

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL PARISH OF BOX 107A, 107B and 107C 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 Parish of Box 107A, 107B and 107C 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 with the notification 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. On 1 September 2015 Wiltshire Council received an application from the Springfield and Clift Residents Association for a definitive map modification order (DMMO) to add public footpaths to the definitive map over land at Leafy Lane, Box.
4. The application is supported by evidence of use by 42 members of the public who have used the claimed routes for varying periods of time from 1970 onwards. They claim to have used the paths on foot in a manner that is 'as of right', that is, without permission, without force and without secrecy.
5. The claimed routes lead through woodland from three entry points on Leafy Lane. The routes from the three entry points variously converge and follow the northern boundary of the woodland before leading south along the boundary of a field currently owned and used by Leafy Lane Playing Fields (LLPF) Ltd.

6. Prior to 1998 all of the land was owned by a Mr Padfield who leased some of the land to the Royal Air Force for use as a sports field. Some of the land was leased or tenanted and was used for grazing cows. In 1998 Mr Padfield sold all of the land over which the claimed routes lead to LLPF Ltd who has divided the land into three distinct areas; playing fields and clubhouse, woodland and a separate pathway linking Boxfields Road with the woodland area via a field perimeter path.
7. Wiltshire Council consulted on the application and decided that the application formed at least a reasonable allegation that public rights on foot are reasonably alleged to subsist and accordingly an Order to record the routes as public footpaths was made. The Council's decision report to make the Order is appended here at **Appendix 2** and the relevant legislation is detailed at sections 2 and 11 therein.
8. The Order was duly advertised and attracted one representation in support of the Order and one objection to the Order.
9. Unless the representation and objection are withdrawn, Wiltshire Council may not proceed with confirming the Order which must now be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination.

### **Main Considerations for the Council**

10. **Representation** Mrs K Barstow 27 September 2016

*“Having seen the letter written to you regarding the footpath along the top of the field, I noticed that Mr Mullins says that they have closed off that path during the Football Tournament usually held in early June. I can say that my husband and I have walked along that pathway many of the years that the tournament has been going on and have never been stopped or asked not to use the path. This year we walked along that path, chatted to the people selling the programmes then walked on, at no time were we asked politely or otherwise not to use the path, we most certainly never had to barge our way through.”*

11. **Objection** Foot Anstey acting for Leafy Lane Playing Fields Ltd 24 October 2016

The objection is appended here at **Appendix 3**.

12. The objection raised a number of issues which the applicant has addressed in a response received on 1 December 2016. This is appended here at **Appendix 4**.

### **Comments on the representation and objection**

13. Members of the Committee are now required to consider the representation and objection received.
14. The **representation** challenges the case of the objector with regard to the claim that the Order route was obstructed once a year by programme sellers and that that was sufficient to cause an interruption in the public use so that a dedication either by statute (s.31 of the Highways Act 1980) or at common law cannot occur.

15. It is agreed that an effective interruption may be the regular closing of a route (for example the locking of a gate for one day of the year). However, the interruption has to be sufficient to bring to the public's attention that their use was interrupted and that their right to use the way was being challenged. The High Court has recently held that preventing access to a shop on a day when it was not open (the locking of a gate on Christmas Day) was insufficient to form an interruption for this reason. *Ali v Secretary of State for Environment Food and Rural affairs [2015] EWHC 893*
16. It is clear from Mrs Barstow's response that she was never stopped from using the way by programme sellers and nor was she challenged. No other users report being challenged and in the applicant's response at **Appendix 4** (annex D) it is clear that when the applicant himself walked the Order route on 7 June 2015, the day of the annual tournament, that he was not challenged and nor did he encounter anyone selling programmes.
17. Additionally, it is doubtful that the programme sellers would have been on site for all of the hours of daylight. Since it is known that dog walkers especially frequent footpaths early in the morning and in the evening, for any interruption to come to the attention of the public it would have been necessary to close the path for at least 16 hours at this time of the year. It is also a consideration that people walking dogs or people seeking a quiet walk may actually avoid the path on the day of the tournament and would hence be unaware of any challenge, as would people walking in the woods only.
18. Officers consider that any challenge based on the actions of the programme sellers is insufficient to challenge the public's use and would not form an interruption to any use.
19. The **objection (Appendix 3)** is based on a number of points which are considered below.
20. For Section 31 of the Highways Act 1980 to apply it is necessary to identify a 20 year period in which to examine the relevant evidence. This is known as the "relevant period" and it is considered that there are two relevant periods for consideration. The first ends with the sale of the land to LLPF Ltd (1978 to 1998) and the second ends with the making of the application itself (1995 to 2015). Although evidence relating to the use of the paths is relatively consistent throughout both periods it is clear that the change in ownership, and hence use of the field and woodland by the new owner, does mean that some considerations may only apply for one of the two relevant periods.

