

SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981

APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RECORD TWO PUBLIC FOOTPATHS – Glenavon Farm, Saltford

(Ward Division: **Saltford**)

1. The Issue

- 1.1 An application has been received for a Definitive Map Modification Order (“DMMO”) to be made under section 53(2) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) to modify the Definitive Map and Statement of Public Rights of Way (“the DM&S”) by adding two public footpaths at Glenavon Farm in Saltford.

2. Recommendation

- 2.1 It is recommended that Bath and North East Somerset Council (“the Authority”) refuses to make a DMMO to record the Application Routes, as shown by broken green lines on the plan contained at Appendix 1 (“the Decision Plan”), on the DM&S.

3. Financial Implications

- 3.1 Financial implications are not a relevant consideration which may be taken into account under the provisions of the 1981 Act. The costs associated with making a DMMO and any subsequent public inquiry, public hearing or exchange of written representations would be met from the existing public rights of way budget.

4. Human Rights

- 4.1 The Human Rights Act 1998 (“the 1998 Act”) incorporates the rights and freedoms set out in the European Convention on Human Rights (“the Convention”) into UK law. So far as it is possible all legislation must be interpreted so as to be compatible with the Convention.
- 4.2 The 1981 Act does not permit personal considerations to be taken into account. A decision relating to a DMMO would be lawful without taking account of personal considerations, as provided by section 6(2) of the 1998 Act, as it would be impossible to interpret the legislation in such a way that it is compatible with section 3 of the Convention. Further details of Human Rights considerations can be found in the Planning Inspectorate’s Public Rights of Way Advice Note No. 19.

5. Legal Framework

- 5.1 The Authority, as Surveying Authority, is under a statutory duty, imposed by section 53(2) of the 1981 Act, to keep the DM&S under continuous review. Section 53(2)(b) states:

“As regards every definitive map and statement, the surveying authority shall...keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence...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”

- 5.2 The ‘events’ referred to above are set out in section 53(3) of the 1981 Act. The ‘event’ to which this Application relates is set out in section 53(3)(c)(i) of the 1981 Act which states that:

“...the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...”

- 5.3 The meaning of ‘reasonably alleged’ was considered in *Bagshaw and Norton* [1994]¹ where Owen J. stated that:

“Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to uses is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist then, it would seem to me, to be reasonable to allege such right.”

- 5.4 Anyone may apply to the Authority for a DMMO to modify the DM&S and such applications must be determined in accordance with the provisions of schedule 14 of the 1981 Act. If, after consideration of an application, the Authority decides not to make a DMMO then the Applicant may appeal to the Secretary of State within 28 days of the service of notice of that decision. The Secretary of State will then re-examine the evidence and direct the Authority accordingly.

- 5.5 Evidence of use by the public can be sufficient to raise a presumption of dedication under section 31 of the Highways Act 1980 (“the 1980 Act”) or at common law. Section 31(1) of the 1980 Act states that:

“Where a way over any land, other than a way of such a 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 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.”

- 5.6 Documentary evidence should also be considered in determining applications for DMMOs. Section 32 of the 1980 Act states:

¹ R v SSE ex parte Bagshaw and Norton [1994] 68P & CR402

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

6. Background and Application

- 6.1 On 9 March 2015, Mr Reginald Williams of 24 High Street, Saltford and Mr Howard Griffiths of 18 Claverton Road East, Saltford (“the Applicants”) applied to have two public footpaths added to the DM&S (“the Application”). The Application was accompanied by 14 User Evidence Forms (“UEFs”).
- 6.2 The first route under consideration commences from a junction with Manor Road at grid reference ST 6707 6691 (Point A on the Decision Plan on page 4 below) and proceeds in a generally northwesterly direction for approximately 190 metres to a junction with Application Route B as described below at grid reference ST 6697 6707 (Point B) and continues in a generally northwesterly direction (Fig. 2) for approximately 142 metres to a junction with public footpath BA27/30 at grid reference ST 6686 6715 (Point C). This route is hereafter referred to as “Application Route A”.
- 6.3 The second route under consideration commences from a junction with Application Route A at grid reference ST 6697 6707 (Point B) and proceeds in a generally northerly direction (Fig. 3) for approximately 307 metres to grid reference ST 6703 6736 (Point D) and turns in a generally easterly direction for approximately 249 metres to grid reference ST 6728 6733 (Point E) and turns in a generally northerly direction (Fig. 4) for approximately 204 meters to a junction with public footpath BA27/27 at grid reference ST 6729 6753 (Point F). This route is hereafter referred to as “Application Route B”. Application Route A and Application Route B are hereafter collectively referred to as “the Application Routes”.

