

WILDLIFE AND COUNTRYSIDE ACT 1981
THE WILTSHIRE COUNCIL

THE WILTSHIRE COUNCIL CODFORD PATH No. 15 RIGHTS OF WAY
MODIFICATION ORDER 2016

Purpose of Report

1. To:
 - (i) Consider the objection received to the making of The Wiltshire Council Codford Path No. 15 Rights of Way Modification Order 2016 made under Section 53 of the Wildlife and Countryside Act 1981.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance in the matter.

The Order is appended at **Appendix 1**.

Relevance to Council's Business Plan

2. Working with the local community to provide a rights of way network which is fit for purpose, making Wiltshire an even better place to live, work and visit.

Background

3. In January 2016 Wiltshire Council received an application from the Codford Residents Group for a definitive map modification order to add a byway open to all traffic at Codford St Mary to the definitive map and statement.
4. The application adduced evidence of public use of a metalled road leading from Church Lane, past St Mary's Church and south to its junction with Codford High Street (Salisbury Road). Evidence of use by 14 people who had used the way variously on foot, cycling, riding or driving a car was initially submitted and was subsequently increased to 18 following the Council's initial pre-Order consultation and 28 following the making of the Order.
5. The route is known locally as the Military Road or the Army Road, although the landowner refers to it as Farm Road (the claimed route being part of a route that leads to his farm). It is not a route of great antiquity having been built in two parts to service military needs during the two World Wars. It is considered that the through route that is the Order route was probably formed by 1944.

6. Officers investigated evidence from all interested parties and considered that although the legal tests necessary to record the way as a byway open to all traffic had not been satisfied, the application formed a reasonable allegation that public rights on foot have been acquired during the time period 1983 to 2003 and an Order to record them was subsequently made.
7. The full report including the relevant legislation is appended at **Appendix 2**.
8. The publication and advertisement of the Order attracted one objection that has not been withdrawn and accordingly the Order must be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination.
9. To confirm the Order the Secretary of State applies a more rigorous legal test and must be satisfied that it is shown on the balance of probabilities that public rights subsist.
10. A recommendation from the Council is required to accompany the Order when it is submitted.

Main Considerations for the Council

11. The objection has been submitted on behalf of the landowner and states the following.

“Grounds of Objection

2. *The Owners object to the Order above inter alia on the following grounds:*

A. *Insufficient User*

- *The Owners have been in occupation for all of the relevant period. They dispute that user sufficient to support the claim has occurred.*

B. *Any user has not been as of right/there has been no intention to dedicate*

- *Various permissions have existed.*
- *The Owners have submitted deposits under the provisions of s31(6) Highways Act (1980) in and since 2003 and maintained fencing during the relevant period.*
- *In addition signage has been in place continuously at the entrance to the claimed route since the 1970s. This has had the effect of:*
 - i bringing any use of the way into question in the 1970s prior to any claimed user;*
 - ii at all material time showing an intention on the part of the Owners not to dedicate (s31(3) Highways Act (1980)); and*
 - iii rendering any user contentious.*
- *Any or all of (i) – (iii) would render the claim unsustainable.*

3. *The points above would also be applicable to any claim to higher rights than footpath.*

Comments on procedure

4. *The issue of the effect of signage is likely to be very important in this case and indeed may prove independently determinative. There have been several key cases regarding the interpretation and effect of signage involving areas of law outside public rights of way, for example relating to the law of village greens and private rights of way. This has been a developing area of law. As an example, judgement in the most recent applicable case occurred only within a few months (Court of Appeal – Winterburn v Bennett [2016] EWCA Civ 482).*
5. *The application of these cases to public rights of way involves a full understanding of legal principle. Given this and in order to achieve a proper determination and avoid unnecessary costs for all parties the Owners would ask that:
 - i *the Inspector appointed by the Planning Inspectorate (PINS) should be legally qualified; and*
 - ii *prior to PINS determining how the matter is to be determined, the parties are afforded an opportunity to comment on the appropriate procedure and in particular whether the matter of signage should be determined as a preliminary issue.**
6. *The points raised above are only a brief summary of our Objection. We reserve the right to raise further points of principle and of evidence as matters progress.”*

NB On 30 September 2016 the landowner made a further submission in support of their objection. This is appended at **Appendix 4**.

12. The second submission contains a summary of evidence, witness statements from eight people, aerial photographs and an expert opinion on them. It is regrettable that this information was not made available to the Council at either the initial consultation (pre-Order) stage or at the time of objection; however, it is included fully here at **Appendix 4** for members to consider.
13. The summary of the objector’s submission highlights the following points.
 - (i) All witnesses supporting the objector cover a long timescale with the evidence of Mr Read, Mr Williams, Mr Stratton and Mr Carter all covering the whole of the claim period. The other four cover part of it.
 - (ii) The route was “practically impassable” until the changing of the fencing and gating arrangements around 1989/1990.

