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

SECOND OBJECTION

On behalf of the Midlands Partnership NHS Foundation Trust

Introduction

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

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

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

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

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

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

The Test for Common Law Dedication

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

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

The Law

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

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

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

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

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

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

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

Applying the law to the facts

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

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

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

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

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

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

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

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

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

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

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

The Trust Land As Owned By A Public Body

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

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

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

"Non-Relevant" User Evidence

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

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

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

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

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

The Weight Given To The Evidence Forms

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

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

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

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

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

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

Fair Process

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

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

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

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

It would be unfair to discount existing evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32. The Council must, therefore, either:

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

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

Overall conclusion on the fairness point

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

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

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

Conclusion

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

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