

Blackthorn Lane, Haydon Wick, Swindon

Planning Committee

Date: 10 November 2015

Author: Board Director, Service Delivery
Wards: Haydon Wick, Penhill & Upper Stratton, Rodbourne Cheney
Localities Affected: North and North Central
Parishes Affected: Haydon Wick

1. Purpose and Reasons

- 1.1 To determine the outcome of an application made under Section 53 of the Wildlife and Countryside Act 1981 to have the path known as Blackthorn Lane, Haydon Wick (hereinafter referred to as “the path”) added to the Definitive Map and Statement (“the map and statement”). See Appendices 8.1.1 and 8.1.2 for the location and site plans.
- 1.2 The application was received following the closure of the path by the landowner Swindon Borough Council (hereinafter referred to as “the Council”) in December 2014. The Head of Highways and Transport has authority under paragraph 279 of the Scheme of Delegations to keep the map and statement under continuous review. However, because the making of a Definitive Map Modification Order (hereinafter referred to as “an order” or “the order”) under delegated powers would counteract the decision made by the Council as landowner to close the path, it is felt that the matter be referred to the Committee to decide whether to allow the application, and thereby make the order, or to refuse the application.
- 1.3 The making of an order to record an additional public footpath is in line with One Swindon in widening participation in a leisure activity, namely walking. It supports the Corporate Business Plan 2015-16 in promoting and encouraging walking as a healthy lifestyle choice; the Local Transport Plan 2011-2026 in developing the infrastructure to encourage walking; and the Rights of Way Improvement Plan in developing a link in the rights of way network to fill gaps in access and to create circular routes.

2. Recommendations

The Committee is recommended to:

- 2.1 Authorise the Head of Highways and Transport to:
 - 2.1.1 Make the order as soon as practicable after determination.
 - 2.1.2 If no objections are received within 42 days, to confirm the order.
 - 2.1.3 If objections are received to the making of the order, which are not subsequently withdrawn, forward the order to the Secretary of State for determination.

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3. Detail

History and current status of the path

- 3.1 As mentioned in paragraph 1.2 above, the path is owned and maintained by the Council. However, the path is not a highway maintainable at public expense, and currently has no recorded status as a public right of way.
- 3.2 The first Ordnance Survey (hereinafter referred to as O.S.) map on which the path appears is the 1957 edition (revised 1971) 1:1250 version, on which it is shown marked "Track".
- 3.3 The path runs north-northwest for 200 metres from the private road named Blackthorn Lane, off Whitworth Road, which is coexistent with Public Footpath 30 Haydon Wick, upon a narrow strip of land between Whitworth Road Cemetery and the rear of residential properties on the east side of Kennet Avenue. The path allows direct access from Whitworth Road to Seven Fields public open space and local nature reserve.
- 3.4 The path connects with an existing public right of way, designated a footpath and known as Footpath 30 Haydon Wick, part of which runs along the private road of Blackthorn Lane, and which connects Whitworth Road with the south-eastern cul-de-sac of Kennet Avenue, a distance of 90 metres. Footpath 30 provides alternative access from Whitworth Road to Seven Fields via Kennet Avenue, which is adopted highway. An existing cycle barrier on this route should not prevent access by any but the widest mobility vehicles.
- 3.5 The path runs along the bottom of the back gardens of even numbers 20-54 Kennet Avenue, and along one side of 58 Kennet Avenue, which is built at right angles to the other properties. It is important to note that 56 Kennet Avenue does not abut the path on any side of the property, and is not directly affected by it.
- 3.6 The path is unmetalled and unlit. Kissing gates are installed at both ends of the path, those at the northern end having been poorly maintained. In addition, there is a "squeeze-through" stile at the southern end.
- 3.7 A number of residents whose properties abut the path have campaigned for many years to have the path closed, due to the alleged commission of crime and antisocial behaviour directly attributed to the existence of the path.
 - 3.7.1 Alleged crimes include burglary of homes, garages and sheds, and criminal damage, the perpetrators having used the path to enter back gardens.
 - 3.7.2 Alleged incidents of antisocial behaviour include sexual activity, noise, littering, and dog fouling upon the path, and stones and other objects being thrown into back gardens from the path.

