

**COMMONS AND RIGHTS OF WAY COMMITTEE  
25 NOVEMBER 2009**

**AGENDA ITEM:**

**APPEAL DECISION AGAINST GLOUCESTERSHIRE COUNTY COUNCIL'S  
RESOLUTION NOT TO MAKE A MODIFICATION ORDER IN RESPECT OF A  
CLAIMED PUBLIC FOOTPATH AT WITCOMBE FARM, GREAT WITCOMBE**

**JOINT REPORT OF THE GROUP DIRECTOR, ENVIRONMENT AND THE  
DIRECTOR OF LAW AND ADMINISTRATION**

**1. PURPOSE OF REPORT**

To consider the Council's position in view of the decision by the Secretary of State to allow the applicant's appeal against the Committee's resolution on 20 March 2007 not to make a Modification Order.

**2. RECOMMENDATION**

That having considered the appeal decision and the Inspector's judgement on the reasons given by members for refusing the application, the Commons and Rights of Way Committee supports the Modification Order for the additional length of footpath at Witcombe Farm, Great Witcombe.

**3. RESOURCE IMPLICATIONS**

The County Council is responsible for meeting the costs of the submission of the Order to the Planning Inspectorate. At any ensuing Public Inquiry the Council is responsible for its own staff costs, hire of the venue and advertising costs. At an Inquiry, whilst parties are normally expected to bear their own costs, there is provision for parties to claim costs on the grounds of unreasonable behaviour.

**4. SUSTAINABILITY IMPLICATIONS**

No sustainability implications have been identified.

**5. STATUTORY AUTHORITY**

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub-section (3). Any person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53 (3) (b) or (c). The County Council is obliged to determine any such application that satisfies the required submission criteria in accordance with

Schedule 14 of the Act and, if appropriate, make the subsequent Order in accordance with Schedule 15 of the Act.

## **6. DEPARTMENTAL CONTACT**

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## **7. MODIFICATION ORDER APPLICATION**

- 7.1 On 6 September 2005 Dr Nick Gilbert, a local resident, submitted a Modification Order application for a length of public footpath in the parish of Great Witcombe to be added to the Definitive Map. The application was considered by the Commons and Rights of Way Committee on 20 March 2007. A copy of the Committee report and enclosures is attached at Annex A. The report contains a location map 6A and larger scale map 6B showing the length of path considered at the time of the Committee between points A-B. The footpath runs from Witcombe Farm Lane through Witcombe Farm to Public Footpath AWG 4 adjacent to Witcombe Reservoirs.
- 7.2 In support of the application, Dr Gilbert submitted forty-nine public path evidence forms on behalf of 50 named witnesses. The landowner, Mrs Hicks Beach of Witcombe Farm, disputed the application and her solicitor Charles Russell made detailed comments on the evidence forms and submitted statements and witness evidence forms in opposition to the application. Dr Gilbert commented on these in turn and provided supplemental statements from existing witnesses specifically addressing the landowner's comments.
- 7.3 The attached Committee report sets out full details of the application, including the evidence, observations from the landowner, consultations with local councils and others and legal comments and conclusions. The report should be read in full and the following two paragraphs are a brief summary:
- 7.4 The application was decided on the basis of the user evidence as it was considered that the documentary evidence available did not assist with respect to the status of the route. With respect to the date of challenge, there were two notices of relevance on the site. The first of these was a notice at point A (on map 6B) stating "PRIVATE ROAD. NO UNAUTHORISED VEHICLES " erected over 25 years ago (from the date of the report). However, because of the ambiguity of the wording which referred to vehicles, it was not considered that this notice was effective in denying a public right of way on foot. It was reported that further notices had been erected more recently stating "WITCOMBE ESTATE. PRIVATE LAND. NO PUBLIC RIGHT OF WAY". These notices were seen to be in place at both ends of the path, A and B, in September 2005,

although the notice at B was no longer in position in February 2007. Although there was some uncertainty about the exact date these signs were erected, the general consensus was that it was in about 2001/2002. A cautious approach was therefore taken and the year 2001 was taken as the date of challenge. Thus the relevant period of public use was considered to be the 20 year period from 1981 - 2001.

