

WILTSHIRE COUNTY COUNCIL

AGENDA ITEM NO. 12

REGULATORY COMMITTEE

30th JULY 2008

**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.

The route of the proposed footpath is shown in the Order, Schedule and Map as **Appendix 1**.

Background

2. An application was originally submitted on 27th January 2007 by Wyllye Parish Council to add a Byway Open to All Traffic (BOAT), leading from Wyllye Bridleway 4 to the 'Old A303', to the Definitive Map and Statement for the Salisbury and Wilton Rural District Council Area 1953.
3. A statutory consultation was undertaken and a representation against the proposal was received from the landowner. There was one representation made in favour of the Order.
4. Due to confusion surrounding the highway status of the 'Old A303' and perceived errors in the application, Wyllye Parish Council resubmitted the application on 12th November 2007 for a bridleway leading from Wyllye Bridleway No.4 to Stockton Bridleway No.7.
5. All parties were kept fully informed of the progress of the application at all stages and a further statutory consultation was sent out on 6th December 2007.
6. The applicant, the landowner and all witnesses agreed to let their original respective representations and statements stand. No further representations were made.
7. The path joins points A-B-C on the application map (**Appendix 2**). It runs north-west from Green Lane at point A (Grid Ref: SU00120, 37274) until it joins the 'Old A303' at point B (Grid Ref: SU00014, 37399). From here the path runs in a westerly direction along the 'Old A303' until joining Stockton Bridleway No.7 at point C (Grid Ref: SU99295, 36633). Between points A and B the path is un-surfaced and bounded by a hedge to the north-east and open field to the south-west and is claimed to be 4 metres wide. Between points B and C the path is bounded by hedges to the north and south.

8. The way is being claimed as a bridleway through 'Deemed Dedication' in accordance with Section 31 of the Highways Act 1980.
9. This means that to succeed in being added to the Definitive Map as a bridleway it must be proved that there was 20 years usage as of right leading up to the date that public rights over the way were first called into question. In this case that is from January 1987 to January 2007 when part of the path was barred by the erection of two locked gates at points A and B.

User Evidence available at the time of the making of the Order

10. Twenty-two witnesses claim to have regularly used the path, one with permission as she was a tenant of an adjacent farm. Of these, nine claim to have used the route for more than 20 years (including one witness for 32 years, three for 28 years and two for 26 years). Summaries of the witness evidence are attached at **Appendix 3** and full copies are available in the **Members' Room**.
11. All witnesses claim to have used the same route and none report obstructions, gates or notices until January 2007 when the way was first called into question by the erection of fences and the erection and locking of gates across each end of the claimed route.
12. Nineteen of the witnesses claim to have used it for walking and it has been mainly used for recreational purposes such as family walks, dog walking and exercise for health.
13. Six witnesses claim to use the route for horseriding, three of which claim to be for the full twenty years required and eight have seen others horseriding.
14. Two of the witnesses claim to have cycled the route.
15. No historical documentary evidence has been found for the route.

Responses to Consultation

16. A representation was made against the application by the landowner supported by letters addressed to him by his fencing contractor, his estate agent and an adjacent landowner.
17. Reasons given against the application were as follows:
 - The use of the way is permissive and not 'as of right', i.e. 'No Public Rights of Way', photographs show that notices were in place, permission was given to some witnesses and others were challenged.
 - The path is private and was made and maintained by the landowner to provide a route for agricultural vehicles.
 - Crime prevention and privacy.
 - Disturbance of wildlife, especially nesting birds.
18. One representation was made in support of the application.
19. Copies of the consultation responses are available in the **Members' Room**.

Comments on the Consultation Responses

20. The photographs that show notices either post-date the relevant user period or are too small a scale to interpret and all twenty-two witnesses testify to there being no notices in place declaring that the path was not a public right of way. Twenty witnesses claim they have never been challenged and twenty-one claim they have never been given permission.
21. The facts that the path is on private land and privately maintained and the reason why it was created are not disputed but cannot be considered under the Order legislation.
22. Similarly, issues such as crime prevention, privacy and effects on the environment also cannot be considered under the Order legislation.

Decision to make the Order

23. It was discovered before making the Order that the section of the 'Old A303' marked as points B-C on the application map already carries public rights because, although de-trunked and now isolated from the remainder of the highway network, it has never legally been stopped up by an Act of Parliament.
24. It was considered at the time of the making of the Order there was insufficient bridleway use over the relevant twenty year period to warrant the making of an Order for a public bridleway.
25. Therefore in considering all the relevant evidence and the legislation to be taken into account, a Modification Order was made to add a footpath between points A and B to the Definitive Map and Statement.
26. The Order was made on 30th April 2008 and advertised in the Salisbury Journal on 8th May, 2008. The Order seeks to modify the Definitive Map and Statement by adding a footpath between Green Lane and the 'Old A303' at Wylle.

