

**WILTSHIRE COUNCIL
SOUTHERN AREA PLANNING COMMITTEE**

19 SEPTEMBER 2019

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE WILTSHIRE COUNCIL MERE PATH NO. 78
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2019**

Purpose of Report

1. To:
 - (i) Consider six objections and three representations of support to The Wiltshire Council Mere Path No.78 Definitive Map and Statement Modification Order 2019 made under Section 53 of the Wildlife and Countryside Act 1981.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs (**SoSEFRA**) for determination with Wiltshire Council taking a neutral stance.

Relevance to the Council's Business Plan

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

Background

3. On 24 April 2018 Wiltshire Council received an application from Mr Sams of Mere for an Order to record a public footpath over land north of The Square, Mere in the parish of Mere. The claimed route leads from The Square, Mere north through an archway and across a private car park to North Street, Mere, having a length of approximately 57 metres (please see order route at section 4 of the Decision Report at **Appendix 1**).
4. The application adduced evidence from 23 people who completed User Evidence Forms (UEFs) detailing their use on foot of the application route in full for varying lengths of time dating from the 1940s to 2017. A further two UEFs were submitted at a later date and not in time to be considered for the Decision Report, taking the total to 25 people who submitted forms. It is noted that 26 forms were submitted in total, with the lead applicant, Mr Sams, submitting two forms at different dates. The UEFs are discussed in detail at section 12 of the Decision Report (**Appendix 1**) and Mr Sams' two forms are discussed at 14.13 of the Decision Report (**Appendix 1**).

5. For public rights to have been acquired under statute law (see **Appendix 1** section 9.5 – Highways Act 1980 Section 31) it is necessary for the use of the way to have been uninterrupted for a period of at least 20 years in a manner that is ‘as of right’, that is, without force, without secrecy and without permission. This would give rise to a ‘presumption of dedication’.
6. A presumption of dedication may be defeated in a number of ways, including the erection and maintenance of signage indicating that there is no intention to dedicate public rights, effective challenges to use, the closure of the claimed route (for example a closure for one day every year may be effective depending on the circumstances), the granting of permission or by depositing a number of documents with the Council as prescribed by Section 31(5) and (6) of the Highways Act 1980 (see **Appendix 1** section 9.5).
7. Wiltshire Council has a duty to consider all relevant available evidence and officers conducted an initial six week consultation on the application, commencing in June 2018. The consultation letter was sent to all interested parties, including landowners, Mere Town Council, user groups, the local member and other interested individuals. As a result of this initial consultation it came to light that a number of adjoining properties had not been included in the initial consultation and, as such, further letters of consultation were sent to all known surrounding addresses.
8. All of the evidence and responses to the consultation were duly considered in the Council’s Decision Report appended here at **Appendix 1(A)**. Applying the legal test contained within Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980 (see **Appendix 1** paragraph 9.1 through to 9.5), the application formed a reasonable allegation (see Section 31 of the Decision Report at **Appendix 1**) that a public right subsisted. An Order was made to record the path as a footpath in the definitive map and statement.
9. The Order was duly advertised and attracted six objections and three representations of support. A copy of the Order is appended here at **Appendix 2**.
10. Where objections are received to a Definitive Map Modification Order Wiltshire Council may neither confirm nor abandon the Order and must forward it to SoSEFRA for determination. However, it must first consider the representations and objections to the Order and make a recommendation to SoSEFRA regarding the determination of the Order.
11. It is important that only the evidence adduced or discovered is considered and matters relating to desirability, the environment, need, privacy concerns or health and safety are irrelevant for the application of Section 53 of the Wildlife and Countryside Act 1981.

Main Considerations for the Council

12. 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.

13. 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.”*
14. 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.”*
15. Evidence is the key and therefore objections to the making of the Order must, to be valid, 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, the proximity of any other paths or facilities, environmental impacts and any need or desire for the claimed route.
16. **Objections to the Order:**
- (1) Mr Andrew Lipscombe on behalf of Lipscombe Building Contractors (landowner)
 - (2) Ms Saffron Reilly-Stitt on behalf of The Walton Building Management Company (landowner)
 - (3) Mr James Dyke
 - (4) Mr Andrew Holder
 - (5) Ms Gillian Main
 - (6) Mr Alan Morris (Welcome House Residents Association)

Representations of Support

- (1) Ms Diane Pringle
- (2) Mere Town Council
- (3) Mr Hamish Bell

These objections and representations can be seen in full at **Appendix 3**.

