
Meeting: Development Management Committee
Date: 9 December 2015
Subject: Determination of an application to add a claimed
bridleway through the Crown Hotel and yard,
Biggleswade
Report of: Paul Mason – Head of Highways
Summary: The report proposes that a Definitive Map modification order be made to add a public footpath to the Definitive Map and Statement through the Crown Hotel and its rear yard between High Street and Church Street, Biggleswade. It is also proposed that enforcement action be taken to remove security fencing that obstructs the bridleway to enable free use of the bridleway ahead of a legal order being made.

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Public/Exempt: Public
Wards Affected: Biggleswade South and Biggleswade North
Function of: Council

RECOMMENDATIONS:

The Committee is asked to approve:-

- 1. The making of a definitive map modification order under Section 53(2) of the Wildlife and Countryside Act 1981 consequent upon the discovery of evidence that shows that it is reasonable to allege under Section 53(3)(c)(i) of the 1981 Act that a public right of way on foot subsists through the curtilage of the Crown Hotel, Biggleswade between points A-B on the map at Appendix A**
- 2. The taking of unilateral action by the Council under Sections 143 and 137 of the Highways Act 1980, if necessary, to open up the route through the curtilage of the Crown Hotel in accordance with the Council's published Enforcement Policy for public rights of way with reasonable costs being recovered from the owners, JD Wetherspoon.**

Introduction

1. Mr. Darren Woodward submitted an application on 22 October 2014 under Section 53 of the Wildlife and Countryside Act 1981 (*“the 1981 Act”*) to have a public bridleway added to the Definitive Map and Statement from Church Street through the Crown Hotel’s yard to the High Street. A bridleway gives members of the public the right to pass and repass on foot, on horseback or leading a horse or on or pushing a bicycle.
2. JD Wetherspoon purchased the Crown Hotel, High Street, Biggleswade from Greene King plc. in mid-November 2013. The pub was subsequently closed and (at about this time) the claimed route was obstructed by security fencing pending the successful application for planning consent by JD Wetherspoon to develop the site. This application (CB/14/03126/LB) received planning consent on 19 February 2015. The proposed redevelopment seeks to fill in the passageway through the front of the building which gives access to the yard and Church Street to the rear. If this happens it would completely obstruct the claimed public bridleway – hence Mr. Woodward’s application.
3. The Council’s Development Management Committee resolved at its 24 June 2015 sitting that the evidence considered by the Committee and included in this report should be independently appraised by Counsel. Counsel’s Opinion has now been received and the legal advice incorporated in this revised report.

Legal and Policy Considerations

4. The legal and policy considerations relating to an application to record a public right of way on the Definitive Map and Statement are detailed in Appendix B; the following sections provide a summary of the main points.
5. Section 53(5) of the Wildlife and Countryside Act 1981 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 if they consider these are in error and need correcting. The Council has a duty to keep the Definitive Map and Statement up to date and make any changes that are required. In doing so, the Council has to consider whether the evidence shows, on a reasonable allegation, that the Definitive Map needs modification to add the claimed route.
6. Mr. Darren Woodward has applied to add a public bridleway to the Definitive Map and Statement on the ground that it subsists or is reasonably alleged to subsist, having been a way used both on foot and with pedal cycles. Mr. Woodward’s application is being dealt with out of turn due to the irreversible threat to the route by the proposed development and also because the area is already being investigated as part of a project to map unrecorded public rights of way in the urban centre of Biggleswade.

7. Section 31 of the Highways Act 1980 (*“the 1980 Act”*) requires the Council to deem that a way has been dedicated as public right of way if it has been used *“as of right”* and without interruption by the public for a full 20 years prior to the public’s right to use the way being called into question. In this case the action that has called into question the public’s right to use the claimed bridleway has been the erection of security fencing in late November 2013. The relevant 20 year period is therefore November 1993 – November 2013. The term *“as of right”* means without force, without stealth and without permission.



