

# APPENDIX B

## Legal and Policy Considerations

- B.1. Section 53(5) of the Wildlife and Countryside Act 1981 (*“the 1981 Act”*) permits any person to apply to Central Bedfordshire Council, as the Surveying Authority for the Definitive Map and Statement, for an order to modify the Definitive Map and Statement under subsection 53(2) of the 1981 Act if they consider these are in error and need correcting.
- B.2. Mr. Darren Woodward has applied under Section 53(5) to add a public bridleway to the Definitive Map and Statement through the Crown Hotel, Biggleswade, on the ground that it subsists or is reasonably alleged to subsist, having been a way used both on foot and with pedal cycles.
- B.3. Section 53(2) of the 1981 Act places a duty on the Council, as the Surveying Authority, to modify the Definitive Map and Statement upon the occurrence of certain events detailed in Section 53(3) of the Act. Section 53(3)(c) gives details of some of the events which require the Council to modify the Definitive Map and Statement:

*53(3)(c) 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 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.*

- B.4. Section 31 of the Highways Act 1980 (*“the 1980 Act”*) describes how a highway may be deemed to have been dedicated by the landowner - as indicated by long use of the way by the public. It states:

- 1) 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.*

*1A (Omitted)*

- 2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question...*

- 3) Where the owner of the land...*

*(a) has erected... ..a notice inconsistent with the dedication of the way*

*as a highway...*

*(b) has maintained the notice...*

*the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

- 4) In the case of land in possession of a tenant... ..[the owner] shall, notwithstanding the existence of the tenancy, have a right to place and maintain such a notice...*
- 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 map... .. and... ..statement indicating what ways (if any) over the land he admits to having been dedicated as highways... ..to the effect that no additional way... ..has been dedicated as a highway since the date of the deposit... ..[and is] sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway...*
- 7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.*
- 7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.*
- 8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes...*
- 9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less than 20 years..."*

B.5. Public use must have been “*as of right*” – that is without force, without stealth and without permission - in order to qualify as evidence from which the Council can deem that a public right of way has been dedicated. Additionally, this use must not have been interrupted or challenged by either actions of the owners or by signs being erected which would constitute evidence of an overt and contemporaneous non-intention to dedicate the way as a highway.

B.6. For the purposes of Section 31, the act that called into question the public’s right to use the claimed bridleway was the erection of security fencing in c.November 2013. The relevant twenty-year period is therefore November 1993 – November 2013. During the relevant period the land

(the Crown Hotel and yard) was owned by Greene King plc. It appears from the evidence given by user surveys and statements that during this time many of the inhabitants of Biggleswade used the claimed route as a cut-through. This route is capable of being dedicated at common law and none of the users have reported any challenges or interruptions during the relevant period.

- B.7. The Asda superstore immediately to the north of the Crown Hotel was built on the old Greene King brewery site which closed in October 1997. The brewery had previously been owned by Wells and Winch (as was the Crown Hotel) and had been on the site since the 17<sup>th</sup> Century. It is very likely that some of the brewery workers walked to work through the Crown Hotel yard. Whilst it is conceivable that the brewery may have given permission for the workers to walk this route, given the more general use by the public it is probably more likely that the brewery assumed that its workers used the route in the same manner as the other inhabitants of the town. This assumption accords with the judgment of McMahon J. in *Walsh & Cassidy v Sligo County Council* [2010] IEHC 437, [2009 No 262P] who found that whilst the users of a way may be known to the owner of the land – and even employed by them or have limited permission to use a route, the use of the route outside this limited consent would constitute “non-precarious” user and thus be “as of right”.
- B.8. The legislative tests for the Council being able to deem under Section 31 of the 1980 Act that a public right of way subsists are described above. The case of *Mayhew v Secretary of State for the Environment* [1992] QBD set out that issues of suitability or desirability – and by analogy: disruptive effects, proximity to alternative routes and need for the route cannot be considered in establishing what rights, if any, exist when determining whether to make a definitive map modification order. Consequently the Committee must disregard any perceived or alleged effect that a public right of way could or may have on the proposed development of the Crown Hotel when coming to its decision.
- B.9. The Council’s 24 June 2015 Development Management Committee resolved that the evidence used by the Senior Definitive Map Officer in coming to his recommendation should be independently appraised by Counsel. Counsel was instructed to take a view as to whether the Council should make an order based upon the evidence before it. Counsel concluded that:

