

**RE: DMMO APPLICATION TO RECORD FOOTPATH AT
LECONFIELD ROAD, NANPANTAN, LOUGHBOROUGH**

OPINION

Introduction

1. I am asked to provide an Opinion for the Helen Jean Cope Charity (“the Charity”) upon an application (“the Application”) dated 24 April 2021 made by Barbara Rose Singer (“the Applicant”) to Leicestershire County Council in its capacity as surveying authority (“the Council”) for a Definitive Map Modification Order (“DMMO”) to add a public footpath (“the claimed path”) from Leconfield Road, Nanpantan, Loughborough as shown marked A-B-C-D-E on Plan No. M1269 to the Definitive Map and Statement. The claimed path runs over an agricultural field (“the Field”) owned by the Charity. It forms a circular route over the field to and from Leconfield Road.
2. I provided a previous Opinion dated 13 March 2023. This Opinion supersedes the previous one in its entirety by way of updating it to reflect further information obtained on behalf of the Charity. In particular, it takes account of the contents of three Statutory Declarations (“SD”) sworn by Richard Bailey, who farmed the Field between 1997 and 2001; Richard Smith, who farmed the Field from 2001 until 2019; and Noel Manby, a rural surveyor who has been the Managing Agent for the Charity since 2004. In addition, on 5 May 2023, outline planning permission for the residential development of the Field was granted on appeal.

Legal Framework

3. The Application is made under s.53(2) of the Wildlife and Countryside Act 1981. Section 53(2)(a) requires the Council to keep its Definitive Map and Statement under continuous review and to make modifications as soon as reasonably practicable after

the occurrence of any of the events specified in s.53(3). The relevant event is contained in s.53(3)(c)(i), namely:

*“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—
that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path”.*

4. The fundamental issue for the Council in determining whether to make the DMMO is therefore whether the claimed path “*subsists or is reasonably alleged*” to subsist. The former test is whether, on the balance of probabilities, the claimed public footpath subsists. The latter test is a lesser one of whether a reasonable person, having considered all the relevant evidence available, could reasonably allege the claimed footpath exists: see *R. v Secretary of State ex parte Bagshaw and Norton* (1994) 68 P. & C.R. 402. Nonetheless, as emphasised in that case, “*credible evidence*” must be produced that the claimed path is reasonably alleged to exist in order to satisfy that lower threshold.
5. In addition, a DMMO may only be made upon “*the discovery of evidence*” which, when considered with all other relevant evidence, shows that a footpath subsists or is reasonably alleged to subsist. As was made clear in *R. (on the application of Roxlena Ltd) v Cumbria County Council* [2019] EWCA Civ 1639, once evidence has been found and considered by the authority, together with all other available evidence, some new and additional evidence must be relied upon in order for a s.53(3) event to occur in respect of a fresh application.

The Application

6. The Application is made on the basis of user evidence. The only documentary evidence relied upon is photographic evidence. The Applicant places no reliance upon old map evidence. Instead, the Application itself relies solely upon the claimed path having been allegedly dedicated as a public footpath due to long use. Such dedication can arise pursuant to s.31 of the Highways Act 1980 (“HA”) or at common law. Although the Application does not rely upon documentary evidence, it is acknowledged that the

Council will nonetheless make its own appropriate investigations of available old maps and relevant documentation.

7. The Application is not the first made in respect of a claimed path over the field. An application was previously made in September 2000 for a claimed footpath over a different route over the Field. At that time, the applicant and supporters of that application were claiming to have used a different route over the Field than the route now being claimed. There is therefore an inherent inconsistency between the two applications both relying upon long user insofar as any of the individual supporting users of the Field previously claimed to have walked a different route over the Field than the route they are now claiming to have walked.

Section 31 Highways Act 1980

8. Section 31(1) HA provides:

“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

There must be credible evidence of each of the elements of the statutory criteria for the statutory presumption to arise and in order for a DMMO to be made. Similarly, there must be credible evidence of all the elements of dedication at common law in order to enable a DMMO to be made on that alternative basis.

20 years uninterrupted use of the claimed path

9. The relevant 20 year period for the purposes of s.31 must be calculated retrospectively from the date when the right of the public to use it is brought into question: see s.31(2). On 17 June 2020, Mr Manby, acting on behalf of the Charity, erected notices at the entrance of the claimed path at Leconfield Road and at the access adjoining Burleigh’s Wood to where a number of users claimed to have been walking. Those notices stated:

“PRIVATE PROPERTY
NO PUBLIC RIGHT OF WAY OR ACCESS”

That is confirmed by Mr Manby at paragraph 18 of his SD with photographs of the notices in situ shown in Appendix 5. Those notices would have had the effect of bringing the public's right to use the Field into question for the purposes of s.31(2). Hence, the relevant 20 year period is **June 2000 until June 2020**.

