PUBLIC PATH ORDERS:  
PUBLIC PATH EXTINGUISHMENT PARISH OF HIGHLEY  

Responsible Officers  
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(mark for attention of Mat Stephens)  

Summary  
An application has been received to extinguish footpath UN5 in the Parish of Highley. Following the production of the Draft Delegated Powers Report which recommended rejection of the application the local Councillor requested that the case be considered by the Local Planning Committee rather than by Delegated Powers.

Recommendation  
1. Officers recommend that the application to extinguish footpath UN5 (part) in the parish of Highley be rejected.

LEGAL FRAMEWORK  

Public Path Orders are made by the Council under the provisions of the Highways Act 1980 in its capacity as Highway Authority. The orders most commonly made to change the rights of way network are Diversion Orders, Extinguishment Orders and Creation Orders. This report relates to an application made to the Council to extinguish a footpath.

Extinguishment Orders are used to extinguish all or part of a Public Right of Way under section 118 of the Highways Act 1980.

It must appear to the authority, before making an Order, that it is expedient to stop up the path or way on the grounds that it is not needed for public use. They must ignore any temporary circumstances preventing or diminishing the use of the path by the public.

After an Order has been made consideration must then be given as to whether it should be confirmed. Before confirming an Order the authority or the Secretary of State must be satisfied that it is expedient to confirm the Order having regard to the likely use that would be made of the path and to the effect which closure of the route
would have on land served by it. The authority or the Secretary of State must ignore any temporary circumstances preventing the use of the path by the public.

If objections are received at the publication stage the order will be forwarded to the Planning Inspectorate for determination and it will be decided whether the order is to be determined via a Public Inquiry, a hearing or whether the written representation procedure can be undertaken. In all cases an independent Inspector will be appointed to determine the outcome of the order.

If the order receives no objections at the publication stage the Council can confirm the order.

Before confirming an order the authority or the Secretary of State must have regard to any material provisions set out in any Rights of Way Improvement Plan for the area.

**Background**

On the 3rd of June 2009 Shropshire Council received an application to extinguish Footpath UN5 in the parish of Highley. The stated reason for the application given by the applicants, Mr P Bethell and Mr P Wilson, was that the route had allegedly not been used for “over 70 years”. The application form is included as Appendix A.

The application was prompted by the threat of enforcement procedures after the issue of the obstruction of the route was raised by the Parish Access Project team. The route is currently obstructed by fences and a garden shed and has essentially been incorporated into the garden and driveway of adjoining properties (belonging to the applicants).

The present alignment of footpath UN5 came about as a result of the Town & Country Planning Act 1971 – Section 209 The District of Bridgnorth (Bridleway No 7 and Footpaths Nos 8, 9 and 10 Highley) Public Path Stopping Up and Diversion Order 1980 which modified the lines of the listed rights of way to allow the development of housing on what was previously agricultural land. The development clearly laid out a footway between properties which can be seen on contemporary site layout plans annotated “Public right of way to be constructed during housing development” and “5'-0” wide footpath”; the plan is attached as appendix B. The footway was constructed.

On 3rd May 2000 the Head of Development Policy at Bridgnorth District Council wrote to the Rights of Way team at Shropshire County Council attaching an anonymous letter referring to the “possible illegal acquisition of land between No’s 68 and 70 Yew Tree Grove Highley” And stating that “The occupiers of the above properties have jointly acquired this alleyway, and access to the footpath through the farmland has been blocked”. The letter from BDC also refers to having enquired about the status of the route in 1999, reports that it remains obstructed. The response from Shropshire County Council’s rights of way enforcement officer for the area stated that he had visited the path and spoken to the occupiers of both properties and “advised them of the footpaths existence and the need to keep it free of obstructions” he reports that the occupiers of the adjoining properties alleged that they had made enquiries to “The Council” and been told the path did not exist. The
officer concluded that the route was not a high priority and no further action was taken.

