

HIGHWAYS ACT 1980 AND WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL NORTH BRADLEY 1 (PART) EXTINGUISHMENT ORDER AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2013

Purpose of Report

1. To:
 - (i) Consider objections received to the making of The Wiltshire Council North Bradley 1 (Part) Extinguishment Order and Definitive Map Modification Order 2013, under Section 118 of the Highways Act 1980. The order map showing the proposal is attached at **Appendix 1**.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for confirmation with the recommendation that the objections be dealt with by the written representation procedure.

Background

2. The land over which this section of North Bradley Footpath 1 runs is owned by Doric Developments who have leased it to Trowbridge Town Council. The Town Council leases the land to Trowbridge Town Football Club. Throughout 2011 and since, the club's premises have been affected by numerous incidents of crime and anti-social behaviour, including vandalism to buildings, dugouts and stands. This has cost the club in excess of £4,000 in repair or replacement costs and is threatening its viability. Dog walkers using the site often fail to clean up after their pets. Although the club tries to keep the pitch clean, there have been unpleasant incidents of young football players sliding through dog excrement which has been left behind. Consequently, the club is concerned at the risk to its players, visitors and staff of infection from Toxocariasis, which can lead to blindness in some cases. In 2011 the Football Club spent £20,000 on fencing the recreation ground to make it more secure but this was severely vandalised last year.
3. The club, which is run on a not for profit basis, asked Wiltshire Council to make an application to the Magistrates' Court for an Order under Section 116 of the Highways Act 1980 to stop up the footpath. The application was heard in Chippenham Magistrates' Court on 22 January 2013. Mr Morland, who was at that time the Councillor for the Southwick and North Bradley Electoral Division, raised an objection to the Council using the procedure under Section 116 to close the footpath as he thought the appropriate mechanism to do this was under Section 118 of the Highways Act 1980. Mr Morland did not object to the actual closure of the footpath across the playing field. The Magistrates did not grant the application for an Order stopping up the footpath because they did not accept that the pavement along Woodmarsh Road would be an adequate alternative for the public to use.

4. The club is still experiencing vandalism and anti-social behaviour in the playing field and feels the recreation field cannot be managed effectively with this short section of Footpath 1 crossing the recreation ground as this restricts its ability to completely fence off the field. Whilst the club would prefer to close the footpath across the recreation ground permanently, it did offer an alternative.
5. On 8 February 2014 a further consultation was undertaken to seek views on either diverting the footpath or extinguishing it. Rather than just conduct the usual consultation exercise with the local parish council, statutory undertakers and user groups, an attempt was made to engage with users of the path at an early stage by posting a letter addressed to members of the public with a plan at either end of the footpath at the recreation field, seeking views on either the diversion or extinguishment of the path. Only four replies were received which could be linked with this consultation letter:
 - (i) Mr Oliver of Woodmarsh said he wished to register his disapproval of the change as he believed the path was 'in existence long before the footballers ever dreamt of using the field at Woodmarsh for football, I do feel the footballers have isolated themselves from the residents of Woodmarsh, that I believe is why so much vandalism is caused in the field.'

Mr Oliver did not say he used the footpath.

- (ii) Mr Walters of Lydiard Way, Trowbridge stated 'I say that I support your proposed alteration of the route within the site and object to the football club's original proposal to remove the footpath entirely. I have used the site for the past sixteen years to exercise my dogs, always cleaning up after them, and have seen it used by other dog walkers, golfers and children when the snow is around. I may be wrong, but I had always understood that the field was for public use and I was most peeved when the football club started fencing it off.'

Mr Walters's comments paint a picture of a more generalised use of the field by the public rather than the public walking along the route of the actual path.

- (iii) Mr D Elliott e-mailed to say he 'uses the path at least four times a week' but he also says 'I usually avoid using parts of the football pitch to help preserve the condition of the grass which is being used to play football on. I also don't use this path when football is being played as I think that it will disrupt any football match if I was to walk through it.'

The football pitch does not lie across the footpath. This comment and the comment Mr Elliott also made about rubbish left on and around the pitch all suggest to officers that Mr Elliott does not confine his walking to the line of the footpath but uses the field as a whole for general access.

- (iv) Debbie Elliott of Wiltshire Drive, Trowbridge e-mailed to state 'We use this pathway on a daily basis and did think that Trowbridge Football Club would, yet again, get its own way. However, your decision to divert the path slightly would be acceptable, rather than what the football club wanted, which was to keep people out of the field totally.'

