WILTSHIRE COUNCIL **AGENDA ITEM NO. 6**

EASTERN AREA PLANNING COMMITTEE

25 AUGUST 2011

WILDLIFE AND COUNTRYSIDE ACT 1981

THE DEFINITIVE MAP AND STATEMENT FOR THE DEVIZES RURAL DISTRICT COUNCIL AREA DATED 1952 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL (SHEET ST 96 NE) (PARISH OF BROMHAM – CHITTOE PLANTATION) RIGHTS OF WAY MODIFICATION ORDER NO. 9 2011

Purpose of Report

1. To:

   (i) Consider and comment on the evidence and seven objections relating to the above Order to add public rights of way on foot to the Definitive Map and Statement at Chittoe Plantation, Bromham.

   (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance at Inquiry.

Description of the Route

2. The Order is attached to this report at **Appendix 1** and contains a map showing the claimed routes.

3. The claimed routes lead through and around an area of mature trees and scrub known as Chittoe Plantation. The plantation is bordered by a cul-de-sac highway to the north and west (u/c 7018), predominantly by the rear gardens of properties fronting the u/c 7017 to the south and by an enclosed field to the east.

Background

4. On 18 March 2009 Wiltshire Council received an application from a member of the public for an Order to add a number of routes through and around Chittoe Plantation to the Definitive Map and Statement. The application was supported by the evidence of 22 User Evidence Forms (UEFs) and maps.

5. The Council has a duty to investigate this evidence and to make an Order if, on the balance of probability it is either reasonably alleged, or shown, that public rights subsist over the ways. As a result, an initial consultation and investigation was conducted between 2 December 2009 and 19 February 2010.

6. A considerable amount of correspondence was received, both in support of, and in objection to, the application.

7. Officers considered all of the evidence available and in March 2010 a Decision Report and notice of refusal to make an Order was sent to the applicant. The Decision Report is attached to this report at **Appendix 2**.

8. The applicant exercised his right to appeal this decision with the Secretary of State for the Environment, Food and Rural affairs (SoSEFRA). An inspector acting on behalf of SoSEFRA considered the Council's Decision Report and representations made by the applicant and the principal objector to the application; the leaseholder for the land.

9. The Inspector upheld the appeal and directed Wiltshire Council to make the Order. The Inspector's report is attached to this report at **Appendix 3**.

10. The Order was made and advertised in accordance with the statute. The Order attracted seven duly made objections.

Evidence examined

11. No evidence has been discovered for any historic public rights existing at Chittoe Plantation, though it is noted that in 1910 the Inland Revenue recorded that the nearby Chittoe Heath (or common) had been "given as recreation ground to parish of Chittoe.." (see page 12, **Appendix 2**).

12. No evidence has been found that any similar dedication, or dedication of any ways at Chittoe Plantation to the public, had been made by the landowner and hence the principles of dedication at Common Law are unlikely to apply, though it is noted that long-term acceptance can, in some cases, lead to public rights being acquired in this way.

13. It is considered more applicable to consider the evidence by application of Section 31 of the Highways Act 1980. Broadly, this gives that where a way has been used without interruption by the public 'as of right' for a period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate, then public rights are deemed to have been dedicated. 'As of right' means without force, without permission and without secrecy.

In Support of the Order

14. 22 witnesses gave evidence that they had walked routes in the plantation for varying amounts of time before an effective challenge was issued by the current leaseholder in late 2008. Hence, counting back from this date, the 20 year period in which to apply Section 31 Highways Act 1980 is 1988 to 2008. This is called the relevant period and within this period 9 users have used routes for 20 years, 3 for 19 years and others from 6 to 18 years.

15. Witnesses record that they gained access to the Plantation at several locations and that the Plantation had at those points either stiles, broken down and trampled fences or no fences. Witnesses recalled stiles into the Plantation at two points falling into disuse/disrepair around 1990 (see page 33 **Appendix 2**). A witness for the objector recalls these stiles being in place in the 1940s.

16. One witness recalls a sign before 2008 but cannot recall what it said.

17. All witnesses recall seeing other users.

18. No witnesses recall being challenged prior to 2008 though one witness does recall having her dog accused of chasing chickens belonging to an adjacent property owner (no date).

