



Ms. S Madgwick
Wiltshire Council
Rights of Way and Countryside
Neighbourhood Services
County Hall
Bythesea Road
Trowbridge, Wiltshire
BA14 8JN

Our reference DJS/0963656/O14489503.1/DJS

Your reference SM/PC 141

20 November 2012

Dear Ms. Madgwick

**Wildlife and Countryside Act 1981, s53
The Wiltshire Council (Parish of Lea and Claverton) Path no 34, 35 and 36 rights of way
modification order 2012 dated 18 October 2012 ("the Modification Order")**

I refer to the Modification Order. I am instructed on behalf of my clients, Mr and Mrs Smith of Crab Mill Farm to **object** to the Modification Order.

I attach a copy of my letter dated 11 May 2012 and the supporting statement, which set out in summary form the legal grounds and factual basis for my clients' objection.

My clients intend to adduce substantial evidence from a number of witnesses, including their tenant of the agricultural land, adjoining owners and their predecessors in title to challenge the evidence that will be given by the supporters of the Modification Order. There are obvious disputes of fact between the witnesses for and against the Modification Order. On that basis, we take the view that the issue can only fairly be determined at a public inquiry.

I should be grateful if you would confirm that the Council intend to ask the Secretary of State to appoint an inspector to hear the evidence at an inquiry. If the Council were minded to adopt a different method of determining the dispute, I should be grateful if you would give me advance notice of that intention, together with the grounds for making it, in order that we can respond appropriately.

I await your reply.

Yours sincerely

David Shakesby

Associate

T +44 117 9173326

F +44 117 9173327

E david.shakesby@osborneclarke.com

Ms. S Madgwick
Wiltshire Council
Rights of Way and Countryside
Neighbourhood Services
County Hall
Bythesea Road
Trowbridge, Wiltshire
BA14 8JN

Our reference DJS/0963656/O14489503.1/DJS

Your reference SM/PC 141

11 May 2012

Dear Ms. Madgwick

**Wildlife and Countryside Act 1981, s53
Application for an order to add public footpaths to the definitive map and statement at Lea,
Malmesbury**

I refer to the application to add public footpaths to the definitive map and statement ("the Application") across my clients' land. I attach a statement from my client Mr Kevin Smith setting out his evidence. I set out below our legal submissions. I adopt the definitions used in Mr Smith's statement.

The Application

1. The Application is made pursuant to s53 of the 1981 Act and s31 of the Highways Act 1980. The routes claimed can only be added to the definitive map and statement if:
 - (a) the public has used the route(s) for an uninterrupted period of at least 20 years "as of right"; and
 - (b) there is not sufficient evidence to rebut the presumption arising from s31 of the 1980 Act that the landowner intended to dedicate the land as highway; and
 - (c) the route must be capable of subsisting as a highway at common law.

The evidence in support of the Application

2. The evidence submitted in support of the Application raises a number of issues:
 - (a) Witness number 2 (Mr McManus) records that there was a broken gate ("the Gate") across the Southern Leg which was not locked. It presumably therefore had to be opened or climbed over. There is a reference to conversations with Mr and Mrs Perry, which indicates that his use was permitted or tolerated.
 - (b) Witness number 3 (Mr Coleman), 5 (Mr Masson), 7 (Mr Porter), 8 (Mrs Suter), 9 (Mr Holmes), 13 (Mrs Ind), 17 (Mr Seymour), 21 (Mrs Cole), 23 (Mrs Seymour), 25 (Mr Suter), 26 (Mrs Porter), 28 (Mrs Masson), and 30 (Summersell) all also refer to the Gate.

