpath (A-B), the Claimants submitted that the Council's conclusions were founded on an unlawful approach to the two orders made by the Justices at the 1827 and 1828 Quarter Sessions (under the 1773 and 1815 Highway Acts) in that:

i) **Ground A**: on its proper construction the confirming 1828 order did not reserve a footway, as held by the Council.

ii) **Ground B**: as a matter of statutory interpretation, the 1773 and 1815 Highway Acts under which the orders were made contained no power by which a footway could be reserved.

iii) **Ground C**: in the alternative, even if the Justices had intended to reserve a footway it could only have taken effect in relation to the southernmost section of the claimed footpath, marked as A to A1 on Map 1 (a plan submitted by the Claimants as Appendix 9 to their pre-action letter of 29 September 2021 (Core Bundle page 249)).

iv) **Ground D**: in any event, the 1827 Order did not provide a basis for a lawful conclusion that a footway had existed prior to 1827.

44. In response, the Council submitted that the 1827 decision of the Justices at the Quarter Sessions, which stopped up several highways, bridleways and footpaths, expressly did not stop up the existing footpath between points C and K, as shown on the Plan. The decision stated that the stopping up was "subject to a right of footway from the point marked C to the point marked K on the said plan".

45. The Council submitted that the Justices did not purport to create or reserve a new right of way, as this was outside their powers. They merely recorded the presence of an established footpath which was preserved, despite the stopping up of an adjoining right of way for vehicular and equestrian traffic. It was reasonable to assume that they made their

order, and preserved the claimed footpath, on the basis of the evidence adduced before them at the time.

46. The Council further submitted that the 1828 order merely confirmed the order of 1827. It listed the ways that were to be stopped up but there was no mention of the footpath which the 1827 order stated was to be kept open. However, unlike the order of 1827, the 1828 order was not accompanied by any map or reasoned decision. As Mr Laurence KC accepted, the 1828 order had to be read by reference to the map attached to the 1827 order, which expressly identified the existing rights of way which were to "remain open", in coloured ink, including the claimed footpath. In 1828, the Justices did not purport to vary the 1827 order, by stopping up the footpath that the 1827 Justices had identified as remaining open. Furthermore, these orders were never challenged on appeal.

47. There was a factual dispute between the parties as to the length of the claimed footpath referred to in the 1827 order, its alignment, and whether it was intended to lead to the two named settlements (Whiston and Bigford (now Bickford)).

48. After the resolution was made, the material was reviewed by the two experts instructed by the Claimants (Mr Rocks and Mr Carr) and the Council's in-house expert cartographer, Ms S. Frost. Their work generated further information and disputed issues.

49. Ms Frost used Ordnance Survey ("OS") base mapping to clarify the older mapping, in particular the 1827 map. The parties disagreed as to whether the improved image of the plan attached to the 1827 order did or did not show that there was a separate freestanding footpath, alongside the highway that was stopped up. Ms Frost also referred to OS maps from 1880 and 1902 which showed footpath routes, including the claimed footpath. The Claimants conceded that there was a pedestrian route in 1827 but questioned whether its alignment corresponded with the alignment of the route later shown on the 1880 and 1902 OS maps.

50. In my judgment, Grounds A to D raise issues of fact finding, and in particular, resolving disputed interpretation of maps, which are better suited to determination before a specialist Inspector at an Inquiry, than in a judicial review claim. In so far as they also raise issues of law (e.g. the effect of the 1828 order), the answer is far from clear on the evidence currently before me. These issues are well within the competence of a specialist Inspector to determine, and of course, a statutory review is available in the event of an error of law. In my judgment, Grounds A to D do not disclose any serious and obvious error of law in the Council's decision which gives rise to a compelling need to intervene by way of judicial review, in the public interest.

Grounds E and F

51. The Claimants submitted that the Council also erred in relying upon:

v) **Ground E**: the Finance Act 1910 material; and

vi) **Ground F**: on Parish Surveys or other material prepared under the National Parks and Access to the Countryside Act 1949 ("the 1949 Act").

Properly construed, neither source of information provided a defensible or rational basis for the conclusion that the route was reasonably alleged to subsist between points B-C on the Appendix B plan. The Council recognised that the 1827/28 Quarter Sessions material only

related to points A-B on Appendix B plan, and so this evidence was crucial in relation to points B-C.

