

**WYLYE: PROPOSED ADDITION OF FOOTPATH WYLYE 11  
TO DEFINITIVE MAP AND STATEMENT**

**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 footpath to the Definitive Map and Statement for Salisbury and Wilton Rural District Council Area 1953.
  - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs for consideration and confirmation.

**Background**

2. A report on the above Order was originally presented to the July meeting of the Regulatory Committee which resolved:

*“To defer consideration of the proposal in order that the officers could research the matter further so as to clarify the nature of the use of this path over a twenty year period.”*

An extract from the July minutes referring to the Order is attached to this report as **Appendix A**. A copy of the original July Committee report showing the Order route and laying out the case for supporting the Order is attached to this report as **Appendix B** (this includes **Appendices 1 – 3**).

3. A letter from the landowner, John Lush, dated 26<sup>th</sup> July 2008 was circulated to Members of the Committee prior to the July meeting, raising a number of points from the July Committee report that he wished to question. A copy of that letter together with Officers’ replies to the points raised is attached to this report as **Appendix C**.
4. That letter claimed that photographs submitted by the landowner showed ‘No Right of Way’ notices in place for part of the claimed twenty year period. A copy of these photographs forms part of **Appendix C** to this report.
5. The landowner’s son, Mr. Philip Lush, made representations on behalf of the landowner against the Order at the July Committee meeting. It was claimed the path was permissive and that ‘No Right of Way’ notices were in place on the route, therefore the route was not capable of leading to presumed dedication as a public path. It was also claimed that there was barbed wire across point B until 1988.
6. These were the main points that Members felt should be clarified further and a letter was sent to all witnesses and objectors on 31<sup>st</sup> July 2008 inviting further evidence. Copies of all replies are available in the **Members Room** including the landowner’s reply dated 15<sup>th</sup> September 2008 which had appendices including letters from Woolley and Wallis, Mr. Emerson and photographs of hedges and fences around the large field, including a portion of a hedge ending at point B. Summaries of all user evidence to date are attached at **Appendix D**.

## **Points for Clarification**

### **(i) The Permissive Path**

7. A permissive path, sometimes called a 'concessionary path', may be a way that has been the subject of a formal agreement between the landowner and a local authority. If this was the case the path could not become a public right of way through twenty years use. In this case the path is not the subject of a formal agreement between the landowner and Wiltshire County Council or other relevant local authority.
8. The term permissive path may also sometimes be used for no more than a way, the use of which has not been objected to by the landowner. Even though the landowner may believe in his own mind that the path is permissive, users of the way who have never been given express permission by the landowner can still claim use 'as of right'. There are to date 28 witnesses who have stated that they have used the path without having been given permission.
9. Whether anyone using the way believed it to be private or not has no bearing on the use 'as of right' (R. v. Oxfordshire County Council ex parte Sunningwell Parish Council).
10. When requested for further evidence, the landowner's land agents, Messrs Woolley and Wallis, replied in a letter dated 6<sup>th</sup> August 2008:

*".... At no point has the route been regarded as a permissive route".*

The tenant farmer who was renting the land in question at the time replied in a letter dated 7<sup>th</sup> August 2008:

*"... We have always regarded this route solely for the use of farm traffic to enter the land owned by Mr. Lush and it has never been a permissive route".*

It is not clear, however, what he understands by "a permissive route" and he has not replied to letters seeking to clarify this.

11. Twenty one other replies were received, 18 of which stated that it was not believed to be a permissive route. Three witnesses said they believed the path to be permissive but further clarification revealed that two of these thought it was permissive only in the respect that they thought it was their right to use it.

### **(ii) The Notices on the Route**

12. None of the photographs of 'No Right of Way' notices submitted by the landowner are sufficient to rebut the presumption of dedication of the route as a right of way. This has already been fully discussed in the July Report (**Appendix B**) and a summary of the issue can be seen in a table as **Appendix E** to this report.

### **(iii) The Barbed Wire**

13. It was also claimed by the objectors that there was barbed wire across the path at its junction with the 'Old A303' in 1988 or 1989 and therefore the path could not have been used at this time. It was originally claimed by the landowner that an aerial photograph dated circa 1988-9 (included in **Appendix C**) proved that no exit existed to the 'Old A303' and that a thick continual hedge line was clearly visible at this point in his photograph. Actually, the angle of the photograph was such that these facts could not be determined from it. Conversely, an aerial photograph dated 1981 from the County archives (included in **Appendix C**) does show a gap in the vegetation.

