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**SWINDON BOROUGH COUNCIL FOOTPATH 44 WANBOROUGH
MODIFICATION ORDER 2017**

**SECOND PUBLIC INQUIRY BEFORE INSPECTOR CRUICKSHANK: 7, 8 & 15
DECEMBER 2021**

**CLOSING SUBMISSIONS ON BEHALF OF
SWINDON BOROUGH COUNCIL (“THE COUNCIL”)**

Unless otherwise stated, references in square brackets relate to the bundle prepared by the Council for the second inquiry in December 2021

INTRODUCTION

1. The Council invites the Inspector to confirm the Order as originally made by the Council and as recommended by the previous Inspector in respect of F-E-D-G. In respect of the rest of the Order route, the Inspector is asked to reject the proposed modification of the previous Inspector (the deletion of A-B-C-D-G (“the Original Modification”)) and instead to endorse a different modification (“the Council’s Proposed Modification”). Details of the Council’s Proposed Modification are at [B185]-[B188]. In comparison with the original Order route for A-B-C-D-G, the Council’s Proposed Modification (A-C): (i) widens the Order route; and, (ii) changes slightly the alignment of the Order route by moving point C approximately 3 metres to the south. The changes are necessary so that the relevant part of the Order route reflect accurately the extent of the past public use which has given rise to the public right of way. The Council accepts that if the Inspector were to accept its request above, the Inspector’s decision would have to be subject to the notification procedure in paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 (“the WCA”) given that the Council’s Proposed Modification affects land not originally affected by the Order. This may necessitate a further inquiry.
2. By the end of the inquiry there were two remaining statutory objections to the Council’s Proposed Modification: Mr Hanson (on behalf of residents of Suters Lane) and Mr Stalker (landowner of the northern part of the land affected by the Order). The objection

of Wanborough Parish Council (“WPC”) had been withdrawn, but Mr Hayward on behalf of WPC continued to object to the Council’s Proposed Modification as an Interested Party. These objections are addressed below.

THE COUNCIL’S SUBMISSIONS IN RESPECT OF A-C

The Council’s Proposed Modification an appropriate exercise of the Inspector’s discretion to modify

3. There is no doubt that the Council’s Proposed Modification lies well within the Inspector’s powers (paragraph 7(3) read with paragraph 8 of Schedule 15 to the WCA).
4. Further, the Council’s Proposed Modification represents an appropriate and orthodox exercise of the Inspector’s power to modify as per the principles from *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 266. As per Lord Phillips in that case: “the scheme of the procedure under Sch 15 to the 1981 Act is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry.”

A-C reflects accurately the route used by the public

5. There did not seem to be any real dispute that (subject to the point about whether access to the public was blocked by a locked gate in around 1997), Mr Sadler provided for the unofficial diversion of footpath 25 through land which later became the caravan park. The question, therefore, was not whether this route existed but its correct extent and alignment. This in turn reflects the decision of the previous Inspector which was that the public used a route through that caravan park (paragraph 30 [B11]) but that the route on the Order map showed the route as subsequently reprovided by Bower Mapson rather than the route as used over the 20 year period.
6. The physical extent of dedication is a question of fact to be proved by evidence of the extent of the public use: *Skrenty v Harrogate BC* (1999) EGCS 127. Where the land in question is bounded by fences or hedges consideration should be given to whether the purpose of these structures was to separate the right of way from other land. As set out in *Hale v Norfolk CC* [2001] Ch 717: “the presumption of dedication of all the land

running between hedges or fences can only arise if there is reason to suppose that the hedge or fence was erected by reference to the highway: that is, to separate the land over which there was to be no public right of way from the land over which there was to be such a right. Where matters are lost in the mists of time, it must often be possible to draw such an inference from the layout on the ground.”

7. Mr Fry gave written and oral evidence which explained why the Inspector can be confident that the Council’s Proposed Modification reflects the route as used. In summary, that is because the Council’s Proposed Modification was developed with reliance on the Ordnance Survey base map as it was in 2017 when the informal consultation took place. As set out in Mr Fry’s proof (paragraph 5.4 [B180]): “The base maps used for the Council’s plans are electronic versions of the Ordnance Survey maps that are loaded onto the Council’s GIS and regularly updated when new data is released by the Ordnance Survey.” Further, while Mr Fry cautioned against placing undue reliance on aerial photos (they can be misleading due to trees and vegetation obscuring boundaries), he pointed out that the various aerial photographs would seem to support the Council’s Proposed Modification since they show a very similar route to that extracted from the base map.