52. Ground E concerned the Finance Act 1910 which introduced a tax on land. Landowners were able to apply for a reduction in the tax payable in respect of their land where the land was crossed by public rights of way. Therefore, documents and plans produced under the Finance Act 1910, namely, the Field Book and Plan under hereditament reference 610, were relied upon in the OR as evidence of the existence of footpaths across 3 fields, and a deduction of £20 from the tax payable because of the right of way use.

53. The OR stated:

> "25. The Finance Act material submitted by the Applicant shows that tax relief was granted for footpaths that crossed the plots referred to. An examination of the maps shows that there are 3 footpaths in lot 610 and the routes are annotated on the accompanying map.
>
> 26. ….For plot 610 the landowner did make a claim for footpaths.
>
> 27. The valuers did note that there were public footpaths and made a note on the field book. They granted relief for the paths that crossed the land which they would not have done unless satisfied of their existence."

54. The Claimants submitted that the OR was misleading, as the material showed that tax relief was only granted for one footpath. There were three footpath routes across hereditament 610 and it was not possible to be satisfied which route the claim was for.

55. The Council conceded that the OR erred in stating that tax relief was granted for more than one footpath. However, with the benefit of base mapping and analysis by Ms Frost (after the date of the resolution), the Council submitted that the Field Book entries related to a public footpath running across 3 identified fields in hereditament 610. The other footpaths referred to by the Claimants could not possibly be the public footpath, for various reasons.

56. In my judgment, the admitted error in the OR did not amount to a serious and obvious error of law which gave rise to a compelling need to intervene by way of judicial review. The remaining dispute between the parties as to the correct identification of the public path for which tax relief was granted is an issue of fact and judgment. It is better suited to determination before a specialist Inspector at an Inquiry, than in a judicial review claim.

57. Ground F concerned Parish Survey records produced for the purposes of the 1949 Act. The OR stated, at paragraphs 35 and 81, that the Penkridge Parish survey cards supported the claimed footpath from B-C on the Appendix B map. They showed that there was an objection received regarding the omission of the alleged route, and in consequence, the route was added to the Parish Survey as a footpath.

58. The Claimants submitted that this advice was misleading. The section of the footpath that was recommended for inclusion, and eventually included in the DMS, ran south of point D as far as C. However, the section of the claimed footpath which ran south of point C to points PI/P2 (on the plan at Exhibit SF10 to Ms Frost's second statement) was

struck out from the Provisional Map and Statement ("the PMS"), following a declaration by the Quarter Sessions, on 5 November 1965, that there was no right of way.

59. The Council conceded that the OR was in error in advising that the Penkridge survey cards supported the existence of the claimed footpath, and no longer relied upon this point. The evidence regarding the declaration by the Quarter Sessions on 5 November 1965 only came to light after the resolution was made. However, the Council submitted that there was sufficient other material to satisfy the "reasonably alleged to subsist" test in section 53(3)(c)(i) of the 1981 Act.

60. In these circumstances, I conclude that this error in the OR did not amount to a serious and obvious error of law which gave rise to a compelling need to intervene by way of judicial review.

Ground F1

61. Under Ground F1, the Claimants submitted that the Council erred in acting contrary to, and without regard for, the effect of the order of the Quarter Sessions of 5 November 1965, made pursuant to section 31(3)(a) of the 1949 Act, which declared that no public right of way subsisted over the section of the route proposed to be added by the PMS (the section of the footpath between points C and points P1/P2 shown on the plan at Exhibit SF10 to Ms Frost's second statement). The declaration was conclusive of the non-existence of public rights over this section of the claimed footpath, by virtue of section 31(8) of the 1949 Act which provided that "a declaration made under this section shall be conclusive evidence of the matters stated in the declaration".

62. Although the 1949 Act was repealed by the 1981 Act, the Claimants relied upon subsections 16(1)(b)-(c) of the Interpretation Act 1978 ("IA 1978") which provides:

> "1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—
>
> …
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> …"

63. The Claimants submitted that there was nothing in the 1981 Act which either expressly or impliedly evinced a statutory intention that the review provisions newly introduced in section 53 were effective to override declarations made under section 31(3) of the 1949 Act. The 1981 Act replaced the review provisions in the 1949 Act with comparable, if slightly wider, provisions. It did not replace section 31 with an equivalent right for landowners to apply to courts for declarations but it was silent as to their continuing effect. It therefore evinced no "contrary intention" sufficient to rebut the presumption introduced by the language of subsection 16(1)(b) of the IA 1978 that declarations should continue to have effect.

