

REGULATORY COMMITTEE

31st MARCH 2004

**MODIFICATION ORDERS: BERWICK ST. JAMES,
WINTERBOURNE STOKE AND SHREWTON**

Purpose of Report

1. To consider and comment on objections received to the making of Orders under Section 53 of the Wildlife and Countryside Act 1981 providing for the upgrading of:-
 - Berwick St. James bridleway 3 (part) and 3A
 - Winterbourne Stoke footpath 3
 - Winterbourne Stoke bridleways 4 (part) and 5 (part) and 6B
 - Shrewton bridleways 4 (part) and 15

to byways open to all traffic, as indicated on the plan at **Appendix 1**.

Background

2. As they form part of a longer route, the above rights of way are either directly or indirectly affected by the Side Roads Order for the A303 Stonehenge Improvement which has been made to facilitate the changes proposed to the A303 between Amesbury and Berwick Down.
3. It has been brought to the attention of the County Council and the Highways Agency that the status of the above ways as they are shown in the Definitive Map and Statement does not accurately reflect the historic status of the routes. Historical records, listed in **Appendices 2 to 5**, strongly point to the existence of public vehicular rights over these ways.
4. In the interests of clarity for the Highways Agency, landowners, the public and other interested parties, Orders were made seeking to determine the true status of these rights of way so that proper provision could be made for them in the Side Roads Order should it be confirmed.
5. An Inquiry into the objections made to the A303 Stonehenge Improvement scheme began on 17th February 2004. On 2nd March 2004 the Highways Agency submitted to the Inquiry a document in which it proposed a number of modifications to the draft Side Roads Order, indicating that if higher rights were applicable to each highway then the new highways in the scheme would also carry those higher rights.

Evidence relating to the status of the ways

6. Two key pieces of documentary evidence relevant to the status of the ways in Winterbourne Stoke and Berwick St. James are the Winterbourne Stoke Inclosure Award dated 1812 and the Berwick St. James Inclosure Award dated 1790.

7. Inclosure Awards are unique documents as they took effect as legal documents. If a right of way is shown properly in an Award, it is considered to be a "legal event" which conclusively declares the rights described to exist at the date of the Award. They are arguably the most important source of documentary evidence of public rights of way.
8. Winterbourne Stoke 3 is shown on the map annexed with the 1812 Award as part of a longer road, coloured sienna, fenced, ungated and inscribed '1' "Berwick and Shrewton Road". At its southern end the road is marked "From Berwick Saint James" and at the northern end "to Maddington". In the text to the Award No. 1 the Berwick and Shrewton Road is described as:-

"One Public Road or Highway No. 1 of the breadth of Thirty ffeet leading from Berwick St. James and extending Northwestwards in its present tract over the west side of Westbrook ffield and other Lands to the Northeast Corner of an Allotment of the said Alexander Baring, No. thirty where it enters the Lands of Hampden Heley Esquire being part of the Public Road leading from Berwick Saint James towards Maddington."

9. Winterbourne Stoke 4 and 5 (part) are shown mainly fenced and coloured sienna on the map annexed to the 1812 Award and described in the Award as:-

"And one other Public Road or Highway No. 4 at the breadth of thirty ffeet branching out of the last described Road at the Northeast End of Cheesemax Lane and extending Southwestward along the said Lane over Bourton Mead Bridge in its present Tract to the North End of Hyde ffield Land leading into the Village of Winterbourn Stoke aforesaid."

The several allotments alongside the lane are described as being bounded by "the Public Road leading from Winterbourn Stoke towards Shrewton."

10. Winterbourne Stoke 6B and its continuation Shrewton 4 (part and 15, the Old Salisbury Road) is shown on the map annexed to the 1812 Award coloured sienna, ungated and part of a longer road inscribed "Shrewton and Salisbury Road" inscribed at the southern end "to Salisbury" and at the northern end "from Shrewton", marked road number 3. The Award states:-

"No. 3 Shrewton & Salisbury Road" "One other Public Road or Highway No. 3 of the breadth of Thirty ffeet beginning at the South End of a Lane in the Parish of Rowlstone and extending Southward over a small part of Breach ffield to the usual Entrance thereof into Rowlstone Mead and after passing the said Mead to its usual Entrance again into the Parish of Winterborn Stoke at the South Corner of Rowlstone Meadow adjoining ffrog Mead Acre then extending Southeastward in its present Tract to fforedown fford and thence over the West End of ffore Down to the Southwest Corner thereof and over the late Common fields of Winterborn Stoke to its usual Entrance into the Parish of Berwick Saint James at a Place called Horse Down being parts of the Public Road leading from Shrewton towards Salisbury."

