

SOUTHERN AREA PLANNING COMMITTEE

6 APRIL 2017

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

**THE WILTSHIRE COUNCIL (PARISH OF IDMISTON) PATH NO.9 DEFINITIVE MAP  
AND STATEMENT MODIFICATION ORDER 2016**

**Purpose of Report**

1. To:
  - (i) Consider objections and representations of support received following the making and advertisement of “The Wiltshire Council (Parish of Idmiston) Path No. 9 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 the 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. Wiltshire Council received an application dated 3 November 2015 and 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 Idmiston. The application is made by Mrs V Creswell on behalf of Porton Neighbourhood Plan Group, on the grounds that public footpath rights can be reasonably alleged to subsist or subsist over the claimed route, based on user evidence and should be recorded within the definitive map and statement of public rights of way, as such.
4. The claimed route is located in the village of Porton, in the parish of Idmiston, which lies to the north-east of Salisbury and the south-west of Amesbury (please see location plan at **Appendix A**). The claimed route forms a link between Porton High Street and the recreation ground, leading from its junction with the High Street in a generally north-north-westerly direction and split into three identifiable sections: (i) leading from the High Street over a grassed area for approximately 30 metres, (ii) through Bourne Close, an unadopted road with no footway, for approximately 46 metres and (iii) leading between the gardens of the properties 1A and 2 Bourne Close, to its junction with the recreation ground

via an enclosed section 6 metres in width, having a central metalled section 3.15 metres wide. There are concrete bollards at the southern end of the section between the gardens to prevent vehicular access to the recreation ground, with a litter bin provided at this point. Please see Order plan included at **Appendix C**.

5. The southern section of the route, laid to grass, is privately owned by Mr A Jones and the route through Bourne Close is over an area of unregistered land, which forms the Bourne Close roadway (including the section of the route between the gardens). This roadway is not publicly maintainable and officers consider that the common law belief that adjoining property owners own the land to the centre of the track, is likely to apply here and the road is therefore in the joint ownership/maintenance of the residents of Bourne Close to enable them to access their properties (including with vehicles). There are presently no recorded public rights over Bourne Close or the grass area and therefore members of the public cannot rely on public rights over this land to access the recreation ground.
6. The land in the ownership of Mr Jones, the grassed area A-B on the order plan (attached at **Appendix C**), has been the subject of three planning applications, as follows:
  - (i) 14/10638/FUL – Application registered 14/11/14 to erect new three bed detached dwelling – withdrawn.
  - (ii) 15/04079/FUL – Application registered 13/05/15, proposed two bed bungalow – withdrawn.
  - (iii) 15/10963/FUL – Application registered 08/01/16, proposed bungalow (resubmission of 15/04079/FUL). Refused 29/02/16 on the grounds of the footpath application and the adverse effect on the setting of the adjacent listed building Rose Cottage and the character and appearance of the conservation area.
7. Wiltshire Council commenced an initial consultation regarding the proposals to add a public footpath to the definitive map and statement of public rights of way in the parish of Idmiston, on 29 December 2015. The objections and representations received are summarised at Appendix 1 of the decision report attached at **Appendix B**.
8. Following its investigation of the available evidence, officers of Wiltshire Council produced a decision report in which a recommendation was made to senior officers that a footpath 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 B**). Senior officers approved this recommendation on 17 November 2016.
9. 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. 9 Idmiston (please see definitive map modification order at **Appendix C**). Notice of the making of the Order was duly advertised, served on interested parties (including landowners) and posted on site.