64. In response, the Council accepted that the declaration granted by the Quarter Sessions on 5 November 1965 was a right within the meaning of section 16(1)(c) IA 1978, but it submitted that the right could be overridden because the provisions of the 1981 Act did demonstrate a "contrary intention".

65. The 1981 Act introduced a comprehensive and self-contained statutory code for the ascertainment of public rights of way over land. It replaced the statutory scheme under the 1949 Act.

66. Section 31 of the 1949 Act, including the "conclusive evidence" provision in subsection (8), was repealed by the 1981 Act. The power to make declarations as to public rights of way, which was exercised by Quarter Sessions, was replaced by an entirely different statutory scheme. Under Schedule 15 to the 1981 Act, modification orders made by surveying authorities now have to be confirmed by the Secretary of State, and where there are objections to a proposed modification, an Inquiry will be held. An aggrieved party may apply to the High Court for a statutory review of an adverse decision.

67. Section 53 of the 1981 Act imposes a duty on an authority to keep the definitive map under continuous (as opposed to periodic) review. Section 53(3) sets out the events which may require modification of the definitive map. The various events (which can occur either before or after the coming into force of the 1981 Act) include, at section 53(3)(c)(i), the discovery by the authority of evidence which (when considered with all other relevant evidence) shows that a public right of way which is not shown on the definitive map "subsists or is reasonably alleged to subsist" over land in the area to which the map relates. Section 53(3) now allows for paths wrongly shown on the definitive map to be deleted on review.

68. If section 31(8) of the 1949 Act overrode the provisions of section 53(3)(c)(i) of the 1981 Act, it would mean that the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision following discovery of evidence. Such a state of affairs would be inimical to the statutory scheme under Part III of the 1981 Act. It would mean in practice in this case that only evidence of implied dedication arising after 5 November 1965 would be admissible to justify new entries in the definitive map and it certainly precludes the admissibility of historic evidence to correct errors in the definitive map. This would emasculate the 1981 Act and cannot have been the intention of Parliament.

69. In order to be a comprehensive code, section 53 had to include a power to add a public right of way not shown on the DMS where the evidence relied on is unknown or has not been considered. This may result in the correction of a previously mistaken decision. See *R v Secretary of State for the Environment, ex parte Sims and Burrows* [1991] 2 QB 354, per Glidewell LJ at 380E-G, 384H -385A; *Roxlena* per Lindblom LJ at [62] – [63].

70. I accept the Council's legal analysis, in preference to that of the Claimants. Therefore, I do not accept the Claimants' submission that Ground F1 discloses a serious and obvious error of law which gives rise to a compelling need to intervene by way of judicial review. In my view, what is now required is an investigation by the Council to find out why and on what basis the claimed footpath was included in the PMS in 1965, and why the Council subsequently accepted that no public right of way subsisted over this section of the claimed footpath. Was the Council aware of the 1827/1828 order at that time? The late evidence submitted by the Claimants on the final day of the hearing (which should have been disclosed by them at a much earlier stage in the proceedings), indicates that the

Council made enquiries, and decided not to contest the application for a declaration, but the reasons for this conclusion are not apparent. To my surprise, a week after the hearing had concluded, and without any prior warning to the Court or to the Defendant, the Claimants' solicitors applied to adduce yet further evidence which they had failed to disclose at the appropriate time. As I had already prepared my draft judgment by this time, and the Defendant had had no opportunity to consider this further material, I refused the Claimants' application. At an Inquiry, an Inspector will be able to examine all the evidence and make findings of fact. The Inspector will be able to determine the Claimants' point of law under the IA 1978, with the assistance of counsel, and his decision will be subject to the safeguard of a right of statutory review by the High Court.

Ground G

71. Under Ground G, the Claimants submitted that paragraph 65 of the OR erroneously referred to the lost modern grant doctrine in support of its recommendation, as the doctrine applies to private rights of way, not public rights of way.

