

Dudley Borough Local Access Forum's involvement in Treherns Farm, culminating in appearing at the Public Inquiry on the 3rd March 2009

1. Introduction - Understanding the role of the Forum

- 1.1. In order to comprehend the problems that Dudley Borough Local Access Forum has encountered in dealing with Treherns Farm, it is necessary to appreciate aspects of how the Forum came into being and its function. It was a great surprise and disappointment to discover, in the theatre of a Public Inquiry, that Dudley Council itself does not understand the role of the Forum. The Council's misunderstanding materialised in an unforeseen vicious, vindictive verbal, and potentially financial, assault. Of its nature this report must be long to explain the situation. Under such circumstances it might be tempting to 'skip' this section. However, the patience of the reader is requested because ignorance of the background and role of the Forum is at the heart of the problems experienced and the key to avoiding repetitions is to deal with that issue.
- 1.2. Dudley Borough Local Access Forum was founded in 2003.
- 1.3. Access Forums are advisory bodies established under section 94 of the *Countryside and Rights of Way Act 2000* (the "CROW Act") and operate in accordance with the provisions of that Act, and the *Local Access Forums (England) Regulations 2007*.
- 1.4. *"Forum members are volunteers. They are appointed by local highway authorities and National Park authorities ("appointing authorities") to represent a range of local interests. Many forum members contribute their experience and knowledge in an unpaid capacity for the benefit of their local community. **This makes it very important that members are given the support they require to undertake their advisory role as effectively as possible, and without disproportionate demands being placed upon their time.**"*¹
- 1.5. The latest version of *'Guidance on Local Access Forums in England'* (Product Code: PB12240), from which the above quote was taken, was published by The Secretary of State in February 2007 and came into effect on the 19th March 2007.
- 1.6. This 52 page guidance document contains a wealth of information for the Forum. **In para. 3.1.1** it states,

"Local access forums are advisory bodies. Section 94 of the CROW Act defines their statutory function as being to:- advise as to the improvement of public access to land in the area for the purposes of open-air recreation and the enjoyment of the area, and as to such other matters as may be prescribed."
- 1.7. **In para. 3.1.5** it states,

"Section 94(6) of the CROW Act requires forums to have regard, in carrying out their work, to:- (a) the needs of land management, (b) desirability of conserving the natural beauty of the area for which it is established, including

¹ Paragraph 1.2 of *Guidance on local Access Forums in England* (March 2007)

the flora, fauna and geological and physiographical features of the area, and (c) guidance given from time to time by the Secretary of State.”

- 1.8. The Guidance in **para. 3.2.1** clarifies the position in respect of who advice is proffered to and states,

*“Section 94 of the CROW Act makes it the **statutory function** of forums to give advice to the following bodies:- • the appointing authority(ies) (which will be a highway authority or National Park authority) • any county, unitary, district or borough council within the area of the forum • the Secretary of State (in effect this means any Government Department with a Secretary of State, e.g. Defra and MOD, as well as ‘executive agencies’ such as the **Planning Inspectorate** and the Highways Agency) • Natural England • the Forestry Commission • English Heritage”*

- 1.9. In **para 3.2.2** the list continues as follows,

“Regulation 21 prescribes the following additional bodies to whom it is also the function of forums to give advice:- • Sport England (the English Sports Council) • Area of Outstanding Natural Beauty (AONB) Conservation Boards • Parish and town councils”

- 1.10. **Forums are advised to be proactive** in their advice as indicated in **para. 3.6.1**, which states,

*“Much forum work will inevitably be reactive and dependent on the timing of various initiatives or consultations. **However, forums should adopt a proactive approach in setting their priorities and giving advice. Situations where a proactive approach can assist a section 94(4) body include giving ‘early warning’ of a potential problem or identifying possible solutions to an issue from a novel or fresh perspective. A proactive approach can also increase a forum’s influence by enabling it to advise at an earlier stage in the decision-making process, before the options are narrowed down.** This means, for example, that forums should feel free to:- • encourage section 94(4) bodies to seek forum advice at an early stage; • give advice to section 94(4) bodies without waiting to be asked; • scrutinise and review the proposals, actions, policies or achievements of section 94(4) bodies, and make recommendations on the need for future action or policy development; • ask section 94(4) bodies to assist the forum (e.g. by providing information) to help the forum formulate its advice; • ask when the optimum time would be to provide advice on a particular matter, or ask to be consulted on a particular matter in the future; and, • request feedback.”*

- 1.11. **Public access to documents submitted to the Forum is important - para. 4.5.2** indicates that,

*“The Regulations require that copies of the minutes, the agenda, **any reports submitted** for a meeting of the forum, **a list of any background papers for the report in question**, and at least one copy of each background paper, are open for public inspection at the offices of the appointing authority for at least two years from the date of the meeting.”*

- 1.12. Section 6, **“Guidance for Appointing Authorities”**, in the following paragraphs states,

“6.1.3 Appointing authorities are also section 94(4) bodies and are likely to be the main recipients of forum advice. In this context appointing authorities must have regard to any relevant advice from the forum, and should aim to:-

- **Consult the forum on relevant matters (not just matters where there is a statutory duty to consult), preferably at an early stage in the decision-making process;***
- **Provide relevant information, reports, background papers, speakers, etc;***
- **Give timely feedback on advice received from the forum; and***
- **Raise awareness of the forum amongst officers and members throughout the authority.***

6.1.4 Most forum members are volunteers giving freely of their time and knowledge. If the forum is to serve a useful purpose it is therefore important that the members are given the help and support they reasonably need from the appointing authority.