Comments on the Objections and Representations

Mr Andrew Lipscombe

17. Mr Lipscombe submitted a body of evidence in objection to the Order which includes photographs of the route and documentary evidence. The photographs provided by Mr Lipscombe, labelled “P1-P12” and seen at **Appendix 3**, demonstrate at various times that the route has been blocked by barriers, wooden braced gates and show a padlock and chain in situ on the metal gates from The Square, Mere. The photographs are dated from 2007, 2008, 2009 and 2011.

18. This additional physical evidence shows the route clearly being blocked and unavailable for public use on various dates from 2007-2011. The earliest photographs (P3-P6 - see **Appendix 3**) demonstrate in 2007 when Mr Finan (the previous landowner) sold the land to Mr Lipscombe, the metal gates, although open in the photograph as they were in use to look at the land, did have a chain and padlock. It would be reasonable to surmise the chain and padlock were in use and were barring use of the gateway. We cannot be sure what period of time this padlock was in use but this photograph is significant as it is evidence that the padlock, the existence of which was disputed by supporters and objectors, did exist and was, as evidenced by the photograph, on the gate in 2007. This photograph supports Mr Finan's claim that he padlocked the gate for the majority of the time he owned the land and controlled the gate from 2004-2007.
19. Further photographs, P1, P2, P7, P10, P11 and P12 demonstrate the route was blocked by barriers or braced large wooden gates on various dates in 2007, 2008, 2009 and 2011. The issue of the gates being locked, braced or padlocked, or in the case of the wooden gates being in existence at all, were a main point of contention for the case. It is significant that the bracing of the wooden gates would have locked the gate to users from one direction and made it difficult to use if approaching from the other. Until Mr Lipscombe's evidence submitted in objection to the Order the only evidence for the case of the gates being locked or braced were in the form of one photograph and verbal or written testimony, of which there is also similar evidence denying this. These photographs demonstrate the route was clearly blocked on at least six different occasions covering the years 2007, 2008, 2009, and 2011. It demonstrates a consistent body of evidence that during the period 2007-2011 the route was regularly blocked.
20. The other photographs submitted show cars and wheelie bins restricting the use of the way, although not totally blocking the route, and photographs documenting the change and improvement in the surface of the path pre and post redevelopment work. The path pre redevelopment would not have been as attractive or easy to use for any potential users but could have been used, if the gates were not braced or locked or a barrier in place.
21. The documentary evidence submitted by Mr Lipscombe, "D1-D4", shows a plan from the year 2000 which indicates there were two sets of gates or doors on the route of the path, which is further supporting evidence the wooden gates (now removed) were in existence. Document "D2" is the initial consultation response from Mere Town Council in which Mr Lipscombe highlights some comments made and disputes these comments in his letter of objection. The content of Cllr Jeans' statement to the Town Council is not available in full and the various statements and evidence submitted in support and objection to the application have been considered in the Decision Report at **Appendix 1**. "D3" documents the work carried out by Lipscombe Builders and document "D4" shows "private" signs were purchased with the invoice dating to 2017. This document shows that a laminated aluminium sign stating private was purchased. Mr Lipscombe states this sign, and others previously, was placed on the gates and fencing but unfortunately no photographs are available to demonstrate this.

22. In summary, the objection letter and attached evidence from Mr Lipscombe has assisted officers by providing additional weight of evidence that the wooden gates were beyond reasonable doubt in situ and braced on at least the occasions documented. If a user of the way was approaching from North Street the braced gates would form a barrier that would not be in the normal character of a public footpath and if opened the user could not have re-braced the gates once going through. The gates would not have been openable if approaching the route from The Square. The archway and claimed route were blocked by barriers or gates, at least on the dates of the photographs, and it would seem reasonable to assume on other days photographs were not taken, although we cannot be certain of this. The photographs showing the padlock and chain in place in 2007 support the claims the route was padlocked at various times, although we do not know the extent of the locking, the photograph shows the padlock did exist and the claims from Mr Finan and others that the gate was padlocked at various times gain credibility with this evidence.

Objection from Ms Reilly-Stitt

23. Ms Reilly-Stitt objected on behalf of The Walton Building Management Company who is one of the landowners affected. The content of the objection refers to the potential noise, disturbance and loss of privacy to the residents and the potential additional wear and tear to the paving of the car park.
24. Whilst these concerns are understandable, and can be sympathised with, these points cannot be considered as part of this case, only the evidence and tests as set out in Section 31 of the Highways Act can be taken into account.

