

REGULATORY COMMITTEE

10<sup>th</sup> SEPTEMBER 2003

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**BRADFORD ON AVON: CLAIMED PATHS AT POULTON**

**Purpose of Report**

1. To consider and comment on objections received to the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981. The Order provides for paths to be added to the Definitive Map and Statement at Poulton, Bradford on Avon, and along the edge of Fitzmaurice Primary School playing field, as shown on the plan at **Appendix A** (A - H - B - C and B - F - D).

**Background**

2. On 17<sup>th</sup> December 2001, Dr. M. Walsh of Trowbridge Road, Bradford on Avon, applied to have several footpaths added to the Definitive Map over land at Poulton and along the edge of Fitzmaurice Primary School to Kennet Gardens, off Frome Road. The claim was based on statutory dedication pursuant to Section 31 of the Highways Act 1980. All of the routes claimed are shown on the plan at **Appendix A**.
3. The application was supported by twelve witness forms which have been summarised at **Appendix B**.
4. The land at Poulton is owned by West Wiltshire District Council which is in the process of selling it to West Wiltshire Housing Society and Jephson Housing Association. The Housing Association applied successfully for planning permission for social housing on the former Poulton Garage site.
5. The remaining land over which some of the claimed paths cross is in the ownership of the Education Authority.
6. The District Council made the following comments on the application:-

*"I have read through the documentation provided to this Council and I have also studied the provisions of the above Act and also the Highways Act 1980.*

*In particular I have studied the provisions of S31 of the Highways Act 1980.*

*I should be obliged if you would please confirm how you have calculated the 20 year period.*

*I require this information from you as the District Council has not in any way brought into question the right of the public to use the way claimed.*

*Without this I do not see that you are able to accept such an application and indeed to make a formal Order.*

*I do not consider it fair or equitable for the District Council to be involved in the expense of rebutting such an application when there are no grounds for it to be made. At the moment the District Council does not have the resources available to deal with applications that are bordering on the vexatious.*

*You may be aware that the District Council intends to develop this land and there are members of the public who are endeavouring to thwart the District Council's plans.*

*Also on studying the statements it would seem to me that not all demonstrate that:*

*"public ... use ... believing themselves to be exercising a public right to pass from one highway to another ..." (notes to S31 Highways Act 1980).*

*I would hope that you will now reconsider this application and advise the applicant accordingly as to the provisions of the relevant statutes."*

7. On 26<sup>th</sup> April 2002, Mr. Christopher Waters, on behalf of West Wiltshire District Council, made a statement to the County Council denying that any of the claimed footpaths crossing District Council land had been dedicated as highways. The District Council's Legal Department confirmed in a letter dated 29<sup>th</sup> July 2002 that the statement made by Mr. Waters is a statement under Section 31(6) of the Highways Act 1980.
8. When consulted on the application, the Chief Education Officer stated:-

*"The Chief Education Officer would oppose in principle the right of way claim on the grounds of Health and Safety."*
9. Counsel's advice was sought on the application, in particular to seek opinion on the bringing into question within the meaning of Section 31(2) of the Highways Act 1980. The District Council denies that it has done anything so as to bring the right of the public into question.
10. Section 53 of the Wildlife and Countryside Act 1981 places on the County Council a duty to keep the Definitive Map and Statement under continuous review.
11. Section 53(2)(b) states:-

*"As regards every Definitive Map and Statement, the surveying authority shall:-*

