

**NEWTON TONEY: PROPOSED ADDITION OF FOOTPATH NEWTON TONEY 13  
TO DEFINITIVE MAP AND STATEMENT**

**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 new footpath to the Definitive Map and Statement for Amesbury Rural District Council Area 1952.
  - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs for consideration, modification and confirmation.

The route of the proposed footpath is shown in the Order, Schedule and Map as **Appendix 1**.

**Background**

2. An application was originally submitted on the 3<sup>rd</sup> December 2008 by Nigel Ion Charles Kettlewell of The Old Rectory, Newton Toney to add a footpath leading from where footpath Newton Toney 11 joins footpath Allington 5 in a south south easterly direction to the C.293 Newton Toney to Allington road to the Amesbury Rural District Council Area definitive map and statement. The application was accompanied by evidence of use on foot from 12 residents of Newton Toney and Allington and a Landowner Evidence Form completed by the landowner for the period 1969 to 2005.
3. An initial consultation was undertaken between April and June 2009. Five responses were received including one from the current landowner, the Royal Society for the Protection of Birds (RSPB). There was no dispute that the public had used the claimed route for a period in excess of twenty years 'as of right' that is without force, without permission or secrecy.
4. The claimed path is shown on the application map (**Appendix 2**) and leads along a wide mown track on the eastern edge of a belt of mature beech trees. Where the track joins the road there is a 'squeeze gap' of 0.9 metre and two 3 metre gates. The track is 3 metres wide.
5. The way is being claimed as a footpath through 'Deemed Dedication' in accordance with Section 31 of the Highways Act 1980. Some historical evidence has been found that supports the physical existence of the path since the mid 1800s but no substantive evidence of public use of the path before the 1970s has been discovered.
6. This means that to succeed in being added to the Definitive Map as a footpath it must be proved that there was 20 years usage as of right leading up to the date that public rights over the way were first called into question. In this case that is from December

1988 to December 2008 when the application was made to add the route to the definitive map. This is known as the 'relevant period'.

### **User Evidence available at the time of the making of the Order**

7. Twelve witnesses claimed to have used the route, eleven of these for the full relevant period. A summary of the witness evidence is attached at **Appendix 3**.
8. All witnesses claim to have used the same route without permission, challenge or force. Witnesses variously describe the presence of a gate and a gap at the road junction.
9. The witnesses claim to have used it for walking and it has been used for recreational purposes such as exercise, dog walking, walking to the pub and visiting relatives.
10. The Landowner Evidence Form attached at **Appendix 4** confirms that the owner of the land from 1969 to 2005 believed the way to be a footpath and that they had been aware of local people and others using the route.

### **Decision to make the Order**

11. The evidence of the witnesses was consistent with long term use 'as of right'.
12. Therefore in considering all the relevant evidence and the legislation to be taken into account, a Modification Order was made to add a footpath between points A and B to the Definitive Map and Statement.
13. The Order was made on 7<sup>th</sup> day of July 2009 and advertised in the Salisbury Journal on the 16<sup>th</sup> July 2009. The Order seeks to modify the Definitive Map and Statement by adding a footpath between the southern end of Newton Toney path number 11 and the C.293 Newton Toney to Allington road. The Order details a 0.9 metre wide gap and a 3.0 metre wide gate at the C.293 end of the path.

### **Objections to the Order**

14. There was one objection to the Order. This was received from the current landowner, the RSPB and is attached at **Appendix 5**.
15. The objection states that the RSPB has no dispute with the claim for a right of way along the route but does object to the inclusion of access through either the one 3 metre wide gate or both 3 metre wide gates. The RSPB states that they know that people use the gap but state that the gates have been locked in the past for periods of up to 12 months.

### **Comments on the Objection**

16. Officers considered the objection to be substantive and on the 28<sup>th</sup> August 2009 wrote to all users/witnesses (with copy to the RSPB) requesting that they complete an additional evidence form relating specifically to their use of the gate or gap. Responses were invited by the end of September 2009.
17. Six users responded, five of them confirming that they had only used the gap and one stating that they used the gate when it was open but that this was not often.
18. Two letters from Farm managers for the claimed route spanning the period 1969 to 2009 were also received and both of these stated that the public had used the gap and not the gate or gates which has variously been locked, wired or chained shut.

### **Main Considerations for the Council**

19. The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Nigel Ion Charles Kettlewell. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
20. 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”.*
21. 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.”*
22. In considering and determining the application, the County Council must have regard to ‘all other relevant evidence available to them’, as the statute demands.
23. 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”.*
24. 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.

25. 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.
26. 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.
27. 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.
28. 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.
29. 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*'.
30. 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.
31. None of the witnesses testify to any overt acts on the part of the landowners to show prevention of public use of the way.
32. 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.

### **Brief Summary**

33. The path is claimed to have been used 'as of right' by all users and this is supported by statements received from landowners.
34. Public rights have only been acquired in this case where the public have actually walked and although the right of the public to walk the majority of the order route has not been disputed it does not appear that the public have, after further investigation, acquired the right to use the track where it passes through the gateway; hence the Order should not be confirmed as made.
35. Only evidence of the public rights can be considered in the Order decision. Reasons such as the following cannot be taken into consideration in the decision to make the Order:
  - Safety
  - Crime prevention
  - Safeguarding of property
  - Effects on wildlife or the environment
  - The reason why the track was constructed and

- Current main use of the track
36. It seems to the Council that, after consideration of all available evidence that the Order should be modified to remove the 3 metre wide gate at the C.293 road junction and should only have a 0.9 metre wide gap at this point.

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

37. There are currently no plans to surface the path or add any extra furniture such as gates or stiles. Also the use is predicted to be mainly by local people therefore there are no foreseeable significant environmental impacts associated with this recommendation.

### **Risk Assessment**

38. There will be occasional agricultural vehicles using the track. The surface of the path is of the same character as the existing path Newton Toney 11. No extra risk of accident associated with this path is foreseen.

### **Financial Implications**

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

### **Options Considered**

60. Making the Order or not making the Order.

### **Conclusions**

61. Officers are satisfied that the legal test in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 has been satisfied in respect of that length of footpath labelled A-B on the Order map. 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 to the Planning Inspectorate for determination.

### **Reasons for Recommendation**

62. Officers consider that the criteria set out in the legislation have been met to show that public footpath rights exist between points A and B on the Order plan and the statutory duty placed on the County Council requires that the way should be added to the Definitive Map and Statement. The Order does however include a 3 metre gate through which public rights do not exist and an objection has been received.
63. The legislation states that the Planning Inspectorate is required to determine the matter once an objection is received and not withdrawn.

### **Recommendation**

64. That the Wiltshire Council Sheet SU 24 SW)(Newton Toney 13) Rights of Way Modification Order No. 5 2009 to add a new footpath, No 13 at Newton Toney, to the Definitive Map and Statement for the Amesbury Rural District Council Area 1952 be submitted to the Secretary of State for Environment, Food and Rural Affairs, together with the objection letters and representations with the recommendation that the Order be confirmed with the modification of the removal of the 3 metre gate at OS Grid Reference SU20915 39756 from the map and statement.

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

Correspondence with Parish and District Councils, User Groups, other interested bodies and members of the public.