

**REGULATORY COMMITTEE**  
**19<sup>th</sup> SEPTEMBER 2007**

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**MARLBOROUGH: PROPOSED ADDITION OF FOOTPATH 48, MARLBOROUGH COLLEGE  
TO DEFINITIVE MAP AND STATEMENT**

**Purpose of Report**

1. To:
  - (i) Consider and comment on an objection received to the making of an Order under Section 53(3) of the Wildlife and Countryside Act 1981 to add a new Footpath No. 48 to the Definitive Map and Statement at Marlborough College, Marlborough.
  - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs for consideration and confirmation. The route of the proposed footpath is shown on the plan at **Appendix 1**.

**Background**

2. On 23<sup>rd</sup> February, 2004, Dr. Clapp, on behalf of the Marlborough Civic Society (now disbanded), applied for an Order under Schedule 14 and Section 53(2) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by adding a footpath leading from the junction with footpath MARL 37 (OS Grid Reference SU 18091, 68685) running generally east to join the adopted footway system on Bath Road immediately east of Marlborough College gates (OS Grid Reference SU 18232, 68732). The path is mainly tarmacked but has ten metres of grass just to the west of the college gates where it has been blocked by a wall, railings and pillars since 2003. In the main it is bounded to the north by a hedge running parallel to Bath Road and to the south by the College Playing Fields drainage ditch. The path is 155 metres long with a width of 2 metres.

**User Evidence**

3. The catalyst to the Schedule 14 application was the deposit of a statutory declaration of dedication on 26<sup>th</sup> November, 1998 under Section 31 (6) of the Highways Act 1980. The College claimed to have erected notices prior to this declaration, but no evidence of this was produced at the time of making the Order. The College submitted a further statutory declaration on 21<sup>st</sup> May, 2007.
4. The act that brought the use of the path into question as a public right of way was the submission of the first statutory declaration of dedication on 26<sup>th</sup> November 1998. The question of whether there had been twenty years use as of right is to be reassessed retrospectively from this date i.e. from 26<sup>th</sup> November 1978 – 26<sup>th</sup> November 1998.
5. In support of the application, user evidence forms were submitted from ten people. A further six witness evidence forms have now been received, making a total of sixteen.

6. Seven of the witnesses claim to have used the way for a period greater than twenty years up to the date the way was called into question, openly and without challenge. The remainder support shorter term usage of the way. The witness statements are summarized along with comments from witnesses noted during a meeting with Rights of Way officers in **Appendix 2**. A full copy of the evidence forms will be available for inspection in the **Members' Room** prior to the meeting.
7. The evidence of use of the alleged footpath is said to have occurred whilst the land over which the path runs was owned by Marlborough College which is a registered charity.

### **Responses to Consultation**

8. Consultations with statutory bodies, user groups and the landowner were undertaken on 21<sup>st</sup> March, 2007. The responses are as follows:

**Marlborough Town Council** – supports the footpath being recorded on the Definitive Map and Statement by a majority decision of 6-3.

**The Ramblers Association** - no objection to the footpath being recorded on the Definitive Map and Statement and asked if they could submit more user witness statements.

**The Bursar Estate (on behalf of Marlborough College)** expressed grounds for opposing the footpath being recorded on the Definitive Map and Statement, the majority of which centered on privacy and vandalism. These grounds cannot be taken into consideration for the purposes of making the Order. However, it was also stated that signs were displayed within the College grounds declaring access to College land was by permissive use.

After a meeting with Rights of Way Officers where relevancy for grounds of objections was discussed, the College stated it would be making an official objection if the Order was made.

### **Decision to make the Order**

9. In considering all the relevant evidence and the legislation to be taken into account, a Modification Order was made to add the footpath to the Definitive Map and Statement.
10. The Order was made on 23<sup>rd</sup> May, 2007 and advertised in The Wiltshire Gazette & Herald on 31st May, 2007. The Order seeks to modify the Definitive Map and Statement by adding the claimed footpath across the grounds at Marlborough College. The decision report is available in the **Members' Room**.

### **Objections Received after Order made**

11. The following objections have been received after the making of the Order:

**Robert Smith (local resident)** - Objection on grounds of adequate alternate route on the north side of Bath Road.

**The Estate Bursar (on behalf of Marlborough College)** - does not accept that the public have walked the footpath on the whole of the claimed route as of right.

### **Further Grounds of Objections stated by Marlborough College**

12. Objection on grounds of the path being a private footpath established, surfaced, resurfaced and improved by the College for the specific purpose of providing a secure footpath for pupils to and from the Preshute Boarding House and the College campus.
13. The College has, by various means, made plain its lack of intention to dedicate any public right of way over any of the College land. Signs supporting this view have been on the College grounds since the 1980's.
14. The College policy on public access, for as long as anyone can remember, and certainly since the 1970's has been one of permissive access.
15. The path continues to be maintained by the College.

