

WILDLIFE AND COUNTRYSIDE ACT 1981 - SECTION 53
THE WILTSHIRE COUNTY COUNCIL (SHEET ST 92 NE)
(EBBESBOURNE WAKE NO. 24)
RIGHTS OF WAY MODIFICATION ORDER NO. 11, 2005

Purpose of Report

1. To:
 - (i) Consider the objections received following the making of the Wiltshire County Council (Sheet ST 92 NE), (Ebbesbourne Wake No. 24), Rights of Way Modification Order No. 11, dated 14th July 2005, under Section 53 of the Wildlife and Countryside Act 1981, to add a byway open to all traffic (BOAT) at Ebbesbourne Wake.
 - (ii) Determine the County Council's recommendation which should be attached to this particular Order when it is referred to the Secretary of State for decision.

Background

2. The County Council has received an application dated 1st May 2002, made under Section 53 of the Wildlife and Countryside Act 1981, to add a BOAT to the Definitive Map of public rights of way in the parish of Ebbesbourne Wake, between Byway No. 2 Ebbesbourne Wake and Byway No. 15 Ebbesbourne Wake (the Herepath), as shown on the plans attached at **Appendices A and B**. The application is accompanied by a list of historical evidence to support the claim that vehicular rights can be reasonably alleged to exist on the route in question which is also known as the "Swallowcliffe Road" (see **Appendix C**).
3. The County Council undertook an initial consultation regarding the proposals, involving landowners, statutory consultees and other interested parties, on 25th November 2002. Objections to the proposals were raised by the Parish and District Councils and the landowner.
4. County Council Officers have now investigated the historical evidence submitted with the application in an objective and independent manner and are satisfied that vehicular rights can be reasonably alleged to subsist over the claimed route, on the balance of probabilities (see **Appendix C**).
5. Therefore, under Section 53 of the Wildlife and Countryside Act 1981, the County Council has made a Definitive Map Modification Order, dated 14th July 2005, to add a BOAT at Ebbesbourne Wake (the Swallowcliffe Road) as shown on the plan at **Appendix B**.

6. The making of the Order was duly advertised, circulated and posted on site and was followed by a statutory objection period of six weeks. Three objections to the making of the order were received by the County Council, as follows (see **Appendix D**):
- (i) **Mr. G.L. Foyle, Foyle Bros. (landowner)** - Correspondence dated 21st July 2005:
 - As the landowner Mr. Foyle objects to the making of the Order based upon evidence which will be presented at a future date. Mr. Foyle intends to follow this matter through to a Public Inquiry.
 - (ii) **Ebbesbourne Wake Parish Council** - Correspondence dated 9th August 2005:
 - The Parish Council opposes absolutely any extension to the existing BOAT No. 2 Ebbesbourne Wake, (Swallowcliffe Road). Furthermore the Parish Council maintains that the evidence presented by officers of the County Council fails to justify, on the balance of probabilities, *“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”*. If the matter is pursued further, the Parish Council would require a full Public Inquiry.
 - (iii) **Mr. J.A. Withers, South Wiltshire Rights of Way Preservation Group** - Correspondence dated 9th September 2005:
 - Within the evidence submitted by the County Council there are thought to be a number of inaccuracies and indecisive statements, particularly regarding cartographic evidence.
 - The application as it stands suggests that its purpose is to bring vehicular traffic from valley and downland in the south of the County in order to access the Shaftesbury Ox Drove (Byway No. 15). If this is the case there are two adequate routes to achieve this, both of which are within 1,000 metres of the proposed new byway. One to the west is from Alvediston (the Ansty Road), the other to the east is via Byway No. 3 Ebbesbourne Wake. If, on the other hand, the purpose of the application is to connect to Footpath No. 10 Swallowcliffe, the South Wiltshire Rights of Way Preservation Group would strongly recommend reconsideration. The eventual route would have to negotiate a 1:3 gradient of approximately 140 metres on the north slope of Swallowcliffe Down and would present a serious hazard to life.
 - The proposed modification is over a land surface of clay over chalk which is largely unsustainable if used frequently by mechanically propelled or horse driven vehicles.
 - The proposed route is over unfenced land and in severe wet conditions it is likely that it would rut deeply and so induce additional width to the path, a situation common on downland, even in days prior to use by mechanically propelled vehicles.
 - The proposed byway route runs adjacent and close to recently confirmed open access land on which motorised traffic is prohibited. Parts of the open access land are unfenced.