- 7.5 The report concludes that there was strong user evidence dating back to the 1930's. However there was conflicting evidence in this case and members were advised that they should apply the tests set out in the *Bagshaw/Norton* High Court case of 1994. These are as follows:

Test A: Does a right of way subsist? This requires that there is clear evidence in favour of the right of way and no evidence to the contrary.

Test B: Can a public right of way be reasonably alleged to subsist? Where there is a conflict of credible evidence, it is necessary to show that a reasonable person having considered all the relevant evidence could reasonably allege a right of way to subsist.

The *Bagshaw/Norton* case was reaffirmed by the *Emery* Court of Appeal decision in 1997 which stated that where there is conflicting evidence which could only be tested or evaluated by cross-examination, an order would seem to be appropriate and concluded that "If an applicant can produce credible evidence of public enjoyment of a path for 20 years, then even though there may be conflicting evidence it is reasonable to say that a right of way is deemed to exist".

Members were advised that the requirements of Test B had been met and that under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, a right of way had been reasonably alleged to subsist. It was therefore recommended to the Committee that a Modification Order be made to add the claimed footpath to the Definitive Map.

## **8 COMMITTEE DECISION**

- 8.1 The application was considered by the Commons and Rights of Way Committee on 20 March 2007 when members resolved, contrary to the recommendation, that the application should be refused. A copy of the Minute of the meeting which includes the reasons given for the refusal is attached at Annex B. It is recorded in the Minute that Members acknowledged that case law indicated that if there was a conflict of user evidence then on balance the application should be accepted. However it appears they were concerned about a number of issues which contributed to their resolution that no Order should be made. In summary these issues were:

(1) There was no documentary evidence to show the status of the route.

- (2) The Great Witcombe Parish Meeting had never requested that the route be added to the Definitive Map.
- (3) No further response had been received from the Ramblers Association regarding the application.
- (4) The recent parish survey indicated by a small majority that people who lived in the parish and had responded felt the path was private.
- (5) The Minutes state: "Members felt the evidence was clouded and confused, the majority of the local public were opposed to it, there was no documentary evidence, there was an avenue of appeal, there were anomalies with the use of gates."

## 9 APPEAL

9.1 The applicant appealed to the Secretary of State for Environment, Food and Rural Affairs against the Committee's decision on 9 April 2007. During the appeal process further evidence was submitted by the applicant, the solicitor acting on behalf of the landowner and the Ramblers Association. The case was considered by an Inspector, Helen Slade, and the Council was informed of the Secretary of State's decision on 25 November 2008. The Secretary of State considered that a Modification Order should be made and accordingly directed the County Council to make an Order. A copy of the Secretary of State's decision and the Inspector's report giving the reasons for the decision is attached at Annex C.

9.2 The Inspector's report contains a detailed discussion of the case. For the benefit of current members, it is important to identify that section of the report where the Inspector comments on the Committee's reasons for refusing the application and these will be dealt with in turn:

- (1) No Documentary evidence** - The Inspector notes that the application was made on the basis of user evidence and agrees with the officer's view that lack of documentary supporting evidence is not crucial to the determination. She considers "...it is the user evidence and not the documentary evidence, which is of more value in determining this particular application and appeal" (paragraph 70 of Inspector's report).
- (2) No previous claims by Great Witcombe Parish Meeting** - Members were concerned that no previous application had been made by the Great Witcombe Parish Meeting to add the path to the Definitive Map. The Inspector does not consider the members concern to be relevant, stating that "...the officer's advice that a right of way may have been dedicated subsequent to that time is sound and the absence of a claim in the 1950s has no effect on the qualifying period of user post 1980..." (paragraph 91)
- (3) No further response received from the Ramblers Association** - The Inspector has not commented on this point in her conclusion, although she does report the applicant's comments that "It is not clear how the lack of

evidence from the Ramblers Association has any bearing on the use of the route by 50 other people". Whilst it is the Council's practice to consult user groups such as the RA when any application is made, it is not critical for them to submit evidence in support of an application or even comment on an application. The decision should be made on the evidence available. In fact in this particular case the Ramblers Association subsequently provided evidence in support of the application during the appeal process.