### **Comments**

16. There is evidence of use given by the witnesses from 1960's to the present date. Use has been claimed to be as of right (without force, without secrecy and without permission), unchallenged and continuous throughout the 20 year required period.
17. The fact that the land is, and has been, open to public access, has not been denied although there is dispute as to whether this has been as-of-right or permissive.
18. The adequate alternative route on the north side of the A4 suggested by Mr. Smith (objector) would leave no safe crossing over the A4 from existing public footpath Marlborough 37.
19. Although signs have been in place at various times on College land, these were not specifically at each end of the way in question so not directly brought to the notice of users of the path.
20. 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'.*

### **Main Considerations for the Council**

21. The County Council has a duty to investigate the application made by Dr. Clapp on behalf of the residents of Manton and Marlborough.
22. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
23. Section 53(2)(b) states:

*"As regards every definitive map and statement, the surveying authority shall:*

- (b) *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.*

24. The events referred to in Section 52(2)(b) relevant to this case are set out below in Sections 53(3)(b) and 53(3)(c)(i):
- 53(3)(b) *The expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment of the public of the way during that period raises a presumption that the way has been dedicated as a public path.*
- 53(3)(c) *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 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."*
25. In considering and determining the application, the County Council must have regard to 'all other relevant evidence available to them', as the statute demands. However, no documentary evidence has been discovered by the Council to support the application. Therefore, the application is solely reliant upon presumed dedication through use of the claimed route.
26. 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'.*
27. 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.
28. The term 'as of right' means without force, without secrecy and without permission. So that 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.
29. Mr. Eveleigh, The College Bursar, has provided verbal confirmation to the County Council that the College was aware that the public used the path and that there were never any gates, stiles or restrictions on the path.
30. Mr. Eveleigh also stated that he was not sure if there were any signs erected on the path although there could have been and to his knowledge nobody had actually been turned back whilst using the path.
31. In the objection put forward by the College's representatives (Thring Townsend Solicitors), photographic evidence of a sign was submitted. This sign, stating "*Marlborough College Private Property No Public Right of Way No Dogs Please*" is claimed to have been on the Masters Lodge since approximately 1995. This was said to have replaced another sign (in place since the early 1980's) which read "*You are welcome to walk through the College grounds*".

32. The Masters Lodge is situated some 400 metres away from the claimed path on the opposite side of the College grounds. The sign would not have been visible to anyone using the claimed path.
33. Similarly worded signs are said to have been in other prominent places where the public might seek to enter College grounds although no proof of this has been submitted.
34. None of the witnesses provide evidence of any overt acts on the part of the landowners to show prevention of public use of the way. The witnesses all state that the way was always available for use by anyone and no signage to the contrary was evident.
35. 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.
36. The Hearing 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, without secrecy and without permission.
37. 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, ie 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.

### **Environmental Impact of the Recommendation**

38. The environmental impact of the recommendation is minimal because the path is already physically in existence to a high standard of build so there is no need of further construction.
39. Levels of crime, vandalism, noise, dropped litter, dog faeces etc. should not increase if this path is added to the Definitive Map and Statement as it is already well used by the College and members of the public.

### **Risk Assessment**

40. A new traffic-light controlled pedestrian crossing has recently been installed (January 2007) across the A4, connecting the claimed public path on the south side of the road to the public footway on the north side of the A4.
41. There is no public footway on the south side of the A4 in the vicinity of the crossing and no other safe means of crossing the A4 exists near this location.
42. Therefore, the claimed path in conjunction with the crossing affords the general public walking between Manton Village and Marlborough a safe means of crossing the A4.
43. There are already other public footpaths and bridleways within the College that are well used, as is this one. Therefore it is not anticipated that adding the path to the Definitive Map and Statement would lead to an increase in vandalism or loss of privacy for the College.

### **Financial Implications**

44. Costs will be incurred associated with attending a Public Inquiry for which budgetary provision has been made.

### **Conclusions**

45. Officers are satisfied that the legal test in Section 53(3) (c) (i) of the Wildlife and Countryside Act 1981 has been satisfied. This being the case, the Council is statutorily obliged to forward the Order to the Planning Inspectorate for determination.

### **Reasons for Recommendation**

46. Officers consider that the criteria set out in the legislation have been met and the statutory duty placed on the County Council requires that the way should be added to the Definitive Map and Statement. There are outstanding objections, so consequently the Order must be forwarded to the Planning Inspectorate.
47. The legislation states that the Planning Inspectorate is required to determine the matter once an objection is received and not withdrawn within the stated period.

### **Recommendation**

48. That the Order to add a new footpath No. 48 to the Definitive Map and Statement at Marlborough College be submitted to the Secretary of State for Environment, Food and Rural Affairs, together with the objection letters, with the recommendation that the Order be confirmed without modification.

### **GEORGE BATTEN**

Director of Environmental Services

Report Author

**Tim Chinnick**

Rights of Way Officer

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

Correspondence with Parish and District Councils, User Groups, the College, other interested bodies and members of the public.