- (c) Witness number 7 (Mr Porter) refers to Mr and Mrs Perry "allowing" public access for many years, which indicates permission.
- (d) Witness number 8 (Mrs Suter) refers to a "lowered section of fence", which has to be climbed over. This would presumably (although it is unclear) be at the point of divergence between the Cul-de-sac and the Eastern Route. This section of fence is also mentioned by witnesses 15 (Mrs Knight), 25 (Mr Suter), 30 (Summersell) and 31 (Mrs Jones).
- (e) Witness 14 (Mr Francis) indicates that when he heard that the new owners were not going to be "as accommodating" as Mr and Mrs Perry, he stopped using the routes. That indicates that he understood there to be a revocable permission.
- (f) Witness 19 (Mrs Collingwood) records that she asked for and was given permission before she started using the routes some 43 years ago.
- (g) Witness 21 (Mrs Cole) records that she was given permission to walk on the land.
- (h) Witness 22 (Mr and Mrs Kerstar) records that Mr and Mrs Perry never objected. This indicates permission or toleration.

Intention to dedicate

3. We say that the applicants cannot establish an intention on the part of the landowner to dedicate the land in perpetuity as a highway. This is for the following reasons:
 - (a) the Southern Leg used to have a gate across it; and
 - (b) the Southern Leg has been regularly fenced off with electric fencing (see Mr Smith's statement); and
 - (c) the evidence, even from the Applicants suggests that a significant part of the use was with express permission. Further witnesses give the impression that they understood there to be implied permission; and
 - (d) the gate, electric fencing and the inaccessibility of parts of the land whilst being grazed all potentially amount to interruptions to the claimed period of use.
4. As a consequence, we say that the applications cannot show an intention to dedicate, and conversely my client can rebut any presumption that may have arisen of an intention to dedicate.

As of right

5. The meaning of the term "as of right" is well settled. It means *nec vi, nec clam, nec precario*, or "without force, without secrecy and without permission".
6. The witness evidence shows that witnesses climbed over or opened the Gate, climbed under electric fencing, or climbed over a broken down section of fence. All such use is "with force" and therefore cannot be "as of right". In addition, it would have been obvious to any reasonable objective observer that persons using the routes were not doing so as of right.
7. The evidence of express or implied permission referred to above is fatal to the Application - see *R v Secretary of State for the Environment ex parte Bilson* [1999] QB 274.

Southern Leg

8. The Southern Leg is a deviation from two sections of existing highway. Essentially it cuts the corner between Crabb Mill Lane and the existing footpath.
9. A deviation from an adjoining highway or a recreational walk along a longer route, as opposed to the shorter and more convenient route of a footpath proper between two points cannot be claimed as a public footpath. See *British Museum Trustees v Finnis (1833) 5 C&P 460* and *Bilson (above)*.

The Cul-de-sac

10. The law does not recognise that a cul-de-sac can be a highway; a highway must lead from one place to another. Dedication will not be inferred in such circumstances and it could only be expressly dedicated - see *Attorney General v Antrobus [1905] 2 Ch 188*.
11. Further or alternatively, there is no point of interest, viewing point or other reason in relation to the claimed footpaths to depart from the general rule in *Antrobus*.

Grazing licences

12. For a period of 22 years between approximately 1989 and 2011 a nearby farmer (Mr Baker) took a grazing licence of the land affected by the Application (both my clients' land and that now belonging to Mrs Wright) for each growing season in that period (approximately March to October).
13. During the growing season, all of the relevant land was occupied by Mr Baker. Mr Baker had control of the land during those periods, but he had no authority to dedicate the land as a highway in perpetuity.
14. As a consequence, Mr Baker's occupation during each year operated either as an interruption to a qualifying period of use so that there has never been a 20 year qualifying period of use, or further or alternatively, it is evidence that the landowner did not intend to dedicate the land in perpetuity as highway.