In April 2003 Mr Bethell submitted a planning application for the erection of a stockproof fence. The covering letter (attached as Appendix C) stated that he had purchased land behind his house but had been unsuccessful in his application to change the land from grade 3 agricultural to residential. His letter claims that he is in the process of developing an orchard and is considering grazing the land with either goats or sheep to keep the grass down and the fence was required to control the stock. The Countryside Access Team were consulted and highlighted the need for permission to be sought before the erection of a fence across a right of way and this was included as a planning condition when permission was granted. Site visits revealed that no provision was made for the right of way and neither orchard nor livestock were evident and the fenced off land appears to be a domestic lawn. There is no evidence to suggest that permission was ever sought from the Countryside Access Team to fence across the right of way.

When surveyors from the Parish Access Project visited the route as part of their parish survey in 2008 they found the route obstructed by timber panel and wire fencing as well as by a shed (photographs included as Appendix D). The adjoining residents who appeared to have placed these obstructions were approached and claimed that they had closed the route due to anti social behaviour. Officers were unable to negotiate the removal of the obstructions so the issue was passed back to the original enforcement officer for action and Bridgnorth District Planning Department were informed of the breach of planning conditions.

The enforcement officer wrote to Mr Bethell and Mr Wilson on 19th February 2009 and visited them on site on 2nd March 2009. The following day he sent them copies of maps and documents relating to the original claim and historic Ordnance Survey map together with documents relating to the 1980 TCPA Order. This led to an exchange of correspondence with a Definitive Map Officer where Mr Bethell questioned the validity of the original routes and the claim process; he also submitted further documents. The evidence was considered and Mr Bethell & Mr Wilson were informed by letter that there was no evidence to support an assertion that any route was claimed in error. Mr Bethell questioned these findings in a further letter of 15th May 2009 and was again informed that there was no evidence to support his assertions; furthermore it was pointed out that since the routes had undergone a further legal process since the 1st Definitive Map was produced there was little to gain from re-examining these documents.

An application was subsequently received to extinguish the route under section 118 of the Highways Act 1980.

As part of the investigation land registry details were checked for the adjoining properties which indicated that neither Mr Bethell nor Mr Wilson own the section of track between the houses as this was not included in either land parcel when plots were sold off after the housing development was completed. Neither applicant owns the field through which the majority of the route runs and they acknowledged at the time of the application that they had not consulted the owner.
Shropshire Council planning department investigated a possible breach of planning regulations regarding the unauthorised extension of gardens into agricultural land at the rear of the properties and the breach of planning conditions. In February of this year planning enforcement officers reported that Mr Bethell had installed a stile in the wire fence between his property and the field and that he had indicated that he would remove the rest of the obstructions. A further site visit by the Countryside Access Team on the 16th March 2010 revealed that previous obstructions remained and the stile referred to by the planning enforcement officer had clearly been removed. Aggressive dogs were running loose in the garden containing the path and were able to clear the fence into the field. At the time of writing this report the matter had been referred back to the Planning Department.

**Initial Consultations (carried out by the applicant)**

<table>
<thead>
<tr>
<th>Highley Parish Council</th>
<th>Would not wish to see the path extinguished and would support its reinstatement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open Spaces Society</td>
<td>Object to the proposal</td>
</tr>
<tr>
<td>Local Ramblers Association</td>
<td>Object to the proposal and were unanimously of the opinion that the route is of value and request that enforcement action is taken to reopen the route.</td>
</tr>
<tr>
<td>Councillor Mary Nicholls</td>
<td>No written response was received to consultation however applicants have stated she intended to raise at the Planning Committee</td>
</tr>
</tbody>
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**A Draft Delegated Report was produced and is attached as Appendix E**

**Footpath subject to extinguishment application**

From point A on the attached plan a 5’ wide pathway between properties leading from the county road Yew Tree Grove between properties for 28m (presently obstructed by fences and one shed) to point B then running along a grass field for a further 18.5m (where there is currently an unauthorised fence obstructing the route at point C) and then across another field for a further 120m to meet bridleway 12 bridleway 13 and footpath 11 at point D on the attached plan.

