

WILTSHIRE COUNCIL

SOUTHERN AREA PLANNING COMMITTEE

6 NOVEMBER 2014

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE DEFINITIVE MAP AND STATEMENT FOR THE AMESBURY RURAL
DISTRICT COUNCIL AREA DATED 1952 AS MODIFIED UNDER THE
PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981**

The Wiltshire Council Milston 16 (Part) Rights of Way Modification Order 2014

Purpose of Report

1. To:
 - (i) Consider the evidence and duly made objections and representation relating to the above Order.
 - (ii) Recommend that the Order be submitted to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed.

Relevance to the Council's Business Plan

2. Working with the local community to provide a rights of way network fit for purpose.

Background

3. In 2006 Wiltshire County Council made an Order under Section 53 of the Wildlife and Countryside Act 1981 to:
 - (a) 'delete the footpath leading from Brigmerston corner, Church Road, Milston through the farmyard to RUPP 16 Milston leading to Durrington with a width of two metres'; and
 - (b) add 'the footpath leading from Brigmerston corner, Church Road, Milston and then running parallel to Barn House and Cottage on right then crossing diagonally left to join RUPP 16 leading to Durrington with a width of two metres.'

4. The Order was duly advertised and an objection and representations were made to it. The objections and representations received were considered by the Southern Area Planning Committee on 16 January 2014. A copy of the Agenda item is attached at **Appendix 1**. The Area Planning Committee resolved that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that the Order be confirmed with the modification to the Order map to show the Restricted Byway to be added by a broken black line and small arrowheads.
5. The Order and associated papers were submitted to the Secretary of State for determination but the Order was returned to the Council as the Secretary of State has taken the view that the use of a solid black line to depict the new route and a broken line to depict the route to be deleted is considered to be misleading and a fundamental error which is fatal to the validity of the Order.
6. As a consequence, to correct the drawing error the Order was remade with a revised plan (see **Appendix 3**) on the 15 July 2014 in accordance with Statutory Instrument 1993/12 Wildlife and Countryside (Definitive Maps and Statements) Regulations. The Order was duly advertised and a representation in support of the Order was made by Mr R W Henman on behalf of himself and his wife and objections made by Mr Andrew Smith and Mrs Samantha Smith. Copies of the objections and representation are attached at **Appendix 2** to this report.

Main Considerations for the Council

7. The main issues to be taken into consideration are set out in paragraphs 4 – 27 of the Decision Report contained as Appendix B to the Southern Area Committee report attached here as **Appendix 1**.
8. The judgement given by the Court of Appeal in R v Secretary of State for the Environment ex parte Burrows and Simms (1991) 2 QB 354 held, in effect that if evidence comes to light to show that a mistake had been made in drawing up the definitive map, such a mistake can be corrected in either of the three ways envisaged in Section 53(3)(c) of the Wildlife and Countryside Act 1981.
9. There is a consistent portrayal of the claimed route as part of the local road network on the maps described in the Decision Report. This supports the application applied for by Jancis Henman and triggers the duty of the Council to modify the definitive map and statement accordingly by adding to the definitive map and statement as a Restricted Byway on the claimed route and the deletion of the section of Milston 16 currently shown through Brigmerston farmyard. The historical evidence is entirely supported by the significant amount of user evidence also submitted with the application. No statements and plans have been deposited under Section 31(6) of the Highways Act 1980 in this area.
10. No mapping evidence has been discovered by Council officers to confirm that the section of Milston 16 currently shown on the definitive map through Brigmerston farmyard is correct. Taking the map evidence into consideration with all the other evidence relating to Milston 16, as the legislation requires the Council to do, officers believe that the section of Milston 16 shown through the farmyard should be deleted from the definitive map.

11. The Order was advertised in accordance with the regulations and the attached objections and representation have been received. The Order must now be forwarded to the Secretary of State for determination. The test that the Secretary of State will apply in deciding whether or not to confirm the Order in relation to the proposed additional Restricted Byway made under Section 53(3)(c)(i) is:

Does a right of way subsist on the balance of probabilities? This requires that there is clear evidence in favour of public rights and no evidence to the contrary.

