

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE DEFINITIVE MAP AND STATEMENT FOR THE WARMINSTER AND WESTBURY RURAL DISTRICT COUNCIL AREA DATED 1953 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981**

**The Wiltshire Council West Ashton 1 (Part) Rights of Way Modification Order 2014**

**Purpose of Report**

1. To:
  - (i) Consider the evidence and duly made objection 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 is not confirmed.

**Relevance to the Council's Business Plan**

2. Working with the local community to provide a rights of way network fit for purpose.

**Background**

3. In January 2013 the Council received an enquiry regarding the route of Footpath 1 West Ashton in association with the exchange of contracts for the sale of Manor View, Bratton Road, West Ashton. Footpath 1 was revealed as passing through Manor View and its garden. The solicitors acting for the owners of Manor View applied to the Council for an Order under Section 53 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement. The application seeks to delete that section of Footpath 1 which runs through the property and add the route currently available for the public to use and signed by the Council as a public footpath. The alternative route runs along the south eastern and north eastern boundaries of Montrose and 17a Bratton Road, as shown on the plan attached at **Appendix A**.
4. 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 a way if evidence comes to light that there is no public right of way of any description on the Definitive Map.

5. Officers considered all the evidence available to them and concluded in a Decision Report attached at **Appendix B** that the Definitive Map ought to be modified to reflect the change as shown on the plan attached at **Appendix A**.
6. On 29 July 2014 a Definitive Map Modification Order was made under Section 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 3 above into effect. The Order was duly advertised and an objection was received to the making of the Order from Mr Francis Morland.

### **Main considerations for the Council**

7. Wiltshire Council is the Surveying Authority for the county of Wiltshire excluding the Borough of Swindon. Surveying Authorities are responsible for the preparation and constant review of definitive maps and statements of public rights of way. Section 53(2)(b) of the Wildlife and Countryside Act 1981 states:

As regards every map and statement the Surveying Authority shall -

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
- (b) as from that 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 these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

8. The events referred to in subsection 2 of the 1981 Act which are relevant to this application are:

53(3)(c) 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 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;
- (ii) that there is no 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.

9. The Definitive Map Orders: Consistency Guidelines produced by The Planning Inspectorate make the circumstances of when an error in the Definitive Map can be corrected:

*“The Definitive Map and Statement are conclusive as to the status of highways described, generally without prejudice to the possible existence of higher rights (DEFRA circular 1/09). This conclusively is not, however, a*

permanent feature: as Lord Diplock put it in *Suffolk CC v Mason* (1979) The entry on the definitive map does not necessarily remain conclusive evidence forever. It had been held, in the case of *Rubinstein v Secretary of State for the Environment* (1989), that once a right of way was shown on a definitive map, it could not be deleted, but the judgments in *Simms & Burrows* 1981 made it clear that Section 53 of the *Wildlife and Countryside Act 1981* allowed both for the addition or upgrading of rights of way on the discovery of new evidence, and for their downgrading or deletion. In his judgment Purchas LJ stated that he could see no provision in the 1981 Act specifically empowering the local authority to create a right of way by continuing to show it on the map, after proof had become available that it had never existed. Parliament's purpose, expressed in the *Wildlife and Countryside Act 1981*, he said, included the duty to produce the most reliable map and statement that could be achieved, by taking account of changes in the original status of highways or even their existence resulting from recent research or discovery of evidence. Parish/community councils usually provided the information regarding the routes to be added to the *Definitive Map and Statement* and the status of those routes. It is not uncommon for witnesses (e.g. local inhabitants, parish/community councils or user organisations) to assert that the parish/community council's imputes to the definitive map process are not reliable. It is variously argued that they did not have the proper guidance, to that they misinterpreted it, and these assertions then form the basis of the case for the modification. The Memorandum attached to Circular No 81 was distributed down to parish council/parish meeting level and the legal presumption of regularity applies. Unless claimants can demonstrate otherwise, it should be assumed that a parish/community council received this detailed guidance and complied with it. The diligence with which a parish/community council met the remit is a different question. The Council minutes can be a useful source of information on this procedure, and other local highway issues which have arisen since the relevant date. As the minutes are a public record of the perception of the parish/community council at that time, and therefore probably also represent the perception of parishioners, they may carry significant evidential weight. Other procedural guidance was issued to surveying authorities in Circulars 91/1950, 53/1952 and 58/1953.