72. The Council accepts that this was an error in the OR. However, it submits that it would not have made any difference to the eventual outcome. I agree. I think it is highly likely that the Panel made its decision on the specific evidence that the claimed footpath was a public right of way, not on the officer's observations in paragraph 65.

73. I do not consider that Ground G discloses a serious error of law which gives rise to a compelling need to intervene by way of judicial review.

Ground ZA

74. Under Ground ZA, the Claimants submitted that there was a significant gap of approximately 340 metres between points K3 and B1 on map MTR 9, appended to the report of Mr Rocks, in respect of which there was no evidence of the existence of the claimed footpath. Therefore, the Council erred in finding that there was evidence before them to support the conclusion that public rights of way existed over this gap.

75. The Council asked Ms Frost to investigate this issue and she concluded that there was indeed a gap in the evidence, as it did not cover the claimed footpath between points B and B1 (on the plan at Exhibit SF1 to Ms Frost's first statement). She calculated the length of the gap as approximately 300 metres. However, Ms Frost explained that a footpath was clearly shown on the OS maps of 1880 and 1902 running on the ground both before and after these points, and the alignment of the path remains unchanged. Therefore, it may be inferred that the claimed footpath continued over the gap, as it is unlikely that it simply came to a dead end in the middle of the countryside.

76. In my view, it is a matter for the Inspector to determine whether or not there was a continuous footpath running between points B and B1, having regard to the available evidence, and drawing such inferences as he considers appropriate in the exercise of his specialist judgment. An Inspector is better equipped to undertake this exercise than this Court. It is possible that further evidence on this issue will emerge prior to an Inquiry. I do not consider that Ground ZA discloses a serious and obvious error of law which gives rise to a compelling need to intervene by way of judicial review.

Application for permission to appeal to the Court of Appeal

100. The decision of Warby L.J on the Objectors' application will be found at pp.51-52.

101. As already indicated, the Objectors were claiming that Lang J. was wrong in finding (in effect) that the 1965 declaration under the 1949 Act (see p.50) did not survive the repeal of that Act by the 1981 Act. It follows from her admittedly preliminary ruling that the declaration made by SQS on 5 November 1965 under section 31(8) the 1949 Act did not have the effect mentioned in section 31(8) of that Act (which was to render such declaration conclusive of the matters stated in the declaration which would have meant, if Lang J was wrong about this, that there could be no public footpath between points D-C-P1-P2.

102. However, Lang J's finding about this was essentially a preliminary one as she ruled that a fuller investigation was still required by the Council to find out why and on what basis the claimed footpath was included in the preliminary map in 1965 and why the Council subsequently accepted that no public right of way subsisted over this section of the claimed footpath. Lang J noted that the evidence about this came late in the day and that fuller enquiries were needed for the reason why the Council chose not to contest the landowner's application for a declaration under the 1949 Act.

103. The Council's argument that the declaration made under the 1949 Act was no longer binding was based on subsections 16(1)(b)-(c) of the Interpretation Act 1978 which provides that rights acquired under a statutory provision survive a repeal of that provision unless the contrary intention appears in the later Act. Put shortly, it was the Council's case, which Lang J accepted, that the 1981 Act introduced a comprehensive and self-contained statutory code for the ascertainment of public rights of way over land and it replaced the statutory scheme under the 1949 Act. It followed that the Council was free to determine matters under section 53 of the 1981 Act as it saw fit on the evidence.

104. It was the view of Warby L.J that, as he put it, the evidence surrounding the making of the declaration by SQS in 1965 was unclear and that judicial review would not be appropriate to resolve such uncertainties which could only be dealt with in the statutory process under the 1981 Act (i.e. by way of a confirmation Inquiry). Warby LJ also considered that the route of the proposed footpath may not even be affected by the 1965 declaration which still needed to be plotted with precision at this stage of the process. He also considered that there were still, as he also put it, plausible arguments for and against the proposition that an order made under section 31 of the 1949 Act retains conclusive effect notwithstanding the repeal of that section by the 1981 Act. As he said: "There is no authority on the point and the answer is not self-evident or obvious on the face of the legislation". He considered that the point should be decided on a sound factual basis "rather than, as here, prematurely". For these reasons, Warby L.J found the Objectors' judicial review had no realistic prospects of success and there was no other compelling reason to hear an appeal on the point of law. He considered that the proposed review by the Council of its own decision was the appropriate course of action.

