

CORSHAM: FOOTPATHS 139, 140 AND BOX: FOOTPATH 105
OBJECTION TO MODIFICATION ORDER

Purpose of Report

1. To consider and comment on the 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 footpaths in Westwells, Corsham. The location of the claimed additional lengths of the footpaths is shown on the plan at **Appendix 1**.

Background

2. In 2001 Mrs. Doohan submitted an application to record paths on land falling within the parishes of Corsham and Box in the Westwells area.
3. The application was supported by 31 completed user evidence forms testifying to daily use since the 1950s. A summary of the evidence forms is attached at **Appendix 2**.

Main Considerations for the Council

4. Section 53 of the Wildlife and Countryside Act 1981 places a duty on the County Council to keep the Definitive Map and Statement under continuous review upon the occurrence of an event set out in Section 53. Those events include:

“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 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.”*
5. If the evidence supports the existence of rights over the claimed routes an Order should be made. If there is a conflict in the evidence the principle established in R v Secretary of State for Wales for the Environment ex parte Bagshaw and R v Secretary of State for Wales ex parte Emery is taken into consideration. It is in the public interest to make an Order if there is the reasonable possible outcome of a subsequent Inquiry process that public rights are found to exist.
6. This application is based on dedication whether at common law, by long user or presumed dedication under Section 31 of the Highways Act 1980.
7. There are three essential parts of Section 31 to be fulfilled for the presumption of presumed dedication 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 that 20-year period to dedicate the way to the public.
8. 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 Reg. v. Suffolk County Council, ex parte 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] Conv. 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. Officers have assessed the evidence of use and length of use of the way by the public openly without permission.

9. Officers have taken the 14th September 2001 as the date when the status of the way was brought into question, i.e. the application date as permitted under Section 69 of the Natural Environment and Rural Communities Act 2006.
10. The main issue before the Council is, when considered with all other relevant evidence, is there sufficient evidence to show that the public have enjoyed as of right, without interruption for 20 years prior to the date when the public right was brought into question. Officers also had to establish whether there was sufficient evidence during that 20 year period that there was no intention from the landowner to dedicate the land.
11. Evidence of use has been provided dating back to 1950. The use was frequently daily, sometimes more than once a day by dog walkers. When the Ministry of Defence occupied the site several of the witnesses refer to meeting Ministry of Defence Police whilst using the claimed routes and not being challenged. The private road sign referred to by two of the witnesses was not on the claimed paths.

12. The Crown disposed of the land over which the claimed paths cross in 1963 to The Bath and Portland Group Limited who sold it to Bridgemere in 1995. The use was so frequent and open, none of the witnesses say they were ever challenged but the landowners must have been aware it was well used. No notices were erected by the Bath and Portland Group Limited or Bridgemere indicating the claimed routes were private and no statements have been deposited under Section 31(6) of the Highways Act 1990.
13. An Order was made on the 8th November, 2006 adding the claimed ways to the Definitive Map and Statement.
14. Objection was made to the Order by Bridgemere Limited. In a letter dated the 20th December 2006 the company stated:

“This company has contacted a Member of Defence Estates and we are advised that at no time during its period of ownership has unlawful trespass been allowed. Furthermore, a notice indicating that the way was private was clearly displayed.

You will know that this company erected a barrier to prevent vehicular access along points B-C-D-E-F.”

Comment on the Objection

15. The relevant period of 20 years use is from 1981-2001 before Bridgemere Limited took ownership of the land and after the MOD had disposed of it.

Environmental Impact of the Recommendation

16. There is no provision within the relevant legislation for environmental impacts to be taken into account. Any environmental impact resulting from the use of the rights of way if the Order is confirmed, must be managed under other powers available to the County Council.

Financial Implications

17. The cost of the Public Inquiry will be met within the budget allocation.

Options Considered

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

Reasons for Recommendation

19. Officers believe there is sufficient evidence of use of the claimed path as of right throughout the relevant period.
20. Once an Order has been made under Section 53 of the Wildlife and Countryside Act 1981 it cannot be withdrawn. If an Order is objected to it must be sent to the Planning Inspectorate for determination.

Recommendation

21. That the Order to add additional lengths of footpaths in Westwells, Corsham 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.

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

Correspondence.