

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Monday 16 May 2022 at the Cabinet Suite - Shire Hall, Gloucester.

PRESENT:

Cllr Phil Awford (Chair)	Cllr Robert Vines
Cllr Beki Hoyland	Cllr Susan Williams
Cllr Mark Mackenzie-Charrington	Cllr Dr David Willingham
Cllr Graham Morgan (Vice Chair)	

Officers:

Alan Bently, Principal PROW Officer
Clare Bonser, Lawyer
Andrew Houldey, Asset Data Officer (PROW Definitive Map)
Jaci Harris, Asset Data Officer (PROW Definitive Map)
Rachel Russell, Asset Data Technician
Joanne Bolton, Democratic Services Adviser

Apologies:

Cllr Alex Hegenbarth, and Cllr Dom Morris

8. MINUTES

Resolved

That the minutes of the previous meeting held on 29 March 2022 be approved as a correct record.

9. DECLARATIONS OF INTEREST

No declarations of interest were made.

At this juncture, Cllr Dr David Willingham informed the Committee that he had undertaken an independent informal site visit on Thursday 12 May 2022.

10. PUBLIC QUESTIONS ON APPLICATION(S)

No public questions had been received on the application before the Committee.

11. MEMBER QUESTIONS ON APPLICATION(S)

No questions from members had been received on the application before the Committee.

12. 573/11/147(11) APPLICATION FOR A MODIFICATION ORDER TO ADD A PUBLIC FOOTPATH CONNECTING SPINNEY COURT WITH THE ROUNDABOUTS, BRIMSCOMBE, MINCHINHAMPTON PARISH

12.1 Jaci Harris, Asset Data Officer (PROW Definitive Map), gave a detailed presentation to the Committee aided by a PowerPoint presentation, which included

photographs of the claimed route under consideration. *(For information: A copy of the presentation slides has been uploaded to the Council's website.)*

- 12.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) to add a public footpath connecting Spinney Court with the Roundabouts, Minchinhampton Parish. The claimed route was shown running between points A and B, on the Plan attached at Appendix JH2 to the report.
- 12.3 The Asset Data Officer informed the Committee that it was not clear as to who owned the land over which the claimed path crossed. The applicant had therefore been authorised to erect impersonal notices to 'Owners and Occupiers', to notify anyone with an interest in the claim. Land Registry showed part of the claimed path as unregistered and part within the curtilage of No.5. Weavers Row. This was shown to be incorrect however by means of a conveyance plan, dated 12 August 1971, which showed the claimed path excluded from the curtilage of No.5 Weavers Row.
- 12.4 The Asset Data Officer explained that in an aim to ascertain who the landowner was, Stroud District Council's historic 'Permission for Development' notices had been inspected over the period July 1965 - July 1995. An application dated 1 February 1971, had been identified as being submitted by Hatherley Developments Ltd. Certificate A, which formed part of the application, declared that Hatherley Developments Ltd was the landowner. The accompanying site plan encompassed Weavers (originally Church) Row, the garages, Spinney Court, and the claimed path. Although the application did not refer to the steps or the claimed path, an accompanying plan under the same application reference, showed manholes and storm water drainage pipes located under the claimed path which was shown having a series of steps. The Asset Data Officer clarified that Hatherley Developments Ltd could be found online today but as a business it only dated to May 2010.
- 12.5 The Asset Data Officer informed members that Hatherley Development Ltd submitted Spinney Court and the claimed path for adoption as publicly maintainable highways in the 1970s under Sections 38 and 39 of the Highways Act 1959. Spinney Court was accepted as detailed in the letter of adoption dated 12 January 1978, but the claimed path was rejected for adoption. The Asset Data Officer explained that it was unclear whether anyone associated with Hatherley Developments Ltd retained a legal interest in the land that the claimed path crossed.
- 12.6 The Asset Data Officer advised the Committee that there was no explicit reference in Section 31(1) Highways Act 1980 of use having to be of a level to have come to the attention of the landowner. It did not speak of a landowner being deemed to have dedicated the way, but of the way being deemed to have been dedicated, i.e., irrespective of the existence or non-existence of a person capable of dedicating the paths. She clarified that not knowing the identity of the landowner would not prevent the application from succeeding.

