

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL PARISH OF OGBOURNE ST ANDREW PATH NO. 38  
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2020**

**Purpose of Report**

1. To:
  - (i) Consider one objection to The Wiltshire Council Parish of Ogbourne St Andrew Path No.38 Definitive Map and Statement Modification Order 2020 made under Section 53 of the Wildlife and Countryside Act 1981.
  - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs (**SoSEFRA**) with a recommendation from Wiltshire Council that the Order be confirmed without modification.

**Relevance to the Council's Business Plan**

2. Working with the local community to provide a rights of way network which is fit for purpose, making Wiltshire an even better place to live, work and visit.

**Background**

3. Wiltshire Council received an application dated 30 April 2020 from Carolyn Davis ( on behalf of Ogbourne St Andrew Parish Council), for an Order to record a public bridleway leaving Ogbourne St Andrew byway 6 at Drove Barn leading generally north east to link up with Ogbourne St Andrew bridleway 29 with an approximate width of two metres (please see claimed route at page 2 of Decision Report at **Appendix 1**). The total length of claimed bridleway is approximately 440 metres in length.
4. The application adduced evidence from initially 27 people, a further 6 have come forward since the application, making a total of 33 people who have completed User Evidence Forms (UEFs) detailing their use on foot, bicycle and on horseback of the application route in full for varying lengths of time dating from 1961 to 2020.
5. For public rights to have been acquired under statute law (see **Appendix 1** paragraph 9.5– Highways Act 1980 Section 31) it is necessary for the use to have been uninterrupted for a period of at least 20 years in a manner that is 'as of right', that is, without force, without secrecy and without permission. This would give rise to a 'presumption of dedication'.

6. A presumption of dedication may be defeated in a number of ways, including the erection and maintenance of signage indicating that there is no intention to dedicate public rights, effective challenges to use, the closure of the claimed route (for example a closure for one day every year may be effective), the granting of permission or by depositing a number of documents with the Council as prescribed by Section 31(5) and (6) of the Highways Act 1980 (see **Appendix 1** paragraph 9.5).
7. Wiltshire Council has a duty to consider all relevant available evidence and officers conducted an initial consultation between July and September 2020 on the application. The consultation letter was sent to all interested parties including landowners, the Parish Council, user groups, the local member and other interested individuals.
8. All the evidence and responses were duly considered in the Council's Decision Report appended here at **Appendix 1** (Section 8). Applying the legal test contained within Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 and s.31 of the Highways Act 1980 (see **Appendix 1** paragraph 9.1,9.2 and 9.5), the application formed a reasonable allegation that a public right subsisted. An Order was made to record the path as a public bridleway in the definitive map and statement.
9. The Order was duly advertised and attracted one objection and one representation. A copy of the Order is appended here at **Appendix 2**.
10. Where objections are received to a Definitive Map Modification Order Wiltshire Council may not confirm or abandon the Order and must forward it to SoSEFRA for determination. However, it must first consider the representations and objections to the Order and make a recommendation to SoSEFRA regarding the determination of the Order.
11. It is important that only the evidence adduced or discovered is considered and it is noted that matters relating to desirability, the environment, need, privacy concerns or health and safety are irrelevant for the application of Section 53 of the Wildlife and Countryside Act 1981.

### **Main Considerations for the Council**

12. Section 53(2) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the definitive map and statement of public rights of way under continuous review.
13. The Order is made under Section 53(3)(c) of the Wildlife and Countryside Act 1981, based on:

*“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-*

*(i) that a right of way which is not shown in the definitive map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists*

*is a public path, a restricted byway or subject to section 54A, a byway open to all traffic.”*

14. Under Section 31(1) of the Highways Act 1980 *“where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right without interruption for a full period of 20 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.”*
15. Evidence is the key and therefore objections to the making of the Order must, to be valid, challenge the evidence available to the Surveying Authority. The Authority is not able to consider other considerations, such as the suitability of the way for use by the public, the proximity of any other paths or facilities, environmental impacts and any need or desire for the claimed route.
16. **Objections and Representations:**

**(1) Susannah O’Brien (landowner affected by the Order) – Objection**

*Wiltshire Council has made an Order 19/11/20 to record a public bridleway partly on my land.*

*It is based on a reasonable allegation from submitted evidence that demonstrates that it has been used in the manner of a public bridleway for the past 20 years.*

*I object to the order on the grounds that the decision is wrong and made unfairly. Officers believe that test B has been met: that it is reasonable to allege that on the balance of probabilities a right of way subsists.*

*For an order to be made they rely on 27 user statements.*

1.

