

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Tuesday 23 March 2021. The meeting was held remotely.

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

Substitutes: Cllr Shaun Parsons

Apologies: Cllr Loraine Vivienne Patrick

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

1. MINUTES

Resolved

That the minutes of the previous meeting held on 2 December 2020 be approved as a correct record.

2. DECLARATIONS OF INTEREST

No declarations of interest were made.

3. PUBLIC QUESTIONS ON APPLICATION(S)

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

4. MEMBERS QUESTIONS ON APPLICATION(S)

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

5. APPLICATION FOR A MODIFICATION ORDER FOR AN ADDITIONAL LENGTH OF PUBLIC FOOTPATH CONNECTING STATION ROAD TO BUSHCOMBE CLOSE, WOODMANCOTE PARISH, TEWKESBURY DISTRICT

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

- 5.1 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.)*
- 5.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) for the claimed route located in the Parish of Woodmancote, Tewkesbury District. The claimed route was shown running between points A and B, on the Plan attached at Appendix JH2 to the report. The path ran for a length of approx. 77m connecting two public highways Station Road and Bushcombe Close.
- 5.3 The Committee was informed that the DMMO application was formally submitted on 12 June 2006 by Mrs Spragg ('the applicant'). A total of 5 Public Path Evidence Forms (PPEFs) were completed by 5 individual members of the public in support of the application dating back to 1960 on foot.
- 5.4 The Asset Data Officer explained that Bushcombe Close was a development of 20 bungalows for which planning permission was secured by Leckhampton Estates Ltd in 1959. She explained that her report showed that a footpath was conveyed by the developer for use by the purchasers of properties in Bushcombe Close. Land Registry did not however record any unregistered land in the vicinity of the claimed way so it was reasonable to infer that it had been incorporated over the years into the curtilage of adjacent properties.
- 5.5 The Asset Data Officer drew the Committee's attention to Appendix JH3a, which showed the land owned by the various properties in the vicinity of the claimed way. She referred to two planning applications that had been submitted by the owners of two adjacent properties to the claimed path. The owners of the property 'Waterside' (situated adjacent to Point A and abutting Station Road) received planning permission in 1992 for a two storey extension to provide enlarged living accommodation. The property No. 11 Bushcombe Close (situated behind Waterside near to Point B), received planning permission in 2016 for front and rear extensions, loft conversion and vehicle access and drive. Both planning applications had subsequently been implemented.
- 5.6 The Asset Data Officer presented a series of photos of the claimed path taken on 29 June 2006 - shortly after the DMMO was received, and also on 10 November 2020. The photos showed that the claimed path had been inaccessible at Point A Station Road in 2006 and 2020. The photos also demonstrated that between 2006 and 2020 at Point B Bushcombe Close there had been encroachment of the claimed path over the years, following alterations made to a driveway; the path was now completely inaccessible.
- 5.7 The Committee was informed that the applicant had given two reasons for submitting the DMMO application. The first reason was due to a planning application, submitted by the owners of Beldon House (situated north of the claimed path). The applicant had stated that *'the owners of Beldon House intended to use the footpath which they do not own, for access to a new bungalow in their back*

garden'. The Asset Data officer confirmed that the planning permission for Beldon House had been approved but not implemented to date. She added that Mr Parkin of Beldon House had in his landowner's evidence form refuted the allegation. He had appended a statement explaining that he purchased 14ft of a surplus 18ft of land to the rear of and between the properties; Grayswood, Beldon House and Greenhills on Bushcombe Lane and Waterside on Station Road directly from the developer in 1963. That had left a 4ft strip of land which the developers were obliged to retain for the footpath in accordance with the deeds of the Bushcombe Close properties. The Asset Data Officer reported that it would not therefore constitute a 'bringing into question' or challenge of the public's right to use the path.