8. Various objectors made the point that the gravel track through the caravan park shown in various photographs did not extend to the full area covered by the Council’s Proposed Modification Route. However, the user evidence was that there was nothing to obstruct members of public from using the whole area and there were various specific recollections of people, especially children, using the whole area to pass, including the verges and area immediately adjacent to the electric fence that Mr Sadler had installed. For example, Mr Steve Savage recalled that his children “ran all over it” (“it” being the available area) and Mr Martin Savage recalled an occasion when his grand child was shocked by the electric fence. What is more, the various photographs and aerial photographs indicate strongly that the boundaries to the area shown by the Council’s Proposed Modification were designed to separate the area allocated for public use from other parts of the land. In particular, it seems clear that the metal fence between the public right of way and Duckbridge/the Aviary was put in place with the purpose of showing the boundary of the public right of way (see, for example, the photograph at [B42]).

9. In addition, Mr Hanson argued that the professional survey maps carried out to facilitate the development of Suters Lane should form the basis of any modification rather than the Ordnance Survey base map the Council had relied on because he stated that the former are more accurate. He explained that as a result of the Council's reliance on an inaccurate map as a starting map, the Council had wrongfully included a small additional strip of land along the northwest part of the order route which in fact had been part of the aviary and so had not been used by members of the public. In circumstances where Mr Hanson provided no evidence of the varying accuracy of the two alternative base maps beyond his own assertion as summarised above, the Council considers that this evidence should be afforded limited weight. Rather, it was reasonable for the Council to rely on a standardised and well-respected mapping system in the form of the Ordnance Survey as the basis for the modification route, and in so far as the Ordnance Survey map may contain some inaccuracies, these are *de minimis* in the context.

10. In so far as the Inspector agrees with Mr Hanson that the exact width and/or alignment of the Council's Proposed Modification is not entirely accurate, this does not somehow mean, as Mr Hanson suggests in his closing, that the modification "substantive". All it means, as per *Trevelyan*, is that the Inspector should set out in her decision that relatively minor modification required to regularise the position.

Application of the statutory tests in s.31 Highways Act 1980 to A-C

Preliminary issue: When the right of the public to use A-C was brought into question

11. The previous Inspector noted that there were a range of opinions (2013, 2015 and 2017) as to when the construction of the Suters Lane development resulted in A-B-C-D-G being brought into question (see paragraph 23 at [B10]). On this issue she concluded: "the Order route between Points A and G, via C, became unavailable to use sometime in early 2017, due either to the erection of safety fencing or the temporary closure, or both, and that this is the date on which the right of the public to use the way was brought into question" (paragraph 26 at [B10]).

12. However, Mr Hanson and Mr Stalker claimed that the route had been brought into question earlier, in 2015. In this regard the Council considers it significant that a

photograph was submitted with compelling evidence that it was taken by Mr Neil Stalker on 31 August 2016. The photograph is taken from the Stalker's land looking towards point C. It shows the pathway at point C to be obstructed with wooden fencing, and construction work (wooden roof frames and scaffolding) taking place in the area behind point C now known as Suters Lane. In addition, Mr Hanson provided an undated photograph (which he assumed was taken in the winter of 2015), which showed heras style fencing and what appeared to be the early stages of construction work at Suters Lane.

13. Further, Mr Peter Gallagher's statement refers to an email to sent to the Council on 8 April 2016 which queried the apparent closure of both footpath 25 as well as the Order route.
14. In light of the new evidence summarised above (importantly the evidence of the date that the first photograph referred to above was taken was not provided to the previous Inspector), the Council considers it more likely than not that following the grant of planning permission for the Suters Lane development in March 2015, construction works began towards the end of 2015 and that around that time access through point C was obstructed through fencing. Accordingly, the Council considers the relevant period for the purposes of s.31 HA to be late 1995 to late 2015.

