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