

REGULATORY COMMITTEE  
17<sup>th</sup> DECEMBER 2003

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**MARLBOROUGH: FOOTPATHS 46 AND 47 -  
OBJECTIONS TO MODIFICATION ORDER**

**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 two footpaths to be added to the Definitive Map and Statement on land off Elcot Lane, Marlborough, as shown A-B-C, B-D and E-C-F on the plan at **Appendix A**.

**Background**

2. On 10<sup>th</sup> October 2001 Mrs. J.A. Clarke applied to the Council to add footpaths to the Definitive Map on the line A-B-C and from point F-C shown on **Appendix A** through the Football Club car park to the northern end of the club and works access track.
3. The application was supported by nine witness forms testifying use since as far back as the 1920s, comments from which have been summarised at **Appendix B**.
4. Officers confirmed with the applicant that the public did in fact walk from Elcot Lane, down the access track to the Football Club and Microlight Works and cut through a gap in the hedge from Barrow Close to the playing field on the line D-B.
5. Part of the land over which the claimed paths cross is owned by Marlborough Town Football Club. On 5<sup>th</sup> November 2001 the Chairman of the Club presented the Club's initial objections to the application, citing dog fouling as a health and safety issue, public liability if anyone was injured whilst the pitches were being used, potential damage to property and loss of car parking spaces.
6. Marlborough Town Council owns the recreation field adjoining Elcot Lane. The Town Council has no objection to the route E-C-F being recorded as a public footpath but objects to the route A-B-C.
7. On a landowner evidence form the Football Club, whilst not admitting a public right of way crossed its property, stated that the public used the claimed routes daily as they give access to the water meadows where an existing path lies. The Club also erected notices concerning dog fouling directed at members of the public walking the claimed paths, a further admittance of public use. The Secretary also stated that the Club had erected a fence across the claimed path on the route A-B-C at the boundary of its property and that of the Town Council, but it was removed overnight and re-erected with a gap for walkers alongside, ie making provision for walkers.
8. On being satisfied that it is reasonable to allege, on a balance of probabilities, that the public through usage have established rights of way over the land in question, a Modification Order was made on 11<sup>th</sup> September 2003.

### **Objections to the Order**

9. Objections to the Order were made by Marlborough Town Football Club, Scarlett and Edwards Limited, Mr. R. Doughty, and Microlights Limited (details of which are set out in **Appendix C**).

### **Comments on the objections**

10. Health and safety concerns associated with dog fouling cannot be taken into account in determining whether public rights have been established.
11. The Football Club states that it attempts to repair the fences when they are allegedly vandalised. The Secretary stated on the landowner evidence form that when the Club re-erected the fence in 1979 a deliberate gap was left to enable walkers to pass and repass.
12. It is stated by Mr. Edwards of Scarlett and Edwards Limited that the link through the hedge to Barrow Close has been closed-off at various stages of the year. Officers have written to everyone living in Cornerfields and Barrow Close and the numerous replies to date state that the cut-through is in frequent use and always open. One resident who has lived on the estate since it was built in the 1960s uses the route four times a day throughout the year and states that it is always open.
13. The Football Club states that the paths were not used until the footpath was created across the water meadows.
14. The footpath across the water meadows, from Stonebridge Lane to the Mildenhall road, was the subject of an application to add the footpath to the Definitive Map. The path was not created in 1998 but was confirmed as a public footpath in 1999 following a Public Inquiry at which evidence of years of use was given by members of the public. Similarly, the public have been using the routes which are the subject of this report for decades.
15. The Football Club states that allowance was made for access out of general courtesy or licence. The Club did not make it clear to the public that it was not intended to dedicate the ways as footpaths. By providing a gap in the fence to facilitate use and by erecting notices directed at members of the public in admittance and acceptance of their presence indicates quite the opposite.
16. Mr. Doughty objects to the Order stating that dog fouling makes the condition of the pitch unacceptable at match times. This is not evidence of lack of use of the Order routes.

17. Mr. Doughty also states that he has lived at 3 Cornerfields for 27 years and throughout this time he has used a gap in the hedge to the football ground saving a long walk to the town or nearest shop. This is actual evidence of use. Most of the witnesses use the claimed route D-B-C via its connection with footpath 45 and Stonebridge Lane because it provides a shorter walking distance into town and to the eastern area of the town. Mr. Doughty feels it would be regrettable if this facility were lost.
18. Mr. R. Norton, Director of Microlights Limited, the company next to the water meadows and the Football Club, objects to the Order as he does not concede that rights of way might exist. He also states that part of the route E-C-F is the access track to the works which is used by delivery vehicles, and this could present a safety risk.
19. There are no notices directed at members of the public indicating public rights of way do not exist, nor have there been any deposited plans or statements made under Section 31 of the Highways Act 1980 indicating a lack of intention to dedicate relating to any land affected by the claimed paths.
20. Safety concerns are not issues to be taken into consideration in ascertaining public rights of way. Visibility is very clear for all users of the track.