Element 1: Use by the public

15. The previous Inspector made a finding that A-C (at that time referred to as A-B-C-D-G) was used by the public: "I am satisfied that, for convenience and safety, a route across this piece of land has been used by local people" (para 30 at [B11]). In so doing she rejected the submission from objectors that there was no meaningful use by the public in circumstances where some of those who used the route had enjoyed private rights of access: "The people who benefit from a right of access to their properties along the track to Wrightsbridge do not benefit from any private rights across the former caravan park, although they may have a right of access to Point C. Other people who live further along The Marsh have no such right of access. I am therefore satisfied that, despite some users having a right of access to one end of it, and also along about 10 metres of it (between Points G and D), a route across this piece of land has been used

by a group of people capable of constituting ‘the public’ being local residents of this part of the parish (para 30 at [B11]).

16. There is nothing to indicate that this finding does not apply equally to the slightly modified route (ie A-C rather than A-B-C-D-G) and none of the objectors have suggested otherwise. On the contrary, that A-C was used by the public was strongly supported by the new evidence before the second inquiry. In this regard the Council refers to and relies on the oral evidence of Mr Hunt, Mr Steve Savage, Mr Birley, Mr Martin Savage, Mr Inskip and Mr Offer. Mr Hunt as a former employee of Mr Sadler the previous landowner referred to members of the public walking through the route through the former caravan site for a significant part of the relevant period and the other five witnesses were examples of members of the public who had walked A-C for all or most of the relevant period.

Element 2: 20 years of uninterrupted use (1995 to 2015)

17. Until the route was called into question in 2015 as set out above by construction of the Suters Lane development, there is no suggestion that access to A-C was obstructed or otherwise interrupted in the preceding 20 years, and let alone for any material period. Indeed, Mr Hanson in his closings makes express reference to user evidence which refers to using A-C up to 2015. That others referred to their use being interrupted in 2017 is not considered significant. As the evidence heard at this second inquiry has made clear, understandably, users have difficulty remembering exactly when their use was called in question. Far more important is the general consensus that the use took place for many years (at least 20) until at some point between 2015 and 2017 when it was impeded by the development of Suters Lane.
18. Mr Hunt’s evidence (as given orally at the second inquiry and in writing at [A296]), was that Mr Sadler instructed him to make sure that the public’s access to A-C was unimpeded. Consequently, Mr Hunt made a point of clearing vegetation and ensuring that there were no obstructions. As an employee of Mr Sadler for around 16 or 17 years until approximately 2013 or 2014, this evidence covers the majority of the relevant period.

19. Mr Hunt's evidence is supported by the oral evidence of Mr Steve Savage, Mr Birley, Mr Martin Savage, Mr Inskip and Mr Offer given at the second inquiry. These witnesses confirmed that at no point over the relevant period had their access across A-C been impeded in any way. Importantly, the evidence of uninterrupted use of A-C by these witnesses related to all of the relevant period in circumstances where they have lived in the local area for many years (since the 1980s or in one case since the late 1970s). Their evidence is further supported by the summary of the user forms which accompanied the application [A58]. This shows regular use of the Order route as a whole from 1990 to 2017 by several members of the public, with the earliest reported use from the 1950s. This user evidence is further bolstered by the various written statements provided by the applicant at the first inquiry from members of the public outlining their regular and unimpeded use of the Order route, including over the relevant period (see [A293]-[A313]).

Element 3: Use as of right

20. It is suggested by one of the objectors, Mr Hanson, that the use of A-C was by force since access to the route at point C could only be obtained by climbing over a locked gate from 1997 for a period of several years. In this regard Mr Hanson accepted that since he only moved into Suters Lane in July 2017, he was not in a position to give evidence as to the nature of the previous use himself. Instead, he relied primarily on two pieces of evidence: a witness statement from Ms Angela Raymond (clerk to WPC) and a google photograph of point C from 2010. Some reference was also made to hearsay evidence but this is not addressed by the Council in any detail given that it can only attract limited weight.

21. In respect of Ms Raymond's statement, the Council submits that it should be afforded limited weight for the following reasons:

- (a) Mr Hanson accepted in XX Ms Raymond's long-standing connection with WPC as an employee of WPC. Given this connection the Council submits that it is almost inevitable that Ms Raymond is sympathetic to the WPC's perspective and that, while the Council does not question Ms Raymond's integrity, she can hardly be described as an impartial witness given the WPC long-standing opposition to the addition of A-C.

