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**WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53**

**THE WILTSHIRE COUNCIL (PARISH OF HOLT) PATH NO.73 DEFINITIVE MAP  
AND STATEMENT MODIFICATION ORDER 2016**

**Purpose of Report**

1. To:
  - (i) Consider an objection received to the making of “The Wiltshire Council (Parish of Holt) Path No.73 Definitive Map and Statement Modification Order 2016”, under Section 53 of the Wildlife and Countryside Act 1981.
  - (ii) Recommend that the Order be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

**Relevance to Council’s Business Plan**

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

**Background**

3. In 2014 it was brought to the attention of Wiltshire Council that the route of Footpath No.31 Holt, as recorded within the definitive map and statement of public rights of way, did not accord with the used route of the path on the ground. The used route led to the rear of the properties 22A and 22 Leigh Road on a narrow track enclosed between garden fences on the northern side and a post and wire fence with a drainage ditch to the southern side, before entering the field to join the remainder of Footpath No.31 Holt, which then joins Leigh Road to the west of the property No.23 Leigh Road. The definitive map recorded a route through the gardens of the properties 22A, 22 and 23 Leigh Road.

4. When this anomaly came to the attention of Wiltshire Council, it was not possible to divert the definitive line onto the used route or extinguish the definitive line and create the used route, as the owners of the field through which the used route passed, were unwilling to agree to the diversion or creation of a right of way upon land in their ownership, (it is not possible to divert a public right of way onto an existing highway and where the alternative route has been used by the public, as of right for a period of 20 years or more, without interruption, it may have already acquired public rights, in which case it is not possible to divert onto this route and the diversion of the path may be dealt with by making an extinguishment order over the existing route and a creation order over the used route). Therefore, an extinguishment order was made to stop up that part of the definitive line of Footpath No.31 Holt through the gardens, on the grounds that it was not needed for public use, i.e. it was not used and was unlikely to be used by members of the public. The Parish Council agreed to the extinguishment, but requested that the used line be established as a definitive path as soon as possible where the used route *“has been regarded as a right of way for in excess of thirty years and has been walked regularly during that time.”* At this time Officers of Wiltshire Council confirmed to the Parish Council that where they were in agreement with the extinguishment proposals, it was open to them to make an application to add the used route to the definitive map and statement of public rights of way, under Section 53 of the Wildlife and Countryside Act 1981, where there was evidence of public user for a period of 20 years or more, as of right and without interruption.
5. Following the extinguishment of Footpath No.31 Holt (part), Wiltshire Council is now in receipt of an application, made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the parish of Holt, between Leigh Road and Footpath No.31 Holt (i.e. the used route). The application is dated 23 April 2015 and is made by Holt Parish Council on the grounds that public footpath rights can be reasonably alleged to subsist, or subsist, over the land, based on user evidence and should be recorded within the definitive map and statement of public rights of way, as such.
6. The application is made in the correct form (as set out within Schedule 14 of the Wildlife and Countryside Act 1981) and is accompanied by eight user evidence forms with maps attached.
7. The claimed footpath is located in the parish of Holt (please see location plan at **Appendix A**) and forms a link between Leigh Road and the existing Footpath No.31 Holt, leading to the rear of properties 22A and 22 Leigh Road via an enclosed track for approximately 65 metres, before entering the adjacent field and leading generally north-west for approximately 90 metres to its junction with Footpath No.31 Holt (please see Order map attached at **Appendix B**).

8. The track is presently owned by Mr and Mrs Oakley and Mr and Mrs Arkell of Leigh Road, Holt and a short section of the track at its western end is unregistered. The field is owned by Mr and Mrs Tucker of Manor Farm, Holt.
9. Wiltshire Council undertook an initial consultation regarding the proposals on 15 September 2015 requesting further evidence/information regarding public use of the claimed route. Five landowner evidence forms were completed and two additional representations were received.
10. Following its investigation of all the available evidence, Officers of Wiltshire Council produced a decision report in which they made a recommendation to senior officers that the claimed path should be added to the definitive map and statement of public rights of way, on the grounds that a right for the public on foot can be reasonably alleged to subsist (please see decision report at **Appendix C**). Senior officers approved this recommendation on 24 May 2016.
11. Wiltshire Council subsequently made a definitive map modification order to add the claimed footpath to the definitive map and statement of public rights of way, as Footpath No.73 in the parish of Holt, on 5 July 2016 (please see definitive map modification order at **Appendix B**). Notice of the making of the Order was duly advertised, served on interested parties (including landowners) and posted on site.
12. Following the making of the Order, Wiltshire Council received one objection to the making of the Order from Mr and Mrs Tucker, as follows (please see full correspondence attached at **Appendix D**):