Objection from Mr Dyke

25. Mr Dyke objects on the grounds the land is private, the potential decrease in value of the properties and the availability of alternatives. These points cannot be considered in this case, only the relevant legal tests can be considered.
26. Mr Dyke also states the route has only been used by the residents and during the building work the route was blocked and no complaints were made. The use of the path and locking of the gates has been discussed in the Decision Report and in this report and form the body of evidence that has been evaluated.

Objection from Mr Holder

27. Mr Holder has objected at the initial consultation phase and now at the order making stage and has provided a photograph dating to 2007 showing the route blocked by the wooden gates. Mr Holder states he erected private signs which were removed and that during the building works the gates were usually locked and therefore for a period of five years the route was usually not available.
28. These points have been discussed in the Decision Report as part of the evidence and case to date.

Objection from Ms Gillian Main

29. Ms Main's objection refers to her previous communication which can be seen at **Appendix 1(A)**. In these communications Ms Main objects to the Order on the grounds there are alternatives to the route, that use of the path leads to litter and other unsociable behaviour on the route and the locking of the route has led to those activities ceasing. She also states knowledge of the locking of the gates pre 2000 and by Mr Finan after this period and that signs were erected in 2012 stating private property, but these went missing. She also makes statements regarding the Town Council meeting in which they voted to support the proposal at the initial consultation.
30. The matters of unsociable behaviour, litter and alternative routes can be sympathised with; however, these issues cannot be considered as per the relevant legislation. The issue of the locked gates has been discussed in the Decision Report as has the issue of the signs. The Town Council has supported the Order and any vote it undertook at any stage is a matter for the Town Council, its representation of support is discussed below at paragraph 34 of this report.

Objection from Mr Morris

31. Mr Morris represents the Welcome House Residents Association and refers to his initial objection to the proposal. In this he objects on health and safety concerns and anti-sociable behaviour. These points are not able to be considered as per the relevant legislation to this Order. Mr Morris also raised the point of the wooden gates being locked and Mr Finan locking the gates. These points have been investigated and considered as per the Decision Report to this case.

Representation of Support from Ms Pringle

32. Ms Pringle wrote in support of the Order and states she has used the route regularly since 1985 until recently and was never stopped or challenged. She does state it was padlocked rarely on Christmas Day but not for at least 20 years and that Manor Road is dangerous to use as an alternative.
33. Ms Pringle can be considered a user of the path that we were unaware of previously, the details of her use (frequency and nature) have not been investigated although she states she only saw a padlock on Christmas Day but not for at least 20 years and she used the path regularly. She does not mention the large wooden gates or any other blockage of the route, of which we have photographic evidence as per Mr Lipscombe's objection. Ms Pringle's regularity and nature of use could be investigated at a future public inquiry.

Representation of Support from Mere Town Council

34. Mere Town Council supported the Order as per its letter and meeting held on 13 May. The reasons for support appear to be that the order route is a safer alternative than Manor Road for pedestrians.

35. The desirability of the order route, or the safety of alternative routes, are not points that can be considered as part of this case. Only the evidence and relevant legislation can be considered.

Representation of Support from Mr Hamish Bell

36. Mr Bell refers to the safety issues of using Manor Road as an alternative to the order route. This is not a valid consideration for the determination of this Order, only the evidence can be considered.
37. It has come to the attention of officers that some evidence was omitted from the Decision Report. Prior to submission of the application in the correct format, as set out in the regulations, officers received communication from Mr Sams, the applicant, and Cllr George Jeans regarding the obstruction of the order route. As part of this communication a number of statements from local residents were submitted documenting their concern of the blocking of the order route. Officers responded to Cllr Jeans and Mr Sams advising these statements did not contain the relevant information for the Council to evaluate the use of the route and make a judgement on the rights that may subsist on the route and it was recommended the UEFs were filled out to assist any application made. These initial statements submitted can be seen at **Appendix 5**. A number of the residents who filled out statements did at a later date fill out UEFs but not all of them did so; however, they were all contacted during the consultation phase and any responses were considered in the Decision Report.
38. The Council cannot just 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 1**. There will inevitably be points of conflict within the evidence of objectors and that of the supporters of an Order and this is the case for this Order. For this reason, and the lack of incontrovertible evidence received at the pre order stage, the Order has been made 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 (see **Appendix 1** - paragraph 30.2).
39. 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 map 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.”

40. 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.”

41. 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.”

42. 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 this case, where there were 26 completed UEFs, and no incontrovertible evidence in objection, it suggests that the making of a definitive map modification order was appropriate.

