

WILTSHIRE COUNCIL

NORTHERN AREA PLANNING COMMITTEE
13 OCTOBER 2010

WILDLIFE AND COUNTRYSIDE ACT 1981 S.53 RIGHTS OF WAY MODIFICATION ORDER NO.8 2004 (SHEET ST 96 NE) HEDDINGTON NO.8

Purpose of Report

1. To:
 - (i) Seek approval to forward The Wiltshire County Council (Sheet ST 96 NE)(Heddington No.8) Rights of Way Modification Order No.8 2004, upgrading footpath No.8 Heddington to a byway open to all traffic, to the Secretary of State for The Environment, Food and Rural Affairs, with a recommendation to modify and confirm the Order to show path Heddington 8 as a restricted byway.

Background

2. The plan at **Appendix A** shows the location of path Heddington 8. Heddington 8 leads from Church Farm, Heddington, approximately west, north-west and south to its junction with bridleway Bromham 53 and byways open to all traffic Bromham 17 and 49.
3. In February 2002 the Wiltshire Bridleways Association applied to Wiltshire County Council for an Order to modify the definitive map to show the route of Heddington 8 as a bridleway. The application was based upon evidence of use of the path by the public on horseback for a period of 20 years or more without interruption and 'as of right'. 13 user evidence forms and plans showing the claimed route were submitted.
4. During the course of investigating all available evidence (which includes historical documents) officers discovered that higher rights than bridleway subsisted on path Heddington 8 and that the route had been an old road. It is the Council's duty to make a modification Order as soon as reasonably practicable after this discovery and an Order recognising these rights was made and sealed on the 8 January 2004.
5. A copy of the Order is included at **Appendix B**.
6. The officer's decision report is included at **Appendix C**.
7. Following the making of the Order, a formal objection period of six weeks (from 15 January 2004 to 1 March 2004) was given, during which time objections and representations to the Order could be made. The Order received one representation supporting the Order and one objection opposing the Order. The objection has subsequently been withdrawn.
8. Correspondence was also received from the parish council, neighbouring landowners and residents of Heddington expressing concern regarding the making of an Order to record a byway open to all traffic.

9. Officers met the parish council and concerned residents on the 3 February 2004 and explained the legal tests set out under Section 53 of the Wildlife and Countryside Act 1981. It was explained that the Wildlife and Countryside Act 1981 does not allow for factors like desirability, safety or need to be taken into account but that it was open to anyone to challenge the Council's interpretation of the evidence or to adduce new evidence.
10. It was also explained that the application submitted by the Wiltshire Bridleways Association had acted as a trigger to investigate Heddington 8 and once evidence had been discovered that the definitive map was in error, the Council had no option open to them other than to make an Order under Section 53 of the Wildlife and Countryside Act 1981 as it is the Council's statutory duty and a matter in which the Council has no flexibility.
11. Residents pointed out that the nature of the path was such that it could not be used by vehicles, i.e. it was in a very bad condition and it had badger sets underneath the way and was overgrown in places. In the light of the representations made at this meeting, and in general correspondence, officers agreed to conduct a public consultation into the possibility of placing a Traffic Regulation Order (made under Section 1 of the Road Traffic Regulation Act 1984) on the route which would have excluded motorised vehicles driven by the public.
12. A public consultation of the proposed Traffic Regulation Order was carried out between 27 January 2005 and 28 February 2005. A number of responses, both in support of and opposed to, the proposed Traffic Regulation Order were received. During this time the Definitive Map Modification Order to record the route as a byway open to all traffic, even though it was capable of being confirmed by the Council, was left unconfirmed.
13. The case officer did not progress to submitting a report to the then member with delegated authority (Cabinet Member for Environment, Transport and Economic Development) for making these decisions and on 2 May 2006 new legislation came into effect which affected the Definitive Map Modification Order to record Heddington 8 as a byway open to all traffic.
14. The new legislation that was enacted on 2 May 2006 is the Natural Environment and Rural Communities Act 2006 (NERCA 2006). Although detailed later in this report, Section 67(1) extinguished the public's right to take a mechanically propelled vehicle over any way which was not, as of 2 May 2006, recorded in the definitive map and statement as a byway open to all traffic. This extinguishment was subject to a number of exemptions.
15. Since, as the Order had not been confirmed, and as Heddington 8 was not recorded as a byway open to all traffic in the definitive map and statement on 2 May 2006, officers had to consider whether any of the exemptions to the extinguishment of vehicular rights applied before the Order could be confirmed.
16. In addition to the case officer's investigations as to whether any exemptions applied, a public consultation was carried out between 17 March 2009 and 20 April 2009 to see if any other information relating to the saving of mechanically propelled vehicular (MPV) rights would be adduced.
17. Respondents gave evidence of use of the route by horses, walkers and farm vehicles but no evidence of use by the public in mechanically propelled vehicles or suggestion that historic vehicular rights had been saved was brought to the Council's attention.

18. A public right of way which had public vehicular rights before 2 May 2006 but which had them extinguished for MPVs by NERCA 2006 should be recorded in the definitive map and statement as a restricted byway. On a restricted byway the public has a right of way on foot and on horseback or leading a horse. Additionally, the public have a right of way in vehicles that are not mechanically propelled. This preserves a right of way for pedal cyclists and drivers of horse drawn vehicles.

