

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 be 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 in 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.