*The user statements were gathered in an unfair and dishonest way.*

*The Ogbourne Maisey and Ogbourne St Andrew and Rockley parish Council had a meeting early on to discuss the proposed bridleway.*

*Neither I or Catherine Burrell were invited . The council gave its unanimous support to the proposal.*

*Carolyn Davis who put forward the proposal led the Council to believe that the landowners had no objections to the existing track becoming a public bridleway.*

*This was a lie as I had told her when she raised her intentions with me that I strongly objected. This conversation took place before the Parish meeting.*

*The Chairman of the Council has made a user statement believing that there was no objection from the landowners.*

*Carolyn Davis further states in the Ogbourne st. Andrew and Ogbourne Maisey and Rockley newsletter spring 2020 when asking people to make user statements to present to the Council that the 'current landowners are happy for it to be used'. I.e. the track.*

2.

*Neither I or Catherine Burrell saw these user statements before the Council made their order which is also unfair.*

*I have been sent these statements in a chart . I don't know who prepared that. I have had no opportunity to challenge them.*

*I say at the first opportunity that*

*a) My family of myself ,my husband and three children, dog walkers, staff and friends and Catherine Burrell and her yard with permission have all ridden and walked on the track for 20 years daily sometimes twice daily and that is what these users might /would have seen.*

*b) I have never seen Carolyn or Ian Davis or Andy Curtis riding on my part of the track.*

*c) I have never seen a cyclist on it. Only 4 of the users have said that they used a bike*

*d) my house is out of view so I can't see the track from it*

*e) there was no gate so my children when young could go through on their ponies.*

*These people have used my track secretly.*

3.

*There is evidence that my husband ( now ex-husband ) stopped people .*

4.

*I did make a landowner evidence form but it appears it was never received. With Covid I was expected to scan and send which I thought I had done but obviously not. I have it here dated 27/9 /20 but it adds no more to my comments to Craig Harlow.*

*5 . My representation is that against 16.15 it is wrong to say that it 'would have been clear to the landowner that a right was being asserted.' Section 31. It was not clear to me.*

## **(2) Jilly Carter – Representation**

*Dear Craig,*

*Unfortunately, I would like to withdraw my earlier support for this proposed bridleway.*

*Kind regards,*

*Jilly Carter*

### **Comments on the objection**

#### **17. Susannah O'Brien**

***“The user statements were gathered in an unfair and dishonest way. The Ogbourne Maisey and Ogbourne St Andrew and Rockley parish Council had a meeting early on to discuss the proposed bridleway. Neither I nor Catherine Burrell were invited. The council gave its unanimous support to the proposal.***

***Carolyn Davis who put forward the proposal led the Council to believe that the landowners had no objections to the existing track becoming a public bridleway. This was a lie as I had told her when she raised her intentions***

***with me that I strongly objected. This conversation took place before the Parish meeting.***

***The Chairman of the Council has made a user statement believing that there was no objection from the landowners.***

***Carolyn Davis further states in the Ogbourne st. Andrew and Ogbourne Maisey and Rockley newsletter spring 2020 when asking people to make user statements to present to the Council that the 'current landowners are happy for it to be used'. i.e. the track."***

How the user evidence forms were gathered and submitted to the Council cannot be a valid consideration when deciding whether an Order should be made or confirmed. The UEFs were all signed by the individuals who filled them out as statements of truth regarding their use of the application route. It may or may not be the case that some individuals may have decided not to submit evidence if they knew the landowner would object but the content of their evidence detailing their use and knowledge of the route is what the Council must consider.

17.1 ***"2.***

***Neither I nor Catherine Burrell saw these user statements before the Council made their order which is also unfair. I have been sent these statements in a chart. I don't know who prepared that. I have had no opportunity to challenge them."***

The user evidence forms have been on public deposit and available upon request at any time for anybody to view. Since Ms O'Brien's objection was received officers responded on the 15/02/21 to Ms O'Brien stating the forms have been available by request and asking if she would like copies to be sent to her. She has not requested to see the forms since this email. The chart detailing the contents of the UEFs was prepared by Craig Harlow, Definitive Map Officer and case officer for this application.

17.2 ***"I say at the first opportunity that***

***My family of myself ,my husband and three children, dog walkers, staff and friends and Catherine Burrell and her yard with permission have all ridden and walked on the track for 20 years daily sometimes twice daily and that is what these users might /would have seen."***

It may be the case that when users of the path have stated they saw other people on the route some of these people may have been people with permission to use the route. However, there is a body of evidence from 31 user evidence forms (was 33, two users have now either withdrawn their evidence or cannot confirm the details) that people used the track on foot, bicycle, and on horseback without permission. None of the users recall being challenged on their use of the Order route.

