

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a remote meeting of the Commons and Rights of Way Committee held on Wednesday 2 December 2020.

PRESENT:

Cllr Phil Awford (Chair)	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

Officers: 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

Apologies: Cllr Loraine Vivienne Patrick

35. MINUTES

Resolved

That the minutes of the previous meeting held on 6 October 2020 be approved and signed as a correct record.

36. DECLARATIONS OF INTEREST

No declarations of interest were made.

37. PUBLIC QUESTIONS ON APPLICATION(S)

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

38. MEMBERS QUESTIONS ON APPLICATION(S)

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

39. APPLICATION FOR A MODIFICATION ORDER FOR A LENGTH OF PUBLIC FOOTPATH AT BUSSAGE, CHALFORD, GLOUCESTERSHIRE

39.1 Juliette Walker, 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.)*

- 39.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) for the claimed route which was located in Bussage in the Parish of Chalford, Stroud District. The claimed route was shown running between points A, B and C, on the plan attached at Appendix 1B to the report.
- 39.3 The Committee was informed that the route was located to the west side of Frith Wood, and connected to the class 4 Road (number 41324) at its southern end, which was at point A on the plan. The route headed in a north easterly direction to where it joined the public footpath MCH13 at point C on the plan. It was also joined by a class 6 pathway from the west, which joined the claimed route at point B on the plan. The claimed route provided access to the recreation ground located on the southern side of the Class 4 road, as well as providing access to the public footpaths that ran through Frith Wood and surrounding residential roads.
- 39.4 The Asset Data Officer explained that at point A there was a low stone wall where the path joined a class 4 highway verge. The stone pinch point was built into the boundary wall and was the narrowest part of the path, measuring 0.48m; the rest of the path between points A and B had a continuous boundary to boundary width of 2 metres. At point B the class 6 pathway provided alternative access to the claimed path as the pinch point meant that it was too narrow for users with prams or wheelchairs.
- 39.5 The Asset Data officer informed the Committee that the application was supported by 22 public path evidence forms, completed by 22 individuals. She drew the Committee's attention to the summary of the user evidence forms at Appendix 1Q to the report. She reported that all of the users had claimed use of the path on foot; however, one user had been discounted as they had described having a private right of access to maintain their rear garden boundary which abutted the claimed route.
- 39.6 The Committee noted that the status of the route was first called into question when the parish council undertook maintenance work to improve the surface of the path. Chalford Parish Council subsequently submitted a DMMO to Gloucestershire County Council on 17 November 2018. The Asset Data Officer explained that if the public's use of the path had not been challenged by the landowner, as was the case, then 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 1998 - 2018 leading up to the application.
- 39.7 The Asset Data officer reported that the earliest use of the route was in 1931, although this was noted as being the same year of the user's birth. She explained that for that reason the earliest date was not the strongest evidence on its own. The next earliest date of use was 1976, provided by Mr and Mrs Oakley. Mr Oakley was also the applicant on behalf of the parish council who had submitted

the application. When considering the statutory period, all 21 members of the public had used the path for part or all of the qualifying period between 1998 and 2018 on foot, and of those 19 claimed use of the path across the whole 20 years. The Asset Data Officer informed the Committee that overall the user evidence demonstrated extensive use over the qualifying period on foot between points A and C.