**Consultation Responses and comments on the Draft Delegated Powers Report**

All representations included as Appendix F

Mr P R Bethell & Mr P Wilson (the applicants)

In a document dated 8th February 2010 the applicants made a number of comments on the draft report. These are summarised as follows:

- That the report was skewed and contained omissions
• That the report had not fully considered historic and documentary evidence submitted by the applicants
• That the report had mis-represented the content of a covering letter written by Mr Bethell to planners regarding his application to erect a fence
• That comments made about the obstruction of the route and the nature of the land use behind the property were misleading
• That references made to Anti Social behaviour had not been specific enough
• That other footpaths existed within 150 yards of the path
• That the only three people had visited the site were in favour of the closure
• That the report exaggerated the potential value of the route
• That only 30 yards of “blind alley” had been used and that the path had not been used for 70 years.

The document also makes further points under the heading “Solutions” which are summarised as follows:

• That footpath UN5 should be rerouted onto Bridleway 13
• That the question was about quality of life
• That officer’s suggestions that dog wardens, environmental health and the police were the correct channels to tackle the anti-social behaviour reported was “a total waste of time and money”
• That the question was one of “cost and returns”

Officer comments
The draft delegated report was written after an objective consideration of the circumstances of the case against the prescribed legal tests.

Most of the above representations refer to the background of the report and previous questions raised by the applicants regarding the original claim process.

Evidence and documents produced by the applicant in support of an earlier assertion that the footpath in question should never have been recorded on the Definitive Map were considered by officers and were found insubstantial; furthermore they are not material in considering the tests that must be met by this application. A copy of the letter that Mr Bethell claims was misrepresented in the report is included as Appendix C; officers are satisfied that it was reported accurately. The comments made regarding the nature of the land use and obstructions were made objectively following site visits. The report does not make judgements as to who placed specific obstructions.

Mr Bethell refers to all those having visited the site being supporters of the application however at the time of the Draft Report no representations from any supporters had been received.

The document makes reference to an allegation that a Council officer had advised the applicants to use but not build on the path; officers have seen no evidence to support this assertion.

The document states that Andrew Maiden, an affected landowner, had been fully briefed on all issues however the application form submitted by Mr Bethell and Mr...
Wilson clearly stated that he had not been consulted (attached as an appendix). Since sending a copy of the Draft Report to all affected landowners the Maidens have now been in contact with officers.

The document challenges comments made regarding the nature of the use of the route described by the applicants in earlier correspondence. In response to the Draft Report the applicants visited the offices of the Countryside Access Team and produced photographs and offered further evidence regarding the nature of use of the route and the presence of obstructions since they have been in occupation. Officers accept that the use referred to by Mr Bethell could have been limited to the section of the path between the properties due to the presence of a fence but still feel that this is evidence that the public have tried to use the route although they might have been prevented from accessing its full length. The legislation is quite clear that temporary circumstances (such as fence obstructions) preventing the public’s use of a route must be disregarded when considering whether a route is needed. There is however no proof that the path has not been walked in “70 years” as the document suggests.

The applicants have been informed that it is not legally possible to divert one right of way onto the line of another.

Whilst officers sympathise with the quality of life issues raised by the applicants these cannot be considered as relevant to an application under this legislation.

Officers do not consider that the appropriate response to anti-social behaviour on public highways is to close the route and would reaffirm that such problems should be referred to the relevant agency. Whilst there are procedures in place for the closing of public rights of way for reasons of crime prevention these must be considered under another section of the Act and are only available in areas designated by the Secretary of State; there are currently no such areas in Shropshire. Recent provisions brought about by the Clean Neighbourhoods and Environment Act 2005 have allowed local authorities to make Gating Orders outside of areas designated by the secretary of state and Shropshire Council has recently developed a policy on applications of this sort. Such orders are temporary in nature and are kept under review. They do not have the effect of permanently removing public rights and could provide a more appropriate response if persistent and significant anti-social behaviour or criminal behaviour occurs once obstructions have been removed.

