

WILDLIFE AND COUNTRYSIDE ACT 1981 s.53 (“the 1981 Act”)

**THE WILTSHIRE COUNCIL RAMSBURY 9B, 44, 71 & 72 AND MILDENHALL 16
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2022**

Purpose of Report

1. To:
 - (i) Consider the two objections and three representations received relating to the above Order to add two lengths of restricted byway and upgrade to restricted byway lengths of footpaths Ramsbury 9B and 44 and Mildenhall 16 to the definitive map and statement for the area.
 - (ii) Recommend that Wiltshire Council supports the confirmation of the Order with a modification to correct the recording of the width of part of the Order route affecting Mildenhall path no. 16 (points F to G on the Order plan).

A copy of the Order and Order plan is appended at **Appendix A**.

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 has statutory duties to maintain the legal record of public rights of way in Wiltshire (excluding the Borough of Swindon), to maintain the rights of way shown therein, and to assert and protect them for the use and enjoyment of the public. These duties are not discretionary.
4. The definitive map and statement is the legal record of public rights of way and is conclusive in law as to what it shows, but this is without prejudice to the existence of a more extensive public right (s.56 of the 1981 Act). The Council has a duty to keep it under continual review and make legal orders to modify it when evidence shows it is in error.
5. Members of the public may apply to the Council for an order to modify the definitive map and statement and they do so under the provisions of Schedule 14 to the 1981 Act. The Council must determine these applications by investigating all available relevant evidence and by making a modification order where it is considered it is shown on the balance of probability (i.e., it is more

likely than not) and, in this case, that there has been a reasonable allegation over parts of the route, that a change in the map and statement is required.

6. In October 2018 Wiltshire Council received such an application to add lengths of restricted byway and to upgrade lengths of footpaths to form a continuous restricted byway leading from Axford, Ramsbury south to join the A4 at the Ramsbury and Mildenhall parish boundary. The application adduced historical evidence that the route was a historic vehicular highway but owing to the effect of s.67 of the Natural Environment and Rural Communities Act 2006 (NERCA 2006), the correct status to record it as was as a restricted byway. A restricted byway carries a right for the public to pass and re-pass on foot, riding or leading a horse, cycling or driving a horse drawn vehicle. Public use with a mechanically propelled vehicle is unlawful.
7. Although the Council has a duty to determine these applications within twelve months, owing to a backlog of over 300 applications it is not possible to do so and accordingly, within the provisions of Schedule 14 to the 1981 Act, the applicant made an appeal to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA). In February 2020 the SoSEFRA directed Wiltshire Council to determine the application within six months. Processes were delayed by matters relating to Covid-19 and the application was not determined until April 2022. In line with the established legal principle 'once a highway, always a highway' and guidance issued by The Planning Inspectorate (PINS) acting for the SoSEFRA, a decision was made to make a definitive map modification order (see **Appendix A**) to record the claimed route as a restricted byway.
8. In coming to that decision officers investigated a large range of historical documents dating from 1727 when an inclosure agreement detailed the through route. In 1717 a detailed estate survey map confirmed that the route was pre-existing and was called "Axford Lane" at the Mildenhall end, it was also described as Axford Lane in defining the parish boundary. Later surveys for various purposes confirm its existence and appearance as part of the local road network (for example the 1793 canal survey of John Rennie and the 1773 survey by Andrews and Dury). In 1842 the Inland Revenue's tithe survey records the route as being part of a route to and from Bedwyn and Highway Board and Rural District Council (the highway authorities of the time) records of 1865, 1905 and 1906 show parts of the route as a road. Highway authority records of 1929 record the whole of the order route as a highway maintainable at public expense in the highway record it being handed over from the Rural District Council during the process of the Wiltshire County Council takeover of responsibilities relating to rural roads under the Local Government Act 1929.
9. Additional to this body of evidence, the deposited plans for public undertakings relating to railways in this area have been inspected and the two recorded at the Parliamentary Archive (dated 1844 and 1845) both record the order route as a public road in the control of the surveyor. Considerable weight can be given to this evidence as the building of railways was a public facing process requiring the identification of land ownership and in the case of highways, use. The process culminated in an Act of Parliament which enabled the railway company to proceed with the scheme. Even if schemes were not built, the procedure to enable the build was the same as for the completed schemes.

