

Wiltshire Council

Eastern Area Planning Committee

22 March 2018

WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL PARISH OF PEWSEY PATH NO. 82 AND PATH NO. 82A AND THE PARISH OF MILTON LILBOURNE PATH NO. 34 AND PATH NO. 34A DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017

Purpose of Report

1. To:
 - (i) Consider four objections to The Wiltshire Council Parish of Pewsey Path No. 82 and 82A and the Parish of Milton Lilbourne Path No. 34 and 34A Definitive Map and Statement Modification Order 2017 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 (**SoSEFRA**) 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 which is fit for purpose, making Wiltshire an even better place to live, work and visit.

Background

3. On 12 April 2017 Wiltshire Council received an application from Pewsey East Walkers, for an Order to record public footpaths over land south of Kepnal in the parishes of Pewsey and Milton Lilbourne. The claimed routes lead from footpath PEWS37 in an easterly direction to bridleway PEWS38 where the route splits in two, one spur leading east on the northern side of a stream before crossing back over the stream and continuing east to bridleway MLIL18. The other spur leads east from bridleway PEWS38 on the southern side of the stream following the stream south easterly to its junction with bridleway MLIL18. (Please see claimed route at page 3 of Decision Report at **Appendix 1**). The total length of claimed footpath is approximately 1,537 metres in length.
4. The application adduced evidence from 44 people who completed User Evidence Forms (UEFs) detailing their use on foot of the application route in part or in full for varying lengths of time dating from 1952 to 2017. A further two User evidence forms were submitted at a later date taking the total to 46.

5. For public rights to have been acquired under statute law (see **Appendix 1** paragraph 9.5– Highways Act 1980 Section 31) it is necessary for the use to have been uninterrupted for a period of at least 20 years in a manner that is ‘as of right’, that is, without force, without secrecy and without permission. This would give rise to a ‘presumption of dedication’.
6. A presumption of dedication may be defeated in a number of ways, including the erection and maintenance of signage indicating that there is no intention to dedicate public rights, effective challenges to use, the closure of the claimed route (for example a closure for one day every year may be effective), the granting of permission or by depositing a number of documents with the Council as prescribed by Section 31(5) and (6) of the Highways Act 1980 (see **Appendix 1** paragraph 9.5).
7. Wiltshire Council has a duty to consider all relevant available evidence and officers conducted an initial four week consultation on the application commencing in June 2017. The consultation letter was sent to all interested parties, including landowners, parish councils, user groups, the local member and other interested individuals.
8. All of the evidence and responses were duly considered in the Council’s Decision Report appended here at **Appendix 1 (Section 8)**. Applying the legal test contained within Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980 (see **Appendix 1** paragraph 9.1 and 9.5), the application formed a reasonable allegation that a public right subsisted. An Order was made to record the path as a footpath in the definitive map and statement.
9. The Order was duly advertised and attracted four objections. A copy of the Order is appended here at **Appendix 2**.
10. Where objections are received to a Definitive Map Modification Order Wiltshire Council may not confirm or abandon the Order and must forward it to SoSEFRA for determination. However, it must first consider the representations and objections to the Order and make a recommendation to SoSEFRA regarding the determination of the Order.
11. It is important that only the evidence adduced or discovered is considered and it is noted that matters relating to desirability, the environment, need, privacy concerns or health and safety are not to be considered for the application of Section 53 of the Wildlife and Countryside Act 1981.

Main Considerations for the Council

12. 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.
13. 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.”

14. Under Section 31(1) of the Highways Act 1980 *“where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right 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 was no intention during that period to dedicate it.”*
15. Evidence is the key and therefore objections to the making of the Order must, to be valid, 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, the proximity of any other paths or facilities, environmental impacts and any need or desire for the claimed route.
16. **Objections:**
 - (1) J M Strong and Partners (landowner)
 - (2) Mr Alexander Newbigging (landowner)
 - (3) Mrs Sarah Ingram Hill (landowner)
 - (4) Pewsey Parish Council- Objection now withdrawn - please see letter dated 5 February 2018 at **Appendix 6**.

It should be noted the objections received from JM Strong and Partners, Mr Newbigging and Mrs Ingram Hill came via Bricketts LLP who have been instructed to represent all three parties and their objections are covered in the one letter.

These objections can be seen in full at **Appendix 3**.

