

# COMMONS AND RIGHTS OF WAY COMMITTEE

**MINUTES** of a meeting of the Commons and Rights of Way Committee held on Monday 7 June 2021 at the Council Chamber - 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)	

Apologies: Cllr Alex Hegenbarth and Cllr Dominic Morris

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  
Joanne Bolton, Democratic Services Adviser

**8. ELECTION OF CHAIR**

Resolved

That Cllr Phil Awford be elected Chair for the ensuing Civic Year.

**9. ELECTION OF VICE-CHAIR**

Resolved

That Cllr Graham Morgan be elected Vice-Chair for the ensuing Civic Year.

**10. DECLARATIONS OF INTEREST**

No declarations of interest were made.

At this juncture Cllr David Willingham stated that he had undertaken an informal site visit.

**11. MINUTES**

Resolved

That the minutes of the previous meeting held on 23 March 2021 be approved as a correct record.

**12. PUBLIC QUESTIONS ON APPLICATION(S)**

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

**13. MEMBERS QUESTIONS ON APPLICATION(S)**

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

**14. APPLICATION FOR A MODIFICATION ORDER TO ADD A PUBLIC FOOTPATH AT BREAKHEART HILL, NORTH NIBLEY, GLOUCESTERSHIRE**

- 14.1 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.)*
- 14.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) for the claimed route located in the Parish of North Nibley, Stroud, Gloucestershire. The claimed route was shown running between points A-B-C on the Plan attached at Appendix JH3 to the report.
- 14.3 The Committee was advised that when deciding whether or not to make an order the standard of proof required to show that public rights existed was that there was sufficient evidence to 'reasonably allege' that they existed. This was quite a low threshold and below the civil standard of proof or "balance of probabilities". It was not necessary for evidence to be conclusive or based on the criminal standard of proof or 'beyond reasonable doubt'.
- 14.4 The Committee was advised that if the case was finely balanced and it was considered that there was genuine conflict in the evidence, for example between the evidence of users on the one hand and Landowner on the other, then an order should be made so that the evidence could be tested at a public inquiry.
- 14.5 The Committee was advised that in the event that they determined that an order should not be made, the applicant had the right to appeal against the decision to the Secretary of State. Similarly if the Committee determined that an order should be made the Landowner had the right to appeal. Therefore any order made today was still open to challenge.
- 14.6 The Committee was informed that the applicant had stated that the claimed path connected Public Footpaths CNN9 to CNN10. The accompanying plan however, at Appendix JH2 to report, identified the claimed path as a straight diagonal line across the field which incorporated approximately 40m of designated Public Footpath CNN9 (part of which was legally diverted around the reservoir in 1979). The 40m section of path was annotated by the Case Officer for identification purposes only as running between points X and Y. The Definitive Map provided conclusive evidence as to the existence and status of that section of claimed path designated as Public Footpath CNN9 (without prejudice to higher rights). The user evidence submitted had consisted of pedestrian use only and therefore no further consideration was necessary for that section of path.
- 14.7 The Asset Data Officer explained that with regard to the opposite end of the claimed route near CNN10, the applicant had identified a path that appeared to

pass through the field boundary south of the field gate before connecting with Public Footpath CNN10. The applicant had also submitted a User Evidence Statement (“UES”) and in response to Q.3 described the application route, and responded: “*This is indicated on the attached map from stile to stile...*” Applicants were not expected to be cartographers and therefore an email dated 30 March 2021 was sent to Mrs Gibbs seeking clarification of the route used at that point. Two maps were attached, one of the route as originally claimed and the other at Appendix JH3 to the report which showed the path connecting with the track at a section of fencing adjacent to the field gate which was referred to as a ‘stile’ by nearly everyone associated with this application including the current landowner, Mr Moss, before then proceeding along the track to connect with Public Footpath CNN10. The applicant was asked to clarify which route she used. She responded on 31 March 2021 stating “*The route I took was A to B and B to C and always over the stile*”. The Asset Data Office explained that the applicant’s statement confirmed the route used as shown on the plan at Appendix JH3.