Representations received since the hearing in the High Court

105. The Area Footpath Secretary of Staffordshire Ramblers wrote to the Council on 22 February 2023 saying that she had been contacted by the Ramblers District Footpath secretary who is against the claimed footpath being added to the DMS. The letter noted that the proposed footpath:

> "… is not used by the locals, it is a contrived path that finishes on a very busy road with no pavement, and it passes through Home Farm. Connecting point C, via point B, to footpath Penkridge 43 at PO2 would be much more beneficial."

106. On 21 February 2023 the Parish Council Manager for Lapley, Stretton & Wheaton Ashton Parish Council wrote to the Council saying that the:

> "… would like to reiterate that they retain the view that the footpath should be added to the DM."

107. The Objectors (as landowners and occupiers of the majority of the land over which the proposed footpath passes) have put in a "Comments on Addendum Report" in a document settled by counsel dated 1 March 2023 which will be put to members of the Panel in advance of the meeting. They maintain their objection to the proposed modification order.

108 It is not proposed to deal with the above document in detail as it effectively rehearses points that were made in the course of the judicial review proceedings and were considered by Lang J. The Objectors' observations in relation to the 1827-1828 Orders, the Finance Act 1910 material and the Penkridge Parish survey records are all dealt with in the extract taken from Lang J's judgment and it is unnecessary to replay these matters. The case for a modification order is as summarised in this Addendum Report and it is for the Panel to come to its own conclusions about the evidence and whether it can be said to support a decision that the claimed footpath can reasonably be alleged to subsist.

109. The Council accepts that various aspects of the way in which the evidence was presented to the Panel on 16 July 2021 can no longer be maintained. These matters were put to Lang J whose view it was they did not warrant a compelling need for the court to intervene by way of judicial review.

110. The Council recognises that the initial report contained flaws none of which, in the writer's opinion, are likely to be sufficient to make any difference to the soundness of the existing decision in view of the way in which the Council now puts its case. For instance, the gap between points B-P1-B1 is admitted and is now plausibly explained in the new evidence of Shona Frost and will obviously involve fact-finding and resolving disputed interpretation of maps which are better suited to determination before a specialist Inspector at an Inquiry.

111. The Objectors contend that the Panel (see para 7):

> "… must determine afresh whether it considers that a public right of way can reasonably be alleged to subsist over the claimed path as a whole".

It is not accepted that the Panel is obliged to start again from scratch. The process envisaged by the Undertaking given by the Council to Lang J is that the Council should "review" its previous decision in light of the further evidence and submissions made in the course of the judicial review proceedings, along with the findings of the court and any later representations or objections. It is not a re-hearing but a review. In the writer's view it would not be in the interests of good administration for the Panel to be invited, in effect, to second guess the outcome before a specialist inspector at an Inquiry. The reality is that since the hearing three experts have looked into this application since July 2021 and it would neither be sensible nor practical for this Panel at a review hearing to enquire in detail into matters which will be dealt with later. The only decision for the Panel is decide whether it is reasonable to allege that the claimed footpath "subsists or is reasonably alleged to subsist" (see para 21 above) in circumstances where the Council's duty does not require it to investigate matters in greater depth and detail than it reasonably judges to be necessary.

112. It is the view of the Objectors that the Panel should take into account that there is no direct evidence of actual public use and that this:

"weighs heavily against the overall inference that a public right of way subsists over the claimed footpath."

In the writer's view this is not a compelling point as the application is based on the older documents and not on user sufficient to support an inference of dedication unless there is sufficient evidence to the contrary. The Panel no doubt has ample experience of such cases. Reference should be made to para 24 above where it is stated that the fact that a claimed footpath may have fallen into disuse cannot remove the legal status of the land as a public highway until such time as it has been lawfully stopped up or diverted. The rule is "once a highway, always a highway".