- (b) As from that 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."*

12. The event referred to in Section 53(2)(b) which is relevant to this case is:  
  
53(3)(c)(i) that a right of way 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
13. The words "is reasonably alleged to subsist" in 53(3)(c)(i) above place the burden of proof on the balance of probabilities. If the available evidence is sufficient to enable it reasonably to be alleged that public pedestrian rights have been established over the claimed routes, an Order should be made under Section 53 of the Wildlife and Countryside Act 1981. If there is conflicting evidence, then the claim must be assessed on the basis of the principle established in *R v Secretary of State for the Environment ex parte Bagshaw* and *R v Secretary of State for Wales ex parte Emery*, namely whether it is in the public interest to make the Order. It is in the public interest to make an order if the reasonable possible outcome of a subsequent inquiry process is that public rights are found to subsist. The Council must be satisfied that, on the balance of probabilities, the routes enjoy public pedestrian rights.
14. Although Section 32 of the Highways Act 1980 allows a court or other tribunal to take into consideration relevant documents in support of dedication, no documentary evidence has been submitted to support dedication of the claimed routes as highway.
15. Highways come into existence through dedication of a right of way to the public by a landowner and acceptance by the public of that dedication. Dedication of a way as highway may be presumed after public use over twenty years provided the criteria set down in Section 31 of the Highways Act 1980 are met.

Section 31 states:-

1. *Where a way over any land, other than a way of such 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 twenty 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 twenty years referred to in sub section (1) above is to be calculated retrospectively from the date when the right of public to use the way is brought into question, whether by a notice such as is mentioned in sub section (3) below or otherwise.*
3. *Where the owner of the land over which any such way as aforesaid passes:*
  - (a) *has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway; and*
  - (b) *has maintained the notice after the 1<sup>st</sup> January 1934, or any later date on which it was erected*

*the notice, in the absence of proof of a contrary intention is sufficient evidence to negate the intention to dedicate as a 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 six inches to one 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 six years from the date of deposit; or*
  - (ii) *within six 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 negate the intention of the owner or his successors in title to dedicate any such additional way as a highway.*

- 16. It was established in *R v Secretary of State for the Environment ex parte Blake* (1984) that the word "enjoyment" as used in Section 31(1) means "having the amenity or advantage of using."
- 17. Proof of twenty years enjoyment calls for evidence of use by members of the public generally. Lord Parke observed in *Poole v Huskinson* (1843) that:-
  - (i) there cannot be a dedication to a limited part of the public.
  - (ii) the trial judge should not have told the jury that as such, a partial dedication in favour (only) of the residents of a particular parish and their visitors would nevertheless operate against the intention of the owner of the soil, in favour of the public.
- 18. The term "as of right" means that the use of the way must not rely on permission to use the path given by the owner of the land it crosses.
- 19. The use of the way must be without interruption. Once the twenty year uninterrupted use as of right by the public has been proved, the burden then moves to the landowner to show that there is sufficient evidence that there was no intention to dedicate. In this case, a twenty year period has been established.
- 20. Dedication of public rights may be presumed after use over twenty years unless there is sufficient evidence that there is no intention during that period to dedicate. It is not sufficient for a landowner to say that in his own mind he had no intention to dedicate. There must be some overt act on the part of the landowner to challenge public use of the way.

21. The twenty year period referred to in Section 31(1) is calculated back from the date when the right of the public to use the ways was *brought into question*, whether by a notice or otherwise. The District Council disputes that the claimed paths are highway and does not believe that Section 31 can be applied to this application as it claims it has not *brought into question* the right to use the ways. Counsel's advice has been sought on this important issue. Counsel advised that if the statement referred to in paragraph 7 above was made in accordance with Section 31(6) of the Highways Act 1980, then the District Council had brought into question the alleged public rights on that date. On the 29<sup>th</sup> July 2002, Helen Stephenson, Solicitor, on behalf of the District Council, confirmed that Mr. Waters' statement was made in accordance with Section 31(6). In considering a twenty year period, the 26<sup>th</sup> April 2002 has been taken as the date to calculate back from.
22. Only twelve evidence forms were submitted in support of the claim. Not, perhaps, a significant number in an urban area.
23. Mr. and Mrs. Grover walk hardly any of the claimed route, only a small section A-H, so their evidence adds little weight to the claim. Similarly, Mr. Sherman does not use the claimed routes and walks across the school playground rather than the playing field. The former Head of the school stated that many members of the public walk through the school playground and indeed provided a tarmac path last October which the public are permitted to use and the playground has been fenced-off.
24. From a site visit in January 2001, there was clear evidence of use from H-B-C, B-F-E and F-D. Route C-B on **Appendix A** also appears on aerial photographs.
25. Turning to the remaining witnesses, Mrs. Bowman has clearly used route A-H-B-C for longer than the requisite period. Also have Mr. Coombes, Mr. Gaisford, Mr. Walsh and Mr. and Mrs. Warburton. The other witnesses have allegedly walked the claimed route to Kennet Gardens for very short periods, but they are useful supporting evidence. Officers are satisfied that the terms of Section 53(3)(c)(i) are satisfied in relation to this route and routes B-F-D.
26. Only two witnesses, Gaisford and Gerrish, give evidence of route D-E and this is inadequate to show deemed dedication. Similarly, the spur from G to route F-D has been stated to have been actually enjoyed, used by many witnesses. Many of the witnesses access the field quite naturally from the direction of their homes.
27. The majority of the claimed path is on land owned by the Education Authority, the County Council. The Director, Department for Children, Education and Libraries has not deposited any statements in relation to this land under Section 31 of the Highways Act 1980 and has opposed the claim. Officers are not aware of any notices on site directed at the public indicating lack of intention to dedicate.

