

Your Ref: SM/2016/01

**CODFORD RESIDENTS' GROUP RESPONSE TO
LANDOWNER'S SUBMISSION Dated 30 September 2016**

1.0 Background

- 1.01 In January 2016, the Codford Resident's Group (CRG) put in an application to W.C. for the southern section of the Military Road to be recognised as a public right of way.
- 1.02 In April 2016, an Order was made by W.C. modifying the Definitive Map to record a public footpath over the claimed route.
- 1.03 The excellent, well researched and balanced Decision Report by the Rights of Way Officer has been approved and signed off by the Rights of Way & Countryside Manager and the Senior Rights of Way Officer.

1.0 The Basis of the Claim

- 2.01 The CRG claimed that a right of way over the southern part of the Military Road had been acquired **by prescription**.
- 2.02 **Prescription:** "an easement acquired upon another person's property **by continued and regular use** without permission of the property owner for a period of 20 years. Section 31 of The Highways Act 1980 sets out the conditions for the acquiring of an easement by prescription and is quoted in section 12.1 of the Decision Report.

3.0 Objection

- 3.01 After a lengthy delay, an objection was made on behalf of the Landowner, primarily based on two points:
- 3.02 **"They dispute that user sufficient to support the claim has occurred"** and
- 3.03 **"That use has been either by permission or that signs have been in place since the 1970s showing the intention of the owners not to dedicate a right of way."**

4.0 Review by Wiltshire Council Planning Committee

Since the Order attracted an objection, the case has now to go to the Secretary of State for determination but initially it has to be considered by the Wiltshire Council Planning Committee to decide whether it supports or opposes the Order. This meeting is to be held on Wednesday 2 November 2016 at County Hall, Trowbridge.

5.0 Level of Proof Required

As with civil courts and tribunals, this issue will be decided on **the balance of probabilities**; one party's case has only to be 'more probable' than the other party's to succeed.

6.0 Agreed Facts from Mogers Drewett's Submission, dated 30 September 2016

- The interconnecting road leading from Church Lane to the Military Road (A to B) had originally run through a former army camp and continued down to C. A Definitive Map (date unknown) showed that the whole of the field to the south of the church had been hutted during WW2, hence the references to Camp Road by the Farm witnesses.

- After the camp had been removed the Military (Camp) Road was fenced off at top and bottom (i.e. at B and C) as the whole of the Camp Field was open to stock (Mike Read).
- At a later date the fencing was removed and the Military (Camp) Road was fenced on both sides.
- The main A36 road ran through the village until the Bypass was opened in 1990.

7.0 Queries arising from the agreed facts

7.01 Can the Landowner **prove** that the interconnecting road (constructed by the Military sometime at the end of WW2) was conveyed to the Farm and not to the Church?

Note 1: In Mr Read's witness statement he stated: "The surface of the Camp (Military) Road has always in my recollection been tarmacked. It was originally put in I believe for army use so it will have been a heavy road. I presume that the army put in the original tarmac but I know that the farm has maintained it from time to time since by repair, and filling of potholes."

Note 2: The Landowner deposited an estate plan (dated 28 March 2003) with the then WCC intending to show the rights of way on his estate. Unfortunately, the estate plan was so carelessly drawn that it showed St Mary's Church, the ANZAC War Graves and a large part of Church Lane as being within the curtilage of the Farm.

A second estate plan (dated 27 January 2011) was deposited with WCC, repeating the errors of the 2003 plan, but this was rejected for having been scaled incorrectly.

Might the interconnecting road be yet another mistake?

7.02 When it is stated that the Military (Camp) Road was 'fenced off' at Point B, what does that mean exactly? Point B is right in the middle of a large field, so fencing off the road alone would not restrain cattle at all.

Note: Sally Oliver's testimony was accompanied by some very useful photographs, Nos 1 and 2 taken in 'approximately 1986', No 3 in 'approximately 1988' and No 4 'in about 1990'. The buildings in the background of No 1 are not recognisable and might possibly have been taken elsewhere. If No 1 was in fact taken on the farm, then there were no cattle in sight but a car in the background suggests that it was open to traffic (and therefore to walkers).

7.03 Was the Camp field always pasture or was it ever put to crops after, say, 1975?

Note 1: Mr Read stated: "The Submission that the Strattons put in suggested that it was in the 1970s that the fencing was changed. I do not think that is right, and I wish to clarify it. My evidence is that it was not in the 1970s. ...It was definitely the mid 1980s that the fencing was changed, and perhaps even later than that."

Note 2: The Submission relies quite heavily on evidence provided by aerial photographs. Unfortunately, although this specialist report takes up half of the whole submission, it adds little or nothing to the evidence. The photo taken on 2 April 1984, doesn't show the field in question at all, except for the entrance at C, the second one dated 21 April 1984 is so indistinct that, even under a magnifying glass, it is difficult for a layman to agree, on the balance of probabilities, with the conclusion at 4.3 on p 6 that: "There are no traces of fencing or other boundary materials along the sides of the route between B and C in April 1984."

The author of the Report also had to admit at 4.5 that: “I was unable to see a gate across the route at C in 1984, due to the resolution in the photo” and again at 4.7: “I cannot see any gate structure at C, due to vegetation.”

It is difficult to conclude, on the balance of probabilities, whether the gate at C was still there in 1984, and even if it was, whether it was still in use.

What is certain is that the whole of Camp Field was hutted until about 1947 or a year or two later (Maurice Cole’s testimony in interview), that it was gated off from the main A36 road as the Camp Field was open to stock (how were they kept in at the church end?) and that at some stage the Military Road was fenced off at some time in the 1980s.