113. As has previously been indicated, the Objectors' counsel deals at some length with the Penkridge Parish Survey records on which the Council no longer relies. The relevance of much of this is now questionable in view of the fact

that the Council no longer relies on this material to justify the order made, the focus by Lang J on why and on what basis the footpath between C-B1-P1-P2 was included on the provisional map in the first place in 1965, and why the Council accepted that no public right of way subsisted between these points. It is suggested that this is a matter for an Inspector at an Inquiry and involves a level of investigation which, in the writer's view, need not pre-occupy the Panel at this stage of the process.

114. Lastly, the Objectors' counsel challenges the inclusion of the Finance Act 1910 material to support a right of way between B1-C. He suggests that there is another footpath within the H610 land which also crosses three fields shown on the OS mapping at p.2 between points P-Q-R-T-U.

115. Ms Frost was asked by the Objectors' counsel before the High Court hearing to show the competing path claimed by the Objectors running across three other fields (i.e. other than the three fields passing between B1-C-D on p.44) and she did so at points P-Q-R-T-U on the plan at p.47 (see also p.44 which is similarly marked with these points). As has previously been indicated, if reference is made to these plans one sees that there are admittedly three fields between points P-Q-R-T-U but the footpath crosses only one field within the H610 land (i.e. between points P-Q-R). This can clearly be seen on the plan at p.44. The Objectors' counsel is therefore right when he says that the Finance Act 1910 material is only supportive of the claimed footpath between points B1-C.

Conclusions

116. The Objectors' counsel is obviously right when he says that the evaluation of the evidence is for the Panel and not its advisers. The Panel need scarcely be reminded about this. It is though appropriate that the writer offers his advice to the Panel on the approach which should be adopted to the evidence which is now before it.

117. Clearly the Panel must reach its own conclusion on the weight which should be attached to the fact that the Objectors failed to persuade the Court to

quash the Panel's previous decision. Both Lang J and Walby L.J took the view that it would be appropriate for the disputed factual issues to be resolved by an Inspector appointed by the Secretary of State under the process laid down for this in Schedule 15(7) to the 1981 Act which obliges the Council to submit the opposed order to the Secretary of State for confirmation by him at an Inquiry held by a specialist Inspector who would be able to determine the Objectors' point of law with the assistance of counsel. It is certainly arguable that the approach of the court implies that the order made by the Panel can be justified on the basis of the evidence which is now available to the parties. In other words, that a public right of way can reasonably be alleged to subsist between points A-B-C on the plan at p.2.

118. Neither judge criticised the actual decision of the Council nor found that it disclosed any serious and obvious errors of law which would have given rise to a compelling need for the Court to intervene by way of judicial review. Both judges were clearly of the view that the matter warranted a determination before a specialist inspector at an Inquiry which can only be achieved once the order has been made in which case it becomes subject to confirmation by the Secretary of State, that is, if the objection to the making of the order persists.

119. The making of the modification order is only the first stage in a legal process which now moves on to the confirmation stage. An Inquiry will be held and if the Objectors are still aggrieved by the outcome of the Inquiry they may still apply to the High Court for a statutory review.

120. It will be recalled from the case of *Roxlena* (see para 25) that the order-making part of the process is less intense than the approach to be applied at the stage of confirmation where disputed evidence can be thoroughly tested at an Inquiry. It was said in *Roxlena* that the "margin of appreciation" in such cases is a generous one and that the Council's duty to 'investigate' under Sched.14, para 3(1)(a) did not require it to investigate a particular matter in greater depth and detail than it reasonably judged to be necessary. In the view of the writer the review process achieves this outcome.

121. The writer is able to advise that the Council would be acting lawfully if it confirmed the decision made by the Panel on 16 July 2021 for the reasons set out in the Addendum Report. The writer considers that it would be reasonable for the Panel to find on the evidence summarised in the Addendum Report that the claimed footpath “subsists or is reasonably alleged to subsist” over the relevant land within the meaning of section 53(3)(c)(i) of the 1981 Act and should be added to the DMS.

122. If the Panel decides to take this course the order should be drawn up and the publicity provisions contained in para 3 to Schedule 15 followed. Schedule 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 must also be followed. This Schedule contains additional provisions in relation to the making, submission and confirmation of modification orders. Of particular interest is the regulation which requires the Council to provide a statement of grounds on which it considers that the order should be confirmed. The Council must also provide its observations on any representations or objections which have been made in respect of its order.

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INDEX TO BUNDLE OF ACCOMPANYING DOCUMENTS