

WILTSHIRE COUNCIL

SOUTHERN AREA PLANNING COMMITTEE

19 DECEMBER 2013

WILDLIFE AND COUNTRYSIDE ACT 1981

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

**The Wiltshire County Council (Sheet SU 14 NE) Rights of Way Modification
Order No. 11 2006 (Milston restricted Byway No. 16)**

Purpose of Report

1. To:
 - (i) Consider the evidence and duly made objections and representation relating to the above Order.
 - (ii) Recommend that the Order be submitted to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed subject to correcting an error on the order map by amending the symbol to the way being added to reflect the statutory prescribed symbol for a Restricted Byway.

Background

2. On 13 August 2001 Jancis Henman, on behalf of The Friends of Milston and Brigmerston, applied to Wiltshire County Council for an Order to be made under Section 53 of the Wildlife and Countryside Act 1981 to:
 - (a) 'delete the footpath leading from Brigmerston corner, Church Road, Milston through the farmyard to RUPP 16 Milston leading to Durrington with a width of two metres'; and
 - (b) add 'the footpath leading from Brigmerston corner, Church Road, Milston and then running parallel to Barn House and Cottage on right then crossing diagonally left to join RUPP 16 leading to Durrington with a width of two metres.'
3. The applicant had incorrectly identified the status of the route described in paragraph 2(a) above as a footpath. In 2001 this section of right of way was shown on the definitive map as a Road Used as a Public Path (RUPP). The RUPP was reclassified as a Restricted Byway on 2 May 2006. The map attached at **Appendix A** shows the application routes to be deleted and added.

4. The application was supported by 41 user evidence forms completed by 42 people who claim to have used the route described in paragraph 2(b) above since 1916.
5. The Council has a duty to investigate applications of this nature and to make an Order if, on the balance of probability, it is reasonably alleged that public rights exist over the claimed route and to delete ways if evidence comes to light that there is no public right of way of any description on the definitive map.
6. Officers considered all the evidence available to them and concluded in a Decision Report attached at **Appendix B** that the route referred to in paragraph 2(a) above ought to be deleted and an Order to add a Restricted Byway on the route claimed in paragraph 2(b) above ought to be added to the definitive map.
7. On 2 August 2006 a Modification Order was made under Sections 53(3)(c)(i) and 53(3)(c)(iii) of the Wildlife and Countryside Act 1981, seeking to bring the changes referred to in paragraph 6 above into effect. The Order was duly advertised, two objections were received to the making of the Order from Mr A R H Smith of The Barn House on behalf of himself and family and from Mr B Riley. A representation was made to the making of the Order from Defence Estates. Copies of the objections and representation are attached at **Appendix C**.

Main Considerations for the Council

8. The main issues to be taken into consideration are set out in paragraphs 4 – 27 of the Decision Report attached at **Appendix B**.
9. The judgement given by the Court of Appeal in R v Secretary of State for the Environment ex parte Burrows and Simms (1991) 2 QB 354 held, in effect that if evidence comes to light to show that a mistake had been made in drawing up the definitive map, such a mistake can be corrected in either of the three ways envisaged in Section 53(3)(c) of the Wildlife and Countryside Act 1981.
10. There is a consistent portrayal of the claimed route as part of the local road network on the maps described in the Decision Report. This supports the application applied for by Jancis Henman and triggers the duty of the Council to modify the definitive map and statement accordingly by adding to the definitive map and statement as a Restricted Byway on the claimed route and the deletion of the section of Milston 16 currently shown through Brigmerston farmyard. The historical evidence is entirely supported by the significant amount of user evidence also submitted with the application. No statements and plans have been deposited under Section 31(6) of the Highways Act 1980 in this area.
11. No mapping evidence has been discovered by Council officers to confirm that the section of Milston 16 currently shown on the definitive map through Brigmerston farmyard is correct. Taking the map evidence into consideration with all the other evidence relating to Milston 16, as the legislation requires the Council to do, officers believe that the section of Milston 16 shown through the farmyard should be deleted from the definitive map.

12. The Order was advertised in accordance with the regulations and the attached objections and representation have been received. The Order must now be forwarded to the Secretary of State for determination. The test that the Secretary of State will apply in deciding whether or not to confirm the Order in relation to the proposed additional Restricted Byway made under Section 53(3)(c)(i) is:

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.

13. In considering the part of the Order concerning deleting that part of Milston 16 through the farmyard made under Section 53(3)(c)(iii), in accordance with the decision of the Court of Appeal in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* (2001) it will fall to the Secretary of State to start with the initial presumption that the way did exist. The standard of proof required to show that the inclusion of the right of way on the definitive map was incorrect is the balance of probabilities. But evidence of some substance had to be put in the balance if it was to outweigh the initial presumption that the way had been correctly included.

The Objections to the Order

14. On 23 August 2006 Mr Andrew R H Smith of the Barn House wrote to the Council:

'My family and I object, most forcefully, to the proposed re routing of the Restricted Byway. The occupants of the land, through which the Byway presently runs, locked and fenced the access and route some months ago and signs were erected forcing the walking public to make their way via an overgrown and often muddy track adjacent to our Property.....