Conclusion

15. My client submits that for all of the reasons set out above, none of the routes can be confirmed as additions to the definitive map and statement. In particular, for the reasons set out in paragraphs 8 to 10 above, the two sections of route over my clients' land (the Southern Leg and the Cul-de-sac) cannot, as a matter of law, have been dedicated as highway. If those two sections cannot have been dedicated then it is equally impossible for the Eastern Route to have been dedicated as there would be no lawful means of accessing it from my client's land.
16. For all of the reasons set out above, we respectfully request that the Application be rejected and the Highway Authority determine that there is no need to hold an Inquiry.

Yours sincerely



David Shakesby

Associate

T +44 117 9173326

F +44 117 9173327

E david.shakesby@osborneclarke.com

IN THE MATTER OF S53 OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

AND IN THE IMATTER OF AN APPLICATION TO ADD PUBLIC FOOTPATHS TO THE DEFINITIVE MAPP AND STATEMENT AT LEA, MALMESBURY

STATEMENT OF KEVIN JOHNSTON SMITH

1. My name is Kevin Johnston Smith. I own Crabb Mill Farm, Lea, Malmesbury ("the Property") together with my wife Emma Corden Child. We completed the purchase of the Property from Mr and Mrs Perry on 18 March 2011. The registration of our title to the Property was completed on 30 March 2011. A copy of the registered title number WT285936 and the plan showing the extent of the Property is attached to this statement.
2. We became aware that walkers were trespassing on the Property (the property has been empty since we acquired it, as we intend to refurbish it completely) in or about the summer of 2011.
3. As soon as practicable, we took steps to erect new fences and gates in order to prevent access. We also spoke to a number of people that we saw trespassing on our land and told them that they were trespassing and that they were not permitted to deviate from the existing footpath.
4. During the course of acquiring the Property one of the key attractions was the stretch of river and the fishing rights. We made extensive enquiries via our lawyers to satisfy ourselves that we would acquire the stretch of river and the fishing rights. There is a fishing lodge next to the river, which adds significantly to the Property (including in monetary terms), but which is spoiled if it is not private.
5. For the purposes of this statement, I will refer to the stretches of alleged footpath which are the subject of the application to add footpaths to the Definitive Map and Statement ("the Application") as follows:
 - (a) The stretch between points A and B on the plan supplied by the Council I will refer to as "the Southern Leg";
 - (b) The stretch between points C and D (returning to C), I shall refer to as "the Cul-de-sac"; and
 - (c) The stretch between the point where it leaves the Cul-de-sac (and our land) to point E, I shall refer to as "the Eastern Route".
6. During the course of acquiring the Property we were told on a number of occasions by Mr and Mrs Perry that:
 - (a) there were no public or private rights of way over the Property (other than Crabb Mill Lane); and
 - (b) there were no public or private rights of way in the course of being acquired; and
 - (c) there were no overriding interests over the Property (other than a number of interests that are irrelevant for these purposes).



7. When giving their answers to these questions, Mr and Mrs Perry knew that we were concerned to ensure that the access to the river, the fishing lodge and the field that is the subject of the Cul-de-sac route was private.
8. My understanding is that for the whole of the period that Mr and Mrs Perry owned the Property, they entered into a grazing agreement with Mr Trevor Baker each year. This happened for approximately 22 years until 2011. Mr Baker's practice was to take an early cut of hay or silage in each growing season and then to graze the regrowth with cattle rather than taking a second cut of hay or silage. When livestock were on the fields, Mr Baker would erect electric fencing along Crab Mill Lane in order to prevent cattle straying onto the road. In order to access the Southern Leg, the witnesses supporting the Application would have had to cross the electric fencing. In addition, at point "X" on the attached title plan there is a gate, which used to be across the Southern Leg. Before this gate was removed (it is now lying in the hedge adjacent to the route), members of the public would have had to climb over the gate, or open it to use the route.
9. I also understand that it would be very unlikely (it would have been dangerous) that any of the witnesses (most of them are dog walkers) would have taken dogs through any of the fields, particularly the field containing the Cul-de-sac, when it was being grazed by cattle with calves.

Signed: _____

Date: _____

15/05/2012