WILTSHIRE COUNCIL **AGENDA ITEM NO.**

EASTERN AREA PLANNING COMMITTEE

5 OCTOBER 2017

WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL (PARISH OF URCHFONT) PATH NO. 51 DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2015

Purpose of the Report

1. To:

   (i) Consider the objections and representations received to the making of The Wiltshire Council (Parish of Urchfont) Path No. 51 Definitive Map and Statement Modification Order 2015.

   (ii) Recommend the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Relevance to the Council's Business Plan.

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

Background

3. In January 2014 Urchfont Parish Council applied to Wiltshire Council for a definitive map modification order to add a footpath to the definitive map and statement from the Top Green to the Urchfont Recreation Ground/Playing Field. Twenty seven completed user evidence forms were submitted in support of the application. The forms provided evidence of use of the claimed path from 1969 until December 2013.

4. Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires Wiltshire Council, as the surveying authority, to keep the definitive map and statement under continuous review and process applications such as the one made by Urchfont Parish Council. Pursuant to this duty, officers investigated and considered the evidence from all interested parties concerning the application and produced a report which included the relevant legal considerations to be taken into account in determining it. The report, which is attached at **Appendix 2**, recommended the making of an Order in line with the application. The appendices to the decision report are appended to this report as **Appendices 2(a) to 2(d)** inclusive.

5. The Order was made on 6 October 2015 and when notice was served and published 79 objections were received to it and 27 representations made in its support. As a result of the objections to the Order, which remain unresolved, it must be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination with comments on the objections and representations and a recommendation.

Main considerations for the Council

6. The main issue is whether the evidence shows, on the balance of probabilities, that public footpath rights exist over the route described in the Order attached at **Appendix 1.**

7. The relevant part of the statutory test for confirmation of modification orders is set out in Section 31 of the Highways Act 1980:

"31(1) Where a way over any land, other than a way of such character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there is no intention during that period to dedicate it.

(2) The period of 20 years referred to in sub section (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes-
(a) has erected in such manner as to be visible to persons using a way a notice inconsistent with the dedication of the way as a highway, and
(b) has maintained the notice after the 1st January 1934, or any date on which it was erected,
the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council-
(a) a map of the land on a scale of not less than 6 inches to 1 mile, and
(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time-
(i) within ten years from the date of the deposit, or
(ii) within ten years from the date on which any previous declaration was last lodged under this section[1].
to the effect that no additional way (other than any specifically indicated in the declaration) over the land on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof to the contrary intention, sufficient to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."

[1]The ten year period was extended to twenty years in 2103. Please note that **Appendix 2** to this report, at paragraph 3.3, takes account of the change.

8. Seventy nine letters of objection were received to the making of the Order and twenty seven letters received in support, all letters are summarised at **Appendix 2(b)**. Comments on the objections and representations received can be found in **Appendix 3**. The large number of letters received in objection to the Order may be explained by a letter that was drawn to officers' attention from the Headteacher and Chair of Governors of Urchfont C.E. Primary School addressed to "Parents" informing the reader about the making of the Order which is the subject of this report and requesting "your help to try to stop this Order going through". The letter goes on to inform the reader what information and phrases need to be included in any letter to Wiltshire Council in support of the school's statement that it was not the school's intention to "allow a right of way". When reading the seventy nine letters of objection it is noticeable that a large proportion of the letters include the phrases the Headteacher and Chair of Governors asked would be objectors to include in any letters written to the Council. The letter is attached at **Appendix 4**.

<u>The Statutory Test</u>

The date when use was brought into question

9. Officers have proceeded on the basis that the matter was brought into question by the mechanical lock fitted on the gate nearest the school in October 2011. In taking this decision they considered all the available evidence both received from all interested parties and all other relevant evidence. Objectors argue that other events might have brought the matter into question at an earlier date, such as the formation of the school garden across part of the claimed route in 2009 or the placing of notices in the school grounds in 2002 or the closing of gates.

10. According to Lord Denning in Fairey v Southampton City Council [1956] 2 QB 439 in order for the right of the public to have been:

"brought into question, the right must be challenged by some means sufficient to bring it home to the public that their right to use the way is being challenged… so that they may be appraised of the challenge and have a reasonable opportunity of meeting it."

11. Mr R Hawkins has known and used the order route since 1982 and in the late 1980s to early 1990s was a parent governor at the school. In his letter dated 12 November 2015 written in support of the Order he made the following relevant points:

"I do not recall seeing any signs saying the path was for school access only. If they were there then there was certainly no action (to my knowledge) taken by the school to enforce the sign and stop the public using the path.

