
Meeting: Development Management Committee
Date: 21st October 2009
Subject: The Direction by the Secretary of State for the Environment, Food and Rural Affairs for Central Bedfordshire Council to make a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement in Silsoe
Report of: Roy Waterfield - Assistant Director of Leisure and Cultural, Adult and Community Learning
Summary: Members are asked to approve the making of a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement in the parish of Silsoe as Directed by the Secretary of State for the Environment, Food and Rural Affairs

Contact Officer: Adam Maciejewski - Definitive Map Officer - Countryside Access Service 0300 300 6530 x44069
Public/Exempt: Public
Wards Affected: Silsoe & Shillington - Cllrs. Rita Drinkwater and Alison Graham
Function of: Council

RECOMMENDATIONS:

- 1. That the Committee approve the making of an order under Section 53(2) of the Wildlife and Countryside Act 1981 to add a section of Silsoe Footpath No. 20 to the Definitive Map and Statement. The making of the order is consequent to a Direction by the Secretary of State for the Environment, Food and Rural Affairs under Section 4(2) of Schedule 14 of the 1981 Act. This is because he considers that there has been a discovery of evidence under Section 53(3)(c)(i) of the Act which, when considered with all other relevant evidence available to the Council, 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...”.* The part of Silsoe Footpath No. 20 to be added would have a width of 1.8 metres between points A-B-C.**
- 2. That the Committee support the proposition that Central Bedfordshire Council formally objects to the recommended Definitive Map Modification Order on the ground that it cannot be demonstrated on the balance of probability that a public right of way has been dedicated between points A-B-C.**

1. Silsoe Footpath No. 20 used to run through the garden of Horsekeeper's Cottage in Wardhedges in the parish of Flitton and Greenfield. In the 1960s and 1970s, extensions to the cottage and the erection of a barn blocked the legal line of the footpath.
2. For reasons unknown, in the early-mid 1990s the County Council mistakenly asserted that the legal line of Footpath No. 20 ran around the outside of the cottage's garden and even threatened enforcement action against the farmer of the field adjacent to the cottage.
3. In the late 1990s, the County Council realised that a number of features within the grounds of Horsekeeper's Cottage obstructed the legal line of the footpath and embarked on a protracted effort to divert the footpath.
4. As a consequence of consultations with user-groups over the proposed diversion of the footpath, the Bedfordshire Rights of Way Association (hereafter "BRoWA") applied to the County Council in June 2006 for a Definitive Map Modification Order to add a footpath to the Map and Statement around the outside of the garden of Horsekeeper's Cottage. The Definitive Map and Statement are the Council's legal record of public rights of way. BRoWA provided two user evidence forms to support its allegation that the route A-B-C on the plan at Appendix 1 subsisted.
5. The County Council eventually made a Public Path Diversion Order in July 2006 to divert the section of footpath between points X-C-B-A to a new line between points X-Y as shown on the plan at Appendix 1. A number of organisations including the local parish and district councils and BRoWA objected to the Diversion Order as it was not going to use the claimed footpath.
6. In November 2007 the County Council's Development Control Committee refused the application by BRoWA for the making of an order to add a footpath around the edge of Horsekeeper's Cottage to the Definitive Map on the ground that there was insufficient evidence of public user for the prescribed period of 20 years to deem that a highway had been dedicated by the landowner.
7. In November 2007 a public inquiry was held into the 2006 Diversion Order. The Diversion Order was subsequently confirmed in December 2007 and the section of Footpath No. 20 between points X-C-B-A was stopped-up and the new route X-Y created.
8. BRoWA appealed against the County Council's decision not to make a Definitive Map Modification Order to the Secretary of State for the Environment, Food and Rural Affairs under Schedule 14 of the Wildlife and Countryside Act 1981.
9. In late March 2009 the Secretary of State Directed the County Council to make a Definitive Map Modification Order to add the alleged section footpath to the Definitive Map and Statement. The ground for making a Definitive Map Modification Order was that it could be "*reasonably alleged*" that a public right of way had been dedicated over the claimed route. The requirement to make an order passed to Central Bedfordshire Council as the Surveying Authority for

Central Bedfordshire on 1st April 2009.

