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6 May 2009

Dear Sirs

**Gloucestershire County Council  
Public Footpath at Witcombe Farm  
Modification Order 2009**

We refer to your letters of 23<sup>rd</sup> March enclosing Public Notice Order and map in respect of the above.

We are instructed to lodge an objection on behalf of the Witcombe Trust and the Mark William Hicks Beach Will Trust.

We enclose our detailed grounds of objection and would be grateful if you could confirm that these objections will be submitted to the Secretary of State in due course.

Please could you confirm whether the matter has been referred back to your Public Rights of Way Committee following the Appeal Decision by DEFRA in order to establish the stance that the Council will take in relation to the Appeal. Please could you let us have a copy of the Committee Report and Minute.

Yours faithfully

*Charles Russell LLP*

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## OBJECTION TO MODIFICATION ORDER

### S53 WILDLIFE & COUNTRYSIDE ACT 1981 DEFINITIVE MAP FOR PUBLIC RIGHTS OF WAY FOR GLOUCESTERSHIRE (ADDITIONAL LENGTH OF PUBLIC FOOTPATH AT WITCOMBE FARM) PARISH OF GREAT WITCOMBE GLOUCESTERSHIRE (ORDER 2009)

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#### 1 GROUNDS OF OBJECTION

- 1.1 The claimant has failed to show that a period of time has expired such that the enjoyment by the public of a path during that time raises the presumption that the way has been dedicated as a public path as required by Section 53 (3) (b) of the 1981 Act.
- 1.2 Section 31 of the Highways Act 1980 states that where a way over any land has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The Landowner will provide sufficient evidence that there was no intention during the relevant period to dedicate it. The limited use of the way that has taken place during the claim period has been by particular classes of user and/or with the express permission of the Landowner.

#### 2 FREQUENCY OF USE

The Landowner has reviewed the claim forms submitted in support of the alleged right of way and is extremely surprised by the frequency of user that is being claimed by some supporters of the claim. Some of the Claimant's supporters claim to have used the route "several times a week". Such frequency does not accord with the observations of Mrs Hicks Beach who has lived at Witcombe Farmhouse throughout the claim period or the other members of her family residing with her (Lucy Wakefield, Fred and Andrew Hicks Beach). Nor does it accord with the observations of others present on the site on a daily basis (Georgina Davies, Pamela Cowley, the late Arnold Price)

#### 3 QUALITY OF EVIDENCE

- 3.1 Although the claimant produced a considerable number of evidence forms, it is submitted that the quality of the evidence produced in support of the Landowners case that such use has not taken place is significantly better. In particular, a number of the alleged users live a considerable distance from the site (witness numbers 15,20,22,25,26,32,33,42&47). Many claim to have used it only occasionally (14, 18, 22,33 43) and much of the use claimed falls outside the claim period.
- 3.2 In many instances there is no obvious reason why those people should use this particular route, ( particularly 2,5,12,13, 45, 47) their evidence should be tested further. There are other definitive routes in the vicinity that link into the network and provide adequate or better routes to the destinations which the users claim to be accessing. If the user evidence is analysed it is apparent that there are other often closer or more convenient routes to reach the destinations via the existing highway/footpath network
- 3.3 Similarly there is apparent confusion in a number of the recollections of the supporters. Particularly as to the route that has actually been used (in particular 3,4,15,20,42 & 26). In some instances it is clear that the route referred to is in fact one of the definitive routes and not the claimed route. In several instances the term "Circular Walk" is used. The Landowner disputes that this route includes the claimed path at all.
- 3.4 By contrast, the Landowner and many of her witnesses have been present on site to witness at first hand that the route has not been used as claimed. In particular, Mrs Hicks Beach has been resident at the property along with other members of her family since 1981 i.e. throughout the entire claim period. In addition, a number of witnesses have either been

resident in properties in close proximity with a view of the site or have been employed in the site office or in activities in the farmyard, both adjacent to the claimed path (Georgina Davies, Pamela Cowley, the late Arnold Price)

#### 4 UNINTERRUPTED USE OF THE ROUTE

The Claim has failed to fulfil the criteria of s 31 in that the Landowners evidence identifies a number of instances where those attempting to use the path were challenged and turned back. Such challenges amount to an interruption to the use of the path (see the comments of the Landowner and others in relation to witness numbers 8,14,22,27,32 &36).

#### 5 USE "AS OF RIGHT"

5.1 It is well established that use "as of right" as mentioned in S31(1) requires the open use of the way without force or permission. If the owner gives permission either expressly or impliedly then this requirement is not satisfied. Use will not be prevented from being with permission by reason of the fact that the users were not aware that a permission existed. This is particularly relevant in the case of those users that were permitted by virtue of the permission granted to Gloucestershire Wildlife Trust.