*6.1.5 Although forums are independent advisory bodies and are not part of local government, the appointing authority should ensure that the forum conducts its business within its statutory remit having regard to this Guidance. **Any complaints about the conduct of a forum, or a forum member, should be dealt with through the appointing authority’s normal complaints procedures.”***

- 1.13. Section 7, “**Advising and Consultation**”, explains the advisory role of forums in the following paragraphs,

“7.1.1 The legislation does not define when, how or in what circumstances forums should advise, and it is therefore for forums to decide what would be most appropriate within the local context. Annex A contains a list of matters on which forums may give advice. However:-

- the list is not comprehensive (there are likely to be additional matters which are important to particular forums), and*
- individual forums are not expected to advise on the full range of issues (the list is a ‘menu’ from which forums should select the matters in their area).*

7.1.2 Forums can give advice without being invited to do so, and their advice can relate to any of the activities/functions/policies of the section 94(4) body concerned (in so far as it affects access to land and/or open air recreation, etc).

7.1.3 When requesting advice from forums, Section 94(4) bodies should remember, and make appropriate allowance as far as possible for the fact, that many forums do not meet on a frequent basis and may face difficulties in dealing with short deadlines.”

- 1.14. Under 7.2, “Requirements to consult or notify forums”, the opening paragraph states,

*“7.2.1 Legislation requires forums to be consulted, or provided with information, in a number of specific circumstances, as set out below. **It is important to note that these provisions in no way limit the scope of section 94(4) bodies to consult forums on other matters, nor do they***

limit the scope of forums to advise section 94(4) bodies on other access and recreation matters.”

- 1.15. The Guidance is a significant document to the Forum. The quotes selected for this ‘Introduction’ are pertinent to our actions in dealing with the Treherms Farm issues and not only explain these but also the level of support and information that we could legitimately expect from Dudley Council.

2. The Application, the Orders and The Public Inquiry

- 2.1. The Forum was specifically consulted by Dudley Council in respect of the planning application for the sports pitches et al and then in respect of the ensuing footpath closure and diversion orders. At all times in doing so the responsibility to provide comprehensive, pertinent and appropriate information to facilitate the Forum in giving its advice lay firmly with the Local Authority.
- 2.2. ‘Guidance’ makes it clear that, *“it is very important that [Forum] members are given the support they require to undertake their advisory role as effectively as possible, and without disproportionate demands being placed upon their time.”*² However, in reality Dudley Borough Local Access Forum has, in this consultation process, been starved of key information by certain officers of the Council. Indeed the existence of some important information has only come to the Forum’s attention because of circulation of the Council’s ‘Statement of Case’ in December 2008. If the Forum had not been engaged in the Public Inquiry process then such information may never have come to the Forum’s attention. On occasions, during Forum meetings, members have been told by a Council officer that if they wish to view information regarding the application, it is in the public domain and can be sought on the Council website or by a visit to the planning department. That approach is singularly unhelpful and inappropriate because the Forum as a statutory corporate body, rather than as individuals, needs to be provided with and briefed regarding *the all important information*³. Only when appropriately briefed does the body have a chance to proffer informed and meaningful advice. The Forum, for obvious reasons, cannot and should not rely upon the ‘search’ endeavors of its individual members.
- 2.3. This view of some officers that individual Forum members must chase information, rather than the Forum as an entity being provided with it, surfaced at the Public Inquiry on the 3rd March 2009. The Council’s Counsel argued that plans, which the Forum were unaware of and were not shown in the formal consultation, were available if the Forum searched for them. It was clear that the Counsel did not understand our role and need for support. It was pointed out to her that the Forum is not an amenity society but a statutory body that needs the information provided to it for the Forum to perform its function as an advisor effectively. She would not accept the point.
- 2.4. How can the Council argue that it did not need to advise the Access Forum of access information such as detailed plans of a diverted path or an agreement to dedicate private farm tracks for public access? As unbelievable as it might appear that is what has happened. Amazingly, the Council in creating confusion

² Paragraph 1.2 of ‘Guidance on Local Access Forums in England’

³ Paragraph 6.1.3 of ‘Guidance’ identifies the need for the authority to *“Provide relevant information, reports, background papers, speakers, etc”*

within the Forum by not providing such information then claimed for costs against the Forum, **which it funds**, at the Public Inquiry. Can matters get worse?