- (iii) Prior to 1989/1990 the section B to C of the Military Road was not separately fenced and was a road leading through a field rather than one with fields on either side. Accordingly, it needed to be gated to prevent stock escaping.
- (iv) There were Wiltshire (or Hampshire) short sections of wire fence across a gateway which were difficult to open across the route at approximately points B and C.
- (v) It was only when these were removed and exchanged for easily openable gates that public use occurred at anything above zero or minimal levels of use. It is considered that use by the public did not happen to any notable degree until around 2000 when the claimed route was opened as the main farm access route. Prior to this time all farm traffic, delivery vehicles and public traffic bound for West Country Game Ltd, and later West Country Fine Foods, used Church Lane.
- (vi) This is supported by the testimony of witnesses, photographs and an expert opinion on aerial photographs which show that in 1984 the route was not securely bounded or fenced between B and C but that in 1998 there is evidence for a linear fence along the route between B and C.
- (vii) Witnesses state that they had never seen several of the witnesses for the Order using the route at all.
- (viii) A sign stating 'Private Road' was in place throughout the relevant period (1983 to 2003) at point C.

Comments on the objection

- 14. Members of the Committee are now required to consider the objection received.
- 15. The Order must be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and the Members of the Committee must decide the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State, i.e.:
 - (i) that the Order be confirmed as made
 - (ii) that the Order be confirmed with modification
 - (iii) that the Order should not be confirmed
 - (iv) that the Council takes a neutral stance

Grounds of Objection A: Insufficient user

- 16. In response to the landowner's objection the Council has received a number of letters from additional witnesses bringing the total to 28. A summary of use forms part of Appendix A to the Council's decision report (**Appendix 2** to this report) with additional evidence summarised at **Appendix 3**.

17. A graph depicting use of the route on foot has been appended here in **Appendix 3**. It can be seen that for the years 1983 to 2003 (the relevant period) numbers steadily increased from two users in 1983 to 19 in 2003. This may reflect an increasing popularity of a way with time or may reflect the difficulty of identifying users from over 30 years ago.
18. Guidelines issued by the Planning Inspectorate state that there is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. The guidelines recognise that numbers will vary from case to case and that the quality of the evidence (i.e. its cogency, honesty, accuracy, credibility and consistency) is often more important than the quantity.
19. It is noted that Codford is a small community and that the population during the relevant period fluctuated between 669 and 821.
20. The applicant for the Order, the Codford Residents Group, responded to the objection in writing on 27 July 2016 as follows.

“As Collator of the Codford Residents Group, I am writing to summarise what I believe is the Group’s position concerning our Application for a Modification Order to the definitive Map and Statement of Rights of Way for the access route in the area in front of and leading to St Mary’s Church in Codford St Mary.

The Group were encouraged that Wiltshire Council supported our Application on the evidence we provided and had considered that a public right on foot had been acquired over the application route, but we remain somewhat disappointed that the Council’s endorsement did not include a Byway open to All Traffic. We consider this aspect still outstanding!

We do not give any credibility to the Landowner’s Objections to the Council’s determination. He majored on two counts.

Firstly that insufficient usage of the route claimed had been demonstrated. We decided at the outset of our campaign that we should not appeal “publicly” for support in order to avoid creating an open battleground between villagers and the Landowner. We are a small community and we know of a number of villagers who have expressed support for our intentions without wanting to openly demonstrate that support because they are in some way obligated to the landowner, being his tenants (he is Landlord of in excess of ten properties in the village), or they are his employees, or they occasionally do business with him or his family. At their request, they shall remain anonymous but some have provided us with useful information and moral support.

We feel we have strengthened our case with a number of new submissions by people we had not considered earlier. I am aware that three ladies, who regularly walked along the Military Road over a number of years have recently sent you statements and I believe others, with different testimonies of their usage are in the process of submitting their accounts to you. Additionally I understand that some villagers, who have already passed their comments to you, have decided that they wish to further emphasise their case. I know that Mr Maurice Cole, Mrs Diana Shaw and Mr Bernard Nicholls are amongst that number.

I believe that the sum total of these submissions quite contradicts the Landowner's claim of an insufficiency of evidence.

His second objection focussed on signage. We sent you photographs of a road running through his property where a Private Road sign pointed in the same direction as another sign showing "PUBLIC FOOTPATH – WILTS CC". It is clear that the two indicators can and do co-exist. Whenever the landowner did erect the Private Road signage at the southern end of the Military Road where it meets the village High Street/Salisbury Road we believe that the route had been used by villagers since the end of WW2 and so have created Prescriptive Rights.

