

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Friday 4 October 2019 at the Cabinet Suite - Shire Hall, Gloucester.

PRESENT:

Cllr Phil Awford (Chair)	Cllr Graham Morgan
Cllr David Brown	Cllr John Payne
Cllr Dr John Cordwell (Vice-Chair)	Cllr Brian Robinson
Cllr Carole Allaway Martin	Cllr Robert Vines

Substitutes: Cllr David Brown

Apologies: Cllr Loraine Vivienne Patrick; Cllr Simon Wheeler

11. MINUTES -

Resolved

That the minutes of the previous meeting held on 21 June 2019 be approved and signed as a correct record.

12. DECLARATIONS OF INTEREST

No declarations of interests were made.

13. PUBLIC QUESTIONS ON APPLICATION(S)

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

14. MEMBERS QUESTIONS ON APPLICATION(S)

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

15. APPLICATION FOR A MODIFICATION ORDER TO ADD A LENGTH OF PUBLIC FOOTPATH CONNECTING MOUNT PLEASANT AND VAN DER BREEN STREET, BISLEY, GLOUCESTERSHIRE

15.1 Jaci Harris, Asset Data Officer (PROW Definitive Map), gave a detailed presentation to the Committee aided by a power-point presentation, which included photographs of the claimed route under consideration. *(For information – A copy of the presentation slides is included in the minute book and has been uploaded to the Council's website.)*

15.2 The Committee was informed that a Definitive Map Modification Order (DMMO) was made by Bisley Parish Council on 20 May 2018, for a path which ran for a length of

68m across unregistered land connecting Mount Pleasant and Van der Breen Street. The Committee noted the route of the claimed path marked A-B on the plan attached at Appendix JH2 to the report.

- 15.3 The Asset Data Officer described the character of the path and informed members that it provided pedestrians with an almost direct connection across Mount Pleasant to Public Footpath MBL170 and onto George Street and the main village. In the other direction it provided a direct connection from the village to Mount Pleasant to King George V playing field along Van Der Breen Street.
- 15.4 The Asset Data Officer informed the Committee of the documentary evidence which existed in regards to the claimed path. She explained that the Tithe Map of 1842 and the Finance Act Map 1910, portrayed the path consistently as an established through-route in a manner similar to the existing highway network of the time (i.e. similar colouring, being unnumbered and excluded from adjacent fields and hereditaments). An alternative explanation of its inclusion on the documents could be that the path existed merely for private access to a few properties by the householders; however, there was no evidence to support this.
- 15.5 It was reported that five other routes within walking distance of the claimed path, similarly shown on the Finance Act map as uncoloured and unnumbered were considered. Unlike the claimed path, those 5 routes all terminated at fields and yet were all today designated highways. The Asset Data Officer explained that it was not unreasonable to infer therefore that an open path connecting two highways would more likely be available to the public at large as opposed to restricted to the three households abutting the path. She emphasised that the Tithe Map of 1842 and the Finance Act Map 1910 were executed under legal provision, and were in the public domain and thus enjoyed a high evidential weight.
- 15.6 The Committee was informed that Bisley and Lypiatt Parish Council considered the path to carry highway rights and claimed it as a public footpath during the 1950s National Parks & Access to the Countryside Act 1949 ("NPACA49") process of officially recording the public rights of way network. No objections were found with regard to its inclusion on the legal record, and documents found during the course of the investigation indicated that the omitted path was to be added during the review of the whole legal record of public rights of way; however, this did not take place because the authority did not complete the first Definitive Map until the 1980s at which time the Wildlife & Countryside Act 1981 had overtaken the NPACA49 allowing for the review of the legal record to be done on a piecemeal basis.
- 15.7 The Committee noted that the documents showed that the claimed path had retained the same physical characteristics over a period of at least 176 years.
- 15.8 The Committee was informed that under Section 31 of the Highways Act it had been determined that no action had been taken by a landowner to question or challenge the public's use of the path. Therefore, the application was considered under Section 69 of the Natural Environment and Rural Communities Act 2006, which provided that the date of the DMMO application could be used for the

assessment of the user evidence over the qualifying 20 year period. This gave a 20 year qualifying period of 1998-2018.

