

DURHAM COUNTY COUNCIL

At a Special Meeting of **Highways Committee** held in Committee Room 2, County Hall, Durham on **Friday 24 July 2015 at 9.30 a.m.**

Present:

Councillor C Kay in the Chair.

Members of the Committee:

Councillors B Armstrong, D Bell, D Hicks, K Hopper, O Milburn, S Morrison, J Robinson, J Turnbull, M Wilkes and R Young.

1 Apologies for Absence

Apologies for absence were received from Councillors J Allen, G Bleasdale, O Gunn, D Hall, R Ormerod, J Rowlandson and P Stradling.

2 Substitute Members

There were no substitute Members.

4 Declarations of interest, if any

There were no declarations of interest.

5 Definitive Map Modification Order Application to add footpaths to the Definitive Map and Statement relating to Wharton Park, Durham

The Senior Rights of Way Officer informed the Committee that the purpose of the report was to consider and determine an application to add footpaths to the Definitive Map and Statement of Public Rights of Way at Wharton Park, Durham (for copy see file of Minutes).

The Committee were provided with a presentation which detailed the following:

- location plan of the area
- location plan of the proposed footpaths
- photograph of the North Road entrance to Wharton Park
- photograph of the train station entrance to Wharton Park
- photograph of the Framwellgate Peth entrance to Wharton Park
- summary of evidence

(for copy of presentation see file of Minutes).

The Senior Rights of Way Officer advised the Committee that the County Council had been served with notice of an application to register three public footpaths through Wharton Park by Mr P Hayes. The Committee would need to determine whether public

footpaths already existed and if they did, then those footpaths would need to be recorded. The Committee would therefore need to assess all evidence presented before it and test that evidence against legal criteria, in order to determine whether highway rights had been acquired.

The applicant had provided the County Council with evidence of usage of the 3 footpaths one of which was to be removed as part of the restoration proposals for Wharton Park.

Upon receiving the application, the County Council had researched the usage of the proposed paths and had undertaken a consultation exercise.

The Solicitor referred to Document B within the Committee report and explained the legal framework and considerations for modifications to the Definitive Map. She also detailed the history of the land and the purpose for which it is held by the Council.

Members were provided with an overview and assessment of the evidence which had been gathered both by the Council and the applicant. In referring to paragraph 5.3 of the Committee report, the Senior Public Rights of Way Officer advised that the reference to the Durham City Council minutes dated 18 April 1944 should actually read 16 May 1944.

Members were advised that while the Durham City Council minutes did show that the Council had been responsible for the management of the land, they did not encompass the relevant 20 year period of January 1995 to January 2015.

In referring to paragraph 8.5 of the report the Senior Public Rights of Way Officer indicated that the signage in and around the park does not assist in the determination of the application.

The Committee was advised that it should discount the usage of the paths in the old part of the Park as the 1875 Public Health Act already allowed usage 'by right' whereas it is necessary to be satisfied that usage was 'as of right'. In relation to the new part of the Park, it was held very generally for the purpose of public open space and the usage of the section of Path C which ran through the new Park could be construed to be "as of right".

The Strategic Manager, Culture and Sport, was in attendance to present to Committee the objection to the application from Neighbourhood Services.

The service area objected to the application primarily on the basis that it believed the land was already protected for public usage. While it was a public park, it was necessary for the Council to be able to manage access to it. Members were advised that should public rights of way exist through the park, it would be very restrictive. The Council needed to be able to close the park off at times such as when delivering public events and activities or when undertaking works such as tree felling.

The Committee was advised that the restoration works would see the 1859 entrance to the Park to be the main access point. Potentially, path C created a cul-de-sac into the Park, which was of no benefit and was in itself restrictive. It was highlighted that there were alternative routes to the train station other than path C. It was noted that the gate at the start of path A had been subject to being locked at night time.

Mr P Hayes, applicant, addressed the Committee. He highlighted that the Committee needed to determine whether a reasonable case had been made that the paths were public rights of way. He stated that the threshold was not whether it was more likely than not that the paths were public paths, but rather was it a reasonable possibility.

In referring to the Committee report Mr Hayes acknowledged that the recommendation was that it was reasonable for the path in the new Park, however not for the paths in the old Park.

Mr Hayes stated that the report gave only one reason for why the application failed to make a reasonable case for the old Park paths and this was the speculation that the old Park was owned by DCC under the 1875 Public Health Act.

In relation to whether there was any certainty that the speculation was correct, Mr Hayes stated that this was questionable. In the 1932 Conveyance of the old Park to Durham City Council there was no mention of the 1875 Act. The Act was mentioned in an earlier 1914 lease of the land to the Council, but that lease was later extinguished by the 1932 Conveyance. Mr Hayes advised that the fact that the 1875 Act was mentioned in 1914 and then left unmentioned in 1932, made it quite possible that the City Council deliberately left it out.