10. Following the making of the Order, Wiltshire Council received 23 objections to the making of the Order and 5 representations of support, as follows:

**Objections:**

- (1) Mr Steve Ayling – Correspondence dated 16 January 2017
- (2) Mrs Sue Ayling - Correspondence dated 16 January 2017
- (3) Mr and Mrs W Baker – Correspondence dated 29 December 2016
- (4) Mr Paul Chivers – E-mail correspondence dated 12 January 2017
- (5) Gess Cuthbert – E-mail correspondence dated 17 January 2017
- (6) Mr M Dawson – E-mail correspondence dated 7 January 2017
- (7) Mr Steven Duffin – E-mail correspondence dated 23 January 2017
- (8) Mr R Gould – E-mail correspondence dated 22 January 2017
- (9) Mr Richard Green and Mrs Gillian Green – E-mail correspondence dated 7 January 2017
- (10) Mr Roly Grimshaw – Correspondence dated 16 January 2017
- (11) Mr Owen Harry – E-mail correspondence dated 16 January 2017
- (12) Sally Harry – E-mail correspondence dated 17 January 2017
- (13) Mr Dudley Humphreys – E-mail correspondence dated 16 January 2017
- (14) Idmiston Parish Council – E-mail correspondence dated 17 December 2016
- (15) Mr Mark Jones – Correspondence dated 23 January 2017
- (16) Mr C Joy – Correspondence dated 15 January 2017
- (17) Mr and Mrs Maher – Correspondence dated 13 January 2017
- (18) Mrs Pope – E-mail correspondence dated 12 December 2016
- (19) Mrs Janet Slater – E-mail correspondence dated 20 January 2017
- (20) Mr G Thomas – E-mail correspondence dated 12 January 2017
- (21) Mr Andrew Tidd – Correspondence dated 23 January 2017
- (22) Mrs Jan Tidd – Correspondence dated 23 January 2017
- (23) Mrs B Tooze – E-mail correspondence dated 15 January 2017

**Representations of Support:**

- (1) Mr Mark Adams – Correspondence dated 15 January 2017
  - (2) Dr Patricia Appleyard – E-mail correspondence dated 23 January 2017
  - (3) Mr K Bradley – E-mail correspondence dated 17 December 2016
  - (4) Dr Matthew Brookes – Undated correspondence received within the formal objection period (acknowledged by Wiltshire Council 11 January 2017)
  - (5) Mr D Creswell – Correspondence dated 2 January 2017
11. The objections and representations are included in full at **Appendix D** and officers' comments on the objections are set out at paragraphs 17 to 54 of this report.
12. Due to the objections outstanding, the Order now falls to be determined by the Secretary of State for the Environment, Food and Rural Affairs. Members of the Committee are requested to consider (i) the objections and representations received in response to the making of the order, (ii) the evidence already before the Council in this case, and (iii) the legal tests for making a definitive map and statement modification order, under Section 53 of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980, in order to determine the Wiltshire Council recommendation to be attached to the Order when it is forwarded to the Secretary of State for decision.

## **Main Considerations for the Council**

13. 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 user of 20 years, are outlined at part 8 (pages 10-15) of the decision report attached at **Appendix B**.
14. 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.”*
15. 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.”*
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 Objections**

### **No evidence of use of the grass area and a footpath cannot be reasonably assumed to subsist when there is no evidence of it:**

17. Gess Cuthbert states that whilst serving two separate periods on the Parish Council, on both occasions involved with the Amenities Committee which dealt with footpaths in the parish, *“the footpaths would be walked once a year by members of the committee and I have no recollection of the area in question being used as a footpath.”*

Mr and Mrs Maher state that in 7 years of living in Bourne Close, *“...we rarely saw anyone walk across path A to B, you’d occasionally see a child or dog take a short cut but never adults.”*

Additionally, 7 objectors claim to have accessed the recreation ground via the Bourne Close roadway and state that during their use they never saw anyone using the route across the grass.

18. This evidence must be viewed on balance with the 27 user evidence forms already before the Council, 26 of which outline the individual witness' use of the claimed route over the grass and through Bourne Close.
19. The Council cannot take into account the number of objections but must consider the evidence contained within those objections against the evidence contained within the representations of support and the evidence already before the Council, as outlined within the decision report attached at **Appendix B**. 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 based on a reasonable allegation that a right of way for the public on foot subsists, which is a lower test than the balance of probabilities. Where there is no incontrovertible evidence against this, it is in the public interest for a local authority to support the Order.
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 maps 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 with 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 the Idmiston case, where there are 27 completed user evidence forms, it suggests that the making of a definitive map modification order is 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 foot subsists. Where the objectors have not submitted incontrovertible evidence to defeat that reasonable allegation, the Committee should recommend to the Secretary of State that the Order be confirmed without modification. 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.

