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13th March 2019

By email only: giles.cheetham@kirklees.gov.uk

Cc.: -
[…..]

Dear Giles

APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER ('DMMO') - LAND BETWEEN MIRY LAND AND ST. MARY'S RISE, NETHERTHONG

1.0 Background

1.1 The following information is submitted in support of the position on the part of the landowner, following submission of Form WCA9 and WCA10 evidence. This is in response to what we now know to be a vexatious application for a DMMO, or at very best, an application for a DMMO by local residents that respectfully do not understand the related law.

1.2 The WCA8 evidence, the user evidence, is not credible and we are now confident that evidentially, this application cannot succeed. Moreover, the following will show that based on the evidence submitted and what has arisen since, the Council could not now rationally, or more importantly, lawfully make an order, because a public right of way cannot lawfully exist.

1.3 Therefore, the application should be and must now be rejected. Added to this is that that there is now no recourse for appeal to the Secretary of State by the applicant, because the application has purported to be 'withdrawn'. However, the application must still be determined. I explain this position shortly.

2.0 Further WCA9 Evidence – Mr. [A].

2.1 The Council has in response to submitted User Evidence Forms ('UEF' or Form WCA8) now received Form WCA9 (evidence from previous owners and occupiers) from Mr. [B], the farm contractor for many years and whose family have farmed this land for many decades. Further, the Council has also received a Form WCA9 from Mr. [C], who with a consortium

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of three other business partners, owned the land from 2006 to 2017. Following this, the Council has also received a Form WCA10 from Mr. [E], who is a director of Yorkshire Country Properties (Netherthong) Ltd., the current landowner that purchased the land from Mr. [C] and his partners.

2.2 Following his WCA10 submission and subsequent correspondence, attached separately is a formal **Statutory Declaration** from Mr [E], of Yorkshire Country Properties (Netherthong) Ltd.

2.3 You will see that, in basic terms, this is the information that Mr. [A], the owner of the land for several decades prior to 2006, was/is due to submit. Importantly, it is also noted that the land has been in Mr. [A]'s family for many more decades before he took formal ownership. This is the evidence that Mr. [A] was submitting and still intends to submit in his own form WCA9.

2.4 [Personal data redacted] Mr. [E] has explained that he is preparing to obtain Mr. [A]'s final signed WCA9, given the situation [..]. Therefore, this is provided to facilitate the Council's consideration and reporting in the meantime. The fact that Mr. [E] has gone out of his away to obtain a formal Statutory Declaration should be noted and taken fully into consideration by the Council (see also 3.9, below)

3.0 The Law

3.1 The following is an overview of the law and procedure, so far as it is relevant to this position. We both know the s.53 position and the Council's duty as surveying authority, etc. The following are therefore the basic legal principles for those cc'd.

3.2 The application by Mr. Cooke was made under Section 53(2) of the Wildlife and Countryside Act 1981 ('WCA 81') as amended, which requires surveying authorities to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).

3.3 Section 53(3)(b) WCA 81 provides that one of those specified events is the expiration of a period during which there has been enjoyment of the route by the public, such that this would be sufficient to raise a presumption that the way has been/can be dedicated as a public right of way (i.e. a public path).

3.4 A further event is established in Section 53(3)(c)(i) WCA 81. This provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the DMS subsists, or is reasonably alleged to subsist, over land to which the DMS relates.

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3.5 Case law has evolved[1] to establish that in considering this issue there are effectively two 'tests', which are:

Test 1: Does a right of way subsist on the balance of probabilities?
Test 2: Is it reasonable to allege that a right of way subsists?

You have duly pointed out in your recent email that you only need to be satisfied that the evidence meets Test 2; the so-called *lesser test*.

For this possibility to be established, it will be necessary to show that a reasonable person, having considered all of the relevant evidence available, could reasonably allege a right of way to subsist. Where there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable for a surveying authority or the Secretary of State (SoS), as the case may be, to allege that one does.

The following will clearly show that neither test is passed. The user evidence is not credible and the making of an order would be unlawful in this case, based on the evidence and the facts.