17.3 ***"I have never seen Carolyn or Ian Davis or Andy Curtis riding on my part of the track."***

Carolyn Davis in her UEF stated that *"I have met the owners whilst using the track on horseback"*. Since receiving the objection from Ms O'Brien officers have sought to clarify if Carolyn Davis was referring to Ms O'Brien when referring to

meeting the owners on the track. Mrs Davis has clarified by email *“One particular occasion, probably 5 or 6 years ago, I was riding with someone from the village and whilst on the track we met Susannah O’Brien’s husband, Titus, who was on foot. My companion chose to ride up on the field edge rather than the track and Titus asked her to keep to the track. Her response was that it was too stony and rutty.*

*I have met both of them individually on very rare occasions and would most certainly have exchanged greetings - but this one particular occasion sticks in my mind because of the exchange”.* This was put to Mrs O’Brien who restated that she does not remember seeing Mrs Davis or her husband using the route.

**17.4 *“I have never seen a cyclist on it. Only 4 of the users have said that they used a bike”***

Five Users in total have stated they used the route on a bicycle. It may be the case Ms O’Brien has not witnessed bikes on the route, although of these five users, four have said they believe the landowner would have been aware of public use of the route. Mr Poulton (a user of the route on a bicycle) states, when asked in the user evidence form do you believe the owner or occupier of the land was aware of the public use of the land? *“It happens so frequently that they must be aware”.*

**17.5 *“my house is out of view so I can’t see the track from it”***

This fact does make it difficult for Mrs O’Brien to comment on much of the use of the route and in particular to give first-hand account of the use of the route.

**17.6 *“there was no gate so my children when young could go through on their ponies. These people have used my track secretly.”***

There is no indication that users made any effort to conceal their use of the Order route. Several the users have stated they either met the owner on the route or knew the owners.

**17.7 *“3. There is evidence that my husband (now ex-husband ) stopped people”***

Clarification has been sought from Sir O’Brien regarding his knowledge of use of the order route and in particular any challenges he made to users. Sir Titus O’Brien has replied with the following:

*“In so far as I can help I never saw a cyclist and rarely a horse rider but I did challenge if I saw one, starting about 2010. As I said before I saw carol Davis and a female friend. I never saw the people who made statements. Not to my knowledge did they return. I would challenge people walking, but again I saw people rarely. I hope this helps. Titus O’Brien*

Further clarification was sought from Sir O’Brien as to why, as he states, he began challenging people around the year 2010 when his ownership began in 2000 and the evidence demonstrates use of the route has been consistent in the years pre and post 2010. No reply has been received to date. None of the users

recall being challenged by anybody on the route other than the incident recalled by Mrs Davis as seen at 17.3 of this report.

17.8 “ 4.

***I did make a landowner evidence form but it appears it was never received. With Covid I was expected to scan and send which I thought I had done but obviously not. I have it here dated 27/9 /20 but it adds no more to my comments to Craig Harlow.”***

No landowner evidence form has yet been received from Ms O’Brien, although as Mrs O’Brien states it adds no more to her comments.

17.9 “**5. My representation is that against 16.15 it is wrong to say that it 'would have been clear to the landowner that a right was being asserted.' Section 31. It was not clear to me.**”

The level of use of the route by multiple people on a regular basis over a prolonged period would indicate an onsite landowner would have been aware of the route being used. Although as Mrs O’Brien states she could not see the route from her house. Within Mrs O’Brien’s objection she also states her husband at the time stopped people on the path, which would indicate they were aware of at least some use of the route by people they deemed did not have permission.

18. The Council cannot consider the number of objections but must consider the evidence contained within those objections against the evidence contained within the evidence already before the Council, as outlined within the Decision Report attached at **Appendix 1**. There will inevitably be points of conflict within the evidence of objectors and that of the supporters. For this reason, the Order has been made on a reasonable allegation that a right of way for the public on horseback, on bicycle and on foot (as a public bridleway) subsists, which is a lower test than the balance of probabilities (see **Appendix 1**- paragraph 30.2).

19. Since the Order has been made two more user evidence forms have been received, both detailing use on horseback. Clarification from users claiming use on horseback and bicycle has also been sought. This clarification is detailed at **Appendix 3**. This graph and text details the use claimed of the route in the manner of a bridleway.

