

9 July 2020

HIGHWAYS ACT 1980

THE WILTSHIRE COUNCIL BURBAGE 6 (PART) EXTINGUISHMENT ORDER 2020

Purpose of Report

1. To:
 - (i) Consider one objection to The Wiltshire Council Burbage 6 (Part) Extinguishment Order 2020 made under Section 118 of the Highways Act 1980.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs (**SoSEFRA**) with Wiltshire Council supporting the confirmation of the Order.

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. Wiltshire Council received an application dated 19 July 2019, made under Section 118 of the Highways Act 1980, to extinguish part of the width of footpath Burbage 6, on the grounds that it is not needed for public use. The application is made by Zoe Turner of Holybrook Cottage, 39 Eastcourt Road, Burbage, Marlborough, SN8, with Blake Morgan LLP acting as agent.
4. The application proposes to extinguish a section of the footpath measuring 3.3 metres by 21 metres. The footpath at this section is recorded as 8 metres wide. If the Order is confirmed it will leave a minimum of 4.7 metres of width of highway available to the public on the affected section of the footpath.
5. Wiltshire Council conducted an initial 28 day consultation on the application, commencing in October 2019. The consultation letter was sent to interested parties, including Burbage Parish Council, user groups including The Ramblers, the local member and neighbouring properties.

6. Two objections were received at the initial consultation phase, from Burbage Parish Council and Mr McNicholas. A representative of The Ramblers also replied to the consultation stating they have no objection to the proposal.
7. Responses to the consultation were duly considered in the Council's Decision Report appended here at **Appendix 1**. Applying the legal tests of Section 118 of the Highways Act 1980 (see **Appendix 1** section 7.2), officers believed the application met the relevant tests and an Order was made to extinguish part of the width of footpath Burbage 6.
8. The Order was duly advertised and attracted one objection. A copy of the Order is appended here at **Appendix 2**.
9. Due to the objections received, the Order now falls to be considered by the Eastern Area Planning Committee whose Members should consider the legal tests for diversion against the objections received, in order to decide whether Wiltshire Council continues to support the making of the Order.
10. Where the Authority continues to support the making of the Order, it should be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification, or with modification.
11. Where the Authority no longer supports the making of the Order, it may be withdrawn with reasons given as to why the legal tests for extinguishment are no longer met. The making of a public path extinguishment order is a discretionary duty for the Council, rather than a statutory duty; therefore, the Order may be withdrawn at any time.

Main Considerations for the Council

12. Section 118 of The Highway Act 1980
 - (1) *“Where it appears to a council as respects a footpath, bridleway or restricted byway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.
An order under this section is referred to in this Act as a “public path extinguishment order”.*
 - (2) *The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is*

expedient to do so having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

- (3) A public path extinguishment order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed, defining the land over which the public right of way is thereby extinguished.*
- (4) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path extinguishment orders.*
- (5) Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering-*

 - (a) under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or*
 - (b) under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public,*

the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.
- (6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.*
- (6A) The considerations to which-*

(a) the Secretary of State is to have regard in determining whether or not to confirm a public path extinguishment order, and

(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order,

include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would extinguish a public right of way.”

Objections to the Order:

13. Objection from Mr McNicholas

“I would like to raise a number of objections to the proposed footpath extinguishment order. These are:

- 1. The proposal stated that the footpath, “is not used by the public and is therefore not required for public use”. This statement is incorrect. The full width of the public footpath has and continues to be used by the public including myself.*
- 2. The extinguishment order states that, "it appears to the local authority that the footpath...is not needed." This represents an, "error of fact or judgment" invalidating the order.*
- 3. The change offers no benefit to the public that use the footpath and as such the order is unnecessary.*
- 4. The change would disbenefit the public who use currently the footpath and consequently the order should be opposed.*
- 5. The footpath is a key feature of the conservation zone and should be maintained in order to protect the character of the conservation zone.*
- 6. The decision report produced by Wiltshire council fails to explicitly consider that the footpath is within a conservation zone and the impact of the extinguishment on it. This also represents an, "error of fact or judgment" invalidating the order.*
- 7. No justification or rationale has been provided for extinguishing the footpath.*
- 8. The elected council representatives, representing the footpath users, have objected to the proposed extinguishment. Wiltshire council supporting the order is therefore inconsistent with its Business Plan to work, "with the local community".*

For the above reasons, the order should not be confirmed. Instead, the path should be retained and clear demarcation that was recently removed reinstated along with clear signage. Given the above facts, the council should also exercise its right to change its stance on this order by opposing it.”

Comments on the Objection

14. ***The proposal stated that the footpath “is not used by the public and is therefore not required for public use”. This statement is incorrect. The full width of the public footpath has and continues to be used by the public including myself.***

The Order has been advertised on site, in The Wiltshire Times, via letter to user groups, Burbage Parish Council, the local member and other interested parties. Mr McNicholas is the only objector and only respondent at any stage who claims to use the section of path that is proposed to be extinguished. As stated in the decision report at Appendix 1 section 10.6. The Planning Inspectorate Advice Note 9 states that when considering confirming an extinguishment order a way may be used to a limited degree but still not be needed for public use and be capable of confirmation.