11. Berwick St. James 3 is described in the 1790 Inclosure Award as:-

"Warminster Road No. 2" "One other Public Road beginning at the North End of the Street of the Village of Berwick St. James and extending from thence Westward of its usual Breadth to the Northwest Corner of the ffarm Croft and from thence of the Breadth of forty ffeet in or near its usual course over the late Common fields of Berwick Saint James till it enters the said Downs then continuing Westward along the North Boundary of the Downs to the Southwest Corner of an allotment hereinafter described and awarded to Richard Dawkins and from thence in a straight Line Westward until it enters the Turnpike Road leading from Hindon and Deptford towards Amesbury and after passing along the said Turnpike Road Southwestward about the Distance of seven hundred Yards then continuing in a Westward Direction over allotments to the Right Honourable James Lord Malmesbury to its usual Entrance into the Parish of Wiley at a Place called Common Plot the same being Part of the Public Road leading from Berwick Saint James towards Warminster."

12. In medieval times, maintenance of the King's Highway was placed on the Manor. The public has 'the right of good passage', not only on the beaten track and deviation was permitted if necessary. By the 14th and 15th centuries there was a tremendous increase in travelling in the country but with the breakdown of manorial institutions in the 15th and 16th centuries highways became badly neglected. This led to the passage of an Act in 1555 which, until the Highways Acts of 1835, formed the basis of organisation of road maintenance.
13. This 1555 Act placed the obligation to maintain all existing public highways on the parish and all the inhabitants thereof, parish surveyor of highway, on Justices of the Peace (JPs) at Quarter Sessions and on owners of adjoining land.
14. The parish surveyor came under the jurisdiction of the JPs who, amongst other things, audited the accounts. A JP could present to Quarter Sessions that a highway was out of repair. Many presentments may be found in the Quarter Sessions records, relating to individual highways.
15. The Court of Quarter Sessions was statutorily responsible for highway maintenance. It follows that any record of a highway in these records will be definitive as to its existence at that time. Any evidence discovered is of good quality because any authority with its limited resources would not have willingly maintained a way which it did not feel satisfied or convinced was a highway.
16. The records of the Quarter Sessions held in the County Record Office have been indexed for highway references because they are important evidence and, being a Court of Law, there can be no question as to their reliability.
17. In the Quarter Sessions Roll for the Hilary Session in 1691 the following Indictment is enrolled "Common Way between Berwick St. James and Lomg hedg in Winterbourne Stoke known by the name of Maddington Way." In the Easter session of Quarter Sessions in 1691, the repair was obviously carried out by the inhabitants as the Justices' Certificate of Repair is enrolled "Certificate for the highway leading from Berwick St. James to Maddington." Winterbourne Stoke 3 forms part of this route.

18. At the time of the Indictment the parish was the highway authority responsible for maintaining highway, as described in paragraph 13 above. The Quarter Sessions Court was the body responsible for ensuring the parish carried out this duty. The Court found the way to be a highway and the parish had consequently to repair it, which it did.
19. Tithes were the duty to pay one-tenth of annual produce of land to the Church. Under the Tithe Act of 1836 the remaining tithes were commuted to money rents. To carry this out, all tithable land had to be assessed for its annual produce value. This was done on a parish basis and large scale maps were produced.
20. Rights of way are shown on the maps because the existence of a right of way could affect the productive value of the land, thereby reducing the liability to pay rent to the Church. The Tithe Commissioners had an interest in ensuring that public rights of way were clearly delineated.
21. Winterbourne Stoke 3, 4, 5 (part) and 6B are shown on the Winterbourne Stoke Tithe Award map dated 1841 as part of the local road network, tithe free. Shrewton 4 (part) and 15 are shown coloured sienna on the Rollestone Tithe Award map dated 1840. All other roads coloured sienna are public. The way is not gated. On the Berwick St. James Tithe Award map dated 1843, Berwick St. James 3 is shown as a road of uniform width throughout, being shown in approximately the same way as the A303. It is shown ungated.
22. Obviously, with the increasing need to make travelling easier for both commercial and pleasure traffic, Parliament made several changes to the bodies responsible for highway maintenance. In 1862 a Highways Act was passed which compelled Quarter Sessions to group parishes into highway districts, but this did not universally take effect until the 1872 Public Health Act divided the country into Urban and Rural Sanitary Authorities.
23. In the Minutes of the Amesbury Rural Sanitary Authority for 1st December 1880 the following may be found:-

"The Surveyor was directed to report to a subsequent meeting of the Board on the roads which he considered should not be repaired by the Board in the several parishes of Boscombe, Winterbourn Earls, Durnford, Figheldean, Bulford, Milston, Shrewton, Maddington and Winterbourn Stoke."

