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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

END