

SOUTHERN AREA PLANNING COMMITTEE

11 January 2024

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

**THE WILTSHIRE COUNCIL WINTERSLOW PATH No. 94 RIGHTS OF WAY
MODIFICATION ORDER 2023**

Purpose of Report

1. To:
 - (i) Consider three duly made objections to the above Order to record a width in the definitive map and statement for byway open to all traffic Winterslow 94 (Back Drove).
 - (ii) Recommend that Wiltshire Council supports the confirmation of the Order when, in the event the objections are not withdrawn, the Order is submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.

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 there is a discovery of evidence shows it is in error (s.53(2) of the 1981 Act).
5. Common law provides that the discovery of evidence relates to ‘new’ evidence, that is, evidence not previously considered in the recording of the right of way in the definitive map and statement. Upon the discovery of ‘new’ evidence the Council is entitled to re-examine previously considered evidence. The

consideration of evidence by officers has been carried out with full consultation of the parish council, adjoining residents and user groups and the Order has been advertised and circulated with due regard to the requirements of the 1981 Act.

6. WSLO94, Back Drove, was recorded in the Salisbury and Wilton Definitive Map and Statement dated 1952 as a bridleway with a recorded width of 10 feet (3.04 metres). It was reclassified as a byway open to all traffic (BOAT) at the Second and Special Review in 1972 (being determined at Inquiry by the Planning Inspectorate ten years later). The character of the route is of a worn earth and stone or partly surfaced track leading within a greater fenced width. Despite supporting a greater width at the inquiry in 1982, Wiltshire Council had not specifically proposed a definitive statement change to the width at the Second and Special Review and accordingly the Inspector found against the Council and other objectors on this point. The recording of the status of the route as a BOAT had not been objected to at that time and has not been objected to with this Order.
7. The route is also recorded in Wiltshire Council's highway record as a highway maintainable at public expense leading between the greater fenced width. It was handed over to Wiltshire County Council as such when rural roads were handed over by the Rural District Council in 1929/1930 as a result of the Local Government Act 1929. The Highway Record forms part of Wiltshire Council's List of Streets held under s.36 Highways Act 1980. The basemap for this record is at a smaller scale (1:10560) to the order plan at **Appendix A** (1:2500) but records the width of the highway extending between fenced boundaries in a similar manner to this Order.
8. Recording of WSLO94 Back Drove has been unchanged since the Second and Special Review for the definitive map and statement date 1972 and since 1929 for the highway record, but recent planning applications within the greater fenced width caused officers of the Council to consult both large scale Ordnance Survey mapping and more significantly, the Inland Revenue's Finance Act 1909/1910 records. The Inland Revenue records support the highway as being a public highway extending between a greater fenced width (i.e., more than 10 feet).
9. The Inland Revenue's Finance Act 1909/1910 records were not available to officers during the 1972 Second and Special Review process (or the subsequent Inquiry in 1982) and therefore constitute 'new' evidence with the act of discovery being triggered by investigation related to the planning applications. Officers consider the first occasion that Wiltshire Council relied upon Finance Act 1909/1910 plans for a definitive map case was in 1986, the plans being regularly consulted after that date.
10. Additional evidence relating to Sales Particulars from the early 20th century have also been recently discovered and considered to be relevant.
11. The case officer's report appended hereto at **Appendix B** considers both new evidence and previously considered evidence for the purpose of deciding whether, on the balance of probability, a public right exists over a width greater than 10 feet.

12. The matter of the highway extending between fenced boundaries is supported in the most part by the extent of the registered titles of adjoining properties. The majority of these exclude the full width of Back Drove as recorded by the Inland Revenue in 1909/1910, an exclusion likely to indicate that Back Drove was held by or on behalf of a rating authority. This being further supported by the recording of the full width of the route as a highway when local authority maintenance liability was recorded in 1929.
13. Earlier government records dating from 1841 in the form of the tithe survey arising out of the Tithe Commutation Act 1841 in the parish of Winterslow support that a wide highway existed at this time, coloured in the same manner is the connecting road network and significantly in the same manner as the adjoining highway (PIFA31 now also a BOAT) which was awarded by Act of Parliament at a width of 30 feet in the parish of Pitton.
14. In addition to the support given by documents from the neighbouring parish of Pitton and Farley that Back Drove (WSLO94) formed part of a route to Winterslow, sales particulars arising from the sale of the Winterslow Estate in 1902 demonstrate that Back Drove was excluded from the sale of the neighbouring properties and land. This is in turn supported by the continued exclusion from the registered titles today (with the exception of a workshop building in the middle of the Drove first found shown on maps dating from a survey by the Ordnance Survey in 1874).