High Street - fencing across passageway



Church Street – fencing across car park entrance

8. The Council also has to consider whether there is any evidence of a contemporaneous non-intention to dedicate by the owners of the land; this can be evidenced by erected signs or challenges of the users. The route must also be capable of dedication at common law. During the relevant period the land (the Crown Hotel’s 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. The route is capable of being dedicated at common law and none of the users have reported any challenges or interruptions during the relevant period.
9. 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 summarised above and described in detail in Appendix B. When considering whether a public right of way does or does not exist, the Council cannot consider ancillary matters such as privacy, security, need or convenience or the effect that any added public right of way would have on the proposed redevelopment of the Crown Hotel by JD Wetherspoon; this has been established by the case of *Mayhew v Secretary of State for the Environment [1992]*. Moreover, the proximity of alternative routes – such as Abbot’s Walk should also be disregarded.
10. The Committee should have regard to the fact that if it is satisfied that a public right of way exists it will also need to consider whether action should be taken to make that route open and available for public use. The Council has the power to remove any obstruction on a public right of way under Sections 143 and 137 of the Highways Act 1980. The Council also has the power to extinguish or divert any public right of way affected by development under the Town and Country Planning Act 1990 and or Highways Act 1980.

Historical Evidence

11. A large number of historical documents at the Bedfordshire and Luton Archives have been investigated to try and establish whether a public right of way subsists over the claimed route. None of the documents viewed, see Appendix C, specifically record any public right of way through the Crown Hotel. However, this was not the purpose of most of these documents. Whilst many of the documents show that a route through the Crown Hotel has been physically available for many years, this evidence is insufficient to demonstrate that a public right of way subsists over it. This is also the view of Counsel instructed to appraise the evidence before the Committee.

User Evidence

12. The applicant and the Biggleswade History Society have both submitted evidence of more recent public use of the route through the Crown Hotel's yard. Other Biggleswade residents (and ex-residents) have independently submitted letters and e-mails describing their use of the claimed route. This evidence is described in detail in Appendix D and summarised below.
13. Mrs. Jane Croot, the editor for the Biggleswade History Society canvassed a significant number of elderly residents close to the Crown Hotel as well as people collecting children from St. Andrew's Lower School as the claimed route is the most convenient route for these people. Thirty three of those surveyed have stated that they have used the Crown yard route between 1992 and 2013 - which is the relevant period for deemed dedication under Section 31 of the Highways Act 1980. As these results were from a quick survey there is no specific information relating to signs, challenges or any permissive use. However, none of the people canvassed mentioned any of these things in the "remarks" section of the survey form. By contrast some of the signatories did claim to use the route "regularly" or "all the time". The results, whilst lacking in detail do give a picture of public use of the Crown Hotel's yard as a public thoroughfare from at least as early as the 1920s.
14. The applicant has supplied ten user evidence forms which detail the use of the claimed route through the Crown Hotel. These document public use between 1968 and late 2013 and bolsters the public use within the relevant 20 year period evidenced by the Biggleswade History Society survey. More importantly it provides the necessary detail relating to user "*as of right*"; none of the ten users who submitted statements reported either being challenged or seeing prohibitive signs on the route. None were interrupted in their use prior to the security fencing being erected. Unfortunately none of the users have given a precise date for the erection of this fencing – believed to be in late November or early December 2013. Eight people were interviewed and described their use of the claimed route in detail.
15. Four of the people who submitted user evidence forms stated they had cycled the claimed route – as did two others who contacted the Council independently. Three cyclists used the claimed route for the full 20 years and three for periods of between eight and ten years during the relevant 20 year period. This level of public use is above that previously addressed by the courts in the case of *Whitworth 2010* (see Appendix B for further details of this case) which concerned a rural route. Whilst setting less of a precedent, an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs considered that ten users of an

urban route close to the centre of Scarborough was insufficient to demonstrate use by the public rather than by a few individuals. Likewise, Counsel's received Opinion is that the weight of evidence of cycling use through the Crown Hotel is insufficient to reasonably allege that a bridleway subsists. Consequently, whilst there is evidence of cycle use this is insufficient to cause the Council to deem that a dedication of a route for cyclists (a bridleway) has occurred.

