

SOUTHERN AREA PLANNING COMMITTEE
10th DECEMBER 2009

WILDLIFE AND COUNTRYSIDE ACT 1981

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

**THE WILTSHIRE COUNCIL (SHEET SU 02 NW)(BROAD CHALKE 43 – THE CUT)
RIGHTS OF WAY MODIFICATION ORDER NO 5 2009**

Purpose of Report

1. To:
 - (i) Consider and comment on an objection received to the making of an Order under Section 53(3) of the Wildlife and Countryside Act 1981 to add a Footpath to the Definitive Map and Statement for the Salisbury and Wilton Rural District Council Area dated 1953.
 - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that the Order should be confirmed as made.

Description of the Route

2. The route of the proposed footpath is shown in the Order, Schedule and Map at **Appendix 1**. The path links High Lane in Broad Chalke village with Chapel Lane and is approximately 45 metres long. It leads past the Old Bakehouse and Holly Cottage on the western side and past the rear garden of Sun Cottage on the eastern side. The Order specifies a path of 2 metres wide leading down the middle of a track approximately 3.5 metres wide at its narrowest point.
3. Ownership of the claimed route is shared. The majority of the route and northern section is owned by Mr J Kot and is attached to the neighbouring property "The Old Bakehouse" and the southern section is owned by Mr J Heminsley and forms part of the title for Holly Cottage.

Background

4. An application for an order to modify the definitive map and statement by adding a public footpath between High Lane and Chapel Lane was submitted to Wiltshire Council by Broad Chalke Parish Council on the 4th December 2008. The application was accompanied by evidence of use on foot by fifteen members of the public.

5. The way is being claimed as a footpath through 'deemed dedication' in accordance with Section 31 of the Highways Act 1980. Section 31(1) allows that where a way has been actually enjoyed by the public as of right 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 it.
6. The period of 20 years is known as the 'relevant period' and is the period leading up to the time that the public's use of the way was called into question. For this case the relevant period can be viewed as December 1988 to December 2008 (the date of application). Mr Kot erected a gate and sign saying 'private' in 2007 but this did not appear to stop most people from using the route. However, if the earlier date were taken the evidence of public use is stronger. Officers consider that at this stage the relevant period does not affect the Council's decision and for the purposes of this report the relevant period is December 1988 to December 2008.
7. An initial consultation was undertaken between the 3rd February and the 3rd April 2009. This period was extended to the end of May 2009 to allow for the landowners concerned to respond fully.
8. It was apparent that parts of the way had changed ownership three times within the relevant period and that a variety of activities and changes of use had occurred to properties bordering the claimed way throughout its long history. These are detailed in **Appendix 2**.
9. An investigation was also conducted into the history of the route by referencing historic maps and this evidence is detailed in **Appendix 3**.

Evidence examined

Historic Mapping

10. Maps and documents detailed in **Appendix 3** were examined. Early maps (Ordnance Survey One inch to one mile 1811, Greenwood's Map of Wiltshire 1820, the Tithe Map of Broad Chalke 1843 and the Enclosure Award for Broad Chalke 1861) show that the claimed route was not represented as a highway at those times and provide evidence that the claimed route has always existed as a space between buildings.
11. By 1900 the Ordnance Survey recorded the claimed route as a fenced road, gated at the northern end. It is known from witness evidence that this gate was demolished in the 1940s and by the late 1970s the Ordnance Survey represented the claimed route as open in the same way as the local road network.
12. It is noted that although the Ordnance Survey provides an accurate record of physical features all the maps viewed carry the disclaimer that the representation of any road, track or path is no evidence of the existence of a right of way.
13. The Finance Act 1909/1910 provided for the levying of tax ('Increment Value Duty') on the increase in site value of land between its valuation as at 30 April 1909 and broadly speaking, its subsequent sale or transfer. The Inland Revenue embarked

on an extensive survey of property which involved input from landowners (who were required to fill out a 'Form 4' detailing their property holdings), site visits by Inland Revenue Valuers (details of which are contained in Field Note Books retained at the National Archive at Kew) and the compilation of Valuation Books and the colouring in and numbering of individual holdings (called 'Hereditaments') on working copies and record copies of maps. These records also survive and the valuation book and working copy of the Finance Act plan were viewed in respect of this route.