**Footpath claimed to block planning applications, also preventing a much needed affordable house being provided in the area:**

25. The landowner Mr Mark Jones states that the application to add a footpath was submitted by Mrs Creswell who is also leading a group of objectors to the planning application. He notes that no one submitted a footpath application before the planning application was known. Many of the witnesses are also objectors to the planning application and are aware that the implementation of a footpath will reduce the size of the plot sufficiently to prevent a house being built. Mr Jones suggests that the credibility of witnesses must therefore be brought into question.

Mrs Pope, who through Pope Plan and Build has provided architectural services and is representing Mr Jones in the planning process, states that *“the footpath application will not stop my client from applying for an application as the proposed dwelling can still fit on the land (slightly shifted towards Bourne Close) even if the footpath gets a go ahead, and vice versa if the footpath gets turned down that doesn’t necessarily mean that my client will get the permission to build.”*

Mr Geoff Thomas points out that *“at present there are more planning issues affecting his ability to gain planning permission than just the alleged footpath on his land.”*

*“The fact that there was a planning application to erect a 2 bedroom property on the site is highly relevant to this application but the Council does not appear to have taken this into consideration when assessing the quality and reliability of the evidence submitted”*

Mr Thomas also notes that the evidence in this case is *“...mainly written evidence from 27 users, of whom roughly half have previously objected to the planning applications.”*

Mr Thomas also points out that at the time of the first planning application, (for a three bedroom dwelling) and second planning application, (for a two bed bungalow), the objection letters make little reference to a footpath over Mr Jones' land, however by the third application objectors are referring to use of the land as a footpath.

26. Once Wiltshire Council receives an application to add a public right of way, it has a statutory duty to investigate and determine the application. As part of its investigations the Council may consider only the evidence before it. Whatever the motives of the applicant, the Council is in receipt of 27 witness evidence forms, which provide evidence of use of the claimed route over the grassed area and through Bourne Close for a period beginning in 1960, before the recent planning applications were submitted for this site.
27. Although planning issues are not relevant to the decision to make a definitive map modification order, it is noted that the claimed footpath is not the only reason for the refusal of the planning application to build a bungalow on the site, 15/10963/FUL. The application was also refused on the grounds that the proposal would have an adverse effect upon the setting of the adjacent listed building, Rose Cottage, and the character and appearance of the conservation area with no public benefits arising from the proposal which would outweigh this harm. The Council pointed out that it has a supply of specific deliverable sites sufficient to provide five years worth of housing against the housing requirements, the provision of housing is therefore not a material consideration which outweighs the adverse effects upon the listed building and the conservation area.

**The route A-C along the Bourne Close road without crossing Mr Jones' land is the obvious route:**

28. Mr and Mrs Baker state *“While out walking our dogs, we would always use the roadway of Bourne Close to go to the park, as many other people do...”*

Gess Cuthbert states *“I have lived in the village for over thirty-four years in that time [I] have walked my daughters and latterly my grandchildren from the High Street to the playing fields using the road through Bourne Close, especially pushing a pushchair never using the grassed area, in fact, I cannot recall seeing anybody else using it.”*

Mr Steven Duffin states *“I often visit the play park with my son and until now have always used the tarmac road on Bourne Close to gain access to the park, which quite clearly is a better option than walking across wet grass. It is obvious to me that I am not the only local resident with this view as I can't remember ever seeing anyone else not using the tarmac road for access.”*