*“We are very disappointed that Holt Parish Council needs to pursue the Reopening of this Footpath in Leigh Road Holt.*

*We object to the Route B to C as it has never been walked on this line in our Lifetime, or my Parents.*

*This path was over Grown for many years. People found it easier and Safer to use the stile around the Corner.*

*My wife was on Holt Parish Council for Several years and we know for a fact Some of the Paths were not checked Regularly. We were never asked to clear this path when we owned the Site which the Two houses were on. We feel your letters from some Councillors very misleading and see this Dispute as Totally unnecessary.*

*We have allowed the Public to Walk more or less wherever they have wanted over our Farm for many years, especially down by the River, and behind Holt Village when we owned this land.*

*The public have nothing to gain and everything to lose for the sake of one or two.*

*We may consider an alternative Route marked D on your Plan, Subject to a meeting with yourselves anytime ASAP.”*

13. Due to the outstanding objection, the Order now falls to be determined by the Secretary of State for the Environment, Food and Rural Affairs. Members of the Committee are therefore respectfully requested to consider the objection received against the evidence already before the Council in this case and the legal tests for making a definitive map modification order, under Section 53 of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980, in order to determine whether Wiltshire Council continues to support the making of the Order and the recommendation to be attached to the Order when it is forwarded to the Secretary of State for determination.

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

14. 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. The requirements of this section of the Act and Section 31 of the Highways Act 1980, which refers to the dedication of a way as a highway presumed after public use of 20 years, are outlined at part 8 (pages 11 – 16) of the decision report attached at **Appendix C**.
15. The Order is made under Section 53(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.”*
16. Evidence is the key and therefore valid objections to the making of the Order must challenge the evidence available to the Surveying Authority. The Authority is not able to take into account other considerations, such as the suitability of the way for use by the public, environmental impacts and the need for the claimed route.

## **Comments on the Objection**

17. The objectors, Mr and Mrs Tucker, object to the route B to C over land in their ownership (please see Order plan at **Appendix B**), on the grounds that it has never been walked in Mr Tucker's lifetime, or that of his parents. However, the objectors have not provided sufficient additional evidence to support this claim and to challenge the eight user evidence forms submitted in support of the claim.
18. Mr and Mrs Tucker claim that the path was overgrown for many years and that the public found it easier and safer to use the stile around the corner. Officers are not sure which stile this refers to, but it is possible that the objectors refer to the kissing gate located at the junction of the existing Footpath No.31 Holt with Leigh Road, located immediately to the west of the property 23 Leigh Road, which is reached by continuing in a westerly direction from point A (please see Order plan at **Appendix B**), i.e. "around the corner".
19. Mrs Tucker was a Parish Councillor for several years and Mr and Mrs Tucker claim to know for a fact that some of the paths were not checked regularly and that they were never asked to clear this path when they owned the site which the two houses were built on. When Officers first viewed the path in 2014, it was accessible at that time, (i.e. within the relevant public user period of 1995-2015), however, Mr and Mrs Tuckers' recollection of the path being overgrown would accord with the annual inspection reports of the Parish Council which were sent to and held by Wiltshire Council in 2001, 2003, 2004, 2005 and 2007. The Parish Steward Work Detail Sheet for Holt, dated 28 June 2007, details Priority Programme No.3, from J Gooding as "*Opposite 49 Leigh Road – Footpath 31*" to "*Clear overgrowth around metal stile and strim path on other side as much as possible*", which would suggest that the claimed route was being cleared by the County Council at that time. There is also evidence from the Ramblers that the path was overgrown in 2005 following an inspection by Malcolm Walsh (the then West Wilts Group Footpath Secretary for the Ramblers), who inspected the path following a complaint from Judy Nickless (see paragraphs 10.16 and 10.17 of decision report attached at **Appendix C**).
20. Five of the eight witnesses refer to this path being part of the annual parish footpath survey carried out by the Parish Council, whereby all footpaths in the parish were walked by Parish Councillors and Wiltshire Council has supporting evidence that the path was walked for this purpose in 2001, 2003, 2004, 2005 and 2007, where a list of observations made by the Parish Council is submitted to Wiltshire County Council. Additionally, the Ramblers have, independently from the Parish Council, reported maintenance issues on the path to the County Council, suggesting that in 2005 the Ramblers considered the claimed route to be a public right of way maintained by the Council.