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- 3.7.3 The Council's Community Safety Team has consulted with the Police who can find no statistics for, or evidence of, reported crimes and anti-social behaviour directly related to the existence of the path.
- 3.8 It is believed that the path was temporarily obstructed by a fence in the late 1980s erected by an unknown person, and that Council employees were tasked to clear the obstruction following the posting of a removal notice upon it.
- 3.9 The minutes of the Seven Fields Conservation Group (hereinafter referred to as SFCG), dated 23rd October 1990, refer to recent publicity in the *Evening Advertiser* (now the *Swindon Advertiser*) concerning the possibility of Kennet Avenue residents purchasing the land behind their properties, over which the path runs. See Appendix 8.1.3 relating to all background papers listed below.
- 3.9.1 SFCG sent a letter dated 27th October 1990 to Denys Hodson, Arts and Recreation, Thamesdown Borough Council, objecting to the possible sale of the land.
- 3.9.2 SFCG minutes dated 21st January 1992 refer to continued efforts of the Kennet Avenue residents to have the path closed.
- 3.9.3 SFCG minutes dated 18th March 1992 refer to the possibility of the path being closed, and alternative access to Seven Fields provided via the cemetery.
- 3.10 As a result of the residents' longstanding concerns, the Council, in its capacity as landowner, made a decision in October 2014 to close the path. As the path has no formal status, there was no legal requirement for public consultation before closing the path, and in December 2014 the path was fenced off at both ends to prevent further access.
- 3.11 On 21st January 2015, SFCG and Whitworth Road Residents' Association lodged a joint objection to the Council's closure of the path. Their objection was supported by Penhill and Upper Stratton Ward Cllrs Teresa Page and Joe Tray. A letter was subsequently sent to all ward members for the locality, explaining the reasons for, and the legal basis for, closing the path.

Application to have the path added to the map and statement

- 3.12 An application, dated 2nd March 2015, was made by SFCG under Section 53 of the Wildlife and Countryside Act 1981 (hereinafter referred to as "the 1981 Act") to have the path added to the map and statement as a public right of way. The application was supported by 23 user evidence forms and by documentary evidence.
- 3.12.1 Such additions to the map and statement require the Council, as the surveying authority, to make an order.

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- 3.12.2 Under Section 53(5) of the 1981 Act, any person may apply to the authority for an order under Section 53(2) following the occurrence of one or more events falling within paragraphs (b) or (c) of Section 53(3); and the provisions of Schedule 14 of the 1981 Act set out the process of the making and determination of applications under Section 53(3).
- 3.12.3 Section 53(2) of the 1981 Act allows surveying authorities to make orders to modify the map and statement following an event specified in Section 53(3).
- 3.12.4 One of the events specified in paragraphs (b) or (c) of Section 53(3) of the 1981 Act is Section 53(3)(c)(i), namely, the discovery by the authority of evidence which, when considered with other relevant evidence available to them, shows that a way which is not shown in the map and statement is, or is reasonably alleged to be, a public right of way over land in the area to which the map relates. The application before the Committee is made on this basis.

Evidence in support of application

- 3.13 The application is supported by user evidence to show that the path has been used freely and openly and without challenge or interruption for a period of over twenty years. Statements obtained from 25 witnesses, all current or former local residents, show that the path has been used for purposes of recreation and leisure, and as a route to work and school, since at least 1955, up to the date of closure. For reasons of data protection, a number of documents associated with the application are not included in this report but are available to Councillors on request.
- 3.14 The application is also supported by documentary evidence. This evidence includes extracts from minutes of various SFCG meetings, maps and photographs. A list of material constituting the documentary evidence is attached. See Appendix 8.1.3.
- 3.15 Under s.31(1) of the Highways Act 1980 (hereinafter referred to as “the 1980 Act”), 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 twenty 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.
 - 3.15.1 Under Section 31(2) of the 1980 Act, the period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice or otherwise.

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3.15.2 Under Section 31(3) of the 1980 Act, where the owner of the land over which the way passes has erected a notice, visible by users of the way, that there is no intention to dedicate the way as a highway, and has maintained the notice after 1 January 1934, or any later date on which it was erected, the notice is sufficient evidence to prevent the dedication of the way.