In *Burrows v Secretary of State for Environment, Food and Rural Affairs* [2004] the judge commented that modification of the definitive map requires the discovery of evidence. An inquiry cannot simply re-examine evidence considered when the definitive map and statement was first drawn up; there must be some new evidence, which, when considered together with all other evidence available, justifies the modification.

When considering whether a right of way already shown on a definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status ignored), there can be no reason to consider it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all. See section 4 of Circular 1/09.

*Trevelyan confirms that cogent evidence is needed before the definitive map and statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of Trevelyan that;*  
*'Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that it is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.'*

10. The Council must consider all available relevant evidence.
11. West Ashton Parish Council claimed Footpath 1 at the preparation stage of the Definitive Map and Statement. On a form dated 20 May 1952 the path was described as derelict and was drawn imprecisely by the parish council on the maps provided by Wiltshire County Council to the parish council for the survey. The parish council subsequently asked Wiltshire County Council to amend what it said was a drawing error on the Definitive Map for West Ashton Footpath 1 where it junctions with Bratton Road. An amendment was made but at the 1:25000 scale of the map used to portray the alteration it is difficult to interpret the change.
12. The current parish council supports the change to the route of the footpath as shown at **Appendix A**.
13. The photographs submitted with the application show the alternative route proposed as a well established and defined route which appears to have existed for many years. The route is signed and maintained by Wiltshire Council. There is no evidence of a path through the curtilage of Manor View.
14. A consultation on the change proposed on the Plan at **Appendix A** was undertaken with the usual statutory and non statutory consultees and no objections were raised.
15. When Mr Morland wrote to the Council on 14 August to object to the Order he did not state the grounds on which he objected to it. Officers asked Mr Morland to give the reasons for his objection, which he did on 15 September. Mr Morland believes the Order contains a significant number of errors and other shortcomings which he believes render it unfit for purpose but he has also brought to officers' attention mapping evidence which is directly relevant to the issues for the Council to consider. Mr Morland states:

'To date I have only been able to access an incomplete set of historical Ordnance Survey maps available at Trowbridge Library, which include only two at a scale of 1:2500 (Wiltshire Sheet 38.12 Second Edition dated 1901

and Ordnance Survey Sheets ST8755 and ST8855 dated 1970) and others at smaller scales dated 1890, 1949, 1960, 1975 and 1988.

The provisional conclusions I draw from these and my site visits are as follows:

A footpath running eastwards from Bratton Road at Grid Reference ST 87966 55591 in Plot 67 was shown on the 1890 and 1901 maps and on the Definitive Map of 1953.

Subsequently, its route was blocked/obstructed/encroached upon by the construction of a building in Plot 67, at or close to the present site of the large house at 19 Bratton Road known as Homefield, and a different route to Bratton Road was brought into use, which terminated at point B and which was added to the Definitive Map at its first modification in about 1968 in circumstances I am not familiar with.

Subsequently, a house known as Montrose was built a little to the south-east of that route, not shown on the 1960 map but marked on the 1970 map.

Subsequently, that house was demolished and the bungalows now known as Manor View and Montrose, were constructed in its grounds (not shown on the 1975 map but marked on the 1988 map). It does not appear that the line of the footpath was blocked/obstructed/encroached upon either of these bungalows when first constructed; but at some later date (not recently) a garage extension was added on the south-east side of Montrose across the line of the footpath, which did sever it.

Meanwhile, an alternative route through the grounds of the house known as Montrose, first shown on the 1949 map, came into use and came to be believed by some to be the recorded right of way. That followed a more easterly route than the footpath to be added A – C, but the large modern house numbered 17A and known as Springfields (built since the 1988 map) now sits over and across that route. I have seen no evidence that that route was anywhere less than two metres in width.