21. Mr Gooding, former Rights of Way Warden for the area, recalls that if he found the route to be obstructed by crops, he would always reinstate the County Series map line in the field; however, this does not accord with the used route (please see paragraphs 10.42. – 10.47. of decision report at **Appendix C**). Seven of the witnesses claim to have used the route as claimed, within the field, however none of the witnesses refer to crop obstruction of the route in the field and they did not change their route because of crop obstruction.
22. The frequency of use of the claimed route is as follows: about five times per year; once; twice a year; sporadically; approx eight-ten times per year; once a year; very seldom and once or twice a year and five of the witnesses refer to seeing other users whilst they themselves have been using the route. Aerial photographs of the area in 2005/06 and 2014 record the existing route of Footpath No.31 Holt, faintly on the 2005/06 photograph, but very clearly on the 2014 photograph; however, these photographs do not record a route from the point B on the order plan (please see **Appendix B**) where the claimed route enters the field at the western end of the track, leading to its junction with the existing Footpath No.31 Holt. Use of the claimed route was possibly light, but the route was signed by Wiltshire County Council with a stile at point A at its junction with Leigh Road and a stile provided at point B at its entrance to the field (please see order plan at **Appendix B**). Mr James Gooding confirms that these stiles and the waymark were present when he took up the post of Rights of Way Warden with Wiltshire County Council in around 1990. They were present for the whole of the relevant user period (i.e. 1995 – 2015) and Mr Gooding confirms that the landowner, Mr Tucker, never objected to the rights of way furniture and was aware of the footpath over his land.
23. Mr and Mrs Tucker claim to have allowed the public to walk more or less wherever they wanted over the farm for many years and consider that the public have little to gain and much to lose in pursuing this claim. In discussion with the objectors it appears that as the landowners they intend to limit public access to only the recorded public rights of way over their land, as a result of this claim. Of course, it is the landowners right to limit public access over the land to the recorded rights of way only, however, the landowners have admitted that they allowed the public to walk on the land in the past and there is no evidence before the Council to suggest that the public using the claimed route have been challenged or were doing so with the permission of the landowners. No map and statement (with subsequent declarations) under Section 31(6) of the Highways Act 1980 have been lodged with Wiltshire Council to negate the landowners' intention to dedicate further public rights of way over the land. Where the public have been allowed access to the land and the landowners have not communicated to the public their non-intention to dedicate further public rights of way over the land, this can give rise to the public acquiring rights.

24. The landowners would be willing to consider an alternative route around the field edge, from point B to the junction with Leigh Road at the existing metal kissing gate on path No.31 (please see order map at **Appendix B**) and from Officers conversations with the applicant, it is understood that path users would have no objection to an alternative route at the field edge. However, no representations were made at the initial consultation to suggest a suitable alternative route, agreeable to all, and the definitive map modification order was made, (although Wiltshire Council would still have been placed under a duty to consider the evidence and determine the application as made, where evidence is brought to the Council's attention). Where the definitive map modification order is made, it cannot simply be withdrawn or amended by the Council and where objections are received and not withdrawn, it falls to be determined by the Secretary of State, who may, after considering the evidence, confirm the order; not confirm the order or confirm the order with amendment, which may or may not require advertisement. The Secretary of State may only amend the order to record an alternative route, where there is sufficient evidence that the public have used an alternative route, (which is likely to be an advertised amendment). At this time Officers consider that the objectors have provided insufficient evidence of the use of an alternative route at the field edge, to challenge the witness evidence which is already before Wiltshire Council. Only one witness, Mr J Nibbs, claims to have used a route closer to the field edge route in addition to his use of the claimed route, but the route recorded on his witness evidence form does not quite accord with the route indicated by Mr and Mrs Tucker at the field edge.
25. In conclusion, the objectors have provided insufficient evidence within their submission (please see correspondence at **Appendix D**), to challenge the evidence already before the Council and on which grounds the definitive map modification order is made.

### **Overview and Scrutiny Engagement**

26. Rights of Way policies relating to the definitive map modification order process are included and set out within the Wiltshire Council "Wiltshire Countryside Access Improvement Plan 2015-2025", as approved by the Cabinet Member for Highways and Transport. Where a definitive map modification order application is made to add a Footpath to the Definitive Map and Statement of Public Rights of Way in the parish of Holt, it has been determined and an order made, in line with these policies, as approved by the Cabinet Member. Additionally, the definitive map modification order is not a persistent problem of local community concern, which remains unresolved. There is a statutory procedure in place to determine the order and therefore overview and scrutiny engagement is not required in this case.

### **Safeguarding Considerations**

27. Considerations relating to safeguarding anyone affected by 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.

### **Public Health Implications**

28. Considerations relating to the public health implications 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 order must be made and confirmed based on the relevant evidence alone.

### **Corporate Procurement Implications**

29. When the Order is forwarded to the Secretary of State for determination, there are a number of opportunities for expenditure to occur and these are covered at paragraphs 33 – 36 of this report.