*“...It is my view that the evidence submitted in connection with the Application, considered together with the results of enquires / investigations undertaken by Council officers, is such as to trigger the statutory obligation imposed by section 53(2) and section 53(3)(c)(i) of the 1981 Act. Specifically, I consider that the evidence demonstrates that a right of way which is not shown on the Definitive Map is reasonably alleged to subsist over the Crown Hotel yard, and that as such the Council is obliged to make a Modification Order in respect of the Definitive Map to provide its amendment. I consider*

*that right of way in question is a footpath...*

- B.10. This revised report addresses a number of points made in Counsel's Opinion which, in the main, remains legally privileged and so is not included in the background papers to this agenda item.
- B.11. Witness evidence indicates that the claimed route has been used by six cyclists: three for the full 20 years, and three for periods of 8 - 10 years during the relevant period (see Appendix D). The case of *Whitworth v Secretary of State for Environment, Food and Rural Affairs [2010] EWHC QBD 738 (Admin)* concerned limited levels of public user on a very rural route. In that case Langstaff J. said

(49) “...*What gave me greater pause for thought was the question and questions raised by whether the user went beyond that which would support a conclusion that there was a bridleway. That involved an evaluation by the Inspector of two forms of transport. The first was the use of a pony and trap by a Mr. Clay. Mr. Clay says he used the pony and trap on a regular basis, it appears probably fortnightly, throughout the period from 1976 onwards... ..I reject the suggestion that if one person uses a pathway so regularly, it cannot give rise to there being a carriageway, when use to a lesser extent in aggregate, but by several different users over the same period, might. What matters is the nature and quality of the use taken as a whole, and whether it is secretly, with permission, with force; those requirements which are well understood as necessary for the establishment of a right of way...*”.

- B.12. Langstaff J.'s view on limited user was not dealt with by Carnwath LJ. at the Court of Appeal in *Whitworth & ors V Secretary of State for the Environment, Food & Rural Affairs [2010] EWCA Civ 1468* due to the character of the users. In that case Carnwath LJ. in *obiter* considered it likely that cycle use was the assertion of a private right.
- B.13. By comparison, an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs Bridleways to hear the case of a claimed footpath in the urban centre of Scarborough (North Yorkshire County Council - FPS/P2745/7/44) concluded that 10 users was too insignificant a number for the urban location. This is not though as persuasive as the judgment of Langstaff J. in *Whitworth* which sets a legal precedent. Counsel's Opinion of the current user evidence is that the level of cycling use through the Crown Hotel (see Appendix D) is insufficient to meet the evidential test of “*reasonably alleged to subsist*” and consequently only a public right of way on foot can be considered to subsist.
- B.14. The Countryside Access Team's Applications Policy requires that modification applications be dealt with in strict order of receipt. However, an exception to the policy has been made in this case as the local area is already under investigation as part of an ongoing project to map unrecorded routes within the Biggleswade Excluded Area. Additionally, the claimed route is the subject of planning consent which would permanently

obstruct the claimed route. It is therefore appropriate to process and determine Mr. Woodward's application out of turn.

- B.15. Central Bedfordshire Council's Constitution (Section C of Part E2 at Annex A) identifies the Development Management Committee as the appropriate body to authorise the making of a Definitive Map modification order under the 1981 Act. The Constitution (H3 at Section 4.4.148.) prevents the determination of this application under delegated powers due to the objections to the proposal by the owners of the land, JD Wetherspoon.