- (b) As Mr Hanson accepted in XX, the weight which can be afforded to Ms Raymond's statement is necessarily limited given that her evidence was not tested in XX. Mr Hanson suggested that Ms Raymond was unwilling to give oral evidence because the dispute has become acrimonious and Ms Raymond is frightened that she will suffer (further) abuse if she gave evidence at the public inquiry. However, Mr Hanson accepted in XX that no evidence has been put before the inquiry of any abuse or intimidation suffered by Ms Raymond. That remains the case at the time of delivering these closing submissions on 15 December 2021.
- (c) Mr Hanson accepted in XX that Ms Raymond's statement contained inaccuracies.
- (d) Ms Raymond lives in Wanborough Village rather than in the Marsh/the immediate vicinity of the Order route. This means that she is not as familiar with the Order route as the multiple local people who gave evidence that their access at C was not obstructed at any point during the relevant period. Indeed, Ms Raymond's evidence is that she "did not walk across the corner [ie A to C] regularly". The Council considers that the infrequency of Ms Raymond's use to reduce materially the reliability of her evidence given the inevitable difficulty in recalling the arrangements over two decades ago.
- (e) Ms Raymond's statement seems to suggest that from 1997 onwards the only way to access the Order route as point C was to climb over a locked gate. While this may have been the way that Ms Raymond behaved at point C (assuming she has remembered the position correctly which is not necessarily the case given the concerns at (c) above), Ms Raymond does not give any evidence as to how other members of the public gained access at point C. This is in circumstances where is significant evidence (given orally and in writing) that initially members of the public gained access at point C via a stile but that after this fell into disrepair (there was general uncertainty as to when this occurred), pedestrian access was instead available through a gap to the side of the gate where the stile had previously been. In this regard the Inspector is referred in particular to the oral evidence of Mr Steve Savage, Mr Birley, Mr Martin Savage and Mr Inskip, all of whom confirmed the arrangement described above (and whose evidence was tested in XX). The Inspector is also referred to the written evidence at [B213], [B215], [B216], [B217], [B115], [B133], [B134] in which much the same account is given. The Council does not consider it to be credible that so many members of the public are mistaken or not telling the truth about the existence of the stile and gap. Further, although Mr

Hanson (without any supporting evidence) referred to members of the public giving misleading evidence to support the applicant or being somehow confused about the purpose of the inquiry, he accepted in XX that there was no evidence (apart from the hearsay evidence given by Mr Hanson) that those who spoke in support the applicant at the second inquiry had been intimidated into doing so.

(f) As set out in further detail below, Ms Raymond's evidence that the gap at C was too small to pass through is at odds with the visible gap to the left of the gate which appears in the google photograph of 2010 (at [B38]).

22. With regards to the 2010 google photograph, the Council submits that this supports its case rather than that of Mr Hanson. The "zoomed in" version of the photograph (as per [B38]) shows clearly a gap to the left of the gate. While the full extent of the gap is unclear, there is plainly enough of a gap to allow pedestrians to pass which is consistent with the vast majority of the user evidence. While Mr Hanson had suggested that the vegetation would have prevented people from using the gap, he conceded in XX that one could not tell the height of the vegetation from the photograph on which he relied.

23. Mr Hanson also referred to the apparent inconsistency in the user evidence in that in his oral evidence at the second inquiry Mr Hunt referred to there being a stile at point C to facilitate access by the public throughout his employment for Mr Sadler. In contrast, and as explained above, the vast majority of users indicated that while there was originally a stile at point C, this fell away at some point before or during the relevant period with a gap remaining instead. The Council does not consider this inconsistency to be significant since the key point remains that, regardless of the exact arrangements, all the user evidence apart from that of Ms Raymond indicates that public route of A-C took place as of right of the relevant period.

Element 4: Evidence of no intention to dedicate

24. The Council addresses first the part of the relevant period when Mr Sadler was the landowner of A-C (1995 to 2013). In this regard the Council places significant weight on the findings of the previous Inspector that after Mr Sadler purchased the land in 1984 he "moved" footpath 25 so that it passed through what subsequently became the caravan park (paras 17 and 18 at [B8]-[B9]). This therefore indicates strongly that Mr Sadler positively intended to provide public access through the former caravan park.

