RE: APPLICATION FOR ADDITION OF A FOOTPATH TO DEFINITIVE MAP FROM FOOTPATH NO 6 TO FOOTPATH NO 4 IN WINDMILL WOOD IN PARISH OF TOFT

INTERIM REPRESENTATIONS ON BEHALF OF LANDOWNER

Introduction

1. These are the interim representations of the Owner of Windmill Wood ("the Landowner") in respect of the application ("the Application") of Mr Brian Chaplin made on behalf of the South Knutsford Residents Group dated 26 February 2019 for the addition to the Definitive Map of a footpath between Toft Church at the end of Toft Footpath No 6 to Toft Footpath No 4 in Windmill Wood in the Parish of Plumley with Toft and Bexton ("the claimed route").

2. The Landowner has had sight of the officer report of Mr Peter Skates, the Director of Growth and Enterprise at Cheshire East Council ("the Council"), dated 25 January 2023 ("the OR"). The Landowner is the owner of the land between points B-C of the claimed route as identified on the plan at Appendix 4 to the OR. In advance of inviting and receiving specific representations from the relevant landowners on the Application and its supporting evidence, it is noted that the OR pre-judges the matter by expressly recommending that a Definitive Map Modification Order ("DMMO") be made by the Council. It has been stated in correspondence to the Landowner's legal representatives that:[1]

[1] E-mail from Clare Hibbert dated 6/2/24 at 1:09pm.

"*As the report was deferred and you may have comments to make on the evidence,* ***there may be minor amendments to be made to this report*** *in advance of the next Committee*". (Emphasis added).

The Landowner reserves his position on the validity of that approach.

3. These representations are "interim" given that, despite numerous requests, the relevant background documentation supporting the OR was not provided to the Landowner until relatively recently. Further investigations are currently taking place in the light of that evidence provided, the results and implications of which will be provided to the Council when available. Even at this stage, unredacted versions of the user evidence forms and witness statements on the very basis of which the OR recommends that a DMMO be made have not been provided to the Landowner. The Landowner repeats its request for copies of such unredacted documentation in the interests of fairness to enable full and final representations to be made. There is a legal requirement for the Council to provide background documents relied upon in making a decision as contained in s.100D of the Local Government Act 1972, as amended. The user evidence on which the decision is based is not "exempt" given that such information is specifically provided by the authors to support an application to make a DMMO, which has implications not only to the public at large but very serious implications for relevant landowners. The identity of individuals who contend they have used the claimed route is vital to enable the Landowner to comment upon whether those particular users have used the claimed route "as of right". In the absence of sight of such documentation on which basis the Council's decision will be made, the Landowner is seriously and unfairly prejudiced. It is clearly in the public interest for the Landowner to be given a fair opportunity to comment upon such evidence in advance of any DMMO being made.

Legal Framework

4. In making its decision whether to make the DMMO, the Council must reach a careful and properly informed decision with a proper appreciation and weighing of all available evidence and of any legal principles that apply. In *R. v Isle of Wight County Council ex parte O'Keefe*,[2] Macpherson J. stated:

[2] (1990) 59 P. & C.R. 283 at 288.

"*And in an opposed case the matter must still be "decided" properly, and with a proper appreciation and weighing of the available evidence and any legal principle which may have to be applied, since both the facts and the law bear upon the question whether or not a right of way can be shown to subsist or be reasonably alleged to subsist.*"

In that case, the county council's decision to make a DMMO was found to be unlawful in that the OR failed to fully and properly assess the objector's evidence, and failed to properly assess the strength or otherwise of the applicant's evidence in the light of the objector's evidence. It is therefore imperative that full consideration is given to the Landowner's evidence in determining whether to make an Order, and not merely to potentially make "*minor amendments*" to an existing committee report already recommending the making of a DMMO as a result of such evidence.