Consultation Responses

16. A consultation was carried out with Biggleswade Town Council, Biggleswade Historical Society, local ward members, P3 volunteers, the local Ramblers Representative, and a number of local residents.
17. Biggleswade Town Council has been consulted. The Town Clerk has responded stating the "...*Council have asked that I write to you to insist that an application is made to register the Crown walkway as a footpath on the definitive map....*". A further request from the Deputy Town Clerk was "...*the Council has asked that the route be re-opened with the possibility of the [security] fencing being moved to the boundaries of the route if required, i.e. between the route and the building, rather than sealing off the route....*".
18. Witcomb Project Management Ltd. act as architects for JD Wetherspoon. They have expressed disappointment of the Council's interest in investigating the claimed public right of way. McLellans Solicitors act for JD Wetherspoon and provided legal advice on the matter of a potential public right of way through the Crown Hotel as part of the original planning application. This legal advice was seriously flawed in several ways - namely:
 - It did not consider deemed dedication under S.31 of the Highways Act 1980 or inferred dedication at common law.
 - It did not consider that use of the claimed route was for other purposes that accessing either the brewery or the c.2005/6 Asda supermarket.
 - The proximity of Abbot's Walk to the Crown Hotel and fact that the yard of the Crown Hotel's exit does not have a pedestrian crossing are irrelevant to the issue of whether public rights subsist over the claimed route.
 - The assertion that it would be disproportionate to claim a route through the Crown yard due to the disruption this would cause to the new owners of the land is irrelevant at law (*Mayhew 1992*) to the issue of establishing whether a public right of way already exists through the property.
19. JD Wetherspoon was given an early draft of the previous committee report and appendices in late 2014. McLellans Solicitors, acting for JD Wetherspoon commented on the report stating that the various historic maps cannot evidence the status of the route. Other historic evidence is anecdotal and unsupported and does not support continuous use by the public to the time the public's right to pass and re-pass was called into question. McLellans states that the tithe map does not show a road through the Crown Hotel and the 1833 Assizes report merely indicates that the witnesses were at the location – not necessarily exercising any public right.

20. In response, the report acknowledges at Paragraph 11 above that none of the historic documents investigated specifically record any public right of way through the Crown Hotel but these do show that a route has been physically available for use for over 180 years. Counsel's Opinion on the veracity of the historic evidence confirms that there is insufficient historic evidence to demonstrate the subsistence of a public right of way.
21. McLellans also comments on the poor quality of the user evidence, stating that public use of the route prior to the relevant period (1993 – 2013) cannot count towards evidence for deemed dedication and that the Biggleswade History Society's survey did not differentiate between sporadic and continuous use or the frequency, time of day or purpose for their use. McLellans also points out that only two users have used the claimed route for the full 20 year period. The evidence of Messrs Ball and Page was initially discounted as occurring prior to the relevant period. McLellans also cite the *Whitworth [2010]* appeal case to counter the use by a single cyclist as warranting the making of an order to record a public bridleway; it argues that if any order be made it should be to record only a public footpath.
22. In response, it should be noted that following the comments by McLellans a number of late submissions by the applicant increased the number of user evidence forms to ten. A statutory declaration by Mr. Page has also subsequently been received as well as statements from a number of other individuals. It is accepted that the results of the Biggleswade History Society's user survey are without detail. However, this does show that 33 people used the route during the relevant period – 23 for the full 20 years. Why and when they used the route is irrelevant if the use was "*as of right*". Similarly, with this number of users, a high frequency of use or individual use for the full 20 year period is not required. Following the submissions made by McLellans, eight witnesses were subsequently interviewed and their evidence incorporated into Appendix D. The use by Messrs. Ball and Page and Cllrs. D. and J. Lawrence is both within the relevant period as well as preceding it by several decades and is thus qualifying use.
23. JD Wetherspoon instructed Mr. Ollech of Counsel to represent its interests at the 24 June 2015 sitting of the Development Management Committee. Mr. Ollech asserted that the evidence detailed in that report was insufficient to allow the Council to make a definitive map modification order. As a result, the Council has sought and received Counsel's Opinion of the evidence. Counsel considers that the pedestrian use is sufficient to require the Council to comply with its statutory duty to make a modification order to add a footpath to the Definitive Map and Statement. However, Counsel considered that even though user interviews and late submissions have clarified and bolstered the cycling evidence, the six people who have stated that they had cycled the claimed route is not sufficient for the Council to reasonably allege that cycling rights subsist.
24. Mr. Desmond Ball has written and telephoned the Council concerning the blocked entrance to the Crown Hotel. Mr. Ken Page has submitted a statutory declaration concerning the history of the claimed route to the local Town Council. Mrs. Jane Croot, editor for the Biggleswade History Society, has submitted a user survey and other historic documentation as part of its objection to the planning application for the Crown Hotel. These are discussed in more detail at Appendix D and summarised below.

