

From: Director – Environment and Waste

ITEM 5

To: Regulation Committee- Tuesday 22nd January 2008

Subject: Application to register Public Rights of Way on the former Bayham Estate, Lamberhurst and Pembury.

Classification: Unrestricted

District: TUNBRIDGE WELLS

Summary: To inform Members of the current position relating to this application and to seek approval to refer the eventual decision from the Government Office for the North East to Counsel for advice on further action.

FOR DECISION

Introduction

1. On 5th of April 2005, a Regulation Committee Member Panel meeting resolved to reject an application lodged by the Ramblers Association (“the applicant”) under provisions contained within Section 53 of the Wildlife and Countryside Act 1981. The application was seeking to modify the Definitive Map of Public Rights of Way by adding a number of Public Footpaths across the former Bayham Estate.
2. In such cases, where an application is refused, the applicant has the right of Appeal to the Secretary of State. The applicant exercised this right, and the matter is currently being dealt with by an Inspector appointed by the Secretary of State. The Government Office for the North East is responsible for the administration of this process.

The effect of the ‘Godmanchester’ case

3. The original decision to reject the Ramblers Association’s application was based upon a number of factors. In order to be successful with their application, the Ramblers’ Association needed to show that the criteria contained within section 31 of the Highways Act 1980 had been met. Section 31 reads as follows:
‘where a way over land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway *unless there is sufficient evidence that there was no intention [by the landowner] during that period to dedicate it*’ (emphasis added).
4. One of the prime factors considered in this case was whether the landowner had taken sufficient **overt** actions in order to inform the general public that he had no intention to dedicate rights for the public on land within his ownership. The interpretation which had to be given the words ‘overt’ and ‘intention’ *at the time* of the County Council’s decision had been decided by the Court of Appeal which clearly held that any action taken by a landowner in a manner that appeared to show his desire not to dedicate such rights would be enough to deny the public, despite the fact that some (if not all) of those actions were not being made in a manner that the public would have been aware of.
5. A good example of this at Bayham was the tenancy agreements which were in force during the relevant 20 year period of claimed use. The landowner made it quite clear to his tenants

6. within this agreement that it was his intention that no rights of Way should be dedicated to the public. Although the clause within these agreements would not have been available to the public at large, the interpretation of the word ‘overt’ *at the time* deemed this was enough to show the landowner had no intention to dedicate. Members, in taking their original decision, interpreted that evidence at the time in the accepted manner and this was one of the reasons why the Regulation Committee Member Panel rejected the application.
7. The question arising in the Godmanchester case, which was finally heard in the House of Lords, was the relevance of such actions and, in particular, whether such actions constituted *sufficient evidence* of a landowner’s lack of intention to dedicate. After careful consideration and having heard submissions from very learned Barristers representing both parties, the Law Lords decided that the previous interpretation of the word ‘sufficient evidence’ in the lower courts was wrong. As a result of this decision, it is now considered that landowners must bring to the attention of users of the way by very deliberate acts to show that they have no intention to dedicate the path to the public: the fact that they might have written this in other documents to which the general public do not have access is simply not enough.

The powers of the Secretary of State

8. As a result of the appeal by the applicants against the County Council’s resolution, the decision as to whether or not an Order should be made has now passed to the Secretary of State. He has the power to direct the County Council to make an Order should he deem it appropriate. The Inspector appointed by the Secretary of State to take a decision on this matter has no option other than to interpret the words ‘sufficient evidence’ and ‘overt’ in the manner decided in the House of Lords. It is therefore possible that the County Council may receive a direction from the Secretary of State to go against the original decision not to make an Order. If this should be the case, then I would ask for Members approval to seek Counsel’s opinion as to the stance the County Council should take at any subsequent Public Inquiry.

Recommendation

9. I recommend that members receive this report for information.
10. I also recommend that the County Council seeks Counsel’s opinion on further action in the event the County Council receives a direction from the Secretary of State to make a Definitive Map Modification Order to add Public Rights of way across the former Bayham Estate.

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Background Documents - None