Full details of the relevant law and historical evidence can be found within **Appendix B.**

Main Considerations for the Council

15. Orders made pursuant to the Council's duty under s.53 of the Wildlife and Countryside Act 1981 are evidence based. The evidence must show that, on the balance of probabilities, i.e., that it is more likely than not, the definitive map and statement need changing. The legal maxim of 'once a highway, always a highway' applies where no evidence exists that a highway has been stopped up or extinguished.
16. Matters such as desirability, need, health and safety, safeguarding, environmental concerns or risk may not be considered in determining the Order though they may be relevant considerations of the management of the highway once recorded in the definitive map and statement.
17. Wiltshire Council may not itself confirm an Order where there are outstanding objections. It is irrelevant at this stage whether the objections are relevant or not; where they are not withdrawn the Order must be sent to the Secretary of State for Environment, Food and Rural Affairs for determination.

Consideration of the Objections

18. **Objection No. 1** Jeanette Soloman 14 September 2023

"Good morning,

I am wondering why there is a need to widen this stretch of back drove, as this is used for walkers, horse riders and farm vehicles. I am concerned if it is also going to be levelled out, as this would encourage bike riders to speed up and down, which would be very dangerous for us. I have already experienced bike riders and a car which got stuck on the drove. I would appreciate more information as to why this is going ahead. Please except this as my objection to any changes to Back Drove Winterslow”

19. Officer’s comment: A copy of the Decision Report (**Appendix B**) was sent to Mrs Soloman. It was further explained that the Order is based on historical evidence being discovered by Wiltshire Council. The Council has no known intention of improving the surface of Back Drove or of doing any additional levelling works and currently no enforcement of the greater width, where not available, is scheduled or envisaged. It is noteworthy, but not relevant to this Order that The Drove is subject to planning permission which has been granted for the development of additional residential dwellings both beside and within the historic width of the Drove and it is inevitable that traffic flow will increase. The developer has applied to have relevant parts of the Drove extinguished to facilitate the permitted development. Officers have no objection to this application, but note that, this entirely separate process, has yet to be finalised. It is further noted (and observed in the planning consent) that the character of Back Drove is one of a track with verges.

20. **Objection No. 2** Michael Wood of ET Landnet Ltd on behalf of Mr N Northeast 17 October 2023

“Whilst we await determination of the extinguishment of any highway rights under the Town and Country Planning Act 1990, my client has instructed me to object to the above referenced DMMO on the grounds that the evidence does not show to the required standard that a right of way extends to the areas beyond the boundaries of the current BOAT. The historic mapping shows that buildings have been located upon the land at a time when any highway rights were being determined and this is inconsistent with the acquisition or grant of any highway rights.

Without prejudice to the foregoing, subject to the successful TCPA application then this objection which is to protect my client in the event that an extinguishment is not achieved, will be withdrawn.”

21. Officer’s comment: This objector owns the workshop that is situated within Back Drove and maintains that the workshop pre-dates the public highway and accordingly is not within the extent of the public highway. Officers have noted that the large-scale tithe map produced in 1841 for purposes of taxation by the Tithe Commission did not record a building within the extent of the highway and nor do earlier larger scale maps (notably the 1807/1808 Ordnance Survey’s two inch to one mile drawing and the 1817 one inch to one mile map). The first appearance of a building in the Drove was in the 1874 Ordnance Survey 25 inch to one mile map when a small building was recorded on the site of the now larger workshop.

22. Buildings were shown in other locations on the early Ordnance Survey maps and also on the 1841 Tithe Map (including some within the highway in nearby Pitton)

and it is not considered to be a conflict of scale that did not reveal a building within Back Drove before 1874. Officers have requested from the objector evidence of the workshop building being of an earlier date than 1874 but none has been forthcoming to the date of this report.

23. **Objection No. 3** Colin Burrows 20 October 2023

“Further to recent email exchanges I have discussed with those affected your email regarding the 1901 map and the 'Brown Track Map ' supplied.

Your email advises that

*If a Highway search is made **before** the Modification Order is consolidated the Brown Track Map will re referred to*

*If a Highway search is made **after** the Modification Order is consolidated the 1901 map with shaded WSL094 will be referred to, albeit some areas of the highway affect buildings and gardens*

*In view of this I have authority from present owners of the following properties to **OBJECT** to the Modification Order*

The objection can be withdrawn if the 'Brown Track Map ' prepared by Wiltshire Council is to be the relevant document.

The properties affected are

*Kingsdown
Horse Shoe House
Hillberry
Stone Banks
Beecham House [previously Tregonia]
Lindum
Peacehaven [previously Church Hill House]*

Regarding Peacehaven this objection relates to a triangular section of highway shown on the 'Brown Track Map' to the North West of the gateway onto the Drove. If this is considered de minimis, confirmation from Wiltshire Council will be required to this effect and that no action would be taken to reclaim this area or seek restitution.

There is no wish to hold up clarification of the ' Highway ' aspect of Back Drove but there is alarm at the area shown on the 1901 map and the affect on the properties should this become the modified plan.

