

SECTION 53 of the WILDLIFE AND COUNTRYSIDE ACT 1981

DEFINITIVE MAP MODIFICATION ORDER TO ADD 30 PUBLIC RIGHTS OF WAY IN SOUTHDOWN WARD, BATH

(Ward Division: **Southdown Ward, including a small section of Twerton Ward**)

1. The Issue

- 1.1 This report deals with the evidence relating to 28 alleged public rights of way in the Southdown and Twerton Wards, Bath and seeks the Team Manager - Highways Maintenance & Drainage's approval to make 2 Definitive Map Modification Orders (DMMOs), to record all of these paths on the Definitive Map and Statement for the City of Bath ("DM&S") with 30 separate path numbers (as described in the Background Information at Appendix 1, point 1.6 and listed at Appendix 5).

2. Recommendation

- 2.1 It is recommended that Bath and North East Somerset Council ("the Authority") makes 2 DMMOs on the grounds that the routes as shown by a broken black line and labelled Parts 1 to 30 on the plans ("the Decision Plans") contained at Appendix 2 have been dedicated as public rights of way, and to confirm the Orders if no duly made objections are received to the Orders and not subsequently withdrawn.

3. Financial Implications

- 3.1 Financial implications are not a relevant consideration which may be taken into account under the provision of the 1981 Act. The costs associated with making a DMMO and any subsequent public inquiry or hearing 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 Surveying Authority must make an Order on its own initiative if it discovers evidence which shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist.
- 5.2 Bath and North East Somerset Council, as Surveying Authority, is under a statutory duty, imposed by Section 53(2) of the Wildlife and Countryside Act 1981, 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”.

- 5.3 The “events” referred to above are set out in section 53(3). The event relevant to this report is set out in section 53(3)(c)(i) as follows:

“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.....”

- 5.4 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.”

- 5.5 The Authority must make an Order on its own initiative if it discovers evidence which justifies the making of an Order and such applications must be determined in accordance with the provisions of Schedule 15 of the Wildlife and Countryside Act 1981.
- 5.6 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 state 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

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

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."

- 5.7 For a way to be deemed to have been dedicated as a public right of way at common law it 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. The facts, taken as whole, must be such that the rightful inference to be drawn from them was that there was an intention to dedicate the way as public. Use must be without force, secrecy or permission (i.e. 'as of right') and each case turns on whether the facts indicate an intention to dedicate.
- 5.8 Documentary evidence is often considered in determining applications for DMMOs. Section 32 of the 1980 1980 states:

"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. Consultations

- 6.1 The following groups were consulted - Ward Councillors, local and national user groups, other B&NES Services and local residents. Englishcombe Parish Council and Bathavon South Ward were consulted as they border Southdown Ward.
- 6.2 The Ward Councillors for Southdown, Twerton, Odd Down, Moorlands, Westmoreland, Bathavon South and Englishcombe Parish Council were sent a map and list of the 25 paths to be included in the research in February 2020 (Southdown Ward) and May 2020 (the adjoining Wards). They were invited to comment on the list and to add any paths they considered to be missing (Paths 1 to 25).
- 6.3 Local and national user groups and other B&NES Services were consulted on the list of paths in May 2020 by email. The Bath Ramblers suggested additional paths for inclusion in the public consultation, 3 of which were added to the public consultation (Paths 26, 27 and 28).
- 6.4 Attempts were made to contact all owners or occupiers of the paths being considered for addition to the Definitive Map and Statement in this report. Land Registry searches were undertaken for all paths not completely on Authority owned land. Landowners and adjoining

landowners were consulted by letter, email or phone between May and November 2020.

- 6.5 Local residents were consulted on the paths between September and October 2020. Notices were posted on each of the paths in the consultation on 21st and 22nd September 2020 until 17th and 18th November 2020. Details were also posted on the Authority's website between September and November 2020, in the form of an online consultation, and at the Planning Desk, One Stop Shop, Lewis House, Bath, inviting comments from the public.
- 6.6 Local residents and members of the public supplied information regarding their use of the paths in the consultation in the form of phone calls, emails, electronic responses to the online consultation and by letter.
- 6.7 Documentary and user evidence was gathered for each of the paths included in the consultation and summarised. The following documents were consulted:
- Cotterell's 1852 Map of Bath
 - Historic Maps available on the Authority's GIS Mapping:
 - Bath Town Plan, 1885
 - OS Mapping 1887 – 1891
 - OS Mapping 1901 – 1905
 - OS Mapping 1920 – 1933
 - OS Mapping 1933 – 1936
 - Bath City Engineer's Survey, 1957
 - The Authority's List of Streets
 - Previous Legal Orders