25. The Council also relies on the Inspector’s findings in relation to F-E-D-G at para 58 (at [B15]: “During the part of the relevant period of 20 years when the land was owned by Mr Sadler (1997 to 2008) there is no evidence that there was ever any intention not to dedicate the route in question as a highway. In fact the evidence all points to the fact that he did specifically intend it to be a public footpath.” This conclusion can also be “read across” to the period of 1997 to 2013 when the other half of the order route (ie A-C) was in Mr Sadler’s ownership. Such “reading across” is justified given that there is no evidence that Mr Sadler’s intention was any different in respect of the lower part of the land.
26. In addition, the Council places reliance on the oral and written evidence of Mr Hunt that he was instructed to keep A-C clear to facilitate public access and the letter from Mr Fisher, Mr Sadler’s stepson, at [A60]. In that letter Mr Fisher explains that Mr Sadler “actively encouraged” use by the public of A-C.
27. As such, not only is there no evidence that Mr Sadler did not intend to dedicate A-C – there is compelling evidence that Mr Sadler positively intended to dedicate it as a highway. This far outweighs the hearsay evidence given by Mr Hanson regarding Mr Sadler’s intention (some of which, for example that Mr Sadler wished to prevent access from around 1997 due to illicit drug use, was impermissibly raised as new evidence for the first time in Mr Hanson’s closings).
28. The Council accepts there is not the same positive evidence of an intention to dedicate from 2013 to 2015 after Bower Mapson purchased the land. However, the fact remains that there is no evidence that Bower Mapson did not intend to dedicate A-C in circumstances where throughout this period – prior to the implementation of the planning permission – the public continued to enjoy unimpeded access along A-C (as confirmed by the oral evidence of Mr Steve Savage, Mr Birley, Mr Martin Savage, Mr Inskip and Mr Offer). Indeed, in light of the planning evidence presented by Mr Offer, it seems Bower Mapson’s understanding was that A-C route had already been dedicated as a public right way prior to 2013. In this regard the Council refers to the officer’s report refusing an initial application for planning permission for the Suters Lane development in which the comments of an agent of Bower Mapson on rights of way

are summarised as follows (paragraph 6.29): “none of the proposed development obstructs the original route of footpath 25, although the route appears to be no longer in use, the applicant sees no need to alter it as the ‘unofficial’, new route now deemed to be highway and this is the route our development proposals have already incorporated”. What is more, Bower Mapson did not object to the Order and no evidence has been presented to the inquiry that Bower Mapson took any steps (prior to when the route was called into question in 2017 or 2015) to indicate that the route was permissive. For example, no corresponding signs were erected.

29. It follows that there is no evidence of an absence of the intention to dedicate A-C as a highway by the relevant landowners (Mr Sadler followed by Bower Mapson) over the relevant period.

Common Law

30. In respect of inferred dedication under common law, the Council repeats paragraphs 24 to 27 above. The evidence there summarised makes it clear that Mr Sadler positively intended to dedicate A-C to the public from 1984 when he first bought the land or soon after when he re-routed footpath 25. Indeed, given some of the user evidence going back to the 1950s, 1960s and 1970s, it is possible that previous landowners had already dedicated A-C to the public and that Mr Sadler simply consolidated this. However, this is not considered to be important given the clear evidence that, in any event, the common law test is met with respect to Mr Sadler’s period of ownership of the land.

31. It follows that A-C was impliedly dedicated to the public during Mr Sadler’s ownership (and possibly before) such that by the time Bower Mapson came to purchase the land in 2013 A-C was already a public right of way.

Conclusion on A-C

32. Consequently, it is clear from the evidence that A-C is a public footpath, both on an application of s.31 of the Highways Act 1980 as well as under common law. It must therefore be added to the Definitive Map.

33. In respect of the issue of any structures to be included in the Order route, the Council has nothing to add to the position as set out in Mr Fry's evidence at paragraphs 5.10 to 5.12 at [B182].

THE COUNCIL'S SUBMISSIONS IN RESPECT OF F-E-D-G

34. At the start of the second inquiry the Inspector confirmed that the inquiry was being held under paragraph 8 of Schedule 15 to examine previous Inspector's proposed modification but also as a re-opening of the original inquiry under paragraph 7 of Schedule 15 so that consideration could be given to *new* evidence which has been submitted since the previous inquiry.

