

**In the matter of Stretton to highway east of Bickford Grange Farm,
Alleged Public Footpath**

LANDOWNERS' RESPONSE TO REPORT

Introduction

1. Mr Piers Alastair Carlos Monckton and the Somerford Home Farm partnership (together “the Objectors”) continue to object to the proposal to add the proposed Route to the Definitive Map.
2. The Report to Panel (“the 2021 Officer Report”) suggests that the Panel should accept the application. The 2021 Officer Report followed a previous Report to Panel (“the 2019 Officer Report”), which had also suggested that an order should be made. The Objectors disagree, and contend that the application should not be accepted.
3. The 2021 Officer Report considers that there are different reasons for its conclusions for the northern part of the Route (shown as B-C on the plan) to those for the southern part of the Route (shown as A-B). This Response will consider those elements separately.
4. The 2019 Officer Report states at para. 37 that the basis of the application is under s.53(3)(c)(i) of the Wildlife and Countryside Act 1981, namely “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows...that a right of way which is not shown in the map and statement 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...”. Whilst the Objectors understand that the application is not on the basis of 20 years’ use under the Highways Act 1980, the evidence must still indicate either an express or implied dedication, or some other lawful way in which a highway had come into existence.
5. The application and 2021 Officer Report are each notably silent as to the basis on which it is thought that a public right of way on foot over the Route is alleged or reasonably

alleged to have come into being. This is a significant flaw. There is no evidence of long public user without interruption and, without that evidence, the burden of proving the dedication of a right of way falls upon those asserting it.¹ It is essential to such an allegation that it must be identified when the inferred dedication is said to have arisen just as it is essential to a claim under s.31 of the Highways Act 1980 to identify the date on which the way was called into question². It must also be shown that any historic user is more likely to be referable to a right of way which had been dedicated and accepted (potentially at a time³ where such acceptance resulted in the costs of maintenance being transferred to the parish) than to tolerance or permitted user.

6. As part of any case founded upon common law dedication, it must be shown that the landowner had capacity to dedicate the land at the relevant time. Where the land was held under a copyhold tenure for the relevant period it must be inferred that not only the copyholder but also the lord dedicated the land. If the land was held subject to an entail for the relevant period there will be no capacity to dedicate a way in perpetuity because (i) the estate would revert to the grantor upon failure of issue and (ii) the owner would have no power to do something which would prejudice the rights of his lineal descendants. The Objectors believe that the land has also been held entail for significant periods of time which may provide a full answer to the application. Further, while it is accepted that the land does not appear to have been held under copyhold at the time of the Finance Act records (although the 2021 Report is simply incorrect to suggest at para.70 that if it had been it would not be possible for the landowner to claim deductions for public rights of way⁴) it may have been at an earlier period. It is not possible for the Applicant to demonstrate capacity without identifying the period where he says dedication can be inferred to have taken place.

¹ See *Easteye Ltd v Malhotra Property Investments Ltd & Ors* [] at 18

² Ibid at 298-302

³ If prior to the Highways Act 835

⁴ S.40 of the Finance (1909-10) Act 1910 made express provision for the calculation of values for copyhold land. These allow deductions to be made as with freehold land but subject to an allowance for the cost of enfranchisement.

The Northern Element

7. The Officer Report appears to rely on two elements to support an order being made in relation to the northern part of the route: material arising from the Finance Act 1910 and the Parish Surveys.

Parish Surveys

8. Dealing first with the Parish Surveys, the 2021 Officer Report accepts at para. 32 that the parish survey record cards “varied in their quality”. The evidence appended to the Report must be viewed as of the very lowest quality. There is a map, in which there may appear to some reference to the northern part of the Route with an objection. It is not clear what this objection is, nor why it was made.
9. At para. 34, the 2019 Officer Report states:

“Part of the alleged route was not included on the first Definitive Map due to the objections. Objection number 1067 omitted part A-B of the alleged route. The Survey Map shows counter objections however the route in question was omitted without counter objections.”
10. At para. 35, the 2021 Officer Report states “[t]here was an objection received regarding the omission of the alleged route. As a consequence of this the route was then added on the Parish Survey as a Footpath”. However:
 - (1) the reasoning behind the objection has not been provided;
 - (2) there is no detail about the consideration of the objection and its inclusion onto the Parish Survey;
 - (3) the Route was not included on the Definitive Map.
11. The Parish Survey provides no material support to the Application.

Finance Act 1910

12. The Officer Report relies upon documents from the Finance Act 1910 to justify the approval of the Application as it relates to B-C. With respect, this reliance is not well-founded.