43. In such a case where the balancing test is to be applied to the evidence, the authority was 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.

44. The objectors, and in particular Mr Lipscombe, have now submitted a significant body of additional evidence which must be considered. The photographic evidence has confirmed beyond reasonable doubt that the wooden gates were in existence and closed or braced at various points in time. The photograph of the padlock and chain has provided additional evidence in favour of the gate being padlocked at some time in 2007 and indicates it may have been padlocked prior to this time which is claimed by Mr Finan and one of the previous landowners to him, Mr Squires, dating back to the 1990s and potentially earlier. It is noted these photographs do only provide direct evidence the gate had a padlock in 2007 and the route was blocked at various times during the construction period

after 2007 until 2011. It is deemed likely the padlocking of the gate and obstructions documented would have caused an interruption to public use if somebody wished to use the route during this period. Being in a prominent position in the centre of Mere it would seem unlikely the users of the way, who claim on the whole to have used the route on a regular basis during this period, would have been unaware of these obstructions and the building work going on.

45. Accepting this evidence it is considered the point of calling into question of the route could now be set at the year 2007, as we have evidence the route was padlocked and blocked at various dates from the year 2007 onwards which would have challenged or interrupted the use of the public and communicated to a reasonable user of the way that there was no intention to dedicate this route as a public right of way. Therefore, the potential 20 year user period for claiming a right under Section 31 of the Highways Act 1980 could be seen as 1987-2007. This 20 year period from 1987-2007 does have user evidence as documented in the Decision Report - see **Appendix 1** section 12.2 and **Appendix 4** to this report documenting individual use claimed in UEFs submitted. Some users during this period are claiming use of the path on a daily basis and none encountered a blockage or any locked or braced gates during their period of use. It is noted a number of those users claiming use between 1987 and 2007 also claim use after 2007, some on a daily basis, and have stated they did not encounter a locked gate or blockage to the route.
46. There is clearly still a conflict of evidence which needs to be resolved. The evidence given in objection has clarified some points and assisted in the evidence analysis, particularly after 2007, and also adds some weight to the likely pre 2007 conditions of the route. A number of users maintain their use pre 2007 and this use encompasses a period of 20+ years of use of the route on a regular basis uninterrupted. This is in conflict with verbal and written evidence given to the locking of gates on the route dating back to at least the early 1990s and possibly earlier. The evidence given by some users appears to be inconsistent with the new evidence provided by the objectors and it is deemed on the balance of probabilities a right did not subsist from 2007 onwards as the public use of the route is likely to have been interrupted, as shown by the evidence at this time. The use pre 2007 for a period of 20 years, 1987-2007, is still disputed by the given evidence. The additional evidence adds credibility to the claims of a padlock and braced gates in previous years dating back to the 1990s and earlier and if these earlier interruptions were deemed by an inspector at a public inquiry to have brought the way into question it may move the relevant 20 year period to be considered further back in time which would decrease the number of users and as discussed in the Decision Report potentially to a time when it is claimed the nature of the route was so different to today that using it would have been impossible. 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 to establish whether, on the balance of probabilities, the public right has been acquired.

Overview and Scrutiny Engagement

47. 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

48. Considerations relating to safeguarding anyone affected by the making of the 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

49. Any public health implications arising from 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.

Corporate Procurement Implications

50. In the event this Order is forwarded to SoSEFRA there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 54 to 56 of this report.

Environmental and Climate Change Impact of the Proposal

51. Any environmental or climate change considerations arising from 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.

Equalities Impact of the Proposal

52. Matters relating to the equalities impact of the proposal are not relevant considerations in Section 53 of the Wildlife and Countryside Act 1981.

Risk Assessment

53. 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

54. The making and determination of Orders under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.
55. Where there are outstanding objections to the making of the Order it must be determined by the Secretary of State. The outcome of the Order will then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500. A one day public inquiry could cost between £1,500 and £3,000 if Wiltshire Council continues to support the making of the Order (i.e. where legal representation is required by the Council) and around £300 to £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).
56. Where the Council objects to the Order, the Order must still be forwarded to the SoSEFRA for determination. As in the case of a supported Order, the possible processes and costs range from £200 to £3,000 as detailed at paragraph 55 above.

Legal Implications

57. Where the Council does not support the Order, clear reasons for this must be given and must relate to the evidence available. The applicant or another third party may seek to challenge the Council's decision by way of judicial review if it is perceived by the applicant or third party that the decision is legally incorrect. The Council could incur potential legal costs in defending any legal challenge of up to £50,000.

