

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a remote meeting of the Commons and Rights of Way Committee held on Tuesday 6 October 2020.

PRESENT:

Cllr Phil Awford (Chairman)	Cllr John Payne
Cllr Dr John Cordwell (Vice-Chair)	Cllr Brian Robinson
Cllr Carole Allaway Martin	Cllr Robert Vines
Cllr Graham Morgan	Cllr Simon Wheeler
Cllr Loraine Patrick	

Officers: Philip Williams, Lead Commissioner, Community Infrastructure
Karen Pearman, Asset Data Team Leader (Highway Records & DMMO)
Clare Bonser, Lawyer
Andrew Houldey, Engagement Officer (PROW Definitive Map)
Jaci Harris, Asset Data Officer
Juliette Walker, Asset Data Officer
Natashia Reeves, Asset Data Technician
Simon Harper, Head of Democratic Services
Joanne Bolton, Democratic Services Adviser

27. MINUTES

Resolved

That the minutes of the previous meeting held on 10 December 2019 be approved and signed as a correct record.

28. DECLARATIONS OF INTEREST

No declarations of interest were made.

29. PUBLIC QUESTIONS ON APPLICATION(S)

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

30. MEMBERS QUESTIONS ON APPLICATION(S)

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

31. APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER FOR AN ADDITIONAL LENGTH OF PUBLIC FOOTPATH, POPES HILL TO CHESTNUTS INCLOSURE, PARISH OF LITTLEDEAN

Minutes subject to their acceptance as a correct record at the next meeting

- 31.1 Andrew Houldey, Engagement 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.)*
- 31.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) for the claimed path at Popes Hill in the parish of Littledean. It was noted that the claimed route was shown running between points A, B and C, on the plan attached at Appendix 1B to the report.
- 31.3 The Committee was informed that the claimed path between points A to B ran over land which was owned by the Forestry Commission until 1971, before being sold. From point B the claimed path continued as an unidentified track across bracken to the Forestry Commission owned Chestnuts Inclosure at Point C. The section of the claimed path between points B to C ran over land which was part of the Statutory Forest of Dean, it then continued into the wood as a forest path. The whole length of the claimed route ran over land which had been designated as access land under Part 1 of the Countryside and Rights of Way (CROW) Act 2000. This Act created new public access rights over 'access land' in England and Wales.
- 31.4 The Engagement Officer explained that The Forest of Dean was established by statute under the Dean Forest (Reforestation Act) of 1667. 11,000 acres, being part of the wastelands of the Forest of Dean, were to be inclosed and kept in severalty for the growth and preservation of timber to supply wood for the Royal Navy and for the maintenance of trade shipping. The physical inclosures were to allow the young trees to grow and to be kept free from damage by animals. The provisions of the Act were largely re-enacted in the Dean Forest (Timber) Act 1808.
- 31.5 The Engagement Officer informed the Committee that The National Forest Park Committee (Forest of Dean) produced a report in 1938, which confirmed the Forestry Commission's view was that access to the Forest was regulated and controlled by the Forestry Commission bylaws, and under those circumstances it would be impossible to show an implied intention to dedicate on the part of the Crown in the Statutory Forest since 1938. He explained that this confirmed a regulated permissive right of way on foot over the Statutory Forest, had the effect that any subsequent use would be permissive, and not 'as of right', and hence would not establish a right through long user.
- 31.6 He informed the Committee that the claimed path should be considered as two separate sections i.e. A to B and B to C. This was because the land over which the claimed route ran between points A to B was sold by the Forestry Commission in 1971; the claimed path came into being as a physical feature in 1971, and from that date forward the land over which it ran remained solely as registered access land. The route between points B to C ran over land which remained part of the Statutory Forest of Dean, under the ownership of the Forestry Commission, and was therefore Crown Land. He made reference to The National Forest Park Committee (Forest of Dean) report produced in 1938, which confirmed that it would be impossible to show an implied intention to dedicate on the part of the Crown in the Statutory Forest since 1938. Consequently, the view of officers was that the

application to add a length of public footpath to the Definitive Map between points B to C be refused.