13. The northern part of the Route is found within Hereditament 610. On the first page of the Field Book entry for Hereditament 610 includes the following entry for Fixed Charges, Easements, Common Rights and Restrictions:
- “Public rights of road over 3 fields Use for surface water from road into drain ? meadow at Bickford”
14. When calculating valuation, on the second page it includes for “Charges, Easements, and Restrictions affecting market value of Fee Simple”:
- “Public path across fields as on Ord. Map”
15. On the third page, there is a drawing of buildings. At the southern end, the “Road” is marked.
16. On the fourth page, there is a deduction in relation to Public Rights of Way or User of £20. In pencil, there is also an entry for £20 for Restrictions. These two entries amounted to the same thing: the total deductions were £890, which included Tithe or Tithe Rent Charge of £870.
17. The Finance Act 1910 maps show markings labelled “F.P.” in the north of Hereditament 610. These relate to a path which splits into two (“the Northern Path”). The Northern Path is now shown on the Definitive Map as Penkrige 0.1038 and Penkrige 0.1040.
18. The Objectors make the following observations:
- (1) Nowhere in the Field Book entry for Hereditament 610 is it said that the Public Right of Way is the Route;
 - (2) The “Charges, Easements and Restrictions affecting market value of Fee Simple” on the second page are a subset of the “Fixed Charges, Easements, Common Rights and Restrictions” on the first page, those on the second page being those which affect market value of the Fee Simple;
 - (3) There is only one Public Right of Way referred to, this being the “road” or “path”, referred to on the first and second pages;
 - (4) The entry for “Fixed Charges, Easements, Common Rights and Restrictions” on the first page is referring to an area at Bickford; the Northern Path but not the Route is at Bickford;
 - (5) The road is shown as being to the south of the buildings on the third page;

- (6) The buildings shown on the third page are immediately to the north of the Northern Path;
 - (7) The fork of the Northern Path going east-west connects two more major routes, going across three fields between Bickford and Whiston Hall;
 - (8) The road/path referred to in the record of Hereditament 610 is the Northern Path; it is not the Route.
19. Therefore, the Finance Act evidence does not support the inclusion of Part B-C of the Route as a public right of way.
20. Finally, the Objectors would observe that para. 54 of the 2021 Officer Report appears to have direct quotation from the Applicant, but without quotation marks or it being clear that what is said is a quotation. The Objectors do not seek to impugn the independence or impartiality of Officers, but it is inappropriate to have unacknowledged quotation, particularly of views expressed in the first person (“I disagree”) set out in a report to Members. Furthermore, the “Comments on Evidence from the Landowner”, addressing the Objectors’ 17-page submissions from July 2018, extends to about half a side. The “Comments from the Applicant on the Landowner Evidence”, addressing about 5 pages from the Applicant in December 2018, extends to two sides.

The Southern Element

21. For the Southern Element of the Route (running from A-B), the Officer Report relies upon an Order from 1827. For the Southern Element, the Officer Report does not rely upon the Parish Survey, nor upon records from the Finance Act 1910. However, that does not mean that such material is irrelevant. As will be shown, the 1827 Order did not create a public right of way but merely ensured that any existing rights would not be stopped up. At its highest, it could be considered as evidence that it was believed at that time that a “right of footway” existed. However, this needs to be balanced against (i) the ambiguities in that evidence (which are explained further below) and (ii) the inconsistency of that evidence with other material such as the Parish Survey and Finance Act 1910 records. If those records do not show the Route this does not mean that they are irrelevant to the question of whether there is such a public right of way. The fact that they do not show it

may indicate that there is no such public right of way. Put another way, if such evidence as there is does not support, it may undermine.

22. In relation to the Parish Survey, no public right of way was marked along the Southern Element. There was no objection to this omission referred to by the Council or the Applicant. This is relevant to the question of whether there was a public right of way across the Southern Element. It indicates that the public did not consider that there was a public right of way over the Southern Element. This undermines the argument that there was such a right of way.

23. The 2019 Officer Report stated:

“The 1910 Finance Act was enacted in order to allow for tax to be levied on land based upon the difference between its 1910 valuation and the amount that resulted from any eventual sale or transfer. It was therefore important to the landowner that any deductions for factors that could affect the value were properly recorded and accounted for.”

24. This important passage was omitted from the 2021 Officer Report. It is not clear why. In relation to Finance Act 1910 evidence, the 2021 Officer Report states at para. 39:

“Officers do not require the Finance Act material to support part A-B of the route, as stated above the 1827 Quarter Sessions Order supports this part. And so, the objectors’ comments on plot 1268 are irrelevant.”