10. Additionally, the route was shown on a large number of maps and plans since 1773 and many of these would have been aimed at the travelling public. In all examples the route is shown in the manner of a road and in many instances is given in the key as such (i.e., “Cross Road”, “Parochial Road”). It has also been named “Axford Lane” by the Ordnance Survey since at least 1886 and confirmed as an “unmetalled road” in the Object Names Book by the agent acting for the adjoining Savernake Estate in 1899.
11. Officers have found a great synergy in the range of high weight and lower weight evidence depicting an ancient vehicular highway that had fallen into disuse as a whole by 1950 and in parts, a period beyond living memory.
12. A full report and investigation of the evidence and law relating to it can be found at **Appendix B (and Appendices B.A and B.B)**.
13. The Order was made and duly advertised in accordance with Schedule 15 to the 1981 Act. It attracted two duly made objections and three representations and must now be forwarded to the SoSEFRA for determination as Wiltshire Council may not confirm an Order where there are outstanding objections or representations.
14. This committee is asked to consider the evidence relating to this case and any adduced by duly made objections and representations and recommend what stance Wiltshire Council should take when the matter is sent to SoSEFRA.
15. Any decision regarding this Order must be related to the evidence relating to the highway and cannot take into account matters such as desirability, safety, need or matters relating to the environment. In some cases, these are matters related to the management of the right of way once recorded but they are not matters related to the recording of the right of way itself.
16. The error in the Order relating to the width of section F – G (Mildenhall 16) may be resolved by modification of the Order by the SoSEFRA but not Wiltshire Council.

Main Considerations for the Council

17. Although the legal test contained in s.53(3)(c)(i) Wildlife and Countryside Act 1981 allows for an Order to be made where the evidence adduced only forms a reasonable allegation that a public right subsists (and there is no incontrovertible evidence to the contrary), the legal test to be applied to confirm an Order is that it is shown on the balance of probability (i.e. it is more likely than not) that a public right subsists. In other words, it is a stronger test to be applied to confirm an Order. This approach was confirmed in *Todd and Bradley v SoSEFRA [2004] EWHC 1450* and upheld in *R(on the application of Roxlena Ltd) v Cumbria CC [2019] EWCA Civ 1639*.
18. In addition to the evidence adduced and investigated as part of the original application, the Council must now also consider the objections and representation to the Order.

Consideration of the Objections and Representations (see Appendix C)

19. Full copies of the objections and representations are attached at **Appendix C**, and they are discussed in the following paragraphs.
20. **Objection number 1 – Vicky Henderson and Charlie**

The initial objection challenges the historical evidence and states that they have not dedicated any part of the route as a restricted byway in the past and have no intention of doing so in the future. Further matters raised in correspondence have related to the recorded width for section F to G. Bulleted points are:

 - 1) Ordnance Survey maps show physical features and cannot be used as evidence for public and private rights. Additionally, they have disclaimers on them to this effect.
 - 2) Other maps do not sufficiently differentiate between public and private routes.
 - 3) The width of the order route is totally overgrown and has received no maintenance work over many decades suggesting it is not a highway.
21. Officer's comments:
 - 1) It is agreed that Ordnance Survey maps are a record of great topographical accuracy but carry a disclaimer to the effect that the representation of any road or track is not evidence of a public right of way. They are accordingly given low evidential weight in determining an application such as this. However, they can provide some evidence of the status or use of a path or road, for example, the Order route is recorded as "Axford Lane" suggesting that Axford was the destination of the route rather than adjacent fields and private land. Other Ordnance Survey records arising from the initial survey can also provide some evidence, for example Boundary Remark Books or Object Name Books. In this case, 'Axford Lane' was described as an unmetalled road, a description endorsed by a representative of the Savernake Estate in 1899.
 - 2) On the contrary to the objector's remark, the deposited plans of railway schemes differentiate very clearly in their Books of Reference where a road is private or public (and in the control of the highway authority of the time). Evidence relating to railway schemes is given high evidential weight as a result of the rigorous public facing process they underwent to become part of an Act of Parliament.
 - 3) It is agreed that parts of the route are overgrown and that a clear width is not fully available. However, in nearly all places the historical width of the highway has been preserved between fixed boundaries (i.e., hedge or fence lines). In all places a clear route of passage is available but there is growth at the sides. There are some records relating to inspection and maintenance of parts of the route and in more recent times (post 1952) parts of the route have been maintained but only to a standard suitable for a footpath.
22. Officers have met this objector and their agent on site to discuss how the Council would manage the right of way and to discuss the width of the right of way,