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

21. 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 set out in the following paragraphs 22-49. 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 in accordance with statutory procedure. The objections to the Order were made in the statutory period for objection and do not appear to overturn the evidence of highway status.

### **Legal considerations to be taken into account**

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

*"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 raises a presumption that the way has been dedicated as a public path."*

23. Section 53(c) also requires that an authority issues an order where:-

*"by 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 the Part applies."*

24. The County Council must, in accordance with *R v Secretary of State for Wales ex parte Emery* (1998) and *R v Secretary of State for the Environment ex parte Bagshaw* (1994), consider whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. This does not require the County Council to find that a right of way actually exists.
25. In the case of *R v Secretary of State for Wales ex parte Emery* (1998), under Section 53(3)(c)(i) of the 1981 Act, the Court had to consider whether there is evidence that:-
- (i) a right of way subsists or
  - (ii) a right of way is reasonably alleged to subsist.

The latter test is inevitably less onerous than the former.

26. Where there is no credible evidence of 20 years use at all, or there is incontrovertible evidence that the landowner had no intention, during the period, to dedicate the way to the public, the authority should declare that there is no evidence that a right of way as claimed subsists at all. A problem arises, however, where there is conflicting evidence on one or other or both issues.
27. The Court of Appeal confirmed in *Emery* 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) 68 P and CR 402. In *Bagshaw*, the High Court explained the difference in approaching the two tests. For the first test, 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."*

28. If, looked at objectively, the evidence from the witnesses conflicts, but that, 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.
29. The Court of Appeal in *Emery* underlines that the Schedule 14 procedure and making a Modification Order is only the first stage. Any party who objects has the right, under Schedule 15 of the 1981 Act, to refer the matter to the Secretary of State for the Environment. If an applicant produces sufficient evidence to justify that the right of way subsists, the proper approach is for an authority to make a Modification Order under Schedule 14 of the 1981 Act and then follow the procedures set out in Schedule 15. If there are still objections, the 1981 Act provides for any factual dispute to be resolved at the Schedule 15 stage, by submitting the Modification Order to the Secretary of State for confirmation.
30. 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.

31. 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.
32. 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 20 years. This is given statutory effect under Section 31 of the Highways Act 1980: -
  - "1. *Where a way over any land, other than a way of such character that use of it by 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.*
  2. *The period of 20 years referred to in subsection 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 subsection 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 negative the intention to dedicate as a highway ...*
  4. *In the case of land in the possession of a tenant for a term of years or from year to year, any person for the time being entitled in reversion to the land shall notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.*
  5. *Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way 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 6 inches to 1 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 lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."*

33. It was established in *R v Secretary of State for the Environment ex parte Blake* (1984) that the word "enjoyment" means having the amenity or advantage of using.

34. Proof of 20 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.

35. In simple terms, this means that it is not possible for a way to be acquired through dedication if that dedication has only been made to a specified and limited group of people instead of to the public at large.

36. 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. The meaning of '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*. As a result of this case it is now clearly laid down that the test is, rather, whether the observed use by others would have appeared to the landowner to be use by people who were regarding the way as public highway or whether it was, for example, only used by employees of the landowner who were free to take whatever routes they chose over the land. The Council therefore has to assess the use and length of use of the claimed routes by the public and evidence of such use without permission. Lord Hoffman also considered whether tolerance on the part of the landowner was incompatible with user as of right, he concluded that tolerance was compatible.

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 that there is sufficient evidence that there was no intention to dedicate.
38. The 20 year period of use has to be determined retrospectively from the date and event at which the public right to use a claimed route is brought into question.
39. In *Fairey v Southampton County Council* (1956) QB 439 Denning L.J. held as follows:

*"... I think that in order for the right of the public to have been "brought into question," the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney – General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way. But whatever the public do, whether they oppose the landowner's action or not, their right is "brought into question" as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way..."*

40. Marlborough Town Football Club which owns some of the land over which one of the claimed paths lies confirmed on the 9<sup>th</sup> October 2002 that it erected a fence across the line of the path in 1979 but this was torn down overnight. It was subsequently re-erected with a gap to allow people to pass through it.
41. In the case of *R v Secretary of State for the Environment ex parte Dorset County Council*, Dyson J concluded that overt and contemporaneous evidence of an intention not to dedicate would usually be required. There was no rule that only activities directed at users of the way could constitute sufficient evidence. The second aspect in relation to Section 31 considered what was necessary for the public's right to use a way to be "brought into question". The judge held that Section 31(2) could be satisfied only where it was likely that, as a result of the act relied on, some users would be made aware that the owner had challenged their right to use the way. The pulling down of the fence in 1979 almost immediately after its erection can be taken to be the action of questioning/challenging the public right to use.
42. Of the witnesses only Mr R.J. Milsom and Mr R.W. Milsom can provide evidence of use within the 20 year period from 1959 to 1979, this is insufficient evidence to rely upon to make an Order.
43. In the light of officers' comments in paragraphs 10-20 consideration must be given to whether there has been a dedication at common law.