- 2.5. If the Forum, with what would appear to be advantages of access to information, was not appropriately briefed, what were the chances of third parties being proffered information and clarification? The prospects do not appear to have been good.
- 2.6. These opening remarks are not what the Forum would expect to or wish to make but have materialised from the frustration that the Forum feels in being hampered in performing its function effectively and then victimised at a Public Inquiry where the Counsel concluded with an unspecified threat of “**repercussions for the Forum and its Leaders**”. What misdemeanor warranted that outburst? - it appears nothing more than the Forum advising of some of its own experiences and of a different approach to that of the Council! So, let us assume for a moment that the Forum’s different approach was wrong. Does that then warrant the verbal assault that the Forum has endured? Shouldn’t the right to be *potentially* wrong be respected without recourse to abuse and threats?
- 2.7. This report might well of itself be useful as advice if the Council will give it fair consideration and learn by the experience. Let us now consider the individual elements that led to such a bad tempered Public Inquiry.

The Planning Application P06/1278

- 2.8. The application, for change of use of agricultural land at Treherns Farm to school sports pitches with associated works, was registered with Dudley Council on the **23rd June 2006**.
- 2.9. Following a recommendation from Council officers, Dudley Borough Local Access Forum members attended a site visit to the farm on the **21st June 2006**.
- 2.10. A special meeting was then convened for the **26th July 2006** at which a representative of the applicants (The Feoffees of Oldswinford Hospital School) explained their application. Mr Roger Johnson, former Director of the Urban Environment (Chief Planning Officer) for Dudley Council, but now a Trustee and Governor of the school, made that presentation.
- 2.11. A further special meeting of the Forum was held on the **1st August 2006** with the intention of the Access Forum agreeing the advice it would give the planning department of Dudley Council. Whilst the Forum advice was for the Council to refuse planning permission, this did not make the Forum an objector. The Forum’s function is to advise and the position should be compared to that of a planning officer who recommends refusal. The planning officer would not be considered to be an objector. He is simply doing the advisory job that he is set to perform. That applies also to the Forum and is an important distinction to make.
- 2.12. The Forum advice of the **1st August 2006** was promptly presented to Dudley Council.
- 2.13. The application was not determined until the **7th August 2007**, when it was approved. The Forum had responded within the appropriate consultation period and was surprised to find that it was a further twelve months before the application had been determined.
- 2.14. On the **10th August 2007** the Chairman sent an e-mail to Kevin Clements, Lead Officer to the Forum, stating in connection with the planning permission,

“I am particularly interested in the details of the footpaths Will you please obtain those plans and any others that you may consider important and bring them to the meeting?”

- 2.15. **Those plans were not forthcoming at the Local Access Forum meeting of the 14th August 2007.** If the plans had been made available then the issuing of them should have been recorded⁴.
- 2.16. At the Public Inquiry on the **3rd March 2009**, the planning officer who dealt with the application, Mr David Holloway, provided a list of five plan revisions, relating to the footpaths, that were submitted to the Council between the **6th December 2006** and the determination date of the **7th August 2007**. None of these were drawn to the attention of the Forum at the appropriate times relative to their registration with the Council. Therefore the Forum were understandably unaware of their existence. Clearly the plans were not only important to the Forum in respect of their statutory function relating to access but also in relation to the Forum’s earlier submission in respect of the planning application. Surely, It was a significant omission for the Council to not make the Forum aware of their availability. The plans, as they became available, should have been placed before the Forum with an opportunity for the Forum to comment.
- 2.17. That failure by the Council was exacerbated because the Project Engineer (Traffic) who has dealt with the public footpath Orders is a regular attendee of the Forum’s meetings. He is also a recipient of the Forum papers and should have been aware of the need for the Forum to be briefed.
- 2.18. A further plan (06 Revision H) showing diverted footpath detail was submitted to the Council on the 12th December 2008⁵, sixteen months after the planning application had been approved.
- 2.19. Both Dudley’s Counsel, Miss Clover and Mr Holloway advised the Planning Inspector on the 3rd March 2009 that this late plan ‘*was intended to update the approved layout to take into account changes to the hedgerow management.*⁶’
- 2.20. The plan did more than they acknowledged because it clearly indicated a change in width of the footpath from 2 metres to 3 metres and also revised the height of the post and rail fencing that will border the path.
- 2.21. It is important to note that a copy of plan, 06 Revision H, was not provided to the Forum until the 25th February 2009 - that was the first occasion upon which the Forum had sight of it! That is in spite of the fact that the Forum had been calling for such information regarding the proposed diversion since the 11th February 2008. A variety of plans that the Council was in possession of would have answered our request for detail of the path in relation to the terracing but were not provided to the Forum.
- 2.22. Finally, in this section of the report it is important to note that the Forum was concerned by the manner in which the planning officer’s report was written and presented to the Development Control Committee (D.C. Committee). At their meeting on the 7th August 2007, members of the D.C. Committee expressed

⁴ See paragraph 1.10 of this report

⁵ According to the Written Submission made by Sarah Clover, Counsel for DMBC, dated 2nd March 2009 and presented at the Public Inquiry on the 3rd March 2009.