14. The landowner, his son, his tenant farmer's farm manager and his land agent state that there was barbed wire strung across the path at its junction with the 'Old A303'. The fourteen witnesses who used the path in 1987-8 strongly deny that there was any barbed wire at this point. A recent letter dated 7<sup>th</sup> August 2008 from the tenant farmer of the land states that to his knowledge there was never any barbed wire across the path at this point and he can remember no notices on or near the route, although this appears to contradict an earlier letter from him.
15. The landowner has recently submitted photographs that show that there is an old barbed wire fence in the hedge at the top of the field as well as a new wire fence. The photographs also show that there are some gaps in the hedges including the hedge adjacent to the 'Old A303', however these photographs do not help in determining if there was ever any barbed wire across point B, especially during any part of the relevant twenty year period which is the issue in question.
16. The landowner has since stated at a meeting with rights of way officers (see **Appendix C**) that a hedge across the field that contains the Order route was grubbed out and removed at the same time as the access was opened up between the Order route and the 'Old A303'. He thought that this was done in the summer of 1988. Aerial photographs (shown in **Appendix C**) from the County Archives taken in 1971 and 1981 show the hedge he identified as being there in 1971 but removed in 1981. This means that the access to the 'Old A303' would have been created before 1981.
17. Messrs Woolley & Wallis, the landowner's land agents, state in their letter dated 6<sup>th</sup> August 2008 that it is not believed the access from the 'Old A303' was created before 1988 because until the Wyllye by-pass was constructed, this boundary was adjoining the busy highway, and that no access to the fields existed when the A303 followed its original route.
18. Wiltshire County Council Highway County Surveyor documents show that the final stages of the Wyllye bypass was completed in the year 1975-6.

### **Further User Evidence to Date**

19. Regarding public use of the path over the twenty year relevant period, a continual twenty years of use by any individual user is not required as long as an adequate twenty years continual usage is covered by the body of witness evidence taken as a whole. It can be seen in the original July Committee report that at the time of making the Order there was considered to be sufficient evidence to support a public footpath Order but not enough evidence to warrant the making of an Order for a public bridleway.
20. More user evidence has now been submitted and to date there are now a total of 30 witnesses supporting use of the route during the relevant period. Twenty two users claimed to have used it as a footpath and 11 as a bridleway. Three of these witnesses claim to have used it as both a bridleway and a footpath. Summaries of all user evidence to date are attached as **Appendix D** to this report and presented as charts and tables.
21. With regard to the public bridleway evidence, although the evidence is now stronger with 11 users, the number of users at the weakest point is only six between 1987 and 1990. This is still considered by officers to be insufficient and at best borderline. However, when the Order is referred to the Secretary of State for determination, the Inspector appointed to decide the case will consider this evidence and could possibly consider it enough to warrant awarding the path the status of bridleway.
22. A summary table of the evidence presented for and against the Order is attached as **Appendix E** to this report.

## **Main Considerations for the Council**

23. The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Wylfe Parish Council on behalf of the residents of Wylfe. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.

s.53(2) *“as regards every definitive map and statement, the surveying authority shall:*

- (b) *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”.*

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

s. 53(3)(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 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 such that the land over which the right subsists is a public path, a restricted byway or, subject to Section 54A, a byway open to all traffic.”*

25. When considering and determining the application, the County Council must have regard to *‘all other relevant evidence available to them’*, as the statute demands. 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.

26. Section 31 of the Highways Act 1980 provides that where a way has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway - unless there is sufficient evidence that there was no intention during that period to dedicate the way. The relevant subsections state:

s.31 (i) *“where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.*

s.31 (ii) *“The period of 20 years referred to in subsection (i) 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 (iii) below or otherwise.*

s.31 (iii) *“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 to persons using the way a notice inconsistent with the dedication of the way as a highway; and*
- (b) has maintained the notice after the 1<sup>st</sup> 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.*

s.31 (v) *“Where a notice erected as mentioned in subsection (iii) 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 a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.*

s.31 (vi) *“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 have 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; or*
- (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 lodgement 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.*

27. The term 'as of right' means without force, secrecy and permission. People using the way must do so openly without damaging the property and not be reliant on being given permission to use the path by the owner of the land over which the path runs.
28. 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.
29. The court concluded that it is no longer necessary to establish whether the users believe they have a legal right to use the land. Instead, it should be shown that use has been without force, secrecy and permission.
30. The use of the way must be without interruption. Once the 20 year uninterrupted use 'as of right' has been proved, the burden then moves to the landowner to show there was no intention to dedicate, i.e. evidence of any overt acts by the landowner to deter the public from using the way, or conversely to permit the public to do so.

### **Conclusions**

31. When the evidence was considered by officers there was sufficient witness evidence to support the making of the Order for a public footpath, but insufficient for a public bridleway. There has been further evidence submitted of bridleway use since the making of the Order and officers now consider that it is a borderline case. If the Secretary of State decides there is enough evidence to support public bridleway status he has the power to amend the Order and confirm the route as a public bridleway, in which case the Order would have to be readvertised.

### **Options Considered**

32. The following options have been considered:
  - (i) The Order together with objections be forwarded to the Secretary of State for determination with the recommendation that the Order be confirmed without modification
  - or
  - (ii) The Order be forwarded to the Secretary of State for determination with the recommendation that the Order be not confirmed.

### **Reasons for Recommendation**

33. Officers are satisfied that the legal criteria in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 have been satisfied in respect of that length of footpath labelled A - B on the Order map. Objections have been duly made and not withdrawn therefore pursuant to paragraph 7 of Schedule 15 of the Wildlife and Countryside Act 1981 the Council is statutorily obliged to forward the Order to the Planning Inspectorate for determination.

## **Recommendation**

34. That the Wiltshire County Council Sheet SU 03 NW Rights of Way Modification Order No. 5, 2008 which adds a new footpath, No 11 at Wylde, to the Definitive Map and Statement for the Salisbury and Wilton Rural District Council Area 1953 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 without modification.

## **GEORGE BATTEN**

Director of Environmental Services

Report Author

**Tim Chinnick**

Rights of Way Officer

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

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