- Although environmental evidence is currently unacceptable, by direction to the Planning Inspectorate, it is known that serious consideration is being given in debate of the Natural Environment and Rural Affairs Bill for strictures against damage to protected sites. The locality of this proposed modification is within the Cranborne Chase and West Wiltshire Downs Area of Outstanding Natural Beauty. It is a very open landscape and use with vehicles other than those used for agricultural purposes would be an affront to the beauty of this area, as well as a severe threat to wildlife.
 - The South Wiltshire Rights of Way Preservation Group is aware that the rights of vehicular users are often quoted when claims for modification are based on rights acquired in historic times. The EU Convention of Human Rights and the derived Human Rights Act in this country have played a significant part in recent rights of way legislation. Review is being undertaken to ensure that there is an ethical balance of the rights of users of mechanically propelled vehicles against those of owners/occupiers and conservationists.
7. The only valid objections to the making of a Definitive Map Modification Order are those which question whether or not the Order, as made, correctly reflects existing rights, i.e. those regarding the evidence discovered by the Surveying Authority. Although the objectors have stated that the evidence is insufficient or flawed, no further information to challenge the evidence discovered by the Surveying Authority has been provided by the objectors despite requests from the Order-making authority. Therefore it is not possible to provide the Regulatory Committee with further information regarding the objectors' challenge to the historical evidence. Under the legislation issues such as the environmental impact of the proposals, the effect upon landowners and other path users, or the suitability of the way to carry vehicular traffic cannot be taken into account. At any subsequent Public Inquiry the Inspector appointed on behalf of the Secretary of State will only be concerned with those objections which challenge the historical evidence discovered by the Surveying Authority.
8. In addition one representation has been received supporting the making of the Modification Order, as follows:
- Mr. Bill Riley** - Correspondence dated 24th July 2005 (Definitive Map Modification Order applicant):
- If confirmed, the Order will rectify a long standing anomaly which has caused Byway No. 2 to be a cul-de-sac for equestrian and vehicular users. The Council first attempted to remedy this in 1972 at the Special Review and again under the 1981 Act. The subsequent Public Inquiries confirmed that the route shown on the current Order is historically correct. When the original route is restored, all users will benefit.
9. The Public Inquiries referred to are two local Public Inquiries held in 1991 and 1992 regarding the reclassification of path No. 2 Ebbesbourne Wake (the southern continuation of the claimed route) which was originally recorded on the Definitive Map as a Carriage Road used mainly as a Footpath (CRF). At the first Inquiry the Inspector concluded that path No. 2 should be recorded as part BOAT from its southern end to its junction with path No. 3 Ebbesbourne Wake and that the remainder of the path should be recorded as a bridleway.

10. However, there was a subsequent Public Inquiry which examined further evidence from the parish of Swallowcliffe, including the inclosure award, tithe award and parish surveys upon which it was alleged that a further section of path No. 2 Ebbesbourne Wake should be recorded as a BOAT. However, the Inspector does acknowledge the existence of evidence to allege that the claimed route (which is the subject of this report) carries vehicular rights, but in this instance the Inspector was only able to apply the evidence to the Order route in question at that time: *"... The re-inforced evidence showing the existence of public vehicular rights over the major part of Ebbesbourne Wake 2 was such that only a stopping up or diversion order could remove these rights. There was no evidence to deny the existence of vehicular rights and if any modification to the order was necessary it should only apply to that part of the order path not on the line of the awarded Carriage Road. An application had already been made to add to the definitive map a short length of public highway to follow the Inclosure Award line to the Herepath ..."*
11. In April 1992 prior to the second Public Inquiry, the County Council was advised of the unrecorded right of way. The Rights of Way Section at that time advised that it was aware of this omission and would submit a report to the Rights of Way Sub-Committee seeking approval to add the way under the provisions of the Wildlife and Countryside Act 1981. However, this did not happen and a detailed Modification Order application was made on 1st May 2002. In its decision to make an Order to add the claimed route, ie the northern continuation of path No. 2 Ebbesbourne Wake to the Herepath, BOAT No. 15 Ebbesbourne Wake (as shown on the plan at **Appendix B**) the Surveying Authority has largely relied upon the same evidence presented at the second Inquiry.

Main Considerations for the Council

12. Officers have examined the historical evidence relevant to the assessment of the status of the right of way.
13. Section 32 of the Highways Act 1980, states that:
- "...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 and 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..."*
14. The Surveying Authority must apply the following tests to all documents:
- (i) Why were the documents compiled?
 - Did the recording of the highway have a legal significance?
 - (ii) How were the documents compiled?
 - The compilation process
 - Public participation
 - Accuracy (ie was the map surveyed accurately?)

(iii) Who compiled it?

- What were the consequences for the compiler's rights/duties of including or not including a public right of way?
- What were the consequences for the rights/duties of others?
- Were there any declarations against the compiler's interest?
- Were there any sanctions for falsifying evidence?

