

Our Ref: NVJ/DKH/KLC/051028/00232
Your Ref: SS/VG 257/Headley



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27 January 2016

Dear Sirs

Village Green Registration Number: VG257
Application for a Map Modification Order Number: CR/1112

We refer to your email dated 13 January 2016, enclosing draft reports relating to the above Applications.

We confirm that we have the below additional comments to draw to the attention of the Committee.

Village Green Application – Application Number VG257

We note that the recommendation of the report is to refuse the application. In the circumstances, we intend only making brief comments below.

The Diocese's position in relation to the Council's findings where legal tests are found to have been met pursuant to the Commons Act 2006 are strictly reserved. In particular, the Diocese wish to bring the Committee's attention to the fact they have not been able to properly test the evidence submitted by the Applicants, as they have only been provided with anonymised tables summarising the use. By the Council's own admission, the responses to proformas are confusing and the Diocese reserves its position in relation to the quality of the evidence relied upon.

At Page 1 of the Appendix 2 to the draft Report, it is stated (8th bullet point) that "there are references to the road alongside Rectory Field as "dangerous" – it is submitted that this type of walking is not recreational, but of the nature of highway use, and only over a small proportion of the field, neither of which represent qualifying use". This is not an accurate summary of the evidence submitted by the Diocese in that they have never represented that any walking is "of the nature of highway use" and this should be deleted from the summary at Appendix 2.

Please confirm the Committee will be provided with copies of all evidence and statements submitted by the Diocese. It is the Diocese's position that this should be the case.

Application for a Map Modification Order – CR/1112

The Diocese does not accept the findings of the draft report, and objects to the Definitive Map Modification Orders being made as recommended by the draft report.

DMS/80628270.1

The Diocese's position in relation to the findings of the Council are strictly reserved in their entirety.

It is a matter of law that a lessee cannot dedicate land as a highway without the consent of the owner of the freehold as during the term of the lease, the freehold is not entitled to possession and cannot interfere with persons permitted by the tenant to cross the land. We attach a legal note on this point for circulation to the Committee with the reports.

The Council have come to the conclusion that there is no evidence that consent was not given to Mr Ellis to dedicate the land as highway land. However, the Diocese respectively object to this and submit that the correct test should be that the Committee are satisfied that there is evidence of consent actually being given. It is not unusual for agricultural tenancies (especially granted at this time) to not be recorded in writing and it is the Diocese's position that it has not consented to the land being dedicated as a public highway.

Further, it is noted that the Council have taken the view that routes A to B and D to B came into existence in 1999. The Diocesan Board reserve the position in relation to the conclusion that a length of time of 12 years use is long enough to justify registration if indeed that is a conclusion supported by the evidence (which the Diocese does not accept). Further, in relation to route A to B, the aerial photographs appended to the draft report do not show evidence of its existence until 2005.

As above, the Diocese have not been able to properly test the evidence submitted by the Applicants as they have only been provided with anonymised tables summarising use.

Please confirm that all evidence submitted by the Diocese will be provided to the Committee. It is the Diocese's position that this should be the case and at least all exhibits, including photographs, should be included with the report.

Please also note that the Diocese will be represented at the Hearing of the above applications by Counsel, where it will make further and more detailed submissions to the Committee.

Yours faithfully


Charles Russell Speechlys LLP

RE: DMMO APPLICATION AT RECTORY FIELD, HEADLEY

OPINION

1. I am asked to advise the Guildford Diocesan Board of Finance in relation to a draft Report to Hampshire County Council in respect of an application for a Definitive Map Modification Order to record public footpaths at Rectory Field, Headley.
2. As was set out at paragraph 33 of the Diocesan Board of Finance's Objection to the Map Modification Order, Rectory Field was let to Ellis & Sons from the 1950s until 7 December 2010 and the Diocese has subsequently re-let the land to Mr Luff. Ellis & Sons, the leaseholder during the period of alleged use, did not have the capacity to dedicate the land. At no time during the tenancy was the tenant given consent to dedicate the land by the Diocese.
3. In light of the draft Report's findings that it is unclear as to whether any instructions were issued to Mr Ellis regarding public access (see paragraphs 13.9 in relation to s. 31 Highways Act 1980 and paragraph 13.12.1 in relation to the common law) and thus presumptions of dedication by the landowner could be made, I am asked to advise on the legal position in relation to presumptions of dedication where tenancies are in force in more detail.
4. Under both the common law and the Highways Act 1980, only the person who owns the freehold in land has the legal capacity to dedicate because rights must exist in perpetuity.¹ It follows that a tenant under a lease cannot dedicate unless he has done so with the concurrence of the freeholder. At common law, the onus of

