

WILDLIFE AND COUNTRYSIDE ACT 1981

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

**The Wiltshire Council Collingbourne Kingston 1B (part) & 33 and Chute 3 (part)
Rights of Way Modification Order 2013**

Purpose of Report

1. To:
 - (i) Consider the evidence, one duly made objection and one duly made representation relating to the above Order.
 - (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 as made.

Description of the Routes

2. The Order is attached to this report at **Appendix 1** and contains a map showing the route.
3. The Order route links Chantry Lane in Chute (byway open to all traffic Chute 34) crosses White Lane (byway open to all traffic Chute 35) and leads west to join the road C.21 in the parish of Collingbourne Kingston.

Background

4. A full report relating to this Order is appended at **Appendix 2**.
5. The report at **Appendix 2** is the Council's decision report relating to an application it received in 1987 for an Order to modify the definitive map and statement.
6. The application was to record the route at **Appendix 1** (comprising part of Collingbourne Kingston 1B, 33 and a part of Chute 3) as a byway open to all traffic and was based on historical evidence.

7. A change in the law meant that any rights for mechanically propelled vehicles were extinguished in 2006; as a result, the application was refused and no appeal was lodged.
8. The application had, however, brought evidence to the Council's attention that shows, on the balance of probabilities (that it is more likely than not), that the route is a historic carriageway and should be recorded as a restricted byway in the definitive map and statement.
9. A restricted byway is a public right of way that the public may walk, ride or lead a horse, cycle or drive a horse drawn vehicle along. The public may not drive or ride a mechanically propelled vehicle along a restricted byway.
10. On 29 October 2013 a Modification Order was made under Sections 53(3)(c)(ii) and (iii) of the Wildlife and Countryside Act 1981, seeking to bring the changes referred to in paragraph 8 above into effect. The Order was duly advertised and attracted one objection and one representation.
11. As a result, unless the objection and representation are withdrawn, Wiltshire Council may not confirm the Order which must now be sent to the Secretary of State for the Environment, Food and Rural Affairs for determination.

The Evidence For the Orders

12. A considerable amount of historical evidence has been considered and the full report is appended here at **Appendix 2**.
13. When evaluating evidence, it is necessary to have regard to the evidential weight that can be apportioned to documents and in examining and considering the evidence in the Decision Report officers had regard to The Planning Inspectorate's Consistency Guidelines and Chapter 6 of the book 'Rights of Way A Guide to Law and Practice – Fourth Edition' by John Ridall and John Trevelyan.
14. The report considers evidence in order of evidential weight. The evidence considered covers the period 1773 to 1985 and provides a consistent impression of a historic public carriageway linking the settlements of Collingbourne Kingston and Chute.
15. One representation in support of the Order has been received. This was made by Mr B Riley. The representation states:

"Collingbourne Kingston 1B (pt) & 33 and Chute 3 (pt) Rights of Way Modification Order 2013

Thank you for your letter dated 6 November referring to the above Order.

The evidence supporting the Order has been carefully examined, including the original maps and documents held by the History Centre at Chippenham.

In my view, the supporting evidence is very robust and surpasses the statutory test. Consequently, I am pleased to give the Order my full support."

The Evidence Against the Orders

16. One objection to the Order has been received. This was made by Jane Hanney of Magna Law, acting for Mr R Hallam of Gammons Farm. The objection states:

“The Wiltshire Council Collingbourne Kingston 1B (part) & 33 and Chute 3 (part) Rights of Way Modification Order 2013

I refer to your letter of 6 November 2013 and the enclosed Notice of Modification Order dated 14 November 2013 and the Order dated 29 October 2013.

I have been instructed by Mr Robin Hallam of Gammons Farm to write to you to object to the making of this Order on the grounds that:

1. *The totality of the evidence is not sufficient to show on the balance of probabilities that vehicular rights subsist along the Order route.*
2. *The totality of the evidence is not sufficient to show on the balance of probabilities that a right of way of the status claimed in the Order subsists along the Order route.”*

Main Considerations for the Council

17. 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 evidence initially adduced with the application. Section 53 of the Wildlife and Countryside Act 1981, deals with the duty to keep the definitive map and statement under continuous review.