7. Consultations

- 7.1 In December 2017 the Authority consulted on the Application with the Applicants, Saltford Parish Council, local and national user groups, the ward members and the affected Landowner. Notices were also erected at either end of the Application Routes and on the Authority’s website.
- 7.2 Prior to the commencement of the public consultation, the owner of the land over which the Application Routes run submitted an objection to the Application Routes being recorded on the DM&S. Responses to the consultation itself were received from the Chairman of Saltford

Environment Group and both Applicants; a further UEF was also submitted by a member of the public. All evidence and submissions are considered in sections 8, 9 and 10 below.

- 7.3 Two members of the public expressed concern that the Application could result in the landowner declining to grant permissive access and therefore to a loss of public access to paths around Saltford; however, this is not a relevant consideration in relation to the determination of the Application.

8. Documentary Evidence

- 8.1 Extensive archival research was undertaken in the Somerset Heritage Centre (“SHC”) in Taunton, the Bath Record Office (“BRO”) and in the Authority’s own records.
- 8.2 The following documents have been examined but were not found to provide any evidence in respect of the Application Routes:
- Day and Masters’ Map (SHC Ref.: D\B\wsm/38/6);
 - Map of the Bristol Turnpike Roads (SHC Ref.: W/RUP/59c);
 - Greenwood’s map (SHC Ref.: A\AUS\60);
 - Saltford Tithe Map and Apportionment (SHC refs.: D\D/Rt/M/363 and D\D/Rt/A/363);
 - Inland Revenue documents (SHC Refs.: DD/IR/7/14 and DD/IR/B/21/1);
 - Definitive Map records.
- 8.3 The Application Routes were included as permissive bridleways under a Higher Level Stewardship Scheme (HLSS) administered by Natural England from March 2001 until 2013. In 2014, a group of local residents agreed with the landowner for the Application Routes to become permissive footpaths in exchange for annual payments. The section of Application Route A between points A and B on the Decision Plan and the whole of Application Route B is shown on a walks leaflet as part of Saltford Environment Group’s History Walks of Saltford No.4; the leaflet refers to both the HLSS and current permissive access. On 30 October 2014, the landowners made a Landowner Deposit under section 31(6) of the 1980 Act. The Application Routes were not admitted as public rights of way on the map or in Part B. On 31 October 2014 the landowner made a subsequent Landowner Deposit including a Part C. The Part C declaration stated that the landowner had no intention to dedicate any new public rights of way during the intervening period.

9. Landowner Statements

- 9.1 The previous owner of the land over which the Application Routes run submitted a written statement dated 22 September 2015. It is stated that:
- the concrete track over which the section of Application Route B between points E and F on the Decision Plan runs was constructed in 1970;

- the wide grass margin along the remainder of Application Route B did not exist in 1967 and there was a heavy iron gate at point E on the Decision Plan which was difficult to open;
- there was a barbed wire fence crossing Application Route B between points D and E on the Decision Plan and the gap at this location was only created in c.2001 as part of the HLSS;
- the current field margin was ploughed up from early 1980s until 2001;
- the gate at point A on the Decision Plan was installed in 2001 or 2002 and there was previously a barbed wire fence across the section of Application Route A between points A and B on the Decision Plan;
- and in March 1982 planning permission was granted for tipping waste and this tipping made it virtually impossible for anybody to walk Application Route B at that time.

9.2 The current owner of the land over which the Application Routes run submitted a written statement dated 22 September 2015. It is stated that:

- there was previously a barbed wire fence crossing Application Route B between points D and E on the Decision Plan and a gap was only created in c.2001 as part of the HLSS;
- the Application Routes were opened up as permissive bridleways in March 2001 as part of the Countryside Stewardship Scheme;
- a sign explaining the permissive access was located north of point F on the Decision Plan from 2001 until 2014; an identical sign is still in situ at point A on the Decision Plan;
- these permissive paths closed in November 2013 and signs were erected informing members of the public;
- the landowner entered into a new permissive path agreement for the Application Routes in November 2014
- and map issued by Saltford Parish Council and updated in April 2008 shows the Application Routes as '*Permissive and other paths*'.

9.3 A herdsman who previously worked between 1968 and 1983 on the land over which the Application Routes runs submitted a written statement dated 6 May 2015. It is stated that:

- the herdsman helped to lay the concrete track between points E and F on the Decision Plan with the landowner and states that prior to the construction of the concrete track there was a dry stone wall crossing Application Route B at point E on the Decision Plan;
- a barbed wire fence crossed Application Route B between points D and E and between points A and B on the Decision Plan;
- and there was no stile or gate onto Manor Road and they did not see members of the public using the Application Routes.

9.4 The son of the individual who owned the land from c.1949, and latterly the farmer of the land until 1966, submitted a written statement dated 2 September 2015. It is stated that:

- There has never been a footpath along the track between points E and F on the Decision Plan.