I think it is important to realise that for many years after the school was built the environment around the school building was very different from what you see now. The school consisted of a single rectangular building, with an additional mobile classroom used at various times. I have indicated the extent of the main building and the general layout of the school on a revised version of your plan attached. There was no fencing at all around the school located in the corner of the open playing field and people using the path were able to walk around either side of the building to access the field, play equipment, tennis courts and Oakfrith wood. During this time there were no child safeguarding measures in place, in fact the main doors to the school were not even locked. It was probably only about 10 years ago that a voice operated access system was first installed to the main doors of the school building (not the gate). The area around the school was open; there were no fences as such to prevent access or egress from the school site. Why would you bother to lock a gate on the footpath if the rest of the boundary to the school was completely open? The path was always considered, by the village residents, to be the main 24/7 access to the school, playing fields, play equipment, tennis courts and Oakfrith wood. There was never any thought of it not being available for public use, the gate(s) were not locked, the school did not prevent access – why would anyone not consider it a public Right of way."

As can be seen from the summary of the witness statements which was appended to the Decision Report as **Appendix 2(b)**, other witnesses corroborate Mr Hawkins's evidence.

Whether the public used the routes

12. The Parish Council submitted twenty seven user evidence forms in support of the application. Twelve of the witnesses give direct evidence of use of the order route dating back to when the school was built and a further nine from the late 1970s through the 1980s. The evidence submitted is sufficient to satisfy the requirement that the order route has been used by the public. Even if 2011 is not accepted as the date upon which the right to use the path was brought into question, and therefore not the date back from which to identify a 20 year user period, there is on the balance of probabilities sufficient evidence of use back to 1974 to support an alternative 20 year public user period.

As of right

13. The common law holds use "as of right" to be use without force (nec vi), without secrecy (nec clam), and without permission (nec precario).

Without force

14. The evidence provided by the witnesses and by the representations in support of the Order all testify to the path being freely available along the route. At times gates may have been erected across the path but none of the witnesses have given evidence that their way was barred by a locked gate until October 2011, e.g. Mr and Mrs Brockie, Mr Giddings, Mr Monkton, Mrs Milanes, Mr Minty, Mr Davies and Mr and Mrs Bailey. The gate nearest the school may have been closed for periods during school opening hours but there is no credible evidence that the gate was actually locked.

Without secrecy

15. There is no suggestion from Wiltshire Council, as owners of the playing field, or from Salisbury Diocesan Board of Education, as owners of the school and the path from the school to the Top Green, of any secrecy in the usage of the order route.

Without permission

16. There is no evidence from the owners of the land over which the order route crosses that express permission was given to members of the public to use the route. None of the witnesses who completed user evidence forms submitted in support of the Order or any of the people who have made representations in support of the Order have said they had sought and received permission to use the route; use of the route was simply taken as a right. From 2005 the school did grant the Scarecrow Festival permission to use the field for parking which included access on foot through the school grounds to the village green. This permission relates to a wider use of the school grounds than use along a specific route and was, and is, clearly related to the Scarecrow Festival held over the May Bank Holiday weekend. In its April 2014 response to the application to record the order route as a public right of way Urchfont C.E. Primary School stated:

"Anyone using the path and coming through the gate, who was not entering the site on school business, was never officially sanctioned and this only occurred when school security has been circumvented and they were trespassing. Before the mechanical locking system was fitted, on the instructions of Wiltshire Council Health and Safety Officer, the gate was bolted from the school side once all children were in school. Unfortunately, as this could easily be unbolted by parents leaving the site and as it was not in view of the school office, it could be left open for periods of time. Under these circumstances, anyone who walked through the school site to access the playing field did not have the permission of the school to do so."

17. Whilst it is acknowledged that it is possible, as a matter of law, for implied permission to defeat a claim to prescription, the courts suggest that the landowner must do some positive act in order to give rise to the implication, otherwise the landowner is merely acquiescing. In R v North Yorkshire County Council & Others ex parte Barkas [2014] UKSC 31, Lord Neuberger stated:

"In relation to the acquisition of easements by prescription, the law is correctly stated in Gale on easements (19th edition, 2012), para 4-115:

The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not 'as of right'. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence."

18. The same is true of rights of way. In Rowley v Secretary of State for Transport, Local Government and the Regions and Shropshire County Council, May 2002, Justice Elias held that the acquiescence of a tenant may bind the landowner on the issue of dedication. Also, in the absence of evidence to the contrary, there is no automatic distinction to be drawn between the actions of a tenant acting in accordance with their rights over the property and that of the landowner in determining matters under Section 31 of the Highways Act 1980.

19. There is no evidence from Wiltshire Council or the Salisbury Diocesan Board of Education of any positive acts, expressly or by implication of granting the public permission to use the order route.

