

WILTSHIRE COUNTY COUNCIL

SOUTHERN AREA PLANNING COMMITTEE
7 JANUARY 2010

WILDLIFE AND COUNTRYSIDE ACT 1981

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

THE WILTSHIRE COUNCIL [SHEET SU 13 SE] PARISH OF WINTERBOURNE
RIGHTS OF WAY MODIFICATION ORDER No. 14 2009

WINTERBOURNE 30 AND 18 (PART)

Purpose of Report

1. To:
 - (i) Consider and comment on objections received to the making of an Order under Section 53(3) of the Wildlife and Countryside Act 1981 to add a new Bridleway and record part of an existing footpath as Bridleway on the Definitive Map and Statement for the 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 confirmation with the support of Wiltshire Council.

Description of the Route

2. The Order route joins points A, B, C and D on the Order Map (**Appendix 1**). The Order route starts at the south end of Figsbury Road (point A) following Winterbourne Footpath 18 under the railway bridge in a south-easterly direction for approximately 60 metres with a width of 3 metres to point B.
3. The route then follows a lane bounded by grass verges leading in a north-easterly direction for approximately 240 metres with a width of 3.6 metres to point C.
4. The route then leads in a south-easterly direction along a surfaced path bounded by a grass verge to the south-west and a chain link fence to the north-east for approximately 90 metres with a width of 3 metres to OS grid reference SU 17984, 34515. A location map is included as **Appendix 2**.

Background

5. An application was submitted on 7 October, 2007 by Mrs. Caroline Bingham to add a Bridleway to the Definitive Map and Statement for the Amesbury Rural District Council Area 1952, leading from Figsbury Road Railway Arch to the M.O.D. camp. The application was supported by sixteen witness statements.

6. The way is being claimed through 'Deemed Dedication' in accordance with Section 31 of the Highways Act 1980 which asserts that to be added to the Definitive Map as a bridleway it must be proved that there was 20 years uninterrupted bridleway use '*as of right*' leading up to the date that public rights over the way were first called into question. In this case the relevant twenty year period is from July 1986 to July 2006 when the route was barred by the erection of a barrier near Figsbury Road Railway Bridge.
7. A public consultation was undertaken in January 2008 and a representation against the application was received from the landowner. A representation from the Ministry of Defence indicated initial concern due to the military sensitivity of the area.
8. There were five representations supporting the application. Copies of all consultation responses are available in the **Members' Room** at County Hall, Trowbridge and at Planning Reception, 61 Wyndham Road, Salisbury.

Original Order Decision

9. An Order was not made on the grounds that there was insufficient user evidence to raise the presumption that the way had been dedicated as a public right of way and therefore did not warrant the making of an Order to add a public bridleway or public footpath to the Definitive Map and Statement. The applicant and consultees were informed of the decision on 22 May, 2008

Appeal

10. On 23 July, 2008 Wiltshire Council was notified by the National Rights of Way Casework Team, acting on behalf of the Secretary of State for the Department of Environment, Food and Rural Affairs, that the applicant had appealed on 16 July, 2008 against the decision not to make an Order.
11. The above notification of appeal was accompanied by further evidence of use, consisting of three new witness evidence forms and six letters, two of which had attached lists of horse riders from Hurdcott Livery Yard who were known to have used the route. One list had 26 names, the other had 41 names.
12. The Secretary of State commissioned an Inspector's report from the Planning Inspectorate the findings of which are attached (**Appendix 3**).
13. On 27 July, 2009 the Secretary of State, having considered the appeal, directed that an Order should be made and instructed Wiltshire Council to make an Order under s.53(2) of, and Schedule 15 to, the 1981 Wildlife and Countryside Act as proposed in the application of Ms Caroline Julia Bingham, dated 7 October, 2007.

Evidence of Use to Date (November 2009)

14. Twenty five witnesses have claimed to have used the route '*as of right*' (openly and without permission or without using force) during the relevant period. A user evidence summary including graphs is attached as **Appendix 4**.
15. Of the twenty seven witnesses that have submitted witness forms or substantial written correspondence, 20 have claimed to have used the way for horse riding, 17 for walking, 5 for cycling and 3 for driving MPV's.
16. As well as this first hand use, all of the witnesses have claimed to have seen others using the path by various means.

