

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

**THE WILTSHIRE COUNCIL (PARISH OF ASHTON KEYNES) PATH NO.41  
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2018**

**Purpose of Report**

1. To:
  - (i) Consider an objection and representations of support received following the making and advertisement of “The Wiltshire Council (Parish of Ashton Keynes) Path no.41 Definitive Map and Statement Modification Order 2018”, 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 30 September 2016 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 Ashton Keynes. The application was made by Ashton Keynes Parish Council on the grounds that public footpath rights subsist or could be reasonably alleged to 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 Parish of Ashton Keynes which lies to the north-west of Swindon, (please see location plan at **Appendix A**). The claimed route forms a link between Friday’s Ham Lane at Rixon Gate and Footpath no.19 Ashton Keynes, which forms part of the Thames Path, (please see Order plan at **Appendix B**).

5. Before determining the application Wiltshire Council undertook 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 Ashton Keynes, (the objection, representations and additional evidence received are included at Part 7 of the decision report attached at **Appendix C**).
6. Following an 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 of way for the public had been dedicated at common law by the landowner in 2004, (please see decision report at **Appendix C**). Senior officers approved the recommendation on 19 June 2018.
7. Wiltshire Council subsequently made a definitive map modification order to add a footpath to the definitive map and statement of public rights of way as Footpath no.41 Ashton Keynes, (please see Definitive Map Modification Order at **Appendix B**). Notice of the making of the Order was duly advertised, served on interested parties (including the landowner) and posted on site.
8. Following the making of the Order, Wiltshire Council received one objection to the making of the Order and two representations of support, as follows:

**Objection:**

- 1) Ashfords LLP for and on behalf of Alvin Mark Lindley (the landowner) – 19 November 2018

**Representations of Support:**

- 1) Ms P Lawrence – 18 November 2018
- 2) Ashton Keynes Parish Council, C/O Mr D Wingrove, Chair – 25 October 2018

Thames Path National Trails Officer – 22 October – No comments

9. The objection and representations are included in full at **Appendix D** and officer's comments on the objections are set out at paragraphs 16-43 of this report.
10. Due to the objection 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 the objection and representations received against, (i) the evidence already before the Council in this case and (ii) the legal tests for making a definitive map modification order under Section 53 of the Wildlife and Countryside Act 1981, Section 31 of the Highways Act 1981 and the principles of common law dedication, in order to determine the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State for decision.

## **Main Considerations for the Council**

11. 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 up to date and under continuous review.
12. 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.”*
13. 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.”*
14. In this case, the evidence suggested that a public right of way could not be established under statute, (Section 31(1) of the Highways Act 1980) where 20 years use of a route by the public could not be established due to the mineral extraction works on site forming an interruption to public user of routes north of what is now Lake 82, from 1992 – 2004 and the Order route only being available since 2004. However, this does not preclude consideration of dedication of a public right of way at common law, which does not rely upon a period of use of 20 years and can be based on a much shorter period of public user. In this case there is evidence that the previous landowner, Aggregate Industries UK Ltd, set out and dedicated the route in 2004 and evidence that the public accepted the route, therefore a Definitive Map Modification Order was made adding Footpath no.41, based on common law dedication.
15. Evidence is 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 of the proposal, the availability of suitable alternative paths, or the “need” for the claimed route.

## **Comments on the Objections**

16. The objector, Ashfords LLP, on behalf of the landowner Mr Alvin Lindley, sets out a number of objections and officers will address each point in turn.