19. The Inspector acting on behalf of SoSEFRA considered, in his report at **Appendix 3**, that the evidence formed at least a reasonable allegation that public rights subsisted. This view was in accordance with the findings of the Decision Report with regard to aspects of the evidence relating to whether use had been 'as of right'.

Against the Order

20. In the Decision Report issued by Wiltshire Council (**Appendix 2**) officers observed that there was considerable variation in the routes that users had taken and with the application plan (see pages 37 to 43 **Appendix 1**). Permission was not granted by the leaseholder to hold site visits with witnesses to walk routes and it was noted that there was a lack of a wholly discernible path around the perimeter and no evidence of paths across the centre. As a result of this, officers took the view that the definition of 'a way' (Section 31(1) Highways Act 1980) had not been satisfied as the evidence did not support that the public had all walked the same way. This was the reason for refusing to make the Order.

21. The Inspector acting on behalf of SoSEFRA did not concur with the Council's view on this and considers that the absence of any discernible track does not necessarily mean that any way was not used. His Decision (see paragraph 25 **Appendix 3**) points out that the appropriate course of action, where there is a conflict of evidence, is that an Order is made so that if objections are raised then the evidence may be tested.

22. On advertisement of the Order seven objections were received. They are summarised and commented on as follows:

Name	Nature of Objection	Officer's Comment
C P Smith	Has always been private land	It is the nature of public rights of way that they give the public access over privately owned land
	There are plenty of places for the public without new footpaths	Desirability and need are not considerable under the Wildlife and Countryside Act 1981
	Unsavoury things go on at this location	These matters are not considerable under the Wildlife and Countryside Act 1981
L Smith	The Plantation is private land	It is the nature of public rights of way that they give the public access over privately owned land
Bromham Parish Council	The area could become under threat from undesirable activities.	These matters are not considerable under the Wildlife and Countryside Act 1981.
	The owners plans for forestry and replanting work will be affected if public access is granted.	Any addition to the definitive map would only record something that has already been acquired it will not create new paths.

Name	Nature of Objection	Officer's Comment
	A right of way through the plantation would not link up with existing footpaths.	This is not necessary. A right of way must either link highways or provide access to a place of public resort or interest.
Mr & Mrs R Lawrence	Moved to area in 1970. Woods were fenced and signed Private all around.	This evidence conflicts with UEFs
	It is only since around 2001 that the fence and signs have disappeared.	This evidence conflicts with UEFs
D Spens	There was no entrance at or about position A on the Order Plan. You would have to climb a fence to the south.	This evidence conflicts with UEFs but there have been alterations to fences in this area.
	A new fence was erected close to the new hunting gate leading to the church, interrupting the claimed route.	The newly erected fence (which divided the land leased to Mr Seed and that retained by BCH UK Ltd.) would have interrupted use of the claimed route. However, the purpose of it was not to stop the public and they diverted their route to enter north of it. They did not see it as calling their use into question as a diversion was easily used.
	Walkers wandered where they pleased as though on a common.	This evidence conflicts with UEFs but is supported by the lack of discernible paths in some places.
	Removing individual rights of ownership is an abuse of power.	No rights of ownership are removed by the Wildlife and Countryside Act 1981.
	The Local Authority does not have the right to purport to grant rights of way ..without compensation.	The Local Authority is not granting a right of way. The order, if confirmed would record a pre-existing one.
	Asks that there should be a public enquiry (sic) at which this matter may be properly considered.	This is in line with the Inspector's Appeal decision.
CJ & ML Seed (leaseholders)	Objects to the decision of the Inspector and the order noting: The Original application was for a single footpath and not footpaths	The Inspector found it helpful to break down the application routes into a perimeter route and cross paths and the Order reflects this. This will simplify the inquiry as all witnesses may describe routes more easily. The naming of paths is a matter for the authority to decide – this representation is consistent with other ways in the County.
	The evidence needs more thorough testing.	This is in line with the Inspector's Appeal decision.
	The leaseholders case is supported by the Parish Council. It is asked that the Council, in line with other considered decisions it takes to support orders and the strength of evidence in our favour is legally represented at the inquiry. Failure to do so would be a dereliction of public duty and such a decision would be open to judicial review.	Where a council supports an order and an inquiry is held counsel is normally instructed. This is because it is the Council's duty to amend the definitive map when evidence is found to do so and it is in the interest of the public that this duty is adhered to. In cases where a council does not support an order and where evidence remains untested it is usual for the Council to adopt a neutral stance with officers presenting background or facts without interpretation (PINS Advice note No. 1). In cases where a council opposes an order it may be legally represented at inquiry.
	A number of specific points of objection are raised.	Considered in subsequent paragraphs.