- 15.9 The Committee noted that a total of 14 Public Path Evidence Forms (PPEFs) were completed by 14 individual members of the public in support of the application dating back to 1935 on foot. However, three forms were discounted: one on the basis of an incomplete PPEF without a signature; one witness who provided 2 PPEFs and thus were considered as one; and one who used the PPEF to object. The evidence of the latter was conserved under the section of the report which looked at 'lack of intention to dedicate'. Therefore 11 PPEFs submitted by 11 individual members of the public were included in the analysis of use. All 11 individuals claimed to have used the path across the whole 20 year qualifying period. There was no evidence of use of the path by force, secrecy or permission and therefore use was deemed 'as of right'.
- 15.10 The Asset Data Officer drew members' attention to the statements provided by Mrs Batten, a teacher and PE & Sports Co-ordinator at Blue Coat Primary School and Mrs Dawn Lane, School Business Manager. In their statements, Mrs Batten had indicated that she had worked at the school for 20 years and Mrs Lane 19 years. Both stated that the path between Mount Pleasant and Van Der Breen Street had been used, to varying degrees, by pupils and staff, during that time. They both commented that the path was used by pupils to cross the village and gain access to the King George V playing field, from Van Der Breen Street as the school did not have its own playing field.
- 15.11 In response to a question, the Asset Data Officer confirmed that as the path was on unregistered land, the owners of the cottages which abutted the claimed path, could potentially claim ownership of the path up to its centreline.
- 15.12 The Committee was informed that the owners of one of the three cottages abutting the claimed path used their PPEF to object to the path being dedicated as a public footpath. They had indicated that they had known about the path for 15 years and had used it on a weekly basis for maintenance of their property; they were concerned about extra foot traffic occurring from an order being made to add the footpath to the Definitive Map. The Committee was reminded that this process was only concerned with evidence of highway rights and factors such as desirability and suitability could not be taken into account when determining whether an order should be made to modify the legal record of public rights of way. If an order was made, it would be recording an existing right, not adding a new one. Further, the objectors had not done anything to make prevent public use or make it clear to users that it was not a public path. Consideration needed to be given as to whether this objection constituted sufficient evidence of a lack of intention to dedicate or a challenge to public use.
- 15.13 In concluding her presentation, the Asset Data Officer explained that on the balance of probability, a combination of the documentary and user evidence suggested that the path subsisted. The recommendation therefore was that an Order be made to add the length of public footpath to the Definitive Map.

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15.14 In response to a question, the Asset Data Officer explained that Gloucestershire County Council had undertaken at some point in the past, the tarmacking of a section of the path, and the installation of a chicane system. However, as the path was not currently included on the Definitive Map as a public footpath, and therefore not maintained by the local authority, the Council would have had no legal justification for this undertaking, but it did raise the question of whether the highway authority considered it at some point in the past to be highway.

15.15 A member made reference to the manhole cover which indicated utilities under the path, and it was clarified that utility companies carried their own rights in regards to accessing land, and thus would be unaffected by the determination of this application.

15.16 Having considered all of the information before it, the Committee

Resolved:

That a Definitive Map Modification Order be made to record the claimed route between points A-B as a public footpath.

16. APPLICATION FOR A MODIFICATION ORDER FOR A LENGTH OF PUBLIC BRIDLEWAY AND ADDITIONAL SPUR AT THE KNOLL, CRANHAM, GLOUCESTERSHIRE

16.1 Jaci Harris, Asset Data Officer (PROW Definitive Map), gave a detailed presentation to the Committee aided by a power-point presentation, which included photographs of the claimed routes under consideration. *(For information – A copy of the presentation slides is included in the minute book and has been uploaded to the Council's website.)*

16.2 The Asset Data Officer made the Committee aware of the following corrections to her report:- Paragraph 11.20 – should read 9.13 not 9.15; paragraph 11.26 – should read 11.21 not 11.22; paragraph 11.30 – should read 9.20 & 21 not 9.22 & 23.

16.3 The Committee was informed that a Definitive Map Modification Order (DMMO) was made by Mrs Hayden, Cranham Common Management Committee, on 22 June 2018, for a path which had an overall length of approximately 207 metres ('main path'), and an additional spur path ('spur path') which had an overall length of 29 metres. The claimed paths connected the junction of 3/193 and the 41149 highways, abutting the property, Hillfield, with Cranham Wood and Cranham Common. The Committee noted the route of the claimed paths on the plan marked A-F the 'main path' and B-G the 'spur path', attached at Appendix JH3 to the report.

16.4 The Asset Data Officer described the character of the paths and informed members that the claimed paths crossed land abutting Cranham Wood and Common, designated under the Commons Registration Act 1965 and thus by virtue of Section 2 Countryside and Rights of Way Act 2000 ("CROW Act"), granted the public a right

of access on foot to land mapped as registered common land for the purpose of enjoying 'open air recreation'.

