

WILDLIFE AND COUNTRYSIDE ACT 1981

THE DEFINITIVE MAP AND STATEMENT FOR THE MALMESBURY RURAL DISTRICT AREA DATED 1952 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL (PARISH OF LEA AND CLEVERTON) PATH No. 34, 35 and 36 RIGHTS OF WAY MODIFICATION ORDER 2012

Purpose of Report

1. To:
 - (i) Consider the evidence and one duly made objection relating to the above Order to add public rights of way on foot to the Definitive Map and Statement near Crab Mill, Lea.
 - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed.

Description of the Route

2. The Order is attached to this report at **Appendix 1** and contains a map showing the claimed routes.
3. The routes lead across fields and beside the Woodbridge Brook and link to footpath Lea and Cleverton No. 3 and Crab Mill Lane.

Background

4. On 17 January 2012 Wiltshire Council received an application from a member of the public for an Order to modify the Definitive Map and Statement by recording footpaths across fields in the Crab Mill area of the village of Lea. The application was supported by a total of 31 witness evidence forms detailing use of the claimed routes dating back to 1971.
5. The Council has a duty to investigate this evidence and to make an Order if, on the balance of probability, it is either reasonably alleged, or shown, that public rights subsist over the ways. Pursuant to this duty, consultations and investigations were carried out between February and May 2012.

6. Correspondence was received, both in support of, and in objection to, the application.
7. Officers considered all of the evidence available and on 16 October 2012 a decision was made to make an Order. The Decision Report is appended here at **Appendix 2**.
8. The Order was made on the basis that it is reasonably alleged that Section 31 of the Highways Act 1980 applies. Broadly, this gives that where a right of way has been used without interruption by the public 'as of right' for a period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate, then public rights are deemed to have been dedicated. 'As of right' means without force, without permission and without secrecy.
9. In deciding to make the Order the Council was bound by the case of R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P and CR 402 which gives that the Council must apply one of two tests.

Test A: Does a right of way subsist on the balance of probabilities? This requires that there is clear evidence in favour of public rights and no evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? This requires that the allegation of public rights is reasonable and that there is no incontrovertible evidence to the contrary.
10. Test B is the weaker of the two tests and was applied to make this Order.
11. The Order has been advertised in accordance with the regulations and one objection to it has been received.
12. The Order must now be forwarded to the Secretary of State for determination. The test for confirmation of the Order that will be applied by The Secretary of State will be Test A; i.e. that, on the balance of probabilities, a right of way subsists.

The Evidence in Support

13. A total of 31 members of the public have submitted user evidence forms (UEFs) detailing their use of the claimed paths for varying periods of time dating from 1971 to 2012.
14. Photographs showing the family and dogs of one of the witnesses using some of the claimed paths were additionally submitted. The photographs are dated 2005, 2007 and 2009.
15. UEFs were all accompanied by a map showing where the witnesses had walked. Not all witnesses had walked all routes claimed. All 31 witnesses claimed to have used the route A to B on the Order plan (**Appendix 1**), 26 claimed to have used the route around the field perimeters (C-E-F) and 12 claimed to have used all of the routes.

16. Witnesses all claim to have used the routes without challenge until the autumn of 2011 when a number of witnesses were either challenged or had heard of others who had been. This challenge precipitated the application and has been taken as the date that the use was called into question.
17. If the end of 2011 is taken as the date that the public use was called into question then the relevant period for the consideration of 20 years use is between 1991 and 2011.
18. All 31 users have used the routes within this 20 year period, without interruption to use, challenge or permission (except for witness No. 19 who states that she did have permission).
19. The UEFs are summarised at **Appendix 3**.

The Evidence Against the Order

20. Prior to making the Order, evidence was adduced by the current landowners and one previous landowner. This evidence is amongst that considered at **Appendix 2, pages 13 to 17**.
21. Nothing in this evidence was considered incontrovertible (i.e. not able to be denied or disputed) and capable of defeating Test B referred to at paragraph 9 above, hence, the Order was made.
22. The Order was advertised from 25 October 2012 to 7 December 2012 and attracted one duly made objection. The objection was made by Osborne Clarke on behalf of one of the affected landowners (land shown coloured blue at **Appendix 2, page 6**).
23. The objection is appended in full at **Appendix 4**.
24. The objection is the same as that submitted during the initial consultation period and is summarised and discussed at **Appendix 2, pages 15 to 17**.
25. The covering letter to the objection states that substantial evidence from a number of witnesses will be adduced, including that of the tenant of the agricultural land, adjoining owners and predecessors in title to challenge the evidence that will be given by the supporters of the Modification Order at a Public Inquiry.
26. This evidence has not been made available to Wiltshire Council.

Main Considerations for the Council

27. The Council, as the surveying authority for the county of Wiltshire, excluding the Borough of Swindon, has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Mr. M. Moss. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.

28. Section 53(2)(b) states:

“as regards every definitive map and statement, the surveying authority shall: “as from that date (the commencement date), keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.”

29. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(i):

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows: that a right of way which is not shown in the 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 to which this Part applies.”

30. In considering and determining the application, Wiltshire Council must have regard to ‘*all other relevant evidence available to them*’, as the statute demands.

31. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31(1) of the Highways Act 1980. The Section states:

“where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and 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.”

