

SOUTHERN AREA PLANNING COMMITTEE

12 January 2017

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE WILTSHIRE COUNCIL DURNFORD PATHS 8, 25 AND 26 RIGHTS OF WAY
MODIFICATION ORDER 2016**

Purpose of Report

1. To:
 - (i) Consider the one representation and one objection received to the making of The Wiltshire Council Durnford Paths 8, 25 and 26 Rights of Way Modification Order 2016 made under Section 53 of the Wildlife and Countryside Act 1981.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination and that Wiltshire Council supports the confirmation of the Order as made.

The Order is appended at **Appendix 1**.

Relevance to Council's Business Plan

2. Working with the local community to provide a rights of way network which is fit for purpose, making Wiltshire an even better place to live, work and visit.

Background

3. In August 2015 Wiltshire Council received an application for an Order to modify the definitive map and statement by adding a bridleway and upgrading a short section of footpath No. 8 to the bridleway at Great Durnford.
4. The application was supported by the evidence of twenty eight users of the entire route and four users of part of the route. Users had used the route variously on foot, on a horse, on a bicycle and in one case, with a pony and trap. The use extended back to 1957 in one instance and other users had used it for varying lengths of time since then. All users reported encountering other users of the path.
5. The claimed route is a well defined route that is used by the landowner and tenant with vehicles and links bridleway Durnford 4 (Woodway) with footpath Durnford 8 and bridleway Durnford 10. It is essentially a north south route linking other routes over land between Great Durnford and the A345. The route as a defined feature is not thought to have historic origins and is only recorded in part by the Ordnance Survey in 1939.

6. The land over which it passes is in the ownership of the Durnford Estate.
7. The application relies on the acquisition of public rights by uninterrupted use that is 'as of right' (that is, without force, permission or secrecy), more particularly by deemed dedication under s31(1) of the Highways Act 1980.
8. The land forms part of the Durnford Estate which has passed from one owner to another on three occasions since the end of the last century (1999). Although there is no evidence before the Council that any owner of the land undertook any overt acts to indicate to the public that they had no intention to dedicate public rights over the land before 2004, the owners of the land in 2004, Julian Properties Corporation and Woodhouse Properties Inc., deposited a statement and plan for the purposes of s31(6) of the Highways Act 1980 with the Council. In 2005 they deposited a statutory declaration to the effect that they had not dedicated any further rights of way.
9. The purpose of s.31(6) is that it enables the owner of land to deposit a statement with the Council declaring what rights of way do exist over the land and then to make a statutory declaration outlining whether any rights of way have been dedicated over the land since the deposit was made. In the usual course of events the landowner has not dedicated any further rights of way and the declaration that they have no intention to do so may be taken as a break in any 20 year period of use, or, 'a calling into question'.
10. Although the deposit and statutory declaration were not made strictly in accordance with the Regulations (the plan was at the incorrect scale and the deposit statements were not dated) officers have taken the view that they still took effect and accordingly the relevant date for considering the user evidence is from 1984 to 2004, though strictly, if the date of the declaration is considered to have taken effect, the period would be 1985 to 2005. If the deposits and declarations are held not to have taken effect then the relevant period for the consideration of evidence is to be taken as 1995 to 2015 with the posting of notices and locking of the gates being the events that called the use into question.
11. Twenty seven witnesses used the route during the period 1984 to 2004 on foot, cycle and horse-back and twenty reported seeing other walkers and riders and six of these also reported seeing cyclists. Four people used the route throughout the twenty year period, two on foot and two on horse-back.
12. No incontrovertible evidence was adduced to defeat the claim that this use had been 'as of right' (that is, without permission, force or secrecy) during this period and an Order to record the claimed route as a bridleway was made. For the Council's decision to make this Order please see **Appendix 2**.
13. The Order was duly advertised and one representation and one objection were received.