23. Specific Points of Objection raised by Mr and Mrs Seed:

Objection	Officer's Comment
There is a lack of evidence of use and most of the witnesses are unable to claim use over a period of 20 yrs or more.	It is not necessary for all witnesses to have used the land for the full period just that the land has been used, uninterrupted, in a manner that is 'as of right' for the 20 year period. Planning Inspectorate Consistency Guidelines point out that is no set number to establish a sufficiency of evidence just the evidence should be cogent and credible.
In 2002 signs saying 'Private Woodland – Keep Out' were erected and For Sale signs were also periodically erected.	There is no indication that the erection of notices challenged what the public were doing and the notices did not demonstrate that there was no intention to dedicate a public right of way, just that the land was private.
The application was a for a single footpath and we are being prejudiced if any alteration to the original submission is made.	The application brought evidence to the council's attention for a number of routes which all linked with each other and adjoining highways. The total length of claimed public rights is not altered by dividing the claimed routes into sections. The numbering of paths in the definitive map is an administrative detail that does not affect the public right itself, if recorded.
The user must establish that there was a right of passage over a more or less defined route and not a mere indefinite passing over land.	Although a used path does not have to be visible it is important that users have all walked the same way. It will only be during the testing of evidence at inquiry that this point may be addressed.
Between 1954 and 1992 the land was leased to the Ministry of Agriculture Fisheries and Food (MAFF)and s.31 of the Highways Act 1980 can not apply to Crown Land.	MAFF were not holders of the fee simple and did not have the capacity to dedicate public rights over land not owned by them. P.17 Appendix 2. Correspondence from the Forestry Commission stated it was not common practice to deposit plans under s.31(6) of the Highways Act plans (essentially a statement that no further rights of way were dedicated)as they left this to the freeholder to undertake. This was not done.
Some witnesses have admitted that their original witness statement is negated by written acceptance of permission.	Witnesses gave evidence of the nature of their use prior to Mr Seed granting permission and their evidence details the nature of their use. Since it details something they have already done it cannot be removed.
The land has been properly fenced for many years. The public would have had to scale the fence to gain entry. This is supported by several witness statements from local residents who object.	This conflicts with UEFs highlighting the need to test both UEF and objector's evidence at inquiry.
It is noted that all objectors are local whereas none of the witness supporting the application live within walking distance and are not local.	It is the evidence given that is important, not where those giving it come from.
One of the witnesses, Sarah Collins, said she obtained permission from the Spicer Family (the landowner).	If Mrs Collins did use the woods having obtained permission it is unlikely her evidence would be considered (it is not 'as of right'). However it is unclear whether Mrs Collins specifically asked and received permission and this evidence would be best tested at public inquiry.
Three of the witnesses (the Thompsons) were tenants of the landowner.	As above, if the family were tenants then their use is unlikely to be as of right, however they did not work for the landowner throughout their entire claimed period. Again, their evidence

