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Our reference **AVC/BZS/cch/98287/3**

Your reference **MOD20**

Date **9 October 2015**

FAO Ms E Bowman  
North Somerset Council  
DX 8411  
Weston-Super-Mare

By DX and by email: [Elaine.Bowman@n-somerset.gov.uk](mailto:Elaine.Bowman@n-somerset.gov.uk)

Dear Sirs

**OUR CLIENTS: MR SEAN KINGSTON AND MRS THERESA KINGSTON  
KING'S WOOD/CONGRESBURY WOODS  
FOOTPATH AX16/31**

### Introduction

1. We write on behalf of our clients Theresa and Sean Kingston to outline their concerns over the application of Woodspring Bridleways Association ("Woodspring") reference number MOD20 dated 25 February 1996 made pursuant to Section 53(2) of the Wildlife and Countryside Act 1981 ("the Act"), in relation to footpath AX16/31 which we understand is to be considered by the Public Rights of Way Sub Committee on 17 November 2015 ("the Application").
2. We ask that you consider the matters raised in this letter in compiling your report to the Committee. Depending upon the recommendation of your report we may seek to make further submissions in writing in a similar vein on behalf of our clients directly to the Committee at or before their consideration of the Application.
3. We understand that Woodspring make the Application on the basis that the consideration of the previously submitted application (and ensuing enquiry) in regards footpath AX16/31 did not include certain additional evidence which they say has since come to light. We are not clear as to the exact basis of their Application but have guessed as best we can as we discuss further below.

### Background

4. Our clients are the owners of the woodland falling within title numbers ST162588, AV102397, and ST184498 (now amalgamated) and ST6611, which are predominantly affected by the Application.
5. Our clients purchased the land within title ST162588, AV102397, and ST184498 in around August 2011 from The Vincent Wildlife Trust; and the land within title ST6611 in around July 2014 from David Ridley and Anne Ridley.

### Our clients' position

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6. Our clients oppose the Application on legal grounds and wish to protect their right to the peaceful possession of their land. However, they also have concerns are over the safety of lawful visitors to the woodland, and for the conservation of the nationally and internationally designated habitats and species within the woodland crossed by footpath AX16/31 (although it is accepted that these considerations cannot form a part of the Committee's decision making process).

### **The nature of the Application**

7. Woodspring's Application as originally made is said to contain "new evidence" in the form of submissions and documents numbered 1-14 provided with their application, since then Woodspring have provided further submissions and documents listed by Mrs Bowman in a letter to Woodspring dated 8 March 2013, which we have been provided a copy of following our clients' FOI request, these latter documents are referred to in this letter using the suffix "B".

### **The Law**

8. It is not exactly clear how Woodspring are seeking to rely upon the information they have provided to demonstrate that footpath AX16/31 should be upgraded to a bridleway, and as such it has been necessary for the purpose of these submissions to seek to define it. First of all (and purely for convenience, as you will no doubt be familiar with the law on this topic), the law is summarised below.

9. The relevant sections of the Act state:

*(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.*

10. The events falling within paragraph (b) or (c) of subsection (3) are:

*(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;*

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

*(i) 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, a restricted byway or, subject to section 54A, a byway open to all traffic;*

*(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*

*(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

11. It appears from the Application of Woodspring that they assert that an 'event' has arisen pursuant to subsection (5), and that 'event' is the discovery of evidence that the description of a highway contained in the map and particulars ought to be shown as a highway of a different description pursuant to subsection (3)(c)(ii).
12. There is no provision under subsection (3)(c)(ii) for Woodspring to 'reasonably allege' that there is a right of way subsisting, as would be the case if a new right of way was being asserted pursuant to subsection (3)(c)(i). Thus the Committee needs to be of the view that the description of the right of way ought to be changed, the standard of proof for which has been defined as 'on the balance of probabilities'; i.e. the civil court standard of proof.<sup>1</sup>
13. Thus subsection (3)(c)(ii) requires that the Committee review the evidence provided and decide whether or not a mistake has been made such that footpath AX16/31 should have been classified as an existing bridleway in the first place - i.e. following the statutory process provided for pursuant to section 27 onwards of the National Parks and Access to the Countryside Act 1949.
14. The procedure adopted at that time was focussed upon outlining as many possible public rights as possible, forming a composite plan, then consulting upon that plan; the quarter sessions would hear any objections, and then eventually a definitive map would be produced. It is understood that the definitive map was produced to the public in May 1957 (marking AX16/31 as a footpath).
15. If a right of way appeared upon the composite plan which was contested, the legal principles which would have been applied in the Quarter Sessions making a decision are pursuant to the common law (that there had been inferred dedication by the landowner at common law), and/or statutes in force at that time including section 1 of the Rights of Way Act 1932 (now amended and featuring in section 31 of the Highways Act 1980).
16. Where dedication by the landowner is inferred at common law:
  - (a) it is for those claiming there is a route to prove that it can be inferred from the landowners conduct that they had actually dedicated the route as a public right of way;
  - (b) mere user of the right is not sufficient, dedication must also be present;
  - (c) use must be as of right (without force, secrecy, or permission); and
  - (d) by the public at large, not just a discrete group.
17. Meanwhile section 1(1) of the Rights of Way Act 1932 stated:

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<sup>1</sup> *Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin).

*(1) Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.<sup>2</sup>*

18. Section 31(1) of the Highways Act 1980 states:

*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.*

19. However the wording of subsection (3)(c)(ii) of the Act is not just focussed upon whether or not a right of way had by then been established such that the definitive map was wrong, it also is clearly intended to cover the situation where there has been some error in recording the right such that the definitive map should be amended.
20. An example of this might be definitive evidence such as a deed of grant or dedication, or public record of the actual existence of a right. It is submitted that nothing less powerful than the aforementioned examples would do the job of proving on balance of probabilities that the definitive map is wrong, and ought to be changed.

### **The Application**

21. We are unable to tell whether Woodspring are seeking to demonstrate by their Application that there was a mistake back when the definitive map was produced, or to establish 20 years use prior to that date, such that the definitive map was wrongly drawn up, or are seeking to have the decision of the Inspector at the enquiry revisited based upon new evidence thus we have tried to cover all bases.
22. The specific documentation provided by Woodspring and their submissions are now reviewed and submissions made in response below:

#### The post definitive map and Inquiry 'evidence'

23. It is noted that Woodsprings' submissions seem to indicate that they rely upon (3)(c)(ii), however to the extent that Woodspring are seeking by the Application to challenge the earlier decision of the Inspector as to user after the definitive map was published, presumably in reliance upon the Bristol Municipal Charities documents, and the historic maps (if that is what they are seeking to do), it is submitted that this part of the Application is an abuse of process and should be dismissed.
24. First, it is accepted that the Committee are entitled to consider new evidence provided by Woodspring alongside that provided at the earlier inquiry in reaching a decision pursuant to section 53(3)(c). However regard must also be had to "Res

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<sup>2</sup> As amended by section 58 of the National Parks and Access to the Countryside Act 1949.

*Judicata*" the common law principle that a party should not be allowed to litigate issues which have already been decided by a court or tribunal of competent jurisdiction, and where a matter becomes the subject of litigation, parties to that litigation should bring forward the whole of their cases.<sup>3</sup>

25. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*<sup>4</sup> Lord Sumption set out the law on *Res Judicata* as follows:

*(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.*

*(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.*

*(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.*

26. Woodspring could, if they wished, have gone the extra mile in seeking to obtain the further evidence which they now rely upon, and put it before the Inspector at the Inquiry, but they simply did not choose to direct their resources thus. They did not act with reasonable diligence.
27. Second, Woodspring did not choose to appeal the Inspector's decision in accordance with schedule 15, paragraph 12 of the WLCA'81, and have now sought to bring this renewed application presumably on the basis that it will give them a further bite of the cherry, without having to expend monies on a High Court challenge.
28. Were this matter being litigated in the civil courts and an appeal was being brought on the basis of new evidence having 'come to light' (as in the circumstances of this Application), Woodspring would face a seriously uphill struggle in even seeking to demonstrate that they should be allowed to appeal. It is submitted that the rules of natural justice require that the Committee adopt a similar approach.
29. The case of *Ladd v Marshall*<sup>5</sup> sets out the criteria for adducing fresh evidence at appeal, they are: (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; (3) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

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<sup>3</sup> See *Henderson v Henderson* (1843) 3 Hare 100.

<sup>4</sup> [2013] UKSC 46.

<sup>5</sup> [1954] 1 W.L.R. 1489 per Lord Denning at 1491.