3.15.3 Under Section 31(6) of the 1980 Act, the owner of the land may at any time deposit with the appropriate council a map of the land over which the way passes, indicating what ways over the land, if any, are admitted to be already dedicated as highways, and a statement to the effect that no ways over the land other than those shown on the map are intended to be dedicated as highways. A statutory declaration by the landowner or his successor must follow within twenty years of the original deposit, and every twenty years thereafter, to the effect that no additional way has been, or is intended to be, dedicated as a highway.

3.16 There is no evidence of the Council's intention not to dedicate the path as highway, either by the erection of notices or by a statutory declaration.

Informal consultation prior to the making of an order

3.17 Although the Council is not required in law to consult prior to the making of an order, a period of non-statutory informal consultation, lasting 28 days, was begun on 4 June 2015, outlining the application and the proposal to make an order to add the path to the map and statement.

3.17.1 The consultation comprises correspondence by email or letter, and includes a map showing the proposed route of the path.

3.17.2 The statutory consultees are the Parish Council and the public utilities, and the user groups as specified in Schedule 6 Regulation 7(3) of the Wildlife and Countryside Regulations 1993.

3.17.3 Other consultees include the Members representing the wards of Haydon Wick, Penhill and Upper Stratton, and Rodbourne Cheney, and the residents of nos.20-54 and 58 Kennet Avenue, whose properties abut the path.

Response to the informal consultation (in support)

3.18 The Ramblers' Association supports the application. Its response is summarised as follows:

- The Ramblers welcome the proposal to add the path to the Definitive Map, and have been critical of the lack of consultation in closing the path.

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3.19 Of the ward members consulted, Cllr Peter Watts (Rodbourne Cheney ward) supports the application. His response is summarised as follows:

- Cllr Watts has been contacted by several residents of Whitworth Road asking when the temporary barriers are to be removed and the footpath reinstated to a suitable standard for pedestrian use. He has received unconfirmed reports that some residents of Kennet Avenue have been tipping on the path and that some rear boundary fences have been erected across the path.

Response to the informal consultation (in opposition)

3.20 Haydon Wick Parish Council (HWPC) opposes the application. Its response is summarised as follows:

- The Planning & Highways Committee of HWPC has resolved to support the residents of Kennet Avenue in their request to continue the closure of the path and for it not to be added to the Definitive Map.

3.21 Of the ward members consulted, Cllr David Renard (Haydon Wick ward) opposes the application.

- Cllr Renard is the Ward councillor lead supporting the Council's decision to close the path.

3.22 Of the nineteen Kennet Avenue households involved in the consultation, eleven have responded and are all opposed to the application. The views of these residents are summarised as follows:

- Resident for 35 years – in that time, witnessed the path evolve into security and environmental hazard – suffered 4 burglaries – entry via rear garden fence – most of year, waist high in nettles and brambles – problem with dog faeces – noise/bad language and antisocial behaviour at night – bottles and stones thrown over fence into garden – at one time, regular occurrence of Police chasing youths along path. Since closure, quality of life has improved and wildlife is flourishing.
- Resident for 17 years – in that time suffered all manner of problems caused by people using path – stones thrown at roof, cracking Velux window – guttering pulled from shed – fence damaged, and workmen repairing fence suffered verbal abuse and threats of violence – path is dumping ground for litter and dog faeces – stolen bikes burned out – maintenance sporadic, but concerned that if path is closed, maintenance will cease altogether, bushes and nettles will take over and area will become dumping ground.