21. **1978 – 1998**

The land was owned by Mr Padfield during this time. He states that there were no gates or stiles and that access must have been by force. The objector adduces a statement from Mr Hancock at 2.3.2 "*[from 1968] no one used the wood for recreation...*" but contradicts it with one from Mr Beattie who vaguely recalls going to the woods with his older brothers and sisters in the period 1954 to 1964 and more clearly as a teenager in the mid to late 1960s and early 1970s "*spending many of the school holidays playing in the woods making dens and having lots of fun*". Mr Beattie recalls having to climb a fence to get into the

wood and of being chased out by 'the farmer'. However, Mr Beattie's use of the woods as a school child and teenager pre-dates both relevant periods and may well reflect the situation with the land at that time. There is no evidence to suggest that anyone was challenged in either relevant period. Additionally, photographs supplied by the applicant at Annex K, **Appendix 4** show that there was at least one stile into the woods (Order plan point B) in 1996 and at Annex H a gate and gap, side gate or stile at Order plan point C. The squeeze gap at A is long standing and contemporary with the concrete posts and the stone stile to the east of A in the wall is a historic feature pre-dating 1950 (when a footpath was diverted from the field).

22. It is further noted that Ministry of Defence (MOD) housing to the north of the wood has a gate into the wood and a stile existed at point B on the Order plan which enabled access to the NAAFI on the opposite side of the road. A stile in the fence line between the wood and the field also existed (presumably to enable access to the sports ground when it was used by the MOD) (see **Appendix 4** Annex J. The land was demonstrably porous despite the recollection of Mr Padfield that it was not.
23. In 1995 Mr Padfield wrote to Mrs Hair (Chairman of the Rudloe Action Group) stating that *"we had an understanding that I would allow residents continued access to the land, in return I had hoped to have some co-operation over the development of football facilities"*.
24. Mrs Hair responded in writing to Mr Padfield after a site meeting with him. At point 4 she stated *"If a decision is made to go ahead with football pitches, our community group will co-operate with regard to access to and on the area, e.g. signposts or possible leaflet to householders."*
25. If Mr Padfield's approach to the Rudloe Action Group is held to be a grant of permission and a demonstration of the landowner's lack of intention to dedicate then this would amount to a calling into question of the public right and another relevant period (1975 to 1995) would need to be considered.
26. No evidence has been submitted relating to the nature of the "understanding" that Mr Padfield thought he had with the Rudloe Action group and there is no evidence as to the size and scope of this group. It is also clear that any "understanding" related to the development of football facilities and did not extend to the woodland.
27. It is an essential requirement that any intention of the landowner not to dedicate a right of way is brought to the attention of the relevant audience, that is, the users of the path. In relation to the proper meaning of the words in s31(1) *"there is sufficient evidence that there was no intention ... to dedicate ..."*, the leading decision is that of the House of Lords in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28, [2008] 1 AC 221*. Lord Hoffmann said (paragraph 32):

*"... 'intention' means what the relevant audience, namely users of the way, would reasonably have understood the landowner's intention to be"*.

Lord Hoffmann then said (paragraph 33):

*“[section 31(1)] requires ‘sufficient evidence’ that there was no such intention [to dedicate]. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner’s consciousness ... the objective acts must be perceptible by the relevant audience”.*

In the same case Lord Hope said (paragraph 57) that:

*“[the landowner] must take steps to disabuse the public of the belief that the way has been dedicated to public use. ... the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso”.*

Lord Scott, also in the same case, said (paragraph 68) that:

*“Evidence ‘sufficient’ to displace the statutory deemed conclusion of dedication should at least establish a positive intention”.*