especially with regard to the section F to G (Mildenhall 16). Evidence suggests that this route has been narrower than the majority of the order route and it is accepted that an error in the Order has occurred and the section F to G should not be recorded at 10 metres in the definitive statement. This section is a sunken road (a characteristic typical of ancient highways that have not had significant surface improvements) with a narrow pathway surviving surrounded by banks.

23. Although the objector's agent would like to see only the central walked section recorded as the right of way it is clear from the map evidence that this part of the route was once wider than this. Indeed, although the land on either side of the old lane has been ploughed and cultivated, the general width of the lane has survived, albeit as a deep 'V' shape.
24. Officers therefore propose to use the physical width of the lane F to G where shown bounded by solid lines on both sides as observed and recorded by the Ordnance Survey in the late 19th and early 20th century as being the width of the historic highway in these places. This being the earliest source of reliable accuracy. Where F to G is not defined by solid lines on both sides, the width of highway maintainable at public expense as shown coloured brown in Wiltshire Council's Highway Record shall apply. See **Appendix D** for an extract from the Highway Record and **Appendix E** for an extract from the 1:2500 Ordnance Survey sheet 29.15 printed in 1886.
25. It is not unusual for a highway to have relatively inaccessible verges and their recording as part of the highway does not mean that as matter of routine practice they will necessarily be returned to being part of the accessible highway they may once have been 250 years ago. It is appreciated that this objector has concerns relating to the environment and in managing this highway Wiltshire Council has a duty to consider biodiversity, fauna and flora and would maintain the highway in a sympathetic and lawful manner appropriate for the use the highway has.
26. **Objection number 2 – Kevin Light**
Mr Light highlights the following concerns:
 - 1) There could be unintended consequences of opening the route as a restricted byway as it could also be open for motorcycles and 4 wheeled vehicles. It will create a 'rat run'. It will become rutted and unpleasant to walk.
 - 2) There is a major sight line issue where the route meets the A4.
 - 3) The route bisects a considerable area of quiet countryside with a range of habitats for the indigenous wildlife. It will need considerable widening which will damage trees, shrubs and areas of bluebells and Solomon's Seal.
 - 4) A compromise position could be the downgrading of the route to a bridleway.

27. Officer's Comments:

- 1) Parts of the route are already open to unlawful public vehicular use (especially at the A4 end) but the Council has no evidence of complaint relating to that use of the highway. It is understood that unfenced adjoining land suffers incursions from hare coursers and poachers though it is also understood that action is being planned by the landowner to securely fence that land to prevent incursion. Wiltshire Council has many miles of restricted byways and generally unlawful use is not a problem. Wiltshire Council's provision of byways open to all traffic is high and this may account for the low number of problems encountered with managing restricted byways. Where excessive unlawful vehicular use compromises the safety of lawful users of the highway Wiltshire Council does have powers to erect restrictive barriers (s.66 Highways Act 1980), but they must also be in line with Equality Act 2010 duties relating to least restrictive access.
- 2) It is agreed that the junction of the order route with the A4 is not ideal for recreational use as the road has a 60-mph speed limit at this point and the verges are not especially generous. It is certainly possible that this will deter many equestrians from using this end of the route. However, the Council has no record of complaints from existing users (walkers). If visibility is needed to be improved, hedge cutting practices could be altered slightly to improve matters. However, matters such as this are not relevant considerations for the recording of the route, though they may be for the management of it. Further note is made of other applications for definitive map modification orders in this area which may, when determined, give rise to greater access opportunities that could cause use of only part of this order route. However, again, this is not a consideration for the determination of this order.
- 3) As with the response to Objector number 1, Wiltshire Council has a duty under the 1981 Act to have regard to biodiversity of flora and fauna when managing land. Additionally, at common law, it only has a maintenance duty for the highway that is appropriate for the local traffic of the area. For example, it would be inappropriate to clear and surface the full 33 feet for a low level of use by walkers, equestrians and cyclists although the law is clear that the public right exists across the whole of the highway.
- 4) It is not within the powers of the 1981 Act to downgrade this route to a bridleway and the Council in this case must make its decision based on the historical evidence alone. The Council does not have the power to downgrade the route to a bridleway, but it could make application to the magistrates court if it had reason to do so (for example if a higher right was unnecessary). This is an uncommon and costly event and highly unlikely to be pursued. The highway network for driving horses in the absence of mechanically propelled vehicles is not vast and it is considered unlikely that a link such as this would be deemed to be unnecessary.