- 31.7 The Engagement Officer drew the Committee's attention to the 1971 conveyancing plan at Appendix 1 to the report, which included the track A to B. He explained that the document reserved a right of way at all times for the purposes of the then current owners and occupiers of Rock House sheds and the general public. The covenant's restrictions and stipulations contained in the Schedule also bound any successors in title. It was not considered that the wording of the conveyance would prevent a right of way coming into being over the section A to B through long user.
- 31.8 The Committee was informed that the majority of the Forestry Commission's forests were dedicated in perpetuity as open access land under the CROW Act which gave walkers a right to roam across those areas. Whilst everyone had a right to individual and family recreation on open access land the use of the claimed paths for reasons other than for 'air and exercise' could succeed as set out in the case law *R v SoS for Environment ex parte Billson [1998] EWHC Admin 189*, Sullivan J. Applying that ruling to this application meant that if the path running between points A to B was being used, not for the purpose of air and exercise but to travel from a highway along a defined route to reach a place of popular resort, then this use could be considered capable of satisfying a claim. Members noted that the section of claimed path from point A to B had the character of a track and gave access to an area of land used for 'air and exercise', namely Chestnuts Inclosure. The path A to B, although dedicated as access land, was not in itself a destination.
- 31.9 It was reported that a further requirement for a claim of presumed dedication was that the path joined a highway at both its start and end points or connected with a highway at its start point and with a place of popular resort at the other. Public user could not give rise to a presumption of dedication if it did not. It was confirmed that the section of path from point A to B connected to a highway at its eastern end and to a place of popular resort at its western end, an area of access land to which the public had a right to air and exercise under Section 16 of the 2000 Countryside and Rights of Way Act.
- 31.10 The Engagement Officer explained that having established that public user could give rise for a claim of presumed dedication of the path between points A and B, consideration now needed to be given as to whether there was sufficient user evidence to support the claim. He drew the Committee's attention to the summary of public path evidence forms at Appendix C to the report. He reported that the application was supported by 9 user evidence forms, completed by 9 individuals. Use was on foot, for leisure purposes, and to give access to Chestnuts Woods, Welshbury and Green Bottom.
- 31.11 The Engagement Officer explained that as the claimed route only came into being as a physical feature in 1971, the user evidence from before that year should be disregarded. There were some witnesses who had claimed to have used the path before 1971, however, he felt that they were referring to the public footpath adjacent to the claimed route between points A and B.

31.12 The Committee was informed that there was no event that had been identified by which use by the public had been brought into question. The 2006 Natural Environment and Rural Communities (NERC) Act allowed for the date of the making of an application under Section 53 of the 1981 Wildlife and Countryside Act as the date of bringing into question. As a result, the date of bringing into question was the application date of March 2005. For the purpose of section 31(1) of the 1980 Highways Act the 20 year qualifying period was therefore 1985 to 2005. There were three witnesses who had used the path for a full 20 years and one for 19 years. It was pointed out that two of the witnesses' use seemed to date from the physical setting-out of the path in 1971.

31.13 The Engagement Officer explained that use of the path should be by a number of people who together may sensibly be taken to represent the community. He confirmed that all users of the path who had submitted the public path user evidence forms were from the Popes Hill area. However, he referred to the case law for Coleridge LJ in *R v Southampton (Inhabitants) 1887*, which confirmed that local usage of a path by a particular community rather than the wider public was not a hindrance to rights of way coming into being through long user.

31.14 In concluding his presentation, the Engagement Officer explained that the weight of user evidence was sufficient to show that the claimed path between points A and B subsisted as a public footpath.

31.15 A member referred to the land over which the section of the claimed path ran from points B to C. He questioned whether Point B could be considered to be a place of popular resort as the land was still part of the Statutory Forest of Dean. In response, the Engagement Officer explained that The Countryside and Rights of Way Act 2000 gave the public right of access to land mapped as 'open country' (mountain, moor, heath and down) or registered common land. Whilst the Act did exclude forestry land, the Forestry Commission took the opportunity under Section 16 of the Act to designate the land as access land. Consequently, as well as the confirmed regulated permissive right of way on foot over Statutory Forest Land, the public's right of access was further encapsulated by the recording of the land as access land. He added that a place of popular resort was essentially where the public had an interest in visiting (e.g. seashore or a local beauty spot). He confirmed that point B did meet the criteria for a place of popular resort; as the public reached point B, they had a right enshrined in law to then walk over land past point B to Chestnuts Inclosure.

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

Resolved

a) That an order be made to add a length of public footpath to the Definitive Map and Statement between points A and B; and

(b) That the application to add a length of public footpath between points B and C be refused.

32. APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER FOR AN ADDITIONAL LENGTH OF FOOTPATH CONNECTING PUBLIC FOOTPATH RWD10A WITH KIDNALLS WOOD, YORKLEY, WEST DEAN, GLOUCESTERSHIRE

- 32.1 Jaci Harris, Asset Data Officer, 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.)*
- 32.2 The Committee considered an application for a Definitive Map Modification Order (DMMO) for the claimed path marked A-B on the plan attached at Appendix JH2 to the report. The claimed path was situated in the village of Yorkley in the parish of West Dean, and crossed land which had until recently, formed part of the 180 acre Yorkley Court Estate. It connected to Public Footpath RWD10A at point A and at point B connected with Kidnalls Wood.
- 32.3 The Committee was informed that the ownership of the Yorkley Court Estate had been unclear for many years. A public notice, dated 1 October 2018, placed in the London Gazette under Section 27 of the Trustee Act 1925 sought surviving family members connected to 23 deceased people with links to the Grade II-listed farm, buildings and lands. Meanwhile the land had been leased via a trust to a succession of tenant farmers. The Land Registry had confirmed that this was the position until December 2014, when at that point in time Yorkley Court Farm Ltd was sold with a possessory title.
- 32.4 The Committee was informed that the application for the DMMO was made in January 2017 and the photos of the claimed path were taken by the Asset Data Officer 2 years later in January 2019. A length of strained post and wire fencing topped with a strand of barbed wire, installed in January 2017, marked the start of the claimed path at point A at its junction with Public Footpath RWD10A. The barbs had been removed from the section across the claimed route but as the fence was not damaged or bent out of shape from being climbed over, it seemed that the claimed path had received very little use since the fence was erected. At point B on the plan there was an old broken post and wire boundary fence, sections of which were missing meaning there was nothing to impede access at that point. The old fence line was shown as the boundary of Kidnalls Wood by Land Registry for the Forestry Commission under title GR290807 and Yorkley Court Farm Ltd under title GR371316.
- 32.5 The Asset Data Officer explained that regarding frequency of use, from the user evidence supplied, 5 individuals had claimed daily use, 19 had claimed weekly use, 5 had claimed monthly use and 6 had claimed infrequent use. This did conflict with statements made by Ashfords Solicitors LLP acting on behalf of the landowner, they had questioned the alleged claimed use of the path on the basis that contractors of the landowner and some farmers and tenants in the area had never seen anyone using the path.

- 32.6 The Asset Data Officer reported that in response to the consultation on the application, a letter had been received dated 1 March 2019 from Mr Duncan of Ashfords Solicitors LLP acting on behalf of the landowner, Yorkley Court Farm Ltd, which set out the landowner's comments on the application and points of objection. The applicant had responded by email on 19 March 2020, and it was noted that some of the responses to the issues raised, were made by Gloucestershire County Council as the surveying authority). The Committee was informed of the following key points:
- 32.6.1 The landowner's representative commented on the failure to challenge the fence or submit a timely application. The Committee was informed that the application was submitted in July 2017 by recorded delivery to GCC and to the landowner. It wasn't processed until December 2018, when the consultation was then undertaken. The landowner was not contacted directly due to a previous history of intimidation on walkers. The applicant's response referred to one occasion where it had led to a conviction of assault by beating in April 2017.
- 32.6.2 In response to the landowner's representative's comments on the background to the application, members were informed that the fact that some individuals who had supported the application had been involved in a previous litigation matter was irrelevant. Members were advised that that they should only consider whether there was sufficient evidence to imply that highway rights had come into being.
- 32.6.3 With regard to the landowner's rebuttal of the witness evidence, via his solicitor, members were advised that no direct evidence had been supplied by anyone other than the landowner to substantiate the claim that no one has been seen using this path. The applicant had indicated that the claimed path was at the furthest end of the farm and was shielded by trees and a distance of 300m from the solar farm. It was also pointed out that many walkers used the path early morning or after work so may not have been seen by the people working at the farm.
- 32.6.4 The historical aerial photographs supplied by the landowner's representative were of poor quality, and it looked like ploughing had obliterated evidence of the path. The existing public footpath RWD10a which ran along the field edge in the same field was also not shown in any of those photos supplied. The landowner's solicitor had questioned the existence of the path because the wood was "*dense and established*". The Asset Data Officer confirmed that during her inspection of the path, she found that the spacing of the trees and the tree canopy itself permitted easy access and good visibility through the wood. She referred members to the photos attached at Appendix JH3a-f to the report.
- 32.6.5 The records showed that there was a path into Kidnalls Wood via Deanwood House (Shaphouse Farm). This was closed up and walkers found an alternative access. A claim was submitted to the Surveying Authority in August 1990 for a length of unrecorded footpath to be added to the legal record of public rights of way connecting Kidnalls Wood with RWD10A via Shaphouse Farm Equestrian Centre. The application was rejected by the Commons and Rights of Way Sub Committee in October 1991. The failure of the 1990 claim effectively denied members of the public access to Kidnalls Wood via public footpath RWD10A and the suggestion

made by the applicant that this may have prompted members of the public to find another access to Kidnalls Wood was not unreasonable. Members were advised that the application being considered today must be judged on its own merits.