12. In considering the part of the Order concerning deleting that part of Milston 16 through the farmyard made under Section 53(3)(c)(iii), in accordance with the decision of the Court of Appeal in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* (2001) it will fall to the Secretary of State to start with the initial presumption that the way did exist. The standard of proof required to show that the inclusion of the right of way on the definitive map was incorrect is the balance of probabilities. But evidence of some substance had to be put in the balance if it was to outweigh the initial presumption that the way had been correctly included.

The Objections to the Order

13. On 18 August 2014 Mr Andrew Smith of the Barn House wrote to the Council:

“Whilst I have objected previously both by letter and email I write to comply with the notice dated 15 July. Let me once again place on record an objection to the proposal to divert the footpath from the existing delineated route as designated on the definitive map.

In the notice you have requested grounds to the objection and the following are the basis for these.

- 1. Points raised in my letter of 23 August 2006*
- 2. Evidence of aerial photography of the 70’s and 80’s which clearly indicates the path is routed and utilized via the stables which is the present route as confirmed by the definitive map.*
- 3. The intrusive effect on the family home of the proposed alteration.*
- 4. The failure of the Council to undertake any discussion with ourselves since we purchased the Properties in 2002 concerning the proposed change.”*

Comment on the Objection

14. Mr Smith is not contesting the physical presence of a route adjacent to his property along the line of the proposed Restricted Byway as he has acknowledged its existence in his letter dated 23 August 2006. He states ‘an overgrown and often muddy track adjacent to our Property’ and ‘the proposed re-routing is directly along a path which becomes waterlogged during the winter months and overgrown during the summer.’

15. Mr Smith has not produced any evidence to challenge the use of the proposed Restricted Byway given by the 42 local people who have completed witness evidence forms testifying to daily use of the route dating back to 1916. Many of the people who completed user evidence forms commented on a former owner of Barn House frequently observing them from his garden using the claimed right of way and never being challenged whilst doing so.
16. The aerial photographs show the physical features that existed at the time the photographs were taken and it simply is not possible to deduce from them where the public have walked, or the nature of that use.
17. In 'A Guide to definitive maps and changes to public rights of way' produced by Natural England the legal considerations to be taken into account in matters relating to definitive map modification orders are made clear. The guide, which is targeted at members of the public, states:

'Definitive map modification orders are about whether rights already exist, not about whether they should be created or taken away. The suitability of a way for users who have a right to use it, or the nuisance that they are alleged to cause, or to be likely to cause, are therefore irrelevant. So also is the need for public access, locally, if the order alleges that public rights do not exist.'

Evidence is the key

The definitive map is a legal recognition of existing public rights to walk, ride and use vehicles. As such, any proposal to modify it by means of a definitive map modification order to add a right of way has to be judged by the legal test: 'Do the rights set out in the order already exist?.' If they do, then the map must be modified, regardless of any effect on anyone's property interests, or whether or not the routes physically exist at the present time on the ground. Similarly, if the evidence in support of the order proves to be sufficient, and the test is not satisfied, then the map remains as it is, however desirable it may seem for the public to have those additional rights.'

Evidence is also the key where the proposal is to remove some or all of the rights recorded on a way already shown on the map. In this case it must demonstrate clearly that a right of way, of that status, did not exist when it was first shown on the definitive map, and that an error was made.'

18. On the 18 August 2014 Mrs Samantha Smith wrote to object to the Order for the following reasons:
 1. *The failure of the Council to undertake any discussion with ourselves since we purchased the Properties in 2002 concerning the proposed change.*
 2. *Points raised in my letter of 9 October 2013 including the request to change the right of way from uninhabited land to running directly past our house and cottage as well as Vandalism.*
 3. *Right to Respect for Private and Family Life under Human rights Act 1998 including the infringement and 'protection of our property.'*

4. *Wiltshire County Council lead by you to protect one parties interests over another. This has been seen over the last 12 years where The Smith Family residing at The Barn House and Cottage having had attempts at bullying regarding Milston Restricted Byway 16.'*

Comment on the objection

19. The comments made in paragraphs 14–17 above are relevant to this objection.

Representation in support of the Order

20. Mr R W Henman wrote on 1 August on behalf of himself and his wife in support of the Order:

'For the record, you should be aware that we both fully support this revised order as we believe it accurately reflects the correct route. There has been considerable correspondence and evidence produced over the last seven years or so in support of this route, and there is therefore little point in repeating it all now.'

