

## REGULATORY COMMITTEE

13<sup>TH</sup> JUNE 2007

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**WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53**  
**DEFINITIVE MAP MODIFICATION ORDER NO.7, 2005 –**  
**UPGRADING FOOTPATH NO.21 GRIMSTEAD (MACKS LANE) TO A BYWAY**  
**OPEN TO ALL TRAFFIC**

**Purpose of Report**

1. To:
  - (i) Update Members on developments regarding the above mentioned definitive map modification order made in 2005 to upgrade Footpath No.21 Grimstead (Macks Lane) to a byway open to all traffic (BOAT), following the adjournment of the Public Inquiry into this matter on two occasions.
  - (ii) Seek Member approval that Wiltshire County Council continues to support the definitive map modification order on those parts of the definitive line that are adjudged to lie within the confines of Macks Lane, (as shown by a purple line on the original definitive map, see **Appendix A**) following representations made at the Public Inquiry.

**Background**

2. The above-mentioned definitive map modification order was made on 17<sup>th</sup> March 2005. Officers made the order to upgrade Footpath no.21 Grimstead (Macks Lane) to a BOAT, based upon historical evidence of vehicular rights. Upon the making of the order, objections were received and the case fell to be determined by the Secretary of State. At their meeting of 2<sup>nd</sup> November 2005, Members of the Wiltshire County Council Regulatory Committee considered the evidence and concluded that when the order was submitted to the Secretary of State it should include a recommendation from Wiltshire County Council that the order be confirmed without modification (see Regulatory Committee Report dated 2<sup>nd</sup> November 2005 at **Appendix B** and Committee resolution at **Appendix C**).
3. Once the order was forwarded to the Secretary of State, a Local Public Inquiry was arranged at which an independent Inspector, appointed on behalf of the Secretary of State, would hear all evidence both supporting and opposing the making of the order, to determine whether or not the order should be confirmed. The Public Inquiry was held on 6<sup>th</sup> December 2006, but was adjourned until March 2007 as objectors advised that they had been informed that the Inquiry was arranged to last only one day, (although it had been booked to last for three days). They argued that this put them and their Counsel at a disadvantage and an adjournment was granted by the Inspector. During the time available to this part of the Inquiry, Wiltshire County Council was able to present its evidence in support of the existence of vehicular rights along the whole of Macks Lane, begin cross examination by the objectors and then be re-examined by its own Counsel.
4. The Inquiry reconvened on 13<sup>th</sup> March 2007, but was again adjourned to allow Wiltshire County Council to consider a legal opinion of Leading Counsel recently obtained by the Green Lanes Protection Group, which the objectors claimed might have an important bearing on the Macks Lane case.

5. The Public Inquiry is due to resume on Tuesday 26<sup>th</sup> June 2007. To date three key issues have arisen from that part of the Inquiry which has already been heard:
- (i) New historical evidence has been brought to the attention of officers by the objectors. The technical details from the *“Plan of the Proposed Salisbury, Romsey and Southampton Railway”*, dated 30<sup>th</sup> November 1836, show Macks Lane as an “Occupation Road”.
  - (ii) The legal opinion referred to in Paragraph 4 which brought into question the validity of the original application for a definitive map modification order, because the applicant had submitted only a list and brief summary of the content of each document relied upon in evidence, where the legislation required the applicant to supply copies of all documents relied upon.
  - (iii) The definitive line of the footpath, as shown on the definitive map, could show the route to be in part outside the confines of Macks Lane itself.
6. It is not usually the case that a modification order would be taken back to Regulatory Committee for consideration during the course of a Public Inquiry, however in this particular case, three complex issues have arisen which should be brought to the attention of Members.

### **New Evidence**

7. At the start of the second Public Inquiry, objectors brought to officers attention that on the *“Plan of the Proposed Salisbury, Romsey and Southampton Railway”* dated November 30<sup>th</sup> 1836 (please see **Appendix D**), the technical details show Macks Lane to be an “Occ. Road”, (presumably an “Occupation Road”). Officers consider the definition of an occupation road to be a route available to owners/occupiers to reach property or land, not necessarily having a public right. Within the plan of the proposed railway line itself, Macks Lane is numbered jointly with other routes as no.12, referred to within the book of reference as a *“Parish Road”*, it is not numbered separately or set out separately as an *“Occupation Road”* within the book of reference. Officers would agree with objectors that the route is referred to as an *“Occupation Road”* within the technical data of this particular piece of evidence, which suggests a private route. However, it must be looked at against the other evidence available, as a whole. Of particular significance is the Salisbury Highway Board Schedule of Main and District Roads, dated 1882 which includes Macks Lane as a *“Main or District Road”*. Also there are three sets of railway plans for the *“Salisbury Railway from the South Western Railway at the Bishopstoke Station to Salisbury”* which consistently refer to Macks Lane as *“Road”* and *“Parish Road”* within the Books of Reference, none of which refer to the route as an *“Occupation Road”*. (Please see Wiltshire County Council Inquiry statement available in the **Members’ Room**, which summarises the historical evidence and includes copies of historical documents relied upon).
8. Officers therefore believe that the County Council should continue to support the order as made, despite this new evidence presented by the objectors, because it does not substantially change the view of officers that on the balance of probabilities public vehicular rights exist.