In a letter dated 15th December 1880, Mr. Peake, Surveyor, wrote the following letter to the Board:-

"Gentlemen. In pursuance of the direction given me at the last meeting of the Board I beg to make the following report as to the roads which appear unnecessary for public use in the following parishes"

Winterbourn Stoke. The road commencing at the Corner by the Bell Inn and running on to the Down. This road is used principally by Mr. Boyce and for about a mile where it is enclosed is in good repair. I remain Gentlemen, Your obed Servant. J.T. Peake."

This incorporates Winterbourne Stoke 4, 5 (part) and part of 6B. No action was taken and the road subsequently remained a repairable highway. Even if it had ceased to be repaired by the Board, the road would still have been recorded as a highway over which public vehicular rights existed.

24. There are innumerable maps upon which the ways are shown in the same manner as other public roads are shown. Indeed, many of the maps were prepared for travellers needing to exercise public vehicular rights. These are listed in **Appendices 2 to 5**.
25. The ways also appear on Ordnance Survey Maps. Ordnance Survey Maps are useful as a guide when researching the history of the status of a right of way as they contain many useful points of reference. The manner in which features such as roads are shown on certain editions and scales of maps does provide useful supporting information regarding the status of highway. This was at a time before the current disclaimer on Ordnance Survey Maps which states *"The representation on this plan of a road, track or footpath is no evidence of the existence of a right of way."*

Main Considerations for the Council

26. To comment on the objections and representations made to the making of the Orders.
27. **Berwick St. James Parish Meeting** wrote on 6th February 2004 to say that following a public meeting villagers had expressed the wish that Berwick St. James 3 remain as a bridleway as they are concerned about the possible effects on its surface if it is used by off-road motor vehicles.
28. **Carter Jonas**, acting on behalf of Berwick Down Limited, one of the owners of the land over which Berwick St. James 3 crosses, objects to the order upgrading the right of way and comments as follows:-

"This track, whilst subject to the footpath rights, has been gated and no vehicular rights exist.

Vehicular rights have not existed over this track in living (or greater) memory, as evidenced by the fact that none were claimed in the Salisbury and Wilton Rural District Council Definitive Map and Statement 1953.

We also contend, as evidenced on the ground, that the width of the track has never extended to 12.2m at the eastern end of the track. This is in a deep cutting and is only approximately 4m wide."

29. **Mr. C.H. Street** wrote on 2nd February 2004 on behalf of G.E. Street and Son to object to the addition of byway Berwick St. James 3. In his letter he stated that he realised the 1790 Enclosure Award states the route crosses his field but comments:-
 - (i) It seems unnecessary to reinstate the original route as there is already a track to the A303 as an alternative.
 - (ii) It will cause extra cost to the A303 plans.

- (iii) He wishes the 1790 route to be diverted on to the northern section of Berwick St. James 3.
30. **Mr. B. Riley** wrote on 26th January 2004 supporting the making of all the Orders.
31. **Mr. R. Collins** wrote on 3rd March 2004 in support of the making of the Orders. He stated:-
- "The amount of vehicular rights of way in this country is extremely small (less than 5%) and this reclassification will go some way to increase this and put less pressure on existing routes.
- However, you should be aware that an anonymous 'local councillor' has requested, through the Salisbury Journal letters page, that people object to this application. The letter printed had the usual anti-vehicle bias and inferred that the routes were being 'upgraded' (rather than confirming existing rights), byway status was somehow linked to crime and that farmers were responsible for their maintenance.
- This is something you need to consider if you receive a large number of objections from local residents. It seems that this is an increasingly used tactic. Witness the over 300 supporters to a TRO on Smithey's Ridge on the Ridgeway that was encouraged by the Ramblers compared to only 90 objectors. Are we in danger of making a decision based on numbers of letters received, rather than actual objective evidence?"
32. **Mr. M. Vere-Hodge** wrote on 27th February 2004 to object to the upgrading of the rights of way in Winterbourne Stoke. Mr. Vere-Hodge does not see the need for the change and is concerned with the potential damage which vehicles may cause to the flora and fauna.
33. **Mr. S. Nathan** wrote on 1st and 24th February 2004 objecting to the upgrading of the ways in Winterbourne Stoke as this would be environmentally damaging in a Site of Special Scientific Interest and contradicts the Government's intentions set out in the consultation document "Use of Mechanically Propelled Vehicles on Rights of Way". He also does not see the need for the change which could affect local farming.
34. **Mr. J. Tarrant**, tenant of Rollestone Farm, farms land crossed by Shrewton rights of way 4 and 15. In a letter dated 16th January 2004 he stated that any vehicles using these ways would disturb a wildlife site which he has set up in an adjacent field. He feels it would also encourage the dumping of cars, a problem he already suffers from.
35. **Mr. C. Edwards** wrote on 10th February 2004 objecting to the upgrading of the rights of way in Shrewton and Winterbourne Stoke as:-
- it would cause damage to the flora and fauna
 - it would spoil the opportunity for the public to use the ways for quiet enjoyment of the countryside
 - the banks of the River Till would be damaged at the ford
 - the existing bridge over the River Till is fragile
 - the junctions on the A303 and A350 are dangerous