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- Lives alone – upset by bad language from people using path, heard whilst sitting in garden – path used as toilet and has witnessed evidence of drug use – since closure of path, has seen more wildlife.
 - Resident for 45 years – problems of drug use, litter and antisocial behaviour on path – bottles and cans thrown into garden from path – roof damaged by throwing stones – smell from dog faeces prevented use of garden and open windows in summer – all neighbours suffered from burglaries, including theft of three classic motorcycles with one set alight on path. Return of much wildlife since closure of path.
 - Resident for 45 years – no cemetery behind properties when moved in in 1970 – title deeds stated rear gardens abutted cemetery fence, but only open fields for future extension of cemetery – farm track at rear leading to five-bar gate. Path used for glue sniffing – evidence of drug use – path used for hiding stolen goods – physical attack on young girl – dog faeces cause smell and flies – rubbish thrown over fences – garages and sheds broken into – stolen motorbikes burned out – washing stolen from gardens – antisocial behaviour, including use of path as toilet – path used to escape from Police – most of this went unreported to Police. Since closure of path, feeling of safety and security as many residents elderly – increase in wildlife – no flies and smell from dog faeces.
 - Resident for over 30 years – path has been source of trouble up to closure, since when it has been much more pleasant to live here. In early days, problems with noise from off-road motorcycles – glue sniffing and foul language – break-ins to sheds and garages, theft and damage to properties – personally suffered theft of 4 classic motorcycles, two burned out on path – smell from dog faeces.
 - Resident for over 30 years – born locally and played in fields as a child – path never a right of way, but a farm track later used by construction workers during building of Kennet Avenue – in 30 years as resident, many instances of vandalism, trespass and damage to property, more so in last few years – break-ins and thefts from garages and sheds – both neighbours affected, with motorbikes stolen and damaged – personally suffered so much trespass into garden that he removed rear gate and fenced in for more security. Litter thrown from path into garden – noise and antisocial behaviour especially in summer. Council maintains path at least once a year but sometimes nettles 6 feet high – what cost to the council, when money better spent elsewhere? Greater sense of security since closure of path.
 - Resident for 12 years – does not understand why SFCG wants path opened as it is outside Seven Fields Local nature Reserve – has never seen SFCG clearing litter, dog faeces and nettles on path – annual visit from SBC tractor

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which decimates fauna and creates more litter. Closure of path has created wildlife corridor, and amount of birds has doubled.

- Pensioners, wife caring for ill and disabled husband – his only pleasure is sitting in the back garden, which has been bliss since the path was closed – no more foul language – no more fear of being broken into again – frightened and upset to witness person climb over fence from path and run through garden and into street to escape Police. Return of so much wildlife since closure of path.
- Has observed many incidents of antisocial behaviour over the years – drug use, sexual activity – fear of burglary – aware of neighbours witnessing people accessing their gardens and property via the path – back doors have to be kept locked at all times – observes that most people access Seven Fields via Kennet Avenue and believes path not a significant access to Seven Fields – not well-maintained for majority of year and often overgrown - dog faeces a common obstacle.
- Resident for 8 years – witnessed under-age drinking, drug use and sexual activity on path – caught youth climbing into garden – witnessed Police chasing person along path – knows of several neighbours burgled – path barely used for innocent reasons – most people use Kennet Avenue, as path overgrown in summer and muddy in winter – rarely cut back.

Review of evidence submitted with the application and of responses to the informal consultation

- 3.23 The evidence supporting the application to have the path added to the map and statement is sufficient for officers to consider that the requisite legal tests have been met and that the order should be made by the Council (in its statutory capacity as the surveying authority). The evidence can be summed up as follows:
- The path has been used by the public as of right and without interruption for 20 years or more, in accordance with S.31(1) of the 1980 Act.
 - There is no evidence of the Council's intention not to dedicate the path as highway in accordance with S.31(6) of the 1980 Act, either by the erection of notices or by a statutory declaration.
- 3.24 The Committee's attention is drawn to the responses to the informal consultation from residents, members and statutory consultees in opposition to the application to add the path to the map and statement. There is some indication that opposition to the use of the path by the public has been evident for at least 45 years, due to the alleged use of the path for purposes of crime and anti-social behaviour. It is correctly argued that an alternative route between Whitworth

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Road and Seven Fields already exists via Kennet Avenue, and that this route is equally convenient, if not more so, as it is metalled and lit, which the path is not. It is argued that reopening the path will be severely detrimental to the wellbeing and quality of life of the residents whose properties abut the path.

