# RIGHTS OF WAY SUB-COMMITTEE

Minutes of the meeting held at 7.00 pm on 10 January 2024

**Present:**

Councillor Simon Fawthrop (Vice-Chairman, in the Chair)
Councillors Adam Jude Grant, Alisa Igoe, Chris Price, Michael Tickner, David Jefferys and Tony Owen

**Also Present:**

Councillor Jonathan Andrews

## 6 APOLOGIES FOR ABSENCE

Apologies for absence were received from Councillors Jonathan Laidlaw and Harry Stranger, who was replaced by Councillor David Jefferys. The Chairman, Councillor Jonathan Andrews, was replaced by Councillor Tony Owen and the Vice-Chairman took the chair. Apologies for lateness were received from Cllr Michael Tickner.

Note from Director of Corporate Services and Governance: Councillor Andrews before the meeting gave notification that although he was not a member of the Downe Residents Association (on whose behalf the DMMO for the Landway was made) he had attended their Committee meetings at their invitation as ward councillor. He had also walked the path with local residents opposed to the application. In the circumstances he had decided to stand down from acting as Chairman or as a voting member of the Sub-Committee for this item but with the permission of the appointed Chairman would address the Sub-Committee in his capacity as a ward councillor only.

## 7 DECLARATIONS OF INTEREST

There were no declarations of interest.

## 8 QUESTIONS

Seven questions had been received for oral reply, and six questions for written reply. The questions and replies are set out in Appendix A and Appendix B to these minutes.

## 9 MINUTES OF THE MEETING HELD ON 28 SEPTEMBER 2022

**RESOLVED that the minutes of the meeting held on 28 September 2022 be confirmed.**

## 10 PROPOSED PUBLIC RIGHT OF WAY AT THE LANDWAY, DOWNE

Report ES20341

The Sub-Committee received a report requesting them to determine an application for a Definitive Map Modification Order to recognise a public right of way at the Landway at Petleys Farm, Luxted Road, Downe. The application had been made under the Wildlife and Countryside Act 1981 which placed a duty on the Council, as the Surveying Authority for public rights of way, to keep the Definitive Map and Statement under continuous review.

The application had been made by Mr Steve Barnes on 10th June 2020 on behalf of the Downe Residents Association. The landowners objected to the application. The Council had appointed a consultant, Robin Carr Associates, to investigate the application and his report, concluding that the application should be refused, was at Appendix 1 to the report.

The Sub-Committee had received a statement from David Evans, Vice-Chairman of the Downe Residents Association, and a number of public questions (set out in Appendices to these minutes). Members also noted that, in the report, references to Schedule 13 of the Act should be to Schedule 14 and that the Secretary of State (and not the Magistrates Court) had directed the Council to determine the application by March 2023.

The Director of Corporate Services and Governance's representative summarised the legal position and the process to be followed by the Sub-Committee. The Sub-Committee was in a quasi-judicial role and needed to consider the evidence for whether there was use of the way over a period of twenty years as of right and without interruption and whether there was sufficient evidence of lack of intention to dedicate on the part of the landowners.

The Vice-Chairman invited Cllr Jonathan Andrews to address the Sub-Committee as ward councillor. Cllr Andrews stated that this was a long-running matter and that he had heard concerns from residents of Downe on both sides. He drew attention to two small discrepancies in the Consultant's report at paragraph 4, where there was reference to a Parish Council which did not exist and to consultation with ward councillors which had not taken place. He referred to recent case law which showed that applications should be granted by the Council where a right of way which was not shown in the map and statement is reasonably alleged to subsist. Over 80 residents had submitted evidence forms stating that they had used the path without requiring permission. The evidence concerning the presence of gates was varied and not clear as to whether a particular gate was locked or could be walked through. He therefore concluded that there was a reasonable case that a right of way existed.

The legal representative confirmed that the relevant test for the Sub-Committee was whether the right of way subsists or is reasonably alleged to subsist.