### **Enforcement issues**

- B.16. The Council has a duty under Section 130(1) of the Highways Act 1980 to "...assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority...". If the Committee determines that an order should be made to add a public right of way to the Definitive Map and Statement on the grounds that a right subsists, it will need to also consider what action could be taken to make that route open and available for public use. The Council has the power to remove any obstruction under Sections 143 and 137 of the Highways Act 1980.

#### **137 Penalty for wilful obstruction**

- (1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale.*

#### **143 Power to remove structures from highways.**

- (1) Where a structure has been erected or set up on a highway otherwise than under a provision of this Act or some other enactment, a competent authority may by notice require the person having control or possession of the structure to remove it within such time as may be specified in the notice.*

*For the purposes of this section the following are competent authorities—*

- (a) in the case of a highway which is for the time being maintained by a non-metropolitan district council by virtue of section 42 or 50 above, that council and also the highway authority, and*

- (b) in the case of any other highway, the highway authority.*

- (2) If a structure in respect of which a notice is served under this section is not removed within the time specified in the notice, the competent authority serving the notice may, subject to subsection (3) below, remove the structure and recover the expenses reasonably incurred by them in so doing from the person having control or possession of the*

*structure.*

*(3) The authority shall not exercise their power under subsection (2) above until the expiration of one month from the date of service of the notice.*

*(4) In this section “structure” includes any machine, pump, post or other object of such a nature as to be capable of causing obstruction, and a structure may be treated for the purposes of this section as having been erected or set up notwithstanding that it is on wheels.*

## **Planning Consent matters**

- B.17. The role of the Members of the Committee is to determine whether a public right of way does or does not exist along the route claimed by Mr. Woodward through the Crown Hotel. It is not for the Committee to second guess how any added right of way would be managed or impact on any proposed development of the Crown Hotel. However, the following sections seek to answer Members questions on just these issues.
- B.18. On 19 February 2015 the owner, JD Wetherspoon, received planning consent to develop the Crown Hotel. However it cannot act on this consent until any public right of way - whether officially recorded or not – has been legally extinguished or diverted. To do so would be illegal as any development would constitute either an unlawful interference with the surface of the highway or a wilful obstruction of the highway. Consequently JD Wetherspoon, or their agents, will need to apply for a legal order under either the Town and Country Planning Act 1990 or under the Highways Act 1980 to either extinguish or divert the claimed right of way. Development could not begin until any order was confirmed and had come into operation.
- B.19. When considering an application to extinguish the claimed right of way, the nearby Abbot’s Walk cannot be considered as a suitable alternative as this is not a public right of way. The alternative routes therefore are either via Rose Lane to the east or via Shortmead Street to the west. Legislatively these are unlikely to be seen as reasonable alternatives owing to their increased length and circuitousness.
- B.20. The alternative is for JD Wetherspoon to apply to create an alternative public right of way nearby. The nearby Abbot’s Walk is currently extensively used by the public and would provide a suitable alternative route. However, the owner of Abbot’s Walk, Hunting Gate/AC Estates Ltd., has indicated that it would not wish the route to become a public right of way. Under the Town and Country Planning Act 1990 the provision of an alternative route over a third party’s land requires that party to consent to the diversion. As this is not the case, the claimed right of way would need to be diverted under the Highways Act 1980.
- B.21. Under the 1980 Act the owner of Abbot’s Walk has a right to claim compensation where their value of an interest in land has been

depreciated or where they have suffered damage by being disturbed in their enjoyment of the land (Abbot's Walk) in consequence of the coming into operation of a public path order. This (as of yet unquantified) compensation would need to be paid by JD Wetherspoon as the applicant and "donor" of the path. However, if the added right of way was diverted by the Council as part of a Council-generated order rather than consequent to an application by JD Wetherspoon the Council would be liable to pay any compensation sought.

- B.22. The relative narrowness and congested nature of Abbot's Walk would make it only suitable for pedestrian use and consequently any equestrian/cyclists' rights (if established) would need to be extinguished.