

# nineteen47

CHARTERED TOWN PLANNERS  
& URBAN DESIGNERS

## **Rebuttal Proof of Evidence (Planning)**

**of Carl Stott BA (Hons) MA TP (UC) MRTPI**

### **Appendix 1**

#### **Landowner's Legal Opinion on DMMO Application**

Appeal against the refusal of Outline Planning Permission for a residential development with associated infrastructure for up to 30no. dwellings, including detail of associated point of access. All other matters (landscaping, scale, layout and appearance) reserved.

Land off Leconfield Road, Nanpantan, Loughborough.

On Behalf of Bowbridge Homes (Nanpantan) Ltd.

PINS ref: APP/X2410/W/22/3304644 LPA ref: P/20/2199/2

**Client:**

Bowbridge Homes (Nanpantan) Ltd.

**Project:**

Land off Leconfield Road, Nanpantan

**Report Title:**

Rebuttal Proof of Evidence (Planning)

Appendix 1: Landowner's Legal Opinion on DMMO Application

**nineteen47 Reference:**

n1875P

**Date:**

14<sup>th</sup> March 2023

**RE: DMMO APPLICATION TO RECORD FOOTPATH AT  
LECONFIELD ROAD, NANPANTAN, LOUGHBOROUGH**

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**OPINION**

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**Introduction**

1. I am asked to provide an Opinion for the Helen Jean Cope Charity (“the Charity”) upon an application (“the Application”) dated 24 April 2021 made by Barbara Rose Singer to Leicestershire County Council in its capacity as surveying authority (“the Council”) for a Definitive Map Modification Order (“DMMO”) to add a public footpath (“the claimed path”) from Leconfield Road, Nanpantan, Loughborough as shown marked A-B-C-D-E on Plan No. M1269 to the Definitive Map and Statement. The claimed path runs over an agricultural field owned by the Charity. It forms a circular route over the field to and from Leconfield Road.

**Legal Framework**

2. The Application is made under s.53(2) of the Wildlife and Countryside Act 1981. Section 53(2)(a) requires the Council to keep its Definitive Map and Statement under continuous review and to make modifications as soon as reasonably practicable after the occurrence of any of the events specified in s.53(3). The relevant event is contained in s.53(3)(c)(i), namely:

*“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—*

*that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path”.*
3. The fundamental issue for the Council in determining whether to make the DMMO is therefore whether the claimed path “*subsists or is reasonably alleged*” to subsist. The

former test is whether, on the balance of probabilities, the claimed public footpath subsists. The latter test is a lesser one of whether a reasonable person, having considered all the relevant evidence available, could reasonably allege the claimed footpath exists: see *R. v Secretary of State ex parte Bagshaw and Norton* (1994) 68 P. & C.R. 402. Nonetheless, as emphasised in that case, “*credible evidence*” must be produced that the claimed path is reasonably alleged to exist in order to satisfy that lower threshold.

4. In addition, a DMMO may only be made upon “*the discovery of evidence*” which, when considered with all other relevant evidence, shows that a footpath subsists or is reasonably alleged to subsist. As was made clear in *R. (on the application of Roxlena Ltd) v Cumbria County Council* [2019] EWCA Civ 1639, once evidence has been found and considered by the authority, together with all other available evidence, some **new and additional evidence** must be relied upon in order for a s.53(3) event to occur in respect of a fresh application.

### **Application**

5. The Application is made on the basis of user evidence. The only documentary evidence relied upon is photographic evidence. There is no reliance upon old map evidence. It is thus evident that the Application relies upon the claimed path having been allegedly dedicated as a public footpath due to long use. Such dedication can arise pursuant to s.31 of the Highways Act 1980 (“the 1980 Act”) or at common law.
6. Significantly, the Application is not the first made in respect of a claimed path over the field. That is of particular note in relation to the application of the relevant criteria for dedication which I shall address below, and also to the “discovery of evidence” test referred to above. There must be some new and additional material evidence that has not previously been considered by the Council in order for the requisite discovery of evidence to have occurred.

### **Section 31 Highways Act 1980**

7. Section 31(1) of the 1981 Act provides:

*“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without*

*interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”*

There must be credible evidence of each of the elements of the statutory criteria for the statutory presumption to arise and in order for a DMMO to be made. Similarly, there must be credible evidence of all the elements of dedication at common law in order to enable a DMMO to be made on that alternative basis.

### **20 years uninterrupted use of the claimed path**

8. The relevant 20 year period for the purposes of s.31 must be calculated retrospectively from the date when the right of the public to use it is brought into question: see s.31(2). In the absence of any suggested bringing of the right into question in the Application, the relevant 20 year period ends on the date of the Application. It would therefore be **April 2001 until April 2021**. Notably, at least one previous application for a footpath over the field was made and considered during that relevant 20 year period, namely in 2010. I understand investigations are ongoing over previous applications made.