32. The Section provides that where a way has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway - unless there is sufficient evidence that there was no intention during that period to dedicate the way.

33. The term 'as of right' means without force, secrecy and permission. People using the way must do so openly without damaging the property and not be reliant on being given permission to use the path by the owner of the land over which the path runs.

34. The case of *R. v. Oxford County Council ex parte Sunningwell Parish Council* (1999) considered the issue of public use of a way. Lord Hoffman presiding stated, “...*the actual state of mind of the road user is plainly irrelevant*”, it is immaterial therefore whether the public thought the way was a 'public' path or not.

35. The case concluded that it is no longer necessary to establish whether the users believe they have a legal right to use the land. Instead, it should be shown that use has been without force, secrecy and permission.
36. The use of the way must be without interruption. Once the 20 year uninterrupted use 'as of right' has been proved, the burden then moves to the landowner to show there was no intention to dedicate, i.e. evidence of any overt acts by the landowner to deter the public from using the way, or conversely to permit the public to do so. Overt acts are covered in Section 31 (3) (4) (5) and (6) below:
37. Section 31 of the Highways Act states as follows:

“31. Dedication of way as highway presumed after public use of 20 years

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually 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.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes –

(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and

(b) has maintained the notice after 1 January 1934, or any later date on which it was erected.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.

(6) An owner of land may at any time deposit with the appropriate council -

(a) a map of the land on a scale of not less than 6 inches to 1 mile and

(b) a statement indicating what ways (if any) over the land he admits to having been dedicated as highways;

And, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time –

(i) within ten years from the date of deposit

(ii) within ten years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(7) For the purpose of the foregoing provisions of this section, 'owner', in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above 'the appropriate council' means the council of the county, metropolitan district or London Borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.

(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an Order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over the land as a highway would be incompatible with those purposes."

38. The Supreme Court (House of Lords) recently considered two cases which hinged on the intention to dedicate and the application of Section 31 of the Highways Act 1980. In the judgement delivered 20 June 2007 [2007] UKHL 28 Lord Hoffman reasoned:

"It should first be noted that s.31(1) does not require a tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be a difficulty in satisfying such a requirement without any evidence at all. It requires 'sufficient evidence' that there was no intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible

outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J, in Billson's Case [R v S of S for the Environment ex p. Billson [1999] QB374 it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience."

Environmental Impact of the Recommendation

39. Effects on the environment cannot be taken into consideration for an Order decision.

Risk Assessment

40. Risks or safety cannot be taken into consideration for an Order decision.

Financial Implications

41. It is considered that with this case and the need to test the evidence of witnesses from both sides, that a Public Inquiry is unavoidable. However, the decision whether to determine the Order by Written Representations, a Public Hearing or a Public Inquiry rests with the Secretary of State.
42. The Council has a duty in law to support Orders where it is considered that on the balance of probability public rights subsist as shown in the Order. Budgetary provision has been made for this duty.
43. It is rare for a Council to object to an Order, though it may do so. An example of this may be when an Order has been made and during the advertisement period evidence against the Order is brought to its attention that is incontrovertible. This would attract a similar cost to supporting an Order and could be in the region of £3,000 to £10,000.

Options Considered

44. That:
- (i) The confirmation of the Order is supported as made.
 - (ii) The confirmation of the Order is supported with modifications.
 - (iii) The confirmation of the Order is objected to.

Reasons for Recommendation

45. The application adduces evidence that shows that on the balance of probability the routes have been used by the public at large for a period of at least 20 years without interruption in a manner that is 'as of right'.
46. The objector to the Order disputes this evidence on a number of grounds.

47. Wiltshire Council is not aware of any incontrovertible evidence to defeat the application of s.31(1) HA80 and has no evidence of any statements or deposits being made in respect of s.31(5) and (6) HA80 or of any signs or notices being placed to satisfy s.31(3) or (4).
48. There is no requirement to demonstrate an intention to dedicate with the application of s.31(1) HA80. It is for the landowner to demonstrate a *lack* of intention to dedicate the way as a public right of way to the relevant audience and Wiltshire Council has no evidence before it that this was done.
49. The placement of fencing and gates does not constitute an interruption to use unless the intention of the gate or fence was to prevent public use and that it was effective in doing so. As the land was grazed it is likely that the purpose of the fencing was to contain livestock. UEFs show that use of the ways was continuous since 1971 and that the presence of cattle did not prevent use. There is no evidence of gates being locked or of locks or fencing being damaged by users to gain entry to land.
50. Although a dog walker may choose not to walk in a field containing cattle it is a fact that many hundreds of kilometres of rights of way in Wiltshire pass through fields containing cattle and that the public use them without incident.
51. All of the routes shown in the Order satisfy the term 'way' as given in s.31(1) HA80.
52. In the absence of any further evidence being adduced at the Order making and advertisement stage it is considered that on the balance of probabilities rights of way subsist over the Order routes and that the Order should be confirmed.

Recommendation

53. That the Wiltshire Council (Parish of Lea and Cleverton) Path No. 34, 35 and 36 Rights of Way modification Order 2012 is forwarded to the Secretary of State for Environment, Food and Rural affairs for determination with the recommendation that the order be confirmed.

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Rights of Way Officer

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

Correspondence with Parish Councils, user groups, other interested bodies and members of the public