17. The frequency of claimed use is significant with four witnesses claiming to have used the route daily and 70% of all witnesses, who have submitted written evidence, claiming to have used it on at least a weekly basis.
18. The witnesses come not only from the Winterbournes but other surrounding towns and villages such as Gomeldon, Porton, Middleton, Pitton, Idmiston, Durrington, Amesbury and Salisbury, as well as from further afield. The body of submitted evidence taken as a whole amounts to uninterrupted and significant use by the public at large.
19. It is not unreasonable to assume that there has also been much other use of the way as it seems to be common knowledge that the field that is now in the camp to the north-east of point C on the Order map used to be the village football field.
20. Among the correspondence is a letter from a long-standing resident who lives very close to the route and, although not a horse rider himself, he states that it has been well used by equestrians and he often used the manure on his garden. This is further supported by two substantially long (41 and 27) lists of names of horse-riders from local stables who have used the route.
21. None of the witnesses, during the relevant 20 year period, have reported seeing any notice erected by the landowner that would have been sufficient to rebut the intention to dedicate, i.e. stating "No Public Right of Way", and the objectors have no evidence to the contrary.
22. The M.O.D. perimeter path is a physical continuation of the claimed route and, when open, it allows the public to continue to Gomeldon beyond the claimed route. The M.O.D. has stated the following regarding the extent of public use of its perimeter path, including horse-riding:

"...week-days a maximum would be 10 a day during the daylight hours, during the autumn and winter it is hardly used due to the restriction of daylight and closures due to training; it does pick up slightly during the weekends".
23. A copy of all the evidence is available in the **Members' Room** at County Hall, Trowbridge and at Planning Reception, 61 Wyndham Road, Salisbury.

The Making of the Order

24. An Order was made on the 11 August, 2009 to modify the Definitive Map and Statement for the Amesbury Rural District Council Area 1952, by adding Winterbourne bridleway 30 and recording the existing public footpath 18 (part).

Objections and Representations to Making the Order

25. There have been five objections to the making of the Order: four letters from residents and a short note from the landowner's legal representative.
26. The landowner's legal representative has so far only briefly stated two grounds of objection, whilst reserving the right to set out further grounds at the Inquiry. The grounds stated are that *"there is a clear indication by the landowner not to dedicate the right of way as evidenced by the erection of signs"* and *"that the public at large, do not use the right of way for the period claimed"*. Points of objection from the other letters are listed below.
 - There was a notice on the barrier stating that there was no access to the roadway.

- Increased use will encourage general nuisance, such as noise and disruption, vehicles parking nearby, dogs being let off leads leading to dog-mess problems, fly tipping and other parish problems that can only be sorted by civil law.
 - People from another parish will use it.
 - It would allow illegal vehicular access which could lead to it becoming a racetrack for cars and motorbikes therefore becoming dangerous for walkers.
 - Security and safety issues for elderly and retired people with undesirable people coming over the railway line onto local properties.
27. The M.O.D. state that they have no objection in principle.
28. There was a further letter of support for the Order from the applicant and six new witness evidence forms have now been submitted making a total of 25.
29. A copy of the objections is available in the **Members' Room** at County Hall, Trowbridge and at Planning Reception, 61 Wyndham Road, Salisbury.

Comments on the Objections

30. There has been no evidence submitted to prove that there were any notices erected and maintained by the landowner on or near the route during the relevant 20 year period sufficient to rebut the intention of dedication (see Highways Act 1980 s.31 in paragraph 36 below). Such notices must show that the route is not a public highway (*Rights of Way Law Review: November 2007: Section 6.3 Pg 117*).
31. Regarding the public at large using the way for the claimed period, there are now 24 user evidence forms indicating sufficient public use over the claimed route, 18 of these have claimed to have ridden horses. All of the witnesses claim to have seen others using the route, either on foot or cycling or riding a horse or by a combination of these types of use. There are also letters and lists of riders that have used local stables, although these lists in most cases only give first names of the riders and the names of their horses.
32. Issues such as security, nuisance, privacy, safety, illegal use and effects on the environment cannot be considered by the inspector in making the confirmation decision. Only evidence for and against 20 years uninterrupted use '*as of right*' can be considered.
33. Most of these issues are discussed in more detail in the Inspector's Report attached as **Appendix 3**. (Note: six new user evidence forms have been submitted since the report was completed).