¹ "It is clear that there can be no dedication of way to the public for a limited time, certain or uncertain. If dedicated at all, it must be dedicated in perpetuity" (per Byles J in Dawes v Hawkins (1860) 8 CB (NS) 848 at 857)

proof lies on the claimant to show that the evidence is sufficient to indicate an intention to dedicate. Under s. 31 Highways Act 1980, a presumption of dedication occurs at the end of a 20 year period which can be rebutted by sufficient evidence that there was no intention to dedicate it during that period. Even where land is subject to a mortgage, there is some authority that the mortgagee must consent to dedication.²

5. At common law, the burden of showing that the user as of right has been asserted against a landowner with the capacity to dedicate falls on the claimant (see *Sauvain on Highways Law*, 3rd edition at 2-44). As set out, where land is held on a lease, dedication cannot be implied unless the acquisition of the freeholder in the use by the public can be established. The concurrence of the freeholder is difficult to establish (see *Davies v Stephens* (1836) 7 Car & P570 and *Corsellis v LCC* [1907] 1 Ch 704). Evidence of the acts and knowledge of the freeholder prior to the grant and / or after the expiry of the lease are relevant. Proof of continued public user over successive leases may also be significant (see *Davies v Stephens* (above)). Proof of actual knowledge of the public's use by the freeholder will be of significance.

6. These principles are analogous to those in relation to the acquisition of other prescriptive rights (e.g. easements and rights to light) where the essential element of prescription is that a right can only be acquired against the freehold owner (although a right in the course of being acquired can be passed onto a lessee pursuant to a lease which is a conveyance pursuant to s. 62 Law of Property Act 1925).³ If a lease is in existence at the beginning of the relevant period, then the freeholder would have no power to permit or prohibit the use.

² *Man O'War Station Ltd v Auckland City Council* [2002] UKPC 32, at [49]

³ *Midtown Ltd v City of London Real Property* [2005] EWHC 33 Ch and *Pugh v Savage* 2 QB 373

7. In the instant case, there is no evidence that the Diocesan Board of Finance, as freeholder, ever consented to any purported dedication of public rights of way by its tenant. The draft Report to Committee appears to place emphasis on the absence of a written lease. The law does not require evidence of positive acts taken to prevent a tenant allowing public access. It only requires evidence that the tenant has capacity to dedicate. The absence of a written lease does not, it is submitted, provide sufficient evidence that the tenant had capacity to dedicate in this case.
8. Furthermore, there is no evidence that the freeholder had actual knowledge of use by the public of the land. Even if the freeholders' employers visited the land from time to time, they could not reasonably have known of the extent of the public's use. It is highly relevant that the oral tenancy was in existence at the beginning of the periods relied on and therefore, even if public use was observed, without express provisions in a written lease which could be enforced against, the freeholder would have had no power to take action against his tenant or prohibit / permit the public use itself. Accordingly, prescriptive rights cannot be acquired in perpetuity against the Board.
9. The same points are relevant both in respect of dedication at common law and dedication under the Highways Act 1980. Accordingly, in my opinion, there is insufficient evidence that either (a) the Diocesan Board of Finance dedicated public rights of way during the period when the land was leased or (b) that Ellis & Sons had sufficient capacity to dedicate those alleged rights.
10. If I can be of any further assistance, those Instructing should not hesitate to contact me in Chambers.

ANNABEL GRAHAM PAUL

FTB

27th January 2016