Previous Application

5. The first and crucial factual evidence of note is that the claimed route has been subject to a previous application to record it on the Definitive Map. That information is clearly set out in a previous Inspector's decision dated 11 October 1989 ("the ID"), albeit the decision itself concerned a different route in Windmill Wood. Despite the author of the OR referring to the ID and thus being aware of it,[3] no reference whatsoever is made in the OR to the previous unsuccessful application in relation to the claimed route, let alone an assessment of its implications. It is not only surprising, but extremely concerning, that such a crucial and highly relevant factual matter has not been addressed.

6. At paragraph 10 of the ID, the Inspector recorded the evidence of the County Council, the predecessor to the Council, as follows in relation to the claimed route at the time of the preparation of the Definitive Map in around 1953:

"*The footpaths shown on the first draft of the Definitive Map included … an east-west line from the Lodge to Toft Church along the carriageway through Windmill Wood. But following objections raised by the landowner the matter was reviewed at a hearing in 1963: it was decided that a case for that right of way had not been*

[3] See para 38 of OR.

established and it was deleted, except for a short section of about 100 metres between Toft Church and Holmes Chapel Road."

That carriageway, namely the claimed route, was a private vehicular carriageway which had been used "*in days gone by*" to serve Toft Hall.[4] It was found that no public footpath existed over it in 1963.

7. That previous application is of particular importance in that it is evidence that:
    a. No public footpath was found to exist over the claimed route in 1963 after evidence was heard and assessed at a formal hearing.
    b. The Council's predecessors specifically acknowledged that position in 1989.
    c. The landowners have consistently objected to any public rights of way existing over the claimed route.
    d. The line of the claimed route was a private vehicular carriageway in the past. That explains its physical existence being depicted on old maps.
    e. That application caused the landowner at the time, and subsequent landowners, to take specific measures thereafter to ensure no public right of way was created over the claimed route, as evidenced in the then landowner's proof of evidence submitted to the 1989 inquiry, the contents of which were accepted by the Inspector.

Documentary Evidence

8. Turning to the available documentary evidence considered in the OR, which notably excludes the evidence of the previous 1963 decision and the evidence before the 1989 inquiry, the OR considers each document in turn. A number of Ordnance Survey maps are referred to between 1848 and 1972. It is pointed out in the OR that they show a route on the ground. However, it is well established that Ordnance Survey maps are not evidence of the status of a route, but only of what the surveyor physically found on the ground on the date of the survey. Indeed, they contain an express disclaimer to that effect.

9. In *Attorney-General v Antrobus*,[5] Farwell J stated in relation to Ordnance Survey Maps:

[4] Para 5 ID.
[5] [1905] 2 Ch 188 at 203.

"***Such maps are not evidence on*** *questions of title, or questions* ***whether a road is public or private****, but they are prepared by officers appointed under the provisions of the Ordnance Survey Acts, and set out every track visible on the face of the ground, and are in my opinion admissible on the question whether or not there was in fact a visible track at the time of the survey.*" (Emphasis added).

Similarly, in *Moser v Ambleside Urban District Council*[6], Pollock MR stated:

"*If the proper rule applicable to ordnance maps is to be applied, it seems to me that* ***those maps are not indicative of the rights of the parties****, they are only indicative of what are the physical qualities of the area which they delineate*". (Emphasis added)

More recently, Cooke J. observed in *Norfolk CC v Mason*:[7]

"*Throughout its long history the OS has had a reputation of accuracy and excellence……. It has one major, self-imposed, limitation; it portrays physical features, but* ***it expresses no opinion on public or private rights***". (Emphasis added).

10. Thus, although Ordnance Survey Maps may identify a visible route on the ground at the time of the survey, that is merely evidence of that physical feature and not of its status. Those maps are *not* evidence as to whether the claimed route is a public right of way.

11. The position is similar in relation to other maps referred to, and such limitation is expressly acknowledged in the OR. In relation to the county maps, it is stated at para 24 of the OR, "*they may provide supporting evidence of the existence of a route*"; whilst para 26 of the OR notes that Tithe Maps "*may provide good supporting evidence of the existence of a route*". Further, there is no information provided by the Finance Act 1910 records to assist in demonstrating whether the claimed route had any public rights of way over it.