- 14.8 The field over which the claimed path crossed was visited on 21 January 2020 and then again on 1 March 2021. The Asset Data Officer described the findings of the site visits. She explained that the claimed path commenced at the point marked A on the plan at its junction with Public Footpath CNN9. It ran in a generally east north easterly direction for approximately 138 metres across the field to the point marked B on the plan. The path then continued for a further 8m in a generally easterly direction to a point marked C at its junction with Public Footpath CNN10. A stile was located at point A and a ‘stile’ (without a step) was located at point B adjacent to an old padlocked wooden field gate. The claimed path viewed from points A and B could be identified on the ground and was found to be unenclosed and unsurfaced across a grass field.
- 14.9 The Committee noted that the current landowner, Mr Moss, had confirmed that he had installed a stock fence and 2 padlocked wooden field gates in October 2019 and planted a mixed native hedge one month later around the field. The work had resulted in the obstruction of the claimed path running diagonally A-B across the field.
- 14.10 The Asset Data Officer drew the Committee’s attention to the dotted red line on the plan at Appendix JH3, which was set out around the perimeter of the field between the natural field edge and the stock fence installed and the hedgerow planted in 2019. Part of the track had served for many years as private access to the reservoir but now additionally served as the route of a signed permissive path provided by the current landowner, Mr Moss. White directional waymarks had been erected along the route stating ‘*Permissive Footpath*’.
- 14.11 The Asset Data Officer advised the Committee that prior to Mr Moss taking ownership of the land in September 2019, the land was for many years in the ownership/ tenancy of the Pegler family. There was some evidence that the Merchant Venturers Charity had an interest in the land also.
- 14.12 The Committee was informed that historic documents such as Tithe, Inclosure and Finance Act maps did not show the claimed path. However, the 1950’s statutory

process of compiling the DMS (legal record of public rights of way) provided background information with regard to the claimed path and detailed a conflict within the legal record which affected it. Separately, internal files belonging to Gloucestershire County Council suggested a level of concern held by the Ramblers' Association and North Nibley Parish Council with regard to the obstruction of Public Footpath CNN9 and their interest in the route of the claimed path over the period 1996 - 2007. The Asset Data Officer indicated that the 1950s process had been detailed in the report to provide the Committee -particularly the new members to the Committee, with background information on the DMS process.

- 14.13 The Committee noted that as part of the DMS process Gloucestershire County Council initially provided parish councils in 1950 with maps to identify the paths that they considered to be public rights of way. A parish meeting was required to be held before the maps were submitted to the County Council. Members' attention was drawn to North Nibley's original submission at Appendix JH5 to the report. It showed that the path subject to the application was not claimed. The Asset Data Officer explained however that it was important to consider the route designated as Public Footpath CNN9. It was originally claimed as a bridleway and was identified by a line drawn in red ink, numbered 9 and shown running through Millend Wood around Breakheart Quarry. Importantly, the eastern end of the path was shown terminating at the end of the wood.
- 14.14 The Committee noted that a requirement for a claim of presumed dedication was that the path had definite start and end termination points, either at a designated highway or a place of popular resort. The Asset Data Officer explained that it could be inferred that some discussion took place with regard to the termination of the eastern end of path No.9 due to the fact that it did not end at a highway or a place of popular resort. The original submission identified two routes drawn in pencil from the red line termination point; one of which continued in a generally north north easterly direction to connect with the 41472 highway and the other continued in a generally east north easterly direction to connect with a footpath marked with a blue pen annotated No.10.
- 14.15 The Asset Data Officer explained that the submissions once completed were collated by the Divisional Surveyor's Office at the County Council where officers would examine the returned maps. The draft map did not show the route of the claimed path but it was important to note that the eastern end of CNN9, identified as a bridleway, was shown extending beyond Millend Wood in a north north easterly direction to the 41472 highway, one of the routes marked in pencil on the original submission. The accompanying statement indicated that the bridleway started at the 41472 highway, crossed Millend Wood to Breakheart Hill, across field parcel numbers 717, 720a & 726 back to the 41472 highway.
- 14.16 The Committee was informed that as a result of the public consultation, an objection was received with regard to CNN9 from Merchant Venturers, on 22 June 1954. The complaint stated: "*That CNN9 should be shown between OS 722 & 720 and not through OS 720a. Is this a draughtsman's error?*"