5.2 Mrs Hicks Beach and other objectors attest to the fact that most of those using the path were people to whom permission had been given (5, 8,17,18,19,24,29,33,35,39,40,41,& 45). Others claiming to have used the route will have been doing so in the company of users to whom permission had been given for example to take part in the Rogation Service or as Members of the Wildlife Trust (33 & 49) or for a specific purpose such as delivering to Witcombe Farm House (5) school nature walks (30) stabling of horses (44) or as an invitee of the Landowner (48). Such use is not as of right. The Landowner contends that the evidence of claimed use as of right carries little weight and should not be accepted at face value.

5.3 The Landowner does not accept that it is necessary to grant permission on each and every occasion that the permission is exercised. Users granted permission by the Landowner are, unless it is expressly stated otherwise, permitted to use the path until such permission is withdrawn. The use by all such persons as were granted permission expressly or impliedly is not use as of right.

#### 6 LACK OF INTENTION TO DEDICATE DURING THE RELEVANT PERIOD

A lack of intention to dedicate must be "overt" and not merely a state of mind on the part of the Landowner. The Landowner's evidence that it has been her family's and employees' habitual practice to turn back anyone seen using the claimed route without permission throughout the period of their ownership is good evidence of a lack of intention on the part of the Landowner to dedicate a footpath over the claimed route (7,14,22,27,32 &36). These overt acts by the Landowner during the claim period directed to members of the public using the way indicate an intention to keep the way private and are sufficient to rebut the presumption of dedication under s31 (1). It is possible that there were *some* members of the public that used the route who were not seen by the landowner or others (although given the fact that the landowner and her family reside at the property adjacent to the way and given the number of witnesses that were routinely on the site any such use must have been very limited). This does not matter, the question is whether the landowner was acquiescing in the use by the public which is patently not the case here.

In the Court of Appeal case *Lewis v Thomas* 1949 Cohen LJ quoted with approval the judgement of MacKinnon J in *Moser v Ambleside UDC* 1925:

*....a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment.....a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge.*

## 7 OTHER MATTERS

- 7.1 There are other adequate alternative definitive routes and therefore there is no reason why the users need to use this route at all. Whilst it is acknowledged that need is not a pre requisite for establishing such a claim, the existence of alternative routes to the destinations identified on the claimants evidence forms on a balance of probability this does suggest that the route is unlikely to have been used as claimed.
- 7.2 Similarly whilst the poll conducted after the submission of the application cannot constitute evidence of the status of the claimed route it does nevertheless indicate a lack of support amongst parishioners for the claimed route. It did not throw up any further evidence of the route's existence as a PROW.

## 8 VERACITY OF THE EVIDENCE IN SUPPORT

- 8.1 It is noteworthy that although the use is claimed to date back in some instances to 1930s the route was not recorded on the definitive map following the initial survey under National Parks Act 1949. Although the Inspector indicates that "the absence of a claim in the 1950s has no effect on the qualifying period of user post 1980" the failure to record the route at that stage casts doubt on the veracity of the user evidence albeit outside of the claimed period.
- 8.2 There are a number of inconsistencies in the recollections of the users. For example the existence of the gate which is mentioned only by 6 of the 22 witnesses that claim to have used the path during the period when the gate was in situ. The recollections of the witnesses of the existence of the notices at point A also sheds doubt on the reliability of their evidence.
- 8.3 Evidence forms have been submitted by many people who live a considerable distance from the path and who have no obvious reasons for using the path.

## 9 THE RELEVANT STANDARD OF PROOF

- 9.1 Whilst the Secretary of State for Environment, Food and Rural Affairs has allowed the claimant's appeal and directed the Highway Authority to make this Order, the relevant test for making an Order is 'whether it is reasonable to allege that a public right of way subsists'. This test may be satisfied even though there is a conflict of credible evidence as is the case here. The standard of proof for confirmation of this Order however is significantly higher. The claimant must show 'on a balance of probability that a public footpath subsists along the route in question'.
- 9.2 The Court of Appeal case R -v- Secretary of State for Wales ex parte Emery ruled that where there is "conflicting evidence that can only be tested or evaluated by cross examination, an order would seem to be appropriate. If an applicant can produce credible evidence of public enjoyment of a path for twenty years then even though there may be conflicting evidence, it is reasonable to say that a right of way is deemed to exist".
- 9.3 It is not accepted that the evidence produced by the Claimant is "credible" but it is noted that the Secretary of State has acknowledged that the evidence produced in this case is conflicting and it is appropriate that this evidence should be tested at a public inquiry to determine whether the Order should be confirmed.

## CONCLUSION

The Definitive Map should not be modified for the following reasons:

- The Claimants have failed to establish that their use of the path has been as of right. There is no evidence of acquiescence by the landowner. In fact there is considerable evidence demonstrating that the landowners not only did not tolerate such use but actively prevented anybody trying to enter her property without permission

- The turning back of users by the landowner, her family and employees amounts to an interruption in the use of the path
- There is a dispute as to the facts. In particular as to the extent of the use that is claimed.

The Landowner therefore objects to the making of this Order and asks the Council to stand by its original decision at committee and join with them in objecting and requesting that it be not confirmed. However, should the Secretary of State be minded to confirm the Order the Landowner requests that a Public Inquiry first be held in order to properly test the evidence.