12. The OR goes on to refer to the Definitive Map records. Somewhat incredulously, it does not refer to the hearing in 1963 at which the inclusion of the claimed route was objected

[6] (1925) 89 JP 118 at 119.
[7] [2004] NR205111.

to and was subject to a formal hearing after which a decision was made that no public rights of way were shown to exist over it.

13. It is very clear from the documentary evidence that not one piece of evidence referred to in the OR supports the existence of public rights of way over the claimed route. Such evidence merely demonstrates that a physical route existed on the ground. The OR makes no reference to any of those documents identifying that the claimed route was a public right of way. At its very highest, the documentary evidence is neutral in effect in that regard. However, when the previous hearing is taken into account, the Definitive Map Records positively support a finding that there was no public right of way over it as of 1963.

14. Moreover, although the documentary evidence does indicate that a physical route existed on the ground, that has always been acknowledged. That was made clear in the ID at para 5 in which the Inspector described the claimed route which was used as a private vehicular carriageway in the past. That is further confirmed by the Council's interview notes with the landowner of A-B of the claimed route in which they explained: "*Historically the claimed route formed the private driveway that went from Chelford Road to the east past the church (pre church) to the Hall.*" It therefore clearly existed on the ground as a route. Yet, there is no evidence whatsoever that the public used it at that time or that any public rights existed over it. Instead, the evidence explains the reason for the claimed route being marked on the old maps as physically existing, which relevant factor is unfortunately not acknowledged in the OR.

15. It follows that there is no support from available documentary evidence to reasonably allege that the claimed route is a public footpath.

User Evidence

16. The issue then arising is whether the user evidence provided is such to demonstrate that a reasonable allegation has been demonstrated that the claimed route is a public footpath. In so recommending, despite doing so in advance of taking into account the Landowner's representations on the evidence, the OR suggests that there is such a reasonable allegation purely on the basis of the presumption of dedication contained in s.31 Highways Act 1980.

17. Any presumption of dedication under s.31 must be based upon a specific 20 year period which is to be "*calculated retrospectively from the date when the right of the public to use the way is brought into question*": s.31(2). The claimed route is stated by users to have been obstructed by a fence in December 2018 which is regarded by the OR as having brought the public's use of the route into question. The identified relevant period is therefore December 1998 until December 2018.

18. In order for the presumption to arise, the claimed route must have been "*actually enjoyed by the public as of right and without interruption for a full period of 20 years*". In the absence of the unredacted statements of evidence of use by identified individuals, the Landowner reserves his right to adduce further evidence once such evidence being relied upon by the Council is made available.

19. However, in these interim representations, the Landowner firmly contends that, irrespective of other elements of the statutory criteria which he reserves the right to comment upon, particularly in respect of the extent of the use of the claimed route over the relevant 20 year period and any interruptions to that use, any such use has not been "as of right" throughout that period.

As of Right Use

20. In order to be "as of right", the use must have been exercised "*nec vi, nec clam, nec precario*", namely without force, without secrecy and without permission.

21. In assessing whether a use is without force, it is important to note that "force" for such purposes does not merely mean physical force. Use is by force in law, namely *vi*, if it involves climbing over or breaking down fences or gates, but also if it is done under protest and thus contentious, such as by ignoring clear and visible signs or challenges made. Hence, Lord Rodger stated in the Supreme Court in *Lewis v. Redcar and Cleveland Borough Council (No.2)*[8] that:

> "*it would be wrong to suppose that user is 'vi' only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression*

[8] [2010] 2 AC 70 at [88].

originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi".

22. In relation to signs or notices erected by a landowner, the issue of *vi* was considered by the Court of Appeal in *Betterment Properties (Weymouth) Limited v. Dorset County Council*,[9] which was not affected by the subsequent decision of the Supreme Court. Patten LJ stated:-

> "*if the landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in.*"

23. However, signs are often repeatedly removed after being erected and re-erected, placing a landowner in a difficult position with users then contending they never saw the signs. That issue in the context of use being *vi* was also considered by the Court of Appeal in ***Betterment Properties*** in which Patten LJ stated:-

> "*It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that* ***if left in place****, the signs were sufficient in number and location; and were clearly enough worded;* ***so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious****. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am*

[9] [2012] EWCA Civ 250 at [8].

prepared to assume the minority) were prepared to take direct action to remove the signs?"[10] (Emphasis added).