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

30. Considerations relating to the environmental or climate change 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 order must be made and confirmed based on the relevant evidence alone.

### **Equalities Impact of the Proposal**

31. Considerations relating to the equalities 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 order must be made and confirmed based on the relevant evidence alone.

### **Risk Assessment**

32. 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 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 a complaint 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**

33. The determination of definitive map modification order applications, and the modifying of the definitive map and statement of public rights of way accordingly, are statutory duties for the Council; therefore the costs of processing such orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.
34. Where objections are received to the making of the order and not withdrawn, the order falls to be determined by the Secretary of State and cannot simply be withdrawn. The order will now be determined by an independent Inspector appointed on behalf of the Secretary of State by written representations, local hearing or local public inquiry, each of which has a financial implication for the Council.
35. Where the case is determined by written representations, the cost to the Council is £200 - £300; however, where a local hearing is held, the costs to the Council are estimated at £300 - £500. A public inquiry could cost between £1,500 and £3,000, if Wiltshire Council supports the order (i.e. where legal representation is required by the Council) and around £300 - £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).
36. Where the Council makes an order which receives objections, it may potentially be liable to pay subsequent costs if the Planning Inspectorate finds that it has acted in an unreasonable manner at the public inquiry. However, costs awards of this nature are rare, but may be in the region of up to £10,000.

## **Legal Implications**

37. Where the Council no longer supports the making of the order, clear reasons for this must be given, as the applicant may seek judicial review of the Council if this decision is seen by them to be incorrect or unjust.
38. The determination of an order, which has received objections, is made by the Secretary of State and not Wiltshire Council. Therefore, any challenge to that decision is against the Secretary of State (although the Council would be considered by the Court to be an "interested party" in any such proceedings).

## **Options Considered**

39. Members of the Committee should now consider the objection received and the evidence as a whole, in order to determine whether or not Wiltshire Council continues to support the making of the order under Section 53(2) of the Wildlife and Countryside Act 1981. The making of the order has been objected to, therefore the order must now be submitted to the Secretary of State for determination and members may determine the Wiltshire Council recommendation which is attached to the order when it is forwarded to the Secretary of State. The options available to members, having considered the available evidence and the objection received, are as follows (please note that all references to the available evidence below, now includes the submission made at the formal objection period (please see correspondence at **Appendix D**), as well as the evidence considered within the decision report dated 19 May 2016), (please note that the evidence in full is available to be viewed at Wiltshire Council's Offices at Ascot Court):
- (i) Members may resolve that Wiltshire Council continues to support the making of the order, based on its consideration of the available evidence, in which case the Committee should recommend that the order be confirmed without modification;
  - (ii) Members may resolve that Wiltshire Council continues to support the making of the order with modification based on its consideration of the available evidence, in which case the Committee should recommend that the order be confirmed with modification;
  - (iii) Members may resolve that Wiltshire Council no longer supports the making of the order, on its consideration of the available evidence, in which case the Committee should recommend that the order is not confirmed.

## **Reason for Proposal**

40. The order has been made on the grounds that there is sufficient evidence for it to be reasonably alleged that a right of way for the public on foot, subsists.
41. Following the making and advertising of the order, no further evidence has been submitted which would lead officers to change this view, please see comments on objections as set out at paragraphs 17-25 of this report.
42. At the confirmation of an order there is a more stringent test than the "reasonably alleged" test which is sufficient at the making of the order. The test is whether public rights subsist on the balance of probabilities. Officers consider that since the making of the order the objectors have provided evidence that they *"have allowed the public to walk more or less wherever*

*they wanted over our farm for many years...*” which suggests that the landowners have not contested the public walking in the field and that the public did so without permission, force or secrecy and no evidence is submitted to support the landowners non-intention to dedicate a public right of way. Officers consider that this additional evidence is sufficient to satisfy the more stringent test of the balance of probabilities, (i.e. that it is more likely than not that a public right of way has been acquired over the land).

43. The landowners, in their objection (please see correspondence at **Appendix D**), claim that the route through the field has not been used by the public, yet insufficient evidence to support this claim is submitted and there is not sufficient evidence before the Council that the public used an alternative route through the field, i.e. at the field edge.

### **Proposal**

44. That “The Wiltshire Council (Parish of Holt) Path No.73 Definitive Map and Statement Modification Order 2016”, be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the order be confirmed without modification.

### **Tracy Carter**

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Report Author:

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Rights of Way Officer

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

None

### **Appendices:**

**Appendix A** – Location Plan

**Appendix B** – “The Wiltshire Council (Parish of Holt) Path No.73 Definitive Map and Statement Modification Order 2016”

**Appendix C** – Decision Report (19 May 2016)

**Appendix D** – Correspondence received in the formal objection period