25. Mr. Ball has asserted that as a former employee of the Biggleswade Urban District Council (“*BUDC*”) he assisted with a rights of way survey in the 1950s and that the Crown Hotel yard was considered a public through-route. Indeed he alleges that the *BUDC* carried out publicly funded repairs to the route sometime in the late 1940s or 1950s. There is no corroborating documentary evidence of this or that the brewery disputed the public status of the claimed bridleway. However, Mr. Page was employed by the brewery to look after its property records during the same period and recalls that it welcomed the works by the *BUDC* to maintain the claimed route. Mrs. Temple, another witness and a former employee of the Crown Hotel owned by the brewery has stated that the landlord told her the claimed route was a public right of way.
26. Mr. Ball has also stated that the Crown Hotel’s yard was used as access to the school which used to exist on Church Street (previously Brewery Lane) as well as to a number of smaller shops which people again accessed from the High Street via the Crown Hotel’s yard. There was even a barber and dentist actually within the yard of the Crown Hotel. Mr. Ball also recalls that many people used to walk down Chapel Fields from Cowfair Lands and access the Market Square and High Street via the Crown Hotel’s yard as the current cut-through (*Abbot’s Walk*) didn’t come into being until c.1978. This newer route is not recorded as a public right of way.
27. Mr. Ken Page is local historian and ex-employee of the brewery and has submitted a statutory declaration describing his extensive knowledge of the Crown Hotel. He and his friends regularly used the Crown Hotel’s yard route in the 1930s as a pedestrian route to get to and from the junior school in Church Street. The claimed route was also used by brewery workers going to and from the brewery in Church Street. Mr. Page states that he has no knowledge of the route ever being closed or public use challenged in his lifetime until the erection of the security fencing in early 2014. Mr. Page also stated that long ago drovers herded cattle south from Biggleswade Common along Sun Street and then into Chapel Fields and through the Crown Hotel’s yard into the Market Square to access to the cattle markets.
28. Mrs. Jane Croot, the editor for the Biggleswade History Society, submitted a lengthy objection against the proposed re-development of the Crown Hotel. Much of the Society’s grounds for objection were based on the historic nature of the public thoroughfare though the Crown Hotel. As part of the objection she submitted a user survey consisting of 51 people which describes public use of the route since the 1930s (see Appendix D). She has also asserted that the route was historically used as part of the cattle trail from Biggleswade Common – something supported by a leaflet in the Bedfordshire and Luton Archives on the origins of the Market House Café.
29. Biggleswade P3 Group and the Ramblers have not responded to the consultation.
30. Following consultations with the local ward members for Biggleswade North and Biggleswade South, Cllrs. Jane and David Lawrence have responded to say that they have both lived in Shortmead Street since 1978 and until Asda was built (c.2005/6) used to use the claimed route “...*through the Crown to go to the Market Square from Brunts Lane and Chapel Fields. More recently because of ASDA we tend to use Abbots Walk...*”.