We have lived here for almost twenty three years and it is well known that this is the route of the byway. We particularly object to the residents of Barn House unilaterally deciding that it suits them to change the route of this right of way. We also understand that the residents have been abusive to ramblers on this public land and if this is correct, we find their behaviour to be totally unacceptable.'

Comment on the Representation

21. Mr and Mrs Henman have provided evidence of actual use of the Restricted Byway to be added to the definitive map and have long knowledge of the area.

Safeguarding Considerations

22. Considerations relating to safeguarding anyone affected by the making and confirmation of an Order made under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be confirmed based on the relevant evidence alone.

Public Health Implications

23. Considerations relating to any public health implications of the making and confirmation of an Order made under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Orders must be confirmed based on the relevant evidence alone.

Environmental Impact of the Recommendation

24. Considerations relating to the environmental impact of the making and confirmation of an Order made under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Orders must be confirmed based on the relevant evidence alone.

Risk Assessment

25. Considerations relating to risks or safety of the impact of the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Orders must be confirmed based on the relevant evidence alone.

Financial Implications

26. It is considered that with this case, and the need to test the evidence of witnesses from both sides, that a Public Inquiry is unavoidable. However, the decision whether to determine an Order by written representations, a Hearing or a Public Inquiry rests with the Secretary of State.
27. The Council has a duty in law to support Orders where it is considered that on the balance of probability public rights subsist or the definitive map erroneously shows a right of way as it is believed the evidence shows for that section of Milston 16 which runs through Brigmerston farmyard. Budgetary provision has been made for carrying out this duty, including covering the cost of any Public Inquiry or hearing that may be convened to determine the Order.

Legal Implications

28. Wiltshire Council has a legal duty to keep the definitive map and statement under continuous review and therefore there is no risk associated with the Council pursuing this duty correctly.

Options Considered

29. That:
- (i) The confirmation of the Order is supported as made.
 - (ii) The confirmation of the Order is supported with modifications.
 - (iii) The confirmation of the Order is objected to.

Reasons for Recommendation

30. Under Section 53(3)(c)(i) the Surveying Authority is not required to prove beyond all reasonable doubt that rights exist. The burden of proof lies on the 'balance of probability', i.e. that it is more likely than not that the rights exist. An Order may be made under this section where rights can be 'reasonably alleged to subsist'; however, at the confirmation of an Order a more stringent test applies, that public rights 'subsist'. The wording for Section 53(3)(c)(iii) is different, as the Surveying Authority has to be satisfied that there 'is' no public right of way shown on the definitive map.
31. The earliest map examined which officers believe shows the route sought to be added to the definitive map is Andrews' and Dury's map of Wiltshire dated 1773. Whilst it may be argued that this map is on such a small scale, 2 inches to 1 mile, that it is not possible to identify with any degree of accuracy the route of a particular way, when compared with the later mapping evidence, in particular the large scale Ordnance Survey maps, a picture of the road layout of this area becomes clear. There is a consistent portrayal of the claimed additional route as part of the local road network on the maps described in the Decision Report attached at Appendix B to the Southern Area Planning Committee report attached here as **Appendix 1**. This supports the application applied for by Jancis Henman and triggers the duty of the Council to modify the definitive map and statement accordingly by adding to the definitive map and statement as a Restricted Byway the claimed route and the deletion of the section of Brigmerston 16 through the farmyard. The historical evidence is entirely supported by the significant amount of user evidence also submitted with the application. No statements and plans have been deposited under Section 31(6) of the Highways Act 1980 for the land over which the claimed Restricted Byway runs.
32. No mapping evidence has been discovered by Council officers to confirm that the section of Milston 16 currently shown on the definitive map through Brigmerston farmyard is correct. Taking the map evidence into consideration with all the other evidence relating to Milston 16 the Council has considered, officers believe that the section of Milston 16 shown through the farmyard should be deleted from the definitive map.

Recommendation

33. That the Wiltshire Council Milston 16 (Part) Rights of Way Modification Order 2014 is forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that the Order be confirmed.

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The following unpublished documents have been relied on in the preparation of this Report:

Correspondence with Parish Council, user groups, other interested bodies and members of the public

Appendices:

- Appendix 1 - Southern Area Committee Report – 16 January 2014
- Appendix 2 - Objections and representations to the Order
- Appendix 3 - Order Map dated 15 July 2014