⁶ From Miss Clover’s written submission.

considerable concerns regarding the application. Some of these were reported in the press. The Forum considers that there were substantive points associated with the application that would have allowed the D.C. Committee the latitude to have rejected the officer's recommendation and voted for refusal if they were so minded. However, the report was written in a manner that did not allow the D.C. Committee such discretion without taking a considerable risk in respect of the applicant successfully appealing against refusal. Such a risk is understandably foremost in their minds. However, if the report had fairly and objectively reported points that would allow for refusal, that appeal risk would be diminished. It is not suggested that the officers report was unprofessional but upon reflection the Forum thought it worthwhile to review that report in accordance with our mandate and to give advice to improve future reporting.

- 2.23. However, the Forum's main concern was the manner in which the planning officer reported our advice. Reporting it more appropriately would have assisted the D.C. Committee in exercising their discretion to vote for or against approval as they saw fit. A key paragraph of our report of the 14th August 2007, which was sent to the planning officer, amply explains how his reporting misrepresented the Forum. Our report states,

"Most but not all of the Forum's points of advice were reported to the Development Control Committee but these were subsumed amongst reporting of all the points of consultation 'en bloc'. In effect this means that our advice was not segregated from the views and objections of other respondents. Therefore, readers of the officer's report for Trehern's Farm could not establish what the Forum's views were. In general terms this also means that our advice was associated with views that we had not expressed and may disagree with. This can have the effect of diluting or even discrediting our advice. Whilst it may mean a lengthier report, we believe that it is important that views are attributed to the appropriate parties that express them rather than opting for the easier option of lumping them all together.

For example, the Forum did not express and would not support some views, attributed to objectors, including DBLAF, such as the ones which stated, 'the land will be turned into previously developed land and thereby be subject to pressure for future housing'; 'OHS have a reputation for selling off land for housing'. Whilst we respect the right of others to make such points, the Forum in its statutory role as an advisor to the Council wish for its advice to be clearly and unambiguously conveyed in officer's reports and attributable to the Forum rather than grouped with other party's objections."

The Orders - Stopping Up of Footpath S73 & Diversion of Footpath S75

- 2.24. It should not have been assumed that those interested in the Orders would be fully conversant with the planning application documentation for the change of use from agricultural land to school sports pitches. It is possible that for some individuals or groups, the footpath Orders would be their first involvement in the site issues. For all parties, the information provided in relation to the Orders needed to be adequate for them to understand the situation. At least the Forum believes so and in accordance with Guidance the Forum gave **'early warning' of a potential problem**⁷ and advice in respect of how to avoid it.

⁷ See Paragraph 1.9 of this report for full quote taken from the Guidance on Local Forums in England

- 2.25. Unfortunately the Forum advice was dismissed out of hand and the problem that we warned of did occur and followed through to the Public Inquiry. With relatively little effort the Council, or more particularly individual officers, could have avoided that situation as will now be explained.
- 2.26. At the Local Access Forum meeting of the **23rd January 2008**, the Forum were given two weeks upon receipt of the **Draft Order** documents to advise the Council in respect of them. The officer involved was Mr David Jacobs, Project Engineer (Traffic).
- 2.27. A sub-committee of the Forum promptly and efficiently dealt with the matter and proffered written advice on the **11th February 2008** - within the timescale agreed. The **main** points of the Forum's advice are summarised to be:
- *That the Highways Act could be used for the Orders instead of s257 of The Town and Country Planning Act 1990.*
 - *That the cross field paths S73 & S75, which had been obstructed for many years, should be reinstated for public use.*
 - *That the status of farm tracks as Public Rights of Way should be formalised concurrently with the Orders*
 - *That the proposed diversion route for S75 should be made clear in relationship to the topographical changes required for the development. This would make interested parties aware of the true nature of the diversion and allow them to make a meaningful comparison between 'old' and 'new' in coming to an informed opinion.*
- 2.28. The Orders were made on the **7th March 2008**, without the Forum's advice being responded to by the Council. At that time the fact that members of the Forum had not received a response was of greater significance to them than the fact that their advice did not have an impact on the finalised Orders. Forum members, voluntarily and at short notice, had put in considerable effort to meet a tight schedule, only to find that the Council officer whose requirements they had satisfied could not be bothered to reply appropriately or apologise for not replying. His approach was seen as a snub.
- 2.29. It was only after pursuing this point at the Forum meeting of the **19th March 2008** that clarification was received. The approved minutes record that,
- "Mr Jacobs reported that a stopping up order and a stopping up and diversion order had now been published in respect of two public footpaths at Treherns Farm. Copies of the orders had been circulated with the agenda for the meeting. **It was reported that a four week statutory representation period was currently underway, following which the Council would attempt to mitigate any objections to the orders. If this did not prove possible, the Secretary of State would consider the orders and come to a decision as to whether or not they would be implemented.***
- It was noted that the Forum sub-group established to consider and give advice on the proposed orders had formulated a written report on the issue which had been circulated to all members and the appropriate officers for their consideration. **Mr Jacobs stated that, according to the statutory requirements, the Council would consider the advice in the document and have regard to it when making decisions regarding the proposed orders.** However, this did not necessarily mean that all of the advice in the*

report would be incorporated in the Councils final action. Mr Jacobs offered to explain to the Forum the Council's response to the Sub-group's advice. Members declined this offer, however, in favour of the submission of a written report to the next meeting."