14. Finance Act plans use the Second Edition of the Ordnance Survey 1:2500 map (surveyed 1884, revised 1900) as a base map and the claimed route is shown uncoloured and excluded from neighbouring hereditaments in the same way as the public road network. The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i.e. they will be shown uncoloured and unnumbered. It is possible, but by no means certain, that this is related to s.35(1) of the Act: *No duty under this part of the Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.* The practice would also be compatible with s.25(3) which states that *The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to... any public rights of way.* So if a route in dispute is external to any numbered hereditament, there is a strong indication that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books.
15. It is noteworthy that whilst this exclusion only raises a possibility (Consistency Guidelines from the Planning Inspectorate) that the way is a public highway it does, in a survey based on information given by landowners themselves, indicate that in 1910 the claimed route was not in any known ownership.

User Evidence in support of public rights

16. Fifteen local residents submitted evidence that they had used the route 'as of right' for a range of periods of time. See **Appendix 4**. Seven of these users had walked the route for the full 20 year period (and longer) , six had used the route for a shorter period within the relevant period and two users had not used the route in the relevant period but had submitted evidence of use for a 27 and 11 year period pre-dating the relevant period.
17. The majority of witnesses had used the route for very long periods of time (for example 83, 78, 73, 71, 69, 61, 57, 55 and 54 years).
18. For use to have been 'as of right' (as required to satisfy Section 31 of the Highways Act 1980) the use has to be without secrecy, permission or force. None of the witnesses, even when specifically asked claim to have ever used force, been given permission or exercised secrecy.
19. Users claim to use the route for visiting friends, dog walking, getting to village functions, getting to do voluntary work, recreation, going to catch the bus, going to school, going to work, getting to the post box, getting to the surgery, rambling and going to the church yard to put flowers on relatives' graves.

20. Many users note that the route provides them with a safe alternative to walking from High Lane into North Street on the road where there is a sharp, blind corner and no pavement or footway.
21. No users report seeing any signs barring public access.

Evidence against the acquisition of public rights

22. The majority of the claimed route (past the Old Bakehouse) was owned by Mr D Blanchard for the relevant period (Mr Blanchard became the owner of the claimed route on 27th June 1991 and owned it until 2007) and Mr Blanchard strongly contests that public rights have been acquired. Mr Blanchard subsequently sold the property to Mr J Kot and both parties have provided the Council with helpful information during the investigation of this case. Mr Blanchard owned property to the east of the claimed route and ran Bower Valley Gate and Fencing Supplies from the buildings from 1979 to 2007.
23. Mr Blanchard spoke to officers on the 17th February 2009 and the 10th August 2009 (post making the order) and wrote to the Council on the 9th March 2009 and raised the following points.
 - i) The claimed route had a sign saying “Caution Working Area” near both ends. Mr Blanchard erected these signs “to warn members of the public who may have wanted to walk through that there was an element of risk of vehicles being unloaded or loaded or of materials being moved from building to building”.
 - ii) He did not object to people using the route if conditions allowed and regarded this use as being by “kind permission”.
 - iii) When he applied to Salisbury District Council for planning permission to change the use of the workshops to residential he declared that there were no public rights of way over the land and that is what he believes.
 - iv) While he was the owner “the number of people using the driveway over the years had reduced dramatically ending up with just a few dog walkers who let their dogs foul the driveway”.
 - v) He had gone to great lengths with neighboring property holders to record private access rights for them.
 - vi) He gave permission to many people but can not remember to whom.
 - vii) Many of the people using the route were his customers.
24. Mr Kot purchased the claimed route from Mr Blanchard in 2007 and wrote to the Council on the 16th February, 9th March, 30th March and the 20th May 2009 (all pre-order) disputing that public rights existed. As Mr Kot did not know the site before 2007 he relied on information from Mr Blanchard to support his claim that public rights had not been acquired and many of his points are as above. Additionally Mr Kot made the following points:

i) That Mr Blanchard's strong contention that he had not intended to dedicate a public right of way provides incontrovertible proof that section 31(1) of the Highways Act does not apply.

ii) Even though Mr Blanchard claimed there was no public right of way, and plans allowed for a private garden over the claimed route, neither the Parish Council nor members of the public objected at the time of the planning application and subsequent consultation.

iii) Because of the nature of Mr Blanchard's business the route was often blocked by a parked truck.

