

**IN THE MATTER OF BRIDLEWAY NO. 5 LANGFORD (IN THE PARISH
OF HENLOW)**

ADVICE

1. I am asked to advise the Letchworth Garden City Angling Association Ltd. (“LGCAA”) in relation to proposals made by the Central Bedfordshire Council (“CBC”) for the Poppyhill Lakes Improvement Scheme. I understand that this Advice may be disclosed to CBC as part of LGCAA’s responses to consultation in relation to the Improvement Scheme.
2. The history of public rights of way in this area is complicated. At present there is recorded on the Definitive Map a public right of way running generally in an a north –south direction from the southerly end of Common Road, Langford to the line of Footpath 7 (Henlow) (“FP7”) which footpath links Coach Road and Church Road, Henlow. I have deliberately described the route generically as a public right of way because the route carries different definitive rights over different lengths as follows (using the lettering adopted by CBC in the plan attached to their consultation document, namely:
 - (a) From Point A to Point B (where it joins FP12) the public right of way is recorded as a public footpath –FP19;
 - (b) The path was then originally recorded on the Definitive Map as Bridleway No 5 (Langford) (“BW5”) running from Point B along the line B-C-Y-Z-E-F and joining FP19 where the route crosses the River Ivel.
 - (c) The path then continues as FP19 from G-H where it joins FP7 which in turns provides a link between Coach Road and Church

Road, Henlow.

- (d) Another path –FP25 (within Henlow Parish) and FP 19 (within Langford Parish) has been subsequently added to the Definitive Map along the line of a former haul road that presumably once served the gravel workings in that area. This path connects points C and F by a much more direct route than does bridleway No 5 - following the line C-D-E-F.
- 3. The boundaries of the parish councils have changed since the days when the paths in this area were originally numbered and Bridleway No5 (Langford) is now within the Parish of Henlow between points Y and G.

Anomalies

- 4. The first obvious anomaly that appears from looking at these routes on the map is that there is no definitive bridleway right linking with either the southern or the northern end of Bridleway No. 5. The second anomaly that appears from looking at the modern maps is that Bridleway 5 between points Z and F deviates from the north-south route sharply to the west and then curves back towards point F following a southeasterly alignment. Over a substantial part of this curved route the path goes through what is now a fishing lake and is clearly impassable for any type of user.
- 5. The reason for the deviation of this north-south route in this strange manner seems to have been due to the fact that during the preparation of the Definitive Map it was alleged that members of public may have diverted around the edge of a cornfield. Mineral workings had however been granted planning permission over the line of the route and gravel was then extracted with the result that water has accumulated over the line of the recorded path forming the present fishing lake.
- 6. Whilst the planning consent (an Interim Development Order consent) clearly intended that the area should be re-instated by backfilling¹ - possibly for agricultural purposes - there appears to have been little

¹ See the letter from the Secretary of State dated 1st April 1948.

detail as to how or to what level the area should be restored nor where the material for backfilling should come from. Certainly there is no express permission for tipping on the site – although the correspondence indicates that, in fact, due to the lack of other materials on site, the only way in which the area could have been restored to previously existing levels would have been by importing material.

7. It appears from the correspondence between the local planning authority (the County Council) and the then mineral operator that by May 1951 mineral extraction had ceased in some areas and those excavated areas had already filled up with water. This may have related to one of the more northerly lakes. The correspondence demonstrates concerns from the County Council about the use of imported material for infilling and at the slow rate of progress in achieving restoration. The correspondence that I have seen peters out in 1954 and it would appear that there has been no subsequent enforcement action in relation to the site over the following 57 years by the relevant planning authorities (the predecessors to the CBC).
8. LGCAA purchased the land on which the relevant lake lies in or about 1978. So far as I am aware they have done nothing to cause the obstruction to public user that the Lake represents.
9. The Lake is recorded on aerial photographs since 1954 and the relevant date for the Definitive Map is 1951. The path has, therefore, not been usable for almost 60 years. As the route does not connect with any other bridleway it must be extremely doubtful whether it has, or could ever have been, ever used by horse traffic.
10. The former County Council (the predecessor to the CBC) has made previous attempts to address the problem.
 - (a) In 1998 the County Council, on the application of LGCAA promoted a diversion order under the provisions of section 119 of the Highways Act 1980. This proposed the diversion of two sections of BW No.5. The relevant part of the new section of bridleway would have run south-south-east for 340 metres instead

of running first west and then southeast through the lake. Objections were made to the Order an Inspector appointed by the Secretary of State refused to confirm it in 2000 on the grounds that a diversion along the proposed route would not be substantially as convenient to the public. Bearing in mind the fact that the existing path is submerged in the lake, this is a surprising conclusion but the Inspector seems to have sought to compare the convenience of the diversion with a putative route that the public might have been entitled to take in order to deviate around the obstruction. In my view, this approach was arguably wrong but I understand that the attempt to challenge this decision was not pursued.