- 12.7 The Committee was informed that the path was inspected on 10 November 2021 and was re-inspected again a few days before the Committee meeting. The path was found to consist of intermittent sets of double concrete steps with an approximate width of 1.5m between the boundaries of Laburnum Cottage and No.5 Weavers Row. The Asset Data Officer explained that three of the steps were breaking away, were in a poor condition and needed attention.
- 12.8 The Committee was informed that there was minimal supporting documentary evidence of the claimed path. The path was not identified on any maps and was not claimed as part of the National Parks and Access to the Countryside Act 1949 process. The Committee's determination of the application would therefore be predominately based on the user evidence presented.
- 12.9 The Asset Data Officer explained that a letter issued by the County Surveyor at Gloucestershire County Council, dated 12 January 1978, to Hatherley Developments Ltd of 48 London Road, Stroud, recorded that Spinney Court, Burleigh was "adopted as maintainable at public expense" under the statutory provision of the Highways Act 1959. However, a comment was added; "*This does not include the steps down to the existing county road which are not in an acceptable condition for adoption*". The claimed path was not recorded on the List of Streets (record of publicly maintainable highways).
- 12.10 The Asset Data Officer reported that one of consultation responses received from Mr Amor of Laburnum Cottage, via email dated 22 February 2021, provided background information on the claimed path. This corroborated that the claimed path was subject to an official adoption process but was rejected for adoption as a publicly maintainable highway on the List of Streets.
- 12.11 The Asset Data Officer explained that where no action was taken to question or challenge the public's use of the path, as with this DMMO application, Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) provided that the date of the application could be used in accordance with paragraph 1 of Schedule 14 to the Wildlife & Countryside Act 1981. The user evidence would therefore be assessed over the 20-year period 1999-2019 leading up to the application.
- 12.12 The Asset Data Officer drew members' attention to the summary of the user evidence forms at Appendix JH6. She reported that 15 Public Path Evidence Statements (PPEs) were completed by 15 individual members of the public in support of the application. All 15 individuals claimed use of the path over part or all of the 20-year qualifying period. Use dated back to 1976 on foot. A total of 3 individuals claimed use of the path over the whole 20-year qualifying period, 4 individuals claimed use of the path over a 10-20-year period and the remaining 8 individuals claimed less than 10 years use. She advised members that with regard to sufficiency, it was held in *Mann v Brodie* 1885 that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. In a semirural area such as this, it would be generally accepted that the amount of use of a way may be less than a way in an urban area.

- 12.13 The Committee was informed that for a claim to give rise to a presumption of dedication, user must be without force, secrecy, or permission. Use that complied with those three requirements was termed user 'as of right'. There was no evidence that use was by force or by secrecy. With regard to use by permission, one individual, in response to Q.15 in their PPES, stated that part of her use of the path was because of a "Private right of way as granted in the title to 1 Weavers Row, Walls Quarry, Brimscombe, GL5 2 PX". The Asset Data Officer explained that an easement, described in the conveyance document, was conferred on all 5 properties making up Weavers Row granting a private right of access across the rear of the properties to the claimed path. It did not include the path itself and therefore this would not constitute permission capable of rebutting the claim.
- 12.14 The Asset Data Officer advised the Committee that when applying the relevant case law, the use of the claimed path was sufficient to raise a presumption of dedication as a public footpath.
- 12.15 The Committee was informed that some of the individuals whom submitted PPESs had commented in their forms about the poor condition of the steps. The Asset Data Officer explained that with regard to maintenance, she had contacted Mr Morriss (representative of the applicant), and Mrs Newby who had submitted a PPES and who lived within metres of the path, to ask them whether they knew of anyone who had maintained the path over the years. They both independently commented that local people had kept the steps clear of brambles and nettles but no one had maintained the steps.
- 12.16 Members were reminded that as part of their determination of the application, they could not consider issues such as suitability, desirability or safety. Their determination must be solely based on the user and documentary evidence presented. Similarly, the question of future maintenance was irrelevant for the purposes of determination; however, it was important from a legal perspective so that Gloucestershire County Council as the Highway Authority could make informed responses or decisions in regard to any future queries or claims concerning liability or maintenance affecting the path.
- 12.17 The Committee was informed that Sections 38 & 39 of the Highways Act 1959 introduced a new procedure for establishing public paths (footpaths & bridleways) and roads which would be formally adopted as public highways, maintainable at public expense. They were to be recorded on the List of Streets, a public record all highway authorities were required to maintain. This document although conferring a permanent right of way for members of the public to pass and repass along a defined route, was merely a record of public maintenance liability and inclusion of a way gave no guidance as to the nature of the rights that existed over it (other than the fact that inclusion on the list proved that at least a right of way on foot existed). Sections 39(2) & (3) required that such ways were "*of sufficient utility to the public to justify its being maintained*" and "*made up in a satisfactory manner*".
- 12.18 The Asset Data Officer reported that the Definitive Map, unlike the List of Streets, provided legally conclusive evidence of its status (as provided by statute) compiled by means of records and evidence of public use, which may or may not be publicly