2.30. Points to note are that Mr Jacobs stated the Council would attempt to mitigate any objections. Having seen some of those objections it is clear that the Council did not pursue appropriate resolution of objections. Surely that was a mistake and should now be a cause for concern by the Council?

2.31. In respect of the Forums advice - this was unequivocally made in respect of the '**Draft Orders**' on a tight schedule set by Mr Jacobs. All parties, including Mr Jacobs, could not have been under any misunderstanding that this advice was urgently given, in accordance with Mr Jacobs' requirements, to potentially influence the final form of the published Orders. Why Mr Jacobs then chose to decide that the Forum's advice, in respect of the Draft Orders, would not be considered until making decisions regarding the published Orders, remains unclear. His comments in misconstruing the purpose of the advice of the Forum, are not explainable by the Forum. Nevertheless, the frustration of Forum members who had given their time freely, to provide that advice urgently, is totally understandable.

2.32. On the **10th April 2008**, the last day of consultation, the Forum made a further advice representation in respect of the Orders. The following opening paragraph of that letter made the Forum's position clear,

*"I trust that you are in receipt of our letter of **advice** dated the 11th February 2008? That letter should be considered to be a representation from the Forum in respect of the above orders. **We have some concerns and that representation may be useful to the Secretary of State if there are objections.** Today's (this) letter should be also entered as a further representation from the Access Forum."*

2.33. Mr Jacobs' response to the Forum advice regarding the 'Draft Orders' was received at the Forum meeting on the **21st May 2008 - over three months after the Forum gave that advice and nearly 6 weeks after the close of consultation for the Orders. Mr Jacobs' reply was too little and too late.** Two points he made are,

"The farm tracks around the field where the Order paths cross have been acknowledged by the owner as public paths. This will be further confirmed by an agreement with the Highway Authority."

"Cross sections showing existing and proposed levels and as well as current photographs were part of the planning application. It is not part of the Order procedure, prescribed by Government for Orders to be supplemented in this way."

2.34. At the time that Mr Jacobs made that response he should have been aware that objections had been made, by other parties, that referred to that lack of information and therefore why did he not attempt to shed light and resolve such objections? If Mr Jacobs was aware of a particular plan that indicated clearly the relationship between the diverted path, S75, and the development terracing, why didn't he show this to the Forum, who themselves wished to be made aware of the detail? Was there anything in legislation that prevented him from better informing the public to avoid confusion resulting in objections?

- 2.35. If the Forum, with all the advantages of being informed by officers prior to the close of consultation, could not get unambiguous clarification, what were the prospects for other parties without such an advantage? Surely, very poor.
- 2.36. An intention to forge an agreement regarding the status of the farm tracks could not be taken for granted by third parties. Even when the agreement was made on the **8th August 2008**, four months after the close of consultation in respect of the Orders, it was not drawn to the attention of the Forum or the objectors. One asks why not when it was seen by them as important?

The Public Inquiry, 3rd March 2009

- 2.37. On the **29th August 2008**, the Planning Inspectorate wrote to objectors **and others making a representation that was not deemed to be an objection**, advising that the Inspectorate had decided a Public Inquiry was necessary and details would be sent to all interested parties in due course.
- 2.38. If the person or body receiving this notification was deemed to be an objector then the word '**Objection**' was clearly printed immediately below their address. **If, as in the case of Dudley Borough Local Access Forum, the individual or body was not deemed to be an objector then the word 'Representation' was clearly printed below their address. It is important to note that the Forum was not identified as an objector!**
- 2.39. The notification letter to the Forum was reproduced as the last two pages of the papers for the Forum meeting of the **17th September 2008**. This ensured that Forum members and Council officers, including Mr Jacobs, were aware of the notification and status of the Forum's participation.
- 2.40. On the **26th September 2008** the Planning Inspectorate wrote to advise that the Public Inquiry would be held on Tuesday, 3rd March 2009, at Dudley Council House and included a timetable for the submission of 'Statements of Case' and 'Proofs of Evidence'.
- 2.41. On the **21st November 2008**, the Planning Inspectorate again wrote including a copy of the Council's 'Statement of Case'.
- 2.42. In the Council's 'Statement of Case' ascribed to Project Engineer, **David Jacobs**, he **clearly identifies '13 Objections and 1 Representation', with the Forum being clearly identified as making the Representation. Again this is important to note!**
- 2.43. Mr Jacobs perpetuates the differentiation between Objection and Representation when he heads a section of his statement as '***Response to the objections and the representation***'. He also, in discussing the Forum's advice, marks the Forum's contribution as '**Representation only**'. Mr Jacobs' position is made clear in that he correctly identifies that the advice of the Forum is not an objection.
- 2.44. It is of note that in "***Guidance on procedures for considering objections to DEFINITIVE MAP and PUBLIC FOOTPATH ORDERS in England, December 2007***", it is written in the Costs Section in paragraph 8.4, that,
- "If we [The Inspectorate] believe that your representation or objection is irrelevant, we write to you to give you the opportunity to withdraw or amend it."*
- 2.45. As no such advice was given to the Forum and with the Forum considering that the responsible approach was to provide a 'Statement of Case', the Forum did so