Comments on the objections

17. **J M Strong and Partners, Mr Newbigging and Mrs Ingram Hill**

The three landowners affected by this application state in their objection:
[Appendix 3(i)]

“The evidence of use relied upon in making the Order, particularly use prior to 2007, is not consistent with the objectors knowledge and experience of the use of this land. The objectors do not accept that there has been sufficient use as of right to represent use by the public”. “The order route follows 6 meter wide field margins that were first created in 2007 when the land was entered into an Entry Level Stewardship Scheme. Prior to this the land was cultivated up to the field edge, leaving no strip which could have been used as a footpath, and there was no evidence of

any such use. Such use as there may have been of the Order route has only taken place since 2007 when the 6 metre grass strips were in place.”

A total of 46 user evidence forms have been submitted claiming use of the way on a regular basis with many people claiming daily or weekly use. Of the 46 users 33 have claimed use dating back before the year 2007 which shows 72% of the users claim to have used the path before 2007 when the objectors say the route was not used. The use of the order route may have increased with the creation of the 6 metre wide strips but the submitted user evidence forms clearly claim significant use before this date. The claimed use shows a consistent use of the route by the public for the relevant 20 year period of 1996-2016.

This point was further explored as it forms a substantial part of the landowners' objection to the order. A letter was sent on 19 December to all 33 users who claimed use of the order route before 2007 to recall any details of their use before 2007 and any change in the nature of the land they may have noticed around that date and how that may have affected their use (letter attached at **Appendix 5**). At the time of writing this report eleven responses have been forthcoming and are attached at **Appendix 5[1-11]**.

“The order route is subject to significant seasonal flooding which is often sufficient to render the route impassable due to the depth of water and ground conditions”

The ground may flood during certain periods of heavy rain but this would not act as a period of interruption for the use of the route in terms of acquiring a right under Section 31 of the Highways Act. Section 31 states “...the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”. Flooding or other natural events are not actions taken by the owner or tenant of the land and so do not demonstrate an intention to not dedicate the way. It would also not be unreasonable to assume any walkers of the route would deviate around the flooding or avoid using it during any period of temporary flooding which would again not constitute an interruption of use.

“In response to such public use as there was after 2007 the landowners or their representatives challenged users on the Order route and signs were placed on the route stating that the land is private and denying the existence of any public right of way. Although the signs were repeatedly removed and or damaged, they were reinstated a number of times. By these means any subsequent use of the route was rendered not as of right and furthermore the landowner sufficiently demonstrated a lack of intention to dedicate”

The issue of signage and challenges on the route have been discussed at paragraph 14 of the decision report at **Appendix 1**. There is some submitted evidence in the form of signed statements that signs were erected on the route informing the public not to use the field margins in 2008 but these were repeatedly torn down and eventually they gave up and did not replace them. None of the submitted 44 user forms considered at that time state they saw any signs of that nature on the order routes. We do not have the precise wording of any notices which may have been on the order routes. There is a conflict of

evidence on the issue of signs and challenges and without any incontrovertible evidence it was appropriate to make an order to record the routes as public rights of way. A public inquiry can give the chance for cross-examination on the points raised.

18. Ms Emma Kingston submitted late correspondence in a letter dated 29 January 2018 on behalf of Mr Newbigging detailing works carried out on the claimed route in 2013. It is claimed before this work was carried out the route would not have been accessible to anybody on foot, this is clearly in conflict with the user evidence submitted, a public inquiry can explore this point further (**please see letter at Appendix 6**).
19. A submission of support was received at the Order making stage from Milton Lilbourne Parish Council which can be seen at **Appendix 4**. Milton Lilbourne Parish Council also expressed its support of the Order at the consultation phase as did the Wiltshire Rambler representative for the area (**see paragraph 8 of Appendix 1**).
20. The Council cannot take into account the number of objections but must consider the evidence contained within those objections against the evidence contained within the representations of support and the evidence already before the Council, as outlined within the Decision Report attached at **Appendix 1**. There will inevitably be points of conflict within the evidence of objectors and that of the supporters. For this reason, the Order has been made on a reasonable allegation that a right of way for the public on foot subsists, which is a lower test than the balance of probabilities (see **Appendix 1**- paragraph 28.2). Where there is no incontrovertible evidence against this, it is in the public interest for a local authority to support the Order.
21. 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 map and statements, based upon witness evidence of at least 20 years uninterrupted public user and where the councils determined not to make Orders. On appeal, in both cases, the Secretary of State considered that the councils should not be directed 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.”