- 39.8 The Asset Data Officer drew the Committee's attention to paragraph 10 of the report which detailed the responses received to the statutory consultation. She explained that the most notable response came from Mr Wade, the registered landowner for the northern section of the claimed route (between points B and C). Mr Wade had informed the case officer that his family had purchased the property in 1964. Mr Wade had always believed that the path held public footpath status, as it had been recorded as a public footpath on a plan accompanying the conveyancing documents for the property. He had advised the case officer that he only ever challenged one person using the path who was on a motorbike. It was clarified that the section of path between points A-B was unregistered and there had been no indication of anyone claiming ownership.
- 39.9 The Asset Data officer explained that the key evidence in respect of the application was the documentary evidence. The Inclosure Award was a very important legal document, with the conveyancer given the power to set out new highways. The 1869 Bisley Inclosure Award provided for the Inclosure of Nashend Common or Bisley Common, Oakridge Common, including Bourn's Green, Nottingham Scrubs, Aston Scrubs, Dunkile Hill and all outlying pieces of common or waste situate in the Parish of Bisley in the County of Gloucester, which were duly authorised under the provisions of the Acts for the Inclosure exchange and improvement of land. The Committee's attention was drawn to the map accompanying the Award, along with the Award text, which set out the footpath marked LII and included the claimed route.
- 39.10 The Asset Data Officer explained that the public footway was legally set out in the 1869 Award which although executed under a private act of parliament which was missing, was also made subject to the general provisions of the 1801 Inclosure Act which granted commissioners the power to set out highways and made the process subject to public scrutiny and an appeals process. As such it would not be unreasonable to conclude that the Award provided strong evidence to show that this route was dedicated as a public footway.
- 39.11 The Committee was informed that the evaluation of the legal process which led to the creation of the Definitive Map and Statement, showed that the claimed route was initially included on the Parish Submission, the Draft Map and the insert map included in the Provisional Map. However, the claimed route was missing from the Definitive Map. It could be considered from the Parish Submission Map and Statement that the parish council had initially intended for the claimed route to be included on the Definitive Map as part of public footpath MCH11. The anomaly first appeared on the Provisional Map as the route shown for MCH11 did not extend south long the claimed route to join the 41324 road. The Asset Data Officer suggested that the exclusion of the claimed route from the Provisional Map,

considering its inclusion in the other earlier records, and given that there were no documents to suggest that a decision was subsequently taken to remove it, was an act of human error, particularly as it was still included in the Definitive Statement. The Asset Data Officer confirmed that the Definitive Map took precedence over the Definitive Statement and therefore the claimed route was not currently recorded as a public right of way.

- 39.12 In concluding her presentation the Asset Data Officer explained that on the balance of probability, the documentary and user evidence was considered sufficient to show that the claimed path marked A-C on the plan, had been shown to subsist, therefore the path should now be protected by being recognised on the Definitive Map.
- 39.13 The Asset Data officer clarified that whilst the Bisley Inclosure Award 1869 had recorded the footpath's width of 5ft, the historical OS maps from the 1880s to the 1920s indicated that the eastern side of the path was unbounded during that time. It could only be demonstrated that a boundary had existed since the 1970s (i.e. when Velhurst Drive was built), which had led to a measurable width of 2 metres being available for use and accepted by the public for the full length of claimed route from points A-C. She further clarified that in the time period between the publication of the agenda reports, and the Committee meeting, the recommendation to the Committee had been amended to reflect this. The recommendation to the Committee was to add a public footpath to the Definitive Map of Public Rights of Way between points A-C, with a boundary to boundary width of 2 metres, as opposed to a width of 5ft as stated in the published report.
- 13.14 The Asset Data Officer referred to the existence of the wall and the pinch point which measured 48cm wide at point A on the plan. She explained that on the grounds that there was no evidence to indicate or confirm the age of the wall, it was the officers' view that it should not be included in any published Definitive Map Modification Order; however, officers would not actively seek the removal of the wall at the present time.
- 13.15 In response to a question, the Asset Data confirmed that the if the Committee approved the recommendation to add the claimed path to the Definitive Map of Public Rights of Way, then users of the path could raise the issue of the wall causing an obstruction, and make a request for its removal, with Gloucestershire County Council's Public Rights of Way Team.
- 13.16 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-C, with a boundary to boundary width of 2 metres.