Without interruption

20. The objectors contend that the use was interrupted by the locking of a gate across the order route, signs being displayed at the entrance to the order route indicating the path "affords access only to the school" and challenges made to users. None of the witnesses refer to signs existing on the claimed route earlier than 2011. In a letter dated 3 October 2014 Mrs Giddings, who has lived in Urchfont since 1969 and has used the order route since the school was built, states:

"My eldest Son attended this new school built in the playing fields from 1978 until he left in 1983. There was no gate at either end of the path at that time and no signs.

My younger two children attended the school between the years of 1992 and 2001 and I believe the gates were erected at the school during this time. I never knew these gates to be closed or locked at any time. They were certainly never closed or locked during the frequent times I accessed the playing fields during or outside of school hours. I frequently visited the school during school hours to assist with swimming lessons, reading, crafts, and I was also a part time lunch supervisor. Again the gates were never closed or locked during those times.

Most parents would also frequently use the path during and outside of school hours to access the playing fields with younger pre-school children with no problems at all.

The playing field was always the main point of the village for children and teenagers to meet. It was the first place we all congregated after school to

knock a ball around or simply play on the equipment. It was the same for my children while they were growing up and even now my son and his friends frequently use the football pitch to have a knockabout. I also still use the field frequently with my grandchildren when they visit. We have all always used the existing path. Not only is it a shortcut through but it is also a safe access way. To use the main gate into the playing field would mean walking around a dangerous bend in the road at Cuckoo Corner.

As to signs, I cannot recall any signs being erected in the pathway until around 2011. The only sign I can remember being erected earlier than 2011 was asking the public not to use the school grounds. I seem to recall that this was erected to prevent youngsters playing on skateboards, etc on the school playground as it was feared that they could cause some damage. I certainly do not recall any earlier signs "prohibiting the unauthorised use of school grounds.

I can confirm that I have never at any time been challenged while using this path."

21. Another witness, Mr Hawkins, who like Mrs Giddings has known the order route for a long time and has made representations in support of the order states in a letter dated 12 November 2015:

"I moved to Urchfont in 1982 with my wife and family and my children attended Urchfont School between 1985 and 1995. During the period 1989 to 1995 I was a parent governor at the school and an active member of Urchfont School Parents' Association (USPA). I used the alleyway on a frequent basis during this time to carry out my duties as a parent governor and for USPA meetings and also for walks with the family to the recreation field, play equipment, tennis courts and Oakfrith Wood. During this period I cannot recall any locked gates, signs relating to school access only or being told I could not use this access. As a governor I certainly accessed the alleyway perhaps 5 to 10 times a week during school hours.

When my children left Urchfont School I resigned as a parent governor but still used the alleyway at various times throughout the day, including school hours, to walk to Oakfrith Wood and to play tennis on the recreation field tennis courts. At various times I even attended the school to give lessons to the children about bridges, which relates to my profession as a Chartered Civil Engineer. At no time did I find my access through the alleyway, or past the school, restricted by locked gates, signs relating to school access only or being told I could not use this access. I continued to use the alleyway access up to June 2011 not only to access the recreation field, Oakfrith Wood and the tennis courts but also to deliver flyers, News & Views magazines and the occasional bus rota for my wife to the school. In June 2011, without any consultation with the village, the school locked the gates during school hours preventing any access to the recreation field facilities, Oakfrith Wood or the tennis courts."

22. The minutes for the school Governors dated 2002 refer to signs having been erected in the school alleyway and on the playground, not the playing field, prohibiting the unauthorised use of school grounds. The exact wording of the signs is not known but it is clear from the evidence provided by the witnesses in support of the application that whatever the wording did say it was insufficiently clear to the public using the order route that the owners of the land, i.e. Wiltshire Council and the Salisbury Diocesan Board of Education, did not want the public

to have a right to use it. The signs appear to have been taken by those walkers who did see them as meaning use of the school playground and school building was denied, not use of the order route path which leads to the village recreation field. There was no reason why users of the order route should believe that Wiltshire Council, as owner of part of the route, did not want to dedicate the route as a public path as the path led to the community assets of the village playing field, children's play area and tennis courts which Wiltshire Council lease to the Recreation Field Committee for public use.

23. Witnesses for the school have given evidence that the gate nearest the school was locked at various times since the school was built; however, officers do not find that on the totality of the evidence it can be established or found that the stated locking of the gate interrupted the public use of the order route.

No intention to dedicate

24. The above considerations in respect of interruption to public use of the order route apply equally to the issue of the lack of intention to dedicate, or lack thereof.

25. No maps have been deposited under Section 31(6) of the Highways Act 1980 by the owners of the land over which the order route crosses to declare the lack of the intention of the landowners or their successors in title to dedicate the order route as highway.