We much regret that this situation could not have been settled amicably but we feel now that a legal determination would decide the situation for posterity. We are grateful for all your assistance and apologise for bombarding your busy desk. As a Group, we are comprised of villagers from different backgrounds but we are united in our aim of not being prevented from exercising what we know are long established rights of passage."

21. Officers consider that while the number of users in the early years (1983 – 1985) is relatively low, four people do claim to have used the route during this period and by 1986 there are a total of eight claiming to have used the route in a variety of ways. Accordingly, if their evidence is cogent and consistent then it is likely that it is sufficient to satisfy s.31(1) of the Highways Act 1980 (subject to other considerations).
22. Officers consider that the objector has established that on the balance of probabilities there were changes to gates and fences across and surrounding the route between 1988 and 1990. The objector's case is that before these changes were made the Wiltshire gates across the route were very difficult to open and accordingly no-one would have used the route (or perhaps very few walkers only). Their case is that the only traffic to use the route at that time were large combine harvesters at harvest time.
23. Although this may be the case in the objector's evidence, it has to be weighed against the evidence of eleven witnesses who claimed to have used the route in the period leading up to the re-fencing of the field and the route and the changes to the gates. There is clear conflict.
24. If no-one used the route then the statements of witnesses 3, 4, 9, 10, 14, 16, 17, 18, 23, 24 and 26 are wholly wrong. On the other hand, if the evidence of the witnesses for the objector is examined closely there are also matters which would need resolution under cross examination. For example, Mr Carter recalls a Wiltshire (or Hampshire) gate at point B which was replaced in 1988/1989 and yet the photograph provided by Ms Oliver taken in approximately 1988 clearly shows an open steel gate at point B. Additionally, there is no information available to the Council regarding the opening or closing of gates. For example, Ms Oliver's photograph No. 3 from 1988 shows the gate at point B open and photograph No. 1 shows a car on the claimed route. These events may have been unique events or they may have been the norm, it is simply not known.

25. Mr Stratton recalls in his original statement that the land was re-fenced and the claimed route 'fenced off' in the mid 1970s and further considers that it was likely that the fencing coincided with the installation of the private road sign in the 1970s. It subsequently appears that with respect to the date of the fencing, it happened some 10 to 15 years later than Mr Stratton recalled.
26. It is not surprising that witnesses on either side will have differing memories after the passage of 30 or 40 years. If the evidence of one is to be preferred over the other then having the evidence examined by seeing the witnesses at a public inquiry is the only way to properly determine this Order.
27. Much of the objectors' statements also relate to not having seen people who claim to have been there. Again, this is a clear conflict of evidence; one version of events should not reasonably be preferred by the council and should be examined at a public inquiry.

Grounds of Objection B: Any user has not been as of right/that there has been no intention to dedicate

28. For the relevant period (1983 to 2003) the objector relies on the placement of a sign saying "Private Road" which was, and is, in place at the southern end of the claimed route (at its junction with High Street/ Salisbury Road). The objector considers that the erection of the sign in the 1970s had the effect of bringing into question the public use of the way, that it demonstrated the Owners' lack of intention to dedicate and that it rendered user contentious.
29. For user to have been 'as of right' it must have taken place without force, permission or secrecy. Force extends beyond the usual sense (i.e. where a fence has been cut) to include use that is in contravention of a sign that clearly prevents it.
30. In addition, s.31(3) of the Highways Act 1980 permits the owner to erect a notice, visible to persons using the way, that is inconsistent with the dedication of the way as a highway. If this is maintained, s.31(1) is not engaged and public rights cannot be acquired under that section.
31. In response to the objection based on the sign the applicant has pointed out (and provided photographs of) a right of way across the same landowner's land that is both signed as a "Private Road" and a "Public Footpath". It is therefore clear that the two are not mutually incompatible and indeed there are many examples in Wiltshire of private roads carrying lesser public rights. A further example of a public bridleway being signed as a 'Private Road' lies to the north of the claimed route in the direction of Chitterne.
32. The sign stating "Private Road" may also refer to the maintenance liability not being public. The objector considers this unlikely but signs indicating private maintenance liability are not uncommon in other places on the highway network.
33. Additionally, it is noted that the Private Road sign was and is only in place at one end of the claimed route. In the 1970s this junction of the claimed route was with the A36, the main road to Salisbury and its placement there, and its appearance as a usual street name sign is logical in that context. It is certainly possible that

anyone walking the route from Church Lane east and south may never have seen it, though it is accepted that this is unlikely.