**The claimed path was not dedicated as a public footpath by the landowner. Such intention to dedicate has not been demonstrated. On the contrary, the claimed path was provided as a permissive path.**

17. The objector claims that the evidence falls far short of establishing that Aggregate Industries UK Ltd intended to dedicate the claimed path as a public footpath and that the route was laid out by them, (as the then landowner) in 2004, as a “permissive path” only. If a landowner was able to demonstrate that use of the path by the public was by a revocable permission, it would defeat a claim to add public rights where user was not “as of right”, i.e. without force, without secrecy and without permission. However, the evidence before Wiltshire Council, as the Surveying Authority, suggests the opposite, i.e. that it was the intention of Aggregate Industries UK Ltd to dedicate the path to the public as evidenced in correspondence between Aggregate Industries UK Ltd and Wiltshire County Council, dated 18 February 2004, in which Mr R Westell, Estates Surveyor for Aggregate Industries UK Ltd, confirmed that the order route had been installed and requesting advice on how this route could now be formally dedicated. It was clearly the landowner’s intention to dedicate the route to the public when it was laid out in 2004. An extract of the letter from Mr Westell is set out below.

*“FOOTPATH No.20, RIXON LAKES, ASHTON KEYNES, WILTSHIRE  
In 1995, this Company diverted the original footpath 20 to an alternative route (dark green on the attached plan), while sand and gravel extraction was being carried out. The diversion route was a temporary measure until a new path could be created around the northern and western margins of the newly created lake (the order route). I write to inform you that the new footpath 20 (red in the attached plan) has now been installed and is connected to Fridays Ham Lane and the Thames Path (footpath 19) (the order route).*

*I understand from historical correspondence held on our files that we now need to formally dedicate the new route, replacing the temporary diversion route. Could you please advise how this may be dealt with and furnish me with any forms, which need to be completed.”*

18. If the route was intended by the landowner to be permissive only, the actions of the landowner in providing a fenced route, with kissing gates and “Public Footpath” waymarking discs, suggest quite the opposite and would not have communicated to the public that their right to use the path was being brought into question, or that their use was subject to a revocable permission. In the case of R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA and R (on the application of Drain) (Appellant) v SSEFRA [2007], Lord Hoffman endorses Denning L J’s interpretation of bringing into question as contained in *Fairey v Southampton County Council* [1956] and quoted him as follows:

*“I think that in order for the right of the public to have been “brought into question”, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that it may be appraised of the challenge and have reasonable opportunity of meeting it... But whatever the public do whether they oppose the landowner’s action or not, their right is “brought into question” as soon as the landowner puts up a notice or*

*in some way makes it clear to the public that he is challenging their right to use the way”...As a statement of what amounts to bringing the right into question, it has always been treated as authoritative and was applied by the inspectors and the Court of Appeal in these cases.”*

19. There is no evidence before the Council that the landowner erected permissive path notices, or closed the path to the public for short periods. Neither did they lodge with Wiltshire Council a statement and plan, followed by statutory declarations at regular intervals, under Section 31(6) of the Highways Act 1980, to negate their intention to dedicate additional public rights of way over land in their ownership.

**The claimed path has not been used by the general public to any material degree over a material period, either to be sufficient to demonstrate implied dedication at common law or to demonstrate acceptance of any dedication, which dedication is denied.**

20. Officers consider that use by the general public following the landowner’s dedication of the right of way in 2004, has been demonstrated by the user evidence between 2004 and 2016, (when the route was closed to the public), please see user evidence chart at paragraph 10.13 of the Wiltshire Council decision report dated 15 June 2018, at **Appendix C**.
21. The landowner’s intention to dedicate the footpath in 2004 is denied in the Objector’s case; however, the present landowner, Mr A Lindley, was not the landowner with the power to dedicate the land at that time and would not have known the intention of Aggregate Industries UK Ltd. Where it is alleged that Aggregate Industries UK Ltd, the landowner in 2004, set out the path as a permissive route, correspondence dated 18 February 2004 suggests that it was the intention of Aggregate Industries UK Ltd, to dedicate the path to the public, (please see correspondence at paragraph 17). However, for whatever reason the path was never formally added to the definitive map and statement of public rights of way. Only once the path was physically closed to the public in April 2016, was an application made to add the path.