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

- 14.17 The Asset Data Officer explained that the notes by the County Surveyor's department following investigation stated: *Submitted by Parish Council as far only as is shown marked on OS through Millend Wood. When questioned, Parish Clerk stated that it should continue, north, as shown on the Draft Map. On site, the track (CNN9; Case Officer's annotation) is well worn and there is a stile at its east end. From the stile, there are plain signs of use by pedestrians in an ENE direction to a field gate which leads to the south end of CNN10. The field gate has a notice on its top bar "Please shut this gate". There is no sign of a track from the wood N to the road as indicated at present on Draft Map, nor is there any stile at the first boundary from the road. It would seem that the NE end of the path, as marked on the Draft Map is an error.*"
- 14.18 It was reported that any claims regarding omitted paths from the draft map or objections to paths shown on it were referred back to the parish councils and landowners, and agreement sought to alter the maps or secure withdrawal of the objection. Where agreement could not be reached, a hearing was arranged, to hear the representations and objections made to the County Council in connection with the Footpath Survey. The barrister then subsequently submitted their recommendations, which were in turn ratified by the County Council's Highways Committee.
- 14.19 The Asset Data Officer provided the Committee with the details of the objections as set out in the report. She also explained that fresh O.S 6" 1924 edition maps were prepared called the Draft Modified Maps to reflect the determinations made following investigation at the draft map stage. Those were placed on deposit for 28 days during which time any individuals could comment/ object. Notice of the determinations was placed in the London Gazette, The Citizen and The Stroud, News and Journal on 28 October 1960.
- 14.20 The Committee was informed that the entry regarding CNN9 was as follows "*Re-classify to footpath the whole of bridle road CNN.9 from County Road 41472 at Millend Wood to the point where it re-joins County road 41472 at Breakheart Hill, and realign via O.S. field Nos. 720a, 719 and 721*". In addition to the two committee dates noted against objection No.18, the entry in the newspapers confirmed that the alignment issue was determined and accepted by the Highway Committee. The Asset Data Officer explained that there was no map to confirm the route of the re-aligned section of CNN9. However, a compass bearing of ENE from the termination point shown on North Nibley Parish Council's original submission suggested a route similar to that of the claimed path and followed the second route marked in pencil on the original submission. Although the statement was modified to correctly reflect the determination; re-classification and the re-alignment, the Modified Draft Map merely reflected the re-classification to footpath. The re-alignment of CNN9 was not shown. The error of not reflecting the re-alignment of CNN9 on the Modified Draft Map was transposed onto the Provisional Map and then onto the final Definitive Map.
- 14.21 The Committee was informed of the details of the correspondence with North Nibley Parish Council regarding the obstruction of CNN9 and use of the claimed path. It was explained that. Mr Powell, a North Nibley Parish and Stroud District Councillor,

took a keen interest in the public rights of way network, ensuring that any obstructions were brought to the attention of the Public Rights of Way ("PROW") Team.