In general terms the property through which the Byway runs was used continuously by the public from the moment we moved into our property in October 2001 until four months ago..... It should also be appreciated that the proposed re routing is directly along a path which becomes waterlogged during the winter months and overgrown during the summer.

Given that the Byway is presently routed mostly along a made up track, the re-routing would in fact be over a less direct and more inconvenient route and therefore the reason for the re-route is unclear and questionable.'

Comment on the Objection

15. Mr Smith is not contesting the physical presence of a route adjacent to his property along the line of the proposed Restricted Byway as he has acknowledged its existence in his letter dated 23 August. He states 'an overgrown and often muddy track adjacent to our Property' and 'the proposed re-routing is directly along a path which becomes waterlogged during the winter months and overgrown during the summer.'

16. Mr Smith states that he and the family moved into Barn House in October 2001. Gates were erected across the route of the proposed Restricted Byway in effect giving the appearance that it is within the curtilage of Barn House; however, the land over which the route crosses is not within the registered title of the property. Mr Smith has not produced any evidence to challenge the use of the proposed Restricted Byway given by the 42 local people who have completed witness evidence forms testifying to daily use of the route dating back to 1916. Many of the people who completed user evidence forms commented on a former owner of Barn House frequently observing them from his garden using the claimed right of way and never being challenged whilst doing so.
17. Mr Smith has not produced any evidence of use of the route through Brigmerston farmyard.
18. In 'A Guide to definitive maps and changes to public rights of way' produced by Natural England the legal considerations to be taken into account in matters relating to definitive map modification orders are made clear. The guide, which is targeted at members of the public, states:

'Definitive map modification orders are about whether rights already exist, not about whether they should be created or taken away. The suitability of a way for users who have a right to use it, or the nuisance that they are alleged to cause, or to be likely to cause, are therefore irrelevant. So also is the need for public access, locally, if the order alleges that public rights do not exist.'

Evidence is the key

The definitive map is a legal recognition of existing public rights to walk, ride and use vehicles. As such, any proposal to modify it by means of a definitive map modification order to add a right of way has to be judged by the legal test: 'Do the rights set out in the order already exist?'. If they do, then the map must be modified, regardless of any effect on anyone's property interests, or whether or not the routes physically exist at the present time on the ground. Similarly, if the evidence in support of the order proves to be sufficient, and the test is not satisfied, then the map remains as it is, however desirable it may seem for the public to have those additional rights.'

Evidence is also the key where the proposal is to remove some or all of the rights recorded on a way already shown on the map. In this case it must demonstrate clearly that a right of way, of that status, did not exist when it was first shown on the definitive map, and that an error was made.'

19. Mr Riley wrote on 25 August 2006 to object to the status of the additional right of way being added to the definitive map as a Restricted Byway. Mr Riley believes that 'on the balance of probability, the correct status is a byway open to all traffic.' Mr Riley goes on to explain that:

'In all probability, many (perhaps most) former RUPPs will have been used by MPVs (including tractors and traction engines) before 1 December 1930, and in some cases mainly by MPVs in the five years before 2 May 2006.'

The principal evidence implying MPV use of Milston 16 before 1 December 1930 (a tree lined lane until at least 1954) consists of its classification on four Bartholomew's half-inch maps, which are available for inspection.

1. Survey Atlas of England & Wales, Plate 64, 1904: 'Other Driving roads'

2. *Reduced Survey for Tourists & Cyclists, Sheet 29, 1911 'Secondary Roads (Good)'*
3. *Reduced Survey for Tourists & Cyclists, Sheet 29, 1920 'Motoring Roads: Secondary Roads'*
4. *Revised Contoured Map, Sheet 29, 1929: 'Motoring Roads: Secondary Roads'*

Comment on the objection

20. Section 67 of the Natural Environment and Rural Communities Act 2006 ends certain unrecorded public rights of way. Section 67(1) states:

'An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement-

- a) was not shown in a definitive map and statement, or*
- b) was shown in a map or statement only as a footpath, bridleway or restricted byway.*

But this is subject to subsections (2) to (8). Officers are not aware of any of the exceptions in subsection (3) relating to public rights applying to the section of additional Restricted Byway. No evidence of actual vehicular use of the route has been submitted to the Council. Section 67 of the Act is attached to the Decision Report at **Appendix C** to this report.

Representations in support of the Order

21. Mr R D Watts, Senior Land Agent at the Defence Estates, wrote on 14 September 2006 to support the making of the Modification Order which is the subject of this report. Mr Watts stated:

'I would make the point that the Byway has never run through our land and when I used to work at our Durrington office, on an almost daily basis for approximately 8 years, I would walk the route in front of what is now Mr Smith's house along the correct route. There had not been any problems with this route until the ownership of The Barn House changed hands. It was at this time that difficulties began to arise over access along the byway as it was obvious that the new owner wished to prevent access in front of their property and it was at this time that the local inhabitants began to go through the MOD land, hence the reason why we put the signs up.