28. In any event, if Mr Padfield’s “understanding” was to be held to represent the granting of permission and an interruption to use that is ‘as of right’ there remains a sufficiency of evidence for the relevant period 1975 to 1995.
29. The objector considers that the evidence of use of the paths is unpersuasive as the user evidence forms fail to differentiate between use before and after 1999 (when the field perimeter path was fenced off from the wider field).
30. It is agreed that users generally fail to record changes such as the fencing of the perimeter path or perhaps the dilapidation of a stile or fence with time. However, this could be indicative of how little the changes affected their use of the paths. Users were accustomed to following the perimeter of the field from Boxfield Road to the woodland (as requested on the MOD signs) so why would the erection of the fence and subsequent hedge planting in 1999 have made any difference to them? Photographs taken from the perimeter path prior to 1999 confirm that it was in use (**Appendix 4**). It is clear that some users did stop using the cross field paths at this time (Mrs Barstow is one) but these routes are not the subject of this application.
31. The objector questions the motivation of the applicant and considers that the evidence has been produced in response to a campaign rather than on the basis of factual recollection and is therefore partial and has been given undue weight by the Council.
32. There is no requirement for Statements of Fact or Statutory Declarations in this process and it is usual for applications to be made to the Council in the same manner that this one is. There is always a motivation for making these applications and it is equally usual for applicants to try to locate users of the path. In so many cases people have a nodding acquaintance with other users but have little idea of who they are or how to contact them and accordingly it is again quite usual for evidence to be actively sought rather than passively given.

33. Any shortcomings in evidence, from any party, would, in any event, be revealed under cross examination at a subsequent public inquiry.
34. The objector considers that 'well worn tracks' did not arise until the 1980s, late in the first relevant period and that this is supported by photographs of the playing field taken in 1998 (**Appendix 2A** – sub appendix 8). It is also contended that the woodland was overgrown.
35. Officers are unconvinced that these photographs would have shown a walked path as the camera angle and distance is such that only the fence, grass and shrubs can be seen behind the goals. In **Appendix 4** the applicant has provided photographs of the woodland in 1985 (it is far from overgrown) and of the field edge in 1998 (showing stile and MOD notice on the route at point A) and in 1996 which may show a walked path. Additionally, he has included photographs taken from the field edge path in 1996 and 1997. The photograph taken in 1999 after the fence had been put in place by LLPF Ltd shows that a trodden path was clearly well established by this time. Photographs of paths in the wood taken in 1993, 1996, 1997, 1998 and 1999 are also included.
36. There is some evidence that Mr Padfield erected signs in the woodland though it is not known where they were sited, what they said or the periods they were in place or maintained for. There is evidence that the MOD erected signs stating that "all dogs must be kept on a lead and only walked around the perimeter of the station sports field" and that these signs were in place in 1998. There is also evidence of signs being erected by LLPF Ltd at entrances to the woodland. Although it is known what they said, they were not maintained and failed to be readable at some point.
37. For a sign to be effective in defeating s.31(1) of the Highways Act 1980 it must clearly indicate the land owners lack of intention to dedicate a public right of way. Signs stating "private land" or "private road" have been held by the courts not to apply. A sign granting a revocable permission may be taken as intention not to dedicate.
38. Officers consider that none of the above signs sufficiently convey to the users of the path that their use is by permission or that the landowner has no intention to dedicate a public right of way. The LLPF Ltd signs welcome public access to some areas, thus making it clear that the public should not use the other areas and are very clear about risks associated with dog fouling.
39. LLPF Ltd has, amongst its stated objectives, an objective to "*provide for the inhabitants of Corsham and surrounding areas in the interests of social welfare facilities for the recreation and leisure time occupation with the object of improving their conditions of life*" and "*to advance and improve the education and physical, mental and social well being of the community by the provision of sporting and recreation amenities, grounds and facilities of all kinds.*" NB there is a misquote of these stated objectives in the objectors submission 3.21.
40. While it may be argued that these objectives mean that use by the public from 1999 to 2015 has been 'by right' and not 'as of right', it is clear from LLPF Ltd's proposed sale of the woodland that they do not consider this to be an area provided as part of their statutory objectives. The woodland is clearly

superfluous and is to be disposed of. Additionally, they make clear in their letter to the Parish Council of 11 February 2013 (**Appendix 2A**) that the path at the field edge *“It is not a thoroughfare but an access path only to the rear of Leafy Lane Playing Fields Ltd.”*