25. With the greatest of respect to Officers, this is unsustainable. Hereditament 1268 includes the Southern Element of the Route. No deduction is made in relation to public rights of way for Hereditament 1268. This is not irrelevant. It does not support the existence of a public right of way over the Southern Element. It actively indicates that there was not such a public right of way. It is not acceptable, as a public authority, to ignore evidence just because it is contrary to a preliminary view formed. This is made no better by para. 57 of the 2021 Officer Report, which states that Finance Act evidence “does not support this part of the route”.

26. With respect, the Officer Report is fundamentally flawed on the basis of this selective approach to evidence.

27. The evidence on which the Officer Report does rely in relation to the Southern Element is the 1827 Quarter Sessions Order. This does not support the Southern Element as a public right of way.

The Quarter Sessions Evidence

28. The 1827 Quarter Sessions Order states:

“...having also upon view found that a certain part of another Highway in the said Parish communicating between the [roads] from the Crown Inn and Round Oak [Inn Stretton from the point marked C on the said plan to the opposite point also marked C on the same plan for the length of 435 yards or thereabouts is also useless and unnecessary and having also upon view found that a certain there part of another Highway in the said Parish leading from Stretton to Congreve from the point marked B on the said plan to the points marked F on the same plan for the length of 1,909 yards or thereabouts is also useless and unnecessary... We do therefore order that there said several Highways, bridleways and footways hereinbefore described and which are respectively coloured on the said plan blue be forthwith stopped up. (But subject to a right of footway from the point marked C to the point marked K on the said plan).”

29. On its face, this Order stops up certain routes. It does not affect a right of footway from C to K. This does not mean that there was such a right of footway from C to K. That was not the public law decision which the Quarter Sessions was making. It was deciding to stop up certain public rights. It did not interfere with certain rights of footpath from C to K, if they existed. This is not a finding that there were such rights.

30. That this is so is reinforced by the fact that the Plan with the Order includes no fewer than three points marked K. If the Order was conclusively finding that there was such a right, then it would be need to be clear as to what the extent of the right was.

31. This interpretation of the Order on its face is supported by the confirmation decision made by the Quarter Sessions in the Epiphany Session 1828. This confirmation decision makes no reference to a right of footway. This indicates:

- (1) That the 1827 Order was not deciding that there was such a public right of way;
- (2) There was not in fact such a public right of way.

32. In any event, at very most the reference to the route between C and K can only be referring to the southern point marked K. The distance between the southern point K and the other points marked K has nothing to do with the Order, which concerned stopping up. The reference on the Plan to “those [parts] coloured Brown & Red are intended to remain open” does not indicate that any public law decision was being made in relation to the brown parts. There is a reference only to an intention. The Order made no difference in relation to those parts.

33. Since the building of the Lodge and bridge over the moat/lake towards the southern extent of the Route, the bridge has been kept locked. There is no evidence of historic objection to this, whether by private citizens or public authorities. Given the likely involvement or knowledge of public authorities in these works, there would have been such an objection if the locking of the gate interfered with a public right of way. The 2019 Officer Report states that extracts from family memoirs and a timeline of Stretton is of very limited evidential value “as it is someone’s opinion”. Section 53 of the Wildlife and Countryside Act 1981 requires all evidence to be considered by the Council. It is difficult to see why historical memoirs should be less reliable than a historical map. In the 1884 OS map submitted with the Applicant’s letter dated 5 December 2018, there is a solid line marked immediately north of the bridge.
34. The Applicant appears to argue that the start of the Route and the bridge are themselves adopted highway. If this was the case, then the installation of a bridge would be expected to be addressed in records of the Parish. No such records have been provided by the Applicant.
35. Edward Monckton was a Justice of the Peace in 1846. In 1873, Francis Monckton can be seen to be aware of the requirements of the highways legislation. This is not a family which would have unlawfully blocked a public right of way. This suggests that there was no such right.

The Map Evidence

36. The Stretton Estate Map of 1766 does not show a route proceeding to the north of the southernmost point K marked on the 1827 Order map. Likewise, the 1721 Map does not show a route continuing north from the southernmost point K marked on the 1827 Order Map.
37. The 2019 Officer Report states that maps which show only physical features are of limited evidential value. This is correct, insofar as what is being considered is the status of a route.

Conclusion

38. For these reasons, and those set out in previous submissions by and on behalf of the Objectors, the application should be dismissed. The evidence is insufficient, and insufficiently precise, to demonstrate a reasonable case that a public right of way over the Route subsists.

Matthew Dale-Harris

Landmark Chambers

2 July 2021