35. However, the vast majority of Mr Stalker's objections to the endorsement by the previous Inspector of the Order route between F-E-D-G were based not on new evidence but on submissions. In other words, Mr Stalker has simply set out his reasons for disagreeing with the previous Inspector. Plainly, this does not amount to new evidence. The absence of any new evidence is particularly apparent in respect of the representations made in Mr Stalker's written objection and proof under the headings of "Inconsistency" and "Need/Safety" (see [B142]-[B143]).

36. In this regard it is especially important to note that Mr Stalker has not produced any new evidence regarding Mr Sadler's intentions in respect of F-E-D-G. This means that there is no legitimate basis on which the Inspector could depart from the findings of the previous Inspector that Mr Sadler impliedly dedicated F-E-D-G under common law (paragraph 68 at [B17]). Accordingly, in so far as any genuinely new evidence has been submitted about the Stalkers' intentions regarding F-E-D-G, it is irrelevant because the land was dedicated prior to their ownership.

37. Nonetheless, in the interests of completeness (and because it is potentially relevant to this Inspector's reasoning), below the Council considers the implications for the Stalkers' intentions of any new evidence. First, however, it is important to clarify the approach in law to the question in s.31(1) HA of whether "there is sufficient evidence that there was no intention during that period to dedicate it". That is because Mr Stalker appeared to be proceeding on the erroneous basis that intention in this context relates to a landowner's subjective intention and that there is no requirement for the intention

to be communicated to the public. This is said to be supported by the Court of Appeal's decision in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWCA Civ 1597. However, *Godmanchester* was successfully appealed ([2007] UKHL 28) and the House of Lords confirmed that there can only be "sufficient evidence" that a landowner had no intention to dedicate a path as a public way if the landowner performed overt acts so that the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention. Effectively this confirmed Lord Denning's statement of the principle from the earlier case of *Fairey v Southampton CC* [1956] 2 QB 439:

"In my opinion a landowner cannot escape the effect of 20 years prescription by saying that locked in his own mind, he had no intention to dedicate it: or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be 'sufficient evidence that there was no intention' to dedicate the way, there must be evidence of some overt acts on the path of the landowner such as show the public at large – the public who use the path, in this case the villagers – that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public rights: see Mann v Brodie..."

As such, the question for present purposes in terms of intention is whether Mr Stalker has produced any new evidence which shows that the Stalkers communicated to the public at large that they did not intend to dedicate F-E-D-G as a public right of way.

38. The (potential) items of new evidence produced by Mr Stalker are considered below.

(a) Email thread from January/February 2017 between the Council and Mrs Stalker

39. The email thread in question is at [B149]-[B156]. It relates to a period in early 2017 when Bower Mapson (presumably as part of the construction works for Suters Lane) closed the lower part of Footpath 25 and put up signs to divert pedestrians to the upper part of Footpath 25 through the Stalkers' land. In response to the Council's comment that Bower Mapson would be asked to remove the diversion signs, Mrs Stalker replied on 1 February 2017: "...I'm afraid I don't agree. By allowing a footpath to be closed at a point where there is no access/exit to the continuation of that right of way, you are in actual fact responsible for the general public trespassing over my land. The right of way would be closed at a point where it is still usable." [B153]. This then resulted in the

Council's closing footpath 25 on a temporary basis, with pedestrians diverted to alternative public rights of way.

40. First, the Council does not accept that the above is new evidence. The material part of the email exchange (Mrs Stalker's reference to trespassing) was before the previous Inspector (see [A213]-[A215]).
41. Secondly, even if it is new evidence, a reference to the public trespassing in an email to the Council did not communicate to the public at large that the Stalkers did not intention to dedicate F-E-D-G.
42. Thirdly, Mrs Stalker's observations about trespassing do not seem to apply to F-E but rather to people using what was described as "the track" (ie the stretch between G and footpath 25).