41. Although the objector has produced minutes demonstrating that it had encountered problems with dogs around the playing areas, that a gate needed replacing, that private and ‘no dogs’ signs were to be investigated, that Box Highlands School had “used the woodland” without permission and that a fence had been cut, it is not clear whether any of these incidents relate to the claimed path. It is known that the metal fencing around the woodland was severely damaged by falling trees in 1990 and this may have been the reason it was removed.
42. The objector questions whether the path is two metres wide. It is agreed that parts of the path may have restrictions and if the Inspector is minded to confirm the Order they are empowered to alter the recorded width.
43. The objector states at 7.1 that they will make a claim under Section 28 of the Highways Act 1980 as a result of the depreciation value of its property. The compensation so described does not apply to orders made under s.53 of the Wildlife and Countryside Act 1981. Only in the event of unreasonable behaviour by any party at a public inquiry may any party seek to reclaim costs.
44. The objector also considers that if the Order is confirmed they will apply for a diversion order to divert the paths to the perimeter of the property. Wiltshire Council would accept such an application, which it has a power to process, subject to the necessary legal tests being met.

### **Safeguarding Considerations**

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

### **Public Health Implications**

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

### **Corporate Procurement Implications**

47. 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 51 to 53 of this report.

### **Environmental and Climate Change Considerations**

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

## **Equalities Impact of the Proposal**

49. Matters relating to the equalities impact of the proposal are not relevant considerations in accordance with s.53 of the Wildlife and Countryside Act 1981.

## **Risk Assessment**

50. There are no identified risks which arise from the confirmation of 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**

51. 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.
52. 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 the Planning Inspectorate by way of 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).
53. Where the Council objects to the Order 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 52 above.

## **Legal Implications**

54. Where the Council does not support confirmation of the making of 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 by them. The cost for this may be up to £50,000.

## **Options Considered**

55. 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 should not be confirmed.



## **Reason for Proposal**

56. Unless the objection and representation is withdrawn the Order must be forwarded to the Secretary of State for Environment Food and Rural Affairs for determination.
57. It is considered that nothing in the objector's submissions demonstrates that, in spite of the landowners' stated intention not to dedicate a public right of way, that they brought that lack of intention to the attention of the relevant audience, that is, the users of the path.
58. There is evidence that since at least the 1970s the site has been porous, there was a squeeze gap and stone stile into the field at the Boxfields Road end (point A), there was a stile into the woods, there was a gate from the MOD housing into the wood and there was at least one gate and one stile leading from the woodland into Leafy Lane. The route from the MOD housing gate to the former NAAFI is an obvious and attractive one. Furthermore, signs pre-dating LLPF Ltd ownership encouraged people to walk around the perimeter of the field.
59. There is correspondence relating to public access to the area from 1995 onwards between the landowner and both the Rudloe Action Group and the Parish Council but it is unclear as to whether this relates to the claimed routes and the focus of the attention appears to be, justifiably for an organisation promoting playing fields, on keeping the public and dogs away from football pitches rather than away from the site entirely.
60. Evidence of challenges pre-date the relevant period and evidence relating to the placement and the wording of signs is vague in the period pre-dating LLPF Ltd's ownership and insufficient to satisfy s.31(3) of the Highways Act 1980 during LLPF Ltd's ownership.
61. The testimony of users of the path has been questioned by the objector and this evidence may be tested, along with the objector's evidence at a public inquiry. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton* [1994] 68 P&CR 402 Owen J "*In a case where the evidence of witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.*"
62. In making this Order the Council considered that public rights on foot are reasonably alleged to subsist. It is considered that no further evidence has been adduced to alter either that decision or to conclude that, on the balance of probability, a public right has not been acquired. Clearly the testing of witnesses will be key to the final decision in this case.

## **Proposal**

63. That “The Wiltshire Council Parish of Box 107A, 107B and 107C 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.

### **Tracy Carter**

Associate Director – Waste and Environment

Report Author:

### **Sally Madgwick**

Rights of Way Officer – Definitive Map

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### **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 - Landowner’s response to initial consultation
- Appendix 2B - User evidence summary
- Appendix 3 - Objection
- Appendix 4 - Applicant’s response to objection