Mr Roy Gould as a member of Idmiston Parish Council for 50 years states that *“During this period I have made countless visits to Porton Play Park (PPP) via the Bourne Close entrance in order to carry out hundreds of inspection and maintenance tasks in my role as parish councillor. Also, accompanying my children and later their children on twice weekly visits to the park. Throughout the 62 years I have lived in the parish of Idmiston, I have never ever witnessed any trespassers on the land at the junction of High Street and Bourne Close now belonging to Mr Mark Jones...The road linking PPP with the High Street, i.e. Bourne Close, is unrestricted to pedestrians and cyclists.”*

Mr and Mrs Green state *“There is certainly evidence available that many non residents of Bourne Close (including ourselves) have walked on the roadway from the High Street to the recreation ground during the period between when Bourne Close was built and the present day and this is the usual route taken, not the route across the privately owned piece of grass.”*

Mr R Grimshaw *“I live in Porton, with my wife and disabled mother-in-law. We walk our dogs daily and often access the playground from the High Street. We would not dream of crossing the usually damp and messy patch...”*

Mr Owen Harry writes *“Myself and my family regularly walk in this area and have done so for many years now and see no issue using the tarmac road for this route, using the grassland as the path seems completely unnecessary.”*

Sally Harry writes *“I regularly walk in this area with my granddaughter on our way to the recreation ground and have no issue with the current route. I consider a footpath on the grassland at that point unnecessary...”*

Mr D Humphreys states *“I am a resident of Porton and have lived in the village since 1998. During this time, I have used the footpath to and from the park. The majority of people that I have observed, over the various date and times, like me, have used the tarmac road rather than use the grass triangle.”*

The landowner Mr Mark Jones suggests that *“There is a perfectly good level and safe route for pedestrians from A to C on the little used tarmac road.”*

Mr C Joy writes *“My brother and I walk to the local shop everyday. We regularly continue up the High Street, walk into Bourne Close on the tarmac road through the park and back home. We have lived in this village over 70 years and do not see any point having a footpath over the grass area when there is a perfectly good tarmac road to use.”*

Mr and Mrs Maher state that part of the *“Path A to B is across private land and there is already a tarmac path in the same direction next to it that is already used constantly. Path B to C has always been used as a route to the park anyway.”*

Mrs Slater states that *“Anyone wishing to access Porton playing field from the High Street would normally walk on the nearby tarmac roadway...I have lived in the village, close to the area concerned for nearly 40 years and have never understood there to be a footpath over this green area, and have always walked on the tarmac.”*



Mr and Mrs Tidd state that they always walked their dogs *“through the playing field by the entrance on Winterslow road and then through and out down Bourne Close. We have never walked on the grass verge as it does not join the pathway to the playing field and it is a very very quiet road with hardly any traffic movements, except for access to the houses, therefore there was no necessity to walk anywhere other than on the roadway.”* To their knowledge and recollections, they have never seen anyone walking along the grass and everyone that they are aware of uses the roadway.

Mrs Barbara Tooze considers the order route to be in the wrong place where *“People walk to the recreation ground along the roadway of Bourne Close from the High St...perhaps the order should place the footpath along the route taken by so many people, including myself in the past, and follow the line of the roadway rather than across the piece of open land.”*

