

WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL PARISH OF WHITEPARISH PATH NO. 41 RIGHTS OF WAY MODIFICATION ORDER 2017

Purpose of Report

1. To:
 - (i) Consider the two representations and two objections received to the making of The Wiltshire Council Parish of Whiteparish Path No. 41 Rights of Way Modification Order 2017 made under Section 53 of the Wildlife and Countryside Act 1981; and
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation from Wiltshire Council that the Order be confirmed as made.

Relevance to the Council's Business Plan

2. Working with the local community to provide a rights of way network which is fit for purpose, making Wiltshire an even better place to live, work and visit.

Background

3. On 27 October 2016 Wiltshire Council received an application from five residents of Whiteparish for an order to record a public footpath over land at Mean Wood, Whiteparish. The claimed path leads through the woodland in a relatively direct north-south direction broadly parallel to the western edge of the woodland.
4. The application adduced evidence from 25 people who completed user evidence forms (UEFs) detailing their use on foot of routes in Mean Wood for varying lengths of time dating from 1969.
5. For public rights to have been acquired by statute law (see **Appendix 1** paragraph 12.1 – Highways Act 1980 Section 31) it is necessary for the use to have been uninterrupted for a period of at least 20 years in a manner that is 'as of right', that is, the use must have been without force, without secrecy and without permission. This would give rise to a 'presumption of dedication'.

6. A presumption of dedication may be defeated in a number of ways, including the erection and maintenance of signage indicating that there is no intention to dedicate public rights, effective challenges to use, the closure of the claimed route (for example a closure for one day every year may be effective), the granting of permission or by depositing a number of documents with the Council as prescribed by Section 31 of the Highways Act 1980 (see **Appendix 1** paragraph 12.1).
7. Wiltshire Council has a duty to consider all relevant available evidence and officers conducted an initial consultation into the application between November 2016 and the end of January 2017.
8. All of the evidence and responses were duly considered in the Council's Decision report appended here at **Appendix 1** and based on the legal test contained within Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (see **Appendix 1** paragraph 2.1), that is that the application formed a reasonable allegation that a public right subsisted, an Order was made to record the path as a footpath in the definitive map and statement.
9. The Order was duly advertised and has attracted two representations in support and two objections. A copy of the Order is appended here at **Appendix 2**.
10. Wiltshire Council may not confirm or abandon this Order and must forward it to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA) for determination. However, it must first consider the representations and objections to the Order and make a recommendation to SoSEFRA regarding the determination of the Order.
11. It is important that only the evidence adduced or discovered is considered and it is noted that matters relating to desirability, the environment, need or health and safety are not relevant considerations for the application of Section 53 of the Wildlife and Countryside Act 1981.

Main Considerations for the Council

12. Section 53(2) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the definitive map and statement of public rights of way under continuous review.
13. The Order is made under Section 53(3)(c) of the Wildlife and Countryside Act 1981, based on:

“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 definitive 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.”

14. Under Section 31(1) of the Highways Act 1980 *“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 actually been enjoyed by the public as of right 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.”*
15. Evidence is the key and therefore valid objections to the making of the Order must challenge the evidence available to the Surveying Authority. The Authority is not able to take into account other considerations, such as the suitability of the way for use by the public, the proximity of any other paths or facilities, environmental impacts and any need or desire for the claimed route.

The representations and the objections

16. **Representation** Mr and Mrs H Barrett

“We wish to support the order proposing to add the footpath through Mean Wood to the definitive map. The path is an attractive, seasonally varied, tranquil and sheltered walk through mixed woodland.

We have regularly used the path which has migrated to different alignments since moving to Whiteparish in 1985. We have never been challenged but noted that works at the northern and southern ends in, we think, 2014, clearly discouraged use.

We would welcome the addition of the path as a contribution to continued quiet enjoyment of the countryside.”

17. **Representation** Ms Trudi Deane (one of the applicants)

“As you can appreciate it was difficult for us to accurately plot the route we followed on a map as there were lots of twists and turns around trees and such like in the woods. However, I have recently spoken to a lady runner in the village who used the route regularly and often wore a GPS tracker. She has kindly printed me out a copy of the route.”

A copy of the route monitored by the runner’s GPS is appended at **Appendix 3**.

