

SOUTHERN AREA PLANNING COMMITTEE

2 FEBRUARY 2017

WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53

**THE WILTSHIRE COUNCIL (PARISH OF DONHEAD ST ANDREW) PATH NO. 27
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2016**

Purpose of Report

1. To:
 - (i) Consider objections received to the making of “The Wiltshire Council (Parish of Donhead St Andrew) Path No. 27 Definitive Map and Statement Modification Order 2016”, under Section 53 of the Wildlife and Countryside Act 1981.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

Relevance to the Council’s Business Plan

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

Background

3. Wiltshire Council received an application dated 15 May 2015 and made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the parish of Donhead St Andrew. The application is made by Donhead St Andrew Parish Council on the grounds that public footpath rights can be reasonably alleged to subsist, or subsist over the claimed route, based on user evidence and some documentary evidence and should be recorded within the definitive map and statement of public rights of way, as such.

4. The claimed route is located in the parish of Donhead St Andrew which lies between Shaftesbury (Dorset) to the west and Salisbury to the east (please see location plan at **Appendix A**). The claimed route crosses a field known as the Mansfield, to the east of Beauchamp House and forms a link between two recorded footpaths and two former mills, (Kelloways Mill and a mill formerly known as Ricketts Mill). The claimed route leads generally north-east, following the eastern field boundary, from its junction with Footpath No. 4 Donhead St Andrew, crossing the fence line via a stile and then continuing to its junction with Footpath No. 5. The surface of the route is laid to grass.
5. The northern and central parts of the claimed route lead over land in the ownership of Wardour Ltd (Mrs Anne Shaw and Mr Colin Shaw), who have owned this land since 2012 and the southern part of the route passes over land in the ownership of Mr and Mrs Shepherd (landowners since 2011).
6. Wiltshire Council undertook an initial consultation regarding the proposals on 8 September 2015. The objections and representations received are summarised at Appendix 1 of the decision report attached to this report at **Appendix B**.
7. Following its investigation of all the available evidence, Officers of Wiltshire Council produced a decision report in which a recommendation was made to Senior Officers that a footpath should be added to the definitive map and statement of public rights of way, on the grounds that a right for the public on foot can be reasonably alleged to subsist (please see decision report at **Appendix B**). Senior Officers approved this recommendation on 22 July 2016.
8. Wiltshire Council subsequently made a definitive map modification order to add the claimed footpath to the definitive map and statement of public rights of way, as Footpath No. 27 Donhead St Andrew (please see definitive map modification order at **Appendix C**). Notice of the making of the Order was duly advertised, served on interested parties (including landowners) and posted on site.
9. Following the making of the Order, Wiltshire Council received nine objections to the making of the Order, as follows:
 - (1) Marcus and Johanna Shepherd – e-mail correspondence dated 7 October 2016
 - (2) Claire Macdonald – e-mail correspondence dated 9 October 2016
 - (3) David Pitman – correspondence dated 10 October 2016
 - (4) John Graham – correspondence dated 12 October 2016
 - (5) Paul Farrant – e-mail correspondence dated 12 October 2016

- (6) H R Graham – correspondence dated 12 October 2016
- (7) Anne and Colin Shaw – correspondence dated 14 October 2016
- (8) Margaret Pitman – e-mail correspondence dated 15 October 2016
- (9) John Barton – e-mail correspondence dated 15 October 2016

The objections and representations are included in full at **Appendix D** and Officers comments on the objections are included at **Appendix E**.

10. Due to the objections outstanding, the Order now falls to be determined by the Secretary of State for the Environment, Food and Rural Affairs. Members of the Committee are therefore respectfully requested to consider the objections and representations received against the evidence already before the Council in this case and the legal tests for making a definitive map modification order, under Section 53 of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980, in order to determine the Wiltshire Council recommendation to be attached to the Order when it is forwarded to the Secretary of State for determination.

Main Considerations for the Council

11. Section 53(2) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the definitive map and statement of public rights of way under continuous review. The requirements of this section of the Act and Section 31 of the Highways Act 1980, which refers to the dedication of a way as a highway presumed after public user of 20 years, are outlined at part 8 (pages 10–14) of the decision report attached at **Appendix B**.
12. The Order is made under Section 53(3)(c) of the Wildlife and Countryside Act 1981, based on:

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-

 - (i) *that a right of way which is not shown in the definitive map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to section 54A, a byway open to all traffic.”*
13. Evidence is the key and therefore valid objections to the making of the Order must challenge the evidence available to the Surveying Authority. The Authority is not able to take into account other considerations, such as the suitability of the way for use by the public, environmental impacts and the need for the claimed route.