15. ***The extinguishment order states that "it appears to the local authority that the footpath...is not needed." This represents an "error of fact or judgment" invalidating the order.***

Taking into consideration the consultation responses received and the location and nature of the path officers believe that not all of the width of the footpath at this location is needed. The path has a recorded width of 8 metres at this section, the Order, if confirmed will reduce this to a minimum of 4.7 metres wide. This is deemed more than adequate for the passing and re passing of pedestrians using the footpath. The Countryside Access Improvement Plan sets out Wiltshire Council's policy for new or diverted paths; this states that new footpaths should be a minimum of 2 metres or 3 metres if fenced. If confirmed this Order will leave a width of 4.7 metres which exceeds the minimum width required for a footpath in Wiltshire Council policy. The location and nature of the path have also been taken into consideration. As can be seen in the photographs of the site at section 5 of Appendix 1, the natural continuation and use of the path, particularly between Eastcourt Road and the section to be extinguished, is not affected, this is clearly demonstrated at photograph 5.4 of the site and proposed area to be extinguished.

16. ***The change offers no benefit to the public that use the footpath and as such the Order is unnecessary.***

The application for the Order is made by the landowner and the Council has a power to consider these applications. It is recognised by the legislation being in place to enable extinguishments and diversions that the rights of way network may not meet modern needs and circumstances. Each individual case is considered, and the relevant legal tests applied. In this case the only test to be applied is whether the path is needed for public use and the Council is exercising its power in determining this application. Whether or not there is public need for a path with a width of 8 metres at this location is the only matter to be considered in applying Section 118 of the Highways Act.

17. ***The change would disbenefit the public who use currently the footpath and consequently the Order should be opposed***

It is not considered by officers the public would be negatively affected by the confirmation of this Order. The proposed width of the path is the natural continuation of width available from Eastcourt Road as seen at photograph 5.4 of Appendix 1. The section of path to be extinguished is a gravelled area in front of a private dwelling, and not an attractive area for the public to use while exercising. Mr McNicholas is the only person, of those who responded to the consultations, who claims to use this section of path in front of the property.

18. ***The footpath is a key feature of the conservation zone and should be maintained in order to protect the character of the conservation zone.***

The decision report produced by Wiltshire Council fails to explicitly consider that the footpath is within a conservation zone and the impact of the extinguishment on it. This also represents an, "error of fact or judgment" invalidating the Order.

19. Mr McNicholas has confirmed via email that the conservation zone is referring to the Eastcourt Conservation Area. Officers have now reviewed the Eastcourt Conservation Area appraisal document which was last reviewed by Kennet District Council in 2008. The conservation zone is still considered by planning officers when considering planning applications in the affected area; however, this Order is not made under any planning regulations, it is an extinguishment Order for a public right of way made under the Highways Act.
20. Considering the document which is attached as **Appendix 3**, Section 2.2.8 refers to public footpaths. Stating "Footpaths separate to the road are important to rural character and encourage less use of the private car. It is important they are not diverted from their original direct routes, maintained clear of overgrowth and surfaced adequately to encourage universal use." This extinguishment Order does not divert the path from its original route and does not affect its maintenance or surface. Therefore, the Order clearly does not meet the policies of the Eastcourt Conservation Zone appraisal document.
21. ***No justification or rationale has been provided for extinguishing the footpath.***

The application to extinguish the footpath was made by the landowner on the grounds the path is not needed. The Council has a power to consider these applications and officers have followed the regulations and legal tests set out in Section 118 of the Highways Act 1980.

22. ***The elected council representatives, representing the footpath users, have objected to the proposed extinguishment. Wiltshire Council supporting the Order is therefore inconsistent with its Business Plan to work, "with the local community.***

Burbage Parish Council did object to the proposal at the initial consultation phase; however, it has not objected to the Order during the statutory consultation phase. The Parish Council's initial objection was considered in the Council's

decision report at Sections 9.5 and 11.3. The main point of the Parish Council's objection was on the grounds that drains run under that strip of land. Utility searches have been undertaken and the only utilities directly under the affected section of the footpath are electricity cables in the control of Scottish and Southern Energy, who have consented to the Order. Any drains under the section of the path will be the responsibility of the landowner and the extinguishment of the path will not affect their maintenance. The Order regulations will contain provisions for any statutory undertakers to maintain access to their plant. Burbage Parish Council was sent a copy of the Council's decision report to explain the decision to make an Order following the initial consultation.

23. The Ramblers, who represent the walking community of Wiltshire, have not objected to the Order and the local population have been consulted via on site notices and in a local newspaper. Mr McNicholas is the sole objector to the Order and the only objector at any stage who claims to have used the section of path to be extinguished.

Overview and Scrutiny Engagement

24. Overview and Scrutiny Engagement is not required in this case.

Safeguarding Considerations

25. There are no safeguarding considerations identified as a result of the proposal.

Public Health Implications

26. The Order has no identified public health implications.

Corporate Procurement Implications

27. 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 31 to 33 of this report.