20. The case of R v Secretary of State for the Environment, ex p.Bagshaw and Norton, Queen’s Bench Division (Owen J.): April 28, 1994, deals with the applications of both Mrs Norton and Mr Bagshaw, who had applied to their respective county councils for Orders to add public rights of way to the definitive map and statements, based upon witness evidence of at least 20 years uninterrupted public user and where the councils determined not to make Orders. On appeal, in both cases, the Secretary of State considered that the councils should not be directed to make the Orders. At judicial review, Owen J allowed both applications; quashed the Secretary of State’s decisions and held that:

*“(1) under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, the tests which the county council and the then Secretary of State needed to apply were whether the evidence produced by the claimant, together will all the other*

*evidence available, showed that either (a) a right of way subsisted or (b) that it was reasonable to allege that a right of way subsisted. On test (a) it would be necessary to show that the right of way did subsist on the balance of probabilities. On test (b) it would be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. Neither the claimant nor the court were to be the judge of that and the decision of the Secretary of State was final if he had asked himself the right question, subject to an allegation of Wednesbury unreasonableness. The evidence necessary to establish that a right of way is reasonably alleged to subsist is less than that needed to show that a right of way does subsist. The Secretary of State had erred in law in both cases as he could not show that test (b) had been satisfied.”*

21. Owen J also held that:

*“(2) In a case where the evidence from witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.”*

22. It is notable in the Norton case that, the Secretary of State “...notes that the user evidence submitted in support of a presumption of dedication is limited to four persons claiming 20 years of vehicular use as of right; he must weigh this against the statements from the landowner, supported by 115 signed forms and the Layham and Polstead Parish Councils, indicating the use of the route has been on a permissive basis and that active steps to prevent a presumption of dedication arising have been taken...”. In both the Norton and Bagshaw cases Owen J concluded that:

*“If, however, as probably was so in each of these cases, there were to be conflicting evidence which could only be tested or evaluated by cross-examination, an order would seem likely to be appropriate.”*

23. Even in a case with only limited supporting evidence and a large number of objections, Owen J held that an Order would seem appropriate. When this case law is applied to this case, where there are 33 completed UEFs (31 with the two withdrawn statements), 13 of which after investigation detail use in the manner of a bridleway, it suggests that the making of a definitive map modification order was appropriate.

24. In such a case concerning the balancing test to be applied to the evidence, the authority is correct in making the Order on the grounds that it is reasonable to allege that a right of way for the public on horseback, on a bicycle and on foot subsists. The use of the route in the manner of a bridleway has been



investigated and the evidence demonstrates when taking into account the objections raised that bridleway rights subsist. The 13 users who claim use on horseback or bicycle cover a period of 20 + years in a consistent manner. Given the rural nature of the location the use demonstrated represents a reasonable account of use in the manner of a public bridleway. The objection submitted has been discussed at paragraph 17 of this report and does not raise any incontrovertible evidence to defeat the allegation that public bridleway rights subsist on the route. There are conflicts within the evidence and as an objection has been received the only way to properly determine the Order is to see the witnesses at a public inquiry where they may give evidence in chief and their evidence may be tested through the process of cross-examination to confirm whether, on the balance of probabilities, the public right has been acquired. Officers suggest it will also be open to an inspector to consider if further evidence is brought at later date to defeat the allegation of bridleway rights that the Order may be modified to record a public footpath as there is a substantial body of evidence recording use of the route in the manner of a public footpath. Based on the evidence before the Council officers believe the committee should recommend to SoSEFRA that the Order be confirmed without modification.

### **Overview and Scrutiny Engagement**

25. Overview and Scrutiny Engagement is not required in this case. The Council must follow the statutory process which is set out under Section 53 of the Wildlife and Countryside Act 1981.

### **Safeguarding Considerations**

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

### **Public Health Implications**

27. Any public health implications arising from the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

### **Corporate Procurement Implications**

28. In the event this Order is forwarded to SoSEFRA there are several opportunities for expenditure that may occur, and these are covered in paragraphs 32 to 34 of this report.

## **Environmental and Climate Change Impact of the Proposal**

29. Any environmental or climate change considerations arising from the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

## **Equalities Impact of the Proposal**

30. Matters relating to the equalities impact of the proposal are not relevant considerations in Section 53 of the Wildlife and Countryside Act 1981.