Andrew and Janet Maiden (affected landowners)
Mr Maiden called the officer on 5th February 2010 in relation to footpath UN5. He was concerned that he might be asked to put a gate in his fence and stated that he would only accept a stile. He made no specific comments about the merits of the application but did explain that he had problems with people allowing their dogs to foul his land and also raised concerns over the status of a nearby bridleway.

Janet Maiden called the office on 11th February having only just received the Draft Report. She informed officers that they did not live at the farm the report was addressed to and had therefore only just received it. She indicated that her agent would be in touch and asked that a copy of the report be sent to the agent by email.
This was done and the case was discussed with the agent. To date no further correspondence has been received.

Mr Bache
Mr Bache offered his support for the application in a letter dated 15 February 2010. He makes similar points to those made by the applicants. He asks what inspections were made by the planning department and the Access Team to ensure planning conditions were observed when the development was completed and suggests that the gap was left between the houses for the purposes of accessing a drain.

Mr Bache challenges the credibility of the anonymous complaint made to the District Council and points out that the complainant made no contact with either of the householders.

Mr Bache challenges officer’s consideration that the route was covered by Chapter 7 of the Countryside Access Strategy as he states that the Country Park and the Severn Way were not in existence at the time of the Parish Claim and that the bridge over the river Severn was not available for public use until 1974.

Mr Bache states that there are also two footpaths near footpath UN5 leading to the same areas of countryside which are “currently well used”.

Mr Bache refers to the alleged anti-social behaviour and also explains that County councillor Phillip Engleheart had been involved. Mr Bache states that Mr Malcolm Bridges, the deputy surveyor for the area arranged for the site to be cleared that he claimed to be responsible for the maintenance of footpaths and stiles and that this route was not on his schedule.

Mr Bache questions the officer’s dismissal of the Human Rights Act arguments.

Officer Comment
Officers are unable to comment on what inspections were made with regard to planning conditions at the time of the development and do not feel that it is relevant to this application. Mr Bache’s assertion that the gap between properties was simply for access to a drain is incorrect. The 1980 Diversion Order and the plans of the development provide irrefutable evidence that the gap was intended to accommodate a public right of way; whether that gap might also have served any secondary purpose is immaterial.

Complaints made by the public are not summarily dismissed solely because the complainant wishes to remain anonymous nor would Access Enforcement Officers expect members of the public to try and challenge alleged offenders in person before making a complaint.

The references to the Countryside Access Strategy for Shropshire 2008-18 are made in relation to the current public rights of way network, not the network as it was at the time of the original parish claim.

The two footpaths referred to by Mr Bache are not sufficiently close to render footpath UN5 unnecessary and the fact that two nearby unobstructed paths leading
to the same network of paths and area of countryside are well used demonstrate a local demand and suggest that UN5 would be similarly used should the longstanding obstructions be removed.

The County Council rights of way team would have been responsible for the management of public rights of Way in the area at the time of the meeting referred to and not the Deputy Surveyor who would only have had an interest in adopted footways. This would explain why this path was not on his schedule.

The Human Rights Act seeks to achieve a balance between the rights of the individual and the rights of society. The right of way was in existence at the time that the applicants purchased their properties so it is difficult to see how such arguments could be considered valid.

Comments made about the lack of vehicular use of the bridge at Severn Valley Country Park are believed to be the result of a misunderstanding of the report.