- 14.22 A report was submitted by Mr Powell on 17 November 1999, which stated with regard to CNN9: "*Eastern exit path to Stinchcombe Hill-Whiteway Road does not exist*". It was explained that the obstruction of CNN9 by a wall meant that the public could not access the 41472 highway. A PROW officer responded to North Nibley Parish Council by letter dated 26 November 1999 detailing the anomaly with regard to CNN9 and the claimed path on the DMS and advised that the matter had been passed to the Highway Records Team. The PROW officer also asked Mr Powell if he could ascertain whether it was possible to walk the section of route highlighted green, as shown on the statement (i.e., 720a, 719 and 721, thereby connecting with CNN10). The PROW Officer had felt that it was reasonable to regard it as the intended route and that it would therefore be inappropriate to force a route through parcel number 726.
- 14.23 The Asset Data Officer drew the Committee's attention to the map at Appendix JH14. The map under cover of a letter dated 9 December 1999 was sent by the PROW officer to Mr Powell to identify the route used by the public. The PROW officer highlighted in green the routes of CNN9 and CNN10 excluding the section of claimed path subject to this report which was highlighted pink. The field parcel numbers recorded on the written statement were also provided.
- 14.24 The Committee was shown the photographs at Appendix JH15 taken by Mr Powell on 23 December 1999 which were returned to PROW on 7 January 2000 with the accompanying map annotated. On the returned map, Mr Powell had annotated the pink route drawn by the PROW officer: "*This red route not viable into 719*". He drew a second route connecting the stile at point H with the stile adjacent to the field gate at point J. Against that route he added the words: "*This red route in current use*". The path followed the alignment of the claimed path.
- 14.25 The Committee was informed that a site visit took place on 22 October 2003 between Mr Powell of North Nibley Parish Council and Andrew Houldey of Highway Records and Mr Hawking, Diversions Officer, Gloucestershire County Council. Resulting from that site visit it was suggested that the best way forward was to process a Public Path Order to extinguish the eastern section of CNN9 in favour of the route of the claimed path as used by the public. Mr Powell agreed to sound out the landowner.
- 14.26 The Asset Data Officer explained that Mr Powell wrote to Mr Houldey of Highway Records on 4 November 2003. The letter, copied to Mr Pegler and to the Parish Council, detailed his understanding of the problems using CNN9. He also confirmed that he had spoken to Mr Pegler who was quite happy with the situation as currently walked; he had advised Mr Pegler that the County Council would contact him to resolve the anomaly.
- 14.27 The Committee was informed that an Excel spreadsheet of PROW diversions included an entry dated 25 November 2003 for the diversion of CNN9. It stated

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

*“County Council sponsored application to sort out Definitive Map anomaly at Breakheart Quarry. Waiting response from landowner”.* It was reported that the responsible officer had retired many years ago and no file had been found.

- 14.28 The Asset Data Officer explained that in the table of diversions, within the PROW computer files at Gloucestershire County Council, the entry stated: “negotiating compensation with landowner – last correspondence 2007”. The Committee was also informed of the contents of a memo on file dated 19 February 2007 from a PROW officer to two PROW Line Managers, which outlined the conversation the officer had had with Mr Pegler. The PROW officer had indicated in the memo that Mr Pegler had agreed to the diversion onto his land, for a sum of £150.00. in compensation. The Committee’s attention was drawn to a copy of the plan showing the proposed diversion attached to the letter and also to a similar letter of 6 October 2006 addressed to North Nibley Parish Council at Appendix JH16.
- 14.29 A member of the Committee pointed out that the memo referred to an unrecorded conversation with Mr Peglar, and represented only the PROW Officer’s recollection of the conversation. In response, the Asset Data Office advised that the primary issue to be decided was whether there was evidence to show that public rights subsisted or were ‘reasonably alleged’ to subsist. It was not necessary therefore for evidence to be conclusive or ‘beyond reasonable doubt’.
- 14.30 The Committee was informed of the details of the past correspondence with the S. Cotswold Ramblers’ Association Group. It was pointed out that a letter from Mr Heaton, Footpath Secretary dated 20 August 2001, was incorrectly dated 24 March 2001 on the Power Point presentation.
- 14.31 The Committee was advised that nothing in the correspondence between Gloucestershire County Council and North Nibley Parish Council and the S. Cotswold Ramblers’ Association Group over the period 1996 and 2007, suggested that the landowner obstructed their use of the claimed path in any way. Further the Ramblers’ Association held internal discussions with regard to pressing the County Council as Highway Authority to use its statutory powers to address the obstructions along CNN9 but ultimately chose not to do so in favour of lobbying for an official diversion to the route of the claimed path. The correspondence showed the intent of both agencies which was to have the claimed path added to the Definitive Map.
- 14.32 The Committee noted that the status of the claimed route was first called into question when the landowner obstructed the claimed route by means of a stock fence and padlocked gate erected in October 2019 and a native hedge planted shortly thereafter. The user evidence was therefore assessed over the statutory qualifying 20 year period 1999-2019 leading up to the application.
- 14.33 The Asset Data Officer explained that the Land Registry indicated that the land over which section B-C crossed as shown on Appendix JH3 was unregistered. An inspection of the Rural Payments Register however recorded that the land was now in the ownership of the Breakheart Community Project Ltd. Historically a conveyance dated 1958, between the Merchant Venturers of the City of Bristol &