Objections to the Order

27. There were seven objections to the making of the Order on the following grounds:
 - (i) The use of the way is permissive and not 'as of right', i.e.' No Public Rights of Way', photographs show that notices were in place, permission was given to some witnesses and others were challenged.
 - (ii) Aerial photographs show that the way was not physically open to the 'Old A303' and therefore could not have been used during part of the claimed user period.
 - (iii) The path is private and was made and maintained by the landowner to provide a route for agricultural vehicles.
 - (iv) Crime prevention and privacy.
 - (v) Disturbance of wildlife especially nesting birds.
28. There were a further five objections made to the making of the Order on the grounds that there was sufficient evidence to make the path a public bridleway.
29. Copies of all objections and representations are available in the **Members' Room**.

Comments on the Objections

30. The photographs that show notices either post-date the relevant user period or are too small a scale to interpret and all twenty-two witnesses testify to there being no notices in place declaring that the path was not a public right of way. Twenty witnesses claim they have never been challenged and twenty-one claim they have never been given permission.
31. The aerial photographs supplied as evidence do not prove one way or the other whether the way was open to the 'Old A303' as the junction in question is not visible. In fact there are aerial photographs from the County Archives showing conclusively that the path was in fact open at this point. Copies of all relevant photographs are available in the **Members' Room**.
32. The facts that the path is on private land and privately maintained and the reason why it was created are not disputed but cannot be considered under the Order legislation.
33. Similarly, issues such as crime prevention, privacy and effects on the environment also cannot be considered under the Order legislation.
34. Since the time of making the Order there have been four further user evidence submissions. There are now a total of ten users claiming to have ridden horses, although four of these are from the same family so it is difficult to see that the usage fairly represents a general cross section of the public. Only three users have claimed the full 20 years relevant usage. It is the Officer's view that the evidence to add a public bridleway to the Definitive Map and Statement is still insufficient (**see Appendix 3 - summaries of witness evidence**).

Main Considerations for the Council

35. The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Wylze Parish Council on behalf of the residents of Wylze. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
36. 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”.
37. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(i):

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows: 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.”
38. In 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.

39. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31 of the Highways Act 1980. The Section states:

“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”.

40. The Section 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.
41. 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.
42. 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.
43. 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 without force, secrecy and permission.
44. 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.
45. The recent appeal case – *Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* drew the following conclusion regarding non intention to dedicate: ...*‘Sufficient evidence of no intention on the part of the landowner to dedicate a way as a highway required evidence of overt acts coming to the attention of users of the way’.*
46. The landowner was aware that the public used the path although it is claimed that the use was permissive. Twenty-one of the witnesses claim that their use was ‘as of right’ and not permissive.
47. Signs are claimed to have been at each end of the path throughout the relevant period of user evidence although no proof of this has been submitted.
48. None of the witnesses testify to any other overt acts on the part of the landowners to show prevention of public use of the way. The twenty-two witnesses unanimously state that the way was always available for use by anyone throughout the relevant period and no signage to the contrary was evident.
49. 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.

Brief Summary

50. The path is claimed to have been used 'as of right' regularly by twenty-one witnesses. Of these, nine have used the route for more than 20 years (including one for 32 years, three for 28 years and two for 26 years).
51. The landowner has claimed that use of the path is permissive.
52. The landowner has supplied photographic evidence but this is not relevant to the Order decision.
53. Only evidence of the public rights can be considered in the Order decision. Reasons such as the following cannot be taken into consideration in the decision to make the Order:
 - Safety
 - Crime prevention
 - Safeguarding of property
 - Effects on wildlife or the environment
 - The reason why the track was constructed and
 - Current main use of the track.
54. Public rights for all users already exist over that length of the claimed route marked B-C on the map so an Order was not made for that part of the route.
55. It seems to the Council that, after consideration of all available evidence, on the balance of probability it is reasonably alleged that public footpath rights exist or subsist over the route marked A-B on the map but witness evidence is not strong enough to support it being a public bridleway.
56. The County Council therefore has decided to make a Definitive Map Modification Order amending the Definitive Map and Statement to record footpath rights over the route marked A-B on the map.

Environmental Impact of the Recommendation

57. There are currently no plans to surface the path or add any extra furniture such as gates or stiles. Also the use is predicted to be mainly if not wholly by local people therefore there are no foreseeable significant environmental impacts associated with this recommendation.

Risk Assessment

58. There will be occasional agricultural vehicles using the track. The surface of the path is of the same nature as the existing adjacent bridleway at Green Lane which is also used occasionally by agricultural vehicles. No extra risk of accident associated with this path is foreseen.

Financial Implications

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

Options Considered

60. Making the Order or not making the Order.

Conclusions

61. Officers are satisfied that the legal test in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 has been satisfied in respect of that length of footpath labelled A-B on the Order map. 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 to the Planning Inspectorate for determination.

Reasons for Recommendation

62. Officers consider that the criteria set out in the legislation have been met to show that public footpath rights exist between points A and B and the statutory duty placed on the County Council requires that the way should be added to the Definitive Map and Statement. As there are outstanding objections the Order must be forwarded to the Planning Inspectorate.
63. The legislation states that the Planning Inspectorate is required to determine the matter once an objection is received and not withdrawn.

Recommendation

64. That the Wiltshire County Council Sheet SU 03 NW Rights of Way Modification Order No. 5, 2008 to add a new footpath, No 11 at Wyllye, 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

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Rights of Way Officer

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.