Mr David Shelley (Rambler's Association Shropshire Area Countryside Officer)
In a letter dated 10th February 2010 Mr Shelley requested that two matters be added to the Draft Report;

• That this section of footpath UN5 was shown in the booklet “Walks Around Highley” compiled by the Highley Initiative with financial support from Bridgnorth District Council and the Rural Development Commission.

• That as leader and participant in the Highley Walking the Way to Health, ‘Severn Strollers’ group he had been authorised to confirm the group’s objection to the application and their support for its reopening to allow greater variation in routes available to the countryside east of the Yew Tree Grove estate.

Officer Comment
The Ramblers Association had already lodged their objection to the proposed extinguishment following initial consultation by the applicants.

The Severn Strollers are part of the Walking for Health initiative supported by Shropshire Council. These comments provide further indication that footpath UN5 would be used by the public were the obstructions to be removed. The group has approximately 30 registered members and meet for local walks from Highley on a weekly basis.

Mr Harry Scott (Open Spaces Society)
In an email dated 3 February 2010 Mr Scott stated that he agreed with the report and had no further comments to make.

Legal Tests
As laid out at the start of the report the legal tests for an extinguishment under section 118 of the Highways Act 1980 are as follows:
• Where it appears to a council, before making an Order, that it is expedient to stop up the path or way on the grounds that it is not needed for public use, a council may make an order. They must ignore any temporary circumstances preventing or diminishing the use of the path by the public.

• Before confirming an Order the authority or the Secretary of State must be satisfied that it is expedient to confirm the Order having regard to the likely use that would be made of the path and to the effect which closure of the route would have on land served by it. The authority or the Secretary of State must ignore any temporary circumstances preventing the use of the path by the public.

• Before confirming an Order the authority or the Secretary of State must have regard to any material provisions of a Rights of Way Improvement Plan prepared by the relevant Highway Authority.

IPROW Good Practice Guide
The Good Practice Guide (section 4.7) written by the Institute of Public Rights of Way Management states that the Highways Act allows a local authority to make an order only when the authority considers that the path is not needed for public use. These are the only grounds on which an order to extinguish a footpath or bridleway may be made. This may be because other paths adequately serve the area, or because the path, although available to use by the public, has not been used for many years. Lack of use due to unavailability of the path does not constitute grounds for an extinguishment.

The legislation also requires that, before confirming an order, the council or inspector must again apply a separate legal test. The Council or the Inspector must be satisfied that it is expedient to confirm the legal order having regard to the extent to which the path is likely to be used and the effect that its closure would have on the land served by it.

This means that an authority must look not just at any present use of the path but at the use that is likely to be made of the path in the future. Any temporary circumstances that diminish the public use must be disregarded; temporary circumstances have been held to include unauthorised and illegal obstructions, including buildings.

Officer Conclusion
Officers have considered a number of factors before making a recommendation.

The value of the route in terms of its location in relation to other routes, centres of population and attractions.
The footpath provides a link from a centre of population to the wider countryside and more specifically the rights of way network and Severn Valley Country Park.

The location of the River Severn and the limited opportunities for crossing with vehicles makes the rights of way network between Highley and the bridge at Severn Valley Country Park particularly important. A journey from Highley to Alveley for a pedestrian using public rights of way would be in the region of 3km whereas a...
journey by car would be over 20km and take over 25 minutes. Footpath UN5 forms part of this network.

Footpath UN5 also forms a part of a pedestrian route from this residential part of the town to the centre of Highley and the leisure facilities at the Severn Centre for those wishing to avoid roads.

The current use and past use of the footpath
Any lack of use must be attributed to the long term obstruction of the route. The applicants have accepted that there has been use of the route up to the fence although it is appreciated that the nature of some of this use has been problematical.

The applicants assert that as there has only been one complaint about the closure of the route this indicates a lack of need. It is contended that as the route has possibly not been made fully available or signposted since it was diverted and has essentially been disguised for many years the majority of local people will not have been aware of the existence of the footpath and therefore this argument cannot stand.