He went on to state:-

"*It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger on Redcar (No. 2)) that rights of property cannot be acquired by force or by unlawful means for the Court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious.*"[11]

24. Thus, the legal position is that provided the landowner has erected signage of such a nature that, if left in place, a reasonable user would have been aware that their use of the land was contentious, then such use is not as of right. If such signage has been continually removed, that fact cannot be relied upon by users. A landowner is only required to erect such signage as is reasonable, and to replace it insofar as reasonable.

25. Applying those legal principles to the available evidence, it is abundantly clear that the landowners have, over the years, continually erected signage in Windmill Wood indicating that the public must not trespass in the Wood other than to use the public footpaths. Any use of the Wood other than via the footpaths, which are clearly signed, was contentious and so not as of right.

26. The following pieces of entirely consistent evidence are of particular note in that regard. In his Proof of Evidence to the 1989 Inquiry, the then landowner of Windmill Wood, who had owned it since 1978, stated, in evidence that was subject to an inquiry process, that he had taken extensive steps to indicate that the Wood was private. Signs were

[10] At [60].
[11] At [63].

erected stating "private woodland – keep out – no right of way". Those signs applied to the entire Wood. They were continually removed and he replaced them. In addition, of specific relevance to the claimed route, he stated at para 1(iv) of his Proof that:

> "*After all the vandalism I decided that steel signs were needed instead of wooden ones on the trees and in 1979 onwards I erected steel signs on the trees. There is a sign at each end of the proposed footpath. Further,* ***there have been similar signs at each end of the path running from Chelford Road through Windmill Wood to the church***." (Emphasis added).

27. Importantly, that evidence of signage was accepted by the Inspector. Moreover, in the ID at para 36, he notes and accepts the evidence that the previous landowner prior to 1978 took all reasonable steps, particularly after the 1963 hearing, to ensure that trespassers were warned off the Wood *in its entirety* by way of notices, fencing and by his staff.

28. The County Council, as the Council's predecessors, did not contest the evidence of signage. It was noted at para 6 ID that in a letter dated 1 December 1980 from the landowner of the Wood between 1962 and 1978, he stated that throughout his period of ownership, active steps were taken to prevent access to the Wood by fencing, turning back trespassers, and indicating by notices that the Wood was private and the public were to keep to the footpath, namely Toft No. 4.

29. The landowner of the Wood from 1978 until 2023, namely throughout the entire relevant 20 year period, has given sworn evidence in a statutory declaration as to the steps he took throughout his period of ownership to indicate that the Wood was private land. The contents of his statutory declaration are of crucial significance. He confirms his evidence given to the 1989 Inquiry. He emphasises that the signage erected applied to *the entire Wood*. He was thereby making it clear that the Wood *as a whole* was private land and the public were not entitled to trespass on any part of it, save to use the recognised footpaths. At para 38, he points out:

> "*As stated, signs were put up along the route of the claimed footpath and at the end of the claimed footpath at the boundary of land with Toft Church. The signs at the*

boundary were placed on a tree by a gate. The sign was facing Toft Church to deter trespassers coming on to the land. The signs were constantly removed/vandalized throughout our ownership and invariably took different forms, whether size, content, or its material. One thing is certain, we continually placed signs telling people to keep off the land and that it was private."

He goes on at para 41 to confirm he continued to put signs up *along the claimed route*, but they were removed or vandalized. Further, throughout his ownership, he always challenged trespassers in the Wood, including in the area of the claimed route: para 42. He then makes the very telling observation at para 43 as to why he would have gone through all the stress, time, effort and cost of defending the application in 1989 and then not have continued to protect the Wood as he had done previously. It would have been nonsensical for him to take that approach in such circumstances.

30. Such evidence by the landowner over the relevant 20 year period is extremely compelling, and is entirely consistent with that contained in his Proof of Evidence many years earlier, which evidence was not contested by the County Council and was accepted by an Inspector. To summarily dismiss it on the basis that no photographs of the signs have been produced, as the OR seeks to do, entirely fails to assess that detailed evidence either properly or at all or to give it any appropriate consideration.