- 5.8 The second reason for the DMMO application was that the local residents of Bushcombe Close (situated parallel to the claimed path), were concerned about the absence of a pavement along the lane and the impact this was having on pedestrian safety.
- 5.9 The Committee was informed that documents such as Inclosure Award 1847, the Tithe Map 1839, Finance Act Map 1910, the first, second and third edition 25" County Series Ordnance Survey Maps and the papers relating to the survey of public paths under the National Parks and Access to the Countryside Act 1949 were inspected. None however showed any indication of the claimed path.
- 5.10 The Asset Data Officer referred to Appendix JH5a-d, which showed a copy of the first three pages of the conveyance and plan for Plot No. 11 Bushcombe Close. The conveyance had been submitted by the applicant of 18 Bushcombe Close who had advised that the conveyance had formed part of the deeds to her house. A check with the Land Registry of the titles of 8 of the original bungalows revealed similar records of conveyances between Leckhampton Estates Ltd and the original purchasers of properties in 1960. The Asset Data Officer informed the Committee that it could be inferred from the wording of the conveyance that the rights, easements and restrictive covenants conveyed to the purchasers of Plot No.11, were similarly conveyed to the other 19 purchasers of properties within the Bushcombe development.
- 5.11 The Committee was informed that the 1960 conveyance referenced two separate footpaths; both of which were set out by the developer. The Asset Data Officer drew the Committee's attention to Appendix JH5c which showed the plan that accompanied the conveyance for Plot No. 11 Bushcombe Close. She explained that the alignment of the footpath shown on the plan was consistent with the route of the claimed path. The wording of the conveyance indicated that the path was provided for use by the purchasers of the 20 properties within the Bushcombe Development, and for which they were required to share the ongoing maintenance costs, and therefore it was a private easement of a footpath. A statement made by the applicant corroborated this when she said '*The footpath was clearly assured by Leckhampton Estates in favour of each and every one of the future owners of their development site in Bushcombe Close in the first instant of perpetuity*'.
- 5.12 The Committee noted that the second footpath was referenced in point 4 of the conveyance as follows: '*The Vendors hereby covenant with the Purchasers that*

they will make up the road and footpath on which the land shown edged red on the plan annexed hereto abuts to the standard required for adoption by the local authority'. The Asset Data Officer explained that the annexed plan described had not been submitted. However, Gloucestershire County Council had within its records a Stopping up Order of 25 January 1960 executed under the Town and Country Planning Act 1947 permitting the diversion of Public Footpath AWO12 in Woodmancote. The Order specified that *'the new highway shall be provided in accordance with the reasonable requirements of the County Council of Gloucester by Leckhampton Estates Limited'*. Further *'The cost of providing the new highway shall be paid by the said Leckhampton Estates Limited'*. Parts I & II of THE SCHEDULE, described the 'Highway to be Stopped Up' and 'The New Highway' as a footpath. She added that the Order Plan at Appendix JH6 showed the new footpath running along the length of Bushcombe Close. It was therefore reasonable to suggest that the Order appeared to be the 'footpath' noted under point 4 of the conveyance for which the developer would initially be responsible for setting out to a certain standard before its adoption by the local authority on behalf of members of the public.

5.13 The Committee was informed that in a letter dated 29 June 2006, Mr Quirk of No. 11 Bushcombe Close had advised that his deeds and the deeds of the other owners of properties along Bushcombe Close had said that the path should be maintained by the owners. Mr Quirk also advised in his letter that no one had used the path in 36 years as it was now narrow due to the houses along Bushcombe Close encroaching onto it.

5.14 The Asset Data Officer emphasised that whilst the claimed path had been set out by the developer, it was not clear as to whom the landowner was. A Public Rights of Way – Landowner Evidence Form (Claimed Path) was sent out with a covering letter dated 1 February 2007 to the affected and abutting householders. The Committee noted that the purpose of the evidence form was not to record evidence of use of the claimed path, but for the landowner to declare any overt action to show their lack of intention to dedicate the path.

5.15 It was reported that a total of 5 responses were received. Questions contained within the evidence form included:
'Does the route go onto your land?' All but one responded 'Yes'.
'Do you believe this way to be public?' All 5 responded 'No'.
'Have you seen or been aware of anyone using the path?' All but one responded 'No'. The owner that responded 'Yes' said it was closed by 'Waterside' in the late 1970's.
'Have you required people to ask permission?' All responded 'No'.
'Have you stopped anyone from using the path?' All responded 'No'.
'Have you told anyone that the path is private?' All responded 'No'.
'Have you ever erected signs stating that the way is private?' All responded 'No'.
'Have you ever obstructed the way?' All responded 'No'.