25. A number of points were raised by Mr Kot which are irrelevant to a decision determining an application made under the Wildlife and Countryside Act 1981. these factors relate to health and safety, reasonable alternatives and the low number of users.

Decision to Make the Order

26. It was considered that although there was supporting evidence that the route may have been regarded as a public highway since the beginning of the 20th century Section 31(1) of The Highways Act 1980 applied and that a right of way was reasonably alleged to subsist over land in the area to which the map relates and an Order was made and advertised on June 11th 2009.

Objections and Representations to the Order

27. One objection was received to the Order. No representations were received. The objection was from Mr J Kot and was received on the 8th July 2009.
28. Mr Kot maintains that Section 31(1) of The Highways Act (deemed dedication) is defeated by both his and Mr Blanchard's contention that they had no intention to dedicate a public right of way. This was evidenced by:
- i) Mr Blanchard stating 'when I was asked for permission to walk through....on many occasions...';
 - ii) the people walking through may have been customers (and hence there by implied licence);
 - iii) the fact that Mr Blanchard had gone to lengths to establish and record private access rights for adjacent property holders;
 - iv) the fact that Mr Blanchard had obstructed the route with a parked truck or transit;
 - v) the fact that Mr Kot had erected a gate and sign on the route saying 'private' late in 2007.

29. The letter of objection also details a number of other issues that may not be taken into account, for example household security, behaviour of the parish council, alternative routes available for pedestrians and the incomprehensibility of legal jargon.

Comments on the Objections

30. Although Mr Blanchard has claimed that he was asked for permission to walk through, no witnesses claim to have asked for permission (or have been granted it) and as Mr Blanchard is unable to recall who did ask for permission it is not possible to draw a conclusion from this statement. However it is noted that when use of the route outside of the relevant period is viewed (use pre 1988) it is clear that public use of the route as a whole extended back beyond Mr Blanchard's ownership (which for his part of the claimed route commenced in 1991) and the public may well have already acquired a right to pass.
31. The establishment of private access rights is unrelated to public rights. Private rights may be specific (for example 'for oil deliveries only' or for vehicles) and are controlled by the grantor and the grantee. Even if a public footpath had been recorded on the claimed route at the time these private rights were negotiated, officers consider it unlikely that it would have affected their arrangement.
32. The route was partially obstructed by a truck or vehicles parked along the route. However, witnesses only claim use on foot and witnesses have reported that they did have to walk around the parked vehicle. Aerial photos and other photographs have been viewed which show that adequate room to pass on either side of a parked pick up truck existed. The truck did not form an obstruction to walkers and was not always there.
33. Mr Kot erected a gate and sign saying 'private' sometime late in 2007. The appearance of these did not appear to stop the public use as it was possible to open the gate. Equally a sign saying 'private' does not necessarily indicate that no public right of way exists as it is a feature of public rights of way that they do pass over land in private ownership.
34. The issue that use of the route was by licence as Mr Blanchard was in business is an important point. Officers note that it is not uncommon on commercial premises, car parks etc to see signs saying 'no public right of way'. Mr Blanchard did not erect any such signs, infact he erected signs to warn the public that the route past his workshops was a working area.
35. Public use of the way is reported dating from the 1920s. At this time Holly Cottage was a shop and the area behind was a bakehouse. In 1910 we know that the claimed route did not belong to the Holly Cottage holding, but at some time before 1991 (when it passed to Mr Blanchard) it was recorded as part of that holding. Hence it would appear that at the beginning of the 20th century, access to the shop was gained over a route not in their ownership and that access continued to 2008 regardless of various changes in ownership of buildings and land. Holly Cottage ceased to be a shop in the late 1970s and became a residential dwelling (Holly Cottage). The old bakery building ceased baking some time after 1957 and

became a store in around 1965 with the freehold passing to Mr Gatehouse in 1970. A number of businesses operated at this site (Bower Valley Timber, All Type Fencing, Anchor Joint Sealant and Commercial Supplies) and access to them would have been over the claimed route, which remained in the ownership of Holly Cottage. Holly Cottage granted a private right of access to these businesses (via the freehold of the old bakehouse) which ceased in 1991 when part of the route passed to Mr Blanchard.

