

LUCKINGTON: FOOTPATH 62
OBJECTIONS TO A MODIFICATION ORDER

Purpose of Report

1. To consider and comment on objections received to the making of an Order under Section 53 of the Wildlife and Countryside Act 1981 providing for the addition of lengths of footpath in Luckington. The locations of the paths are shown on the plan at **Appendix 1**.

Background

2. On the 28th February, 2003, Mr. Neale of The Street in Luckington applied to the County Council for an Order under Section 53 of the Wildlife and Countryside Act 1981 to add the footpaths, which are the subject of this report, to the Definitive Map and Statement. Sixty-eight user evidence forms were submitted in support of the application which are summarised in **Appendix 2**. The evidence forms will be available for inspection in the **Members' Room**.
3. On the 21st March, 2007 the Council made an Order seeking to modify the Definitive Map and Statement in accordance with Mr. Neal's application. The Order was advertised and objections received.

Main Considerations for the Council

4. Section 53 of the 1981 Act imposes a statutory duty on the County Council to keep the Definitive Map and Statement under continuous review and to modify it by, for example, adding a highway on the occurrence of certain specified events.
5. The relevant events in this application would appear to be either Section 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 by the public of the way during that period raises a presumption that the way has been dedicated as a public footpath.

or 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.

Section 31 of the Highways Act 1980 acknowledges dedication of a route as highway through usage for 20 years. If the evidence raises a presumption that a highway has been dedicated, the Order must be made.

6. There are three essential parts of Section 31 to be fulfilled for the presumption to arise, these are:-
 - (i) *Use of the way by the public as of right without interruption.*
 - (ii) *Use for 20 years running back from the date on which the right of the public to use the way is brought into question.*
 - (iii) *No sufficient evidence that there was no intention during the 20 year period to dedicate the way to the public.*
7. Use “as of right” was considered by the House of Lords in *R v Oxfordshire County Council and Oxford Diocesan Board of Finance ex parte Sunningwell Parish Council*. The issue before the House of Lords was whether “as of right” included an honest belief by the public in a legal right to use the common. Lord Hoffman rejected this subjective element.

In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like Steed when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr. J.G. Riddall's article "A False Trail" (1997) 61 The Conveyancer and Property Lawyer 199.

In short, providing that the public are using a way without force, secrecy or permission, they are using it as of right whether or not they believe that they have such a right. I have assessed the evidence of:

8. Lord Hoffman considered whether tolerance on the part of the landowner was incompatible with user as of right, he concluded that tolerance was compatible.
9. Mr. Robert Simkin has rented the three fields alongside the B4040 in partnership with his father for 23 years. He confirmed for most of that time he had a verbal summer grazing agreement with the former owner but since 2001 with a farm business tenancy agreement. Mr. Simkin stated in a letter that the gate on the B4040 at Point B on the attached plan was chained and padlocked from 1998. The case officer took 1998 as the date on which the public right to use the route B-D on **Appendix 1** was brought into question. Mr. Simkins' tenancy agreement required him to discourage trespass. The Council has taken the year 2001 as the date on which the right to use the route A-D-C was brought into question as this was when the tenancy agreement was signed.
10. Evidence of use of the claimed routes dating back to 1956 has been submitted. There is conflicting evidence regarding locking of gates and interruptions to use.

Objections

11. Objections have been made to the Order and it must be submitted to the Secretary of State for determination. The objection letters will be available for inspection in the **Members' Room** prior to the meeting.
12. **Martin Rea of Sherston** objects to the Order as he thinks there are sufficient footpaths in the village and this route would seem to serve no useful purpose. He also disputes that there is sufficient evidence of use.

Comment

13. The Council does not have to find that a right of way exists, only that it is reasonable to allege one does on a balance of probabilities. The alleged need or usefulness of the route is not a consideration which can be taken into account in determining whether or not the Definitive Map and Statement should be altered.
14. A petition was submitted signed by 38 people stating

"We the undersigned hereby consider the present and existing rights of way in Luckington completely adequate."