6. Officers noted that the grass along the route of the footpath shows no sign of regular use. The only sign of regular use on the line of the path is at the access points into the field from Axe and Cleaver Way and Woodmarsh Road. The consultation exercise did not bring to the Council's attention any notable demand or need to use that section of North Bradley Footpath 1 which crosses a corner of the recreation field.
7. Officers considered from the evidence before them that there is little actual use made of the footpath by the public.
8. Section 118(1) of the Highways Act 1980 states that:

'Where it appears to a council as respects a footpath, bridleway or restricted byway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way. An order under this section is referred to in this act as a 'public path extinguishment order'.
9. Section 118(2) of the Highways Act 1980 states:

'The Secretary of State shall not confirm a public path extinguishment order and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in Section 28 above as applied by Section 121(2) below.'
10. Officers concluded it was expedient to extinguish the 145 metre length of Footpath North Bradley 1 as shown on the plan at **Appendix 1** because it is not needed for public use, the test to be applied in deciding whether or not an Order ought to be made in Section 118(1) of the Highways Act 1980. The test was considered in the case of R v Secretary of State for the Environment ex parte Stewart [1980] JLP 175. The path could be needed by some members of the public but if it was not needed by many of them, then the extinguishment order could be confirmed.
11. On the 25 April 2013 an Order was made providing for the extinguishment as outlined above.
12. Notice of the making of the Order was circulated to all interested parties, posted on site and advertised in a local newspaper. This was followed by a statutory objection period of 28 working days, during which time two objections were received from Mr Peter Oliver and Mr Francis Morland. The objections to the making of the Order are set out below and copies of the objections are attached at **Appendix 2**.

13. Mr Peter Oliver wrote on 21 May 2013 making the following points:

'I cannot see any reason for the closure or modification to the layout. It is an ancient footpath that was there before Even I was born or any of the people using the playing field and should remain untouched and unmodified for future generations to come.

My wife and I do use the footpath if only occasionally just to keep it open'.

14. Mr Francis Morland e-mailed on 3 June to state:

'I wish to object to the above Order made on 25 April 2013.

At a hearing on Tuesday, 22 January 2013, the Magistrates' Court at Chippenham determined that the footpath in question was not unnecessary for public use and therefore declined to make an Order to stop it up under Section 116 of the Highways Act 1980.

There have been no material changes of circumstance in the three months following that decision to justify the Order now made by Wiltshire Council, which is a clear abuse of its ordermaking powers.

I remain deeply unhappy that Wiltshire Council has not carried out the measures I proposed in my e-mails sent 16 April 2012 and 08 August 2012, which I believe are essential before any further steps are taken to revisit the Magistrates' decision on the basis of a subsequent change of circumstances.

I reserve the right to amend or add to the grounds of my objection to the Order.'

15. In his e-mail dated the 16 April Mr Morland stated:

'As you know, I do not favour the use of the Magistrates' Court's power to stop up highways except where no alternative powers exist for Wiltshire Council itself to make an Order (for example, where there are public vehicular rights over the highway in question). In this particular case, as far as I am aware, the way is not recorded as having any public rights over it other than as a footpath, so these alternative powers are available under Sections 118 and 119 of the Highways Act 1980.

Having heard the views of North Bradley Parish Council, I do not have any other objection to the stopping up of this length of footpath, but I consider that it should be made strictly conditional on the formal dedication of and addition to the relevant Definitive Map and Statement as a footpath of at least 2 metres in width of the existing way directly linking Boundary Walk to Bradley Road, Trowbridge at a point approximately 80 metres north of point A across land in the same ownership as North Bradley Footpath 1.

It seems to me that this will provide the public with a more commodious route on foot from Boundary Walk to Bradley Road than the existing route via NBRA2, NBRA3 and NBRA1 and gives a proper statutory basis for linking the two proposals together (whether formally as a Diversion of NBRA1 or otherwise).'

16. Due to the objections received, the Order now falls to be considered by the Western Area Planning Committee whose Members should consider the legal tests for extinguishment against the objections received, in order to decide whether or not Wiltshire Council continues to support the making of the Order.

17. Where the Authority continues to support the making of the Order, it should be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification, or with modification.
18. Where the Authority no longer supports the making of the Order, it may be withdrawn with reasons given as to why the legal tests for extinguishment are no longer met. The making of a Public Path Extinguishment Order is a discretionary duty for the Council, rather than a statutory duty; therefore, the Order may be withdrawn at any time.

Main Considerations for the Council

19. The Extinguishment Order has been made under Section 118 of the Highways Act 1980, the provisions of which are set out in paragraphs 8 and 9 above.
20. Section 118 of the Highways Act 1980 allows the highway authority to extinguish a footpath where it considers it expedient to do so as the footpath is infrequently used by the public. Officers believe this legal test has been satisfied, please see paragraph 10 above.
21. In making creation agreements and creation, diversion and extinguishment Orders, Sections 29 and 121(3) of the Highways Act 1980 require authorities to have due regard to the needs of:
 - (a) agriculture and forestry, and
 - (b) the desirability of conserving flora, fauna and geological and physiographical features.
22. Section 40 of the Natural Environment and Rural Communities Act 2006 also places a duty on every public authority exercising its functions to have regard to the conservation of biodiversity, so far as is consistent with the proper exercise of those functions. In this section, conserving biodiversity includes that in relation to a living organism, or type of habitat and restoring or enhancing a population or habitat.
23. There are no considerations for agriculture and forestry over this site. With regard to conserving flora, fauna and geological and physiographical features and biodiversity, the County Ecologist has been consulted regarding the proposal and no adverse comments were received.