Dursley Rural District, granted an easement for access to the reservoir “*along the roads or way coloured brown on the said plan*”. The road referred to, included the section of unregistered land B-C. It should be noted however that there was no explicit reference in section 31(1) of the 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.

- 14.34 The Committee noted that the application was initially supported by the user evidence of 29 individuals, collected on User Evidence Statements (“UES”). The Committee’s attention was drawn to the summary and bar chart of use at Appendix JH19 & JH20.
- 14.35 The Asset Data Officer explained that all but three of the 29 individuals identified a path which was largely consistent with the depiction of the claimed route A-B-C on the plan. Most described the path as running between 2 stiles, i.e. A-B, thus falling short by 8m of the termination point C. However, most of the individuals also either drew the path on the accompanying plan extending to point C or supplied grid references which included it. Individuals who omitted the 8m of path extending to point C completely were contacted by letter of 19 February 2020 seeking clarification. Those who did not respond were identified in the summary as No’s 3, 4 & 10 and as such their UES’ were not included within the overall tally of users.
- 14.36 The Committee was informed that use by the remaining 26 individuals dated back to 1969 and all claimed use of the path over part or all of the qualifying period: 1999-2019. Of those, 17 claimed use of the path over the whole period. All use appeared to have been for recreational purposes by individuals on foot only and the frequency of use varied: 4 claimed daily use; 15 claimed weekly use; 3 claimed monthly use and 4 claimed use of the path every few months. In response to Q.6: *how wide is the application route?* There was a variety of responses: 2 individuals did not specify a width; 12 stated 1m (3ft); 4 stated 1.5m (4/ 5ft); 2 stated 2m; 3 stated 3m; 1 stated 4m; one stated walking width and one stated wide enough for two people to walk side by side. Where no evidence existed as to the boundaries of a track, the presumption would be that the way was a “*strip of reasonable width*”. It was clarified that if the Committee was minded to recommend that an order should be made, a width of 2m was recommended based on the common law presumption that a path should be wide enough for 2 people to pass and re-pass.
- 14.37 The Asset Data Officer explained that Mr Moss via his legal representative, Wilsons Solicitors, alleged that the Foot and Mouth Disease (“FMD”) 2001/2, during which the national public rights of way network was placed under a closure order (in Gloucestershire from 28 February 2001) constituted sufficient evidence of an interruption for the purposes of Section 31 Highways Act 1980 to rebut the statutory test of presumed dedication. The Committee was advised however that an ‘interruption’ for the purposes of s31HA80 was an action taken by the landowner to show that he maintained that the way was not a highway and had no intention of dedicating it as such. In case law *Merstham Manor v Couldson and Purley 1932*, it was considered that to constitute an interruption, there must be some “*physical and*



*actual stopping up of enjoyment*" of the public's use of the way and it must not be shown to be for any other purpose, i.e. preventing cattle escapes.