40. APPLICATION FOR A MODIFICATION ORDER FOR AN ADDITIONAL FOOTPATH IN UP HATHERLEY PARISH, CHELTENHAM, GLOUCESTERSHIRE

- 40.1 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.)*
- 40.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) for the claimed path in the Up Hatherley Ward, Cheltenham. The Committee was informed that the application was submitted to Gloucestershire County Council on 5 June 2018, by Up Hatherley Parish Council.
- 40.3 The Asset Data Officer explained that there was no documentary evidence being submitted in support of the application. This was due to the land over which the claimed path crossed, being formally owned by Gloucestershire County Council for the purposes of a farm. The land was sold in the early 1990s to a developer for the construction of the existing residential development. It could therefore be inferred that the claimed path had come into existence through the construction of the housing estate. This correlated with the user evidence, with the earliest use being claimed from the early 1990s.
- 40.4 The Committee was informed that as part of the statutory consultation process, John Newbury of Living Streets, had responded to inform officers that his organisation would oppose the order because it would limit the use of the route to people on foot. In addition, John Mallows of Cycling UK & Secretary and Press Officer for the Cheltenham & Tewkesbury Cycling campaign had responded to indicate support for the path receiving a higher status to reflect use by cyclists. The Asset Data Officer wrote to John Newbury in January and John Mallows in May 2020, to outline that the DMMO application process was solely evidence based (user and documentary) and therefore suitability and desirability could not be taken into account. The Asset Data officer had asked Mr Newbury and Mr Mallows whether they or any of their members had any evidence of use of the claimed path beyond pedestrian use, and which could be submitted via a public path evidence form. She had advised them that if sufficient user evidence was received, regarding use by cyclists, then even though the application was for a footpath, an order could be made to give the claimed path the higher status of a restricted byway.
- 40.5 The Asset Data Officer explained that no response was received from Mr Mallows or Mr Newbury, and despite a chase up email being sent on 4 November 2020 reminding them of their need to supply evidence of use by cyclists, no response was subsequently received. She reminded the Committee that its decision on the application must be based solely on the evidence being presented.
- 40.6 In response to a question, the Asset Data Officer clarified that if there had been sufficient user evidence showing use of the claimed route by cyclists, then an order would be made for a restricted byway. Since the Natural Environment and Rural Communities Act came into force in 2006, restricted byways were open for use by walkers, horse-riders, cyclists and carriage-drivers (horse and cart), but not mechanically propelled vehicles.

- 40.7 The Committee noted the claimed route as outlined on the plan attached at Appendix JH2 to the report. The claimed path ran from Cheriton Park via a retail park across areas of greenspace within an urban conurbation to Jasmine Way at points A-F on the plan. Analysis of the user evidence showed that 3 additional sections of path had been claimed. Those were annotated ALT1/ ALT2 & G-H- I on the plan.
- 40.8 The Committee was informed that the section A-B of the claimed route crossed a retail park consisting of a community centre, public library, Morrisons Superstore, The Greatfield Pub and a fuel station, in addition to a network of private access roads and parking areas.
- 40.9 The Asset Data Officer reported that the applicant, Mr Willcox, drew the section of claimed path between the community centre and Caernarvon Road, diagonally across a car park. Mr Willcox had clarified however that it was more of a desire line and that the actual route would likely be around the outside. She added that 15 individuals who claimed use of the section of path between points A-B initially marked a path diagonally across the car park on the plan attached to their user evidence forms. As the applicant had stated that this was a desire line, all 15 individuals were contacted and asked to provide clarification of their use of that specific part of the claimed route.
- 40.10 Of the 15 responses received, only 4, Mr & Mrs Brogan, Mr A Blackmore and Mr P Cox, marked the route diagonally across the car park. The Asset Data Officer explained that applying the case law *R. v. SSETR (ex p. Dorset)* [1999], 4 users was considered to be insufficient user evidence to satisfy the statutory test. She confirmed that the remaining 12 users (including Mr A Blackmore who marked both routes) marked a route around the car park at A-ALT1-B, and that this would constitute sufficient user evidence. In addition, she explained that it was unlikely that members of the public could consistently use the same route across a car park given the continual movement and regular change in the location of parked cars. Use therefore of the path across the car park for 20 years prior to 2018 was unlikely to have occurred without interruption.
- 40.11 The Committee was informed that the section of the claimed path C-D started at its junction with Caernarvon Road. The first 11m had a tarmacked surface. A small wooden and metal pedestrian gate provided access to a wide open area of amenity green space, designated by Cheltenham Borough Council as Davillia Drive Open Space. A length of unenclosed, unsurfaced path crossed the area of land for a distance of approx. 128m ending at its junction with Public Footpath CHU8. The area of green space provided pedestrian access to Crythan Walk and Davilia Drive. Street lights and waste bins were located at each end of the section of path.
- 40.12 The Committee was informed that the section of the claimed path at points E-F started at its junction with the public footpath shown as point E, and ran for a length of approximately 175m across an area of amenity green space land designated by Cheltenham Borough Council as Jasmin Way/ Justicia Way Open Space, to Jasmine Way at a point marked F on the plan. That particular section of claimed path encompassed most of the route currently designated as the 690012 highway

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and as such was a well maintained, unenclosed, surfaced path with metal chicanes at each end, a waste bin, and 5 street lights along its length. It was formally adopted as a public highway 690012 on 4 August 1997 and recorded on the List of Streets (a document which all highway authorities were required to maintain under Section 36(6) Highways Act 1980).