3.6 However, before moving to that, briefly and in order to provide context to the basic legal position, with respect to evidence of use of an alleged right of way, Section 31 of the Highways Act 1980 ('HA 1980') states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a period of 20 years (i.e. a full 20 years without interruption), that way is deemed to have been dedicated as a highway **unless** there is sufficient evidence that there was no intention to so dedicate during that period (NB. my emphasis).

In basic terms, but importantly, 'as of right' is established to mean that a way is used without force, without secrecy and without permission. This is often quoted in latin: *nec vi, nec clam, nec precario*. More recently, in more modern parlance, a leading Judge has helpfully put it more basically: not by force, nor stealth, nor the licence of the owner[2].

Where at any point in its history this is not the position and for example a way has been used by stealth, or more blatantly by trespass, then in the absence of information dedicating the way by other means, a public right of way cannot be established. Such a way cannot be deemed a public right of way in accordance with s.31 HA 1980. Case law has also established that 'without interruption' means just that. To close a way just once is sufficient to negate it becoming a public right of way. Landowners will often close a way just one day a year to preserve the position of their land assets in order to prevent the suggestion of or coming into being of a public right of way.

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[1] E.g. *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] 68 P & CR 402; as upheld in *R v. Secretary of State for Wales ex parte Gordon Michael Emery* [1997] EWCA Civ 2064.

[2] Lord Hoffman in *R.* v. *Oxfordshire County Council ex p. Sunningwell Parish Council* [2000] 1AC 335 at 350.

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3.7 The period of 20 years referred to in 3.6, above, is calculated retrospectively, from the date when the right of the public to use the way was brought into question. Therefore, in this case, we count backwards 20 years from the date of Mr. Cooke's application.

3.8 The Council as surveying authority will also consider whether dedication of the way as a highway could have taken place at common law. Basically, consideration of whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way could be shown to have occurred expressly or, alternatively, whether dedication could be inferred by the conduct of the landowner and/or the alleged users, etc. Unlike Section 31 HA 1980, no prescribed period of use is required at common law. This is because the length of time required to allow such an inference to be reasonably and conclusively drawn will depend on the circumstances. The burden of proof lies with the person or persons claiming the rights.

It transpires that a position in considering the common law arises on land not owned by the current owner, which I shall outline shortly.

3.9 Aside from the Council's requirement to have regard to DEFRA guidance, etc., for completeness, we should perhaps identify the basics on the examination and weight of evidence. Section 32 of HA 1980 requires that, before determining whether a way has or has not been dedicated as a highway, the decision-maker (including a Court) must take into consideration any maps, plans or general history of the site and the area, or any other relevant documents that are submitted as evidence, and shall give such weight to aspects of evidence as is justified in the circumstances.

Accordingly, it is submitted that the weight to be given to the evidence of Mr. [A], submitted at present in the form of a Statutory Declaration by Mr. [E], is significant and should be viewed with parity in relation to the other WCA9 and WCA10 evidence.

3.10 Before moving to the evidence and application of the law here, for the purpose of this matter, I wanted to remind the Council of the important principle that public rights of way cannot be created where they do not connect to other highways, or places to which the public has access.

Unhelpfully, a proper statutory definition of the word 'highway' still does not exist. However, the common law position has relatively well-settled for almost the past 150 years, i.e. a right for all subjects at all seasons of the year, freely and at their will to pass and repass without let or hindrance[3].

[3] *Lewis, Ex p.* (1888) 21 Q.B.D. 191, [1888] 6 WLUK 93.

Where for example a landowner wishes to permit people to cross his land, in circumstances falling short of those necessary to create a public highway, then he may do so by other legal means, such as a licence. This may be formal or informal.

However, even where there is a wide scope of beneficiaries, where the use is restricted to the public at large (i.e. it is intended for a portion of the public to be restricted), or if the route is not sufficiently defined, this cannot become a highway. A landowner in such circumstances cannot dedicate a route across their land as a public highway. He/she cannot create a public highway, with the obligations that that imposes on the public, if that which he wishes to give away falls short of the criteria required by law for a highway to exist.

As a matter of legal principle, the concept of an *isolated highway*, being one that was unconnected to another highway, cannot exist in law. This is because such a way cannot have all the requisite essential characteristics of a highway; i.e. remaining open with a right to pass and re-pass by the public, free from obstruction, at all times.