**In order for dedication to have occurred at common law, the burden of proof is firmly on the applicant to demonstrate that the landowner intended to dedicate the way. Caselaw establishes that this is a heavy burden: Jones v Bates [1938]. Further it must be established by the applicant that any such dedication was accepted by the public.**

22. The Jones v Bates Court of Appeal case [1938], considers the Rights of Way Act 1932, which stated at Section 1(1):

*“Where a way, not being of such character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of*

*twenty years there was not at any time any person in possession of such land capable of dedicating such way.”*

23. Prior to the 1932 Act, in England, as Scott L.J. considers in the Jones v Bates case:

*“Our legal theory had always been – at any rate within the last century or two – that the sole origin of a public highway was dedication to the public use by the owners of the land over which it ran, and in consequence that, in case of dispute, the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated... The practical result of the English rule of law was that in many cases although quite a formidable body of evidence was available to demonstrate what I call the Scottish premises, the public claimant failed on the additional English requisites. I infer from its terms that the Rights of Way Act, 1932, was passed for the definite purpose of getting rid of these extra difficulties of proof... the Act has got rid of all the trouble and difficulty inherent in the task of inducing the tribunal of fact to give a solemn finding of an act of dedication at some past date, which was, as a rule, wholly imaginary, and often by an imaginary owner... Its main object was obviously to get rid of the onerous fiction of proving an actual dedication which had been imposed by a long series of English decisions...”*

24. In the same case, Farwell, J states:

*“Prior to the Act, it was extremely doubtful whether a public right of way could be acquired by prescription, and, generally speaking, it is true to say that the only way in which a public right of way could be created, apart from express creation by statute, was by dedication by the owner of the soil. Such dedication could be either express or implied, and the necessary implication would be made in a case where the court was satisfied that there had been at some material times a person or persons capable of dedication, and that the evidence of user by the public led inevitably to the conclusion that there must have been such dedication. In my judgment, notwithstanding the Act of 1932, it is still true to say that, apart from the statute, dedication is the only way by which a public right of way can be created. It is still possible to prove the existence of such right by express grant or by implication where the user is less than 20 years, but, where the user is for 20 years or more, no implication is necessary, because in that event sect. 1 of the Act provides that there shall be deemed to have been dedication if during that period dedication would have been possible...”*

25. It is accepted that prior to the Rights of Way Act 1932, (forerunner to what is now Section 31(1) of the Highways Act 1980), and where there is no such 20 year period of user as required under statute, the only way in which a right of way could be created was by dedication (at common law) which placed a heavy burden on the applicant in demonstrating that at some time in the past dedication took place. There could be a high level of public user, but it would be defeated where dedication could not be shown. In the Ashton Keynes case, no such 20 year user period can be shown and therefore it is open to officers to consider the application at common law. Please see paragraph 28 of this report and e-mail correspondence from Mr D Wingrove, Chairman of Ashton Parish Keynes Parish Council, dated 16 May 2016, in which the Parish Council, as the applicant

in the Definitive Map Modification Order, confirm that they considered that it was the landowner's intention to dedicate the path, as evidenced in the letter and map attached to this correspondence from Mr R N Westell, Estates Surveyor for Aggregate Industries UK Ltd, dated 18 February 2004, (please see letter extract at paragraph 17 of this report). The e-mail from Mr Wingrove also suggests that the landowner did not take steps to make it clear to users that the path was "permissive", (if that was their intention) and took no action to prevent public use.

26. The Ashton Keynes case is unusual in that there is direct evidence provided by the landowner, Aggregate Industries UK Ltd, at the time the order route was set out, that they themselves put in the route and it was their intention to dedicate it, as evidenced by the letter from Mr R Westell, dated 18 February 2004, (please see paragraph 17), i.e. as the landowner, capable of such dedication. Additionally, the evidence of user is sufficient to demonstrate that the route was accepted by the public, which is also required as part of the test at common law. Officers are satisfied that the order route has been successfully dedicated by the landowner and accepted by the public.

