

REGULATORY COMMITTEE
19th NOVEMBER 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.

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 until the next meeting 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 26th 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 until 1988 there was barbed wire across point B (shown on the plan attached as **Appendix 2** to **Appendix B**).
6. These were the main points that Members felt should be clarified further and a letter was sent to all witnesses and objectors on 31st July 2008 inviting further evidence. Copies of all replies are available in the **Members' Room** including the landowner's reply dated 15th September 2008 which had appendices including letters from Woolley and Wallis and Mr. Emerson and photographs of hedges and fences around the large field, including a portion of a hedge ending at point B (see **Appendix 2** to **Appendix B**). Summaries of all user evidence to date are attached at **Appendix D**.

7. At the meeting of the Regulatory Committee held on 17th September 2008 the Chairman announced that it was anticipated that the research would be completed in time for a report to be presented to the next meeting of this Committee due to be held on Wednesday 15th October 2008. However, on 10th October 2008 the County Council received a letter from Wilsons Solicitors, the legal representative of the landowner, asking that the report be withdrawn as they had only just been appointed and wished to see all the evidence concerning the application. The Solicitor to the Council advised that it was in the interests of fairness to all parties to agree the request for a deferment. Members were therefore informed at the meeting on 15th October that a report would be presented to the Committee at the November meeting. All further evidence submitted after the date of preparation of the original July Committee report has been taken into consideration and the original recommendation stands.

Points for Clarification

(i) The Permissive Path

8. 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.
9. 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 which is the subject of this report without having been given permission.
10. When asked to submit further evidence, the landowner's land agents, Messrs Woolley and Wallis, replied in a letter dated 6th 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 7th 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 the tenant farmer 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 is discussed in paragraphs 39-49 of the July Report (**Appendix B**) and a summary of the issues is set out in a table as **Appendix E** to this report. There was an error in paragraph 47 of the July Committee report. This should have stated '*signs are claimed to have been at each end of the path for part of the relevant period of user evidence although no proof of this has been submitted*'.

(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 7th 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 or during 1981.
17. Messrs Woolley & Wallis, the landowner's land agents, state in their letter dated 6th August 2008 that it is not believed the access from the 'Old A303' was created before 1988 because until the Wylve 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 Wylve bypass were 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 thirty witnesses supporting use of the route during the relevant period. Twenty two users claimed to have used it as a footpath and eleven 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 eleven 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. Any amendment proposed to the Order would have to be advertised before a final decision could be made.
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 Wyllye Parish Council on behalf of the residents of Wyllye. 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 1st 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.

Brief Summary

- 31. Only evidence concerning 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
- 32. There are to date a total of 30 witnesses supporting use of the route during the relevant 20 year period.
- 33. The landowner claims that notices were in place during part of the relevant period and that barbed wire obstructed the path in 1987 – 1988. All witnesses stated that the path was not obstructed by barbed wire or any other obstruction during the relevant period of their claimed use. In addition all witnesses have stated that there were no notices in place on or near the route during the relevant 20 year period. The landowner has supplied photographic evidence of notices but these either post-date the relevant user period or are not sufficiently clear to be relevant to the Order decision for the reasons explained in paragraph 30 of the July report (**Appendix B**).

34. The landowner has claimed that use of the path is with his permission yet 28 of the witnesses have stated that they have used the path without any sort of permission.
35. Aerial photographic evidence from the County Archives is not inconsistent with the user evidence.

Conclusions

36. As is often the case in applications of this nature there is conflicting evidence for and against the Order. The main issue is, when considered with all other relevant evidence, is there sufficient evidence to show that the public have enjoyed using the path “as of right”, without interruption, for 20 years prior to the public right being called into question. There is credent evidence to support the Order. The law only requires the rights to be reasonably alleged to subsist and this test is met as is demonstrated by the following excerpt from the England and Wales High Court (Administrative Court) Decisions Website:

R v the Secretary of State for the Environment ex parte Norton & Bagshaw [1994] 68 P & C.R. 402, a decision of Owen J. In that case Owen J. was considering, among other things, the correct approach to Section 53(3)(c)(i), and what he said about it, at the bottom of page 407 of the report, was this:

“It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing “that a right of way which is not shown in the map and statement subsists” and showing that a right of way which is not shown in the map and statement “is reasonably alleged to subsist”. Accordingly the questions for the Council and subsequently for the Secretary of State were: does the evidence produced by the claimant together with all the other evidence available show that either:

(a) a right of way subsists? (I shall call this Test “A”), or

(b) it is reasonable to allege that a right of way subsists? (I shall call this Test “B”).”

... The Inspector then sets out Test B, which he explains thus:

“If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that one does exist.”

That has not been criticised as a proper approach. Indeed, as Owen J. made clear, the question is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence, and the Council and the Secretary of State in turn must be judges of that. It is perfectly obvious that the evidence necessary to establish Test B will be less than that necessary to establish Test A.

37. The Environmental Impact, Risk Assessment and Financial Implications included within the original July report at **Appendix B** still stand.
38. 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 proposed amendment to the Order would have to be readvertised.

Options Considered

39. 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

40. Officers are of the opinion 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 to the Wildlife and Countryside Act 1981 the Council is statutorily obliged to forward the Order to the Planning Inspectorate for determination.

Recommendation

41. 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 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.