36. From 1980 to 2007, when Holly Cottage was a residential dwelling the owner was Mrs P Chamont who makes it clear in an e.mail dated 11th November 2009 that the route was used by the public as a right of way. She writes "I was resident there for 27 years and during all that time there was never a problem with the right of way between Holly Cottage and Sun Cottage, the local residents had always used it as a safe route off the dangerous road round. I don't understand why it is now a problem. I do hope that for safety and long usage it will continue as a public right of way".
37. Mrs Chamont's response makes it very clear that the claimed route was regarded as a public right of way by not just the public but also the land owner of the whole of the claimed route at that time and that private access rights granted to anyone leasing or owning the freehold on the store/old bakehouse or workshop were independent of any right the public may have had.
38. It is clear from witness responses that the public were not using the route to access business but were using it as part of the local village highway network.

Main Considerations for the Council

39. 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 Broad Chalke Parish Council. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
40. Section 53(2)(b) states:

"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"
41. 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."

42. In considering and determining the application, the County Council must have regard to ‘*all other relevant evidence available to them*’, as the statute demands.
43. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31 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”.*
44. 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.
45. 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.
46. 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.
47. 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.
48. 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.
49. 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 the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention is sufficient evidence to negative the intention to dedicate the way as a highway.

(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.

50. The recent appeal case – Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs drew the following conclusion regarding non intention to dedicate: ...*‘Sufficient evidence of no intention on the part of the landowner to dedicate a way as a highway required evidence of overt acts coming to the attention of users of the way’.*
51. The landowner was aware that the public used the path and no evidence has been found that any acts were performed to prevent this use.
52. None of the witnesses testify to any overt acts on the part of the landowners to show prevention of public use of the way.
53. There have been no Highways Act 1980 Section 31(6) statutory deposits declaring non-intention to dedicate the claimed route deposited with the Surveying Authority during the relevant period or at any other time.

Environmental Impact of the Recommendation

54. Effects on the environment can not be taken into consideration for an Order decision

Risk Assessment

55. Risks or safety can not be taken into consideration for an Order decision

Financial Implications

56. Costs would be incurred associated with attending a Public Hearing or a Public Inquiry for which budgetary provision has been made.

Options Considered

57. That:
 - (i) The Order is confirmed as made
 - (ii) The Order is confirmed as made with modifications
 - (iii) The Order is not confirmed

Conclusions

58. The evidence from users of the route shows that the route has been used by the public ‘as of right’ for a full period of twenty years. Therefore in accordance with

section 31(1) of the Highways Act 1980 the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate it.

59. In the cases of *R.(Godmanchester Town Council) v. Secretary of State for the Environment Food and Rural Affairs and Cambridgeshire County Council and R. (Drain) v. Secretary of State for the Environment Food and Rural Affairs and Yattendon Estates Ltd* heard in the House of Lords, judgement delivered 20 June 2007 [2007] UKHL 28, two test cases were brought before the House of Lords for a ruling on the effect of the provision in s.31(1) of the Highways Act 1980. The main issue in both appeals concerned the nature of the evidence which is sufficient to demonstrate that there was no intention to dedicate.

Lord Hoffman reasoned:

“ It should first be noted that s.31(1) does not require the 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 such intention. In other words, the evidence must be inconsistent with an 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”.

60. It is therefore considered that there is insufficient evidence that there was no intention to dedicate the way and that it is reasonably alleged that s.31(1) applies
61. There is a considerable body of evidence extending back before the relevant period that supports that public rights exist.

Reasons For Recommendation

62. Officers are satisfied that a public footpath subsists along the order route between High Lane and Chapel Lane, Broad Chalke. The statutory duty placed on the Council requires that the way should be added to the Definitive Map and Statement.
63. Objections have been duly made and pursuant to paragraph 7 of Schedule 15 of the Wildlife and Countryside Act 1981 the Council is statutorily obliged to forward the Order along with all evidence and objections to the Secretary of State for determination.

Recommendation

64. That the Wiltshire Council (Sheet SU 02 NW)(Broad Chalke 43 – The Cut) Rights of Way Modification Order No 5 2009 be submitted to the Secretary of State for

Environment, Food and Rural Affairs, together with the objection letter and with the recommendation that the Order be confirmed as made.

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The following unpublished documents have been relied upon in the preparation of this report:

Correspondence with parish councils, user groups, other interested bodies and members of the public.