31. Moreover, that evidence is supported by that of the Ward Councillor. He specifically notes in his correspondence to the Council dated 21 April 2019 that:

"*The Windmill Wood section has never been 'permissive' with many 'private' warning signs fixed to trees for many years of which there is pictorial evidence.*"

That cogent independent evidence is simply not referred to in the OR for no explicable reason. It is clearly a highly relevant piece of available evidence to be taken into account.

32. Furthermore, the information supplied by the landowner of A-B of the claimed route further supports the erection of signage all over the Wood, and yet that evidence has

similarly not been properly assessed in the OR. It was pointed out by that landowner in interview that there had always been a sign up at the point where the claimed route meets Windmill Wood along the lines of no public access, and that the previous owners of the Wood Redacted) "*had put signs up all over wood*".

33. In addition, although photographic evidence is not a pre-requisite, there is a photograph of one sign in any event in a newspaper article dated 2 November 1994, within the relevant 20 year period, annexed to Redacted sworn statutory declaration. The contents of the press article are also particularly noteworthy in which it is stated:

> "*Walkers are angry at being told to keep to the path in a woodland in Knutsford. Signs have been pinned to trees in Toft Wood banning trespassers.*"

It is reported that one local walker informed the press "*that dog walkers were 'up in arms' about the new signs*". That supports the evidence that signs requiring the public to keep to the footpath were erected in the Wood and that dog walkers were aware of them.

34. Therefore, there is an abundance of consistent evidence that signage was erected in the Wood during the relevant 20 year period clearly informing the public that they were required to keep to the footpaths, which were notably signed. Despite frequent vandalism of such signage, it was regularly replaced by the then landowner. Such evidence is extensive and over a significant period of time, including evidence from an Inspector, the County Council, a Ward Councillor, and the views of local walkers given to the press. In the particular circumstances, the relevant landowner could do no more. That clear, cogent, extensive and consistent evidence clearly demonstrates that the use during the relevant period was *vi* and so not as of right. The Landowner also provided details of Parish Councillor, Redacted , to the Council whom it is understood supported the position that Redacted regularly requested trespassers not to use the Wood. As far as the Landowner is aware, Councillor Redacted has regrettably not been asked to provide any evidence.

35. In addition, there is also evidence of challenges being made to users, which also results in the use being *vi*. Such references are made in both Mr and Mrs Redacted respective

statutory declarations. Indeed, Mrs Redacte notes her husband was assaulted on a number of occasions when requesting users to leave due to trespassing, resulting in several incidents being reported to the police and she identifies the crime reference numbers received. It should be noted that Mr and Mrs Redact d owned and occupied the Wood from 1978 to 2021 save for a three year period from 2009 to 2021 and were not therefore absent landowners. Moreover, Mr and Mrs Redact no longer have any legal or personal interest in the Wood nor do they have any connect with the current Landowner.

36. It is thus evident that there can be no reasonable allegation that the use has been as of right throughout the relevant 20 year period in the light of such clear and cogent evidence that the use was with force.

37. Furthermore, even if the s.31 presumption of dedication was established, the above evidence is also sufficient to demonstrate that the relevant landowner did not have any intention to dedicate the claimed route as a public footpath during the relevant 20 year period and so the proviso to s.31 would be established.

Conclusion

38. In conclusion, the available evidence when considered as a whole fails to demonstrate a reasonable allegation that a public footpath subsists over the claimed route. Instead, the consistent evidence of the actions of the relevant landowners from the 1960's onwards to date serves to demonstrate that there has been no dedication of the claimed route, and that the statutory criteria for presumed dedication under s.31 of the Highways Act 1980 is not established. It follows that the legal test for making a DMMO is not met, and the Council ought to determine not to make the Order sought.

39. We reserve our position to submit further evidence in relation to this matter for the reasons referred to in paragraph 3 above.

DATED: 18 March 2024

Ruth Stockley K.C.

Kings Chambers