maintainable. It was important to recognise that most paths added to the Definitive Map would be publicly maintainable; however, some would be privately maintainable and some would have no designated maintenance responsibility at all. The claimed path was rejected for adoption on the List of Streets; however, this would not preclude either a statutory claim of express or presumed dedication, or a claim of inferred dedication of a path to be added to the Definitive Map as a public footpath.

- 12.19 The Committee was informed that if it considered that highway rights subsisted resulting in the direction that an order be made to add the claimed path to the Definitive Map, it should be noted that the path would not be added as publicly maintainable for the same reason that it was rejected previously; 1) public rights along this path had come into being post 1959 when criteria for paths proposed to be adopted as publicly maintainable was introduced, 2) the steps were still not considered to be of an acceptable standard for adoption.
- 12.20 Cllr Dr Willingham explained that during his site visit he had not noted any signs to indicate that people should not use the path. The DMMO application notices were present at both the top and bottom of the path and clearly visible. There was a lamp post located at the corner of the path where the steps did a 90 degree turn. He had checked on the "FindIt_pub" Gloucestershire County Council (GCC) mapping application which confirmed that reference: GCC Column number 00005 Spinney Court, was GCC owned and maintained. He had noted that the streetlight was designated to illuminate the path at Spinney Court rather than on the Roundabouts. He commented that it seemed odd that GCC would light a private way. He questioned whether these should be a material consideration that the Committee should take into account in its determination of the application.
- 12.21 Cllr Dr Willingham reported that the lower steps were in a poor condition and were obstructed to a degree by vegetation making them difficult to navigate. He had noted the presence of either a sewage or storm drainage inspection cover on the lower part of the steps and questioned whether this would place any liability on the statutory undertaker concerning any maintenance of their facility, and ultimately whether this was a material consideration that the Committee should take into account in its determination of the application.
- 12.22 In response to Cllr Dr Willingham's comments and questions, the Asset Data Officer explained that under the planning application dated 1 February 1971, the accompanying plan showed manholes and storm water drainage pipes located under the claimed path. She informed members that the streetlight had had been put in place by GCC in 1960 at the behest of Minchinhampton Parish Council, and that it was erected before the path was upgraded to form the steps that were present today. The presence of a streetlight and manhole cover on the path were not an indication of the path being publicly maintainable.
- 12.23 In response to a question, the Asset Data Officer explained that a decision as to whether the path would become publicly maintainable in the future may be taken by officers at a later date - discussions were ongoing and the Parish Council had indicated that it wished to undertake maintenance work on the path, if the path was

added to the Definitive Map. The Asset Data Officer emphasised the point that whether the path was maintained by GCC as public highway in the future was not a matter for consideration by the Committee.