on the **22nd December 2008**. Largely, the statement was an affirmation of the advice proffered to the Council since February 2008, but with the following exceptions, in which the Forum stated,

*“In the summary section of their statement, the Council makes a generalised comment that **“the Council believes that the objectors are primarily using the Order as a secondary attempt to stop a development”**. Sadly, that ‘tars all involved with the same brush’ in what amounts to an unreasonable accusation that devalues all representations. A comment from the Council of this nature should not be made unless it can be justified. Of course it is possible, and even likely, that some objectors may have that intention but if that is so then the comment should be specific to such representations.”*

“For the first time (despite our concerted efforts to get them to do so) the Council have in their ‘Statement of Case’, finally defined where the diverted path will lie in relation to the significant terracing of the development. Their doing so is arguably too late given that users had to make representations without this important detail. The Forum had strongly advised the Council that this should have been done from the outset because, as the Pedmore Walk Leaflet points out, this “is a rich and varied landscape, one of the most significant in Dudley’s countryside”. Therefore, the key to the public’s interest in this respect is where the diverted path precisely lies. It is a major consideration. Again, the Council could have advised those making representations of this previously withheld detail with a view to removal of such objections. For some considerable time the Forum has been encouraging the Council to do more than the minimum that they have to do by statute in such situations. The key to success may well be that which can be done.”

*“It is not unusual for long established playing fields to be crossed by Public Rights of Way. An instance that comes to mind in the Borough is footpath H97, which virtually goes through the centre of Bartley Green Football Club’s pitch. Whilst the football ground has been in existence for around 40 years, within a popular walking area, neither the Council nor the Club have sought to address this situation despite having the opportunity to do so within the framework of recent planning applications. The Forum has raised the issue without the Council seeing fit to address any potential conflict. **That does not mean that it is undesirable to divert such paths** but is an indication that it is not appropriate to use the planning procedure, which should be reserved for situations where the development could not otherwise proceed.”*

- 2.46. The Forum did not feel that it was necessary to add a ‘Proof of Evidence’ but upon receiving that of the Council noted that the Forum was still not described as an ‘Objector’, although the Forum believed that in some respects the Council was misrepresenting the Forum’s position.
- 2.47. The Forum appeared at the Public Inquiry on the 3rd March 2009. Two objectors also appeared - The Monarch’s Way Association and the Halesowen Abbey Trust.
- 2.48. A member of Hagley Parish Council attended believing that the Chairman of the Parish Council would be attending to present their evidence. He was wrong and on reflection he should not have participated in the Public Inquiry because he was not well informed or authorised to speak on their behalf. His presence gave

the Inspector a difficult problem and no blame can be afforded to the Inspector for allowing this man to appear. However, as the Inquiry proceeded, it became clear that this man was not only unaware of the issues but also of the protocol of the proceedings and the Inspector frequently had to ask the man, in a reasonable manner, to stop interrupting the proceedings.

