

WILTSHIRE COUNTY COUNCIL

AGENDA ITEM NO. 17

ENVIRONMENTAL SERVICES SUB-COMMITTEE
10th JANUARY 2001

**LITTLE CHEVERELL: APPLICATION FOR
MODIFICATION ORDER**

Purpose of Report

1. To consider an application by the Chairman of Little Cheverell Parish Council for an Order under Section 53(2) of the Wildlife and Countryside Act 1981 adding a public footpath to the Definitive Map and Statement. The footpath follows a line from unclassified road 7086, School Lane, at Grid Reference ST 9875 5375, leading north-north-easterly for approximately 400 metres to unclassified road 7087, Low Road, at Grid Reference ST 9892 5412, with a width of three feet (0.9 metres) as shown on the plan attached at **Appendix A**.

Background

2. The application dated the 8th December 1996 was supported by 32 statements from people who have used the claimed path. As the Chairman of the Parish Council stated in a letter dated 9th December 1996, this roughly equated to one-fifth of the village adult population. Twelve more witness forms were later submitted.
3. The land which the claimed path crosses is owned by Mr. and Mrs. Jenkinson who purchased it in 1996. They rigorously oppose the application as they do not believe the people who claim to have used it did so "in the belief that that use was as of right." Thrings and Long, Solicitors, now represent Mr. and Mrs. Jenkinson.
4. The history of ownership is that the Ministry of Defence (MoD) owned the land from 1935 until November 1989. The MoD leased the land to Mr. Nosworthy from 1958 until 1973 when it was then leased to Mr. Harley. Mr. Harley subsequently purchased the land from the MoD in 1989.
5. Mr. Harley has informed the Council that under his tenancy agreement he was bound "so far as possible to stop all encroachments and immediately to inform the landlord thereof and to use his best endeavours to prevent the acquisition of any rights of way, public or private, or easements over any part of the premises." He also stated that he had no knowledge of the way being used by people, he could give no details of people using it, nor had he given permission for anyone to use it.
6. Mr. Oliphant, Mr. Nosworthy's Farm Manager from 1956 to 1963, has confirmed that whilst neither he nor Mr. Nosworthy minded where people walked as long as nothing was damaged, he knew nothing of the claimed way. He doubted its existence as he thinks he would have known of it.

7. The MoD states that during its ownership there was no intention to dedicate the route as a right of way. The tenancy agreements all had a clause within them requiring tenants to prevent the acquisition of public or private rights of way on the land. In March 1974 the MoD deposited a plan and statement pursuant to Section 34 of the Highways Act 1959 (now Section 31 of the Highways Act 1980) indicating those ways which it acknowledged to be public. The claimed route was not one of those indicated. Furthermore, the MoD would not have been aware of public use. Although the land should have been formally perambulated on a regular basis, the Defence Estates Organisation has confirmed by letter dated 4th January 1999 that no perambulation of this land was ever carried out during its ownership.
8. There is general user evidence spanning the total period 1932 to 1997 from 38 of the users. They state that their use of the way was openly as of right without challenge. There is some evidence of waymarking, unlocked gates and stiles. The user evidence is summarised at **Appendix B**.
9. The field through which the claimed path runs has an existing footpath, Number 4, diagonally crossing it. In 1977 the Parish Council asked Mr. Harley if he would agree to footpath 4 being rerouted along the claimed route. Mr. Harley agreed to this, applied for a Diversion Order and erected a stile on the School Lane end of the proposed route. A Diversion Order was made in 1977 but objections were received. Mr. Harley was not prepared to fund a Public Inquiry so the proposal was dropped.
10. After considering the available evidence in relation to this claim, the officer dealing with the matter made an Order on the 6th August 1998 providing for the path to be added to the Definitive Map exercising delegated powers under the Scheme of Delegation to Officers.
11. Thrings and Long challenged the decision to make the Order on the basis that it was ultra vires. They claimed that the Scheme of Delegation to Officers only allowed officers to make Modification Orders where the proposals were non-contentious. They further contended that the Council's Rights of Way Officer had misdirected himself and applied the wrong test in deciding whether to make the Order. They advised their intention to apply for judicial review unless the Order was revoked.
12. Initially it appeared that Thrings and Long were correct in that the Scheme of Delegation had not been followed. Therefore, in October 1998, the County Council agreed to revoke the Order and refer the matter to Committee. This was accepted by Thrings and Long. A further investigation showed that whilst the delegation allowed officers to make modification orders without restriction, the scheme itself contained a printing error and did not reflect the resolution made by Members of the Policy and Resources Committee in December 1997. By this time, however, the Order had been revoked.

13. As to the test to be applied, advice from Counsel has been sought and the relevant points for consideration are set out below. Counsel cannot advise on whether or not the Order should be made since the Committee must assess the evidence impartially and draw its own conclusion as to whether the Section 53 criteria have been met.

Legal points to consider

14. Section 53 of the 1981 Act imposes on the County Council, as surveying authority, a statutory duty to keep the Definitive Map and Statement up to date. Section 53(3)(c) requires that an authority issues a modification order where:-

"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 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."*

15. Schedule 14 of the 1981 Act sets out the procedure to be followed, where a party requests the surveying authority to modify the Definitive Map and Statement. If the authority refuses an application to modify, there is a right of appeal to the Secretary of State for the Environment. In the event of a refusal by the Secretary of State, there is no further right of appeal.
16. If the application under Schedule 14 is granted, by either the authority or the Secretary of State, then Schedule 15 requires the authority to issue notices. If objections are received that cannot be resolved, these must be referred to the Secretary of State who can confirm or refuse the Order. It is usual for him to hold a Public Inquiry. Any substantial issues would be determined at that stage.
17. Guidance has been given by the Court of Appeal in the case of *R v Secretary of State for Wales ex parte Emery* (1996) on the correct approach for Committee to adopt when considering the two tests set out in Section 53(3)(c).
18. The Court confirmed that the correct approach is that which was set out by the High Court in *R v Secretary of State for the Environment ex parte Bagshaw* (1994). In *Bagshaw* the High Court explained the difference in approaching the two tests. For the first test, ie that the right of way subsists, it is necessary to show that on the balance of probabilities a right of way exists. For the second test it is only necessary to show:-

"that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist."