28. **Representation number 1 – Byways and Bridleways Trust**

“The Byways and Bridleways Trust fully support the orders to record restricted byways in the parishes of Ramsbury and Mildenhall.

And we thank the council for doing this work to improve the network for higher rights users.”

29. **Representation number 2 – Mildenhall Parish Council**

“I confirm that Mildenhall Parish Council have no objection to this order.”

30. **Representation number 3 – Ramsbury & Axford Parish Council**

“I’m writing on behalf of Ramsbury & Axford Parish Council to raise a concern with the Wildlife and Countryside Act 1981 Making of Order for a path running from the A4 to Axford submitted by Alan Woodford. The order states that the path to be amended to become a restricted byway. Our request during your decision making, is that any widening is not enforced unnecessarily as currently the path is accessible for walking, riding a horse, and cycling. Our concerns regarding the widening are the potential illegal use by mechanical vehicles as a cut through to Axford or the A4.

We support that parts of the path which are not currently marked on the definitive map are reinstated.”

31. Officer’s Comments:

The concerns raised by Ramsbury & Axford Parish Council are mirrored by both objectors and are noted. However, these concerns are irrelevant to the Council’s decision to make and recommend (or object to) the confirmation of the Order before it. They are management issues not recording issues.

Overview and Scrutiny Engagement

32. Overview and scrutiny engagement is not required in this case.

Safeguarding Considerations

33. There are no relevant safeguarding considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Public Health Implications

34. There are no identified public health implications which arise from the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Corporate Procurement Implications

35. There are no additional procurement implications associated with this recommendation. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Environmental and Climate Change Impact of the Proposal

36. There are no environmental or climate change considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Equalities Impact of the Proposal

37. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Risk Assessment

38. Wiltshire Council is acting within its statutory duty and there is no risk associated with the pursuit of this duty.

Financial Implications

39. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
40. The Order must be sent to the SoSEFRA for determination, and this may incur costs for the Council. The Order may be determined by written representations, at a public local hearing or a public inquiry.
41. In the event that the SoSEFRA decides to determine the Order by written representations there is a minimal cost to the Council in officer time. Where a hearing is held there are costs associated with hiring a venue, these will be in the region of £200. Where a public inquiry is held, and the Council takes a neutral stance, the costs will be related only to venue hire. If the Council objects to or supports the Order the costs are likely to be in the region of £6,000 (for a 2-day inquiry).
42. Costs may be claimed against the Council if it is found by SoSEFRA to act unreasonably at an inquiry. The Council may seek costs against the objectors if they are found by SoSEFRA to act unreasonably at an inquiry.

Legal Implications

43. Any decision of the Council is open to an application for judicial review in the high court. An appeal may be made by any aggrieved party and may be the result of a decision to either support or not support the confirmation of the Order.
44. If the appeal is allowed to be heard in the high court and the Council loses its case, all costs would be paid by the Council. If the Council wins its case, all costs would be paid by the opposing party. Further appeal may be made by either party. If the court finds against the Council in judicial review proceedings, the potential costs to the Council would potentially be in the region of £50,000.
45. Where an Order passes to SoSEFRA and is either confirmed or not confirmed any challenge in the high court to the decision would be directed at SoSEFRA and not Wiltshire Council.