- 32.7 The Asset Data Officer clarified in her presentation that the applicant's response to the landowner's objection regarding 'Failure to challenge the fence or submit timely application', should read '*Fence installed January 2017 but letter of DMMO application not received until 6 December 2018*'.
- 32.8 The Committee was informed that there was no documentary evidence to support the application; consequently, it must be determined upon the supplied user evidence. The applicant first contacted Gloucestershire County Council as Surveying Authority by email in January 2017, the applicant had advised that since the farm was sold and the new owner took over, the footpath had been fenced off and could no longer be used. The Asset Data Officer explained that the action taken by agents of the landowner challenged the public's right to use the path. For the purposes of Section 31 of the 1980 Highways Act the 20 year qualifying period of use therefore had been taken to be 1997 to 2017.
- 32.9 The Asset Data Officer explained that whilst there had been confusion with regard to the ownership of the land over which the claimed path crossed for many years, there was no explicit reference in Section 31(1) Highways Act 1980 to use having to be of a level to have come to the attention of the landowner. Therefore the fact that for a number of years the owner of the land was unknown would not preclude the application from being considered.
- 32.10 The Asset Data Officer reminded members that a further requirement for a claim of presumed dedication was that the path joined a highway at both its start and end points or connected with a highway at its start point and with a place of popular resort at the other. Public user could not give rise to a presumption of dedication if it did not. It was confirmed that the section of path at point A connected to the existing public footpath RWD10A, and at point B connected to Kidnalls Wood which had enjoyed a permissive right of access on foot since 1938 as a satellite forest to the Statutory Forest of Dean and thus did meet the criteria for a place of popular resort. Consequently, the application could succeed.
- 32.11 The Committee noted that a total of 35 public path evidence forms were completed by 35 individual members of the public in support of the application dating back to 1950 on foot. When considering the statutory period, all 35 claimed to have used the path for part or all of the qualifying period, and 15 claimed use of the path across the whole 20-year period. Use of the claimed route for part or all of the qualifying period was fairly consistent as being for the purpose of dog walking, leisure and fitness. There was no evidence of use by force, secrecy or permission and therefore use could be deemed to be 'as of right'. The Committee noted the summary of the public path evidence forms and a bar chart showing the years of use attached at Appendix JH7 and JH8 to the report.
- 32.12 The Asset Data Officer by way of concluding her presentation, explained that on the balance of probability, the user evidence suggested that the section of claimed path

between A and B had been enjoyed by the public on foot 'as of right', without interruption or challenge for a period in excess of 20 years prior to January 2017 when the rights of the public were called into question and was therefore deemed to subsist. It was further submitted that insufficient 'overt action' specifically aimed at the public was taken by the landowner to evidence his lack of intention to dedicate the path over the same period. As a result, it was submitted that the path did exist and should now be recognised on the Definitive Map as a public footpath.

32.13 A member referred to the photograph at Appendix JH3b to the report, and asked for clarification on the relevance of the kissing gate. In response, the Asset Data Officer explained that the kissing gate at point A facilitated access along the public footpath RWD10A and could be considered to be a replacement for the original stile.

32.14 A member questioned whether the applicant's reference to the landowner's previous history of intimidation of the walkers could be deemed as being overt action taken by the landowner of his lack of intention to dedicate the path. In response, the Asset Data Officer clarified that the applicant was referring to incidents that had taken place on the existing public footpath RWD10A, not the claimed path.

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

Resolved

a) That an Order be made to add the length of public footpath between points A-B to the legal record of public rights of way.

33. 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.

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

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

34.2 At this juncture Cllr Graham Morgan asked for the Committee to be provided with an update on the current position of the application for a DMMO for a public right of way across the Stowfield viaduct/Black Bridge, in Lydbrook, Gloucestershire. It was agreed that an update would be circulated to the Committee.

ACTION: Juliette Walker

CHAIR

Minutes subject to their acceptance as a correct record at the next meeting

Meeting concluded at 11.50 am