22. 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.”

23. 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...”. 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.”

24. Even in a case with only limited supporting evidence and a large number of objections, Owen J held that an Order would seem appropriate. When this case law is applied to this case, where there are 46 completed UEFs, it suggests that the making of a definitive map modification order is appropriate.

25. 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 incontrovertible evidence to defeat that reasonable allegation, the committee should recommend to SoSEFRA 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 to establish whether, on the balance of probabilities, the public right has been acquired.

Overview and Scrutiny Engagement

26. 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

27. Considerations relating to safeguarding anyone affected by the making of the 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

28. Any public health implications arising from 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.

Corporate Procurement Implications

29. In the event this Order is forwarded to SoSEFRA there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 33 to 35 of this report.

Environmental and Climate Change Impact of the Proposal

30. Any environmental or climate change considerations arising from 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.

Equalities Impact of the Proposal

31. Matters relating to the equalities impact of the proposal are not relevant considerations in Section 53 of the Wildlife and Countryside Act 1981.

Risk Assessment

32. 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 of public rights of way 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 complaints 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

33. 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.
34. Where there are outstanding objections to the making of the Order it must be determined by the Secretary of State. 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. A one day public inquiry could cost between £1,500 and £3,000 if Wiltshire Council continues to support the making of 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).
35. Where the Council objects to the Order, the Order must still be forwarded to the SoSEFRA 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 34 above.

Legal Implications

36. 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 he sees it as incorrect or unjust by them. The cost for this may be up to £50,000.

Options Considered

37. Members should now consider the objections received and the evidence as a whole in order to determine whether or not we continue to support the making of the Order. The making of the Order has been objected to, therefore the Order must now be submitted to the SoSEFRA for determination and members of the committee may determine the recommendation (which should be based upon the evidence) to be attached to the Order when it is forwarded to the SoSEFRA as follows:
 - (i) The Order be confirmed without modification.
 - (ii) The Order be confirmed with modification.
 - (iii) The Order should not be confirmed.

Reason for Proposal

38. Unless the objections and representations are withdrawn the Order must be forwarded to the SoSEFRA for determination.

39. It is considered that nothing in the objectors' submissions demonstrates sufficiently that there was no intention to dedicate a public right of way and that any attempt at communicating any lack of intention did not reach the relevant audience. This is demonstrated by the evidence that all 46 user evidence forms indicate they were unaware of a declared non-intention. Neither did the owners/tenants satisfy any statutory process of demonstrating a negative intention to dedicate the land, i.e. a valid deposit, plan, statement and subsequent statutory declaration under Section 31(6) of the Highways Act 1980, or a notice under Section 31(5) informing the relevant authority such notices have been torn down (see Section 16 of the Decision Report, **Appendix 1**).
40. The testimony of users of the path has been questioned by the objectors who claim that use of the order route cannot have occurred prior to 2007 and that signs were erected on the path in 2008 to inform the public not to use the route. Where this evidence is conflicted it may be tested, along with all other 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.*"
41. In making this Order officers considered that a right of way is reasonably alleged to subsist over the Order Route. It is considered that no further evidence has been adduced since making the Order, and it being advertised to a wider audience, and shows that, on the balance of probabilities, a public right has been acquired. The testing of witnesses will be key to the final decision in this case but the Council's duty remains with supporting the Order based on the evidence it has before it.

Proposal

42. That "The Wiltshire Council Parish of Pewsey Path No. 82 and 82A and the Parish of Milton Lilbourne Path No. 34 and 34A Definitive Map and Statement Modification Order 2017" is forwarded to the SoSEFRA with the recommendation that it is confirmed as made.

Tracy Carter

Director – Waste and Environment

Report Author:

Craig Harlow

Acting Rights of Way Officer – Definitive Map

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

User Evidence Forms

(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 1 - Decision Report

Appendix A and B to Decision Report – consultation responses from landowners

Appendix 2 - “The Wiltshire Council Parish of Pewsey Path No.82 and Path No.82A and the Parish of Milton Lilbourne Path No.34 and Path No.34A Definitive Map and Statement Modification Order 2017”

Appendix 3 - Objections to the Order

Appendix 4 - Supporting Statement

Appendix 5 – Letter sent to user pre 2007 and responses (**Appendix 5[1-11]**)

Appendix 6 – Late Correspondence