- (b) In 2000 a Definitive Map Modification Order was made by the County Council on the direction of the Secretary of State following an application by Mr Grummitt. This claimed a footpath along the River Ivel and around the edge of the lakes. Following a public inquiry, the Order was not confirmed, as the Inspector was not satisfied that such a route could physically have been walked for the claimed 20-year period.
- (c) In 2001 the County Council promoted two Definitive Map Modification Orders (in the alternative) to delete BW5 between (I believe²) points Z and F. The second of these two orders proposed to add to the Definitive Map a new bridleway linking the two points where the deletion would leave BW5 to be severed. Essentially, the argument was that the definitive line appeared to have been a relatively short-lived diversion, which would have been unlikely to have created a public right of way, and a more direct route linking the two points could be detected from the aerial photographs. The Inspector was not convinced that there was sufficient evidence either to delete the section of BW5 or to add the new path. Essentially, she seems have considered that the aerial photographs

² I haven't seen the DMMO Plan and for the purposes of this advice the precise location of these points is not significant.

showed something that might have been a path along the definitive line prior to 1949 but that lines showing a route along the claimed new path did not demonstrate the existence of a path. Whilst there are some unsatisfactory aspects to the Inspector's reasoning – she was clearly entitled on the evidence then before her to come to the decision that she did and this decision has never been challenged.

11. In 2008 a new footpath route was added to the Definitive Map as FP25 Henlow that follows the line of the old Haul Road.

The dilemma

12. The position with BW5 does create a dilemma. The facts that
 - (a) the original developer, contemporaneously with the early stages of the preparation of the Definitive Map carried out works over the line of the path with the benefit of planning permission and with the knowledge of the County Council without the relevant authority (the County Council) ever raising any question over the potential interference with the line of the path;
 - (b) the County Council, as planning authority, never pursued its planning control remedies to secure the re-instatement and restoration of the land and, as local highway authority and surveying authority, never took any enforcement action to protect the bridleway whilst, at the same, time acquiescing in the recording of the bridleway on the Definitive Map;
 - (c) attempts to delete the path from the Definitive map have failed; and
 - (d) the attempt to divert the path onto a new line has also failed;have resulted in a situation where a recorded path has remained unusable for almost 60 years.
13. The only ways out of this dilemma would appear to be to stop up BW5 Langford or to divert it onto a line which could be considered to be substantially as convenient or, depending on which statutory provision is pursued, nearer and more commodious than the existing route.

The emergence of the current proposals

14. CBC were originally apparently prepared to follow a course of action that involved the stopping up of the current route and the upgrading of the haul road route to bridleway status. I believe that they would have argued³ that with the haul road upgraded, the rights of way on foot and as a bridleway over the existing line of BW5 were not needed (under s.118) or unnecessary (under s.116). A very revealing letter from the Council (mis-dated 10th January 2010 but sent on 10th January 2011) indicates the approach being taken by CBC at this stage. In particular, it indicates that the chosen route for the diversion/alternative route should form a direct link between Henlow and Langford and provide the best surface reasonably possible for walkers and cyclists.⁴ It points to the fact that the Parish Council would prefer that a route following the eastern bank of the River Ivel or round the lakes (on the western side) but correctly points out that the compulsory creation of such a route would not fall within the restrictive terms of the Highways Act 1980 powers which they were intending to pursue. The proposals also included other actions to extend and connect the public rights of way
15. This proposal would have been acceptable to LGCAA and their view was communicated to CBC by letter dated 9th February 2011. Discussions continued on this basis until June of last year when Dr Adam Maciejewski indicated that suggestions were being made that a link across the River Ivel should be provided between the Millennium Field and the Haul Road. LGCAA indicated that this would not be acceptable to them and would significantly interfere with their fishing interests.
16. In a letter dated 26th September 2011 CBC, quoting the decision in *R. v Surrey C.C., ex p. Send*, suggested that the creation of a new pedestrian right of way “around or over the land owned [by LGCAA] would be sufficient to offset the loss of the bridleway through the lake – and thus

³ This appears to be their present approach.

⁴ Clearly this should also include horseriders!

public access to what is an attractive lake area could be maintained". This letter then suggested a number of possible routes which would have provided a network of routes through LGCAA's land. Options 1 and 3 both involved a route over the narrow isthmus separating the southern and northern lakes. Options 1, 2, 4 and 5 involved bridges taking a path across the River Ivel.