- 2.49. The real victim of this man's attendance was the Chairman of Dudley Borough Local Access Forum. Throughout the Inquiry this man was whispering comments to the Chairman and at times was mistakenly accusing the Forum of trying to destroy the local Green Belt. This made it difficult for the Forum Chairman to follow the proceedings. Nevertheless, the Chairman of the Forum holds no grievance against this confused man and felt sympathy for him when he was cross examined by Miss Clover, Counsel for the Council. His unauthorised presence seems to be responsible for Dudley Council making a claim for costs against Hagley Parish Council. Had he not been present then it appears that the Council would not have claimed against the Parish Council.
- 2.50. Having made that point there is no need for the Forum's evidence to be fully recited in this report. In the simplest form it pertains to advice to the Council, which, if pursued, would have resolved and removed most and possibly all objections; would have allowed the development to proceed in 2007 without undue delay and would have assisted in providing a more durable path than that which is planned.
- 2.51. After waiting since August 2007 (see paragraphs 2.14 to 2.21 inclusive of this report) the Forum finally received a copy of Plan 06 Revision H through the post on the 25th February 2009 - only six days before the Public inquiry. Why, given our advice, was it not presented beforehand?
- 2.52. This plan gave the detail of the diverted path, S75, that interested parties wished to see. However, for reasons already explained, they were unaware of the plan's existence. For the first time the Forum, and presumably others, saw in this plan that the path traversed the slope obliquely to reduce the steepness (to 1 in 11). However, the Forum noted that the direct slope appeared to be very steep, possibly even at 45 degrees (Angle of Repose). Such a lateral slope on the grass surface specified would make the path slippery in wet weather and liable to erosion and poor conditions under foot. A better alternative is to stone surface the path after leveling it laterally to create a shelf to climb the slope.
- 2.53. That proposed change would have been a positive outcome **if** the Council had improved its communication and provided the detail at a more appropriate time.
- 2.54. However, Mr Jacobs, in cross examination at the Inquiry, claimed that a stoned path would provide missiles for pedestrians to throw onto the playing fields and at those participating in sport. When advised that the farm tracks were surfaced and would provide opportunity for missiles he claimed that the surface was compacted, implying that no loose material to throw is available. The Forum does not accept that point or the logic in not surfacing.
- 2.55. The Forum, at the Inquiry, reiterated its advice to the Council to withdraw the allegation that all objectors are using the Orders as a secondary attempt to stop the planning application from proceeding. The Forum further warned that,

“For the Council to do so is not helpful and conducive to reasonable debate but potentially descends the dignity of a Public Inquiry into a bad tempered slanging match.”

- 2.56. Sadly, the Inquiry did descend but not into a slanging match but a one sided assault by the Council's Counsel, Miss Clover, apparently upon Council instructions.
- 2.57. She repeatedly accused the Forum of being an 'Objector' but when cross examined by the Forum, Mr Jacobs could not cite a single point of objection.
- 2.58. Before concentrating on Miss Clover's points let us consider a point already made in paragraph 2.16 of this report. This relates to the planning officer, Mr David Holloway, providing a list to the Inquiry of five plan revisions, relating to the footpaths, that were submitted to the Council between the **6th December 2006** and the determination date of the **7th August 2007**. It has already been stated that none of these were drawn to the attention of the Forum at the appropriate times relative to their registration with the Council. All that now needs to be added is that Mr Holloway on cross examination by the Forum **did not claim** that these plans had been presented to the Forum and indeed had no record of any of them being presented to the Forum. Had they been presented to the Forum, regulations⁸ specify that they must be recorded and they were not.
- 2.59. Dudley's Barrister, Miss Clover, made two handwritten submissions during the Inquiry and some points made in these documents, leading to the claim for costs, are as follows. She wrote that,
- "The four Objectors present have raised a plethora, or to use Mr Jacobs' word, a deluge of objection and criticism with the Council."*
- 2.60. In defense, the Forum points out that the Planning Inspectorate and Mr Jacobs, in **all** written correspondence, including Mr Jacobs' 'Statement of Case' and 'Proof of Evidence', have formally identified the Forum as making 'Representation' and not as 'Objection'. That distinction between the two is significant because it arises from their own assessment and judgement of the Forum's submissions and participation. Miss Clover was wrong to persist with her claim that the Forum is an Objector. In cross examination of the Chairman of the Forum she was unable to get him to concede the point that she was trying to make. The Chairman answered all her points and advised Miss Clover on two occasions that it was pointless in pursuing that line of questioning because the Forum was advising and not objecting.
- 2.61. Mr Jacobs should now produce this alleged 'deluge' of objection and criticism from the four parties. Can he do that? Given what has been seen it appears not!
- 2.62. Miss Clover continues with allegations and states,
- "As far as the DBLAF Objection is concerned, the Council submits that this was clearly a formal objection, accepted as such by the Council and the Inspectorate. DBLAF complied with the Objector's timetable and have fully participated as such. There would have been no justification for doing so in a purely 'advisory' capacity. DBLAF has no advisory status to the Inspectorate, and had no reasonable basis to believe that it did. This point will be raised in the context of costs."*
- 2.63. It is difficult to know where to start with Miss Clover's above comment because she was mistaken in about every point of fact. However, the question remains as to whether the Inspector will be aware of her mistaken understanding? We shall have to wait and see. In this report we have already proven that both the Council

⁸ See Paragraph 1.10 of this report.

and the Planning Inspectorate have formally identified the Forum as making 'Representation' and not 'Objection'. Additionally, the timetable provided by the Inspectorate was not for 'Objector's' as Miss Clover erroneously claims but was for 'objection or representation' as clearly and unambiguously indicated on the Inspectorate's paperwork. Contrary to Miss Clover's erroneous and misinformed claim, the Forum has a '**statutory function**' in giving advice to the Planning Inspectorate (see para. 1.7 of this report for clarification) and therefore again contrary to her misinformed comments, the Forum has legal cause to **know** that it has that function. She noted an intent to raise her point, which is now proven to be a misconception, in the context of costs. Mistakenly doing so should have serious implications for the worthiness of her claim on behalf of the Council.