Main Considerations for the Council

14. Representation Mr M Hazzard – witness No. 2

“The Wiltshire Council Durnford Paths Nos 8, 25 and 26 Rights of Way Modification Order 2016

With reference to the above footpaths, I would like it to be noted that I have not worked on Great Durnford Estate since 1980, but have continued to walk the paths regularly. Therefore I feel that my views should be given full consideration on this matter.”

15. Objection Mr and Mrs R Turner – landowners

“Wildlife and Countryside Act 1981 s.53 The Wiltshire Council Durnford Paths Nos. 8, 25 and 26 Rights of Way Modification Order 2016

We act for Mr Ross James Turner and Gemma Louise Turner (‘the Objectors’), who are registered proprietors of the Great Durnford Estate (‘the Estate’) and refer to your letter dated 7 September 2016 enclosing notice of the above-named Order (‘the Order’). The Order would, if confirmed, modify the definitive map and statement for the area including the Estate by adding two lengths of bridleway and upgrading part of a path (as more particularly described in the Notice of Modification Order and the Order itself).

This letter constitutes our clients’ objection to the Order and we would be grateful for confirmation of receipt.

The Objectors agree that there is no evidence of any historic rights of way along the routes to which the Order relates.

The Council considered, by means of the decision report dated 23 March 2013 (‘the DR’), that the date for calling into question the rights referred to in the Order should be taken to be 2004 and that the relevant period is therefore 1984 to 2004. The Objectors agree, whilst considering that the date for calling into question should be more precisely be identified as 24 January 2005, when statutory declarations were submitted to the Council. 24 January 2005 is the strictly relevant date in this context whether pursuant to s.31(6) of the Highways Act 1980 (‘the Act’) or as a matter of fact, since the evidence amply demonstrates, as a matter of fact, that the existence of these rights was called into question at that date. This makes little or no difference overall, however, and the Objectors agree that the appropriate period for consideration of the evidence is, practically-speaking, 1985 – 2004 inclusive.

Consideration of the volume and consistency of the alleged user of these routes over the relevant period on horseback or cycle has been substantially compromised or undermined by the Council’s reliance on inappropriate user evidence forms. The forms were clearly intended to enable the assessment of evidence in relation to one route only, not three. Understanding some of the completed forms involves a quite inappropriate exercise of interpretation, which should not be necessary. It is also considered that the Council adopted an

overly broad-brush approach to the consideration of the evidence available over the period concerned, particularly having regard to the shortcomings of the evidence base.

Attention is drawn to the absence of support or evidence in support of the Order from any of the many bodies consulted. A more appropriate, forensic examination of the evidence available in respect of five year periods within the relevant period will show that the evidence of actual user by the very low number of persons concerned is insufficient, on the balance of probabilities, to demonstrate actual enjoyment by the public as of right without interruption for the full period of 20 years within s.31 of the Act. A presumption of dedication does not therefore arise. The shortcomings of the evidence are both quantitative (very low numbers, infrequent user) and qualitative (e.g. evidence referring to part(s) of the route and walking only, contradicting other evidence).

The objectors will be represented at a public inquiry in due course, when they will expand on these objections.

We look forward to hearing from you and to receiving details of procedural arrangements in due course.”

Comments on the representation and objection

16. Members of the Committee are now required to consider the representation and objection received.
17. The Order must be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and the Members of the Committee must decide the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State, i.e.:
 - (i) that the Order be confirmed as made
 - (ii) that the Order be confirmed with modification
 - (iii) that the Order should not be confirmed

18. Representation

The representation was made by Mr M Hazzard who provided evidence of his own use of the path from 1957 to 2015. During a previous consultation the landowner had pointed out to the Council that Mr Hazzard was a former estate worker and that, for the period of his employment, his evidence of use should be disregarded. The landowner had suggested that Mr Hazzard’s employment ended in 1990 but Mr Hazzard has taken the opportunity of pointing out that it ended in 1980. Accordingly, all of his use within the relevant period (or indeed from 1980 onwards) may be considered not to be under any kind of licence (albeit an implied one) from his employer.