18. 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’.”

19. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(ii) and (iii):

“(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.”

20. In considering and determining the application, Wiltshire Council must have regard to ‘*all other relevant evidence available to them*’, as the statute demands.
21. Section 32 of the Highways Act 1980 permits the Council to consider historical evidence:

“32. A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified, by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”
22. It is necessary for the Council to decide whether it considers that the evidence investigated still supports that public restricted byway rights subsist over the Order route. The legal test is the balance of probability.

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 permitted within the Act. Any such Order must be confirmed based on the 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 permitted within the Act. Any such Order must be confirmed based on the evidence alone.

Environmental Impact of the Recommendation

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

Risk Assessment

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

Financial Implications

27. Unless the objection and representation are withdrawn, this Order must be sent to the Secretary of State for the Environment, Food and Rural Affairs for determination. An Inspector, appointed by the Planning Inspectorate, will be appointed and may decide to determine the case by way of written representations, a hearing or a public inquiry.

28. 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 Orders. Budgetary provision has been made for this duty.
29. 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 or compelling. This would attract a similar cost to supporting an Order and could be in the region of £3,000 to £10,000.

Options Considered

30. To:
 - (i) Forward the Order to the Secretary of State with the recommendation that it is not confirmed.
 - (ii) Forward the Order to the Secretary of State with the recommendation that it be confirmed with modifications.
 - (iii) Forward the Order to the Secretary of State with the recommendation that it be confirmed as made.

Reasons for Recommendation

31. The earliest map viewed, Andrews and Dury's Map of Wiltshire dated 1773, shows the Order route in the manner of a significant road linking Collingbourne Kingston with Chute.
32. In the Court of Appeal in the case of *Fortune & ORS v Wiltshire Council & ANR [2012] EWCA Civ 334* Lewison LJ at paragraph 47 considered the findings of Judge McCahill QC in the High Court. McCahill J had carefully considered Andrews and Dury's Map of Wiltshire and had the benefit of the views of expert witnesses from both sides on the matter who praised its quality. The Judge said of this map that "*it was the first map of the county to be based on a meticulous original survey, and that it is considered by experts to be of very fine quality. It was described, in a catalogue of Wiltshire maps, as one of 'the finest maps of Wiltshire before the Ordnance Survey.'*" McCahill J said that the map did not show footpaths, but only vehicular routes (paragraph 655 High Court judgement).
33. Whilst it is accepted that a map of the scale of two inches to one mile may not readily determine an exact line, this map is very valuable in this case as it predates the Inclosure of the downs and common fields in the Collingbourne Valence tithing and the parish of Chute.
34. There is evidence, therefore, of an existing track linking the two settlements that predates and survives Inclosure. The Inclosure process in the parishes of Collingbourne Kingston and Chute are consistent in it being not only a route linking the two settlements but also a public carriage road.

35. Records of the Collingbourne Kingston Vestry from 1839 support that the route to Chute Heath was a length of public highway used for wheeled carriages and listed in a return made to the House of Commons in 1839 as required by an Act of Parliament dated 1815.
36. A large number of documents support that this route continued to be recorded as a road throughout the 19th and first part of the 20th century.
37. It is clear from these sources that the character of the land over which the route passed changed, for example in the late 1700s the land crossed by Collingbourne Kingston 33 was downland but by 1841 the land had been ploughed. Additionally, although Chute 3 past Tanners Copse was originally defined by fences or hedges, by the mid to late 1980s both hedges had been removed and the land ploughed.
38. No records of extinguishment have been found and no historical records viewed support the representation of the way as a footpath or bridleway, instead of a restricted byway.

Recommendation

39. That the Wiltshire Council Collingbourne Kingston 1B (part) & 33 and Chute 3 (part) Rights of Way Modification Order is forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that the Order be confirmed.

Tracy Carter

Associate Director of Environment and Leisure

Report Author

Sally Madgwick

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

Appendices:

Appendix 1 - Order

Appendix 2 - Decision Report and Appendices