If, looked at objectively, the evidence from the witnesses conflicts, but by reasonably accepting one side's evidence and reasonably rejecting the other side's, the right would be shown to exist, then, according to *Bagshaw*, it is reasonable to allege such a right. Effectively, the authority does not have to find that a right actually exists, only that it is reasonable to claim one.

19. This application does not rely on statutory dedication pursuant to Section 31 of the Highways Act 1980 as the 20 year test cannot be satisfied. The application was made in

December 1996. Prior to 1989 the land was owned by the MoD and Section 31 does not apply to Crown land.

20. For the application to succeed it must therefore rely on dedication at common law.
21. It is settled law that there are two compulsory ingredients for the creation of a highway at common law. They are:-
 - (i) dedication by the landowner of a public right of way across his land; and
 - (ii) acceptance by the public of that right of way.

In the absence of evidence of express dedication, dedication may be implied from evidence that the public has used the right of way and the landowner has acquiesced to that use.

22. Proof of dedication at common law becomes much more difficult if the landowner has let the land because, as a general rule, a tenant cannot dedicate a highway so as to bind the owner of the freehold. There would also have to be proof that the owner of the freehold concurs with the dedication.
23. If there is no express dedication then in order to decide whether dedication can be implied, it is necessary to look at all the facts to see whether public use has been open as of right without permission. This includes consideration of the nature, length, purpose, quality and geography (is there a well defined path or has the public roamed?) of public user.
24. In the recent case of *R v Oxfordshire County Council ex parte Sunningwell Parish Council* (1999), the House of Lords considered the phrase "use as of right" and found it was not necessary to enquire into the minds of the users because, as Lord Hoffman said, "*..... 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.*"
25. User evidence must then be balanced against the possibility that the landowner has tolerated public use without intending dedication, although the Sunningwell case also found that a landowner cannot defeat a claim by showing that he has tolerated public use where it has been use as of right. It is also necessary to examine any evidence that the landowner has been proactive in attempting to prevent a right of way coming into existence over his land (eg signs, gates).
26. There is no set period of time which raises a legal presumption at common law. Evidence of "heavy" public user over a long time will go further to prove implicit dedication than light user over a few years. Old cases have found periods of user of as little as six years to be sufficient.

Conclusions

27. There is evidence of use from 1932 to 1997 without challenge and openly undertaken. However, from 1958 until 1989 the land was tenanted.
28. The evidence concerning waymarking and the locking of gates and stiles is conflicting.
29. There is a recorded public footpath (footpath 4) in close proximity to the claimed route within the same field. To reach footpath 4 entails climbing up a bank. This footpath has in the past been ploughed and not reinstated and the public appear to have deviated, as often is the case, to the perimeter of the field. This was encouraged by Mr. Harley, the tenant, when he erected a stile in 1997. Whilst this may be seen as an invitation to the public to use the claimed route, Mr. Harley could not bind the MoD which owned the land.
30. The MoD had made it abundantly clear in its tenancy agreements that it had no intention to dedicate public or private rights of way. It had strengthened this intention by depositing a plan and statement in March 1974 pursuant to Section 34 of the Highways Act 1959 showing the public rights of way which it acknowledged. As in Section 31 of the Highways Act 1980, this *"shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention to dedicate the way as a highway."* This deposit would, however, have been ineffective if the public had already acquired the right to use the way by March 1974.
31. Mr. Watkins of 65 High Street, Great Cheverell, stated in letters dated the 10th March and 19th April that to his knowledge there was a War Department notice saying "Private - No Entrance" on the farm gate on School Lane near to point B on **Appendix A**. Mr. Jenkinson also stated in a letter dated 12th December 1997 that *"before Mr. Harley erected the gates at the School Lane end there was barbed wire across what is now that entrance."*
32. Again, when Mr. Harley requested footpath 4 to be diverted in 1977, he did so with the approval of the MoD. This is evidence against dedication as there would have been no need to divert had the MoD recognised the alternative route, which is the claimed route, to be already a public path.
33. No defined route can be seen on the ground which would have alerted the farmer or the MoD. Indeed, there is evidence, albeit untested, from Mr. Nosworthy's Farm Manager that from 1956 to 1963 the farm in effect did not mind the public wandering at will on the farm provided no damage occurred. The MoD has also admitted that it did not perambulate the land so would not have been aware of any public use of it. It is therefore difficult to infer that the landowner acquiesced in such use.
34. Taking the evidence into account, it would appear that there is no evidence of express or implied dedication on the basis of the test set out in paragraphs 14 to 26 above.

Recommendation

35. That:-

- (i) The application by Little Cheverell Parish Council for an Order under Section 53(2) of the Wildlife and Countryside Act 1981 to add to the Definitive Map and Statement a public footpath from unclassified road 7086, School Lane, at Grid Reference ST 9875 5375, leading north-north-easterly for approximately 400 metres to unclassified road 7087, Low Road, at Grid Reference ST 9892 5412, with a width of 0.9 metres, be refused; and
- (ii) The applicants be informed accordingly.

RICHARD J. LANDER

Director of Environmental Services

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

Correspondence with Parish and District Councils, the Ministry of Defence and its tenants, Mr. and Mrs. Wilkinson and representatives of user organisations.

Environmental impact of the Recommendations contained in this Report:

None.