**(4) Parish Survey –** Members had considered a survey carried out by Great Witcombe Parish Council in 2005 in which all residents of the parish were invited to express their views on the modification order application. They noted that the survey indicated by a small majority that people who lived in the parish and had responded felt the path was private. The Inspector comments that whilst the survey may have been conducted in a genuine attempt to gauge local opinion, "...it cannot provide evidence of the claimed route...It is not evidence of the landowner's lack of intention to dedicate a public right of way and can only express the feelings of the members of the parish some considerable time after the qualifying period of user". (paragraph 94)

**(5) Anomalies with the use of gates -** Members felt that the evidence was confused as some of the witnesses had noted a gate on their evidence forms whereas others had not. The Inspector refers to the statement by one of the landowner's witnesses that the gate was removed in the early 1970's and concludes it cannot have been present during any part of the qualifying period of user (1981 – 2001). Furthermore the Inspector agrees with the applicant's explanation that the gate was often open and unnoticed by users of the route and that its presence did not preclude the dedication of a public right of way. This, she states, does not constitute evidence of the landowner's lack of intention to dedicate a public footpath during the period in question. (paragraphs 92 & 93)

### **9.3 Inspector's Conclusion**

The Inspector does not consider any of the reasons given by members for refusing the application to be justifiable. The Inspector agrees there is a conflict of evidence and that the correct legal test is that set out in paragraph 7.5 above and also set out clearly by officers in the Committee report. Consequently, while members are entitled to take a different view to their officers, if it can be justified, the Inspector in this case agrees with the officers' recommendation that the legal test has been met and that it has been reasonably alleged that a public footpath subsists along the route in question. The Inspector therefore considers the appeal should be allowed. Her finding was endorsed by the Secretary of State and the Council was directed to make a Modification Order.

## **10 MODIFICATION ORDER**

- 10.1 The Modification Order was duly made on 18 March 2009 and advertised on 26 March 2009. A copy of the Modification Order is attached at Annex D. It can be seen from the Order map that the length of footpath A-B-C-D on this map is slightly longer than the route originally claimed. The reason for this is that when the Order was being drawn up, it was realised that the class 4 highway, Witcombe Farm Lane, was shown on the List of Streets as stopping short at the southern boundary of 2 Hillview Cottages and that it did not in fact extend as far as the access to the reservoir. (Whilst the road was shown on Glosmap as extending as far as the access, it is the List of Streets which is the legal document). The Order map therefore includes the additional length A-B, a length of approximately 65 metres. The total length of the footpath is about 275 metres.

## **11 OBJECTION RECEIVED**

Following the publication of the Order, one objection dated 6 May 2009 was received from Charles Russell solicitors on behalf of the Witcombe Trust and the Mark Williams Hicks Beach Will Trust. A copy of the objection letter is attached at Annex E. Charles Russell dispute the evidence and ask the Council to stand by its original decision at Committee and join with them in objecting to the Order.

## **12 FUTURE COURSE OF ACTION**

- 12.1 The County Council made the Order as a result of the direction from the Secretary of State. As an objection has been received to the Order, the Council does not have the power to resolve the matter itself but has to send the Order together with a statement of case to the Planning Inspectorate for determination. The Inspectorate may deal with the matter by written representations, a hearing or a Public Inquiry. In cases of this nature involving user evidence the Inspectorate almost always decides on an Inquiry. When the Order is submitted to the Inspectorate, the Council has to state whether or not it supports the Order. There are in fact three options open to the Council following a direction from the Secretary of State: the Council may support the Order; adopt a neutral stance or actively object to the Order. The *Planning Inspectorate's Advice Note No 1 (revised September 2009)* sets out the procedure to be followed in these circumstances and a copy of the advice note is attached at Annex F. Paragraph 11 of the Note states that:

“Where an OMA (Order making authority) has decided not to support confirmation of the Order ...the Planning Inspectorate should be informed at the earliest opportunity. A clear statement indicating whether the OMA intends to actively oppose the Order or to adopt a neutral stance is required, together with an indication of its reason for doing so.”