Use of defined route over land

10. Both under s.31 and at common law, any long use resulting in dedication can only occur over a defined route on the ground. That is a fundamental characteristic of any highway which must follow a known and defined line in contrast, for example, to recreational use of a village green. In *R. (on the application of Pereira) v Environment and Traffic Adjudicators* [2020] EWHC 811 (Admin), having reviewed the legal authorities, Fordham J. stated at [12]:

“It is, in my judgement, an error of law to allow fluctuation in the course of passage across land to constitute the maintenance of ‘a course of passage’, so as to support a conclusion of uninterrupted enjoyment by the public of ‘a way’ over land. What is needed is greater precision, the identification of what the uninterrupted ‘way’ is, and an analysis of whether the location in question falls within that uninterrupted ‘way’.” (Emphasis added).

Hence, a precise defined route must be identified in order to comprise a “way”, and it is that specific route which must be assessed.

11. The defined route of the claimed path is A-B-C-D-E on Plan No. M1269. The 20 years uninterrupted as of right use must therefore have been of that specific route from June 2000 until June 2020 in order for the s.31 statutory presumption of dedication to arise. Similarly, at common law, any long use must have been uninterrupted and as of right along that precise route.

12. In my opinion, a reasonable allegation of such uninterrupted use of A-B-C-D-E has not been demonstrated on the basis of the evidence I have seen. The matter is ultimately for the Council to assess after considering all the evidence. Nonetheless, the following are of particular note:

- a. An application made in 2000 and being considered by the Council in 2010 claimed an entirely different route over the Field. Its route led from Nanpantan Road from where access to the Field was being claimed and not from Leconfield

Road. It was not a circular route. There was not even an overlap between the route then claimed and the current claimed path. There was no suggestion that the claimed path was in use at that time. From that previous application, it is evident that the public were claiming to have used a different route across the Field at that time, and not the claimed path.

- b. The user forms in support of the current Application do not consistently support the use of the defined route currently being claimed. The responses to question 2 of the user forms vary considerably. It is evident that different routes are claimed to have been used by the users. Many state they used the Field to gain access to Burleigh Wood rather than to walk the circular route claimed, as evidenced by the various responses to question 12 of the user forms. Others claim to have walked other routes over the Field, such as around its perimeter, whilst many others are unclear as to the specific route they used.
- c. It is likely that a number of such users also supported the previous application for a different route, then claiming to have used that alternative route. That previous supporting evidence ought to be taken into account as available material evidence when assessing the evidence in support of the current Application, particularly in respect of the specific route then claimed to have been walked by individual users who have now also provided evidence in support of the claimed path.
- d. The aerial photographs submitted in support of the Application show other routes across the Field. That supports the proposition that insofar as the public have used the Field, its use has clearly not been confined to the defined route now claimed. In any event, reliance on tracks shown on photographic evidence to support the Application is of limited value given that the Field has been in use for agricultural purposes over the relevant 20 year period and would have been regularly accessed by the farmer for such purposes.
- e. The farmers have provided evidence in their statutory declarations that the route being used by the public (whose use was challenged) was primarily as a short cut to Burleigh Wood rather than a circular walk over the Field: see paragraph 5 Mr Bailey SD; paragraph 11 Mr Smith SD; and paragraph 9 Mr Manby SD. That is consistent with the contents of a number of the user forms.
- f. The Field comprises agricultural land let under a succession of Farm Business Tenancy Agreements since 1995 until 2019. During that period, it was grazed

by cattle and mown for hay and silage. Any public use along the circular route of the claimed path through the middle of the field and back along another route also through the middle of the field would have been inconsistent with such agricultural use. In particular, as referred to by Mr Smith at paragraph 3 SD, he grazed the Field with cows, calves and young stock from April to November each year from 2001 until 2019. Having members of the public walking through the middle of the Field as claimed when it was being grazed by livestock, particular with calves, would have been dangerous and most members of the public would not have taken such a circular route through the middle of the Field in such circumstances rather than, say, walking around its perimeter.

13. Consequently, it does not seem to me that there is currently credible evidence of uninterrupted public use of the specific route claimed in the Application throughout the relevant 20 year period or for any period of long use relied upon at common law. Instead, the available evidence suggests that any long use of the Field has not been uninterrupted use over the defined route of the claimed path. On that basis alone, it is my opinion that on the basis of the current evidence available there is no reasonable allegation of dedication of the claimed route either under s.31 or at common law and a DMMO should not therefore be made.