29. There may be evidence that the public used a route over the tarmac route of Bourne Close, and there is certainly evidence of this provided by the objectors. However, this must also be balanced against the 27 witness evidence forms provided from users of the grass area and it is significant that witnesses refer to their use being brought into question by the erection of a fence around the land in March 2015. The application for the addition of a footpath followed in November 2015, after the public were physically prevented from using the order route. If users had not been using the grass area, but were using the roadway instead, the claim may not have occurred where public use of a route on the roadway, was not brought into question.
30. Supporters of the application suggest that path users walked the grass area as a safer alternative to the Bourne Close roadway. Mr Mark Adams, in his representation of support, advises that *“Until March 2015, this land has not been fenced off for more than 25 years, and has been used by village residents and children for walking dogs and specifically for safe access to the recreation ground in Bourne Close. The shape of the Close produces a blind corner and, as there is no pavement, this puts pedestrians, especially children, at risk from oncoming traffic in either direction. As such access across this small parcel of land has been treated by default as a ‘right of way’ and has become a community asset, which helps justify formal establishment of a public right of way.”*
31. Mr Ken Bradley used the order route as an access to the playing field, avoiding the busy Winterslow Road. In his representation of support he states that *“During the time I have lived in Porton I have used this footpath myself and also been aware of others using it for the purpose of gaining access to the playing field, walking dogs or using it as an alternative to the path running alongside the main road (Winterslow Road). You will be aware that Winterslow Road carries a high volume of traffic including heavy vehicles and buses. When these pass each other, and due to the width of the road, they are very close to the associated pavement with their wing mirrors overhanging the pavement risking injury to pedestrians.  
The value of this footpath is that it provides a safe passage for children on their way to the playing field away from the dangers of the busy Winterslow Road.”*

**What Law or Byelaw allows a Council to confiscate land from a private landowner without any definitive reasons and without the use of compulsory purchase:**

32. Section 53 of the Wildlife and Countryside Act 1981 allows any party to make an application to amend the definitive map and statement of public rights of way, in this case adding a footpath. It also places the Council under a duty to investigate and determine the application and where it fails to do so, the Council is liable to complaints, potentially leading to a complaint to the Local Government Ombudsman. Ultimately, a request for judicial review could be made with significant costs against the Council where it is found to have acted unlawfully.

**The route A-B (the grass area) is over private land:**

33. All recorded public rights of way are public rights over private land (unless the land is unregistered).
34. There are presently no recorded public rights of way over Bourne Close and therefore no public right of access from the High Street to the recreation ground via the Bourne Close roadway.
35. When the land registry index map is examined it shows that the Bourne Close roadway does not have a title number and appears to be unregistered land, however it is assumed that the common law position applies whereby adjoining property owners (in Bourne Close) are said to own to the centre point of the road and are jointly responsible for maintaining the road in order to access their properties, including with vehicles. It has been suggested by two of the objectors that the Parish Council owns and maintains this road as an access to the recreation ground, Officers have requested further evidence of this from the Parish Council, but no evidence of this has been forthcoming.

**The application and the investigation and determination of the application is a waste of taxpayers money:**

36. Where a definitive map modification order application is made, the Council is placed under a statutory duty to investigate and determine the application. Where the Council fails to make a decision within 12 months of the application the applicant may apply to the Secretary of State for the Authority to be given a deadline for determination of the application.

**Mr Jones has owned the land for 12 years and during that time nobody has previously applied for a footpath across it:**

37. Claims to add public rights of way are usually not made until the right of the public to use the way is brought into question. Officers consider it quite reasonable that the public would continue to use this route without a claim being made until the fence was erected around the whole of the grassed area in March 2015, which physically prevented the public from using the route at this time. The application is dated 3 November 2015 which presents a reasonable time between the physical obstruction of the claimed route and the application being made, including the gathering of evidence from witnesses. The witnesses and the landowner do not make any reference to an earlier action by the landowner to prevent the public using the route which would have brought public use of the

right of way into question. If Mr Jones, as the landowner, had taken action prior to 2015 to prevent public use of the claimed route, we may have received an application to add a footpath at that time.

**Only a few local houses opposite stand to benefit:**

38. Where a public right of way is added to the definitive map and statement of public rights of way, the public as a whole stand to benefit and at present there are no recorded public rights of way to access the recreation ground through Bourne Close.

**No need for the path:**

39. Mr M Dawson states *“it would save only 10 metres maximum in walking distance it obviously is not needed.”* and points out that if the footpath were installed *“the land would be fenced off and a fenced walkway for the footpath created with a stile at either end who is ever going to use it nobody”*

Others have pointed out that there is a suitable alternative route available on the Bourne Close roadway.

Mr R Grimshaw objects to the application, the principal reason being the lack of disabled access, and suggests that a route wholly on the Bourne Close tarmaced road area would be accessible.