The potential future use of the route and the representations of consultees.
Responses to consultation have indicated a wish locally to see the path restored. The heavy use of other similar routes in the area provides further evidence of a local demand for paths of this nature.

Consideration of material provisions contained in Shropshire Council’s Rights of Way Improvement Plan.

The Council has set out its aims and priorities for countryside access provision in Shropshire in the Countryside Access Strategy for Shropshire 2008-2018. This document is Shropshire Council’s Rights of Way Improvement Plan for the purposes of section 118 (6A) of the Highways Act 1980. Although 6A does not apply to the making of an order were an Order to be made this document would have to be considered before confirmation. Officers have considered the application in light of the stated objectives and make the following observations:

Whilst the specific legal requirement to consider this document under section 118 (6A) of the Act applies to confirmation rather than the making of an Order this document was produced after significant public consultation and detailed assessment of the current provision countryside access in Shropshire.

In Chapter 6 of its Access Strategy for Shropshire 2008-2018 the Council has recognised the supporting role played by the countryside access network in sustainable transport for functional purposes (e.g. walking to work, shops or leisure facilities); particularly routes around settlements.

In Chapter 7 of the Countryside Access Strategy for Shropshire 2008-2018 the Council recognises the importance of increased physical activity on health and identifies walking in the countryside as an enjoyable and sustainable way to take exercise. The Council has a stated aim under this chapter to:

“Provide accessible, high-quality walking and cycling routes close to where people live and other appropriate locations”
Footpath UN5 provides a link from a centre of population to the countryside. Furthermore the route provides a direct link for pedestrians from this residential part of Highley to the Severn Valley Country Park (0.9km), the Severn Way (1.4km) and the wider rights of way network. It is also felt that the route has strong potential to form part of short circular walks from this centre of population.

None of the responses to the applicant’s initial consultations support the application and three of the four actively object. Both the Parish Council and the Ramblers have stated that they would support the restoration of access along the route.

There has been one letter of support for the application but the majority of consultation has been firmly opposed to the application and has indicated a desire to see the route reopened and an intention to use it.

Section 118 of the Highways Act 1980 allows a local authority to make an order to extinguish a footpath, bridleway or restricted byway only when the authority considers that the path is not needed for public use. These are the only grounds on which an extinguishment order may be made. Officers feel that this test has not been met.

Furthermore officers feel that the further tests regarding likely future use and consideration of the Rights of Way Improvement Plan relevant at confirmation stage could not be met.

**List of Background Papers (This MUST be completed for all reports, but does not include items containing exempt or confidential information)**

**Human Rights Act Appraisal**
This report on the application to extinguish footpath UN5 (part) in the parish of Highley has been considered in the context of the Human Rights Act 1998 generally, and the provisions of Article 1 (protection of property) of the First Protocol, and Article 8 (respect for private and family life) of the European Convention in particular. On balance it is considered that the decision to reject the application would be consistent with the concept of proportionality, and is not therefore contrary to the Human Rights Act.

**Environmental Appraisal**
Public Rights of Way are of vital importance in the use and enjoyment of the countryside.

**Risk Management Appraisal**
Under the provisions of the Highways Act 1980, the County Council as the Highway Authority has the power to divert, extinguish or create routes either in the interests of the public or landowner, lessee or occupier.

**Community / Consultations Appraisal**
Informal consultations are carried out by the applicant as part of the application; further consultation is carried out when the Draft Delegated Powers Report is produced.

**Cabinet Member**
Steven Charmley (Culture and Leisure)

Local Member
Mary Nicholls (Highley)

Appendices

Appendix A – Extinguishment Application
Appendix B – Extract of Plans for Yew Tree Grove Development
Appendix C – Planning Application Covering Letter
Appendix D – Photographs of path 19/5/2008
Appendix E – Draft Delegated Powers Report
Appendix F – Copies of Representations made regarding the Draft Delegated Powers Report