- 16.5 The land was separately subject to a revocable Deed of Grant executed under Section 193 Law of Property Act 1925 ("deed") dated 15 November 1929 which granted the public a right of access for 'air and exercise' and as such was designated as Section 15 land under the CROW Act (land which benefitted from rights of access under an alternative legislation provision). She explained that this deed was subject to an 'Order of the Minister of Agriculture and Fisheries Imposing Limitations on and Conditions as to the Exercise of Rights of Access to a Common or Manorial Waste under Section 193 of the Law of Property Act 1925' dated 12 November 1930.
- 16.6 This deed included sections of the claimed paths. Any such use would operate as a conditional permission to use the land and as such prevent presumed dedication under Section 31 of the Highways Act 1980. However, use of the claimed paths for reasons other than for 'air and exercise' could succeed. The Asset Data Officer explained that in case law; Billson 1998, Sullivan J accepted *"if a track across a common is not used for the purpose of air and exercise but is being used by the public for some other purpose; as a route between points A and B for example, from the village across a common to a nearby school, church, or railway station, then in principle such usage of the track is capable of establishing a right of way over it under section 31 of the 1980 Act.* Applying this ruling, if the paths subject to this application were being used, not for the purpose of air and exercise but to travel along a defined route between two highways, then this use could be considered capable of satisfying a claim.
- 16.7 The Asset Data Officer gave a detailed account of the documentary evidence in existence in regards to the claimed paths. She explained that when considered as a whole, the evidence suggested that the claimed paths were used mainly as a private access to the properties abutting them. Further, Cranham Parish Council did not claim the paths when they had the opportunity to add them to the official record of public rights of way in 1950s.
- 16.8 The Committee was informed that under Section 31 of the Highways Act it had been determined that no action had been taken by a landowner to question or challenge the public's use of the path. Therefore, the application was considered under Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC), which provided that the date of the DMMO application could be used for the assessment of the user evidence over the qualifying 20 year period. This gave a 20 year qualifying period of 1998-2018.
- 16.9 The Committee noted that a total of 13 Public Path Evidence Forms (PPEFs) were completed by 12 individual members of the public in support of the application; use dated back to 1955 and was broken down as follows: all 12 claimed use of the paths on foot, but 4 claimed use by horse back and all 4 claimed additional use with motor vehicles. The frequency of the claimed use varied from 5-10 times per year to 'many'

- 16.10 The Asset Data Officer outlined to the Committee that PPEFs from three individuals record that they had used the paths to deliver goods to the householders, or visit family. This use was not considered to be use by 'the public at large', and therefore did not satisfy the requirements of Section 31 of the Highways Act 1980 that use must be 'by the public'; consequently their use would fail the user 'as of right test'.
- 16.11 In response to a question the officer clarified that it was considered that the use of the claimed path by the three individuals was use by implied permission or private easement even though the land was unregistered. It was pointed out that the home owners whose properties abutting the path could claim ownership of the land up to the centreline of the path.
- 16.12 The Asset Data Officer clarified that for the remaining 9 PPEFs none of the individuals had indicated in their response that their use of the path was by force, secrecy or permission; therefore their use was considered to be 'as of right'. Analysis of the 9 PPEFs had indicated that the paths had been used without interruption or challenge for part or all of the 20 year period, on foot. Of those, 5 used the claimed paths over the whole period, with 4 of those claiming additional use by horse back and 3 claimed additional use by motor vehicles.
- 16.13 The Committee was informed that the claimed use of the path by motor vehicle did not comply with the NERC exemptions and thus a claim for public motor vehicular rights could not succeed. In addition, the quantity of user for use by motor vehicles was insufficient to raise a claim of presumed dedication as a restricted by way or byway. The Asset Data Officer made the point that with regard to the 4 individuals who claimed to have ridden a horse along the claimed paths, it was suggested that the character of the area in which those paths were located was such that one would expect more compelling evidence of use of horse riding along them. The quantity of user on horseback was therefore considered insufficient to raise a claim of deemed dedication as a bridleway.
- 16.14 It was reported that for a successful claim of presumed or inferred dedication, the paths needed to terminate at either a highway or a 'place of popular resort'. The Asset Data Officer explained that by means of the 1929 Deed, executed under the LPA25, the public were granted by way of a private licence or easement, a right to take 'air and exercise' across the common. This meant that Cranham Wood and Common would be considered to be 'a place of popular resort', and would therefore support a claim of presumed dedicated of the paths terminating at it.
- 16.15 In concluding her presentation, the Asset Data Officer explained that on the balance of probability, the user evidence was insufficient to show that the claimed paths subsisted as public bridleways as per the application but it was deemed sufficient to show that the paths subsist as public footpaths. The recommendation therefore was that an Order be made to add the lengths of public footpath to the Definitive Map.
- 16.16 In response to a question, the Asset Data Officer explained that there was no historical evidence showing a boundary feature (wooden field gate) at point C near

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Timbertops, and therefore if the Committee agreed to make the Order, then the homeowner would probably be asked to remove the wooden field gate.

16.17 In response to a question, Janet Smith, Specialist Adviser, informed the Committee that it was not a criminal offence for horse riders to use public footpaths. She pointed out that if a sufficient number of horse riders used the claimed paths then, 20 years into the future, this could give rise for a claim to alter the status of the claimed paths to public bridleways.

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

Resolved:

- (a) That no order be made to add a length of public bridleway to the Definitive Map of Public Rights of Way between points A-F and B-G.
- (b) That an order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-F and B-G.

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

No public questions had been received on matters which were within the powers and duties of the Committee.

18. MEMBERS' QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

No written questions from members had been received on matters which were within the powers and duties of the Committee.

CHAIR

Meeting concluded at 12.00 pm