36. **Shrewton Parish Council** wrote on 24th February 2004 to object to the upgrading of footpaths 4 (part) and 15 stating that the paths are believed to be unsuitable for traffic and have not been so used in the past.
37. **Mr. C.V. Marment** wrote on 5th March 2004 objecting to the upgrading of ways in Winterbourne Stoke. He is concerned that damage will occur to the surface and enjoyment for walkers and riders will be spoilt. Vandalism, the effect on farming and on the environment generally are all concerns.
38. **Batt Broadbent, Solicitors**, wrote on 17th February 2004 on behalf of Mr. J. Tarrant objecting to the Order upgrading the paths in Shrewton. Mr. Tarrant is concerned about the safety of vehicles driving from the track on to the A360 and mud from the track being deposited on the road. Lack of vehicular use since 1971 (Mr. Tarrant's occupancy) and potential environmental damage are also cited as objections.
39. **Mr. and Mrs. James** wrote on 17th February 2004 to object to the upgrading of the ways in Shrewton and Winterbourne Stoke on environmental grounds.
40. **Lyndsay Trewren** wrote on 6th February 2004 to object to the upgrading of the ways in Shrewton on environmental grounds and on the grounds that vehicular use would adversely affect the enjoyment of walkers and riders.
41. **Anne Walton** wrote on 3rd March 2004 to object to the Orders upgrading the ways in Shrewton and Winterbourne Stoke. Ms Walton is concerned about the environmental impact of vehicles on the tracks and ways which she regards are suitable only for walkers and riders.
42. **The Highways Agency** wrote on 5th March 2004 to express concerns about the proposed additional byway numbered 3A Berwick St. James. The Agency believes this could create a safety problem where it meets the A303 and the Secretary of State would not wish to see further access points created along this part of the route. The Agency suggests diverting the rights on to the northern section of Berwick St. James 3 to avoid this problem.
43. **Strutt and Parker, Property Consultants**, in a letter dated 5th March 2004 object to the upgrading of Shrewton 4 (part) and 15 on the grounds of there being no evidence of vehicular use and the historical evidence not being conclusive.
44. **Salisbury District Councillor Colin Mills** wrote on 30th January 2004 stating he is strongly opposed to the proposal to upgrade Shrewton 4 (part) and 15. He stated that the paths are in an environmentally sensitive area which could be damaged by vehicular use and could also attract fly tipping.
45. **Ms Nicola Heron** wrote on 26th February and 6th March 2004 to object to the upgrading of the rights of way in Winterbourne Stoke, citing environmental grounds and the effect on the farming industry.
46. Copies of the letters of objection referred to above are available for inspection in the **Members' Room**.

47. Arguably, the main considerations for Members are the legal points and these are set out in the following paragraphs. Members must consider the issue on these grounds alone in order to avoid serious and costly legal implications.
48. Section 53 of the Wildlife and Countryside Act 1981 places a duty upon the County Council 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:-

- (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."*

49. The events referred to in Section 53(2)(b) which are relevant to this case are:-

- (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.*

50. If Members are satisfied that the available evidence is sufficient to enable it reasonably to be alleged that old tracks enjoy vehicular rights, but will be more suitable for use by walkers and horseriders, an Order should be made under Section 53 of the Wildlife and Countryside Act 1981.

51. Section 32 of the Highways Act 1980 states:-

"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

52. In the case of *R v Secretary of State for the Environment, Transport and the Regions ex parte Masters* (2000), the Court of Appeal considered the definition of "byway open to all traffic" in Section 66 of the Wildlife and Countryside Act and Dyson J's interpretation of the *Nettlecombe* case.