Until the construction of Springfields, I have seen no evidence that most of the route A – C is of any significant age or any sufficient status to justify the Modification Order that has been made. The pieces of land in question appear to be in more than one ownership at present but may have all been in a single title at an earlier date and the title deeds dividing up that title may indicate more clearly how the present situation arose.'

### **Comment on the objection**

16. Officers agree the 1953 Definitive Map showed Footpath West Ashton 1 on the route mapped by the Ordnance Survey on the County Series maps up to and including the 1926 edition. An alternative route was mapped by the Ordnance Survey, as shown on the 1949 map Mr Morland has referred to, but officers do not have any information as to when this route came into existence and who used the path. No evidence about public use has been submitted to the Council regarding this route. The Council only has the map produced at the Second and Special Review of the Definitive Map in 1972 resulting from

the 1968 parish council request to amend the route which it can rely upon. As Mr Morland points out, the route shown on the Second and Special Review map could have been available for public use until the line of the path was obstructed by the construction of the garage at Manor View which occurred after 1972. Looking at the Consistency Guidelines produced by the Planning Inspectorate outlined in paragraph 9 above which need to be applied in considering deleting a right of way from the Definitive Map, there is not sufficient evidence to prove that on a balance of probabilities the section of Footpath West Ashton 1 at Manor View ought to be deleted.

17. Mr Morland points out that he has not seen any evidence of use as a public footpath of the route, shown A – C on the plan at **Appendix A**, until the construction of Springfields 17A Bratton Road and this property has been built since 1988. Officers have no evidence of use of this route before Springfields was built, and no evidence was provided with the application, therefore it is not possible for the Council to conclude public rights exist over the claimed route.
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.”*

**Safeguarding Considerations**

19. Safeguarding considerations are not considerations that can be taken into account when the Council is carrying out its statutory duty to keep the definitive map and statement under continuous review under Section 53 of the Wildlife and Countryside Act 1981. However, it is not considered a refusal to make the Order applied for will result in any detrimental effects upon safeguarding.

### **Public Health Implications**

20. The implications of the proposal on public health are not considerations that can be taken into account when the Council is carrying out its statutory duty to keep the definitive map and statement under continuous review under Section 53 of the Wildlife and Countryside Act 1981; however, it is not considered the proposed change will have any adverse implications on public health.

### **Environmental Impact of the Recommendation**

21. The Environmental impact of the recommendation is not a consideration that can be taken into account when the Council is carrying out its statutory duty to keep the definitive map and statement under continuous review under Section 53 of the Wildlife and Countryside Act 1981; however, it is not considered the proposed change will have any environmental impacts.

### **Risk Assessment**

22. Issues relating to health and safety are not considerations that can be taken into account when the Council is carrying out its statutory duty to keep the definitive map and statement under continuous review under Section 53 of the Wildlife and Countryside Act 1981. It is not considered there is a reputational risk to the Council carrying out this statutory duty correctly.

### **Financial Implications**

23. The continual review of the definitive map and statement are statutory processes for which financial provision has been made.
24. When an Order is made and advertised and no objections are forthcoming, the Council will not incur any further costs beyond advertising the confirmation of the Order. If the Order attracts objections or representations that are not withdrawn, it must be forwarded to the Secretary of State for determination. It may be determined by written representations which would be no significant additional cost to the Council, a local Hearing with additional costs to the Council in the region of £300, or a Public Inquiry, with additional costs in the region of £5,000. The financial provision referred to in paragraph 23 above would cover these costs.

### **Legal Implications**

25. Wiltshire Council has a legal duty to keep the definitive map and statement under continual review and therefore there is no risk associated with the Council pursuing this duty correctly.

### **Options Considered**

26. 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**

27. Under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 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. This burden of proof has not been satisfied.

### **Recommendation**

28. That the Wiltshire Council West Ashton 1 (Part) Rights of Way Modification Order 2014 is forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that the Order is not confirmed.

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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