Comments on the Objections

24. Neither of the two objections address the legal test to be applied in deciding whether it is expedient for the Council to extinguish the length of North Bradley Footpath 1 which crosses the recreation field that is whether the footpath is needed for public use. Although Mr Oliver does say he and his wife use the footpath occasionally, it is clear from the 'Stewart' case mentioned in paragraph 10 above that even though a path could be needed by some members of the public, if it was not needed by many then an extinguishment order could be confirmed. The Council is not aware of any significant public need to use the route Footpath 1 takes across a corner of the recreation field.

25. Mr Oliver's comment that *'I cannot see any reason for the closure or modification to the layout. It is an ancient path that was there before Even I was born or any of the people using the playing field and should remain untouched and unmodified for future generations to come'* is not a relevant consideration to be taken into account in determining whether an order for the extinguishment of a path ought to be either made or confirmed.
26. Mr Morland has acknowledged that the Council has the appropriate power to extinguish this section of Footpath 1 under Section 118 Of the Highways Act 1980. He has also confirmed that he has no other objection to the stopping up of this length of path but he does want this conditional on the dedication of another path on the same landowner's land. The Council does not have the power to make the extinguishment conditional on the dedication of another route. However, the Council has worked with the owner of the land, the football club and other interested parties to secure, as a public footpath, the route Mr Morland desires to be recorded as a public footpath. Once the proposed path is brought up to a standard acceptable to the Council, officers will arrange for it to be formally dedicated as a public footpath and added to the definitive map and statement. Work on the path to be dedicated will start early in the New Year.

Safeguarding Considerations

27. None.

Public Health Implications

28. None.

Environmental Impact of the Recommendation

29. None.

Risk Assessment

30. Trowbridge Town Football Club is seeking the extinguishment of that part of North Bradley Footpath 1 which crosses the field as the closure will enable the Club to fence the entire perimeter of the field and therefore control public access to it. The only section of the field the public currently have a right to access is along the line of the footpath. The public do not have a right to walk or make other uses of the field. The field is in private ownership. If the Order to extinguish the footpath is confirmed and the Football Club chooses to erect a perimeter fence the Council may receive comments from the public about the fencing. The decision of whether or not to fence land rests with the owners and occupiers of the land. The fact that the field may be fenced at some point in the future if the footpath is extinguished is not a relevant consideration that can be taken into account in considering the objections to the making of the Order which is the subject of this report.

Financial Implications

31. The applicant has agreed, in writing, to meet the actual costs to the Council in processing the Order, which includes staff time and the costs of advertising the making of the Order and the confirmation of the Order in one local newspaper.
32. If the Order is withdrawn by Wiltshire Council, the Order is not confirmed and there are no additional costs to the applicant or the Council. However, although there is no form of appeal process against the Council's decision to withdraw the Order, the Council's decision is open to Judicial Review and clear reasons must be given for the withdrawal of the Order.
33. If the Order is forwarded to the Secretary of State for decision, the Order will be determined by written representations, hearing or local Public Inquiry, all of which have a financial implication for the Council as none of these costs can be passed to the applicant. If the case is determined by written representations, the cost to the Council is negligible; however, where a local hearing is held, the costs to the Council are estimated at £200 - £500 and £1,000 - £3,000 where the case is determined by local Public Inquiry.

Options Considered

34. Having considered the objections received against the legal tests for extinguishment there are two options available to Members of the Committee.
 - (i) Where Members of the Committee no longer support the making of the Order in the light of the objections received, the Order may be withdrawn. The making of a Public Path Extinguishment Order is a discretionary duty for the Council rather than a statutory duty; therefore, the Order may be withdrawn at any time. Although there is no appeal procedure for the landowner where the Order is withdrawn, the Council's decision is open to Judicial Review and reasons why the Order no longer meets the legal tests should be clearly stated.
 - (ii) Where Members of the Committee consider that the Order continues to meet the legal tests for the making and confirmation of a Public Path Extinguishment Order, the Order should be forwarded to the Secretary of State for determination through the written representation procedure, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

Reasons for Recommendation

35. Despite the objections received, it is considered, for the reasons given within the report that the making of The Wiltshire Council North Bradley 1 (Part) Extinguishment Order and Definitive Map Modification Order 2013 continues to meet the legal tests for the making and confirmation of an extinguishment order under Section 118 of the Highways Act 1980.

Recommendation

36. That “The Wiltshire Council North Bradley 1 (Part) Extinguishment Order and Definitive Map Modification Order 2013”, be forwarded to the Secretary of State for determination through the written representation procedure, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

Tracy Carter

Associate Director of Environment and Leisure

Report Author

Barbara Burke

Definitive Map and Highway Records Team Leader

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

None

Appendices

Appendix 1 – Order Map

Appendix 2 – Copies of Objections