40. The “need” for the path is not a matter which the Council may consider in its determination of the application. It may only consider the available evidence of use and any documentary evidence, although it is useful supporting evidence to know where users were going and how and why they used the path. The Council must consider the evidence before it, rather than the need for the claimed route, for example where there is a suitable alternative route.
41. There are no recorded public rights over the Bourne Close roadway and if the footpath were added to the definitive map and statement of public rights of way and subsequently fenced out of the field, stiles could not be included where they are not present on the claimed route; it is not the policy of Wiltshire Council to provide stiles which are the most restrictive access option for public rights of way (pedestrian gates being less restrictive and a gap being the least restrictive) and gates on a public right of way may only be authorised where they are necessary for the purposes of stock control.
42. In his letter of support Dr Matthew Brookes states that *“Cllr Mike Hewitt...appears to be ignorant of the fact that Bourne Close is a Private Road. Therefore his comment that there is ‘no justification’ for formalizing the access to the playpark because there is access via the road (Bourne Close) is incorrect; both ‘A to B’ and ‘walking a short distance along the road’ are ‘over private land’, and clarification of a Right of Way is therefore desirable. His suggestion that walkers use the road in preference to the ‘A to B’ route puts walkers, particularly children, at risk from traffic at the junction because there is no pavement on the Private Road...We have three young children and have found traffic turning into and out of Bourne Close a hazard because of the lack of pavement. The fact that*

*the junction is not busy actually increases the risk because it reduces both driver and pedestrian vigilance.”*

43. In his letter of support, Mr David Creswell states that *“Such a right of way will give the public a right of access to the Recreation Ground from the High Street without being dependent upon the good offices of the owners of Bourne Close, a private road. The new path will considerably enhance the safety of pedestrians seeking access to the Recreation Ground form the High Street by separating them from the road traffic on Bourne Close.”*

**It would seem that rights of way officers are working with the Neighbourhood Planning Group and are trying to use their powers incorrectly, working outside their remit:**

44. Officers have assessed the evidence in this case independently and case law within the Norton and Bagshaw judgement would suggest that Wiltshire Council was correct to make the Idmiston Footpath No. 9 definitive map modification order. The Council is not working outside its remit as once an application to amend the definitive map and statement of public rights of way is received, the Council is placed under a duty to investigate and determine the application and where it fails to do so it is liable to challenge with associated costs against the Council.

**Incorrect right of representation:**

45. Mr Mark Jones notes that the decision report states that the application *“is made by Mrs Creswell on behalf of Porton Neighbourhood Plan Group”*. *The Neighbourhood Plan is in draft form only and has not been ratified by Idmiston Parish Council and this group is not a representative body, it is misleading to make that claim.”*
46. The application to Wiltshire Council is made by the “Porton Neighbourhood Plan Group”, this cannot now be amended by Wiltshire Council. Wiltshire Council has subsequently received a letter of objection from Idmiston Parish Council. The Council is only entitled to consider the evidence before it and the applications submission in the name of the “Neighbourhood Plan Group” is not a material factor in the determination of the application.

**Inaccurate witness statements:**

47. The landowner claims that the witness statements are in many cases blatantly inaccurate and need to be verified before a decision is taken. Where there is dispute within the evidence the Order will be forwarded to the Secretary of State, for determination. In a witness evidence case, it is likely to be determined by an Inspector appointed on behalf of the Secretary of State holding a local public inquiry, at which all parties will have opportunity to give their evidence. The evidence will then be tested through cross-examination, which will highlight areas of inaccuracy within the evidence.