**The evidence adduced falls far short of establishing that Aggregate Industries intended to dedicate the claimed path. The route was laid out by them in 2004 as a permissive route only, clearly evidenced in correspondence between Aggregate Industries and the applicant and at meetings between them when the applicant was seeking dedication. It was the applicants' own knowledge that the path was only permissive and had not been dedicated.**

27. No evidence has been adduced that the path was laid out by Aggregate Industries in 2004 as a "permissive path" and the actions taken by Aggregate Industries UK Ltd in 2004, demonstrate quite the opposite, i.e. the letter from Mr R Westell to Wiltshire Council, dated 18 February 2004, (paragraph 17), contemporary with the setting out of the footpath, stating that the route was in place and requesting further details on how the path should be formally dedicated, i.e. added to the definitive map of public rights of way, where it was clearly their intention to do so. Additionally, the treatment of the path does not suggest a "permissive" path, i.e. the route was fenced with kissing gates at either end, allowing public access and public footpath waymarker signs, (the witnesses supporting the Order provide photographic evidence of these waymarkers in situ). This is discussed in further detail at paragraphs 10.25 – 10.31 of the decision report attached at **Appendix C**). There is nothing which may be implied from the actions of the landowner to suggest that it was their intention for the path to be "permissive" only. There is no evidence that they erected "permissive path" signs on the route, or closed the path to the public for short periods; neither did they lodge with the Council a plan and statement under Section 31(6) of the Highways Act 1980, to negative their intention to dedicate. These are not the actions of a landowner who had no intention of dedicating public rights over the land. If the path was "permissive", which officers contend it was not, there is no evidence of how this permission was communicated to the public at large, the public may infer quite the opposite from the public footpath way marker signs at either end of the path.

28. The objector refers to e-mail correspondence in which they claim the applicants (Ashton Keynes Parish Council), concede that the footpath is “permissive” in nature. The correspondence to which the objector refers is an e-mail from Mr Tony Hudson, Estates Manager, Aggregate Industries UK Ltd to Mr Michael Seymour of Ashton Keynes Parish Council dated 6 August 2014, entitled “*Rixon Lakes – Public Right of Way and Permissive Footpath*”, following a meeting between Mr Hudson and Mr Seymour, earlier that day, (please see e-mail included at paragraph 10.43 of the Decision Report (15 June 2018) attached at **Appendix C**). The claimed route is consistently referred to within the e-mail from Mr Hudson as a “Permissive Path”; however, this is no evidence that the Parish Council, as the applicants, referred to the path as permissive and cannot assist in evidence that the applicants in 2014 considered the path to be permissive. Wiltshire Council was not party to that meeting and the contents of that meeting and officers have not viewed correspondence in which the Parish Council directly refer to the footpath as “permissive”. Wiltshire Council has viewed e-mail correspondence, from Mr D Wingrove, Chairman of Ashton Keynes Parish Council, to Wiltshire Council, dated 16 May 2016, which suggests that the Parish Council took the opposite view regarding the status of the path:

*“Ashton Keynes Parish Council is indeed concerned that the new owner of Lake 82 Ashton Keynes has effectively closed the footpath to the north of Lake 82. As I am sure you will be aware, this footpath, named Footpath 20, originally went diagonally across a large field (which is now Lake 82), but in 1995, [i]t’s route ceased to exist when Aggregate Industries, the owners of the land, commenced sand and gravel extraction. Local people immediately started to use a route to the north of the gravel workings (which ultimately became Lake 82) and have used it continuously since then.*

*Therefore, in accordance with Section 31(6) of the Highways Act 1980, this route should now be dedicated as a public right of way. The Act says that this should occur “unless there is sufficient evidence that there was no intention during that period to dedicate it.” We would contend that the reverse is true: there is clear evidence that it was indeed intended to dedicate it. Please see that attached letter and map (letter and map from Mr R N Westell, Estates Surveyor, Aggregate Industries UK Ltd, dated 18 February 2004, as referred to at paragraph 17 of this report).*

*Notwithstanding this, it is questionable as to whether this northern route was ever merely a permissive path as such. As you know, there are two main ways of establishing a permissive path; either through a formal written agreement between the local authority and the owner of the land, or by the owner of land granting consent in a less formal agreement. Neither of these steps have ever been taken. Furthermore, none of the usual recommended steps to prevent public rights accruing have ever been taken with this northern path e.g.*