Members of the Sub-Committee discussed the report. The Chairman remarked on the large number of evidence forms in support of the application gathered

from a small village in a sparsely populated rural area showing the intensity of use of the way over a twenty year period, and this point was supported by other Members. Members noted the evidence about the gates and stiles, but disagreed with the Consultant that the evidence as to the presence of locked gates was sufficient to show a lack of intention to dedicate. The evidence was not unambiguous as to when and which gates may have been locked and a gate might need to be installed for various purposes in a rural location. Some of the objectors had moved in more recently and their evidence would inevitably be more limited. The unanimous view was that there was no incontrovertible evidence to indicate that an order should not be made.

**RESOLVED that the Director of Corporate Services and Governance, in consultation with the Director of Environment and Public Protection, be authorised to make a Definitive Map Modification Order under section 53(c)(i) of the Wildlife and Countryside Act 1981 to add the route shown by a broken line (A-B) on Plan 1 to the Definitive Map.**

(Councillor Michael Tickner, having arrived late, did not vote.)

The Meeting ended at 7.36 pm

Chairman

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**Appendix A**

**RIGHTS OF WAY SUB-COMMITTEE**

**10th January 2024**

**(A) QUESTIONS FOR ORAL REPLY**

By way of introduction to the questions, the Vice-Chairman stated that the Sub-Committee acted in a quasi-judicial capacity, and members of the Sub-Committee had to, at all times, ensure that they did not open up the decision-making process to challenge by way of being, or being seen to be, pre-determined.

**1. From Rob de Pascalis to the Chairman of the Sub-Committee**

Are the Sub-Committee members aware that there are two existing footpaths within 100 metres of the PROW application track one of which circumnavigates the same farm as the private track in dispute goes through?

**Reply:**
The existence or otherwise of other public rights of way in the vicinity of the Application route is not a matter that can lawfully be taken into consideration in the determination of the Application.

**2. From Steve Barnes to the Chairman of the Sub-Committee**

The report shows that there exists a reasonable body of evidence in favour of a "presumption of dedication" through the submission of over 80 evidence forms, yet the recommendation is that a DMMO should not be made. Given this stage of investigation holds that "reasonable" is sufficient, do you agree this is inconsistent?

**Reply:**
Section 31 (1) of the Highways Act 1980 is split into two parts, the first part deals with an initial presumption of dedication. The second part provides that the initial presumption may be overturned if there is evidence of lack of intention to dedicate. It is therefore entirely possible for there to be a reasonable allegation in favour of dedication, only for it to then be overturned by contrary evidence. That is what the consultant has concluded in this instance.

**3. From Abigail Rutherford to the Chairman of the Sub-Committee**

The consultant reportedly engaged with the residents of Petleys Farm, and walked the path with them; he did not engage with the applicant. Is it normal practice for a consultant to seek to interact with only with one side? Could this be considered by the Sub-Committee as potentially biased, inequitable and unprofessional?

**Reply:**
The Consultant did engage with the Applicant's representative albeit remotely. Given that the Application Route is private land, until proved otherwise, the only way that the Consultant can access the route is with the owner's consent. It is quite usual in cases of this nature for the investigator (in this case the consultant) to engage with landowners more so than applicants because this is often the only way to get the necessary information. Applicants are provided with a significant amount of information, free advice, and easy to complete forms etc to put their case. The nature of the process means that landowners do not have the benefit of this and as such the process is often viewed as being heavily biased in favour of the applicants. During the Investigation stage the Council and the Consultant are neutral. Any additional dialogue with the landowners ensures that both sides have an even opportunity to submit their cases.

**Supplementary Question:**
Do you accept that in engaging with the landowners and individuals not familiar with the path when it was open to walkers that the consultant would not have been given all the information?

**Reply:**
The Sub-Committee will remain neutral. The Consultant's report includes evidence from both sides and we will take account of the whole bundle.

**Additional Supplementary Question from Cllr Alisa Igoe:**
How did the consultant engage with the applicant?

**Reply:**
We don't know, it was probably via email. This would not make a material difference.

**4. From Alastair Rutherford to the Chairman of the Sub-Committee**

The report's explanation of the test at confirmation (route exists on the balance of probabilities) and at order making (it can reasonably be argued that the route exists) was poor. Where there is a conflict, an order should made so that a public inquiry decides. Why has the consultant not followed correct procedure and recommended a public inquiry?

**Reply:**
The Consultant has followed correct procedure. The tests are set out in legislation and have been confirmed by the Courts.