Historical Evidence

15. These tests have been applied to all of the documents listed in **Appendix C** and the results suggest that the evidence supports the claim that vehicular rights can be reasonably alleged to exist on the route in question. In fact the claimed route appears to form part of an ancient carriageway between Ebbesbourne Wake and Swallowcliffe, referred to as the Swallowcliffe Road. Documents are available in the **Members' Room**.
16. The route pre-dates and survives the inclosure process, as shown by Andrews and Dury's map of Wiltshire dated 1773, which clearly shows the route. This map was produced for the travelling public of the day and is renowned for its high level of accuracy. It is unlikely that this map would show private routes or those which were not for use by all forms of traffic. Those using horse and carriage were the travelling nobility for whom this map was produced. Therefore to show routes not available to all forms of traffic and private routes would have caused difficulty for both landowners and users, which was not in the interests of the map maker.
17. The Ebbesbourne Wake Inclosure Award describes the route as *"...One other Public Carriage Road and Drift way of the breadth of thirty feet branching out of the last mentioned Road (the road from Ebbesbourne Wake to Sutton Mandeville) at the Distance of about twenty perches from the Northeast corner of the Old Inclosure called Lamb Down aforesaid and from there extending Northwest in its usual Course and direction thro' and over the Allotment of Down Land to the said William Coles Esquire unto the Northwest Corner of the said Allotment where it crosses the late Turnpike Road which leads from Shaftesbury to Salisbury and enters at its usual place into the parish of Swallowcliff the same being part of the Road which leads from the village of Ebesbourne-Wake to Swallowcliff aforesaid..."*. The map accompanying the Inclosure Award, clearly shows the road coloured sienna and inscribed "Carriage Road to Swallowcliff."
18. Inclosure Awards are particularly good evidence of the status of a right of way as all Inclosure Awards stem from Acts of Parliament and the Commissioners had the power to change the road network within that parish. In the case of the claimed byway route, it is shown in two inclosure awards. The Swallowcliffe Inclosure Award describes the route as *"...One other Public Carriage Road and Drift way of the breadth of thirty feet branching out of the New Turnpike Road aforesaid opposite an Old Inclosure belonging to the Earl of Pembroke in possession called the London Elm and from there extending in a southward direction through and over an Allotment to the said Earl in a strait line to the bottom of the hill and from there continuing in its Ancient Course and direction Southeastwards to the usual place of its entrance into the parish of Ebesborne Wake the same being part of the Road leading from Swallowcliff to Ebesborne Wake aforesaid..."* On the plan accompanying the award the route is inscribed as the "Road from Ebesborne Wake".

19. Surveys of the parishes of Ebbesbourne Wake and Swallowcliffe were carried out in 1794 and 1797 respectively. These maps show the suggestion of the route on the index plan and the full route on the main maps. The Ebbesbourne Wake map shows the route labelled *"to Swallowclift"* and the Swallowcliffe plan shows the whole of the route continuing into the parish of Swallowcliffe, suggesting that the claimed byway is part of a long distance route.
20. Parishioners once paid tithes to the church and its clergy in the form of payment in kind, for example grain comprising an agreed proportion of the annual profits of cultivation or farming. Payment in kind gradually began to be replaced by monetary payment, which was formally recognised by the Tithe Commutation Act of 1836, which regularised this system. The Swallowcliffe Tithe Award of 1844, provides further evidence of the status of the claimed route. It is shown on the map by double solid lines, but is not inscribed. However, the British Parliamentary Paper 1837, XLI 405, which sets out the map conventions to be used in plans made under the Commutation of Tithes Act 1836, shows the *"Swallowcliffe Road"* to be an *"Open Road"*.
21. The plan and book of reference for the *"Direct London and Exeter Railway - 1845"* shows the claimed byway numbered 18 in the plan and labelled *"To Swallowcliff"*, further supporting the claimed byway as part of a long distance route. The book of reference refers to route 18 in the parish of Ebbesbourne Wake as a *"Public highway"*, the owners or reputed owners being the *"Surveyors of highways"*. The cross-section of the area giving technical detail refers to the route as *"To Swallowcliffe, level unaltered – to be passed under Railway Arch 43ft H 20ft"*. The width of the tunnel at 43 feet suggests a substantial route which is likely to have been open to all traffic and concurs with the Inclosure Award which sets out the route being 30 feet wide in both the parishes of Ebbesbourne Wake and Swallowcliffe. This map refers only to the southern part of the path which presently forms Byway No. 2 Ebbesbourne Wake, but it can be concluded that it does continue northwards as the claimed route as it is inscribed *"To Swallowcliffe"*. The route leading west, branching out of Byway No. 2 Ebbesbourne Wake, does not lead to Swallowcliffe.
22. Other small scale maps form supporting evidence and consistently refer to the route as a *"Bye Road"*, *"Parochial Road"* and *"Cross Road"*. It is likely that *"Cross Road"* in this context has a different meaning to our understanding of the term today. It would appear that *"cross road"* was first mentioned in Ogilby's *Britannia* of 1675, which used the term to distinguish secondary roads from direct or primary roads, (i.e. those originating in London). In the preface to the *Britannia*, Ogilby states *"...having illustrated the principal roads in England and Wales by 85 several itineraries we have distinguished the same into direct and cross roads...and calling such cross as lead from some of the said lesser centres to another like capital town or place of eminency..."* It would appear that subsequent map makers consistently used this term with the same meaning until about 1912 and dictionaries still contain reference to *"by-way"* within the definition of *"cross road"*.
23. The documentary evidence appears to show that between 1890 and 1901 the route became disused or went out of repair. The route was shown in Ordnance Survey mapping of 1890, but from 1901 onwards it would seem that it was no longer visible on the ground to the Surveyors. Ordnance Survey Maps are topographical in nature and therefore would not be expected to record an ancient route which was still part of local knowledge, (evidence provided by Rural District Council minutes of 1928 and 1929), if it was not evident on the ground, through disuse.