- 1. By erecting permanent signs identifying that the route in question is used ‘by permission’ and not ‘as of right’. (Indeed, the very reverse was true. There were ‘Wiltshire County Council Footpath’ signs along the route.)*
- 2. By closing the path for a short period, for example one day per year, thereby preventing uninterrupted use ‘as of right’ from accruing.*



*Therefore, rather than condone the closure of the northern route and the formalization of the southern route, we request that Wiltshire Council takes the appropriate steps to designate the northern route as a public right of way.”*

29. Whilst Mr Hudson states that the path is “permissive”, this is at odds with the landowner comments from Mr Westell requesting the path be dedicated in 2004 and the landowner’s treatment of the path in 2004, i.e. the provision of a fenced route, with stiles and public footpath waymarkers. Mr Hudson states that the fenced pathway is classed as a “*permissive pathway only as checked with Wiltshire Council’s online public rights of way mapping and through liaison with Barbara Burke, Rights of Way Officer with Wiltshire Council*”. Officer’s agree that the definitive map would not have recorded the claimed route, where it had not been formally added; however, omission from the definitive map is not evidence that a path is “permissive” and the landowner has to do somewhat more to communicate to the public that the path is available only through permission which is revocable at any time, (see *Fairey v Southampton* [1956] in *Godmanchester* at paragraph 18 above). Wiltshire Council does not hold records of permissive paths and would not have been in a position to clarify that the route was “permissive”. There is certainly no evidence before the Council that the landowner at any time (Aggregate Industries UK Ltd), took any action to communicate their alleged intention as a permissive path, to the public in general, i.e. erecting permissive path notices or closing the path at any time, or depositing with Wiltshire Council a plan and statement with subsequent statutory declarations under Section 31(6) of the Highways Act 1980 which would negate their intention to dedicate additional rights of way over their land, as the present landowner Mr A Lindley did in April 2016, around the same time the path was closed to the public. The mere inaction of the landowner with knowledge of use of the land, does not amount to permission, (*R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents)* [2014] UKSC 31, quotes *Gale on Easements* (19<sup>th</sup> Edition, 2012):

*“17. In relation to the acquisition of easements by prescription, the law is correctly stated in Gale on Easements (19<sup>th</sup> edition, 2012), para 4-115:*

*“The law draws a distinction between acquiescence by the owner on the one hand and licence of permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is ‘as of right’; acquiescence is the foundation of prescription. However, user which is with the licence of permission of the owner is not ‘as of right’. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence.”*

30. Four witnesses state that they did not need permission to use the way where the path is a “public footpath” and one user states that there was no need to request permission as the signs showed where to go. One witness suggests that permission is implied by the waymarking discs; however, they do not communicate to the public that the path is permissive, i.e. the public’s use is subject to the goodwill of the landowner which may be revoked at any time.

**The Council Rights of Way Officer removed waymarker signs from the claimed path, acknowledging that it was permissive only. This is pertinent where the officer in her report contends that the public right to use the path was not brought into question until April 2016.**