17. It is clear, therefore that none of these routes was being suggested as a direct replacement for the obstructed BW5 Langford and that they were all being put forward as some form of community gain. In effect it was being suggested that in order to obtain the stopping up of the obstructed path LGCAA should agree to the creation of a completely new route, or routes, which allowed the public new rights of access into the area on the west side of the fishing lakes. This was a complete *volte face* from CBC - running contrary to what they had said in previous correspondence.
18. LGCAA are opposed to these new routes as they consider that they will unreasonably interfere with the fishing rights of their members.
19. CBC having had a further meeting with Henlow Parish Council then, in a letter dated 14th October 2011, narrowed the options down to 2. Both of these involve a new path over the isthmus and Option 1 involves a crossing of the River Ivel. LGCAA indicated their opposition to these routes in a letter of 26th October 2011 and asked for a meeting to discuss the issues. It was also suggested by LGCAA that in order to re-instate the bridleway the lake could either be drained or infilled. This latter suggestion, which was I believe made out a sense of frustration that CBC were appearing to use the obstruction to Bridleway No 5 as a lever to open up the area to public access to the detriment of LGCAA's members interests, was promptly responded to by CBC who raised a number of planning, environmental and ecological objections which they indicated would prevent either course of action.
20. The letter from CBS (dated 5th November 2011) is extremely revealing in that it clearly states that

“The Council intends to create a new footpath between the two lakes within your client’s ownership. The new footpath would be in lieu of the bridleway obstructed by your client’s lake which would be moved onto the section of the Haul Road in your ownership.”

21. A meeting was held with Council Officers and members on 29th November at which the clear impression was given that CBC were determined to achieve a crossing of the River Ivel.
22. CBC have now put forward a whole package of measures for the area to be known as the Poppyhill Lakes Improvement Scheme. This includes a number of measures to rationalize the variable rights over the various paths in order to create a through route for bridleway users. Specifically and, of greatest significance to LGCAA, it includes:
 - (a) The stopping up of Bridleway No 5 (Langford) and the effective upgrading of Footpath No 25 (the Haul Road path) to bridleway status by the creation of a bridleway alongside it.
 - (b) The creation of a new path over the isthmus between the two lakes and over the River Ivel by way of a new footbridge
23. The Council has not identified precisely what source of public funding will be available for the new footpath route and other improvements. The estimates for costs include nothing in respect for compensation payable to affected landowners. It appears that the new paths, including presumably the up-grading of the Haul Road route, will be achieved by Public Path Creation Orders and it is assumed that the stopping up of existing rights over Bridleway No. 5. Langford will be achieved under either s.116 or s.118 of the Highways Act 1980.
24. It is my understanding that LGCAA do not object to the stopping up of Bridleway No5 Langford and the creation of new public rights over or alongside the Haul Road but that they do object to the creation of the new footpath route and the crossing of the River Ivel. However, their agreement to the upgrading of the Haul Road route will depend upon CBC withdrawing their proposal to create the new footpath over the Isthmus.

Issues

25. It appears to me that the Council has at various times confused its obligations to protect and assert the rights of the public to use the existing bridleway No 5 Langford and to address the obstruction to those rights which the existence of the lake provides with its desire, or perhaps the desire of the Parish Council, to open up access into the lakes area generally. In my view, these matters are quite separate and I address them separately.

The obstruction to Bridleway No 5

26. Bridleway No 5 Langford as a pre 1949 footpath now recorded on the Definitive Map is a public highway maintainable at the public expense. The lake clearly obstructs the rights of the public to use the path and almost inevitably its surface is out of repair. CBC, therefore, have two duties to address this – their duty under section 130 of the Highways act 1980 to protect and assert the rights of users of the highway and their duty under section 41 of the Highways Act 1980 to maintain the surface of the highway.
27. In view of CBC’s opposition to the infilling or draining the lake the only way the obstruction to the path can be addressed is by stopping it up or by diverting it.
28. The option of upgrading the Haul Road route to a bridleway and stopping up the existing path appears the most sensible way of addressing the problem because the original link formed part of the north-south link between Langford and Henlow whilst the Haul Road does provide the most direct link between points E and F (the two points on the existing line to be stopped up). The surface of the Haul Road route can no doubt be made suitable for all users and the upgrading of this route will effectively provide the missing link in the bridleway route. It is the shortest, most direct and potentially most commodious⁵ route that could be adopted in order to address the problem of the

⁵ To steal terminology from another section!

obstruction to Bridleway No 5.

29. I am presuming that the Council's argument will be that once the upgrade is achieved the old route along BW No 5 is not needed (s. 118) or is unnecessary (s. 116) and can be stopped up. Logically if this is true of bridleway rights it is also true of footpath rights.
30. This, however, completely addresses the obstruction issue; and the proposal for the creation of the new footpath rights over the isthmus and crossing the River Ivel is an entirely separate issue.