24. The Rural District Council minutes of 1928 and 1929 have maps attached which clearly show the route in question. The gates erected, which the minutes detail, have been placed on the route between West End in Ebbesbourne Wake and the Shaftesbury Drove, i.e. Byway/Bridleway No. 2 Ebbesbourne Wake and Footpath No. 2 Alvediston. This route is referred to as a "*Public Right of Way*". The route in question is not coloured on these maps as the positioning of the gates does not directly affect the route, but in the 1928 minutes it is worth noting that it is shown in the same manner as Byway No. 3 Ebbesbourne Wake which is also uncoloured as it is not affected.
25. The claimed route is not shown on the later Finance Act of 1910 and the Highways Takeover Records of 1930 which are both based on Ordnance Survey mapping. Whilst it is acknowledged that the Finance Act Map could be an important piece of historical evidence and that Highway Takeover records could provide useful supporting evidence, they are inconclusive in this particular case.
26. A public right cannot be extinguished simply because it has become disused and those rights have not been exercised for a long period of time, or because that right has not been recorded on the Definitive Map of public rights of way. Officers therefore contend that the Inclosure Awards and supporting mapping evidence are sufficient to show that vehicular rights can be reasonably alleged to exist, on the balance of probabilities, on the route in question.

The Legislation

27. Section 53 of the Wildlife and Countryside Act 1981 places a duty upon the County Council as the Surveying Authority, to keep the Definitive Map and Statement of public rights of way under continuous review, as follows, (Section 53(2)(b)):

"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."*
28. The events referred to in Section 53(2)(b) above which are relevant in this case are as follows:

"(c) 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 definitive 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."*
29. The burden of proof lies on the balance of probabilities. If the evidence is sufficient to enable it to be reasonably alleged that a BOAT exists, a Modification Order should be made, under Section 53 of the Wildlife and Countryside Act 1981.

30. The Natural Environment and Rural Communities Act received Royal Assent on 30th March 2006. The effect of this Act was to set a cut-off date for Definitive Map modification applications of 20th January 2005. Where applications are made after this date they must be investigated in the usual manner but, where vehicular rights can be reasonably alleged to exist, the Surveying Authority is only able to add/upgrade a route as a 'restricted byway', ie having a right of way for the public on foot, on horseback (or leading a horse) and for non-mechanically propelled vehicles only. This legislation does not apply to the application to add a BOAT at Ebbesbourne Wake as the application pre-dates 20th January 2005 and therefore must be processed under Section 53 of the Wildlife and Countryside Act 1981.

Options Considered

31. The historical evidence has been carefully examined and, on the balance of probabilities, vehicular rights can reasonably be alleged to exist. There was therefore no option available to the County Council, as the Surveying Authority, other than to make an Order under Section 53 of the Wildlife and Countryside Act 1981 to add a BOAT (the Swallowcliffe Road) to the Definitive Map of public rights of way.

Reason for Recommendation

32. To comply with the County Council's legal duties under Section 53 of the Wildlife and Countryside Act 1981.

Recommendation

33. That the Modification Order made under Section 53 of the Wildlife and Countryside Act 1981, to add a byway open to all traffic at Ebbesbourne Wake, be forwarded to the Secretary of State for decision, with a recommendation from the County Council that the order be confirmed without modification.

GEORGE BATTEN

Director of Environmental Services

Report Author

JANICE GREEN

Rights of Way Officer

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

None