- 40.13 The Asset Data Officer explained that the applicant however drew the path deviating from the highway across the adjacent area of grass before returning to the same termination point as the current highway. The applicant later stated that he had actually intended to claim the entire length of the existing highway. In the event that the applicant had intended to show part of section E-F diverging from the 690012 highway, only one other individual similarly claimed use of that diverging path. When considering sufficiency of user, by applying the case law, the user evidence of 2 individuals for that short section of path diverging from the 690012 highway would also fail. However, a total of 14 individuals had claimed use of the section of path at point E-ALT2-F and this would be considered sufficient to carry a claim of presumed dedication.
- 40.14 The Committee was informed that the section of the claimed path at points G-H-I, was never adopted and added to any highway record and thus it remained a private path. However, the path was being maintained by Gloucestershire County Council; it had a tarmacked surface, and 11 street lights along its length. The path was subject to an Agreement executed under Section 106 Town & Country Planning Act, dated 27 February 1991, which provided that a new public footpath would be created so as to link AHU12 (re-named CHU8) through Phase 3 to Farmfield Road through the proposed open space. The intended route was to run between points E-I on the plan. However, only section E-F was formally adopted as public highway 690012 on 4 August 1997 and recorded on the List of Streets.
- 40.15 The Asset Data Officer explained that Cheltenham Borough Council had confirmed that if the Committee approved the recommendation to add the section of the claimed path between points G-H-I to the Definitive Map, then it would submit an application under Section 228 of the Highways Act 1980, for that section to be added to the List of Streets. Consequently the maintenance costs would be covered within the Gloucestershire County Council's highways maintenance budget.
- 40.16 In response to a question, the Asset Data Officer clarified that a path could be included on both the List of Streets and the Definitive Map. The List of Streets was a record of the publically maintained highways, but provided no guidance as to the status of the highways. Whereas the Definitive Map of Public Rights of Way was a legal document conclusive in law as to the existence and status of the public rights of way shown on it.
- 4017 The Committee was reminded that a requirement for a claim of presumed dedication was that a path had definite start and end highway termination points or alternatively could be shown to connect with a place of popular resort. Public user could not give rise to a presumption of dedication if it did not. It was noted that land provided for the enjoyment of the public constituted a place of popular resort. The

Asset Data Officer explained that the claimed path connected the existing highway network with Cheriton Park which had no designated highway status. In addition, a covenant was executed in 1995 between the Predecessor-in-Title and the current landowner, Cheltenham Borough Council with regard to the land known as Cheriton Park. It stated "*The Council covenants with the Transferors that the Council will maintain the property as open space for the enjoyment of the public and will hold the property for the purposes of the Open Spaces Act 1906*". The Asset Data Officer confirmed therefore that Cheriton Park could constitute a place of popular resort.