18. **Objection** Dr Peter Claydon – Campaign for Rural England

“Proposal to modify definitive plan of Rights of Way and list Whiteparish Path 41

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The South Wiltshire Group of the Wiltshire CPRE is puzzled by the application to alter the status of the existing footpath through Mean Wood, Whiteparish from a permissive path into a protected right of way.

Within yards of the proposed Footpath 41 there is, alongside the western border of Mean Wood, an existing Right of Way, Footpath 23. This existing Footpath 23 links between Footpath 21 and Footpath 20 in exactly the same manner as the

proposed Footpath 41. There does not appear to be any historical evidence of there being a footpath other than the Footpath 23 running up to the top of the hill adjacent to the woodland when the Cowesfield Estate was owned by the Lawrence Family.

There is however strong evidence from personal experience and also shown by the correspondence associated with this Decision Report that the footpath within Mean Woodland is well recognised to have been used with permission, given freely by the landowner over many years, which allowed people to walk and ride through the woodland. It is a lovely walk through the woods up to the top of Dean Hill, particularly in the Spring time. That there may have been some that have taken the opportunity without gaining personal permission to use the footpath is a reflection on them rather than the status of the route along which they were trespassing.

The photograph 5.3 in the Decision Notice shows how little respect there is by walkers by the creation of a secondary route alongside the normal path. This alone is sufficient reason for a permissive right to be withdrawn. Clearly this photograph should not be used as evidence to create this route into a definitive Right of Way.

Modifying the definitive map to include this path as Footpath 41 will be taken by many landlords as the catalyst to refuse any permissive rights in the future. Indeed the very nature of a permissive right is that it can be withdrawn if the privilege is abused or the need for privacy, for whatever reason, is required.

The result of altering the status of this footpath may fundamentally alter the carefully developed relationship between landowners and those who love the countryside when within yards of the proposed Footpath 41 there exists a perfectly good accessible Footpath 23.

This proposal should be refused.”

19. **Objection** Whiteparish Parish Council

“Whiteparish Parish Council objects to Wiltshire Council Parish of Whiteparish Path No. 41 Rights of Way Modification Order 2017 – Mean Wood, Whiteparish. This was a unanimous decision and members of Whiteparish Parish Council have always understood this was a permissive footpath.”

Comments on the representations and objections

20. **Representation from Mr and Mrs Barrett**

Mr and Mrs Barrett refer to using the path from 1985 to 2014, a period of 29 years without challenge. They have not completed a UEF and are additional witnesses to those listed in **Appendix 1.B**, their evidence was therefore not considered prior to the making of the Order.

Although they refer to a migration of the route it is not known to what extent or when. It is further noted that the existence of the route is not disputed and in the landowner's submission at the initial consultation stage, Burges Salmon acting for Mr Newman state on the subject of the route itself:

"For the avoidance of doubt, my client does not deny the existence of the Proposed Footpath..."

21. Representation from Ms T Deane

The plan of the route taken by the local runner with her GPS tracker in 2013 (see **Appendix 3**) shows that she took a route very similar to, or the same as, the Order route in respect of the north-south path on the western side of the wood (she also ran a further loop within the wood that is not part of this case). It is considered more likely than not that she was following a trodden or defined path.

22. Objection from Dr P Claydon

Dr Claydon believes that use of the route was with permission "freely given" by the landowner over many years. Since use by permission is not use that is 'as of right' then if, on the balance of probabilities, use was by permission, then the application should fail.

23. It is accepted in the Council's decision report (**Appendix 1** para. 17.15) that the landowner granted permission to use the woods to a number of people. However, it is a well established point of law that for a challenge to be effective it must be brought to the attention of the relevant audience, that is, the users of the path. It is noted that 27 (25 originally plus Mr and Mrs Barrett) people have provided evidence that they did not have permission to walk the path and it is also a route that is promoted on a website for walkers and has clearly been used by members of the public. This is evidenced by the route's inclusion in not only the walking website forum but also another website "Geograph" where people publish photographs and describe them (**Appendix 1** paras 5.1 to 5.8).

24. There have been no signs on the land to deter or inform users; in the period 1992 to 2012 the land was unprotected by any deposits made under the Highways Act 1980 legislation (i.e. s.31(5) or s.31(6)), the route was promoted on the internet and was clearly used as a result. It is difficult to see how any users would have known that the landowner required them to have permission to walk that way if they did not know him, bump into him in the woods or were a member of the shooting syndicate.

