APPENDIX 3

OPINION

SECTION 31 (6) HIGHWAYS ACT 1980

I am instructed by Wiltshire Council, ["the Council"], and asked to advise on a number of matters and issues concerning the interpretation and application of section 31(6) of the Highways Act 1980. That subsection concerns the deposits and declarations made by landowners in respect of rights of way over their land which will, if the correct statutory procedure is followed, and subject to evidence to the contrary, be sufficient evidence to negative the intention of the owner to dedicate any additional way as a highway over the land.

The matters which I am asked to consider concern various specific issues as regards the correct procedure. I have previously given oral advice in conference at the Council offices on the 4th May 2017 and the following is a summary overview of my opinion on the issues which were considered. I should add at the outset that I have been unable to find any direct binding authority dealing with the various questions arising and therefore I have given my opinion based on an application of the provisions within the subsection combined with persuasive authority I have considered in support of that interpretation but in the absence of direct authority on the points then some of the matters would not be free from doubt.

In my opinion, the wording of section 31(6) provides for a two stage approach to the provision by the landowner of the relevant information. Stage 1 is the deposit with the Council of a map and a statement indicating the ways which the owner admits are highways. Stage 2 is the lodging of statutory declarations which confirm that there are no additional highways have been dedicated over the land than as shown on the map and deposit or an earlier section 31(6) declaration. There are strict time limits within which the declaration or further declarations must be made but once the stage 1 deposit has been made there would seem nothing in my view to prevent stage 2 occurring immediately thereafter. In my view, it is clear that in order to take advantage of the statutory protection afforded by section 31(6) both the stage 1

deposit and the stage 2 lodging of statutory declarations must have occurred[1]. It is only the subsequent statutory declarations, when combined with the stage 1 deposit which will satisfy the provisions of section 31(6) and it is in fact the declarations which amounts to the sufficient evidence. The procedural requirements for a valid deposit and declarations are detailed and prescriptive but in my view there is no obligation or duty on the Council to check that any of the details are compliant and/or to advise the landowner as to any deficiencies, procedural irregularities, or time limits for the filing of statutory declarations. The Council, in my view, is merely acting as a recipient and public depository for such information as is supplied together with promulgating that information to the public via its register of deposits. In addition, in my view there would be no power for the Council to refuse to accept the deposit and filing of the declaration which a landowner wished to make even where it was invalid.[2]

If the deposit is not followed by a valid declaration and the specific statutory protection afforded by section 31(6) does not apply, it may in my view, be possible to consider the act of the stage 1 deposit as being sufficient evidence to negate the presumption arising under section 31(1) of the Highways Act 1980, that is deemed statutory dedication on the basis of 20 year user. However, it would depend on all the evidence and circumstances of any given case which would need to be carefully considered including any reasons as to why the process under section 31(6) was commenced but not completed. In my view it could not automatically be taken to apply in every case that the incomplete process could be taken as a landowner's intention not to dedicate even when the deposit had been put on the public register by the Council. Moreover, it would in my view remain open to consider the impact of any user evidence for the purposes of common law inferred dedication which could be established on a length of use for considerably less than 20 years.

As regards the stage 1 deposit, the subsection is specific as to the scale of the map which must be not less than 1:10560 (six inches to the mile). In my view, although I

[1] See Angela Sydenham *Public Rights of Way and Access to Land* p43, and Sauvain *Highway Law 5th Ed para 2-97 page 78.*

[2] The position is to be contrasted with, for example, a planning authority which is given specific power to refuse to validate a planning application where there are deficiencies in that application which rendered it invalid. By contrast, the effect of the deficiencies in the case of section 31(6) will be to negate the protection otherwise afforded by the provisions if the landowner had correctly complied with them.

have not been able to find a direct authority on the point, if the map supplied is not within these minimum specifications then the deposit will not be valid[3]. However, it would be open to the Council to consider whether the non-compliance was de minimis and possible to consider whether the incorrect scale had caused any prejudice and to waive any irregularity.

In addition to the requirement as to scale, the map deposited at stage 1 must correctly identify the land which is actually owned by the person making the deposit and affected by the rights of way identified in the statement. If the plan identifies other land outside of the ownership or fails to show land which is covered by the statement, then on a strict application of section 31(6) the deposit will be invalid. However, depending on the nature, extent and effect of the failure to strictly adhere to the requirements, it may be open to the Council to consider any irregularity and non compliance as de minimis and/or to waive any such irregularity. However, in my view if such power is available it should be exercised with caution and only where there was no possibility of any prejudice to the public.

In order to be valid, the deposit must be made by the owner of the land in question, that is the person in law entitled to dispose of the land in fee simple[4]. However, the act of deposit could be made on behalf of the owner by a properly authorised agent and with knowledge of the owner. There is no right of a leaseholder or beneficial owner, rather than legal owner, to act as if the landowner for these purposes unless they are a properly authorised agent. Whether the person was acting as an agent would depend on the evidence available to verify and establish this. For example subject to proper evidence, a beneficial owner may be considered as acting as an agent for trustees (the legal owners) at the time of the making of declarations or deposits but the ability to do so may be limited by the terms of any trust. If the deposit is made as an agent then it should in my view be signed as such, for example as a solicitor or land agent, and the person signing must be sure that they

[3] The position could be considered similar to that in the case of *R. (Warden and fellows of Winchester College v Hampshire CC [2009] 1 WLR 138* where the Court held that the requirements of schedule 14 of the Wildlife and Countryside Act 1981 had to be strictly adhered to for an application for a modification order to be valid. However, in the case of *R (on the application of the Trail Riders' Fellowship) v Dorset CC [2015] UKSC 18,* some doubt was expressed as to whether the interpretation applied in the Winchester case was too strict and narrow but the judgment is not definitive on the point and is a split decision.

[4] Section 31(7) of the Act defines owner for the purposes of the section and restricts it in these terms and see also Sauvain on Highways 5th Ed at page 79.

have the owner’s authority to act and if necessary of the relevant evidence of such capacity.

Trevor Ward

Pallant Chambers

3 October 2017