Options Considered

46. That:

- (i) Wiltshire Council supports the confirmation of the above Order by SoSEFRA.
- (ii) Wiltshire Council objects to the confirmation of the above Order by SoSEFRA.
- (iii) Wiltshire Council supports the confirmation of the above order with a correction to the recorded width of section F to G (Mildenhall 16).

Reason for Proposal

- 47. It is clear the major concerns of the objectors and of Ramsbury & Axford Parish Council relate to potential unlawful use of the restricted byway and possible environmental harm arising from the management of the restricted byway. It is agreed that the route follows a well-preserved historical landscape and that encroachment from vegetation has occurred over a considerable time. Evidence suggests that the route had largely fallen out of regular vehicular use by the mid-1900s and it is likely that once surrounding roads were improved and surfaced in the early to mid-1900s they became the preferred routes.
- 48. In pursuing its highway duties Wiltshire Council has regard to environmental law and considers the impacts of its actions on the environment. Its duty to maintain only extends to the use given by the local traffic of the area and hence management is unlikely to lead to significant changes to the route.
- 49. However, the Council's duty to record the route in the definitive map and statement is being considered here and matters relating to the environment, or unlawful use, are irrelevant to the confirmation of the Order.
- 50. There is a substantial amount of historical evidence supporting this route being a public vehicular highway, albeit with a right for mechanically propelled vehicles being extinguished by s.67 of the Natural Environment and Rights of Way Act 2006.
- 51. It is correct to record the historical width of the route and an error exists in the Order relating to the affected length of Mildenhall 16 (length F to G) "Axford Lane". Wiltshire Council cannot alter the Order and accordingly a recommendation has to be made to the SoSEFRA to modify the Order.
- 52. The most accurate early survey of Axford Lane is likely to be the Ordnance Survey County Series 1:2500 Sheet 29.15 survey of 1879 and 1885 (printed in 1886) and accordingly the width of the section F to G bounded by solid lines should be recorded as that delineated by the solid lines indicating the hedge or fence line defining the highway. This is an approach accepted by SoSEFRA to record a section of highway where the width alters (in this case between approximately 4.7 metres and 6.0 metres). For that section F to G where it was not recorded between two solid lines in the 1886 Edition the width of highway maintainable at public expense is as shown in Wiltshire Council's highway record coloured brown shall apply. Please refer to **Appendices D and E** for these documents.

Proposal

53. That THE WILTSHIRE COUNCIL RAMSBURY 9B, 44, 71 & 72 AND MILDENHALL 16 DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2023 is confirmed with the Order modified as follows with regards to widths:

Part 1 of Schedule:

Mildenhall 16 (part) "Width from F to G where bounded by two solid lines and ranging from 4.7 metres to 6.0 metres on the Ordnance Survey County Series 1:2500 map Sheet 29.15 printed in 1886 additionally where not bounded by solid lines on both sides width to be defined by the brown track colouring in Wiltshire Council's highway record.

Part 2 of Schedule:

Mildenhall 16 Width modified to "Width 0.3 to 2.4 metres except for Restricted Byway Section where ranging from 4.7 metres to 6.0 metres as delineated by two solid lines on the Ordnance Survey County Series 1:2500 map Sheet 29.15 printed in 1886 and where not bounded by two solid lines as defined by the brown track colouring in Wiltshire Council's highway record".

Samantha Howell
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Report Author:

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Definitive Map and Highway Records Manager, Rights of Way and Countryside

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

None

Appendices:

Appendix A	Order
Appendix B	Decision Report and Appendices B.A and B.B
Appendix C	Objections and representation to the Order
Appendix D	Extract from Wiltshire Council highway record showing brown track colouring
Appendix E	Extract from Ordnance Survey 1:2500 Sheet 29.15 Printing of 1886