An Order may be made if there is a reasonable allegation is favour of the establishment if the public right. This is a relatively low evidential threshold. Such an Order can however only be Confirmed (come into effect) if the rights are shown on balance of probability to subsist. This is a higher evidential threshold.

Whilst it is correct that where there is a conflict of credible evidence the Courts have ruled that an Order should be made to allow the process to be tested through the full process, this requirement cannot however be taken out of context. In this case the Consultant has concluded that there may be sufficient evidence of lack of intention to dedicate during the required twenty-year period that any conflict in the evidence falls away.

The Council cannot lawfully decide to make an Order simply to allow it to be determined at public inquiry. The Council must make a decision one way or the other over whether the alleged public right of way subsists.

**5. From Tony Dixon to the Chairman of the Sub-Committee**

Does the Council consider that it received value for money from the consultant when, apart from the other shortcomings mentioned, a large section of the report deals with historical situations which are irrelevant (at this stage) to the application which seeks to establish unrestricted use over the last 20 years?

**Reply:**
The Council is obliged to take into account all available and relevant evidence when both investigating and determining applications of this nature. This includes both modern day user evidence and historical evidence. It would have been remiss of the Consultant (and a disservice to the Applicants) if he had not considered the historic evidence. The amount of time spent on dealing with the historical elements of the evidence was minimal, and proportional for the case.

**Supplementary Question:**
The Consultant did not engage with the applicant, who was only able to make representations after he found out that the Consultant had met with the landowners. Do you think that the Consultant acted correctly?

**Reply:**
In terms of his report and the advice given, the Consultant has acted correctly.

**Additional Supplementary Question from Cllr Tony Owen:**
Did the Council make any attempt to contact the most recently retired Rights of Way officer?

**Reply:**
No.

**6. From Yvonne Barnes to the Chairman of the Sub-Committee**
(Ms Barnes was not present at the meeting so a written reply would be sent.))

See para 10.1(a) of the consultant's report at the end of page 16. This appears to refer to the attachment below - there is no dotted black line (as in the text) shown on this diagram - only a red dotted line. I believe this calls into question the validity of the analysis - does the committee agree ?

- RoW 100124 App 1 - Plan 1 , item 5. PDF 1 MB

**Reply:**
This is nothing more than a drafting error in the report. It has no bearing whatsoever on the analysis of the actual evidence. Clearly when making its decision the Council will have to ensure that it refers to a broken red line on the plan, and not a broken black line.

**7. From Rita Radford to the Chairman of the Sub-Committee**

In the light of the evidence - as supplied by most of the evidence submissions (over 80) of unimpeded use of Landway as a footpath for many years prior to 2019 - some over 80 years, some over 70 years and many others, why would the PROW committee not approve the PROW application?

**Reply:**
The Council is duty bound to make its decision based upon the actual evidence, not just part of it. No amount of public use will bring about the establishment of a public right of way if there is conclusive evidence that the owners of the land had no intention to dedicate such rights. Whilst there has undoubtedly been use of the Application Route by the public, there is evidence provided by both users and landowners of actions (by the landowners) which could demonstrate a lack of intention to dedicate. These actions deserve due consideration.

**Supplementary Question:**
If the objectors to the application are new occupants of recently converted buildings, not longstanding owners, and so may not be aware of the previous history, does this affect the quality of their evidence?

**Reply:**
The Sub-Committee will take into account a range of factors including the experiences of all those who have submitted evidence. It is a very lengthy report and I thank everyone who has contributed.

**Appendix B**

**RIGHTS OF WAY SUB-COMMITTEE**

**10th January 2024**

## (B) QUESTIONS FOR WRITTEN REPLY

### 1. From Philip Lapper to the Chairman of the Sub-Committee

Does the sub-committee acknowledge that the evidence forms give a very mixed picture about the gate at the bottom of the track? From the wider evidence, there can be no reasonable doubt that there has been a locked gate for many years, so the forms saying otherwise must be inaccurate and should be dismissed from your consideration?

**Reply:**
The user evidence forms do give a mixed response regarding the existence of a gate. The existence of a gate across a way is not however evidence that public rights do not exist. In many instances witnesses will not recall the existence or location of gates if they do not impede their journey. People often only recall things that cause them a problem or inconvenience.