	would best be tested at inquiry.
There is a lack of defined paths. There are also considerable differences in the application maps of the witnesses. Witnesses also record dog walking as an activity and they would have wandered through the woods following their dogs.	There is variation between plans but the inspector noted in his decision report that the woods lack clear and distinctive features and that the routes drawn by people are a reasonable representation of a way given this, and the map scale. This is noted and again is evidence to be best tested at inquiry.
'the user must be as a right of passage and not a mere indefinite passing over land. Where a claim is set up to an ancient public footpath through a wood, it may be shown that the public have merely wandered about the wood as they pleased; that there is no made path, but only a track, never repaired and in wet weather hardly passable. Similarly if there is no definite enduring track way, but merely temporary and transitory tracks, this is strong evidence against a public right of way'. Quoting from Pratt and Mackenzie's Law of Highways at pages 37 and 38, Schwinge and Dowell and Eyre v New Forest Highway Board.	It is agreed that users must have all used the same, or similar route to acquire a public right. It should become apparent, when evidence is tested, whether this has been the case or not.
'Public rights of way must follow a defined line' quoting from the Planning Inspectorates Inspector's decision on a case in Marlborough 2005.	It is agreed that a defined line must be followed but until the evidence is tested it is not possible to say whether the public had done this, or not. Inspector's decisions do not set precedents and the decision will have been based very specifically on the evidence relevant to that case.

.**Main Considerations for the Council**

24. The Council, as the surveying authority for the County of Wiltshire excluding the Borough of Swindon, has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Mr N Thomas. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.

25. Section 53(2)(b) states:

> *"as regards every definitive map and statement, the surveying authority shall: "as from that date (the commencement date), keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event".*

26. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(i):

> "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows: that a right of way which is not shown in the 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 to which this Part applies."*

27. In considering and determining the application, Wiltshire Council must have regard to *'all other relevant evidence available to them'*, as the statute demands.

28. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31 of the Highways Act 1980. The Section states:

> "*where a way over any land, other than a way of such a character that use of it by the public 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 was no intention during that period to dedicate it".*

29. The Section provides that where a way has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway - unless there is sufficient evidence that there was no intention during that period to dedicate the way.

30. The term 'as of right' means without force, secrecy and permission. People using the way must do so openly without damaging the property and not be reliant on being given permission to use the path by the owner of the land over which the path runs.

31. The case of R. v. Oxford County Council ex parte Sunningwell Parish Council (1999*)* considered the issue of public use of a way. Lord Hoffman presiding stated, "…*the actual state of mind of the road user is plainly irrelevant"*, it is immaterial therefore, whether the public thought the way was a 'public' path or not.

32. The case concluded that it is no longer necessary to establish whether the users believe they have a legal right to use the land. Instead, it should be shown that use has been without force, secrecy and permission.

33. The use of the way must be without interruption. Once the 20 year uninterrupted use 'as of right' has been proved, the burden then moves to the landowner to show there was no intention to dedicate, i.e. evidence of any overt acts by the landowner to deter the public from using the way, or conversely to permit the public to do so. Overt acts are covered in Section 31 (3) (4) (5) and (6) below:

34. Section 31 of the Highways Act states as follows:

"***31. Dedication of way as highway presumed after public use of 20 years***

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually 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.

(2) The period of 20 years referred to in subsection (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 a manner as to be visible by persons using the 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 later date on which it was erected.

(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 highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as 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 having 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 deposit
(ii) within ten years from the date on which any previous declaration was last lodged under this section,
to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated 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 of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(7) For the purpose of the foregoing provisions of this section, 'owner', in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above 'the appropriate council' means the council of the county, metropolitan district or London Borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.

(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an Order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over the land as a highway would be incompatible with those purposes."

35. The recent appeal case – Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs drew the following conclusion regarding non intention to dedicate: *…'Sufficient evidence of no intention on the part of the landowner to dedicate a way as a highway required evidence of overt acts coming to the attention of users of the way'.*

36. It is noted that no witnesses record being aware of overt acts prior to 2008.

37. There have been no Highways Act 1980 Section 31(6) statutory deposits declaring non-intention to dedicate the claimed route deposited with the Surveying Authority during the relevant period. No notice under Section 31(5) has been given to Wiltshire Council during the relevant period (or at any other time).

The Order

38. It is important to note that this Order is made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (see paragraph 26 of this report).

39. Further to the case of R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P and CR 402 it is clear that an Order may be made under this section by applying one of the following two tests:

Test A: Does a right of way subsist on the balance of probabilities? This requires that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? This requires that the allegation of public rights is reasonable and there is no incontrovertible evidence to the contrary.