Comments on the Objections

14. The Officers comments on the objections are included in full at **Appendix E**. It is considered that in this case, the objections do not contain sufficient counter evidence which would lead Officers to reconsider their interpretation of the evidence and their determination of the application.

15. In this case, however, there are some points of conflicting evidence and the Order has been made only on a reasonable allegation that public rights for the public, on foot, subsist over the order route. The case of *R v Secretary of State for the Environment, ex p. Bagshaw and Norton, Queen's Bench Division (Owen J.): April 28, 1994*, deals with the applications of both Mrs Norton and Mr Bagshaw, who had applied to their respective County Councils for Orders to add public rights of way to the definitive maps and statements, based upon witness evidence of at least 20 years uninterrupted public user, where the Councils determined not to make Orders. On appeal, in both cases, the Secretary of State considered that he should not direct the Councils to make the Orders. At judicial review, Owen J allowed both applications; quashed the Secretary of State's decisions and held that:

“(1) under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, the tests which the county council and the then Secretary of State needed to apply were whether the evidence produced by the claimant, together with all the other evidence available, showed that either (a) a right of way subsisted or (b) that it was reasonable to allege that a right of way subsisted. On test (a) it would be necessary to show that the right of way did subsist on the balance of probabilities. On test (b) it would be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. Neither the claimant nor the court were to be the judge of that and the decision of the Secretary of State was final if he had asked himself the right question, subject to an allegation of Wednesbury unreasonableness. The evidence necessary to establish that a right of way is reasonably alleged to subsist is less than that needed to show that a right of way does subsist. The Secretary of State had erred in law in both cases as he could not show that test (b) had been satisfied.”

16. Owen J also held that:

“(2) In a case where the evidence from 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.”

17. It is notable in the Norton case that, the Secretary of State “...notes that the user evidence submitted in support of a presumption of dedication is limited to four persons claiming 20 years of vehicular use as of right; he must weigh this against the statements from the landowner, supported by 115 signed forms and the Layham and Polstead Parish Councils, indicating the use of the route has been on a permissive basis and that active steps to prevent a presumption of dedication arising have been taken...”. Parallels may be drawn between the conflict of evidence in the Norton case and the Donhead St Andrew case. In both the Norton and Bagshaw cases Owen J concluded that:

“If, however, as probably was so in each of these cases, there were to be conflicting evidence which could only be tested or evaluated by cross-examination, an order would seem likely to be appropriate.”

18. Therefore, in such a case concerning the balancing test to be applied to the evidence, the authority is correct in making the Order on the grounds that it is reasonable to allege that a right of way for the public on foot subsists. Where the objectors have not submitted sufficient evidence that would lead Officers to reconsider their interpretation of the evidence and their determination of the application, the Committee should resolve to support the making of the Order and recommend to the Secretary of State that the Order be confirmed without modification. The only way to properly determine the Order is to see the witnesses at a public inquiry where they may give evidence in chief and their evidence may be tested through the process of cross-examination.

Overview and Scrutiny Engagement

19. Overview and Scrutiny Engagement is not required in this case. The Council must follow the statutory process which is set out under Section 53 of the Wildlife and Countryside Act 1981.

Safeguarding Considerations

20. Considerations relating to safeguarding anyone affected by the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

Public Health Implications

21. Considerations relating to the public health implications of the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

Corporate Procurement Implications

22. Where an Order is forwarded to the Secretary of State for determination, there are a number of opportunities for expenditure to occur and these are covered at paragraphs 26 to 29 of this report.

Environmental and Climate Change Impact of the Proposal

23. Considerations relating to the environmental or climate change impact of the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

Equalities Impact of the Proposal

24. Considerations relating to the equalities impact of the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

Risk Assessment

25. Wiltshire Council has a duty to keep the definitive map and statement of public rights of way under continuous review and therefore there is no risk associated with the Council pursuing this duty correctly. Evidence has been brought to the Council's attention that there is an error in the definitive map and statement which ought to be investigated and it would be unreasonable for the Council not to seek to address this fact. If the Council fails to pursue its duty it is liable to complaints being submitted through the Council's complaints procedure, potentially leading to a complaint to the Ombudsman. Ultimately, a request for judicial review could be made with significant costs against the Council where it is found to have acted unlawfully.