## Legal Opinion

9. The day before the Public Inquiry was due to resume in March 2007, objectors made it known that in their view the legal opinion recently obtained by the Green Lanes Protection Group from George Lawrence QC and Ross Crail might have an important bearing on the Macks Lane case by bringing into question the validity of the original application for a definitive map modification order, made by Mr Bill Riley, (the legal opinion is available to be viewed in the **Members' Room**).
10. The Natural Environment and Rural Communities Act of 2006 (NERC Act) stated that where any application for a byway open to all traffic was made after a cut off date of 20<sup>th</sup> January 2005 (subject to exceptions), if the evidence revealed that on the balance of probabilities vehicular rights could be alleged to exist, the route could only be upgraded to a "restricted byway" i.e. having a right for the public on foot, on horseback and with non-mechanically propelled vehicles only.
11. The legal opinion suggested that the original application to upgrade Footpath No.21 Grimstead (Macks Lane), made by Mr Riley, may be invalid and not yet complete as the legislation under Schedule 14, paragraph 1 of the Wildlife and Countryside Act 1981 states:

*"Form of applications*

1. *An application shall be made in the prescribed form and shall be accompanied by:*
  - (a) *a map drawn to the prescribed scale and showing the way or ways to which the application relates; and*
  - (b) *copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application."*
12. When making the original application Mr Riley did, as requested by the legislation, produce a map at the required scale to demonstrate the route applied for. He also submitted a list with a brief summary of the contents of all the documents used to support the application. Based on the legal opinion, the objectors have argued that this list of evidence does not comply with the requirements of the legislation and therefore the application is invalid and remains incomplete until copies of all the historical documents looked at in support of the application are forwarded to the Surveying Authority for consideration. As the documents could now only be submitted to complete the application after the NERC Act cut-off date of 20<sup>th</sup> January 2005, Macks Lane could only now be upgraded to a restricted byway.
13. The Public Inquiry was adjourned to allow Wiltshire County Council to consider the effect of the legal opinion. In the meantime, however, DEFRA guidance on this matter has been received, due to the far reaching implications for all Surveying Authorities. The DEFRA guidance states:

*"DEFRA re-affirms its view, that in order for an application to be made in accordance with paragraph 1 of schedule 14 of the Wildlife and Countryside Act 1981, it does not necessarily have to be accompanied by copies of all the documentary evidence the applicant is relying on."*

(Please see DEFRA guidance at **Appendix E**).

14. DEFRA's guidance suggests that Mr Riley's application to upgrade Footpath No.21 Grimstead (Macks Lane) is valid and properly made and officers will continue on the basis that the advice is correct at the Public Inquiry when it resumes on 26<sup>th</sup> June 2007. In Wiltshire, Rights of Way officers are able to gain access to the majority of the documents produced in evidence by applicants as these records are also held by the County Council and therefore officers are able to source their own copies of documents, when a claim is investigated. DEFRA's advice suggests that this is an acceptable course of action. Copies of documents that are not held by the County Council are obtained from the applicant, wherever possible, before the application is determined by the Council.

### **Definitive Line**

15. At the first Public Inquiry dated 6<sup>th</sup> December 2007, objectors submitted that on the definitive map, (the legal record of public rights of way), the purple line which indicates the route of Footpath No.21 Grimstead shows part of this line to be outside the confines of Macks Lane itself, to the west, (please see **Appendix A**). When questioned upon this point at the first Inquiry, officers expressed their view that the line was intending to show the route within Macks Lane, but that poor drafting showed part of the purple line outside the lane. It is therefore the Inspector's decision to what extent the definitive line falls outside Macks Lane.
16. The following options are available to the Inspector:
- The Inspector may decide that the line does fall inside, or that the intention of the draughtsman is that the line should lie wholly within Macks Lane and therefore the order may be confirmed along the whole of Macks Lane if it is decided that the evidence shows that vehicular rights can be alleged to exist on Macks Lane.
  - If the Inspector decides that part of the line lies outside Macks Lane, but that the evidence supports vehicular rights on the whole of Macks Lane, he may only confirm the order to upgrade the footpath on those parts of it which lie inside the lane. This may leave a situation where a vehicular right is established at either end with the central section forming a footpath to the west of Macks Lane in the adjacent field (see **Appendix F**). Where the line lies outside Macks Lane, the County Council has no evidence of vehicular rights as the evidence discovered relates to a route lying wholly within Macks Lane. Therefore if it is found that part of the route lies outside, the Order has been made wrongly. The correct procedure would be to make a modification order to upgrade the footpath to a BOAT at either end of Macks Lane and to make a separate order to add a BOAT over the central section where the definitive line of the footpath falls outside Macks Lane. However, if an order was now made to add vehicular rights over the central section of Macks Lane, it could only become a restricted byway due to the implications of NERC Act which states that for any application made after 20<sup>th</sup> January 2005 (with exceptions), where the evidence discovered points towards vehicular rights, it can only become a restricted byway. In reality on the ground, the used route falls wholly within Macks Lane and there is no furniture or provision for the footpath to go into the field on the west. There is therefore no evidence on the ground to suggest that there has ever been a footpath within the field to the west of Macks Lane.