31. Shortly after purchasing the land, the present landowner, Mr A Lindley, sought to correctly identify and align rights of way over his land and began working with the Rights of Way Department to do so. Officers consider that the Rights of Way Warden removed the waymarking signs on the path, not because the path was permissive, but simply because it was not recorded on the definitive map of public rights of way. Mr Leonard (Rights of Way Warden – North Wiltshire), states: *“My first meeting was on 13th May 2015 and I think I removed the sign post on the claimed route then as well as some waymarkers...”* It cannot be construed from this recollection that Mr Leonard removed the waymarks because he considered the path to be permissive. Additionally, Wiltshire Council does not hold records of permissive paths and Mr Leonard would not have been in a position to comment on whether the path was “permissive”. Additionally, the presence of Wiltshire County Council footpath waymarkers suggests the opposite of a permissive path.
32. In any case, removing the waymarkers alone, did not prevent the public from physically using the path and there is evidence that the public continued using the path after the removal of the waymarks in May 2015. Additionally, the witnesses provide photographs of the path taken in November 2015, which reveal that the path was still signed as a public footpath at its southern end at least until November 2015 (the photographs provide evidence that the waymarkers had been removed at the northern end before November 2015).
33. The path was not physically closed to the public until 29 April 2016, as evidenced by Mr R Nesbit, who wrote to the Council the following day to report the closure following up on two phonecalls made the previous day. He had used the path on the morning of 29 April 2016, but when he returned to use the path at 3:30pm, it was closed shut with barbed wire. This demonstrates that the public’s right to use the way was not brought into question until April 2016, when the path was physically closed to the public and also demonstrates that Mr Nesbit did not consider this path to be “permissive” where he considers the closure to be *“illegal”*, with no notices placed to advise of the closure and that *“...the owner has no rights to arbitrarily close a public footpath...I draw your attention to the Highways Legislation regarding Public Footpaths.”* In his belief that the path was indeed a public path, rather than a “permissive” path only, Mr Nesbit saw fit to report the closure to both the Council and the Ramblers.
34. The order route is also recorded within the Cotswold Water Park Leisure Map as a footpath. It is noted that the map records the “permissive paths” by a different notation to that used for footpaths and records the order route as a footpath consistently in the 2014, 2016 and c.2017 editions which have been viewed by officers. If the route had been mistakenly recorded as a footpath rather than a permissive path in the earlier editions and the landowner had no intention to dedicate the path, as is suggested by the objector, they took no action to rectify this mistake and it is not corrected in later editions of the map. Mr Peter Gallagher of the Ramblers suggests that this route is shown on editions of this map from 2010 to 2017.

**The path has not been used as of right for any material period by the general public from which either dedication at common law can be inferred or from which acceptance by the public can be established:**

**It is apparent from the user evidence forms that the compilers are confused as to the route they are referring to and as to the route of the claimed path. Many of them refer to using the claimed route prior to 2004. As acknowledged by the officer's report that was not possible given that the route was not laid out until 2015 [2004]. Similarly, users claim to have used the claimed path post May 2015 when it was physically closed off by the landowner, again demonstrating that they are wholly confused. In such circumstances no weight can be given to such evidence given that it appears the compilers are referring to other routes walked than the claimed path.**

35. Officers consider that there were a number of routes, used by the public at this location over the years; however, officers have concluded that public use of these routes, prior to 2004 when the site was restored, was very likely to have been "interrupted" by the extraction works and therefore 20 years public use of these routes, under statute, cannot be established. However, witnesses consistently refer to using a route which was fenced with gates at either end, which would correspond with the order route, as laid out by Aggregate Industries in 2004 at the site restoration. A public right of way can be acquired at common law, on a user period shorter than 20 years, where there is dedication by the landowner and acceptance by the public, which are both met in this case.
36. Officers do not agree that the path was closed to the public in May 2015, where there is evidence in an e-mail sent to Wiltshire Council in April 2016, from Mr R Nesbit to report the path closure the previous day, having used it in the morning without problem and returning to use it later that afternoon to find it closed with barbed wire. This e-mail provides evidence of i) the date of closure of the path and ii) that Mr Nesbit considered this to be a public right of way over which the Council would be able to exercise its duty to protect and assert public rights of way.

**The evidence does not, and cannot support the use of the claimed path which only physically existed on the ground from 2004, and could not have been used during the extraction and restoration works on the Land in any event.**

37. It is not claimed by officers that the order route has been used by the public for a period of 20 years or more (and during the extraction period), as required to add a public right of way under statute and officers have not identified a route over the land which would be capable of being claimed under statute. However, where a path has been used by the public for a period of less than 20 years, it can be claimed at common law where there is an act of dedication by the landowner and acceptance by the public. In this case it is acknowledged that the order route has only existed since 2004; however, there is evidence that it was the intention of the then landowner, Aggregate Industries UK Ltd, to dedicate the path to the public, as evidenced in the letter dated 18 February 2004 from Mr R Westell of Aggregate Industries UK Ltd, (see paragraph 17) and the landowner's treatment of the route when it was set out, i.e. being fenced with kissing gates

and Public Footpath waymarker discs. Additionally, the evidence included with the application shows use of the path from 2004 onwards and path users consistently refer to a fenced route with gates and waymarkers, which corresponds with the order route.