40. The evidence adduced in this case, from both supporters and objectors, has been judged by the Inspector in his decision to form at least a reasonable allegation that public rights subsist over the ways applied for, hence the Order was made.

41. To confirm the Order, the stronger test needs to be applied; that is, essentially that contained within Test A. Todd and Bradley v SoSEFRA [2004] EWHC 1450 (Admin). Evans-Lombe J found that the appropriate test for confirmation is the normal civil burden of proof that such a way subsists on the balance of probabilities.

42. No further evidence, either in support of the Order or in objection to it, has been brought to the Council's attention since the making of the Order and Wiltshire Council must consider whether it considers that, on the balance of probabilities, Test A applies to the evidence (in which case the Order would be supported), whether it considers that, on the balance of probabilities, Test A does not apply to the evidence (in which case the Order would be opposed) or whether it wishes to adopt a neutral stance with regard to the Order as the evidence has yet to be tested.

43. The Council's refusal to make the Order arose from one fundamental ground. That is, whether the witnesses had all walked the same routes. From the evidence adduced, and as a result of the limited access to the woods for the public post 2008, it is not possible to tell whether the public had all walked the same way. An Inquiry would hear evidence from supporters which would be subject to cross-examination and would also hear evidence from objectors which would be subject to cross-examination.

44. It is only after the testing of the evidence would it become apparent whether the stronger Test A applied or not.

Environmental Impact of the Recommendation

45. Effects on the environment cannot be taken into consideration for an Order decision.

Risk Assessment

46. Risks or safety cannot be taken into consideration for an Order decision.

Financial Implications

47. It is considered that with this case, given the number of objectors and supporters and the need to test the evidence of both, that a Public Inquiry is unavoidable.

48. The Council has a duty in law to support Orders where it is considered that on the balance of probability the order public rights subsist as shown in the Order. Budgetary provision has been made for this.

49. The Council may maintain a neutral stance where they are directed to make an Order and where the evidence requires testing. This incurs a smaller cost for which budgetary provision has been made.

50. It is rare for a Council to object to an Order, though it may do so. An example of this may be when an Order has been made and during the advertisement period evidence against the Order is brought to its attention that is incontrovertible. This would attract a similar cost to supporting an Order and could be in the region of £5,000 to £10,000.

Options Considered

51. That:

    (i) The confirmation of the Order is supported as made.

    (ii) The confirmation of the Order is supported with modifications

    (iii) The Council takes a neutral stance at Inquiry.

    (iv) The confirmation of the Order is objected to.

Conclusions

52. The evidence from users of the woods show that a variety of routes have been used by the public 'as of right' for a full period of twenty years. Therefore, in accordance with Section 31(1) of the Highways Act 1980 the way would be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate it.

53. There is no incontrovertible evidence against deemed dedication.

54. There is some evidence given by objectors that force was used to enter the land by breaking down fences and that signs saying "private woods" or "private woods keep out" were in place for part of the relevant period. Officers do not consider that the wording of the signs is sufficient to bring to the public's attention that the landowner did not intend to dedicate public rights, further the signs were not maintained in accordance with The Highways Act 1980 s.31(3) and (4). Also see paragraph 34 of **Appendix 3**.

55. There has been no further evidence adduced which either supports that the same ways were used or that the woods were used more generally for walking.

Reasons For Recommendation

56. It has not been possible to hold a site visit with witnesses to ascertain the routes they had walked. Although it is accepted that a public right of way does not have to be visible, it is essential that it has a legally definable route and this can only be acquired, in this instance, by the public walking the same way. If they have wandered more generally in the wood, the definition of "a way" in Section.31(1) cannot be met.

57. In the absence of any additional post Order evidence and before the evidence is heard before an Inspector at Public Inquiry (and cross-examined) it is not possible to judge whether or not the public have used the same routes and whether Section 31(1) is satisfied..

Recommendation

58 That the Wiltshire Council (Sheet ST 96 NE) (Parish of Bromham – Chittoe Plantation) Rights of Way Modification Order No 9 2011 is forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and that Wiltshire Council adopts a neutral stance at Public Inquiry.

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

Correspondence with parish councils, user groups, other interested bodies and members of the public