44. It is settled law that there are two compulsory ingredients for the creation of a highway at common law; they are:
- (a) dedication by the landowner of a public right of way across his land and
  - (b) acceptance by the public of that right of way.

In the absence of evidence of express dedication, dedication may be implied (but not presumed in the sense of raising a legal presumption) from evidence that:

- (i) the public has used the right of way and
  - (ii) the landowner has acquiesced in that use.
45. Proof of dedication becomes much more difficult if the landowner has let the land because, as a good general rule, the tenant cannot dedicate a highway so as to bind the Landlord as the freehold reversioner. It becomes necessary to prove concurrence with the dedication by the reversioner. This can be done by proving long public user but the case law suggests that this is a difficult task. Careful scrutiny is required of the evidence of:
- (a) acts and knowledge of the landowner before and after the periods of lease; and
  - (b) public use over successive leases.
46. Otherwise, in the absence of express dedication, one needs to look at all the facts including the nature, length, purpose, quality and geography (is there a well defined path or have the public roamed) of public use to imply dedication. Public use must be: *nec vi nec clam nec precario* open as of right without permission. This has to be balanced against the possibility that the landowner has tolerated public use without intending dedication. The recent case of *R v Oxfordshire County Council ex parte Sunningwell PC* (1999) 3 WLR 161 does downplay tolerance where use has been as of right. One also needs to examine any evidence that the landowner has been proactive in attempting to prevent a right of way coming into existence over his land (e.g. signs, gates).
47. There is not a set period of time which raises a legal presumption of dedication at common law. Evidence of heavy public use over a long period of time will go further to prove implicit dedication than light use over a few years. Periods of use of as little as six years have been found sufficient.
48. There is no evidence of express dedication of the claimed routes plus an additional Spur to Barrow Close but dedication may be implied from the evidence of use as of right since 1920. This use was effectively continuous, albeit there was an overnight interruption in 1979 to the use of route between A and B up to the time of the claim. The use was on a very regular basis, open and without permission. A great many of the walkers used the routes to connect with and access the local rights of way network.



49. The Marlborough Town Football Club admitted on a form dated 9<sup>th</sup> October 2002 that the public used the claimed routes daily. From the volume of use officers believe it can be implied that the public regarded the claimed routes as public highways and this was observed by the Club. The use may be argued to have been merely tolerated. The landowner was not proactive in attempting to prevent rights of way coming into existence over the land. When the fence was pulled down in 1979 a gap to allow the public to pass and repass was provided. There are no notices informing the public they should not be there, only one on the route A-B asking people to clean up after their dog, an acknowledgement that the public are using the route. A kissing gate device without the gate has been provided on the access to Barrow Close, presumably to prevent cyclists using this path. A barrier exists on the eastern side of the football ground but this has been set back from the boundary and the used path is clearly free and visible on the ground. The Club Secretary made the following statement:-

"In the nature of a football ground, some public access accepted. Prepared to allow walkers access to water meadows etc. A public right of way would seriously compromise the use of the football ground continued access by licence but under club control acceptable."

50. The Town Council agrees to routes E-C-F being recorded as public footpath. The public have used the route as of right and the landowners have acquiesced in that use.

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

51. None.

### **Risk Assessment**

52. The hazard of dog fouling has been expressed as a risk, as also has the use of the route E-C-F by vehicles travelling to and from the Microlight works and the Football Club, but these are not considerations which can lawfully be taken into account under Section 53 of the Wildlife and Countryside Act 1981.

### **Financial Implications**

53. There will be financial implications regarding future maintenance of the footpaths should the Order be confirmed but these will be minimal.

### **Options Considered**

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

### **Reasons for Recommendation**

55. To comply with statutory requirements. Despite the objections received, the public have used the routes as of right and the landowners have apparently acquiesced in that use.

## **Recommendation**

56. That the Order providing for additional paths over land off Elcot Lane, Marlborough, to be added to the Definitive Map be submitted to the Secretary of State for Environment, Food and Rural Affairs with the County Council's recommendation that it should be confirmed.

**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 the District and Town Councils and other interested parties