Thus the Council will have to justify its position with legally valid reasons.

- 12.2 The Council's stance with respect to the Order will have a considerable bearing on the role taken by Council officers at any ensuing Inquiry. If the Council supports an Order then an officer will be responsible for preparing the case, interviewing witnesses, preparing proofs of evidence and giving evidence at the Inquiry. The Council will normally be represented by an advocate who will present the case in support, call witnesses, cross-examine witnesses who oppose the Order, prepare a closing statement and give legal advice where required. If however the Council does not support an Order, it is normal practice for the applicant or another supporter to take the lead in presenting the case. If the Council takes a neutral stance it will have a limited role as the Inspector will invite its representative to make an opening statement. Paragraph 15 of the attached *Advice Note No 1* explains that such a statement should be "...a factual account of the history of the Order and the key issues which influenced the OMA's conclusions leading to its neutral position".
- 12.3 The Committee therefore needs to decide whether to support the Order, object to the Order or take a neutral stance. Some points for consideration with respect to each position are set out below:

#### **12.4 Supporting the Order**

- (1) Whilst it is accepted that there is conflicting evidence, there is nevertheless a substantial body of user evidence in support of the Order.
- (2) The case would have the officer's original recommendation in support together with the Secretary of State's decision at the appeal stage (although there is a higher standard of proof for confirmation of an Order where it has to be shown on the balance of probability that a right of way subsists.)
- (3) The Council's support would minimise the risk of a costs application on the part of the applicant. As explained above, the reasons given by members for refusing the application were dismissed by the Secretary of State at the appeal stage. If the case is successful at a subsequent Inquiry, there is the potential for the applicant to claim costs against the Council for making a legally unjustifiable Committee decision (which subsequently involved the applicant in spending time preparing and defending a complex case possibly including legal representation). *The Rights of Way Circular 1/09 (Version 2 October 2009: paragraph 9.1)* explains that the Planning Inspectorate may order that one party pay the costs of another where:
  1. that party has behaved 'unreasonably'; and
  2. the unreasonable behaviour has caused the other party to incur unnecessary costs that they would not otherwise have incurred.

- (4) The Committee would be supporting the Secretary of State's direction. It is perfectly proper for the Council to reassess its position having considered the reasons set out in the appeal decision.

## **12.5 Objecting to the Order**

- (1) This would support the members' original decision, but an officer at an Inquiry would not be in a position to deal with questions relating to the reasons for the Committee's decision. It would be preferable for a member of the original committee to present the Committee's case and be available for cross-examination.
- (2) There is a risk that objecting to the Order could lead to a costs application from the applicant (including costs of preparation of case and legal representation, functions normally carried out by the Council). This would have to be on the basis that the applicant had incurred unnecessary costs that would not otherwise have been incurred.
- (3) The Committee would not be supporting the Secretary of State's decision.
- (4) The Committee's objection would, of course, have the support of the objector.

## **12.6 Neutral position**

- (1) This disadvantages the applicant so the same argument as to potential costs application set out in 12.5 (2) applies.

## **13 CONCLUSION**

- 13.1 Having considered the appeal decision and in particular the Inspector's judgement on the reasons given by members for refusing the application set out in the Minutes of the meeting of 20 March 2007, it is recommended that the Committee supports the Order. If the Committee decides not to support this recommendation, members should specify, in accordance with paragraph 11 of the *Planning Inspectorate's Advice Note No 1*, whether they wish to object to the Order or take a neutral position and give reasons for their decision.

## **14 APPENDICES**

- A Commons & Rights of Way Committee Report 20 March 2007
- B Minute of Committee meeting 20 March 2007
- C Secretary of State's Decision dated 25 November 2008 re Appeal
- D Modification Order made 18 March 2009
- E Objection letter dated 6 May 2009 from Charles Russell
- F Planning Inspectorate's Advice Note No 1 revised September 2009