- 14.38 The Committee was informed that Kerr J in the High Court judgement in Roxlena 2017 criticised the Planning Inspectorate's advice note on FMD. He nevertheless acknowledged that there was enough evidence of use of the paths that the 'reasonably alleged' test was sufficiently met without investigating the extent of abstinence of use during the FMD outbreak. Therefore his finding on the question of FMD and interruption was *obiter dicta*. The Court of Appeal 2019 reached the same conclusion on the 'reasonably alleged' test, and did not dwell on the question of FMD and interruption. Lindblom LJ (with whom the rest of the court agreed) recited but did not endorse (nor depart from) Kerr J's finding in the court on the question of FMD and interruption.
- 14.39 The Committee was informed of the details of the response to Mr Kind (a consultant on public rights of way issues for over 30 years) following his challenge to the Planning Inspectorate on their position regarding FMD. The Asset Data Officer clarified that to date, the Planning Inspectorate stood by Advice Note No.15 and had not withdrawn it.
- 14.40 In response to a question it was also clarified that the claimed path subject to the application, not being an official public footpath, was not subject to DEFRA's national closure of public rights of way and Gloucestershire County Council did not supply FMD closure notices for land which was not part of the existing PROW network.
- 14.41 The Asset Data Officer confirmed that no evidence had been submitted by users, or by members of North Nibley Parish Council or the Ramblers' Association, to show that they were prevented by the landowner from using the path over that period, whether by word of mouth, notice or by physical obstruction. The Committee was therefore advised that following the guidance provided by DEFRA and the Planning Inspectorate, the report did not accept that FMD acted as an interruption capable of rebutting a statutory claim of presumed dedication.
- 14.42 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 of the claimed path has been by force or in secrecy.
- 14.43 Mr Moss however had alleged that the claimed path had been used by express permission, thus defeating the 'as of right' part of the statutory test. It was claimed that the landowner granted permission to a number of organisers to use the path.
- 14.44 The Committee was informed that the law drew a distinction between acquiescence by the owner on the one hand and licence or permission on the other. Use, which was by acquiescence of the landowner was 'as of right' and passive toleration was all that was required to evidence that. However, a path used with express permission and thus not 'as of right' would mean that a landowner was granting the public a temporary, revocable license but with the intent that it should not be

permanently dedicated as a public right of way. To rebut the 'as of right' test therefore, involved some positive act or acts on the part of the landowner to show his intent.

- 14.45 The Committee was advised that when applying case law (*Beresford Trustees v Secretary of State for the Environment and Cumbria CC, 1995*), it did not follow that the issuing of express/ implied permission to specific parties demonstrated a wider lack of intention to dedicate to the public at large.
- 14.46 The Committee acknowledged that the trails, walks and the run had been promoted by the organisers for years. It was also acknowledged that permission had been sought privately from the previous landowner, Mr Pegler, although no evidence of this had been submitted. When considering the Dursley Dozen Run and the Ramblers' Association's walks booklets, no evidence has been submitted to show that the 'permission' was communicated to the public. Dursley Running Club did not advertise the permission as part of their online promotion of the event or by means of physical notices along the claimed path itself.
- 14.47 The Asset Data Officer informed the Committee that with regard to the Ramblers' Association's walks booklets, there was no mention within either edition; 1995 or 2007, that use of the claimed path was by permission. A comment made by Mr Heaton, S.Cotswold RA Footpath Secretary however, in a letter dated 20 August 2001, appeared to contradict that statement. He described the claimed path in the following way: *"...in this case the unofficial permissive route is far preferable"*. However he then admitted *"... we have been unable to discover who the landowner is...."*. That comment casted doubt on whether permission was sought from the landowner to include the claimed path within the walks booklets and it followed that 'permission' in that context could not rebut a claim of presumed dedication.
- 14.48 It was clarified that the action of privately seeking permission to use the claimed path as part of the Dursley Dozen's annual run or by the RA as part of their walks booklet, but not communicating this to the public would not constitute sufficient evidence of use by 'permission' thus defeating the 'as of right' test.
- 14.49 The Committee was informed that the Lantern Way and the Breakheart Trail, produced by 'Dursley Welcomes Walkers', both advised the public that use of the claimed path was with the landowner's permission and thus might be expected to constitute sufficient evidence to defeat a claim of presumed dedication. Mr Ashbee, a member of Dursley Welcomes Walkers, was responsible for seeking the landowner's permission to incorporate the path within the walks. He supplied user evidence and was identified as No 22 in the summary. In response to Q.12: *'Did the owner give you permission to use the application route?'* He confirmed *"Yes"...* *"Owner said to me by telephone he allowed the path to be used and I could sign it as part of a new route called the Lantern Way – about 2014"*. The Asset Data Officer emphasised, however that again it was important to consider the context in which the word permission had been used, and referred to David Ashbee's response to the consultation as outlined in the report.