10. User Evidence

- 10.1 As detailed in paragraph 8.3 above, use of the Application Routes from March 2001 onwards was by virtue of express permission of the landowner. Therefore, the Relevant Period of use under section 31 of the 1980 Act runs from March 1981 to March 2001. The Authority has received 15 UEFs detailing use of the Application Routes by members of the public from 1950 to 2018. Although User 7 states that they used the Application Routes on horseback from 1950 to 1958, all other use was on foot only. The Authority carried out short telephone interviews with the nine of these users² who were contactable.
- 10.2 All of the UEFs state that the Application Routes were unobstructed throughout the periods of use that they document and during the telephone interviews none of those interviewed recalled any fences or dry stone walls across the Application Routes or the surface of the field margins impeding their use. All of the users interviewed state there has always been a pedestrian gate at point A on the Decision Plan, except User 10 who was unsure on this point. One of the Applicants and Users 1 and 14 are the only individuals, other than those that made the statements detailed in section 9 above, who recalls waste near point A on the Decision Plan but they state that it could be walked around without any difficulty. User 1 and one of the Applicants recalls that there was a gate at point E on the Decision Plan but it could be easily opened.
- 10.3 There is a clear conflict between the evidence presented by owners and occupier which is detailed in paragraphs 9.1 to 9.4 above and the evidence presented by users as detailed in paragraph 10.2 above; additionally, no documentary evidence such as photographs have been produced to corroborate either side's assertions. In the Bagshaw and Norton case,³ Owen J. stated that in circumstances such as these, where the evidence from witnesses is conflicting, a right of way can be reasonably alleged to exist if it is reasonable to accept one side and reasonable rejecting the other.
- 10.4 The Users all state that their use throughout the Relevant Period has been 'as of right'; however, it is necessary to examine whether the user evidence is sufficient to demonstrate that the Application Routes have been '*...actually enjoyed by the public...*' Four users⁴ state that they have used Application Route A throughout the Relevant Period. Additionally, between them, Users 5 and 14's stated use spans the whole Relevant Period and their use can therefore be combined. This brings the total combined use of Application Route A throughout the Relevant Period to five users.
- 10.5 During their telephone interview, User 10 stated that during the Relevant Period they thought they probably used the nearby field gate rather than the pedestrian gate at point A on the Decision Plan.

² Users 1, 2, 3, 4, 5, 7, 10, 13 and 14

³ *R v SSE ex parte Bagshaw and Norton* [1994] 68P & CR402

⁴ Users 7, 8, 9 and 13

Although these gates are only approximately five metres apart these are two distinct routes and User 10 cannot therefore be deemed to have used the whole of Application Route A during the Relevant Period. However, User 10 has used Application Route B and this brings the number of people who used Application Route B throughout the Relevant Period to six.⁵

- 10.6 Although users 7, 13⁶ and 14 used Application Route A on a daily basis, users 8 and 9 only used the Application Route A once a month. This is not a sufficient level of use to demonstrate that Application Route A has been '*...actually enjoyed by the public...*' and the user evidence does not therefore demonstrate deemed dedication under section 31 of the 1980 Act.
- 10.7 The user evidence shows that Application Route B was used throughout the whole Relevant Period with the same frequency as detailed in paragraph 10.4 above but with the addition of the use of User 10. However, User 10 states that they only used the Application Routes '*two or three times a year*' and this does not bring the total use of Application Route B to a sufficient level to demonstrate that it has been '*...actually enjoyed by the public...*'; the user evidence does not therefore demonstrate deemed dedication under section 31 of the 1980 Act.
- 10.8 For the Application Routes to be deemed to have been dedicated as public rights of way at common law they must have been used by the public for a period which is sufficient to constitute evidence of an intention by the landowner to dedicate the way as public. There is evidence that the Application Routes were used for 51 years prior to the HLSS permissive access being granted; however, this is not of such character, and in particular of sufficient frequency, for a rightful inference to be drawn that there was an intention to dedicate the Application Routes at common law.

11. Conclusion

- 11.1 There is not sufficient evidence to reasonably allege that the Application Routes have acquired public rights. Consequently, the Authority should not make a DMMO in respect of the Application Routes.

⁵ Users 7,8, 9, 10, 13 and 5/14

⁶ Between 1993 and 1997 User 13 only used the Application Routes approximately 6 times a year for leisure walks because they didn't have a dog at this time. However, by 1993 Users 1, 2, 4, 5, 6, 11, 12 and 15 had all started using the Application Routes and this compensates for User 13's reduction in use.

AUTHORISATION

Under the authorisation granted by the Council on 12 May 2016, the Authority formally rejects the application to modify the Definitive Map and Statement in respect of the Application Routes.



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Dated: 10/4/18

Craig Jackson
Team Manager – Highways Maintenance and Drainage

Appendix 1: Decision Plan

- Application Route A ● ● ● ● ●
- Application Route B ● ● ● ● ● ● ●
- Unaffected Public Footpath —