As of right use

14. In addition, insofar as there has been any use of the claimed path, it has not been “as of right”, namely without force, stealth or permission (“*nec vi, nec clam, nec precario*”) throughout the relevant 20 year period. In order to satisfy the statutory definition, the use must be as of right **throughout** the relevant 20 year period, as held by the House of Lords in *R. (on the application of Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2008] 1 AC 221. In particular, it is my view that any such use has been “with force” during the relevant statutory 20 year period, and similarly, for the same reasons, insofar as common law dedication is relied upon, on the following grounds.
15. Up until 2008, the only means of access to the Field from Leconfield Road, as claimed, would have involved either climbing over a short length of fence erected following a fire that damaged the large Oak tree previously located at that point on the boundary,

or forcing a way through the mature hawthorn hedge. From 2008 onwards, the only means of access would have involved climbing over that same fence or over a new access gate secured by barbed wire. As explained by Mr Manby at paragraph 12 SD, there was no access into the Field from Leconfield Road until 2008. Planning permission was sought to construct a new agricultural access to serve the Field from the hammer head at the end of Leconfield Road. The supporting documentation is provided at Appendix 4. Planning permission was granted on 26 October 2007 by Charnwood Borough Council. Condition 2 required the hedge on the eastern boundary to be “retained and maintained” whilst condition 3 required a suitable tree to be planted to replace the Oak tree which was felled in 2007 having been badly damaged by fire. The estimate and invoice for removing the fire damaged tree and constructing the new agricultural access are provided.

16. Mr Smith confirms at paragraph 7 SD that the new access gate constructed at Leconfield Road in 2008 was secured with barbed wire, as were the access gates adjoining Burleigh Wood. The barbed wire would be checked daily during the grazing season. Hence, any access to the Field could only have been gained by climbing over the gate or the post and wire fence. There was no other means of access to the Field from Leconfield Road.
17. Access to a site by means of climbing over a secured gate or a fence results in the use being “*vi*”, namely “with force” and thus not as of right. The erection of a fence or a secured gate to enclose or secure land renders the use of that land after entry is gained by climbing over such structures a forcible use: see the Supreme Court decision in *R (Lewis) v Redcar and Cleveland BC* [2010] 2 AC 70. As made clear by Lord Rodger at [87], it must be a “peaceable use” in order to as of right. Further, at [89] he notes that “*Consent or acquiescence of the owner of the servient tenement lies at the root of prescription*”. In other words, the landowner must be acquiescing to the use in order for it to be as of right.
18. Erecting a fence around the Field and securing the access gate with barbed wire does not amount to acquiescence. On the contrary, access by climbing over those structures is a use by force. It follows that the claimed use of the Field from Leconfield Road was not as of right throughout the relevant 20 year period.

19. It is further of note that Google Earth images of the Field confirm the robust and solid boundary around the Field by means of trees and mature hedgerow, and particularly at Leconfield Road until the new access was constructed in 2008. That is shown by a 1999 and 2006 image. In contrast, the changed position from 2008 onwards is shown in a 2010 and 2016 image. Those images are also material in that none of the routes shown over the Field on any of the images are the claimed route.
20. In addition, trespassers were regularly challenged by the tenant farmers and so their use was contentious and not as of right. That is evidenced by Mr Bailey at paragraph 5 SD and by Mr Smith at paragraph 9 SD.

Conclusion

21. In conclusion, it is my firm opinion from the information I have seen that credible evidence has not been adduced to demonstrate a reasonable allegation that the specific line of the claimed route has both been subject to uninterrupted public use for 20 years, or for any period to demonstrate dedication at common law, and that such use has been as of right throughout any such period. On the contrary, it appears the Application is yet a further attempt to seek to have some form of footpath recorded over the Field, no doubt motivated by the development proposals for that site. As with the previous application made, it is my view that the appropriate course would be for the Council to determine not to make the DMMO sought.
22. I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.

RUTH A. STOCKLEY

09 November 2023

Kings Chambers
36 Young Street Manchester M3 3FT
5 Park Square East Leeds LS1 2NE and
Embassy House, 60 Church Street, Birmingham B3 2DJ



Ordnance Survey Mapping 1892 to 1914



Google Earth Aerial Base 1999



Google Earth Aerial Base 2006



Google Earth Aerial Base 2010



Google Earth Aerial Base 2016



Google Earth Aerial Base 2019



Google Earth Aerial Base 2021

This page is intentionally left blank