Environmental and Climate Change Impact of the Proposal

28. There are no identified environmental or climate change implications resulting from the proposal.

Equalities Impact of the Proposal

29. The equalities impact of the proposal has been considered at Section 17 of the decision report at Appendix 1. The Wiltshire Countryside Access Improvement Plan 2015-2025 sets out the Council's policies for access. This proposal meets the CAIP policies. The required width for a new footpath is 3 metres for a fenced footpath; this extinguishment order will leave a recorded width of 4.7 metres. The proposal does not add any restrictions to the footpath or impact negatively on the access for any users.

Risk Assessment

30. 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. Section 118 is a power rather than a duty; however, a request for judicial review could be made with significant costs against the Council where it is found to have acted unlawfully or in making an unjust decision. No specific risks have been identified to the public as a result of extinguishing the section of Burbage 6 subject to the Order.

Financial Implications

31. The applicant has agreed, in writing, to meet the actual costs to the Council in processing the Order, which includes staff time and the costs of advertising the making of the Order and the confirmation of the Order in one local newspaper.
32. Where there are outstanding objections to the making of an Order and it is forwarded to be determined by the Secretary of State, the outcome of the Order will 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 negligible; however, where a local hearing is held the costs to the Council are estimated at £300 to £500. A single day public inquiry could cost between £1,500 and £3,000.
33. Officers would recommend to SoSEFRA that the Order is capable of being determined by written representations; however, the method of determination would be decided by SoSEFRA.

Legal Implications

34. Where the Council decides to abandon the Order, clear reasons for this must be given and must relate to the legal tests. The applicant may seek judicial review of the Council's decision if she sees it as incorrect or unjust by them. The cost for this may be up to £50,000.

Options Considered

35. Members should now consider the objection received and the legal tests as set out in Section 118 of the Highways Act to determine whether Wiltshire Council continues to support the making of the Order. The making of the Order has been objected to; therefore, the Order must now be submitted to SoSEFRA for determination or abandoned. If the Order is abandoned clear reasons should be given as to why. The options for the committee are:
 - (i) The Order be forwarded to SoSEFRA with the recommendation it is confirmed.
 - (ii) The Order be abandoned.

Reason for Proposal

36. Unless the objections and representations are withdrawn the Order must be forwarded to SoSEFRA for determination if it is to be confirmed.
37. The legal tests which must be considered are set out in Section 118 of the Highways Act 1980. The main tests are - is the path needed for public use and how likely is the path to be used. This is the test that SoSEFRA will apply and which this Council should consider.
38. The path is needed for public use and is likely to be used; however, it is important to consider that the path in its whole is not being extinguished; the Order extinguishes a section of path 3.3 metres wide by 21 metres long. The path at this section is 8 metres wide and the Order, if confirmed, will leave a recorded width of 4.7 metres. It is considered this is more than adequate for a public footpath and exceeds the minimum width of 2 metres for a new unfenced path and 3 metres for a new fenced path as set out in the Council's policies. The section of path to be extinguished is not needed for public use; it is a section of path in front of a private dwelling which requires a walker to deviate from their natural continuation east towards Eastcourt Road. It offers no obvious enjoyable features for the public, being gravelled in the manner of the adjoining section of the path and does not offer any additional views for the public. The width offered, 4.7 metres, is more than adequate for pedestrians to pass and repass.
39. The consultations carried out have attracted one objection from Mr McNicholas who claims to use this section of the path. It is clear in the Planning Inspectorates Advice Note 9 that an inspector may still confirm an extinguishment Order if the path is used to a limited degree but not needed for public use. This is relevant to this case, as Mr McNicholas claims to use this section of the path, but it is, in the officer's opinion, not needed for public use as no other evidence has been produced of the need for the full 8 metre width. Burbage Parish Council, who objected at the initial consultation phase, but not to the Order, did not state that members of the Council used or were aware of any use of the affected section of the path. Use of the affected section of path appears to be very limited from consultation responses and what would be the expected use of the 3.3-metre-wide section of path given its location and the available width of the adjoining path to Eastcourt Road.
40. The Order was advertised on site, at either end of the affected section of path, so anybody using this part of the path will likely have seen the notices and been aware of the Order and how to object to the Order. The Order was also advertised in a local newspaper. The regulations have been followed and no evidence has been produced which shows the 3.3 by 21 metre section of path is needed for public use.
41. The legal tests for Section 118 of the Highways Act have been met and the Order is capable of confirmation.

Proposal

42. That “The Wiltshire Council Burbage 6 (part) Extinguishment Order 2020” should be determined by SoSEFRA with Wiltshire Council recommending that the Order be confirmed.

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Definitive Map Officer

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

None

Appendices:

Appendix 1 - Decision Report

Appendix 2 - The Wiltshire Council Burbage 6 (Part) Extinguishment Order 2020

Appendix 3 – Eastcourt Conservation Zone Policy Document 2008