Main Considerations for the Council

19. The Application was made under Section 53 of the Wildlife and Countryside Act 1981 which places the Surveying Authority under a duty to keep the definitive map and statement under continuous review. Section 53 (2) states:

“As regards every definitive 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 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.”*

20. The event in sub-section 3 referred to above is:

- “(3) (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...”*

21. To recap - the application was originally to upgrade the path to a bridleway only, based on evidence of use of the route on horseback for a period of 20 years or more without interruption. However, upon examining historical documents the Surveying Authority found evidence of vehicular rights on the way and therefore made a modification Order to record the route as a byway open to all traffic, under Section 53 (3) (c) (ii) of the Wildlife and Countryside Act 1981.

22. The Natural Environment and Rural Communities Act came into effect on 2 May 2006 and Section 67 had the effect of extinguishing unrecorded vehicular rights except in certain circumstances, as follows:

- “(1) 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 the definitive map and statement only as a footpath, bridleway or restricted byway.*

But this is subject to subsection (2) to (8).”

23. Therefore, as path no.8 Heddington is recorded only as a footpath in the definitive map and statement, unrecorded vehicular rights were extinguished, unless an exemption listed at sub-sections 2-8 applies.

Subsection (3) states:

“Subsection (1) does not apply to an existing public right of way over a way if-

- (a) before the relevant date, an application was made under Section 53(5) of the Wildlife and Countryside Act 1981 (c.69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,*
- (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the act in respect of such an application, or*
- (c) before commencement, a person with an interest in the land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles –*
 - (i) was reasonably necessary to enable that person to obtain access to the land, or*
 - (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.*

(4) “The relevant date” means-

- (a) in relation to England, 20 January 2005...”*

24. Although the application was made before the relevant date of 20 January 2005, it is not an application of the nature specified as sub-section (3)(a) which states that for there to be a valid NERC exemption, the application must be made under Section 53(5) of the Wildlife and Countryside Act as an application to show the way as a byway open to all traffic. Vehicular rights on path no.8 Heddington are not protected under NERC as the application was made originally for a bridleway only, therefore there is no protection of MPV rights under (3)(a). Additionally, the Surveying Authority used its own powers to make the Order upgrading the path to a full byway open to all traffic, not acting on the application.

25. At sub-section (3)(b), again, the saving only applies to ‘such an application’ that is an application for byway open to all traffic and not bridleway, as in this case.

26. Therefore Officers consider that the route cannot be shown as a byway open to all traffic based on NERCA 2006 saving (67)(3)(a) or (b).

27. It has also been necessary for the Council to consider other NERCA exemptions which may be relevant in this case:

Sub-section (2) of Section 67 states:

“Subsection (1) does not apply to an existing public right of way if-

- (a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use with mechanically propelled vehicles,*

- (b) *immediately before commencement it was not shown in the definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense),*
- (c) *it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,*
- (d) *it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or*
- (e) *it was created by virtue of use by such vehicles during a period ending before 1 December 1930.”*

Also under sub-section (3)(c):

“before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles-

- (i) *was reasonably necessary to enable that person to obtain access to the land, or*
- (ii) *would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.”*

28. Heddington 8 does not meet any of the exemptions listed (a) to (e) inclusive, nor was it the subject of an application received by someone with an interest in the land.

Environmental Impact of the Recommendation

29. Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to the environment. However, officers note that the application was based on use going back for over 20 years by horse riders and it is considered likely that use will be continuing as before.

Risk Assessment

30. Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to health and safety.
31. This Order has attracted no objections and although it must now be sent to the Secretary of State for determination (as the Council has no power to modify an Order) the change to restricted byway is unlikely to attract objection as a significant amount of public consultation has already been undertaken.

Financial Implications

32. The determination of Definitive Map Modification Orders and the continual review of the definitive map are statutory processes for which financial provision has been made.
33. If the route is upgraded to restricted byway the highway authority is not placed under a specific duty to produce a suitable surface for use on horseback or for non-mechanically propelled vehicles. However, the authority is placed under a duty to ensure that the route is safe for use by the general traffic of the area and has a duty to maintain the surface of the highway to that extent.

Options Considered

34. Officers have considered the exemptions under NERCA 2006 which could preserve unrecorded vehicular rights and have concluded that none apply. The officers consider that the Order to record a byway open to all traffic can therefore no longer be confirmed and should be amended to record the route as a restricted byway only.
35. If members consider that public vehicular rights have been saved then the Order may be confirmed as a byway open to all traffic by Wiltshire Council as there are no extant objections.

Reasons for Recommendation

36. Officers consider that the public right to drive a mechanically propelled vehicle along Heddington 8 was been extinguished by Section 67(1) of NERCA 2006 on 2 May 2006.
37. However, higher rights still exist that are different to those shown in the definitive map and statement and the Council has a duty to record these, i.e. that the way should be recorded not as a footpath or bridleway but as a restricted byway.

Recommendation

38. That the Wiltshire County Council, Rights of Way Modification Order no.8 2004 (Sheet ST 96 NE)(Heddington no. 8), is forwarded to the Secretary of State for the Environment Food and Rural Affairs with the recommendation that the Order be modified to record the route as a restricted byway.

MARK BODEN

Corporate Director

Report Author

Sally Madgwick

Rights of Way Officer

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

None