28. The routes B-C and B-F on County Council land have been used by the public and Officers have considered the question whether as landowner dedication of the route was granted. In *Folkestone Corporation v Brockman*, 1914, Lord Kinnear characterised the question of dedication as "one of fact, turning upon probabilities of conduct." The landowner's intention is usually a matter of inference, rather than a clearly documented fact, but the common law recognises that an intention that the public should have the right of passage permanently may be inferred from the fact that the landowner stood back and did nothing in circumstances where action on his part was to be expected if:
- (a) he took exception to the public using the route, or
  - (b) he tolerated use but did not want such use to be permanent.
29. From talking with employees at the school it was common knowledge that the public walked A-H-B-C, ie from Trowbridge Road to Kennet Gardens, the route clearly visible. There appears to be clear tolerance of use by the school and its Governing Body and a failure to disabuse the public of the apparent belief that there is a right of way. The provision of a further tarmac path direct through the school grounds from point H to Frome Road perhaps reflects this tolerance and acceptance of public use.
30. An Order was made on 30<sup>th</sup> January 2003 under Section 53(3)(c)(i) adding routes A-H-B-C and B-F-D to the Definitive Map as public footpaths, but not the other routes which were the subject of the application.
31. Objections were received from the District Council, the Clerk to the Governors of Fitzmaurice Primary School and the Director, Department for Children, Education and Libraries.
32. The District Council objects *"in its capacity as landowner, itself and successors in title. The objection is made on the basis that the authority does not believe that the right of way can be found to exist from the nature and volume of the use claimed by the users."* The Solicitor for the Council also stated *"the right of way will affect the proposed development that was to take place on the site. If a satisfactory Diversion Order can be obtained then it may be that the objection on the part of either the authority or its successors in title becomes unnecessary, if a satisfactory solution can be found."*
33. In a letter dated 20<sup>th</sup> March 2003, Carole Collins, Clerk to the Governors, stated:-
- "The basis for our objection is that the school has not at any time accepted that members of the public have a right to make unhindered use of school land and that to allow them to do so could adversely affect the safety and wellbeing of children and staff. The school is of course aware of the existing footpaths (number 26) that cross the field and the comments in this letter refer only to the new claim."*

*It is significant that point A on the map indicates the position of entry from footpath 71 onto school land and that this is the exact location used for many years to control entry onto the site on school fete days. The school fete is held annually to raise money for the school and everyone seeking to enter is stopped and required to pay an entrance fee. This was certainly the case through the 1970s and 1980s and later the pay point was moved to location H after the wall to the west side of path A to H was demolished. This footpath link has therefore been blocked every year for at least the last 25 years and probably longer. A similar control point is set up at the Frome Road end of the site. To the best of my knowledge and belief, the right to impose a charge for access has never been challenged by a member of the public seeking to exercise an alleged right of way across the land.*