19. Objection

The objector raises three areas of objections:

- (i) Lack of support or evidence from any of the bodies consulted.

- (ii) Use of inappropriate user evidence forms and interpretation by a 'broad brush' approach.
- (iii) An insufficiency of evidence.

20. (i) **Lack of support or evidence from any of the bodies consulted**

It is usual for consultations on applications that are based on user evidence to receive very little in the way of responses from any party other than the landowner and this is the case here. A response offering general support would be an irrelevant response that a consultee would be aware was inappropriate and therefore be unlikely to submit. It is also considered unlikely that an organisation that operates nationally with perhaps a Wiltshire branch would have any members within the area affected by the application. It is accepted that they may have, but it has a low probability. Applications such as this one are generally local matters and when the Council conducted the initial consultation, a number of additional user evidence forms were submitted. The original application was submitted with twenty five user evidence forms and a further seven were submitted after the consultation. Officers consider this to be a demonstration of local interest, support and use of the claimed route.

21. (ii) **Use of inappropriate user evidence forms and interpretation by a 'broad brush' approach**

It is noted that in August 2015 the applicant submitted a total of four applications for definitive map modification orders in Great Durnford and although the applications were separately made witnesses had used one evidence form to cover more than one route in cases where they had actually used more than one route. However, in cases where this had occurred, a separate map was submitted. The other three applications have been refused by the Council and it is clear that the application that gave rise to the Order before the Committee was the dominant application in terms of evidence and repute.

22. Of the thirty two user evidence forms submitted, all witnesses had used the Order route or in the case of four, part of it. Thirteen had only submitted evidence in support of the Order route and had not used the other claimed routes. All thirty two had detailed their route clearly on plans that they had annotated themselves and had gone to considerable lengths in their user evidence forms to describe precisely which path they were referring to at many points in the form.

Examples include:

Witness 26 – describes the Order route as Path A "...a wide track which goes along the edge of the field. It is clearly used by farm vehicles..." and the other path as Path B "This is a track across an open field which links DURN 4 to the centre of the village. The path slopes down the hill towards the cricket pitch..." On the subject of use she records that she saw "horses and cyclists on Path A and only walkers on path B".

Witness 3 – describes the Order routes as "1 and 2 are open farm tracks which are used for farm vehicles" and "4, 5 and 6 are paths across fields with gates and stiles...". On the subject of use she records that she saw walkers and on 1, 2 and 3 horses and on 6 people tobogganing.

Witness 2 – describes the Order route as “Tracks no 1 and 2 on the map have always been open with no gates or barriers to prevent access” and that “3 and 4 are well used paths”. On the subject of use he records that he saw others “yes walking and horse riding on 1 – 2”.

23. Officers believe there is little or no ambiguity in the user evidence forms and although some of them require a careful analysis owing to the amount of information they contain, they test the matters arising as a result of the witnesses’ use. The user evidence forms have been in long term use by Wiltshire Council (for at least 15 years) and officers are not aware of any previous challenge to their propriety or interpretation, even including instances where users have provided evidence of having used multiple routes for a variety of uses.

24. **(iii) An insufficiency of evidence**

Officers are guided by the Planning Inspectorate’s Consistency Guidelines Section 5.

“Sufficiency

There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by ‘the public’ and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)”

“It was held in Mann v Brodie 1885 that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area.”