Please confirm receipt of this email within the time limit and if we can meet to resolve this matter please advise when available.

24. Officer’s Comments: Mr Burrows is acting for himself and also on behalf of some residents with properties adjacent to Back Drove. Their concern is that parts of the properties they hold registered title to overlap with parts of the Order

route coloured brown in the order plan and that accordingly parts of their properties may be seen as an encroachment on the highway.

25. In understanding the extent of any encroachment of the modern properties on the historic highway two plans have been produced and shared. Mr Burrows refers to these in his objection. The first plan overlays the extent of the brown track already recorded in the Council's highway record on top of the modern map and the second plan overlays the extent of the order plan highway boundary on top of the modern map. Both maps are produced at an enlarged scale (1:1000) to aid interpretation for the purpose of this query only. **APPENDIX C**
26. In all cases represented by Mr Burrows, where an apparent overlap between the registered title plan and the order plan exists, it is minimal and would not at this current time bring about an action by Wiltshire Council. In any event, all boundaries recorded by Land Registry, are, in this case, 'general boundaries' and are not 'defined boundaries', and it is also true that the GIS overlays are subject to tolerances (or minor errors), as are the Ordnance Survey's base maps. It is further noted that any difference in the overlay produced with the brown track on the highway record arises not from a different width of highway but from the fact that the basemap for the highway record is of a smaller scale and accordingly of lower definition and detail than the Order plan. In making the Order plan officers were entitled by law to use a scale up to 1:25000 but the more detailed scale of 1:2500 was used to reflect the plan used by the Inland Revenue for their Finance Act 1909/1910 process.
27. In the event that a search for the extent of highway at this location was made to Wiltshire Council the extent of the brown track in the highway record (basemap 1:10560) would be declared.
28. Officers understand that residents have concerns about how the boundaries of the highway affect their property and have tried to ease concerns; however, in the absence of any evidence that the width of the public highway is not as shown in either the highway record or this Order, it has not been possible to give the objector the reassurance he seeks.

Overview and Scrutiny Engagement

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

Safeguarding Considerations

30. 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

31. 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

32. 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

33. 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

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

Risk Assessment

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

Financial Implications

36. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
37. 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.
38. 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).
39. 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

40. 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.
41. 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.

42. 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

43. 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.

Reason for Proposal

44. Further to the discovery of new evidence relating to the width of WSLO94 Back Drove being, on the balance of probabilities, wider than the ten feet currently recorded in the definitive map and statement, Wiltshire Council's duty to make an Order to modify the definitive map and statement has been triggered.
45. Where an Order attracts duly made objections which are not withdrawn, the matter must be sent to the SoSEFRA through its offices of The Planning Inspectorate (PINS) for determination.
46. Determination of the Order, either by the Council or by PINS is an evidence-based process and many matters are irrelevant to that determination. This includes matters relating to risk, health and safety, the environment, desirability and need. It is important therefore that Wiltshire Council considers only historical evidence relating to the width of this highway.
47. The status of WSLO94 as a BOAT has not been disputed but the width of it as a drove at only 10 feet wide seems unlikely, it being more likely than not that the public highway was wider and extended between the fence line that is largely in place today. In fact, in many places the width of the track used today is greater than 10 feet anyway.
48. A drove is, by its very nature, a wide area that can facilitate the driving of animals. It is also not likely that a drove of 30 feet wide would have been created in the neighbouring parish of Pitton to connect to one that was only 10 feet wide in Winterslow.
49. The majority of the land that forms the Order route has no registered or traceable owner and records created by the Tithe Commissioners in 1841 and the Inland Revenue in 1909/1910 are clear that a wide highway existed at those times. The evidence presented and explored in the officer's decision report at **Appendix B** supports that, on the balance of probability, the boundaries of Back Drove were created largely as they appear today and that a public right extends between them.
50. Sales particulars dating from the early 1900s are helpful in confirming that no part of Back Drove formed any part of the neighbouring land or dwellings when

the Winterslow Estate was broken up and sold. Again, this is considered supportive of the way being a public highway, unaffected by either private rights or the sale of the estate.

51. No evidence relating to a private right for adjacent properties has been adduced (beyond 2 statutory declarations detailing use from the mid to late 1900s) and nor has any historical evidence that supports a contrary view that the route is a wide public highway.
52. The Order has been prioritised by officers as it is clear that ongoing encroachment and/or development could be detrimental to not only public rights along Back Drove but also to the registration of title in this area. It is believed that all parties will benefit from clarity on the question of the width of this highway.

Proposal

53. **That The Wiltshire Council Winterslow Path No. 94 Rights of Way Modification Order 2023 is submitted to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed as made.**

Samantha Howell

Director of Highways and Transport - Place

Report Author:

Sally Madgwick

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 and Order Plan
- Appendix B Decision Report
- Appendix C Plans showing overlays of (i) the Highway Record
(ii) this Order Plan