38. It is open to the Authority to consider common law dedication, as the Planning Inspectorate “Wildlife and Countryside Act 1981 Definitive Map Orders: Consistency Guidelines” (4<sup>th</sup> revision January 2015), state:

*“5.41 Sometimes dedication at common law will be argued as an alternative, in case the s31 claim fails. In any event, the Inspector should consider common law dedication where a s31 claim fails...”*

**The application plan is fundamentally different from the order plan as acknowledged in the officer’s report (paragraph 10.48). They are referring to inherently different routes. The evidence in support relates to a different route to that subject of the Order and consequently cannot be relied upon in support of the Order.**

39. The application plan is of poor quality; however, it matters not that it differs from the route included in the Order. Once an application is received, Wiltshire Council is placed under a duty to investigate the evidence and therefore the Order includes an identifiable route which is supported by evidence. A claim cannot be dismissed simply because the application plan differs from the route identified within the accompanying evidence and once the authority discovers evidence of public rights, even if the route differs from the application plan, it has a duty to record that route within the definitive map and statement of public rights of way. The witness evidence regarding the fenced route, having a junction with both the Thames Path and Friday’s Ham Lane, (i.e. fully linking the two public highways, which differs from the application plan), is also supported by the presence of a previously fenced path on the ground, with a kissing gate at each end and aerial photography recording the fenced route (2005/06), (please see paragraph 63 of decision report attached at **Appendix C**).

**Lack of use of the claimed path by the public is demonstrated by the fact that it was overgrown to the extent that it was unusable when the landowner purchased the land in March 2015. It had clearly not been used for many years.**

40. Officers accept that there are reports of the path being overgrown, however, Mr R Gosnell provides GPS evidence that he is likely to have used the route between the two fences in both 2007 and 2008 and Mr R Nesbit in his e-mail dated 30 April 2016, reveals that he used the route between the fences on the morning of 29 April 2016, before it was closed with barbed wire when he returned to use the path at 3:30pm on the same day. The user evidence supports use of the fenced, gated and waymarked order route.
41. Mrs Hourihane provides a photograph of the northern end of the path dated 25 November 2015, which shows this end of the path somewhat overgrown (please see photographs included at paragraph 10.29 of the decision report attached at **Appendix C**); however, photographs taken on the same day at the southern end, show that this part is not overgrown. Some of the witnesses mention in evidence overgrowth of the fenced route and it would appear that

when they found it to be overgrown, they took a parallel route outside the fenceline to meet Fridays Ham Lane, (at the northern end of the route), at the field gate rather than the kissing gate. The evidence on this matter is conflicting, for example, Mrs Arnett states: *“There was a fenced in, signed Wiltshire County Council Public Footpath (fencing recently removed) to the North [of the lake] which ended at the road, but for many years walkers have used a route parallel to this exiting at the large gate rather than the road.”*, whilst Mr M Seymour states that he changed his route once *“...when gate by road C.69 was slightly overgrown with blackberry bush. This was later cut out by the owners, Aggregate Industries.”* (please see paragraph 10.56 of decision report attached at **Appendix C**). Mr Seymour provides evidence that when the path became overgrown, the then landowner perhaps carried out clearance works.