53. The Court of Appeal's view was that Parliament's intention was to preserve rights of way to give access to the countryside for walkers and horseriders. Parliament also intended to include ways over which the public had vehicular rights, even if the rights were rarely, if ever, exercised by the public. The definition of "byway" is referring to a type of highway. It does not seek to limit byways open to all traffic to those which are currently and actually used. It would cover, for example, public carriage roads that have fallen into disuse but whose character makes them more likely to be used by walkers and horseriders than by vehicles.
54. Lord Justice Roch upheld the judgement of Hooper J. He stated:-
- "Parliament did not intend that highways over which the public have rights for vehicular and other kinds of traffic should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders than by vehicles. Indeed, where such ways were previously shown in the maps and statements as roads used as public paths, Parliament made it obligatory that they continue to be shown on maps and statements when these were reviewed after 28th February 1983."*
55. The decision has now clarified the "user test" to be applied. A Modification Order adding a byway open to all traffic will be appropriate where historical evidence of vehicular use exists, but recent public use was exclusively by walkers and horseriders or both or such use exceeded all other public use.

Comments on the Objections

56. The legal issues are set out in paragraphs 48-55. The County Council, as Surveying Authority, has a legal duty to record all public rights of way on the Definitive Map and Statement. The Council must look at all the evidence available and decide on the balance of probabilities what rights of passage the public have over these highways. The Council is entitled to take into account the historical evidence.
57. The objections cited such as safety, suitability, need, lack of evidence of vehicular use and environmental grounds are irrelevant to the test determining what public rights exist. These concerns can be addressed, if the Order is confirmed and a problem arises, through traffic management measures.
58. Orders that have objections must be determined by the Planning Inspectorate. Once received, the Inspectorate assesses the objections and those deemed to be legally irrelevant receive a very forceful letter advising the objector of the irrelevance of their objection. Objectors are asked to withdraw their objection or reconsider it or risk the possibility of costs being awarded against them. A copy of this standard letter is available for inspection in the **Members' Room**.
59. The Highways Agency has requested the Inspector holding the A303 Side Roads Order to modify that Order indicating if higher rights are applicable to the ways in Berwick St. James and Winterbourne Stoke, that the new highways in the scheme will also carry those higher rights.

60. If higher rights are found to exist on Berwick St. James 3 and 3A then, following consultation with the Highways Agency and the landowner, the County Council is agreeable to divert Berwick St. James 3A on to the northern section of Berwick St. James 3 and its new access on to the A303.

Environmental Impact of the Recommendation

61. Objectors have raised environmental concerns such as damage to the flora and fauna in the SSSI and the loss of enjoyment for walkers and horseriders. Members could approve the making of a Traffic Order prohibiting motorised vehicular use of the ways to address these problems.

Risk Assessment

62. There is a potential conflict which could arise between the different categories of user. Use of the rights of way can be monitored and the Council has the requisite powers to manage the public rights. If conflict between the different types of user does arise there is a risk of third party claims. However, this cannot be taken into consideration when deciding whether to make the Order. Members must make the decision on the evidence put before them.

Financial Implications

63. If the ways are upgraded to byways open to all traffic and management of the exercise of public vehicular rights is required, financial provision has been allocated in a specific budget.

Options Considered

64. Members are asked to consider the objections received and decide whether or not the Orders should be confirmed. If Members resolve that the objections are duly made and should be accepted, the Orders must be submitted to the Secretary of State for determination. The County Council cannot rule the objections irrelevant. The objections do not appear to overturn the evidence of public vehicular rights.

Reason for Recommendation

65. To clarify the status of public rights over the rights of way by following the statutory procedures relating to Orders made under Section 53(2) of the Wildlife and Countryside Act 1981.

Recommendation

66. That:-
- (i) The Orders upgrading Winterbourne Stoke footpath 3, bridleways 4 (part), 5 (part) and 6B, Shrewton bridleways 4 (part) and 15, and Berwick St. James bridleway 3 (part) and 3A to Byways Open to All Traffic be submitted to the Secretary of State with the recommendation that they be confirmed without modification; and

- (ii) Officers be requested to monitor use of the ways should the Orders be confirmed, with a view to taking appropriate measures to deal with any issues which might arise.

GEORGE BATTEN

Director of Environmental Services

Report Author

BARBARA BURKE

Senior Rights of Way Officer

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

Correspondence with objectors