31. A number of unsolicited e-mails have also been received by the Council concerning the claimed route through the Crown Hotel. Out of the six e-mails received, four people stated that they had used the route; two supported the path's retention; four indicated it should either not be retained or could be moved; and four supported the proposed development by JD Wetherspoon (see Appendix D)

Council Priorities:

32. The proposal reflects the following Council priorities:
- Improved educational attainment.
 - Promote health and wellbeing and protecting the vulnerable.
 - Better infrastructure – improved roads, broadband reach and transport.
 - Great universal services – bins, leisure and libraries.

The proposal will facilitate increased pedestrian and sustainable transport access to the centre of Biggleswade. Walking for local trips and for leisure reduces pollution and increases general health and wellbeing. The proposal will, however, be detrimental to the proposed re-development of a public house and thus be contrary to one of the other Council priorities.

Legal Implications:

33. Section 53 of the Wildlife and Countryside Act 1981 permits a member of the public to apply to the Council, as Surveying Authority for the Definitive Map and Statement, if it considers that the map or statement is in error. The Council has a duty to keep the map and statement correct and up to date and to make any requisite orders to modify the map and statement. Definitive Map modification orders are based on evidence – normally a combination of historic documents and contemporary user evidence. To make an order the Council's Development Management Committee ("*the Committee*") must be satisfied that the evidence shows that it is reasonable to allege that a public right of way subsists. If the order is objected to the Secretary of State will use a stricter test of "balance of probability". The evidence in the report appears to meet the stricter test.
34. The Committee resolved at its 24 June 2015 sitting that Counsel's Opinion be sought on the veracity of the evidence presented. Counsel considers the evidence to be such as to trigger the Council's duty to make a modification order under the 1981 Act to record a footpath through the Crown Hotel.
35. If the Committee agrees with Counsel's Opinion and is satisfied that a public right of way does subsist – and thus ought to be recorded – it has a further duty under Section 130 of the Highways Act 1980 to assert and protect the rights of the public to use the route. The Council has the power to remove any obstruction under Sections 143 and 137 of the 1980 Act. If the Committee resolves that the obstruction should remain in place then the Council is at risk of being taken to the Magistrates' Court under S.130B of the Highways Act 1980 for failure to comply with its duty to assert and protect the rights of the public.
36. The applicant, Mr. Woodward, applied to have a bridleway recorded on the Definitive Map and Statement. If the Committee resolve that a footpath should be added instead, Mr. Woodward does not have a right under the 1981 Act to appeal this decision. He could, however, apply to the High Court for judicial review of the

Committee's decision not to make an order adding a bridleway.

37. 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. JD Wetherspoon has the option of applying under either the Town and Country Planning Act 1990 or the Highways Act 1980 to either stop-up or divert the claimed right of way in order to enable the proposed development to take place.

Financial Implications:

38. The Council has a statutory duty to investigate and determine applications to modify the Definitive Map. Consequently the costs of such investigations are borne by the Council out of the existing Rights of Way Team budget. The administrative cost of this case so far is estimated to be approximately £6000.
39. The last resolution of the Committee that Counsel's Opinion should be sought on the veracity of the evidence has cost the Council £2700. These legal fees have been paid from the Rights of Way Team's budget.
40. The costs of advertising the making and confirmation of the proposed modification order is estimated at £550. However, as the order is likely to be opposed by JD Wetherspoon, the order must be forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation. This is likely to cost the Council approximately £1000 in additional administration and possible venue hire should a public inquiry or hearing be required. Should further external legal advice or advocacy be required at an inquiry, this could cost potentially between £1000 and £3000. Again these costs will need to be met out of existing Rights of Way Team budgets.
41. If the Committee resolves that a modification order should be made, the Council will seek the removal of the security fencing currently obstructing the route. This would be moved at the expense of the land owner, JD Wetherspoon, as would any legal expenses incurred by the Council in securing the compliance of the owner.