### **The Parish Council has objected:**

48. Idmiston Parish Council has objected on the grounds that it believes the application to modify the definitive map is unnecessary and stating *“Section B to C on the proposed definitive map modification order has long been under the jurisdiction of Idmiston Parish Council, as a recognised way of entering Porton Playing Fields. There would be no objection to this section becoming a public footpath, although the change is felt to be unnecessary. In contrast, the proposed Section A to B is over a piece of privately owned grassland which provides little or no advantage to pedestrians over the existing access via the tarmac part of Bourne Close. Making section A-B part of the definitive footpath map would disadvantage the landowner and provide no sensible advantage to parishioners.”*
49. Mr Andrew Tidd was Chair of Idmiston Parish Council from April 2008 – May 2012, he had also worked as a Parish Councillor for over six years and it was his understanding that the Bourne Close roadway belonged to the Parish Council and it was the Parish Council’s responsibility to maintain it. Mrs Jan Tidd, who was Chair from May 2012 to July 2014 and Parish Councillor for over six years, also held this view.
50. No evidence that the Parish Council owns or maintains the Bourne Close roadway has been received by the Council and there are no recorded public rights of way over Bourne Close to access the recreation ground, not even over the section which the Parish Council claims to own and maintain.
51. Whilst the Parish Council does object to the application, this must be balanced against the evidence already before the Council in the form of 27 completed witness evidence forms.

### **Conclusion:**

52. In conclusion, the Order has been made on a reasonable allegation that a right of way for the public on foot, subsists over the land in question and this is a lower test than the balance of probabilities. Where the objections offer no incontrovertible evidence against this, it is in the public interest for a local authority to support the Order.
53. Members of the Committee should now consider the objections and representations 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 decision and Members of the Committee are required to determine the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State.
54. Please note that all references to the available evidence, now include the submissions made at the formal objection period (please see correspondence at **Appendix D**), as well as the evidence considered within the decision report dated 22 June 2016, (included at **Appendix B**). Members should note that the evidence in full is available to be viewed at Wiltshire Council’s Offices at Ascot Court, Trowbridge.

## **Overview and Scrutiny Engagement**

55. 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**

56. 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**

57. 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**

58. Where an Order is forwarded to the Secretary of State for determination, there are a number of opportunities for expenditure to occur and these are considered at paragraphs 62-65 of this report.

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

59. 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**

60. 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**

61. 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 Local Government 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**

62. 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.
63. 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.
64. 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).
65. Where the Council makes an Order in respect of which it 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**

66. Where the Council no longer supports the making of the Order, clear evidential reasons for this must be given, as the applicant may seek judicial review of the Council's decision if this is seen by them to be incorrect or unjust.
67. The determination of an Order, in respect of which the Council 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**

68. The options are:
  - (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 with clear evidential reasons given for this resolution.

### **Reason for Proposal**

- 69. 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.
- 70. Officers have fully considered the evidence submitted within the objections; however, where the Order has been made based on a reasonable allegation, nothing within the objections causes officers to consider that the Order has been incorrectly made (particularly where the Norton and Bagshaw judgement is applied), or that the order is incapable of confirmation.
- 71. There is conflicting evidence in this case; however, officers consider that the Council is correct in making the Order and it should now be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification. Witness evidence may then be presented in chief at the public inquiry and tested through the process of cross-examination.

### **Proposal**

- 72. That “The Wiltshire Council (Parish of Idmiston) Path No. 9 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**

Associate Director – Waste and Environment

Report Author:

**Janice Green**

Rights of Way Officer

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

Witness evidence forms

Correspondence received as part of the initial consultation

(The above-mentioned documents are available to be viewed at the offices of Rights of Way and Countryside, Wiltshire Council, Unit 9, Ascot Court, Trowbridge.)



**Appendices:**

- Appendix A** – Location Plan
- Appendix B** – Decision Report (22 June 2016)
- Appendix C** – “The Wiltshire Council (Parish of Idmiston) Path No. 9 Definitive Map and Statement Modification Order 2016”
- Appendix D** – Correspondence received in the formal objection period:
  - (i) Representations of objection
  - (ii) Representations of support
- Appendix E** – Correspondence from Mr David Adams dated 22 March 2017 – Received outside the formal objection period of 8 December 2016 – 25 January 2017