The Committee was advised that the 1932 conveyance said that if the City Council tried to profit from the land instead of using it as a public park, then half of the profits had to be given to the sellers. Mr Hayes believed that there was evidence against the purchase being based on the 1875 Act, as it explicitly left open the possibility that the land could be used for purposes other than for a park.

Mr Hayes put it that the key point was not that speculation in the report was wrong, but that it was no more than speculation. While it could reasonably be agreed with, it could equally be disagreed with. As such, the speculation could not be cited as the basis for dismissing the application for the paths through the old Park.

Mr Hayes posed the question, if the report was right about the 1875 Act governing the old Park, did it matter. He argued that it did not matter because of the *Barkas* case (*R (on the application of Barkas) v North Yorkshire County Council* and another (2014) UKSC 31 Judgement given on 21 May 2014). Mr Hayes quoted from a letter he had received from the Rights of Way team further to a letter he sent following submission of the application. The letter from the Council used the *Barkas* case to underpin its belief that the use of paths was “by right” rather than “as of right”.

The Applicant advised that having then read the Supreme Court’s judgement on *Barkas*, it was clear that it actually gave unequivocal support for footpaths over publicly owned land by saying that even where an area of land was used for recreation by the public “by right”, when they were to take a pathway through that area they did so “as of right”. Mr Hayes therefore believed the case law was on the side of his application.

In relation to the objection by Neighbourhood Services, Mr Hayes did not believe that path closure for events would not be required very often and if it were required, it would not be too difficult to arrange. He cited that the Regatta was held on a path and there were no issues with closures in that instance.

In conclusion Mr Hayes believed that it was speculative to claim that usage in the old Park was based on the 1875 Act, as the evidence could be interpreted in more than one way. Furthermore, even if that speculation was correct, he argued that it was irrelevant because of the Supreme Court judgement in the Barkas case.

The Solicitor responded to points raised by Mr Hayes as follows:-

- Regatta – The footpaths in that area had a special permission by virtue of an Act which was passed by Parliament in 1984;
- Speculation of the 1875 Act – The Solicitor was very confident this was not speculation. The 1914 lease had been explicit that the Council held the land under the 1875 Act. In order to change the purpose the land would have to be appropriated, there was no evidence that this occurred therefore the 1875 remained relevant.
- The Barkas case did not support Mr Hayes' application in the old park and concluded that if the public already had a statutory right of access then use was 'by right' and not 'as of right'

In response to a query from Councillor B Armstrong, the Senior Rights of Way Officer clarified that if the Committee went with the recommendation to include the section of Path C in the new park to the Definitive Map and Statement, then the Council would be able to close the path temporarily as and when required.

In response to a query from Councillor O Milburn, the Officer advised that the path would not necessarily be publicly maintainable, the inclusion in the Definitive Map and Statement would simply be an acknowledgement of its existence.

Further to a query from Councillor Robinson, the Solicitor clarified her view that no rights of way could be included in the old Park as the rights already existed by virtue of the 1875 Act.

Councillor Robinson found the objection to be irrelevant as the Council would have the power to close the path as and when required. He proposed that the Committee support the Officer recommendations.

Councillor Wilkes advised that he was in support of the application from Mr Hayes. He highlighted that in 1914, the Covenant was for public use and so the seller in 1932 would have been aware of the wishes of her predecessor. The sale allowed the purchaser to do what they wanted with the land in the future. As such the use changed as the point of sale in 1932 to allow the new owners to do what they wished. Indeed the Council would have been within its rights to have sold the land had it wished to do so. Councillor Wilkes therefore argued that the original Act no longer existed. What was relevant was the Act under which the sale was made. He referred to the Highways Act of 1980 and highlighted that those who had used the paths in the last 20 years had done so unhindered.

The Solicitor advised that the Council could purchase land under the relevant Local Government Act at that time, however it then would have to hold the land for a statutory purpose. In relation to the park, the Council took possession of the statutory purpose of public walks and pleasure grounds. There was no record that it changed its purpose,

hence the 1932 Conveyance was silent on the matter as there was no need to reiterate the purpose.

Seconded by Councillor B Armstrong, Councillor J Robinson moved that, based on the evidence presented before the Committee, that a Definitive Map Modification Order be made to add the section of path C in the new park to the Definitive Map and Statement.

Resolved

That a Definitive Map Modification Order be made under the Wildlife and Countryside Act 1981 to add the section of path C in the new park to the Definitive Map and Statement.