- 3.25 Notwithstanding the opposition to the application, it is clear that the legal tests for making the order are met by the submission of the evidence summarised at paragraph 3.23 above, which remains uncontroverted. Hence the officers' recommendations at paragraph 2 above.
- 3.26 If the Committee resolves to make the order, the order will be made as recommended at paragraph 2.1.1, following which a formal statutory consultation will be undertaken. If no objections are received within 42 days, the order will be confirmed as recommended at paragraph 2.1.2.
- 3.27 If the Council makes the order and there are unresolved statutory objections, then the order must be submitted to the Secretary of State for determination of confirmation of the order, as recommended at paragraph 2.1.3.
- 3.28 If the Council has not determined the application within 12 months of the application being certified as validly made, the applicant may make a representation to the Secretary of State to determine the application.
- 3.29 Where an order is confirmed and the validity of the order is questioned, an aggrieved person has 42 days after the publication of the coming into effect of the order to challenge its validity on the grounds that the authority has acted outside of its powers and/or that there have been procedural irregularities.

4. Alternative Options

- 4.1 The Committee may decide not to make the order.
 - 4.1.1 In that case the Council must, as soon as practicable, give notice of its decision by serving a copy of it on the applicant and the statutory consultees.
 - 4.1.2 The applicant may within 28 days of service of notice of the decision not to make the order, lodge a notice of appeal with the Secretary of State for determination.

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5. Implications, Diversity Impact Assessment and Risk Management

Financial and Procurement Implications

- 5.1 The one-off costs of making and confirming the Order, including officer time and statutory advertisements are estimated to be £2500.00. These costs, along with the ongoing costs of maintaining the path, will be met out of the Council's existing Rights of Way revenue budget.

Legal and Human Rights Implications

- 5.2 Legal and Human Rights considerations have been fully taken into account in writing this report.

5.2.1 It is considered that the recommendations of this report are compatible with Convention Rights and are in accordance with the principles of proportionality; any interference with the Convention Rights of individuals is justified by the overall benefit to the community.

5.2.2 The relevant legal provisions, especially those of the Highways Act 1980 and of the Wildlife and Countryside Act 1981 are set out in this report.

All Other Implications (including Staff, Sustainability, Health, Rural, Crime and Disorder)

- 5.3 All of the following implications have been considered in the compiling of this report:

5.3.1 There are no staffing implications relating to the issues to which this report refers, whether to the making and confirmation of the Order or to the ongoing maintenance of the path.

5.3.2 There are beneficial health implications for the general public relating to the use of public rights of way as promoting a healthy lifestyle by increasing physical activity.

5.3.3 There are social implications relating to the issues to which this report refers. The residents affected by the existence of the path have sustained a campaign over many years to have the path permanently closed, and a decision to uphold the application and thereby make and confirm the Order may damage community relations and harm the reputation of the Council and its Officers. Conversely, the application is being made by a community group in the interests of the general public, and a decision to reject the application, and the substantial evidence

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contained therein, may also damage community relations and the Council's reputation.

5.3.4 There are no economic or rural implications relating to the issues to which this report refers.

5.3.5 There are environmental issues relating to the re-opening of the path. Residents whose homes abut the path have reported the return of birds, insects and other wildlife to the path since its closure. The permanent closure of the path will protect and enhance a wildlife habitat.

5.3.6 There are implications relating to crime and disorder directly connected to the existence of the path. These are fully set out in the report.

Diversity Impact Assessment

5.4 A Diversity Impact Assessment (DIA) has not been completed for this report because relevant issues are covered in the DIA for the Council's Rights of Way Improvement Plan (ROWIP). This can be found on the Council's website and identifies the need for improvement of access to public rights of way for people with disabilities. These considerations are clearly identified in this report.

Risk Management

5.5 There are no direct risks arising from this report.

6. Consultees

6.1 The Board Director, Resources (Section 151 Officer) and Director of Law and Democratic Services (Monitoring Officer) are consulted in respect of all reports.

7. Background Papers

7.1 Application for a modification to the Definitive Map and Statement, under Schedule 14 of the Wildlife and Countryside Act 1981, which includes:-

7.1.1 User evidence, as detailed in paragraph 3.13

7.1.2 Documentary evidence, as detailed in paragraph 3.14

7.2 Responses to the informal consultation, as detailed in paragraphs 3.18 – 3.22.

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8. Appendices

8.1 Supplementary information.

8.1.1 Location plan of path

8.1.2 Detailed site plan of path

8.1.3 List of maps, minutes of meetings, etc. constituting documentary evidence supporting application