Select groups or persons passing along a route with permission, for example as a licensee, does not constitute the public (i.e. the whole of the public and not a selection) passing along it freely and at will at any time. This is because the passage was/is at the will of the landowner, who could withdraw the permission or the licence to pass along the land, or in addition could block the way, at any time.

In more basic terms: **highways need to connect to other highways.** Where this is not the case, then, apart from a situation involving a cul-de-sac (which I shall not go into, as it is not relevant here), a public right of way cannot be lawfully established, as clearly identified in *Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 1976 (Admin).

3.11 I wanted to briefly identify the 'withdrawal' of the application by Mr. Cooke and the 'withdrawal' of evidence by Mrs. [F], of number 7 St. Marys Rise, immediately adjacent to the field that is most affected by the application.

We have discussed and agreed previously that the question of whether an application for a DMMO can simply be withdrawn has not yet been formally considered by the Courts. However, there is some judicial guidance in the form of something being mentioned *obiter* (meaning 'by the way', rather than a pertinent point of examination in the case) by His Honour Mr. Justice Kerr in the case known as *Roxlena*[4].

The judge here effectively questioned whether, for the purposes of procedural requirements in Section 53(5) WCA 81, in the case where an application is purported to be 'withdrawn', whether this would extinguish the requirement to keep the DMS under continuous review. In more basic terms: is the Council's Section 53 duty ended by the purported withdrawal of an application. The judge

[4] *R (ex p. Roxlena Ltd.) v Cumbria County Council and Peter Lamb* [2017] EWHC 2651 (Admin)

identified that Section 53(5) is indeed silent on this and the Council cannot 'unsee' (my words) evidence of a public right of way.

A surveying authority is therefore still bound to determine an application for a DMMO, even if this may be simply going through the proverbial motions.

I am and always have been aligned with your viewpoint on this. Although it was only mentioned obiter, I think that it does stand to reason that even if the evidence of users is insufficient and there are attempts to 'withdraw' an application by an applicant, there is still no definitive authority on how such a 'withdrawal' sits against the wider duty on the DM&S (i.e. the wider s.53 duty). If this was formally tested at Court, I would have to agree that there is nothing in law to say that the Council's s.53 duty falls away just because an application has been 'withdrawn'.

Therefore, whilst it is possible to perhaps 'withdraw' an application and evidence (that is of course a person's right), whilst this must undoubtedly dilute or even extinguish the credibility of such evidence and adjust the weight to be attributed to now 'withdrawn' evidence. This is compounded when considering that in this case, both the applicant and the most affected landowner have withdrawn their evidence and will not be available for future examination, the Council's duty to determine the application remains.

4.0 Evidence and Application

4.1 We have received from Mrs. [F] of No. 37 St. Mary's Rise, email correspondence between yourself and Mr. Cooke, the applicant. We have also seen correspondence from Mrs. [F] to local residents, attempting to garner support in order to simply stifle a development.

It is now clear, even from the correspondence sent to you from Mr. Cooke (which we have obtained through Mrs. [F]) that this application was nothing more than such a thing by his own admission to you in writing. Further, Mrs. [F] has similarly admitted to you that this was done with a view to preventing development. You will now see from the Form WCA10 of Mr. [E] that Mrs. [F] has been clear and moreover very much regrets her actions, given the detriment to her own land. I would ask that you revisit Mr. [E]'s Form WCA10.

4.2 Furthermore, it can be seen from the WCA9 evidence of Mr. [A], Mr. [C] and Mr. [B], that the field has always contained barbed wire fencing in various guises, as well as restrictive signage over the years. The signage is not ambiguous and there is no need to examine this in the context of whether there is enough clarity in accordance with the principles in *Godmanchester*[5]. The evidence on signage and details of signage is clear.

4.3 It is abundantly clear from the WCA9 and WCA 10 evidence that there was never an intention on the part of the landowner(s) and one could not be reasonably inferred, to have ever created a right of

[5] *R (ex p. Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2008] 1 AC. 221

way of any kind. Establishing a common law dedication across the field is therefore impossible and merits no further consideration.