30. Again Woodspring could have obtained the evidence upon which they now rely prior to the Inquiry if they had exercised reasonable diligence.
31. Third, the further user evidence supplied does not in any event have any probative value or add anything sufficient to disturb the findings of fact and decisions made by the inspector at the inquiry.
32. Documents 5 - 12 appear to emanate from the records of Bristol Municipal Charities, and initially relate to the management of the area of woodlands comprised in title number ST6611 (Documents 5-6), then to the sale of the title (Documents 7-12).
33. Document 5 is relied upon by Woodspring as proof that [the writer] had been "consulted" and had "...agreed that AX16/31 was a bridleway from before 1940...". With respect to Woodspring this is submitted to be a rather benevolent reading of the correspondence. The correspondence does not amount to a consultation, and simply shows a passing reference to what [the writer] termed as a bridleway.
34. Document 6 is said to comprise minutes of a meeting of Bristol Municipal Charities, following a meeting between representatives of Bristol Municipal Charities and the owner of Woodlands. The minutes are not dated. The minutes state that it had been agreed that there were only two public rights of way through the woods comprised in title no ST6611, one of which was "...a bridlepath from Corporation Cottage to the Congresbury [main?] road near Woodlands.". The dwelling then known as Corporation Cottage is now thought to be named 'Woodside Cottage'. Document 6 is simply a recording of an apparent agreement between two people that they thought a bridleway/path existed.
35. Document 7 is submitted to be even more limited in its probity; it is an undated report on title of Nelson Rooke, Chartered Surveyor, presumably commissioned by Bristol Municipal Charities. Near the top of page three there is a reference to: "Public footpaths and bridleways (shown in yellow) and Rights of Way (shown in blue) are assumed by us to be timber extraction routes."
36. The paths which Mr Rooke may have perceived as bridlepaths are not even coloured separately to those he perceived as footpaths.
37. Document 8 comprises the particulars for the sale of the title and refers to: "public footpaths and bridlepaths".
38. Document 9 is a letter from Mr Rooke to Bristol Municipal Charities dated 13 February 1956, seeking clarification on queries raised on behalf of a purchaser (Messrs. Wrightson) including a reference to a [private] right of way: "From Ball Wood Westwards by track through *Urchin Wood to Bridle Path*."
39. Document 10 is a letter in response to Document 9, from Bristol Municipal Charities in which it is stated that: "...*The three public rights of way which pass through the Woods [...] have been rights of way from time immemorial.*".
40. Documents 11 and 12 consist of an exchange of letters between the purchasers of the title, and Bristol Municipal Charities, wherein the purchasers are seeking comfort or confirmation that they will be able to access the title for timber extraction purposes.

Col. Towill on behalf of Bristol Municipal Charities confirms that there were private rights in place allowing a connection between the title, and the "*bridle paths*".

41. Woodspring are seeking to rely upon a group of documents apparently spanning the period 3 May 1952 - 21 March 1956 (3 years 10 months), in which internal correspondents and one external correspondent make loose references to bridlepaths in the vicinity. Across all of the documents sourced from Bristol Municipal Charities there are only loose references to rights of way as bridle paths, they are never fully defined, or divided into 'footpaths' and 'bridlepaths' nor do the correspondents ever define what they consider a bridlepath to be.
42. The Inspector's decision at paragraphs 29.5, and 30.7-32 deals with the argument that Col. Towill on behalf of Bristol Municipal Charities had at one time indicated his belief that AX16/31 was a bridle path, based upon documents derived from around the same period, and applying what amount to the same principles as under section 53(3)(c)(ii) of the Act (see paragraph 31). Woodspring have simply added more documents which demonstrate the same matters as those upon which the Inspector deliberated in reaching his decision, they add nothing at all.
43. Fourth, it is submitted that there must be a limit to how often, and upon what basis a pressure group such as Woodspring are able to put landowners and the County Council to the inconvenience and expense of having to re-open decisions made pursuant to a statutory process.

#### The Quarter Sessions diversion

44. Documents 1B - 5B relate to an application by the then owner of The Woodlands (the relevant part of which is now ST162588) to divert a "*highway*" known as "*Rocky Lane*". Woodspring aver that this application relates to AX16/31, and that, the fact it is referred to as a 'highway' indicates that it was and is a bridleway. There is some strain to the meanings sought to be ascribed by Woodspring to these documents. In the circumstances where Woodspring are averring that AX16/31 is a bridleway, it is submitted to be inconsistent to then argue that because the term highway is used the correct meaning should be 'bridleway' rather than 'footpath'.
45. Moreover, it has been a consistent feature of the common law, and statute in this area of law to refer to all public rights as 'highways' whatever their character.
46. The plan accompanying the application being considered by the Quarter Session in any event shows two gates at either end indicating no more than a footpath and at most an occupation road conferring private rights in excess of a footpath only. The Ordinance Survey map of 1885 also indicates the same.