- If the Inspector does find that the historical evidence supports the existence of vehicular rights on the whole of Macks Lane, but that the definitive line falls partly outside the confines of the lane, he could decide that it is within his powers to add the section of byway at the centre of Macks Lane, by modifying the order currently before him.

### **Traffic Regulation Order**

17. If the situation arises where vehicles are unable to use the central section of Macks Lane, the need for a traffic regulation order becomes more important. A report has been drafted to go before the Cabinet Member, but this is now being updated due to the implications of the above-mentioned representations. If the central section of Macks Lane proves to be unusable by vehicular traffic, vehicles may use a short section of byway only at either end and would then be forced to retrace their route, or reverse as the lane is too narrow for vehicles larger than a motorbike to turn around (see **Appendix F**).

### **Risk Assessment**

18. In addition to those identified at paragraphs 24 and 25 of the Regulatory Report dated 5<sup>th</sup> October 2005, (see **Appendix 1 of Appendix B**) there may be an additional danger if a byway is created at either end of Macks Lane, as vehicles would be forced to reverse as they are unable to turn around due to the narrow width of the lane where they cannot continue on the central section of Macks Lane, where no vehicular rights are recorded (see **Appendix F**).

### **Financial Implications**

19. In addition to those identified at paragraph 26 of the Regulatory Committee Report dated 5<sup>th</sup> October 2005, both the objectors to the order and the applicant may make claims for costs against the County Council as a result of this case. Any applications for costs to be awarded against the Council would be vigorously defended on the basis that all actions taken by the Council regarding this application have been in order to ensure compliance with statutory requirements.
20. Interested parties were advised on 15<sup>th</sup> May 2007 that Wiltshire County Council could only support the present order upgrading Macks Lane to a BOAT on those sections of the definitive line which fell within the lane itself. Mr Riley the applicant has subsequently written to Wiltshire County Council on two occasions (please see correspondence available in the **Members' Room**). In his letter dated 21<sup>st</sup> May he states:

*"My application was made at the request of certain residents of West Grimstead, but all expenses arising therefrom have been borne by myself in the firm belief that I was acting in the wider public interest. I believe that grounds exist for an application for costs against the Council unless it changes its mind. This is something never previously even contemplated in nearly 30 years of rights of way work, mainly in support of the Council, but then I have never been treated like this before."*

### **Options Considered**

21. Wiltshire County Council could withdraw its support for the order as made and take no further part in the Public Inquiry, if it prefers the new evidence discovered by the objectors to that submitted by officers.
22. If Wiltshire County Council continues to support the historical evidence, it could:
  - continue to support the whole of the order as made, on the grounds that the route of Footpath No.21 Grimstead, as shown on the definitive map, lies wholly within Macks Lane, or that it was the intention of the draughtsman to show the route wholly within Macks Lane;
  - continue to support the order as made, for those parts of the definitive route which lie within the boundaries of Macks Lane only and accept that if any part of the route lies outside Macks Lane, there is no evidence to support vehicular rights over that part of the route.

### **Reasons for Recommendation**

23. If Wiltshire County Council continues to support the order, based on the historical evidence and proceeds to support the order only on those parts of the legal line which lie within Macks Lane, this complies with its legal duties under Section 53 of the Wildlife and Countryside Act 1981. The Council cannot produce evidence to upgrade a route which lies outside Macks Lane as the evidence discovered relates to a route wholly within Macks Lane.

### **Recommendation**

24. That Wiltshire County Council:
  - (i) continues to support the order, based on historical evidence of vehicular rights, despite the new evidence discovered by the objectors which does not substantially shift the weight of the evidence against the existence of vehicular rights, on the balance of probabilities.
  - (ii) continues to support the order, as made, on those parts of the definitive route which lie inside Macks Lane, or are deemed to lie inside Macks Lane, i.e. to upgrade those parts of Macks Lane to a BOAT.

### **GEORGE BATTEN**

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

None.