- 12.24 The Asset Data Officer informed members that consideration needed to be given as to whether there was evidence of a lack of intention to dedicate a public right of way. The 'sufficient evidence' must be inconsistent with an intention to dedicate, it must be contemporaneous, and it must have been brought to the attention of those people concerned with using the way. None of the 15 individuals supplying evidence of their use noted stiles, gates, notices, or obstructions along the path and there was no evidence that anyone was challenged or verbally turned away.
- 12.25 The Asset Data Officer explained that although it was not known whether anyone associated with Hatherley Developments Ltd, retained an interest in this land over the 20-year period being considered for the application (1999-2019), it was important to remember that this company tried to expressly dedicate it as a public highway in the 1970s. She advised members that there was no evidence to indicate the landowner's lack of intention to dedicate the path as a public right of way.
- 12.26 The Asset Data Officer concluded her presentation by advising members that in her view it was submitted that the path was deemed to subsist and must now be protected by being recognised on the Definitive Map as a public footpath.
- 12.27 In response to a request for further clarification on the matters that were the subject of the Committee's consideration, the Asset Data Officer reiterated that whether the path became a publicly maintainable path, or not, (if an order was made to add the claimed path to the Definitive Map) was not a matter for consideration by the Committee.
- 12.28 Cllr Dr David Willingham reported that there were no signs at the bottom or at the top of the path to indicate that people should not use the path. It was accessible and he had not been challenged when walking the path. He referred to Hatherley Developments Ltd attempt to have it dedicated as a public highway, the streetlight being owned and maintained by GCC illuminating the path, and the user evidence being sufficient, and stated that he supported the recommendation in the report to add the length of path to the Definitive Map. He commented that he would be keen for officers to liaise with Stroud District Council, and also Minchinhampton Parish Council, in an aim to determine who held the land ownership rights. He acknowledged that this may be difficult to ascertain given the length of time that had passed. The Chair advised that this was not a matter for consideration by the Committee.
- 12.29 The Asset Data Officer referred to the first page of the report which stated "*If the application were to be successful, the path would not become maintainable at public expense*". She advised that this was how it would currently be recorded within Highway Records. If, however, at some point the path did become publicly maintainable then officers would need to change that designation.

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12.30 Having considered all of the information before it, the Committee:

Resolved that an order be made to add a length of public footpath to the Definitive Map of public rights of way between points A and B.

13. PUBLIC QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

No public questions had been received on the powers and duties of the Committee.

14. MEMBER QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

14.1 Three questions had been received from Cllr Dr David Willingham. A copy of the questions and answers had been circulated and uploaded to the Council's website.

The Committee noted the questions and answers.

14.2 Cllr Dr Willingham commented that the amount of work the officers had to undertake to bring DMMO applications forward for determination, whether under delegated authority or to the Committee, was not inconsiderable. As a supplementary question, he asked whether, given the rate at which applications were being received by GCC, the rate at which they were being determined and the amount of applications that were currently undetermined, the Chair would be willing to write to the Cabinet Member responsible for Public Rights of Way to highlight the issue that more resources were needed for the team, to enable the applications to be dealt with more quickly. He commented that from his point of view he represented an urban division, and ramblers had connected with him about issues in his area; however, this would to a greater extent affect the rural population given that Gloucestershire was predominately a rural county. He commented that some people were waiting a considerable number of years for determination of their application, and therefore it was right to ask for more resources to be provided. He asked whether the Chair could write to the Cabinet member on this issue and provide feedback on any response at a subsequent meeting.

14.3 The Chair informed the Committee that he had not previously written to the Cabinet Member on an official basis, but that he had raised this issue with him verbally. The Chair pointed out that it was only a small team that dealt with DMMOs and therefore it was unlikely that the backlog of undetermined DMMO applications could be cleared in the near future. He also pointed out there were recruitment challenges, and that this was a national issue. He confirmed that he would make contact with the Cabinet Member to raise the issue of resources. He also suggested that it would be of value for the Cabinet member to be invited to observe a future meeting of the Committee.

14.4 Andrew Houldey, Asset Data Officer, reported that funding had been allocated for the provision of two additional fixed term posts – one Asset Data Officer, and one Asset Data Officer Technician. He explained that there had been an increase in the number of DMMOs being received recently. This was in response to the 2026

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deadline to record historic footpaths and bridleways on the Definitive Map. The 2026 deadline had now been informally abandoned, but it had raised interest and therefore DMMO applications were continuing to be received by GCC.

- 14.5 A member questioned whether the DMMO application before the Committee, could have been determined by officers, outside of the committee process, under delegated powers. In response, Andrew Houldey, Asset Data Officer, explained that in other authorities DMMO applications were almost always dealt with by officers under delegated powers. A GCC internal protocol for the determination of applications had been in place for a number of years. Applications that were based solely on documentary evidence were determined by officers under delegated authority. Applications that were based solely on user evidence would go forward to the Committee for determination. Where the evidence was a mix of both user and documentary evidence those applications would also come before the Committee for determination, on the basis that it would be of value for the evidence to be presented by officers and debated by the Committee.

CHAIR

Meeting concluded at 10.45 am