#### The Parish Council Meeting

47. Document 6B appears to consist of minutes of Parish Council meetings on 2 December 1938, and 2 June 1939.
48. These minutes are relied upon by Woodspring in asserting that because the minutes refer to "footpaths and rights of way" the Parish Councillors must have been aware

that there were footpaths and [other] rights of way in the Parish. It is not clear how this assists Woodspring.

#### The 1925 Easement

49. Document 1 shows a private right of way / easement granted by the then owner of the land comprised in title number ST162588 to the then owner of the land comprised in title number ST6611 on 2 March 1925.
50. The easement provides that Mr Harvey (then owner of title number ST162588) granted Bristol Municipal Charities (then owner of title number ST6611) rights to use certain paths and roads in the woodlands to cart stone and timber only to the adjacent public highways, and to use paths and roads in the woodlands for any purpose connected with the use and enjoyment of the cottages at Woolmers.
51. Woodspring seem to be arguing that there was not any necessity for an easement to be granted over any further areas of land because the public rights of way (as mentioned in the deed) must have been considered sufficient for carting stone and timber, etc.
52. Quite how the inference that because there was an undefined and unidentified mention of "adjacent public highways" in a deed of grant providing access to private roads for timber and stone carting and other enjoyment assists Woodspring in their Application for a bridleway is not clear.
53. All bar two of the routes join into public roads, and where the routes only appear to join into the vicinity of footpath AX16/31 who is to say that it was not intended that only foot access be provided in these locations, or that there was not already some other arrangement in place for the higher use of footpath AX16/31.
54. Further, it is noted that title ST6611 records rights granted to the then owners of part of Woolmers dated 30 October 1967 to pass and repass with vehicles etc. over the Eastern end of footpath AX16/31. One might also infer from this grant that footpath AX16/31 was only that, otherwise there would have been no need to grant further rights of access to the owners of Woolmers.
55. Further still, it is noted that title ST162588 records rights granted to the then owners of The Woodlands dated 12 June 1958 to pass and repass with vehicles etc. over the Western end of footpath AX16/31. Again, one might also infer from this grant that footpath AX16/31 was only that, otherwise there would have been no need to grant further rights of access to The Woodlands.

#### Historic maps

56. The arguments in regards Documents 2,3, and 4 seem to be that these historic maps or plans indicate that AX16/31 had been considered by those who compiled those maps or plans to be a 'minor road', Woodspring now rely upon those representations to seek to demonstrate that AX16/31 should be classified as a bridleway. Aside from the obviously warped logic of this contention, there is the purely practical point that



the narrow part of AX16/31 cut into the bank could never have been a road capable of bearing any vehicle mechanical or otherwise.

57. Further, only one of these documents appears to emanate from the time before the definitive map was produced, the remainder postdate the production of the definitive map, and as such it is submitted that they are not of any assistance at all to the deciding of the Application.

Documents 13 and 14

58. Document 13 appears to consist of a critique of the Inspector's decision accompanied by Document 14, a chronology seemingly compiled from Woodsprings' perspective. It is difficult to deal with here as it does not seem to add to the arguments raised on the 'new evidence' and is in any event somewhat incoherent.

Document 7B

59. We do not appear to have been provided with this document and ask that you forward a copy at your convenience.

**Conclusions**

60. In conclusion it is submitted that the bulk of Woodspring's Application amounts to a sprinkling of documents mostly relating to matters upon which the Inspector has already decided, which if they were put along with the matters which the Inspector made his decision would not change it.
61. The Quarter Session documents, and the Easement of 1925 are not probative to the Committee's decision, and even if they were, they do not amount to sufficient evidence for the Committee to find on balance of probabilities that a mistake was made in the production of the definitive map.
62. The remaining documents are simply not significant and barely relevant.
63. We respectfully suggest that the Committee are recommended not to make the Order.

If we may be of any assistance in advance of you producing your report, please do not hesitate to contact us as below.

Yours faithfully

*Michelmores LLP*

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