7. Officer Comments

- 7.1 To avoid confusion, the paths included in the consultation were given reference numbers between 1 and 28. It was considered that these numbers would be easier for the consultees to identify with than the numbering convention used by the Public Rights of Way Team. The numbers given in the consultation are shown in brackets.
- 7.2 Documentary and user evidence was gathered for each of the paths included in the consultation. The information is presented in full at Appendix 4. A recommendation for each path is summarised below in paragraphs 7.3, 7.4 and 7.5.
- 7.3 Officers are satisfied that the evidence gathered for the following paths is sufficient to make an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. The recommendation for these paths is to record them as public footpaths and add them to the Definitive Map and Statement for the City of Bath:

Path Numbers

Path 1 (AQ469b), Path 2 (AQ190), Path 3 (AQ469a), Path 5 (AQ546), Path 6 (AQ473), Path 7 (AQ79), Path 8 (AQ80), Path 9 (AQ71), Path 10 (AQ168), Path 11 (AQ169), Path 13 (AQ65b), Path 14 (BQ65), Path 15 (AQ65a), Path 16 (AQ411a), Path 17 (BQ54), Path 18 (BQ55), Path 19 (AQ411b), Path 20 (AQ65c), Path 21 (AQ472), Path 22 (AQ478), Path 23 (BQ6), Path 24 (AQ72), Path 25 (AQ82), Path 26 (AQ568), Path 27 (AQ457), Path 28 (AQ461). Path 12 (AQ548a) will be separated into 3 sections with unique path numbers.

- 7.4 Officers are satisfied that the evidence gathered for AQ70 (Path 4) is sufficient to make an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. The recommendation for this path is to record it as a public bridleway and add it to the Definitive Map and Statement for the City of Bath.
- 7.5 After analysis of the submitted evidence, Officers are satisfied that the relevant legislation (Wildlife and Countryside Act 1981 section 53(3)(c)(i)) has been met and that 2 Orders should be made for 30 Public Rights of Way in Southdown Ward, Bath.

8. Risk Management

- 8.1 There are no significant risks associated with making of an Order.

9. Conclusion

- 9.1 The Authority has collected both user and documentary evidence concerning each of the paths. Taken together, it is possible to make an Order under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provided the relevant tests are met.
- 9.2 The Team Manager - Highways Maintenance & Drainage has to decide what are the correct facts and, on the basis of those facts, whether a right of way is reasonably alleged to exist along the paths recommended for inclusion in a DMMO.
- 9.3 Officers are satisfied that, there is both a reasonable allegation and that on the balance of probabilities, the documentary and / or user evidence gathered for Path 1 (AQ469b), Path 2 (AQ190), Path 3 (AQ469a), Path 4 (AQ70), Path 5 (AQ546), Path 6 (AQ473), Path 7 (AQ79), Path 8 (AQ80), Path 9 (AQ71), Path 10 (AQ168), Path 11 (AQ169), Path 12 (AQ548a, AQ548f and AQ548g), Path 13 (AQ65b), Path 14 (BQ65), Path 15 (AQ65a), Path 16 (AQ411a), Path 17 (BQ54), Path 18 (BQ55), Path 19 (AQ411b), Path 20 (AQ65c), Path 21 (AQ472), Path 22 (AQ478), Path 23 (BQ6), Path 24 (AQ72), Path 25 (AQ82), Path 26 (AQ568), Path 27 (AQ457) and Path 28 (AQ461) is sufficient to conclude that they should be recorded as public rights of way and that a Definitive Map Modification Order (DMMO) should be made to that effect. It may be that higher rights exist, but

these have not been proven at this time. The Team Manager - Highways Maintenance & Drainage is asked to authorise the making of a Definitive Map Modification Order for the paths listed above. Plans identifying the proposed routes can be found in Appendix 2, labelled as Parts 1 to 30.

- 9.4 It has not been possible to get responses from all of the landowners during the consultation. None of the landowners who have responded have indicated that they will object to an Order.

AUTHORISATION

Under the authorisation granted by the Council on 10 May 2018, the Team Manager - Highways Maintenance & Drainage resolves that the Team Leader: Democratic & Legal Services is hereby requested to seal 2 Definitive Map Modification Orders to record public rights of way as detailed in the Decision Plans (Appendix 2) and Decision Schedules (Appendix 3).



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Dated: 25/03/2021

Craig Jackson
Team Manager - Highways Maintenance & Drainage