25. Objection from Whiteparish Parish Council

The Parish Council maintains that the Order route is a permissive path. In its original submission to the Council as part of the initial consultation phase the Parish Council responded that it had always believed the path to be permissive.

26. Membership of a parish council is a transient matter (membership changes) and accordingly the memory of the parish council exists in its records and minutes. Officers of Wiltshire Council have read Whiteparish Parish Council's minutes from 1896 to 1962 and did not find any reference to the claimed path in Mean

Wood. It is usual for minute books to be deposited at the County Archive but it was noted that no minute books since 1962 had been deposited for Whiteparish.

27. The minutes are a matter of public record and may be viewed and accordingly officers of Wiltshire Council wrote to the parish clerk on two occasions requesting that they provide details of references to Mean Wood in the minutes from 1962 to date or, failing that, permit the Council to inspect them. Unfortunately no response has been forthcoming.
28. It is therefore difficult to attach weight to the Parish Council's objection other than to note that all of the members present at the time of the unanimous decision considered the route to be permissive. The basis on which the Parish Council made this decision is not known.

Safeguarding Considerations

29. There are no safeguarding considerations associated with the confirmation of this Order.

Public Health Implications

30. There are no identified public health implications which arise from the confirmation of this Order.

Corporate Procurement Implications

31. In the event this Order is forwarded to the Secretary of State there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 35 to 37 of this report.

Environmental and Climate Change Considerations

32. There are no environmental or climate change considerations associated with the confirmation of this Order.

Equalities Impact of the Proposal

33. Matters relating to the equalities impact of the proposal are not relevant considerations under Section 53 of the Wildlife and Countryside Act 1981.

Risk Assessment

34. There are no identified risks which arise from the confirmation of this Order. The financial and legal risks to the Council are outlined in the "Financial Implications" and "Legal Implications" sections below.

Financial Implications

35. The making and determination of Orders under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.

36. Where there are outstanding objections to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making and confirmation of the Order. The outcome of the Order will then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500 and £1,000 to £3,000 where the case is determined by a one day local public inquiry with legal representation (£300 to £500 without).
37. Where the Council objects to the Order, the Order must still be forwarded to the Secretary of State for determination. As in the case of a supported Order, the possible processes and costs range from £200 to £3,000 as detailed at paragraph 36 above.

Legal Implications

38. Where the Council does not support the Order, clear reasons for this must be given and must relate to the evidence available. The applicant may seek judicial review of the Council's decision if it is seen as incorrect or unjust by them. The cost for this may be up to £50,000.

Options Considered

39. Members may resolve that the Order should be forwarded to the Secretary of State for determination with a recommendation as follows:
- (i) The Order should be confirmed without modification.
 - (ii) The Order should be confirmed with modification.
 - (iii) The Order should not be confirmed.

Reason for Proposal

40. Unless the objections and representations are withdrawn the Order must be forwarded to the Secretary of State for Environment Food and Rural Affairs for determination.
41. It is considered that nothing in the objectors' submissions demonstrates that the landowners brought their lack of intention to dedicate a public right of way to the attention of the relevant audience, that is, a considerable number of users of the path both locally and from other places. This is in spite of the landowners' stated intention not to dedicate and limited range of granting permission to users. Neither did they satisfy any statutory process of demonstrating a negative intention to dedicate the land.
42. The testimony of users of the path has been questioned by the objectors who claim that use has been by permission and this evidence may be tested, along with all other evidence at a public inquiry. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton* [1994] 68 P&CR 402 Owen J "In a case where the evidence of witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the

other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.”

43. In making this Order the Council considered that a reasonable allegation as to the acquisition of public rights had been made. It is considered that no further evidence has been adduced to alter either that decision or to conclude anything other than, on the balance of probability, a public right has been acquired. Clearly the testing of witnesses will be key to the final decision in this case but the Council’s duty remains with supporting the Order based on the evidence it has before it.

Proposal

44. That “The Wiltshire Council Parish of Whiteparish Path No. 41 Rights of Way Modification Order 2017” is forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it is confirmed as made.

Tracy Carter

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Rights of Way Officer – Definitive Map

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

None

Appendices:

Appendix 1 – Decision report

Appendix A to Decision report – consultation responses

Appendix B Summary of user evidence

Appendix 2 - Order

Appendix 3 – Route traced by GPS tracker in 2013