10. Legal advice indicates that under the current Central Bedfordshire Council's Constitution the Secretary of State for the Environment, Food and Rural Affairs is not a valid authority for the sealing of an Order made by the Council. The Development Management Committee is therefore requested to consider whether to approve the making of a Definitive Map Modification Order in accordance with the Secretary of State's Direction.
11. The landowners affected by the proposed Order: Mr. MacDougall, the owner of Horsekeeper's Cottage; and Mr. Bull, the farmer of the adjoining field, have both expressed their opposition to the addition of any public footpath over the land in question and their intention to object to any Modification Order made.
12. Although the Council has been Directed to make a Definitive Map Modification Order on the ground that a footpath can be *reasonably alleged* to subsist, it is my opinion that there is insufficient evidence to demonstrate, on the *balance of probability*, that a public right of way has been dedicated along the route A-B-C. The evidential test of "*balance of probability*" is the evidential test that would be applied by an Inspector appointed by the Secretary of State to hear an opposed Modification Order.
13. The County Council refused BRoWA's application to add the claimed footpath between points A-B-C, because it considered that there was insufficient evidence of public user for the prescribed period of 20 years to deem that a highway has been dedicated by the landowner. No further evidence has been adduced by BRoWA that suggests, in my opinion, that the County Council's original decision was incorrect. Consequently, it is my opinion that Central Bedfordshire Council should therefore object to any Modification Order it has been Directed to make.

Legal and Policy Considerations

14. The Wildlife and Countryside Act 1981 empowers Central Bedfordshire Council, as the Surveying Authority for the Definitive Map and Statement, to make legal orders to add, delete, or modify any particulars of rights of way (footpaths, bridleways, restricted byways, and byways) shown on the Definitive Map which is the Council's legal record of such rights.
15. Section 53(5) of the Wildlife and Countryside Act 1981 allows any person to apply to the County Council to modify the Definitive Map and Statement by order if they believe it to be wrong.
16. Section 53(2)(b) of the 1981 Act imposes a duty on the Surveying Authority to keep the Definitive Map and Statement under continuous review and as soon as reasonably practicable after the occurrence of any of a number of specified events modify the Definitive Map and Statement appropriately.
17. Section 53(3) of the 1981 Act specifies some of these events as:

“(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public

path...;

(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..."

18. Section 4 of Schedule 14 of the Wildlife and Countryside Act 1981 states:

"Appeal against a decision not to make an order.

(a) Where the authority decide not to make an order, the applicant may, at any time within 28 days after service on him of notice of the decision, serve notice of appeal against the decision on the Secretary of State and the authority.

(b) If on considering the appeal the Secretary of State considers that an order should be made, he shall give the authority such directions as appear to him necessary for the purpose..."

19. The Development Management Committee under the Central Bedfordshire Council's Constitution (E2 at Annex A) is the appropriate body to determine an application requesting that the Council, as Surveying Authority, make a Modification Order under the Wildlife and Countryside Act 1981 to add a public footpath to the Definitive Map and Statement.

20. This agenda item cannot be determined by powers delegated to the Assistant Director - Leisure and Culture, Libraries, Adult and Community Learning under Section 4.4.15 of Appendix H3 of the Constitution as the representations of the landowners constitute "*significant objection*" - the absence of significant objection being a pre-condition of the Assistant Director's power to authorise the making of orders.

21. Defra guidance issued in its Circular 1/09 at Section 4.16 requires that all Modification Orders include a description of the width of the paths. The Countryside Access Service does not consider that there is sufficient evidence to show that a public right of way subsists. Similarly, there is little evidence to indicate what width the path to be included in the Modification Order should have. The Defra National Rights of Way Casework Team at the Government Office for the North-East of England has suggested that the alleged footpath should have a width of 1.8 metres. This width concurs with the estimated width of a lighter strip of grass shown on a 2002 aerial photograph. The lighter colouration may indicate that the grass has been either trampled or mown.