## **Risk Assessment**

31. Wiltshire Council has a duty to keep the definitive map and statement of public rights of way under continuous review and therefore there is no risk associated with the Council pursuing this duty correctly. Evidence has been brought to the Council's attention that there is an error in the definitive map and statement of public rights of way which ought to be investigated and it would be unreasonable for the Council not to seek to address this fact. If the Council fails to pursue its duty it is liable to complaints being submitted through the Council's complaints procedure, potentially leading to complaints to the Ombudsman. Ultimately, a request for judicial review could be made with significant costs against the Council where it is found to have acted unlawfully.

## **Financial Implications**

32. The making and determination of Orders under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.
33. Where there are outstanding objections to the making of the Order it must be determined by the Secretary of State. The outcome of the Order will then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500. A one day public inquiry could cost between £1,500 and £3,000 if Wiltshire Council continues to support the making of the Order (i.e. where legal representation is required by the Council) and around £300 to £500 where Wiltshire Council no longer supports the making of the Order (i.e. where no legal representation is required by the Council and the case is presented by the applicant).
34. Where the Council objects to the Order, the Order must still be forwarded to the SoSEFRA for determination. As in the case of a supported Order, the possible processes and costs range from £200 to £3,000 as detailed at paragraph 33 above.

## **Legal Implications**

35. Where the Council does not support the Order, clear reasons for this must be given and must relate to the evidence available. The applicant may seek judicial

review of the Council's decision if he sees it as incorrect or unjust by them. The cost for this may be up to £50,000.

### **Options Considered**

36. Members should now consider the objection received and the evidence in order to determine whether Wiltshire Council continues to support the making and confirmation of the Order. The making of the Order has been objected to, therefore the Order must now be submitted to the SoSEFRA for determination and members of the committee may determine the recommendation (which should be based upon the evidence) to be attached to the Order when it is forwarded to the SoSEFRA as follows:
- (i) The Order be confirmed without modification
  - (ii) The Order be confirmed with modification
  - (iii) Take a neutral stance on the determination of the Order.
  - (iv) The Order should not be confirmed

### **Reason for Proposal**

37. Unless the objections and representations are withdrawn the Order must be forwarded to the SoSEFRA for determination.
38. It is considered that nothing in the objectors' submissions demonstrates sufficiently that there was no intention to dedicate a public right of way and that any attempt at communicating any lack of intention did not reach the relevant audience. This is demonstrated by the fact that all user evidence forms indicate they were unaware of any challenge to use of the route, no signs or notices were erected on the route and no barriers were erected on the route ( before the application was made or during the relevant 20 year period). Neither did the owners/tenants satisfy any statutory process of demonstrating a negative intention to dedicate the land, i.e. a valid deposit, plan, statement and subsequent statutory declaration under Section 31(6) of the Highways Act 1980, or a notice under Section 31(5) informing the relevant authority such notices have been torn down.
39. The testimony of users of the path has been questioned by the objector who claims that use of the order route has not taken place or was challenged. Where this evidence is conflicted it may be tested, along with all other evidence at a public inquiry. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton [1994] 68 P&CR 402* Owen J "*In a case where the evidence of witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.*"
40. In making this Order officers considered that a reasonable allegation as to the acquisition of public rights over the Order Route had been made. Since the making of the Order and it being advertised to a wider audience additional evidence of use has been adduced and the clarification of the use of the Order

route in the manner of a bridleway has been undertaken. In addition to these actions no incontrovertible evidence has been adduced since making the Order, that demonstrates the route has not been used in the manner of a public bridleway and shows that, on the balance of probabilities, a public right has been acquired. The testing of witnesses will be key to the final decision in this case, but the Council's duty remains with supporting the Order based on the evidence it has before it.

### **Proposal**

41. That "The Wiltshire Council Parish of Ogbourne St Andrew Path No.38 Definitive Map and Statement Modification Order 2020" is forwarded to the SoSEFRA with the recommendation that it is confirmed as made.

### **Jessica Gibbons**

Director – Communities and Neighbourhood Services

Report Author:

**Craig Harlow**

Definitive Map Officer

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

User Evidence Forms

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(The above-mentioned documents are available to be viewed at the offices of Rights of Way and Countryside, Wiltshire Council, County Hall, Bythesea Road Trowbridge, BA14 8JN or available on request by email.)

### **Appendices:**

Appendix 1 - Decision Report

Appendix A to Decision Report – chart of User Evidence (valid at the time of the decision report publication)

Appendix 2 - "The Wiltshire Council Parish of Ogbourne St Andrew Path No.38 Definitive Map and Statement Modification Order 2020"

Appendix 3 - Bridleway use of the order route after investigation