Financial Implications

26. The determination of definitive map modification order applications, and the modifying of the definitive map and statement of public rights of way, accordingly are statutory duties for the Council. Therefore, the costs of processing such Orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.
27. Where objections are received to the making of the Order and not withdrawn, the Order falls to be determined by the Secretary of State and cannot simply be withdrawn. The Order will now be determined by an independent Inspector (appointed on behalf of the Secretary of State) by written representations, local hearing or local public inquiry, each of which has a financial implication for the Council.

28. Where 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. A public inquiry could cost between £1,500 and £3,000, if Wiltshire Council supports the Order (i.e. where legal representation is required by the Council) and around £300 to £500 where Wiltshire Council no longer supports the making of the Order (i.e. where no legal representation is required by the Council and the case is presented by the applicant).
29. Where the Council makes an Order to which it receives objections, it may potentially be liable to pay subsequent costs if the Planning Inspectorate finds that it has acted in an unreasonable manner at the public inquiry. However, costs awards of this nature are rare, but may be in the region of up to £10,000.

Legal Implications

30. Where the Council no longer supports the making of the Order, clear reasons for this must be given, as the applicant may seek judicial review of the Council's decision if it is seen by them to be incorrect or unjust.
31. An Order to which objections have been made is determined by the Secretary of State and not Wiltshire Council. Therefore, any challenge to that decision is against the Secretary of State (although the Council would be considered by the Court to be an "interested party" in any such proceedings).

Options Considered

32. Members of the Committee should now consider the objections received and the evidence as a whole, in order to determine whether or not Wiltshire Council continues to support the making of the Order under Section 53(2) of the Wildlife and Countryside Act 1981. The making of the Order has been objected to, therefore the Order must now be submitted to the Secretary of State for determination. Members should determine the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State. The options available to members, having considered the available evidence and the objections received, are as follows:
 - (i) Members may resolve that Wiltshire Council continues to support the making of the Order, based on its consideration of the available evidence, in which case the Committee should recommend that the Order be confirmed without modification;

- (ii) Members may resolve that Wiltshire Council continues to support the making of the Order with modification based on its consideration of the available evidence, in which case the Committee should recommend that the Order be confirmed with modification;
 - (iii) Members may resolve that Wiltshire Council no longer supports the making of the Order, on its consideration of the available evidence, in which case the Committee should recommend that the Order is not confirmed with clear reasons for this resolution.
33. Please note that all references to the available evidence above, now includes the submissions made at the formal objection period (please see correspondence at **Appendix D**), as well as the evidence considered within the decision report dated 18 July 2016, (included at **Appendix B**). Members should note that the evidence in full is available to be viewed at Wiltshire Council's Rights of Way Offices, Ascot Court, Trowbridge).

Reason for Proposal

34. The Order has been made on the grounds that there is sufficient evidence for it to be reasonably alleged that a right of way for the public on foot, subsists.
35. Officers have fully considered the evidence submitted within the objections; however, insufficient evidence has been submitted by the objectors which would lead Officers to amend their determination of the application (comments on the objections are set out in full at **Appendix E**).
36. There is conflicting evidence in this case; however, Officers consider that the Council is correct in making the Order and it should now be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification. Witness evidence may then be presented in chief at the public inquiry and tested through the process of cross-examination.

Proposal

37. That "The Wiltshire Council (Parish of Donhead St Andrew) Path No. 27 Definitive Map and Statement Modification Order 2016", be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

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

Witness evidence

Correspondence received as part of the initial consultation

(The above-mentioned documents are available to be viewed at the offices of Rights of Way and Countryside, Wiltshire Council, Unit 9, Ascot Court, Trowbridge.)

Appendices:

Appendix A – Location Plan

Appendix B – Decision Report (18 July 2016)

Appendix C – “The Wiltshire Council (Parish of Donhead St Andrew) Path No.27 Definitive Map and Statement Modification Order 2016”

Appendix D – Correspondence received in the formal objection period

Appendix E – Comments on objection