4.4 It is also highly significant that, on the rare occasions people were caught trying to cross the field (caught in the act), they were challenged on their use of the way and have never contested this. What is also clear is that the apparent hole in the wall/stile adjacent to Mrs. [F]'s land, appears to have only appeared at some point post-2006. The vast majority of the WCA8 user evidence and indeed the identified points references the way from the stile/hole in the wall, to the farm gate leading onto/from Miry Lane. Aside from the incorrect OS grid references (see 4.7, below), as well is the defiance of signage and negotiation of barbed wire fencing, it is the case that as this stile has not come into being since after 2006, the users cannot even identify ten years of use, let alone 20 years.

Mrs. [F] has also admitted in what Mr. [B] described as a "spirited exchange" in his evidence, that she knows full well that there is no public or any other right of way across the field.

4.5 Whilst it is noted that 27 UEFs are submitted as part of the now 'withdrawn' application, one UEF purports to have been using the way going back to 1973. We can see from the evidence of Mr. [B] and now Mr. [A], evidence going back beyond 1973, that the St. Mary's Estate was not even completed until the late 1970s/early 1980s. Following this, St.Mary's Rise at the top of the estate was apparently one of the last phases to be built it can be seen from the WCA9 and WCA10 evidence that, even going back to a time before the St. Mary's Estate was built, barbed wire fencing prevented access to the land and the crossing of the field. Add to this evidence of signage over many years and the challenging of users by Mr. [B], it is now apparent that users are and have been misunderstood as to the concept of 'as of right' (see 3.6, above).

4.6 Access across the field has not been done with any of the landowners' permissions; the very contrary. Instead, if indeed this has taken place, this has been done with force and with secrecy. Crossing the field, if it has taken place, has been crossed by stealth, amounting to nothing more than trespass. Local residents have failed to distinguish where they may have been using a way across the field by stealth, rather than passing and re-passing of their free will. An important distinction in the law on determining an application for a DMMO and a misunderstanding on the part of local residents.

4.7 As an aside, albeit an important aside, the marking of the plans showing where the PROW is alleged to have existed is in many cases not reaching the gate on the Miry Lane end, to the east. The field gate is further north/north-east. Therefore, it is the case that the OS references/co-ordinates in the application and the Council's publicity in relation to this application are not correct. Therefore, the Council's own framing of the DMMO plan is incorrect.

4.8 It is also clear from the application, the Council's framing of the application and the plans submitted, both as part of WCA8 evidence and even the Council's preliminary order plan, that the vast majority of apparent user evidence does **not** include plotting a way over the land beyond the field wall at St. Marys Rise. As a result, the following will clearly show that the WCA8 user evidence is very significantly diluted, almost to the point of non-existence.

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4.9 Following the information provided in 3.10 above, the law is clear that **highways must connect to highways, or a place to which the public has access.** Otherwise, they cannot lawfully fall within the parameters of being a highway.

For this to occur, the land at the other side of the wall (and indeed the wall itself) to the west as it meets St. Marys Rise would need to be connected with another highway.

This is significant and where the small parcel of land on St. Marys Rise needs to be addressed. This is because this is not highway land. It is in fact land owned privately by Mr. and Mrs. [F] of no. 7 St. Marys Rise under HM Land Registry freehold title ref: WYK199671, which I also attach for ease of reference. The land in question is the small square of land to the north/north west side of no. 7 St. Marys Rise, which meets the wall to the field to the west.

4.10 Accordingly, the way proposed is not and cannot be highway to highway, based on the user evidence and the facts. This is not highway land. Interestingly, it can also be seen from the HMLR office copy entries that this house and land was first registered in May 1980, adding to the evidence that this phase of the estate was the last to be built, as also evidenced at 4.5, above.

4.11 In order not to fall foul of the requirement for a highway to connect to another highway and therefore satisfy the principles laid down in *Kotegaonkar*, this small area of land would have to be considered either part of the highway, or a place to which the public has access.

This is not the position in both cases here.

4.12 We have established that it is simple point of fact that this is not highway land, which your highways colleagues will also be able to confirm. We are now aware that Mrs. [F], who has 'withdrawn' her evidence, has informed you and has informed Mr. [E], that she did not realise what she was getting into when agreeing to do this on behalf of local residents.

Furthermore, Mr. and Mrs. [F] frequently obstructed and continues to obstruct the alleged way by parking cars and more usually a caravan on this land. Photos are available to this effect.