2.64. In the following comment Miss Clover not only again misrepresents our position but also indicates a lack of understanding of Green Belts. She states,

"DBLAF do not ever appear to have made any case based upon amenity or impact to the public. To the extent that that point now appears to have been introduced, in the context only of surfacing of the path, it appears to be conceded by DBLAF that this point alone would not outweigh 'necessity' and would not affect the Inquiry's decision to confirm the Orders. The Council will assess maintenance on an ongoing basis. Mr Jacobs has given reasons why surfacing proposed by DBLAF is inappropriate. It is also to be noted that this is the green belt, and proposed hard surfacing is inappropriate for that reason too."

2.65. Our point about the need for surfacing is both logical (see paragraphs 2.51 to 2.54 inclusive) and it is desirable to have the surfacing carried out at the applicant's cost in connection with implementation. Had the Forum been aware of the detail of the path route earlier, the point about surfacing would have been made long ago and could potentially have been addressed and incorporated. Miss Clover's comment against surfacing of the path on Green Belt grounds appears to indicate a lack of understanding of the function of Green Belts. Surfacing is not against Green Belt policy. A path surfaced with compacted 'MOT stone' will quickly blend in and match the surfaced farm tracks as well as being conducive to the public enjoying the amenity for many years with decent under foot conditions. It is in no-one's interest to have a muddy eroding 'grass' path. If the condition of such a path became treacherous, the public could legitimately climb over the fence into the sports field to circumnavigate the obstruction caused.

2.66. Miss Clover's point again misrepresents our advice contribution and it would appear that no amount of logical explanation would satisfy her requirements for she has erroneously decided that the Forum are objectors!

2.67. In Miss Clover's other hand written submission she covers much of the same ground in the quest for costs to be awarded against the Forum and the three objectors.

2.68. She makes the point that,

"That the objectors - particularly DBLAF have been happy to deluge the Council with emails and letters" and that "The work necessitated by the Forum's chosen means of intervention is manifest. Mr Jacobs estimated 50% of his time had been taken in dealing with the Forum alone."

- 2.69. Let us have a detailed breakdown of that unquantifiable and subjective accusation. The Council should, if it has such evidence, now substantiate that point and explain its significance. 50% is a nice round figure but of what? Let us see a written evaluation of that time element with hard facts to prove that it was inappropriate? Quite frankly the Forum does not accept the point made.
- 2.70. Miss Clover claims that,
- “... it was wholly unreasonable for each Objector to maintain that they did not know and could not have known the basic facts relating to the location of the diverted paths. Plan H was not the first opportunity by any means. DBLAF was an Objector to the planning application and treated as such. It is wholly unreasonable for the parties to pursue objections so vigorously and vociferously and yet fail to take obvious opportunities to ask for plans, information, advice or the like which would - as it now appears - have wholly answered the points they made.”*
- 2.71. An apology is in order to the reader because the Forum yet again has to remind everyone that the Forum was not and has not been an Objector and apart from Miss Clover's intervention, the Council and the Planning Inspectorate accepted that the Forum was not an Objector.
- 2.72. At various points in this lengthy report, clarification has been provided to show that the responsibility to provide information to the Forum rests firmly with the Council. Regulations require that documents brought to the attention of the Forum are recorded. In consulting the Forum, as in the cases of the planning application and the footpath Orders, the Council should have provided plans for the footpaths. Having said that the Chairman formally called for such plans on the 10th August 2007 - days after the planning application was passed - but the plans were not forthcoming. Then in February 2008 the Forum formally notified the Council of the need for such plans being made available for all parties in order to clarify the position. Again plans were not forthcoming. Mr Jacobs advised the Forum that the Council would resolve objections if possible. No real attempt appears to have been made to do that in order to potentially avert the need for the Public Inquiry. Mr Jacobs attended Forum meetings in the knowledge that we were advising of the need for more information but no plans were forthcoming. The planner, Mr Holloway provided a list of plans issued after we had advised in respect of the planning application but had no evidence that these were submitted to the Forum. How would the Forum know of their existence? Miss Clover incorrectly advised the Inquiry in respect of the changes of detail between plans G and H, without advising that the width of the diverted path S75 had been changed from 2 metres to 3 metres.
- 2.73. Plan H that Miss Clover claimed was not available until December 2008 and was unknown to the Forum or Objectors, at that time, dropped through the letterbox of the Chairman of the Forum six days before the Public Inquiry started.
- 2.74. Miss Clover concluded her quest for costs by advising the Inquiry of unspecified *“repercussions for the Forum and its Leaders”*. What on earth has the Forum done to warrant such a menacing and inappropriate threat? More specifically what significance did such a threat have in the circumstances of this Public Inquiry? The Council have been asked for an explanation and have been reminded that the Forum has hitherto not received any adverse criticism from the Council to justify such an outburst in any circumstances!