What is not clear is exactly when that happened and, even when it had been fenced, there is no firm evidence to show that all walkers were thereby stopped from walking the route. There is a similar situation at Stockton Park (cited by Mogers Drewett at 15 v), where there is a Byway from the private road across a large field (in which cattle are sometimes to be found) to Stockton village.

8.0 Private Road Signs:

The existence of Private signs from an early date is not disputed but, importantly, to this day there is no private road sign opposite the Church lych gate (point A). This means that any visitor reaching the church from Beanis Path (used by the public for several centuries) or by walking up Church Lane (maintained by the Council) could then walk along the interconnecting road, parallel to the church, and then turn right (at point B) along the Military Road without being aware that it was private property. There is only a hand painted sign stating that it was access to the churchyard only.

In any event, a right of way created by prescription is acquired by continued and regular use **without permission** of the property owner.

9.0 Level of Usage

- i. Codford St Mary is a small village, some 120 households, with the Landowner owning at least 10 of those houses, possibly more.
- ii. From this very small constituency (and with little or no canvassing), we received 18 initial responses, then five more late submissions, making a total of 23 in all. Two other people completed forms, but then withdrew them, and several other people sympathised with our claim but felt unable to contribute, either because they do business with the Landowner or are close to others who do. We understand that one person was given express permission by the Landowner to walk and cycle around the farm. In total we estimate that about thirty people would have signed up. Additionally, of course, there has been a small but constant turnover of home owners over the last three decades, so, in all probability, there could well have been others.
- iii. The Report notes: “The Planning Inspectorate’s Consistency Guidelines state at 5.15 that there is **‘no statutory minimum level of user required** to show sufficient use to raise a presumption of dedication. Use should be by a sufficient number of people to show that it was use **‘by public’** and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence etc)”.
- iv. In section 15.0 of the Report (15.3), the Rights of Way Officer makes the telling comment:

“It is noted that the Landowner **only sought to stop use of the routes by the public on foot** (signs erected c. 2012 and still in place) and accordingly officers consider that this must have been the main use of the route.”

- v. Reinforcing this comment, some signs refer to ‘dog walkers’, who clearly would not be going to church, contrary to the Landowner’s assertion.
- vi. Purely anecdotally, the Landowner’s late father, Michael Stratton, was remembered fondly by villagers, because he would find time to have a chat with them while they were walking round the Military Road – totally ignoring the private road signs.

10.0 Credibility of CRG Witnesses:

Mogers Drewett paras 12 & 13: “Mr Cole was never seen on the route anyway” and “the other, Mrs R Wyeth, has according to our witnesses never been seen on the claimed route, by contrast with her observed use of Beanis Path.”

It is indeed true that Maurice Cole was never much given to walking but he mentioned two specific elderly friends of his who did walk round the Military Road and offered to phone them and some others but sadly he died before he could do so.

Mrs Wyeth has been a frequent user of the Military Road, sometimes with groups of visitors, as her evidence testifies and not to believe her evidence would be a serious accusation. I am sure that all the witnesses, who stated that they had not seen those who have claimed use of the route, are telling the truth and were simply working while we were walking. No doubt some of the walkers went round in the evening.

Tellingly, the walkers, when asked, have said that they rarely saw people working in the farm itself and have hardly ever been challenged at any stage over the years, despite the signs, until 2012.

You cannot prove a negative.

11.0 Quotes from farm workers.

Mr Read: “From my observation I would say that there was a noticeable increase in the amount of public walking on the camp road, in the very late 1990s/2000s.”

Mr Williams: “I have noticed an increase in the amount of dog walking on the camp road in the last fifteen years or so.”

Mr Stratton: “I remember occasional walkers along this road after this time (1991), all of whom were people I knew from the village. Usage of this road by walkers increased over time, and there came a time when many of the walkers were unknown to me. As a result, in 2012, I decided to stop all pedestrian access along the private farm roads.

Mrs Stratton: “In the last, say, ten years the use of the farm road has become more frequent by people unknown to us.”

Mr Graham Carter: “I have seen lots of people walking the Beanis Path and of course on Church Lane, but only rarely on this route. Perhaps over the last ten years or so some dog-walkers have come through.”

Mr Alan Bennett: “I can’t remember seeing the public walking along the farm road. There may have been the occasional dog walker but I cannot say who or when. I remember Mr Norman Bennett who

lived at the Lodge and had a poodle. He used to walk along there quite a lot but that was late on after the road had been fenced in by which time the cows were not on the track. There may have been others about the same period but I cannot remember their names.”

Note: we have been led to believe that Mr Norman Bennett walked his dog on the farm very early on, possibly the late 1970s or early 1980s but we cannot verify that.

Conclusion

On the single point, as to whether public use of the Military Road for recreational purposes has been substantiated or not, the well orchestrated witness statements put forward by Mogers Drewett on their own satisfy a higher burden of proof than ‘on the balance of probabilities’. It is ‘beyond all reasonable doubt’ that the public have been so using the Military Road without permission for many years.

The only thing that the CRG has to prove is that this use has been ‘**continued and regular**’ over 20 years. The farm witnesses have testified that the public has walked the Military Road for the best part of 20 years but all with one voice have claimed “not to have seen” those villagers who say otherwise.

As we have already said, it isn’t possible to **prove** a negative and, as our witnesses are not liars, their statements must command the same respect as we showed for the Farmer’s witness statements.

Clearly the further we go back in time, the greater difficulty we face in finding many witnesses who personally used the Military Road in the 1970s and 1980s. Some have died, some are in care homes and others have moved away but we are confident that, on the balance of probabilities, we have amply demonstrated above that villagers have regularly walked the Military Road for recreational purposes, possibly as early as the 1970s but certainly in the early 1980s until stopped in 2012.

Codford Residents’ Group

15 October 2016