Main Considerations for the Council

34. The Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review.

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".

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

“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 to which this Part applies.

(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.”

35. The statute requires the Council to have regard to ‘*all other relevant evidence available to them*’. However, no documentary evidence has been discovered by the Council to support the application. Therefore, the application is solely reliant upon presumed dedication through use of the claimed route.

36. Dedication of a way as highway is presumed after public use for 20 years provided it satisfies the requirements of Section 31 of the Highways Act 1980. The Section is set out below:

(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 lodgment 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.*

37. 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. The Hearing 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 '*as of right*' which means that 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.
38. The use of the way must also 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. In the case of R. v. Secretary of State for the Environment ex parte Dorset County Council, Dyson J. considered this aspect of s.31(1) of the Highways Act 1980, the meaning of "*sufficient evidence that there was no intention ... to dedicate*". The Judge concluded that overt and contemporaneous evidence of an intention not to dedicate would usually be required.
39. The 25 witnesses unanimously claim that the way was always available for use throughout the relevant period and there were no notices that were sufficient in law to prevent public use of the way. No proof to the contrary has been submitted.
40. 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.
41. Only evidence for and against the use of the way 'as of right' and uninterrupted for a period of twenty years can be considered in making the confirmation decision. Issues such as crime prevention, safeguarding of property, safety, convenience of the landowner, privacy and effects on the environment cannot be considered.

Environmental Impact of the Recommendation

42. Winterbourne Parish Council is concerned that increased use of the way and removal of the barrier may encourage general nuisance and lead to fly tipping, dog fouling and other problems.
43. It is possible that these are perceived problems that may not materialize. However, if it proves necessary then dog bins, notices and/or a Traffic Regulation Order may need to be effected.
44. Environment impact cannot be taken into consideration for the confirmation decision.

Risk Assessment

45. Winterbourne Parish Council is concerned that confirmation of the Order and subsequent removal of the barrier may lead to vehicles illegally driving along the route at high speed, putting legitimate users at risk.
46. Should it prove necessary once the Order is made, this issue may be addressed through a Traffic Regulation Order.
47. Effects concerning risks or safety cannot be taken into consideration for the confirmation decision.

Financial Implications

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

Options Considered

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

Brief Summary and Conclusions

50. Taken together there is a substantial body of user evidence claiming use of the proposed public right of way by the public '*as of right*' and without interruption for a full period of twenty years. Therefore in accordance with s.31 of the Highways Act 1980, "*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*".
51. The principal objector challenges the witness evidence on the grounds that "*there is a clear indication by the landowner not to dedicate the right of way as evidenced by the erection of signs*" and "*that the public at large, do not use the right of way for the period claimed*". All other grounds of objections that have been submitted are not relevant to the Order confirmation decision.
52. The signs referred to by the principal objector in the paragraph above are not sufficient in law to rebut the intention of dedication. The body of submitted evidence taken as a whole amounts to significant use by the public at large (see paragraphs 14-22 above).
53. Because there are outstanding objections that have not been withdrawn, the case must now by law be submitted to the Secretary of State for the Environment, Food and Rural Affairs so that the evidence can be tested through a local Public Inquiry, at a Hearing or by written representation as the Secretary of State sees fit.

Reasons for Recommendation

54. Officers are satisfied that the legal test in Sections 53(3)(c)(i) and 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 has been satisfied and that public bridleway rights subsist over those lengths of path between points A-B-C-D on the Order Map.
55. 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

56. That the Wiltshire County Council Sheet SU 13 SE Rights of Way Modification Order No. 14, 2009 to upgrade part of footway 18 at Winterbourne to status of bridleway and to add a new bridleway, No. 30 at Winterbourne 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 as made.

GEORGE BATTEN

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Report Author

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Rights of Way Officer

2 December 2009

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