(b) Finding from 2012 Tribunal decision

43. Mr Stalker also submitted a Lands Tribunal decision from 2012 which related to a boundary dispute elsewhere on the Stalkers' land. The finding relied on is at [B168]: "I accept the Respondents' evidence that they gave express permission to the Applicants to place ploughs and other machines on the Track in order to prevent members of the public from obtaining access as an alternative to using the public footpath". The Council understands that Mr Stalker's position is that this finding is evidence of the lack of intention by the Stalkers to dedicate F-E-D-G to the public.
44. There are two main difficulties with Mr Stalker's argument. The first is that he clarified during XX that "the Track" being referred to by the Tribunal did not include any part of the route F-E-D-G. Therefore, even if ploughs and machinery were left on "the Track", this would not indicate to users of the public that there was no intention to dedicate F-E-D-G. On the contrary, users of these routes found their access unimpeded during the relevant period until February 2017 when the Stalkers on their own account closed the race (see [A175]).
45. Secondly, if the Tribunal's reference to "the Track" included F-E-D-G, a finding that the Stalkers told their neighbours they had permission to leave ploughs and machinery

does not indicate that this was actually done, and let alone to extent sufficient to communicate to the public that there was no intention to dedicate.

(c) Letter from Thames Water

46. Mr Stalker submitted a letter from Thames Water (at [B158]) dated 10 February 2021 which provides: “I can confirm an active water meter has been fitted at your property since May 1985. We can confirm the meter is still active and supplying water to the trough.”

47. As Mr Stalker broadly accepted in XX, the letter merely indicates that the land was connected to the water supply during the relevant period. Thames Water is plainly not in a position to confirm what the water supply was connected to (such as a water trough). Accordingly, the letter does not demonstrate the presence or absence of water troughs on the land during the relevant period, and therefore does not disturb the Inspector’s findings at paragraph 49 [B14] that the aerial photographs do not show water troughs which would indicate the route as used does not match that marked on the Order plan. Instead, Mr Stalker indicated that he had produced the letter because it undermined the credibility of Ms Moore who had referred to there being no water supply on the land and to Mr Sadler’s instruction that F-E-D-G be kept clear of obstructions. In so far as Ms Moore was wrong about the lack of water supply (which in all likelihood was an innocent error and related to the lack of proximity between the water supply and Ms Moore’s paddocks), the Council does not consider this to be significant. As explained above, the presence of a water supply does not indicate that the Order route is not accurate. Further, Ms Moore’s other observations were supported by Ms Lewis and Mr Hunt as set out in the previous Inspector’s decision.

(d) Photographs showing the different approach to maintenance and construction of routes intended by the Stalkers to be public rights of way

48. The above do not advance Mr Stalker’s objection any further given that the legal test is action by the Stalkers which communicated to the public at the large that they did not intend to dedicate F-E-D-G. The narrow width of the route does not communicate this.

Indeed, as the user evidence illustrates, it was certainly passable because it used by the public over the 20 year period (as found to be the case by the previous Inspector).

49. For the avoidance of doubt, much the same point same applies to D-G given Mr Stalker's argument in closing (despite not being based on any new evidence) that the surface area of this part of the Order route (gravelled) would have made it clear to the public that there was no intention to dedicate. As the Inspector will be well aware, there is nothing remotely unusual about a rights of way by foot which is gravelled (and which may be shared with vehicles).

Conclusion on F-E-D-G

50. Mr Stalker has not submitted any new evidence (as opposed to making representations) regarding Mr Sadler's intentions in respect of F-E-D-G. As a result, there is no basis for disturbing the finding by the previous Inspector that Mr Sadler impliedly dedicated F-E-D-G at common law. Consequently, any new evidence regarding the Stalkers' intentions does not cut across F-E-D-G being confirmed because this route had already been dedicated prior to their ownership.

51. In any event and more generally, the genuinely new evidence submitted by Mr Stalker is minimal and does not in any way undermine the previous Inspector's findings for the reasons set out above. On the contrary, in reality Mr Stalker's objection is an impermissible attempt to have "two bites of the cherry" and re-run the first inquiry in respect of F-E-D-G. This should be strongly resisted, especially given that Mr Stalker had every opportunity to participate at the first inquiry and did so (he submitted a lengthy objection, a proof of evidence and also gave oral evidence).

CONCLUSION

52. The Council invites the Inspector to adopt the Council's Proposed Modification at [B188] subject to the notification procedure in paragraph 8(2) of Schedule 15. For the reasons given above, this course of action is strongly supported by the evidence.

KATHERINE BARNES

39 Essex Chambers

14 December 2021