Mrs. [F] has conveyed that she simply wants this whole situation to "go away". We have also seen correspondence that Mrs. [F] has now "blocked up" the hole/makeshift stile on the wall (which according to WCA9 evidence appeared some time in post-2006) to the field and has informed you of this in writing (we have seen and have copies of the emails to Sharon Huddleston and yourself from Mrs. [F]).

4.13 Therefore, following the principles outlined in 3.10 above, in order to establish the *highway to highway* connection, where the land is not highway land, as in this case, the small area of land owned by Mr. and Mrs. [F] would have to be an area to which the public had access.

At this point, the matter turns on whether Mr. and Mrs. [F] have allowed their land to become an area to which the public has access (meaning the whole of the public, indiscriminately).

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4.14 It is clear from the evidence and further correspondence that Mr. and Mrs. [F] of no. 7 St. Marys Rise have not, and never have had any intention of dedicating the way as a public right of way, or for that matter any other way to which the public has access.

4.15 I have already identified correspondence that Mrs. [F] has sent to the Council, which we have all seen and you obviously are aware of as it was sent to you. In addition, Mr. [E] has received direct email correspondence from Mrs. [F], which states:

"…Basically the reasons for withdrawing our support were:
*- no of new houses rising from 5 to 21 and so possibly a lot more people walking across **our land***
- we used to know most of the people using the shortcut but we wouldn't with so many new people moving in
- wanting to use our land for parking/possible garage
- so long since application went in that most people who used it in the past have found alternative routes…"
(NB. **my emphasis**)

We can provide the full email if it is required.

4.16 Mrs. [F] has followed the above by confirming to Mr. [E] that it was only ever intended for local residents only and not the public at large. Her position in the application process was principally in an attempt for her to be an essential element in attempting to stifle the development, in that the alleged way begins in the field at the position adjacent to her property. Therefore, there was a corralling of some of the local residents, in an attempt to stifle the development. We have seen some of this correspondence from local residents that were less supportive of the DMMO application and have not submitted user evidence.

Accordingly, the evidence is clear that Mrs. [F] was allowing use of her land on licence and with permission, for select local residents only, not the wider public. Therefore, notwithstanding the shortcomings in the plans associated with the DMMO application in any event, Mrs. [F] had never intended to give her land over to the public as a right of way or anything else. This is evident in her now realising what she had got 'carried away', had not realised what she 'gotten into' to the detriment of her and her husband and their property. Mr. and Mrs. [F] have since blocked up the stile/hole and are wanting to continue as they have done to obstruct the alleged way with cars, caravans and other domestic paraphernalia, with the ultimate ambition of building a garage on this land.

In more simple terms, Mrs. [F]'s land was never a highway, nor land where the public at large enjoy a free passage that is unobstructed. For completeness, following 3.6, 3.8 and 4.3, above, a common law right of way position cannot be established across Mr. and Mrs. [F]'s land. This land has been crossed by select beneficiaries, with no intention for the wider public to use the way.

4.17 Therefore, in more basic terms, it is now unarguable that the land owned by Mrs. [F] is not highway land and is not (and never has been) intended as an area to which the public has access.

Accordingly, following *Kotegaonkar* (see 3.9 and 3.10, above) the Council cannot lawfully make an order, even if the remaining WCA8 evidence was credible, which in this case it is not. The reason is that the footpath would not connect highway to highway and therefore a public footpath cannot exist in law.

4.18 Added to this, neither Mrs. [F], nor for that matter Mr. Cooke, will be providing further evidence, as they have 'withdrawn' and will not be attending a public inquiry to have their evidence tested in cross-examination. Further, on this point, it is the case that due to purported withdrawal, Mr. Cooke will not be able to appeal to the Secretary of State where the Council resolves not to make an order. This is because paragraph 4 of Schedule 14 WCA 1981 only permits an applicant to appeal to the Secretary of State. Others that have submitted evidence in the form of WCA8 have no opportunity or recourse to appeal where a Council resolves not to make an order.

Whilst the fact that the most affected landowner and the applicant have purported to withdraw, and will not be positioning themselves to be cross-examined, are in themselves are not determinative so far as the DMMO application is concerned. Nevertheless, these facts must be reported and given significant weight in the circumstances.