Options Considered

58. Members should now consider the objections received and the evidence as a whole in order to determine whether or not Wiltshire Council continues to support the making of the Order. The making of the Order has been objected to, therefore the Order must now be submitted to SoSEFRA for determination and members of the committee may determine the recommendation (which should be based upon the evidence) to be attached to the Order when it is forwarded to the SoSEFRA as follows:
 - (i) The Order be confirmed without modification.
 - (ii) The Order be confirmed with modification.
 - (iii) The Order should not be confirmed.
 - (iiii) The Order should be determined by SoSEFRA with Wiltshire Council taking a neutral stance.

Reason for Proposal

59. Unless the objections and representations are withdrawn the Order must be forwarded to SoSEFRA for determination.
60. Whilst an Order can be made on the basis of a reasonable allegation of rights subsisting, in relation to confirmation of an Order at this stage, the decision in *Todd and Bradely V the Secretary of State for Environment, Food and Rural Affairs* (2004) means that only one test is to be applied. That is whether, on the balance of probabilities, a right of way which is not shown on the Definitive Map or Statement subsists. By reference to *Todd and Bradley*, this is the ordinary civil burden of proof, meaning that “it is more probable than not on the evidence and on all the evidence that a right of way exists”. This is the test that SoSEFRA will apply and which this Council should consider.
61. It is considered that the additional evidence submitted as part of the objectors’ submissions demonstrates sufficiently that there was no intention to dedicate a public right of way from 2007 onwards and any use would have been interrupted sufficiently by the padlocking or blocking of the route as shown by the photographs and the implication being this would have occurred on a regular basis, particularly from 2007 onwards.
62. The use of the route pre 2007 is disputed. The given evidence in objection demonstrates the route was padlocked or blocked by gates at various times pre 2007 and the user evidence given demonstrates that the way was used without interruption on a regular basis during the period 1987-2007 and earlier. The additional evidence contained within the objections to the Order casts doubt on the claims of the users who claimed use on a regular, at times daily, basis from the 1960s to present day, which appears to be unlikely from the additional evidence given, certainly from 2007 onwards.
63. The reasonable implication is that the use pre 2007 may have also been interrupted, with Mr Finan claiming to have locked the gates from 2004-2007 and Mrs Young and Mr Squires giving evidence they locked the gates, or were aware of locked gates, indeed the lead applicant remembers the gates being locked by Mr Squires in the early 1990s. The circumstances of the gates and use of the path pre 2007 is unclear at best and there are inconsistencies in the evidence in support. However, a number of users still claim use pre 2007 for a period of 20 years in a manner that is as of right and would meet the tests of Section 31 of the Highways Act 1980.
64. Where there is conflicting evidence it may be tested, along with all other evidence, at a public inquiry. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton* [1994] 68 P&CR 402 Owen J “In a case where the evidence of 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.”

65. In making this Order officers considered that a reasonable allegation as to the acquisition of public rights over the Order Route had been made. It is considered that given the further evidence that has been adduced since making the Order, that sufficient doubt has been cast by that evidence as to bring into question the credibility of evidence in support of the Order and, as such, Wiltshire Council should not continue to support the Order but should facilitate a public inquiry or hearing. The testing of witnesses will be key to the final decision but due to the lack of clarity and inconsistencies in the evidence the Council stays neutral in this case and allows the objectors and supporters to represent themselves at a future public inquiry or hearing. The holding of a public inquiry or hearing will facilitate an inspector appointed by SoSEFRA to determine the Order with the benefit of the evidence being cross-examined by either side if an inquiry is held.

Proposal

66. That “The Wiltshire Council Mere Path No.78 Definitive Map and Statement Modification Order 2019” should be determined by SoSEFRA with Wiltshire Council taking a neutral stance.

David Redfern

Acting Director – Communities and Neighbourhood Services

Report Author:

Craig Harlow

Definitive Map Officer

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

User Evidence Forms

(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, Wiltshire, BA14 8JN.)

Appendices:

- Appendix 1 - Decision Report- including Appendices 1[A], 1[B], 1[C] to the Decision Report
- Appendix 2 - “The Wiltshire Council Mere Path No. 78 Definitive Map and Statement Modification Order 2019”
- Appendix 3 - Objections and representations of support to the Order
- Appendix 4 - User Evidence Analysis
- Appendix 5 - Statements filled out prior to application - omitted from initial report