Consultations

22. Mr. and Mrs. MacDougall, the owners of Horsekeeper's Cottage, have been informed of the Secretary of State's Direction and have expressed their opposition to the proposed Modification Order.

23. Mr. and Mrs. Bull, the owners of the pastureland next to the cottage have also been informed of the Secretary of State's Direction and have expressed their opposition to the proposed Modification Order.

24. Silsoe Parish Council and Flitton & Greenfield Parish Council have been informed of the Secretary of State's direction.

Conclusions

25. The Secretary of State for the Environment, Food and Rural Affairs has Directed the old County Council - and thus Central Bedfordshire Council as the successor Surveying Authority - to make a Definitive Map Modification Order to add part of Silsoe Footpath No.20 to the Definitive Map and Statement around the edge of Horsekeeper's Cottage in Wardhedges in Flitton.
26. The Direction is the result of a successful appeal against the decision by Bedfordshire County Council to refuse an application by the Bedfordshire Rights of Way Association to add the claimed footpath.
27. As the Central Bedfordshire Council Constitution does not recognise the Secretary of State for the Environment, Food and Rural Affairs as an authority for the sealing of orders, the Development Management Committee is asked to ratify the Secretary of State's Direction. The Development Management Committee will therefore become the authority for sealing for the Directed Definitive Map Modification Order.

CORPORATE IMPLICATIONS

Council Priorities:

Statutory Duty / Direction by Secretary of State for the Environment, Food and Rural Affairs

Financial:

The Council, as Surveying Authority, has a statutory duty to investigate and make Definitive Map Modification Orders where appropriate. Central Government consequently provides some degree of funding for this purpose.

The Council will have to advertise a Modification Order in the local press and, as the Order is going to receive objections, will have to advertise the date and location of a probable Public Hearing or Public Inquiry plus pay for the hire of an appropriate venue. In opposing the Modification Order the Council will have some administrative costs but these will be less than if it was supporting the Order. As long as the Council acts in a reasonable manner, it is unlikely to find costs awarded against it.

Legal:

Bedfordshire County Council received its Direction to make a Definitive Map Modification Order in March 2009. If the Central Bedfordshire Council does not make a Modification Order it is unclear what sanctions the Secretary of State can impose to compel the Council to make the Order as Directed. It may be possible for the applicant to lodge a complaint with the Local Government Ombudsman if the Council does not make an Order

If the Committee resolves that a Modification Order should be made there is nothing preventing the Council either taking a neutral stance or objecting to its own Order.

Risk Management:

No risk issues in my opinion.

Staffing (including Trades Unions):

No staffing issues in my opinion.

Equalities/Human Rights:

No equalities issues in my opinion.

Community Safety:

No safety issues in my opinion.

Sustainability:

No sustainability issues in my opinion.

Appendices:

Appendix 1 – Map showing the proposed Modification Order

Background Papers:

- 1) Bedfordshire County Council' Development Control Committee Agenda Item 22nd November 2007 entitled "*The determination of an application under Section 53 of the Wildlife and Countryside Act 1981 to add a footpath to the Definitive Map in the Parish of Silsoe*". (internally available at <P:\Countryside Access Service shared folder\DMC Reports and Background Papers\Silsoe FP 20>)
- 2) Department for Environment, Food and Rural Affairs letter dated 27th March 2009 Directing Bedfordshire County Council to make a Definitive Map Modification Order. (http://www.gos.gov.uk/nestore/docs/transport/rightsofway/2009/wardhedges_ltr.pdf)
- 3) Report to the Secretary of State for the Environment, Food and Rural Affairs dated 29th August 2008 detailing why a Definitive Map Modification Order should be made. (http://www.gos.gov.uk/nestore/docs/transport/rightsofway/2009/wardhedges_rep.pdf)

Location of background papers: the Countryside Access Service, Borough Hall, Cauldwell Street, Bedford and also via *MyApps* and the Internet.