5.16 The Asset Data Officer explained that if the public's use of the path had not been 'brought into question' or 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 qualifying period 1986 – 2006.

- 5.17 The Asset Data Officer drew the Committee's attention to the bar chart of user evidence between the years 1986-2006 at Appendix JH7. She reported that the applicant had answered 'No' to the question 2 of the PPEF: '*Have you used the above path?*' Consequently whilst the detail supplied by the applicant was useful background information, the applicant's PPEF could not be included in the overall number of claimed users of the path.
- 5.18 The Asset Data Officer advised the Committee that there was no statutory minimum level of user required to show sufficient use to raise a claim of statutory dedication. However, when considering sufficiency of user, in the case law *R. v. SSETR (ex p. Dorset) [1999]* the judge considered that although the evidence within five user evidence forms was truthful, it was insufficient to satisfy the statutory test. It followed therefore that the user evidence of the remaining 4 individuals would also fail.
- 5.19 The Asset Data Officer explained that when analysing the user evidence she found that it had failed 3 further aspects of the statutory test. The first was that the length of the claimed use of the path by the remaining 4 individuals over the statutory qualifying period 1986-2006, fell short of the required 20 years necessary for a claim of statutory presumed dedication. The 4 individuals claimed use of the path from 1960/ 1961, i.e. the start of the development and continued for at most 12 years until 1972, when alternative paths in the vicinity were being favoured over the claimed path. Its lack of use therefore resulted in it being incorporated into adjacent gardens.
- 5.20 The second aspect of the statutory test the evidence failed on was that use must be 'by the public'. The Asset Data Officer made reference to an extract of a report by Ross Crail, Barrister for the 'Rights of Way Law Review' which specified that '*users need not come from all over the country; but that they must represent a wider cross-section of the public than just the owners or occupiers of nearby properties and their visitors*'. It was noted that the 4 remaining individuals who supplied PPEFs all lived in Bushcombe Close. Any use of the path therefore by individuals living in Bushcombe Close would be by a means of a private easement or right, thus not meeting the criteria of use 'by the public'.
- 5.21 The Asset Data Officer explained that a third aspect of the statutory test the evidence failed on was that for a claim to give rise to a presumption of dedication, user must be 'as of right', without force, secrecy or permission. A private right to use this path was conveyed by the developer, Leckhampton Estates Ltd, to all purchasers of properties within the Bushcombe Development for which they all had to contribute towards its maintenance. The four individuals all stated that they had been given permission. Consequently the private easement for the footpath running alongside No.11 Bushcombe Close which corresponded with the claimed

path within the conveyance thus had the affect of failing the 'as of right' test because use was by private easement a form of permission and thus 'by right'.

- 5.22 The Committee was informed that where an application failed the test for statutory dedication under Section 31 of the Highways Act 1980, consideration may be given to whether rights had been dedicated at common law. The Asset Data Officer advised that the application must fail at common law because the 1960 conveyance granted an easement to the householders to use the claimed path. Their use was therefore with a form of permission thus 'by right'. As such there could be no implied dedication of the claimed route at common law.
- 5.23 In concluding her presentation, the Asset Data Officer advised members of the Committee that if they agreed that on the balance of probabilities, the claimed path could not reasonably be alleged to subsist by statutory or inferred dedication then they should direct that no order be made to record the claimed route as a public footpath. The recommendation therefore was that no Order be made to add the claimed footpath to the legal record of public rights of way on the basis that the user evidence failed to meet the required criteria of the Section 31 Highways Act 1980 statutory test and at common law.
- 5.24 In response to a question, the Asset Data officer confirmed that point 2 of the 1960 conveyance at Appendix JH5a, referred to 'said plots' as opposed to 'sold plots' as she had stated during her presentation.
- 5.25 Having considered all of the information before it, the Committee

Resolved that;

No Order be made to add the claimed footpath to the legal record of public rights of way on the basis that the user evidence failed to meet the required criteria of the Section 31 Highways Act 1980 statutory test and at common law.

6. 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.

7. 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 10.50 am

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