4.19 Given that the WCA9 evidence provides that there was signage and fencing, as well as challenge by Mr. [B] in the case of users 'caught in the act' (facts that are not denied by any alleged user), then access by residents allegedly using the right of way was done by stealth, in defiance of signage and the physical barrier of barbed wire in various guises over the years and decades, by going under, over or through fences.

4.20 Aside from the admissions of Mrs. [F], it is the case that the alleged user evidence is simply not credible. The applicant, Mrs. [F] and the rest of the alleged users have clearly not understood that a way needs to be established 'as of right' by the public. This has neither occurred across Mrs. [F]'s square of land or indeed over the field. Access, where and indeed if it has taken place, has been by stealth and with force and not with permission to the public at large in the case of the filed or Mrs. [F]'s land.

4.21 Added to this, because Mrs. [F]'s land is not highway land or a place to which the public has access, then a right of way cannot be established, as clearly laid down in *Kotegaeonkar*.

Therefore, a public right of way cannot be legally established in any event, which must weigh significantly and conclusively and must be reported. Consequently, the Council could not rationally or in fact lawfully make an order in these circumstances.

5.0 Determination Procedure

5.1 In order to hopefully assist, a final point on determination procedure before concluding, if I may.

It is unusual, but not rare, for a DMMO application to result in an order not being made due to impossibility in law. However, in such circumstances, because this is the case, unless otherwise specified in its Constitution, Councils can dispense with the requirement for a Committee

determination, because the Committee could only lawfully decline to make an order in such circumstances, because it is clear that such a way could not be established as a highway.

5.2 Where, as in this case, an order cannot be lawfully made based on factual evidence, as in this case (being a lack of highway to highway positions), there is nothing in the Council's current Constitution that would appear to prevent a decision being made without going to Committee for determination. For completeness, a report can be taken afterwards to the relevant Committee to explain the position.

Perhaps you may wish to take advice from the Council's Monitoring Officer or Democratic Services Manager on this point.

6.0 Summary and Conclusion

6.1 For completeness, we should revisit the 'tests':

Test 1: Does a right of way subsist on the balance of probabilities?
Test 2: Is it reasonable to allege that a right of way subsists?

It can now be seen that based on all of the evidence, the answer to both questions is 'no' in these circumstances.

6.2 Putting ourselves in the unassuming position of the reasonable person having considered all of the evidence available, the logical conclusion is that a right of way could not subsist, principally because a lawful right of way could not and cannot be established here. This is indisputable, or to follow the language used at 3.5, above: incontrovertible.

6.3 However, notwithstanding this position in law, contrary to what you had first thought, there is in fact no real conflict of evidence here.

This is because the evidence submitted by the users is not credible, principally because it can now clearly be seen that users have failed to understand the concept of a right of way being created and used 'as of right', as opposed to use by stealth and with force across the field, in defiance of clear signage and physical barriers, as the previous landowners and occupiers (who have since left the site and have no proverbial 'axe to grind') have identified in WCA9 evidence. In the case of Mr. and Mrs. [F]'s square of land as described, this is not highway land. In addition, whilst it has not been used by force or by stealth, it has clearly been used (if indeed it has) with permission, which in any event and aside from being frequently obstructed, evidence has now shown that this was for a select body of people and not the public.

6.4 It must subsequently and logically follow, that even where a select body of people, principally being local residents were using Mr. and Mrs. [F]'s square of private land, then the wider public must also have been restricted from using the alleged way in the field, given the physical connections.

6.5 Consequently, following Test 2, as identified above, it is not reasonable to assume that a right of way exists now or even existed in the past based on the evidence before the Council.

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6.6 It must be remembered, as you and the Council are aware, that the motivation for the application was one borne out of a desire to frustrate a development, which ultimately received planning permission and is now going ahead on site. The motivations have led to the admission on both the part of the applicant and Mrs. [F] that this is/was a vexatious claim attempting to do just that.