*In 1997 and 1998 there was an exchange of correspondence between the school and the Chief Education Officer (Mrs. J. Bedford ref. DP/G3/1) and in a letter of 5<sup>th</sup> March 1998 the CEO was asked by the school to deposit plans declaring that the route from Trowbridge Road to Frome Road is not to become adopted.*

*The use of the site including the field by dog walkers has been recorded by the school as a nuisance and potential health hazard. From time to time persons allowing their dogs to foul the school site have been challenged by members of staff (or former members) but records of dates and times have not been kept. From time to time notices reading*

*FITZMAURICE PRIMARY SCHOOL  
CHILDREN'S PLAY AREA  
NO DOGS*

*have been placed around this site, most recently in the Spring of 2001, but the notices are always quickly vandalised or destroyed. We have to accept that there is a significant amount of use of the land in question but do not accept that rights of way should be created."*

34. On behalf of the Department for Children, Education and Libraries, Mr. M. Dodds stated in a letter dated 19<sup>th</sup> March 2003:-

*"I write to object to the Order on behalf of the Director of the Department for Children, Education and Libraries on the grounds of health and safety for the Fitzmaurice School site. As the safety of small children at school is of concern to parents, staff and the general public alike with events such as the Dunblane attack in recent memory, ensuring security on school sites is of paramount importance to local education authorities. Whilst we can protect school buildings, security of a school site can often prove more difficult. A public footpath running alongside the Fitzmaurice Primary School site will do nothing to make this task easier."*

### **Comments on the Objections**

35. Evidence of use of the Order routes has been provided from 1964 to the present time. Witnesses state that they used the path without permission or challenge. No signs are on site or are recorded as being erected to indicate to the public that they did not have a right to walk the Order routes. Use of the routes can clearly be seen on the ground giving the landowners an opportunity to address the issue of use if they so wish.
36. None of the witnesses state their use was interrupted.
37. Given the evidence available to Officers, it can reasonably be alleged that public pedestrian rights have been established over the Order routes and the reasonable possible outcome of a Public Inquiry into the Order could find public rights to subsist.
38. The safety concerns expressed by the Chair of the Governors and the Department for Children, Education and Libraries are not matters which the County Council can take into account in determining whether public rights exist over the Order routes. Although not a relevant consideration, it is difficult to reconcile their stance regarding safety concerns, given the existence of a path closer to the school playground which is used by the public at all times.
39. It has been explained to the Director, Department for Children Education and Libraries that the Wildlife and Countryside Act 1981 sets out strict criteria for objections and health and safety factors cannot lawfully be taken into account. The objection has now been withdrawn.

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

40. Members are asked to consider the objections received and decide whether or not the Order should be confirmed. The legal considerations to be taken into account are given in paragraphs 10 - 22 of this report. If Members resolve that the objections are duly made and should be accepted, the Order must be submitted to the Secretary of State for determination, as this is the statutory procedure. The objections do not appear to overturn the evidence of highway status.

### **Environmental Impact of the Proposal**

41. None.

### **Risk Assessment**

42. The safety of school pupils has been expressed as a risk of the recording of the footpaths but this is not a consideration which can lawfully be taken into account under Section 53 of the Wildlife and Countryside Act 1981.

### **Financial Implications**

43. There will be financial implications regarding future maintenance of the footpaths should the Order be confirmed but this will be minimal. However, if the Order is not made the application will be submitted to the Secretary of State for determination, which could lead to a Public Inquiry with its attendant costs.



### **Options Considered**

44. There are statutory procedures to be followed associated with Section 53 Orders which must be adhered to.

### **Reasons for Recommendation**

45. To comply with statutory requirements.

### **Recommendation**

46. That the Order providing for additional paths to be added to the Definitive Map at Poulton, Bradford on Avon, be submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**GEORGE BATTEN**

Director of Environmental Services

Report Author

**BARBARA BURKE**

Senior Rights of Way Officer

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

Correspondence with District and Town Councils and other interested parties.