25. The user evidence forms submitted form a cogent, credible and consistent body of evidence when viewed in the context of the order route; that is, a rural route in an area of sparse habitation. The parish of Great Durnford had a population of 372 in 1981 and 348 in 2001. Given the rural spread of the parish the population of the village itself would inevitably have been even lower than that. In the event that users from outside of Durnford used the path (more likely with riders or cyclists) it would have been difficult for them to be identified or to have heard about the application.
26. Equally, the number of horse riders in the area will be substantially lower than the number of walkers and officers consider the equestrian use demonstrated by the user evidence forms is likely to represent the level of use for any accessible bridleway in the area.
27. Twenty four of the twenty seven users consider that the landowner was aware of their use and variously refer to, for example; “frequent meetings with previous owners”, “very often I would pass the previous owner”, “there are horse marks and droppings”, “there is evidence of horses”, “have met the previous owner on the path”, “hoof marks and droppings from horses are obvious”, “the

gamekeeper has seen me use it”, “frequently chatted to the keeper”, “yes often seen the game keeper”, “we would often ride along the track while the fields were being ploughed”, “have seen many workers and tractors working alongside the track whilst riding”.

Safeguarding Considerations

28. There are no safeguarding considerations associated with the making of this Order.

Public Health Implications

29. There are no identified public health implications which arise from the making of this Order.

Corporate Procurement Implications

30. In the event this Order is forwarded to the Secretary of State there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 34 to 37 of this report.

Environmental and Climate Change Considerations

31. There are no environmental or climate change considerations associated with the making of this Order.

Equalities Impact of the Proposal

32. Matters relating to the equalities impact of the proposal are not relevant considerations under s.53 of the Wildlife and Countryside Act 1981.

Risk Assessment

33. There are no identified risks which arise from the making of this Order. The financial and legal risks to the Council are outlined in the “Financial Implications” and “Legal Implications” sections below.

Financial Implications

34. The making and determination of Orders under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.
35. Where there are outstanding objections to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making and confirmation of the Order. The order will then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500 and £1,000 to £3,000 where the case is determined by local public inquiry with legal representation (£300 to £500 without).

36. Where the Council objects to the Order, (i.e. it no longer supports making it) the Order must still be forwarded to the Secretary of State for determination. As in the case of a supported Order, the possible processes and costs range from £200 to £3,000 as detailed at paragraph 35 above.

Legal Implications

37. Where the Council does not support the Order, clear reasons for this must be given and must relate to the evidence available. The applicant may seek judicial review of the Council's decision if this is seen as incorrect or unjust by them. The cost for defending this may be up to £50,000.

Options Considered

38. Members may resolve that:
- (i) The Order should be forwarded to the Secretary of State for determination with a recommendation as follows:
 - (a) The Order be confirmed without modification
 - (b) The Order be confirmed with modification
 - (c) The Order not be confirmed.

Reason for Proposal

39. Unless the objection and representation are withdrawn the Order must be forwarded to the Secretary of State for Environment Food and Rural Affairs for determination. The objection fails to adduce any further evidence for the Council to consider and relies instead upon challenging the interpretation of the evidence and of the sufficiency of use.
40. The Order was made on the grounds that the application showed that, on the balance of probabilities, public bridleway rights had been acquired over the claimed route and, in terms of the evidence before the Council, nothing has changed since that decision. Officers continue to say that in the context of a rural route some distance away from the main village settlement there is a sufficiency of evidence of use for the period 1984 – 2004 and, in the event that an Inspector considers that the s.31(6) deposit not made strictly in accordance with the Regulations had not taken effect, there is an even greater weight of evidence for the period 1995 to 2005.
41. It is usual in cases which rely upon user evidence that the Planning Inspectorate holds a public inquiry before determining the Order. This process allows evidence to be tested under cross examination to enable the Planning Inspector to form a view on its truthfulness, cogency and consistency.

Proposal

42. That “The Wiltshire Council Durnford Paths Nos. 8, 25 and 26 Rights of Way Modification Order 2016” is forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it is confirmed as made.

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Rights of Way Officer – Definitive Map

The following unpublished documents have been relied on in the preparation of this Report:

None

Appendices:

- Appendix 1 - Order and Plan
- Appendix 2 - Decision Report
- Appendix 2A - Summary of User Evidence