As access along the byway has been restricted by the erection of gates, I assume you will be taking enforcement action against Mr Smith.

Concerning the condition of the paddock along which the right of way runs, the tenant has strimmed the nettles, which I understand is your responsibility, which now allows unimpeded access along the correct route.

I really fail to see how Mr Smith can object; indeed I am somewhat confused as to how it is on the definitive map because the byway has never taken this route.'

Comment on the Representation

22. The evidence in support of the Order provided by Mr Watts on behalf the Defence estates is welcome.

Safeguarding Considerations

23. Considerations relating to safeguarding anyone affected by the making and confirmation of an Order made under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be confirmed based on the relevant evidence alone.

Public Health Implications

24. Considerations relating to any public health implications of the making and confirmation of an Order made under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Orders must be confirmed based on the relevant evidence alone.

Environmental Impact of the Recommendation

25. Considerations relating to the environmental impact of the making and confirmation of an Order made under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Orders must be confirmed based on the relevant evidence alone.

Risk Assessment

26. Considerations relating to risks or safety of the 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 Orders must be confirmed based on the relevant evidence alone.

Financial Implications

27. 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 an Order by written representations, a Hearing or a Public Inquiry rests with the Secretary of State.
28. The Council has a duty in law to support Orders where it is considered that on the balance of probability public rights subsist or the definitive map erroneously shows a right of way as it is believed the evidence shows for that section of Milston 16 which runs through Brigmerston farmyard. Budgetary provision has been made for this duty.

Legal Implications

29. The making of this Definitive Map Modification Order is in line with the Council's statutory duty under Section 53(2) of the Wildlife and Countryside Act 1981. When the Order was made in 2006 no challenge to the exercise of this duty was made and it is considered unlikely that any would be made now.

30. The Order attracted objections to the changes it sought to make and must be forwarded to the Secretary of State for Food, Environment and Rural Affairs for determination.
31. If the Council fails to do this it may be liable to judicial review at a possible of cost in the region of £50,000.
32. The Secretary of State may decide to determine the Order by way of written representations, a local hearing or a public inquiry. Costs for written representations and a hearing are likely to be low (below £500) but would be in the region of £5000 - £10000 for a public inquiry. As this is related to a statutory duty, financial provision has been made for this.
33. These costs relate to the provision of the inquiry and the Council's own costs in supporting its stance on the Order. The Council would only be liable to the awards of costs against it by any objector if it was deemed by the Inspector to have acted in an unreasonable manner.
34. It is not considered likely that this would occur.
35. Any decision taken regarding this Order after it has been forwarded to the Secretary of State may be challenged, but the liability for this is the Secretary of State's and not Wiltshire Council's.

Options Considered

36. 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

37. Under Section 53(3)(c)(i) the Surveying Authority is not required to prove beyond all reasonable doubt that rights exist. The burden of proof lies on the 'balance of probability', i.e. that it is more likely than not that the rights exist. An Order may be made under this section where rights can be 'reasonably alleged to subsist'; however, at the confirmation of an Order a more stringent test applies, that public rights 'subsist'. The wording for Section 53(3)(c)(iii) is different, as the Surveying Authority has to be satisfied that there 'is' no public right of way shown on the definitive map.
38. The earliest map examined which officers believe shows the route sought to be added to the definitive map is Andrews' and Dury's map of Wiltshire dated 1773. Whilst it may be argued that this map is on such a small scale, 2 inches to 1 mile, that it is not possible to identify with any degree of accuracy the route of a particular way, when compared with the later mapping evidence, in particular the large scale Ordnance Survey maps, a picture of the road layout of this area becomes clear. There is a consistent portrayal of the claimed additional route as part of the local road network on the maps described in the

Decision Report attached at **Appendix B**. This supports the application applied for by Jancis Henman and triggers the duty of the Council to modify the definitive map and statement accordingly by adding to the definitive map and statement as a Restricted Byway the claimed route and the deletion of the section of Brigmerston 16 through the farmyard. The historical evidence is entirely supported by the significant amount of user evidence also submitted with the application. No statements and plans have been deposited under Section 31(6) of the Highways Act 1980 for the land over which the claimed Restricted Byway runs.

39. No mapping evidence has been discovered by Council officers to confirm that the section of Milston 16 currently shown on the definitive map through Brigmerston farmyard is correct. Taking the map evidence into consideration with all the other evidence relating to Milston 16 the Council has considered, officers believe that the section of Milston 16 shown through the farmyard should be deleted from the definitive map.
40. The order map has a drafting error on it as the route to be added as a Restricted Byway is not portrayed with the statutory prescribed symbols. Consequently, officers recommend that the Order be submitted to the Secretary of State with the recommendation that the Order plan be modified accordingly.

Recommendation

41. That the Wiltshire County Council (Sheet SU14 NE) Rights of Way Modification Order No. 11, 2006 (Milston Restricted Byway No. 16) is forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that the Order be confirmed with the modification to the Order map to show the Restricted Byway to be added by a broken line and small arrowheads.

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

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

Appendices:

Appendix A - Order Plan
Appendix B - Decision Report
Appendix C - Decision Report Attachments