**As of April 2016 when the landowner made a deposit under Section 31(6) of the Highways Act 1980 to negative his intention to dedicate any public rights of way over the land, there had been no suggestion of, or any reference to, the claimed path being a public footpath which ought to have been recorded on the Definitive Map, whether by the applicant, any alleged user, any Rights of Way Officer from the Council or any other person. The first mention of any such contention was in September 2016 when the claim was made.**

42. There is a gap of five months between the closure of the footpath to the public, as evidenced by Mr R Nesbit in his e-mail dated 30 April 2016, sent the day after the fenced footpath was closed, the new landowner's Section 31(6) Highways Act 1980 deposit dated 28 April 2016, and the application to amend the definitive map and statement of public rights of way, dated 30 September 2016. This is to be expected where the Parish Council was compiling the claim and non-reference to the path during this period, does not negate the evidence. Where the public had used the route since 2004 without challenge, it is not considered unusual that the path was not claimed previously, where public rights had not been brought into question until the closure of the path and the landowner's Section 31(6) Highways Act 1980 deposit, in April 2016.
43. It is noted that the Parish Council has applied for this definitive map modification order and is supporting it, which demonstrates support from the local community, (please see e-mail, representation of support from Ashton Keynes Parish Council (C/O Mr D Wingrove), dated 25 October 2018 at **Appendix D**). Mrs P Lawrence also supports the making of the Order on the grounds that the path has been signed with footpath waymarker signs for at least ten years and where it provides a usable footpath link to Bridleway no.38 and then other footpaths, without walking on the road, where the recorded Footpath 20 crosses marshy land that can become impassable in wet weather.

### **Overview and Scrutiny Engagement**

44. 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**

45. 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**

46. 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**

47. 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 51 to 54 of this report.

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

48. 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**

49. 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**

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

## **Financial Implications**

51. The determination of definitive map modification order applications and the modification 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.
52. 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.
53. Where the case is determined by written representations, the cost to the Council is negligible. 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 the 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).
54. Where the Council makes an Order which receives objections, it may potentially be liable to pay subsequent costs if the Planning Inspectorate finds at the public inquiry that the Council has acted in an unreasonable manner. However, costs awards of this nature are rare, but may be in the region of up to £10,000.

## **Legal Implications**

55. 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 if this decision is seen by them to be incorrect or unjust.
56. 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**

57. Members of the Committee should now consider the objection 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. The options available to members, having considered the available evidence, the objection and representations of support, are as follows:

- (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.

58. Please note that all references to the available evidence above, 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 15 June 2018, (included at **Appendix C**). Members should note that the evidence in full is available to be viewed at Wiltshire Council's Offices, County Hall, Trowbridge.

### **Reason for Proposal**

59. Common law dedication can be applied to the order route, where the landowner, Aggregate Industries UK Ltd, created a fenced route, with kissing gates and "Public Footpath" waymarkers. Common law dedication does not require a 20 year user period, (as at statute), and can apply to a much shorter period of public user. There is evidence of public acceptance of the order route, since 2004, through witness evidence, as required at common law.
60. The objector has provided insufficient evidence that it was not the intention of Aggregate Industries UK Ltd to dedicate the route to the public. There is no evidence that it was Aggregate industries UK Ltd's intention to provide the route only as a permissive path. Their actions in providing a fenced route, with kissing gates and public footpath waymarkers, suggest quite the opposite. They did not lodge with Wiltshire Council a deposit and plan under Section 31(6) of the Highways Act 1980 and there is no evidence that they took any steps to communicate their non-intention to dedicate the order route as a public right of way. At the time of setting out the footpath in 2004, Aggregate Industries UK Ltd requested further details from Wiltshire County Council on formalising this dedication, i.e. adding the path to the definitive map.

### **Proposal**

61. That "The Wiltshire Council (Parish of Ashton Keynes) Path no.41 Definitive Map and Statement Modification Order 2018", be forwarded to the Secretary of State for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

**Parvis Khansari**  
Director Highways and Environment



Report Author:  
**Janice Green**  
Rights of Way Officer

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**The following unpublished documents have been relied upon 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, County Hall, Bythesea Road, Trowbridge)

**Appendices:**

<b>Appendix A</b>	Location Plan
<b>Appendix B</b>	The Wiltshire Council (Parish of Ashton Keynes) Path no.41 Definitive Map and Statement Modification Order 2018
<b>Appendix C</b>	Decision Report (15 June 2018)
<b>Appendix D</b>	Correspondence received in the formal objection period: (i) Representation of objection (ii) Representations of support