- 14.50 The Asset Data Officer explained that whilst granting permission for the claimed path to be included in the walks leaflets, Mr Pegler's direct remarks to Mr Ashbee, showed that he considered the claimed path to be an official public footpath. That could be based upon the fact that 7 years previously in 2007, he had been contacted by a PROW Officer to ask him if GCC could divert part of CNN9 onto his land along the route of the claimed path to address the conflict in the DMS, which he had agreed to. In response to a question it was clarified that no compensation had been paid to Mr Pegler in order that part of Public Footpath CNN9 could be diverted onto his land. The PROW Officer had transferred to another team shortly after contacting Mr Peglar and it looked like the diversion was then subsequently overlooked.
- 14.51 The Asset Data Officer explained that Mr Pegler's 'permission' for the claimed path across his land to be included in the Lantern Way and the Breakheart Trail was not based upon a temporary license which could be revoked at will whilst retaining his intention of not permanently dedicating the path. His direct comments to Mr Ashbee indicated that he was under the impression that the GCC sponsored diversion had been processed and the path had been dedicated as an official public footpath and thus in effect, Mr Pegler rebutted the allegation himself that use of the path was by permission and thus not 'as of right'. She stressed that the fact that the diversion had not taken place or that no compensation had been paid was irrelevant. Following the launch of the walks, he did not punctuate the public use of the path across his land by occasional closures or notices. Whilst aware of the use to which the land was being put, he took no action to deter it. She added that Mr Ashbee's statement suggested that the decision was taken by the organisers, in good faith, but independent of the landowner, to use of the word 'permission' within the description of the Lantern Way and Breakheart Trail, perhaps because they did not want to misrepresent the status of the path. Mr Ashbee stated in response to Q.13 of his UES: "*I knew from maps that it (claimed path – officers clarification) was not a PROW.*" The Asset Data Officer suggested that a better word to describe the claimed path within the leaflets may have been 'unofficial'. They did not however reflect the landowner's view with regard to the path and therefore use of the word 'permission' in the walks description in that context was not considered sufficient evidence to rebut the 'as of right' test.
- 14.52 The Committee noted that members of the public claiming use of this path were asked in Q.12 of the UES: "*Did the owner give you permission (or did you seek permission) to use the application route?*" A total of 24 out of the remaining 26 individuals responded "No".
- 14.53 Question 10 asked: *have you ever seen signs or notices suggesting whether or not the application route is a public right of way? (prior to the 2019 permissive path signs):*
- Mr Snell, identified as No.26 in the summary stated: "*Yes- marked public footpath by both stiles marked on the map since I've been using it between 1977 and 2019*".
  - Mr Scragg, identified as No.23 in the summary (1996) stated: "*yes – public footpath arrow on both stiles*".

