

WILDLIFE AND COUNTRYSIDE ACT 1981
THE WILTSHIRE COUNCIL

THE WILTSHIRE COUNCIL CODFORD PATH No. 15 RIGHTS OF WAY
MODIFICATION ORDER 2016

Purpose of Report

1. To:
 - (i) Set out evidence relating to a material change in the evidence relating to determination of The Wiltshire Council Codford Path No. 15 Rights of Way Modification Order 2016.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs 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 January 2016 Wiltshire Council received an application from the Codford Residents Group for a definitive map modification order to add a byway open to all traffic at Codford St Mary to the definitive map and statement.
4. Members of the Western Area Planning Committee considered the Order at its meeting on 2 November 2016. The recommendation was made that the Order should be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the Council taking a neutral stance. The agenda reports pack can be found here:
<http://cms.wiltshire.gov.uk/ieListDocuments.aspx?CId=149&MId=10241&Ver=4>
5. The Committee resolved:

That "The Wiltshire Council Codford Path No. 15 Rights of Way Modification Order 2016" is forwarded to the Secretary of State for the Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance in the matter.

6. After this meeting officers became aware that the advice they had previously acted upon in relation to parts of the evidence (relating to Section 31(6) of the Highways Act 1980) may be incorrect and accordingly a legal opinion was sought. A copy of counsel's opinion confirming the advice as given in conference is attached to this report as **Appendix 3**.
7. Having now received counsel's opinion in the matter officers are aware that the Committee was incorrectly briefed on 2 November 2016 and that this may have affected its decision. Accordingly, the matter is being brought forward once again for consideration.

Main Considerations for the Council

8. The Committee is asked to reconsider the evidence relating to deposits made under Section 31(6) of the Highways Act 1980 and to reconsider their effect on the evidence relating to this Order.
9. Two deposits affecting the land over which the Order route leads have been deposited with Wiltshire Council for the purposes of Section 31(6).
 - (i) Statement and plan at the scale of 1:10000 submitted by Mr J Stratton in April 2003.
 - (ii) Statement and plan at the scale of 1:25000 submitted on behalf of Mr Stratton in February 2011.
10. The legal opinion given to officers in conference (and attached in writing at **Appendix 3**) identifies a number of legal issues concerning s31(6) deposits, including in this case a failing on the part of the landowner to follow due process and potential errors in the plans deposited. The opinion also questions the entitlement of tenants and those other than legal owners to make a deposit. The issues concerning the errors with the plan deposited and whether or not Mr J Stratton was entitled to make a deposit may be considered by the Inspector at the public inquiry. As the legal opinion given to officers identifies a failing on the part of the landowner in following due process, this issue is set out in more detail in the following paragraphs.
11. Section 31(6) details a two stage process whereby a statement and plan are deposited, followed by, sometime later, but within ten years (changed in 2013 to twenty years), a statutory declaration relating to the dedication of, or the lack of intention to dedicate, any additional ways since the original deposit was made.
12. The Planning Inspectorate issues Consistency Guidelines for Inspectors. The following is an extract from Section 5.27.

“Under s31(6), an owner of land may deposit a map and statement of admitted rights with “the appropriate council”. Provided the necessary declaration is made at twenty year intervals (changed in 2013 from ten) thereafter, the documents are (in the absence of evidence to the contrary) “sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways”. This is for the period between declarations, or between first deposit of the map and first declaration.”

13. This makes it clear that the declaration must be made for the deposit to take effect. It is a two stage process.
14. In Highway Law Fifth Edition 2 – 97 Steven Sauvain QC agrees and states the following.

“The landowner may deposit with the council a map of his land, together with a statement indicating what ways have been dedicated over that land as highways.....Any lodged statement must be augmented by declarations in a valid form (prescribed form from 2013 onwards) that no additional rights of way have been dedicated or, if there have been such, identifying any new rights of way. This action will be sufficient evidence to negative the presumption of dedication of any ways not included within the statement and map – in the absence of other evidence of a contrary intention.”
15. Further, in Rights of Way, A Guide to Law and Practice (Fourth edition) at page 56 the following is stated.

“A further provision in s.31(6) enables a landowner to deposit with the highway authority a map and statement showing the ways (if any) that he admits are dedicated as highways. If he then, within ten years, deposits a statutory declaration that no additional ways have been dedicated since the deposit of the map, this is sufficient, in the absence of proof to the contrary, to establish no additional ways have in fact been dedicated.”
16. It is clear that Section 31(6) cannot have a statutory effect unless the declaration is made after the deposit. Mr Josh Stratton never made a declaration to accompany either of his deposits.
17. The opinion of officers had previously been that the deposit made in Section 31(6) had the effect of calling the right of way into question but this is now known to be incorrect. It did not form an incontrovertible act and owing to the failure to complete the statutory s31(6) process so far as the deposit and declaration are concerned it is difficult to attach weight to the deposit as an indication of a lack of intention to dedicate.
18. **User Evidence 1992 – 2012 and 1995 - 2015 Appendix 2**