- 40.18 The Committee was informed that no action was taken by the landowner to challenge the public's use of the path. In such cases, 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 1998 - 2018 leading up to the application.
- 40.19 It was noted that 18 public path evidence forms completed by 19 individual members of the public spanning a period of 28 years from 1990 to 2018 had been submitted in support of the application. The claimed use was pedestrian only. Frequency of use varied from three times per year to 'approximately 200'. Individuals had stated that the route was used on foot, without interruption, to access Morrisons Supermarket, Up Hatherley Library, the community centre, GP and the pub, in addition to using it for health walks, dog walking, recreational walking, running and leisure. All 19 individuals had claimed to have used it for part or all of the qualifying period and of those, 5 had claimed use of the path over the whole 20 year period. The Committee's attention was drawn to the summary of the user evidence at Appendix JH4 to the report, and a bar chart detailing the use at Appendix JH5 to the report.
- 40.20 The Asset Data Officer explained that in addition to establishing twenty years of user evidence, for a claim to give rise to a presumption of dedication, use must be without force, secrecy or permission. Use that complied with those three requirements was termed user 'as of right'. She advised that the user evidence submitted indicated that none of the users had ever worked for any of the landowners nor sought permission to use the land and none were ever turned back or challenged by a landowner whilst using the route. There was no evidence of use by secrecy or force associated with any part of the claimed route plus extension (A-I). There was also no evidence of use by permission over section C-D.
- 40.21 The Committee was informed that sections E-F & G-H-I crossed land in the ownership of Cheltenham Borough Council and were subject to a similar covenant that affected Cheriton Park, executed under the Open Spaces Act 1906. Therefore there was an existing right of access whereby the public could use the land for recreation purposes. Where land was in public ownership and where there was an arguable case that the public was entitled to walk the claimed route 'by right', as was the case with sections E-F and G-H-I, any such use would operate as a conditional permission to use the land and as such prevent presumed dedication under 31 Highways Act 1980. It was explained however that use of the claimed

paths for reasons other than for recreation could succeed. The use could be distinguished as a highway as opposed to a recreational walk from the fact that it was set out on the ground as a highway with adjacent street lights. Whilst the user evidence for the section E-F was considered 'as of right' it was insufficient to satisfy a claim of presumed dedication of a public footpath. The user evidence for G-H-I however which was also deemed to be 'as of right' was considered to be sufficient to satisfy a claim of presumed dedication.

40.22 The Committee was informed that Section A-ALT1-B of the claimed path did not cross land subject to an existing public right of access where the landowner may consider that he was unable to challenge anyone's use and thus use was 'by right' unless it could be physically distinguished as being used as a highway. Section A-B crossed a retail park, and the Land Registry title deeds showed that a variety of private rights of way were reserved for various private 'persons', but at no point was a right of way reserved for the public at large. The landowner had deliberately set out paths and openly invited and encouraged the public by means of signage to make use of his facilities so any use of this claimed path to access Morrisons Supermarket, Up Hatherley Library, the community centre, GP and the Greatfield pub would constitute use 'by right', thus failing the statutory test. The Asset Data Officer explained however, that all 19 individuals using section A-ALT1-B also claimed use of the path for health walks, dog walking, recreational walking, running and leisure. None of those activities were undertaken at the invitation of or with express permission of the landowner and therefore their use would constitute 'as of right'.

40.23 The Asset Data Officer detailed ways under Section 31 of the Highways Act 1980 by which a landowner could protect his land from claims of presumed dedication. She confirmed that she had found no notices or signs, at the retail park declaring the landowner's lack of intention to dedicate highways across it. Further, there was no record of any Section 31(6) deposits lodged with Gloucestershire County Council on behalf of the owner of the retail park. It could therefore be considered that there was sufficient claimed use of section A-ALT1-B as a highway thus 'as of right'.

40.24 In concluding her presentation the Asset Data officer informed the Committee that the analysis of the user evidence for the sections of path A-ALT1-B, C-D, E-ALT2-F, G-H-I was considered sufficient to satisfy a claim of presumed dedication of a public footpath. No evidence had been provided by the landowner of his lack of intention to dedicate the path. The footpaths were therefore deemed to subsist and should now be protected by being recognised on the Definitive Map as public footpaths.

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

Resolved that

- No Order be made to add a public footpath along section A-B (*diagonally across the car park*) to the legal record of public rights of way.
- An Order be made to add a public footpath along claimed section A-ALT1-B (*around the car park*) to the legal record of public rights of way.

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- An Order be made to add the section of public footpath along the claimed route C-D to the legal record of public rights of way.
- No Order be made to add a public footpath along section E-F (*the route as shown on application plan*) to the legal record of public rights of way.
- An Order be made to add a public footpath along section E-ALT2-F (*whole of the 690012 highway*) to the legal record of public rights of way.
- An Order be made to add the section of public footpath along the claimed route G-H-I to the legal record of public rights of way.

41. 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.

42. 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 11.40 am