The Public Path Creation proposal

31. Clearly CBC does have power to improve its rights of way network by the creation of new public rights of way. These can be achieved, in the absence of agreement, by the making of a public path creation order made under section 26 of the 1980 Act. The requirements of the section are set out in subsection (1) namely:

“Where it appears to a local authority that there is need for a footpath bridleway or restricted byway over land in their area and they are satisfied that, having regard to—

(a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and

(b) **the effect which the creation of the path or way would have on the rights of persons interested in the land**, account being taken of the provisions as to compensation contained in section 28 below, it is expedient that the path or way should be created, the authority may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order, create a footpath bridleway or restricted byway over the land.”

32. It is, as yet, unclear as to how CBC have gauged the “need” for the

creation of this new route across the River Ivel. This will have to be tested at public inquiry. So far, the Council have conflated the “need” with the obstruction issue and regard this path as being some form of compensatory route for the public in view of the loss of Bridleway No 5. In my view, there can legally be no connection between the two. Either the Haul Road route will provide a satisfactory alternative route for potential users of Bridleway No 5 or it will not. It does not become more or less satisfactory through the creation of an entirely different route with different beginning and end points.

33. The Council have repeatedly quoted the decision in *Send* in support of their proposals to open up the area to the public. Again, I am of the view that CBC are confusing their duties to address the obstruction to the existing bridleway and their powers in relation to the creation of new rights of way. The Court in *Send* made two points which are relevant to the question of how a Council should address the obstruction of a highway. The first point is that where a highway is obstructed the primary duty of the local highway authority is to get the route restored rather than to pursue other options at the behest of the obstructing landowner. The second point is the recognition of the role that section 130(6) gives to the Parish Council in transforming general duty to protect and assert into a specific duty to act to address obstructions. There is no doubt that once the Parish Council has made representations to CBC requiring them to address the obstruction to Bridleway No 5 then CBC do have a duty to act – in relation to that obstruction. This they will be doing by upgrading the Haul Road and stopping up the obstructed bridleway. This has nothing to do with the proposals to create the new path shown on Plan 2 of the Consultation Document. It is not open to the Parish Council to dictate to CBC how they should exercise their section 26 powers (they are simply a consultee - as with any public path creation order) nor is it open to the Parish Council to require some form of compensatory new right of way.
34. Whilst *Send* does support the view that the interests of the public come before the interests of the landowner in relation to dealing with

obstructions the position under section 26 is quite different. The Council has a duty to have regard to the “effect which the creation of the path or way would have on the rights of persons interested in the land.”

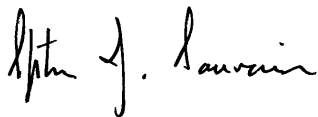
35. In this case, I am instructed that the isthmus is too narrow to contain a path of the width that the Council appears to be seeking whilst maintaining the ability of LGCAA to maintain their fishing positions. The introduction of public access past those positions will be hazardous (in view of the length of rods or poles used by anglers) and there will be a significant impact both on the finances of the association and the enjoyment of their members if the path was to be created.
36. In addition to the statutory requirement to have regard to the interests of the Club the Council will also have to be able to demonstrate that it has acted proportionately in the use of its powers in order to avoid breach of LGCAA’s Convention rights (A1P1).
37. The LGCAA is a private company limited by guarantee with over 500 current members and a potential membership of 650. It is non-profit making. I understand that the Lakes are regularly used by members pursuing this extremely popular recreational activity. The members are themselves members of the public and the area of the Lakes is already, therefore, providing a considerable recreational benefit to a large section of the community. This, I am instructed, will be significantly and adversely affected by the creation of this proposed path.
38. From the correspondence that I have seen there appears to be little recognition from CBC as to what the effects on LGCAA will be. This is in contrast to the weight apparently being given to the desire of the Parish Council to see more public access into the area.
39. Whilst the financial impact on the Club may, to some extent, be taken into account through the statutory right to compensation (and the Inspector at any public inquiry will have to bear in mind that such compensation rights exist) there is no indication that the Council have yet taken into account the potential cost to the public purse of having to pay such compensation. In any event, the impact on LGCAA goes

beyond simple financial loss and affects a very significant membership.

40. One other point arises. As the Council are proposing a bridge across the river Ivel they will, in my view, require a compulsory purchase order in order to acquire the necessary rights to place that structure in LGCAA's land. I do not believe that the rights can be obtained compulsorily solely through a section 26 order.

Conclusions

41. In my view, there is evidence which indicates that the Council is confusing its duties in respect of addressing the obstruction to Bridleway No 5 Langford – in relation to which the proposal to stop up the path and to upgrade the Haul Road seems to be a very sensible and appropriate solution - and their powers to improve the public rights of way network.
42. There is also evidence that contrary to the express words of section 26 the Council are not fully taking into account the impact of the proposed public path creation order on the LGCAA and on the interests of their 500+ plus members.
43. In my view, LGCAA do have valid grounds to object to the proposed creation of the new path



Stephen Sauvain Q.C.

5th February 2012



cornerstone barristers

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