It is now appropriate to consider the evidence of use for two later 20 year (or ‘relevant’) periods than were previously considered. The calling into question may be viewed as the date at which the public use was effectively challenged, or, where it is considered that no effective challenge has occurred, the date of the application.
19. In 2012 Wiltshire Council received an email from Rosemary Wyeth of Codford asking about the owners’ right to close the route that is now the subject of the Order. Clearly, Ms Wyeth was aware of a challenge at this date.
20. Wiltshire Council supplied application forms for a Definitive Map Modification Order (DMMO) to Codford Parish Council at some date between 2012 and 2015. A record has not been kept of the date though matters relating to public access

at East Farm were obviously an issue in the few years before the application was made.

21. **Appendix 2** shows the effect of both relevant periods on the evidence. It is clear that there is considerably more evidence of use of the claimed route for either period than for the earlier period considered when the Order was made. Notwithstanding potential weaknesses in some of the evidence (for example that of those attending church or military parades for which permission may have been sought and granted) it is considered that there is a sufficiency of evidence for either period of use to support the confirmation of the Order as made.

Safeguarding Considerations

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

Public Health Implications

23. There are no identified public health implications which arise from this Order.

Corporate Procurement Implications

24. 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 28 to 31 of this report.

Environmental and Climate Change Considerations

25. There are no environmental or climate change considerations associated with this Order.

Equalities Impact of the Proposal

26. Matters relating to the equalities impact of the proposal are not issues for consideration under Section 53 of the Wildlife and Countryside Act 1981.

Risk Assessment

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

Financial Implications

28. 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.
29. 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 outcome of 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).

30. 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 29 above.
31. In the event that the Council takes a neutral stance in the matter the Order must still be forwarded to the Secretary of State for determination but the case in support of the Order will be made out by the applicant and not the Council. The Council would also be required to give reasons to the Planning Inspectorate for taking a neutral stance. The Council would be expected to attend the Inquiry and to meet all costs relating to room hire (in the region of £300).

Legal Implications

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

Options Considered

33. Members may resolve that the Order should be forwarded to the Secretary of State for determination as follows:
 - (i) The Committee withdraw their resolution of 2 November 2016 and the Order be confirmed without modification.
 - (ii) The Committee withdraw their resolution of 2 November 2016 and the Order be confirmed with modification.
 - (iii) The Committee withdraw their resolution of 2 November 2016 and the Order should not be confirmed.
 - (iv) The Committee confirm their resolution of 2 November 2016 and Council takes a neutral stance with regard to the confirmation of the Order.

Reason for Proposal

34. When the Council made the Order it was considered that the application formed a reasonable allegation that public rights subsisted. This is the first stage of the legal test that can be applied in accordance with Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. However, a higher standard of proof is required to confirm the Order; this is that it must be considered on the balance of probabilities that public rights subsist.
35. Since making and advertising the Order the Council has been made aware of significant amounts of additional evidence from both supporters of the Order and from the objector.

36. In *R v Secretary of State for the Environment ex p Bagshaw and Norton* [1994] 68 P&CR Owen J 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 the witnesses at the inquiry.*”
37. Unless the objection is withdrawn the Council must send this Order to the Secretary of State for the Environment, Food and Rural Affairs for determination. This is done through the offices of the Planning Inspectorate and it is their usual practice to determine Orders where there is a conflict in evidence of use by holding a public inquiry where the evidence may be tested under cross examination.
38. It is clear that this is a case where the conflict of evidence may only be resolved under cross-examination.
39. The effect of the deficient Section 31(6) deposits has had the effect of applying a different date for the calling into question of the public use of the way. Had the deposits been effective, the relevant period of 1983 to 2003 would apply. However, legal opinion is that they were sufficiently defective not to represent a calling into question at the time they were made. Accordingly, relevant periods of 1992 – 2012 or 1995 to 2015 are considered to apply.
40. There is considerably more evidence of use for these periods, the evidence is considered to be cogent and consistent and officers consider that there is now a greater weight of evidence supporting this Order than there was originally thought to be.
41. Notwithstanding the need to test this evidence under cross-examination at a public inquiry it is considered that evidence in support of the Order outweighs that against it and that it is appropriate that Wiltshire Council now supports the Order when it is submitted to the Secretary of State.

Proposal

42. That “The Wiltshire Council Codford Path No. 15 Rights of Way Modification Order 2016” is forwarded to the Secretary of State for the Environment, Food and Rural Affairs and that Wiltshire Council supports the confirmation of the Order 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:

Western Area Planning Committee records 2 November 2016

<http://cms.wiltshire.gov.uk/ieListDocuments.aspx?CId=149&MId=10241&Ver=4>

Appendices:

- Appendix 1 Order and Plan
- Appendix 2 Summary of User evidence
- Appendix 3 Counsel's Opinion Trevor Ward