The fact that a gate is referred to by some user witnesses, does not mean that the gate was actually locked. That can only be taken to be the case if they specifically state this. Some user witnesses refer to locked gates along the route, not necessarily at the bottom of the track, other do not. This may be consistent with the occasional locking of the gates. It is however a matter for the Sub-Committee to determine how much evidential eight they place on this evidence.

The forms which do not mention gates certainly cannot be dismissed from consideration. It would be unlawful to do so. Such forms must be considered alongside all other available and relevant evidence.

### 2. From Helen Lapper to the Chairman of the Sub-Committee

Does the PROW committee accept that if the LBB employ a professional advisor to report on a technical issue beyond a layperson understanding that the LBB should only follow the recommendation provided by the paid/employed expert.

**Reply:**
The decision to be made by the PROW Sub-Committee is quasi-judicial in nature, which means that the Sub-Committee must make its own decision, based upon all of the available and relevant evidence. It would be potentially unlawful for it to blindly follow the recommendation, or opinion, of a third party.

Notwithstanding the above, the Sub-Committee cannot and should not disregard the advice it receive lightly. If the Sub-Committee reaches a different conclusion to that reached by its professional advisors, it will have to set out in some detail (as part of the minutes of the meeting) the rationale behind its decision.

**3. From Simon McDowell to the Chairman of the Sub-Committee**

Does the sub-committee acknowledge that the Landway only leads to fields that are actively farmed with large machines that take up the width of the track and, with blind spots, will pose significant health and safety risks to walkers and their dogs, which is one of the reasons why the landowners restrict access?

**Reply:**
The Landway as a physical track does lead to fields but also links to a public footpath at the golf course end. It would therefore be wrong to state that it only leads to fields at this stage of the proceedings. A full answer to that element of the question will only be resolved once the DMMO application has run its full course and the issue of the existence, or otherwise, of a public right of way has been determined.

Issues relating to health and safety, the width of the track, blind spots etc, whilst genuine concerns are not matters that can lawfully be taken into consideration. The DMMO application does not seek to create any new public rights, only record those already alleged to exist. If a public right of way is shown to have been established then both the landowners and the Authority may have to consider these issues.

**4. From Richard Ward to the Chairman of the Sub-Committee**

What is the Sub-Committee's opinion as to why two public footpaths lead into the western end of the Landway if not because the Landway has been used historically as a highway connecting the paths to the centre of the village? (See maps, Apps. 1&6.)

**Reply:**
The origin of the footpath that crosses the western end of the Application Route is unknown. The origins of the Application Route itself are however clearer and more probably than not rest in it being a private occupation road leading to fields. There is certainly insufficient historic evidence available at this time to suggest that the Landway was historically a public highway of any description. Whether public rights have been established through long public use has yet to be determined and is the

subject of the current application. It is however fair to say that if the footpath which crosses the western end of the Landway did not exist, then it would be highly unlikely that the Landway would be subject to any public right of way because it would be a cul-de-sac.

**5. From Wendy Ward to the Chairman of the Sub-Committee**

The user evidence summary table App 8 shows my name but no comment, and comments of others reduced to very few words / issues. I and others wrote on more than one issue. How will the committee be made aware of the full detail and range of comments made?

**Reply:**
The comments section of the Summary only contains comments that were considered relevant by the Consultant. If both comments were entered against a specific user, then this would indicate there is no information other than that covered elsewhere in the report. Appendix 8 should not be taken in isolation. All evidence provided to the Consultant is included within the report and its Appendices. The Sub-Committee will consider the report and its appendices in the whole, not isolated elements of it.

**6. From Joanna Clark to the Chairman of the Sub-Committee**

What evidence does panel consider is required if numerous statements, about 80, from local people confirming land used for many years as a path, is deemed insufficient? I would suggest that evidence provided by DRA is significant. It provides evidence that the community have used this path for many years.

**Reply:**
It is important to understand that no amount of public use will result in the establishment of a public right of way if there is evidence that the landowner had no intention to dedicate the route as a public right of way. In this particular case there would appear to be such evidence.

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