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

- Ms Blitz, identified as No.2 in the summary (2017) stated: “Yes – Gloucestershire County Council Public Footpath signs were in place both sides of both stiles indicating a public right of way. Also Jubilee Way and lantern Way signs”.

- 14.54 In response to Q.13: *has anyone ever told you that the application route was not public?* No one responded ‘Yes’. Mr Ashbee commented however that “*I knew from maps it was not pro*”.
- 14.55 The Asset Data Officer reported that the responses indicated that the public did not consider that they used the path with permission or that they required it.
- 14.56 The Committee was informed that in addition to the evidence submitted within the UESs, the promoted use of the claimed path via the walks leaflets and booklets was evidence of user by the public of such a volume that the landowner could not have been unaware of it even if he had not been approached by the organisers of events and walks. The physical characteristics of the path demonstrated the landowner’s acquiescence. The applicant noted PROW waymarks on the stiles at either end of the path throughout her use of the path which dated back to 1972 and Mr Snell noted similar signs throughout his use from 1977. Stiles at each end of the path were noted by Mr Peace who claimed use of the path from 1969.
- 14.57 The Committee was informed that when considering the qualifying period 1999-2019, no evidence had been submitted to show that any ‘overt’ action was taken by the landowner to challenge the public’s use of the claimed way or to indicate to them that he had no intention of dedicating the path, whether verbally, by notice or by physical obstruction. The outward appearance of the landowner’s action was of acquiescence over a long period. Further, in 2003 & 2007 he had agreed to dedicate the path as an official public footpath and considered by 2014 when approached by one of the organisers of the Lantern Way, that it had become so.
- 14.58 The Asset Data Officer advised the Committee that it was her opinion the evidence was sufficient to show, that a public footpath was reasonably alleged to subsist over the claimed route and it was her recommendation that it should be recorded on the definitive map and statement. The final decision of course lay with the Committee.
- 14.59 The Committee was informed that the application could also be considered at common law. The Asset Data Officer indicated that the Pegler family, who owned the field over which the claimed path crossed from 1939, knew of and acquiesced in the use of the path by the public. Unlike the statutory test, it was not necessary to demonstrate a defined period of continuous use and the case was considered on its individual facts.
- 14.60 The Asset Data Officer detailed the relevant evidence which could be considered at common law, and explained that it was her opinion that the same would be considered sufficient to represent ‘acceptance by the public’, one of the pre-conditions for the creation of a highway at common law.

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

- 14.61 The Asset Data Officer reiterated that there was no evidence that any permission granted by the landowner to the Ramblers' Association for their 1995 walks booklet and the organisers of the Dursley Dozen Run which started in 1989 was communicated to the public and thus would not rebut the 'as of right' test.
- 14.62 The lack of 'overt' action taken by the landowner to rebut any suggestion of dedication such as erecting physical barriers, installing notices stating that the route was not a public right of way or turning people back represented the other pre-condition for the creation of a highway at common law; implied dedication.
- 14.63 The Committee was informed that the available evidence suggested that there had been a route corresponding to the claimed path dating back to the late 1950s which the public had used on foot, as of right and without interruption thus giving rise to an inference of dedication at common law.
- 14.64 In concluding her presentation the Asset Data Officer advised the Committee that the case had been made in the report for a claim of statutory presumed dedication over the period of 1999–2019 but that a claim of inferred dedication at common law citing use dating back to the late 1950s, had also been considered. She explained that there was conflicting evidence between the current landowner and the users with regard to use being 'interrupted' and 'by permission'. However, the report set out the context of why those arguments should be rejected, and it was submitted that the user evidence was sufficient to show that the claimed path A-B-C was reasonably alleged to subsist as a public footpath and therefore the section of path must now be protected by being recognised on the Definitive Map as a public footpath.14.65 Having considered all of the information before it the Committee resolved to recommend:

That an order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-B–C.

## **15. 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.

## **16. 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 12.10 pm

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