Risk Management Implications:

42. The Council, in carrying out its statutory duty to keep the Definitive Map and Statement up to date, will be preventing the proposed re-development of a local historic landmark by a national pub chain. The actions of the Council are, however, supported by local residents and the local town council. It is likely that any ensuing definitive map modification order will be opposed by the owners. This could result in a public hearing or local inquiry being convened to hear the objections to the order. It is also possible that the Council may receive negative press coverage over this issue due to the differing perspectives of the parties involved, and incur legal and administrative costs of up to £4,000.

Equalities Implications:

43. The Wildlife and Countryside Act 1981 is concerned only with whether public rights already do, or do not exist. Consequently the primary legislation of this Act takes precedence over the Council's statutory duty placed upon it by the Human Rights Act 1998 to have regard to a person's right to privacy and security. The proposed modification order would recognise the existence of a public right of way. In doing

so it would prejudice the re-development of a business. However the business does have a right to object and be heard by an independent Inspector. It also has the opportunity to apply for the diversion or extinguishment of any public right of way that is ultimately added to the Definitive Map and Statement.

44. The proposal would not discriminate against any particular group of local residents. If the proposal succeeds in the recording of a public right of way, the Council does have a duty under the Equalities Act to ensure that it is usable as far as reasonably practicable by all members of the public. The route is currently fairly level and surfaced. Consequently if the obstructions were removed it would be suitable for use by disabled people and mobility scooters.

Community Safety Implications:

45. The Council has a statutory duty under the Crime and Disorder Act 1998 to consider the community safety implications that may result from making the decision set out in the report. The proposed footpath does mean that the current car park to the Crown Hotel would be shared by pedestrians accessing the passageway through to High Street. However, it must be recognised that this proposal merely formalises the informal access situation that existed prior to November 2013. As a recognised public right of way the Council will be able to monitor and take any necessary steps to mitigate any hazards that become evident.

Conclusions

46. There is no direct documentary evidence to indicate that the claimed route through the Crown Hotel yard has been statutorily created as a public right of way. Mapping and other evidence does suggest that the route has been physically available for use for over 180 years; this though only can lend weight to an inference of a historic dedication of public rights. Evidence of public pedestrian use potentially dates back to 1833. More recent user surveys and statements suggest that the Crown Hotel's yard has been used regularly and to a significant extent by the public at large as a pedestrian thoroughfare since the 1930s. This level of use – which appears to have been unchallenged and “*as of right*” – supports a stronger inference of dedication.
47. User evidence forms and user interviews have provided evidence of significant public pedestrian use of the claimed route during the relevant 20 year period - counting back from the erection of security fencing in late c.November 2013. In the absence of any evidence demonstrating an overt and contemporaneous non-intention by the brewery to dedicate a highway, the Council has a duty under the 1980 Act to deem that a public right of way on foot exists across the curtilage of the Crown Hotel. This view is fully supported by Counsel's Opinion.
48. Evidence of use of the claimed route by bicycles during the relevant 20 year period also exists. However, Counsel's Opinion is that use by six people within an urban environment is insufficient for the Council to reasonably allege that a public right for cyclists (a bridleway) subsists.

49. If the Committee considers that a public right of way (of any status) is deemed to have been dedicated then the current security fencing is an unlawful and unauthorised obstruction – albeit an unintentional one erected on behalf of JD Wetherspoon. Representations from the Town Council and frustrated users indicate that there is a wish to see this route re-opened as soon as possible. This can be done under the powers contained within the Highways Act 1980.

Appendices:

Appendix A – Location plan showing Crown Hotel

Appendix B – Legal and Policy Considerations

Appendix C – Historic Evidence

Appendix D – User Evidence