Comment

15. The Council does not have to find that a right of way exists, only that it is reasonable to allege one does on a balance of probabilities. The alleged need or usefulness of the route is not a consideration which can be taken into account in determining whether or not the Definitive Map and Statement ought to be altered.
16. **Thring Townsend, Solicitors**, objected on behalf of:
 - **Messrs. Stourton**, who own the land crossed by the path between points A-D-E and B-D
 - **Miss S. Godwin**, who owns the field between points E and F
 - **Mr. Spencer** and his sister
 - **Mrs. Yugin**, who own the land south-east of point F
 - **Mr. Simpkins**, tenant of some of the Stourton land
 - **Mr. and Mrs. Snell**, tenants of part of the Stourton land behind Barn Cottage.

The main points of objection are:

- (i) The route has not been enjoyed as a right
- (ii) There is sufficient evidence of lack of intention to dedicate
- (iii) The Council should make a formal resolution not to proceed with the Order
- (iv) Successive owners and occupiers have made it plain, by locking of gates, erecting of signs, challenges and making a public statement to the Parish Council that the public did not have a right to walk in the fields

Comment

- (i) During the relevant 20-year period of use, 1978-98, Mrs. Donner owned the land between the points A-E and D-B. Mrs. Donner left no direct records of any steps she may have taken in the way of notices, locked gates or challenges to people using the route. It is noted that in the minutes of the Parish Council in 1993 that "Mrs. Donner has brought to the Council's attention that a path has been worn in her two fields which runs behind Barn Cottage to Mr. Spencer's also stones have been put in the gateway to give better access. She wishes it to be known that this is not an official right of way". The use of the claimed path was significant enough to have marked its route on the ground wearing away the grass. Mrs. Donner could have availed herself of the procedure under Section 31(6) of the Highways Act 1980 of depositing a statement and plan of what ways, if any, she acknowledges as public ways on her property. No deposit had been made.
 - (ii) Mr. Simkins who was the tenant of the fields during this period confirmed in a letter dated the 7th April, 2003: *"During the summer grazing period we would tie string around the gates to try and stop people walking with their dogs and upsetting cattle. The small gate at the bottom of the hill which was put in for the convenience of the Beaufort Hunt was also tied with barbed wire outside of the hunting season. The gate where the proposed spur joins the B4040 has had a chain and padlock on for at least the last five years. On signing a farm business tenancy with the current owners their agent gave me two chains and padlocks with instructions to periodically lock the centre gates."*
 - (iii) It would seem that the current owners have taken steps to prevent access but this is outside the 20-year period of relevant use.
 - (iv) The witnesses claim to have used the way without permission and as of right.
 - (v) Paragraph 7(1) of Schedule 15 of the Wildlife and Countryside Act 1981 states: *"If any representation or objection duly made is not withdrawn the Authority shall submit the Order to the Secretary of State for confirmation by him"*. The Council does not have the authority to resolve not to submit the Order or revoke it.
17. **Mr. and Mrs. Snell** submitted a letter of objection dated the 14th May 2007 requesting that a public inquiry be held so the evidence can be tested. He cites damage to property and environmental factors as concerns.

Comment

18. Environmental factors may not be taken into account in determining what rights may exist over the way. However, a public inquiry would be an appropriate forum to air the evidence and issues.

Risk Assessment

19. There is no provision within the relevant legislation for risk to be taken into account. Any risk resulting from confirmation of the Order must be managed separately.

Financial Implications

20. The cost of the public inquiry will be met within the budget allocation.

Options Considered

21. This is a statutory procedure which the Council must follow. There is no other option.

Reasons for Recommendation

22. Officers believe there is sufficient evidence of use of the claimed path as of right and it is reasonable to allege the rights exist on a balance of probabilities.

Recommendation

23. That the Order to add footpaths as shown on the plan at **Appendix 1** to this report be submitted to the Secretary of State with the recommendation that it be confirmed.

GEORGE BATTEN

Director of Environmental Services

Report Author

Barbara Burke

Senior Rights of Way Officer

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

Correspondence with Parish and District Councils and other interested parties.