### **Use of defined route over land**

9. Both under s.31 and at common law, any long use resulting in dedication can only occur over a defined route on the ground. That is a fundamental characteristic of any highway which must follow a known and defined line in contrast, for example, to recreational use of a village green. In *R. (on the application of Pereira) v Environment and Traffic Adjudicators* [2020] EWHC 811 (Admin), having reviewed the legal authorities, Fordham J. stated at [12]:

*“It is, in my judgement, **an error of law to allow fluctuation in the course of passage across land** to constitute the maintenance of ‘a course of passage’, so as to support a conclusion of uninterrupted enjoyment by the public of ‘a way’ over land. **What is needed is greater precision**, the identification of what the uninterrupted ‘way’ is, and an analysis of whether the location in question falls within that uninterrupted ‘way’.”* (Emphasis added).

Hence, a precise defined route must be identified in order to comprise a “way”, and it is that specific route which must be assessed.

10. The defined route of the claimed path is A-B-C-D-E on Plan No. M1269. The 20 years uninterrupted as of right use must therefore have been of that specific route from 2001 until 2021 in order for the s.31 statutory presumption of dedication to arise. Similarly, at common law, any long use must have been uninterrupted and as of right along that precise route.
11. In my opinion, a reasonable allegation of such uninterrupted use of A-B-C-D-E has not been demonstrated on the basis of the evidence I have seen. The following are of particular note:
- a. An application considered by the Council in 2010 claimed an entirely different route over the field. Its route was from Nanpantan Road and not from Leconfield Road. It was not a circular route. There was not even an overlap between the route then claimed and the current claimed path. There was no suggestion that the claimed path was in use at that time. From that application, it is evident that the public were allegedly using a different route across the field at that time, which notably is within the relevant 20 year period.
  - b. In addition, it appears there have been previous applications for yet different alignments of a path to be recorded over the field. Investigations are being made, but the Council will be aware of them and the evidence relied upon. I understand that none of those applications were for the claimed path either, and instead related to different routes over the field.
  - c. The user forms in support of the current Application do not consistently support the use of the defined route currently being claimed. The responses to question 2 of the user forms vary considerably. It is evident that different routes are claimed to have been used by the users at different times. Many state they used the field to gain access to Burleigh Wood rather than to walk the circular route claimed, as evidenced by the various responses to question 12 of the user forms. Others claim to have walked other routes over the field, such as around its perimeter, whilst many others are unclear as to the specific route they used.
  - d. It is likely that a number of such users also supported previous applications for a different route, claiming to have used an alternative route. Such supporting evidence of previous applications is currently being sought. Nonetheless, it will be in the Council's possession and ought to be taken into account as available

material evidence when assessing the evidence in support of the current Application.

- e. The aerial photographs submitted in support of the Application show other defined routes across the field. That supports the proposition that insofar as the public have used the field, its use has clearly not been confined to the defined route claimed in the Application. In any event, reliance on tracks shown on photographic evidence to support the Application is of limited value given that the field has been in use for agricultural purposes over the relevant 20 year period and would have been regularly accessed by the farmer for such purposes.

12. Consequently, it does not seem to me that there is credible evidence of uninterrupted public use of the specific route claimed in the Application throughout the relevant 20 year period. Instead, the various previous applications serve to demonstrate that any long use of the field has not been uninterrupted use over the defined route of the claimed path. On that basis alone, it is my opinion that there is no reasonable allegation of dedication of the claimed route either under s.31 or at common law and a DMMO should not be made.

#### **As of right use**

13. In addition, insofar as there has been any use of the claimed path, it has not been “as of right”, namely without force, stealth or permission (“*nec vi, nec clam, nec precario*”) throughout the relevant 20 year period. In order to satisfy the statutory definition, the use must be as of right **throughout** the relevant 20 year period, as held by the House of Lords in *R. (on the application of Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2008] 1 AC 221. In particular, it is my view that any such use has been “with force” during the relevant statutory 20 year period, and similarly, for the same reasons, insofar as common law dedication is relied upon, on the following grounds.

14. The field comprises agricultural land let under a succession of Farm Business Tenancy Agreements since 1995 until 2019. During that period, it was grazed by cattle and mown for hay and silage. Any public use along the circular route of the claimed path through the middle of the field and back along another route also through the middle of the field would have been wholly inconsistent with such agricultural use.

15. The fences round the field were maintained throughout that period. In particular, the access gates used by the tenant farmers both off Leconfield Road and adjoining Burleigh Wood were secured with barbed wire. Any climbing over the gates to gain access to the field in such circumstances was “*vi*”, namely “with force” and thus not as of right.

16. In addition, trespassers were challenged by the tenant farmers and so their use was contentious and not as of right.

### **Conclusion**

17. In conclusion, it is my firm opinion that there is not credible evidence to demonstrate a reasonable allegation that the specific line of the claimed route has both been subject to uninterrupted public use for 20 years, or for any period to demonstrate dedication at common law, and that such use has been as of right throughout any such period. On the contrary, it appears the Application is yet a further attempt to seek to have some form of footpath recorded over the field, no doubt motivated by the development proposals for the site. As with previous inconsistent applications made, it is my view that the appropriate course would be for the Council to determine not to make the DMMO sought.

18. I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.

**RUTH A. STOCKLEY**

13 March 2023

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