6.7 In addition, it has led to a misguided notion of the evidential requirements for making a DMMO, with the applicant, Mrs. [F] and alleged users clearly not understanding or appreciating the concept of establishing a use without interruption and 'as of right' for a period of 20 years. The WCA9 and WCA10 evidence shows that this has not occurred and cannot reasonably or logically be concluded to have occurred. All of the WCA8 evidence is misguided and has not realised or not properly understood the law in this respect. They have possibly not been advised, or appropriately advised. The WCA8 alleged user evidence is therefore not in any way credible and found wanting in any event. As such, there is no real conflict of evidence; the WCA8 alleged user evidence simply does not deal with the relevant requirements to reasonably or even lawfully enable the Council to make an order.

6.8 Added to the above, the user evidence becomes heavily diluted in terms of quantity, quality and efficacy when considering that the vast majority of the UEFs do not identify Mrs. [F]'s land. In addition, the application has purported to be 'withdrawn' and the most affected landowner, being Mr. and Mrs. [F] of no. 7 St. Marys Rise, have purported to similarly withdraw their evidence. Neither will be putting themselves up for examination and I have already identified that there is no recourse to appeal by Mr. Cooke. Similarly, the OS referenced co-ordinates are not correct, which follows through to the Council's DMMO plan.

6.9 There is no possibility of establishing such a position at common law, because it can be seen from the WCA9 and WCA10 evidence that there was clearly no intention to dedicate a right of way, or that one could be reasonably inferred at any time. This applies to the field and the square of private land owned by Mr. and Mrs. [F], which is not highway or a place to which the public had/has access.

6.10 Use by the public, as of right, without interruption, for a period of twenty years, is simply not achievable based on the evidence submitted. The Council could not reasonably or rationally make an order based on the evidence before the Council. However, more pertinently, the Council now knows that it could not lawfully make an order based on all of the evidence.

6.11 Consequently, it follows that as well as being unlawful to make an order, there is no prospect of an opposed order being defended by the Council and confirmed by the Secretary of State.

6.12 In order to assist finally, a summary of the facts, based on all of the evidence is as follows:

- The claim and the application was made with the intention of stifling a development. The Council is aware of this.
- The user evidence fundamentally misunderstands the law required to achieve a DMMO and is not credible.
- The WCA9 and WCA10 evidence clearly shows that there was never any intention to create a path across the filed at any time over the last six or seven decades.

- Accordingly, there is no conflict of evidence. The user evidence is not based on the correct legal principles.
- Adjacent private land owned by Mr. and Mrs. [F] is not highway land and it is abundantly clear that there was similarly never any intention to create a public right of way.
- It is clearly established in case law that a highway must connect to another highway, which does not occur here – accordingly, an order cannot lawfully be made, because a public right of way cannot lawfully exist in these circumstances.
- Outside of the position that a lawful right of way cannot be established, in any event there is no possibility that the user evidence has established whole public usage 'as of right', without interruption for a period of 20 years.
- The alleged way has clearly had physical interruption in the form of barbed wire fencing, as well as informative interruption in the form of unambiguous signage.
- The plans submitted with the WCA8 evidence, as well as the prospective order plan, do not/does not contain the correct OS references and do not show the way across Mrs. [F]'s square of land in the vast majority of cases in the UEFs.
- The applicant and the main affected property owners, the two main protagonists, have 'withdrawn' their application and evidence respectively and will not be available for cross-examination. However, whilst an application can be withdrawn, the Council's duty under s.53 survives and the application still needs to be determined, even if it is a formality.
- Based on all of the evidence, it is therefore not reasonable or rational to conclude that a right of way subsists on the balance of probabilities
- Based on all of the evidence, it is similarly not reasonable or rational to allege that a right of way subsists.
- The applicant in this situation has no legal recourse to appeal to the Secretary of State.
- The application in the circumstances does not have to go to Committee, because it is not lawfully possible to make an order.
- The Council can now determine the application and formally decline to make an order. It in fact has no other option in the circumstances.

6.13 Whilst it is not desirable to sign off finally in this way, in the unlikely event that the Council elect to make an order, then it is hereby on notice in relation to costs and compensation as identified in Section 8 of the relevant Guidance[6].

6.14 Should any further clarification on anything be required, please do let me know. Otherwise, the Council are now invited to determine the application and decline to make an order as soon as possible. Your bringing this formal determination forward is very much appreciated.

Noel Scanlon
Director & Consultant
NSCL

[6] Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England (PINS, October 2018)

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