Safeguarding Considerations

26. Safeguarding considerations cannot be taken into account in relation to Orders made under Section 53 of the Wildlife and Countryside Act 1981. However, significant concerns have been raised with officers of the Council that, should the Order be confirmed, the existence of a public footpath that is required to be open and available for use at all times will increase the perceived, if not the actual, level of safeguarding risks.

27. A number of meetings have, since the receipt of statutory objections to the order, and prior to bringing this report to the committee, been held between the Council's Rights of Way and Countryside Manager, the Headteacher, and representatives of the school governors, the diocese and Urchfont Parish Council. The aim has been to develop a package of safeguarding measures focussing primarily on the making of public path orders in order to create a segregated public footpath in place of part of the modification order route that would give a higher level of protection to the schoolchildren and staff.

28. Discussions are ongoing but as yet have failed to identify a mutually acceptable solution. Having made the Order and received objections to it, the Council cannot delay indefinitely sending the Order to the Secretary of State for determination so it has been decided to bring this report to the committee so that a recommendation can be made as to whether only on the assessment of the available evidence, the Order should or should not be confirmed. The Council will, however, continue to work with the school, the diocese and the parish council to try to identify a suitable route onto which to divert the path, if the Order is confirmed.

Public Health Implications

29. There are no identified public health implications arising from the proposal.

Procurement Implications

30. The submission of the Order to the Secretary of State does have financial implications for the Council which are covered in paragraphs 34 to 36 of this report.

Environmental and Climate Change Considerations

31. There are no known environmental or climate change considerations associated with the proposal.

Equalities Impact of the Proposal

32. Matters relating to the equalities impact of the proposal cannot be taken into account when deciding whether to agree the proposal.

Risk Assessment

33. There are no identified risks associated with the proposal. The financial and legal risks to the Council are outlined in paragraphs 34 to 37 below.

Financial Implications

34. The making and determination of Orders made 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 an Order the committee may resolve that the Council continues to support the making and confirmation of the Order. The Order will be determined by an Inspector appointed on behalf of the Secretary of State by either written representations, a local Hearing or local Public Inquiry, all of which have financial costs for the Council. Written representations cost the Council £200 to £300, a Hearing £300 to £500 and £1,000 to £3,000 for a Public Inquiry with legal representation (£300 to £500 without).

36. Where the Council objects to the Order, the Order still has to be forwarded to the Secretary of State for determination, with costs ranging from £200 to £3,000, as detailed in paragraph 35 above.

Legal Implications

37. Where the Council does not support the Order, clear, legally robust reasons must be given which must relate to all the relevant evidence available. The applicant may seek Judicial Review of the Council's decision if the decision is found to be lawfully incorrect or unjust by them. The cost to the Council for this may be up to £50,000.

Options considered

38. The committee may resolve that the Order should be forwarded to the Secretary of State for determination as follows:

    (i) The Order be confirmed as made
    (ii) The Order be confirmed with modification, or
    (iii) The Order should not be confirmed.

Reason for the Proposal

39. When the Council made the Order it was considered that the public enjoyment of the route has raised the presumption that the way had been dedicated as a public footpath on the balance of probabilities. Since the making and advertising of the Order, the Council has received objections to its making and representations in support of the Order. Officers do not believe the objections have raised any further evidence to negative the presumed dedication of the footpath on the legal test of on the "balance of probabilities".

40. There is a conflict between the witness evidence of the supporters and those opposed to the Order. In R v Secretary of State for the Environment ex parte Bagshaw and Norton [1994] 68 P&CR Justice Owen held that:

    "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 witnesses at the inquiry."

41. When objections are made to an Order made under Section 53 of the Wildlife and Countryside Act 1981 the Council is required to submit the Order to the Secretary of State for determination. Where there is a conflict in evidence, as in this case, it is usual practice to determine the Order by holding a Public Inquiry to test the evidence under cross-examination.

Recommendation

42. To forward the Order to the Secretary of State for the Environment, Food and Rural Affairs for confirmation as made.

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

None

Appendices:

Appendix 1 - The Wiltshire Council (Parish of Urchfont) Path No. 51 Definitive Map and Statement Modification Order 2015
Appendix 2 - The Officers' Decision Report on the application for a Modification Order
Appendix 2(a) - Notice of Application for Modification Order
Appendix 2(b) - Summary of witness evidence user statements
Appendix 2(c) - Submission from the school
Appendix 2(d) - Submission from the Salisbury Diocesean Board of Education
Appendix 3 - Wiltshire Council's comments on the representations and objections made to the making of the Definitive Map Modification Order
Appendix 4 - Letter from the Headteacher and Chair of Governors addressed to "Parents"