34. It is usual in considering the effect of notices and signs to consider two key cases (*Paterson v SSEFRA* [2010] EWHC 394 (Admin) and *Burrows v SSEFRA* [2004] EWHC 132) though the objector considers the recent decision of the Court of Appeal in *Winterburn v Bennett* [2016] EWCA Civ. 482 to be an important development in the interpretation of the effect of signs and notices.
35. In *Burrows* the High Court considered the effect of a sign stating “Private Road – Access Only” on an existing public footpath over which bridleway rights were claimed. It was found that an Inspector was entitled to consider that the sign had not called into question the claimed public rights with a horse though it might have been taken as a challenge to the use of the lane by vehicles other than those using it for access. The Court found (at paragraph 8) that “*The inference as to the intention of the person who erected it (in the absence of any evidence to the contrary) naturally to be drawn from how the notice would be likely to be understood by members of the public who saw it in its context.*”
36. In *Paterson* the High Court considered the effect of signs stating “Private” or “Private No Tipping” and, as in the case of *Burrows*, found that an Inspector had been entitled to consider that the signs did not unambiguously provide sufficient evidence or notice that there was no intention that the footpath be dedicated to public use.
37. In his judgement Sales J had the benefit of the Supreme Court judgement in *Godmanchester* ([2007] UKHL 28) where Lord Hoffman at paragraph 32 states that “*I think that upon the true construction of section 31(1), “intention” means what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be. The test, is, as Hobhouse LJ said, objective: not what the owner subjectively assumed but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885) 10 App Case 378, 386, to “disabuse [him] “ of the notion that the way was a public highway.”*”
38. It is clear in the case of the claimed route at Codford that the signs that were erected by the Owner in 2012/2013 were a clear indication of the landowner’s intention (subsequently leading to the application for the Order in front of this Committee) but the one from the 1970s was not. It was not specific about its purpose, not erected at both ends of the route, had the appearance of road signs and was of the same style and format as the one on a private road that was also a public footpath within the same parish. It gave no indication of the Owner’s intention with regard to public rights on foot. The public never considered their right to use the way was challenged as a result.
39. The objector raises the case of *Winterburn*. In this case the Court of Appeal considers the effect of a notice erected on private land on the acquisition of a private right to park by a neighbouring property. Although there are clear differences to a case relating to public rights of access the legal principle of the effect of the wording of a notice regardless of people’s behaviour is explored and accordingly it is relevant to consider it here.

40. In *Winterburn* the wording of the sign erected on land owned by the Conservative Club was clear and unambiguous; it said “Private Car Park. For the use of Club patrons only. By order of the Committee.” However, despite this sign the customers and suppliers of the neighbouring chip shop used the Conservative Club’s car park.
41. The Court of Appeal in *Winterburn* found (at paragraph 40) that where the owner of land has made his position clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be as of right and that there is no further requirement for the owner of the land to reiterate his position.
42. Officers consider that in the case before this committee the original sign failed to make the owner’s position clear and that it could not be taken as a notice giving his intention not to dedicate the way as a public footpath. Users may not have understood that this was the owner’s intention.

Safeguarding Considerations

43. There are no safeguarding considerations associated with the making of this Order.

Public Health Implications

44. There are no identified public health implications which arise from this Order.

Corporate Procurement Implications

45. In the event this Order is forwarded to the Secretary of State there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 50 to 52 of this report.

Environmental and Climate Change Considerations

46. There are no environmental or climate change considerations associated with this Order.

Equalities Impact of the Proposal

47. Matters relating to the equalities impact of the proposal are not relevant considerations in s.53 of the Wildlife and Countryside Act 1981.

Risk Assessment

48. There are no identified risks which arise from this Order. The financial and legal risks to the Council are outlined in the “Financial Implications” and “Legal Implications” sections below.

Financial Implications

49. The making and determination of Orders under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.

50. Where there are outstanding objections to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making and confirmation of the Order. The outcome of the Order will then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500 and £1,000 to £3,000 where the case is determined by local public inquiry with legal representation (£300 to £500 without).
51. Where the Council objects to the Order (i.e. it no longer supports making it, or wishes it be modified to record a Byway Open to All Traffic) the Order must still be forwarded to the Secretary of State for determination. As in the case of a supported Order, the possible processes and costs range from £200 to £3,000 as detailed at paragraph 50 above.
52. In the event that the Council takes a neutral stance in the matter the Order must still be forwarded to the Secretary of State for determination but the case in support of the Order will be made out by the applicant and not the Council. The Council would be expected to attend the Inquiry and to meet all costs relating to room hire (in the region of £300).

Legal Implications

53. Where the Council does not support the Order, clear reasons for this must be given and must relate to the evidence available. The applicant may seek judicial review of the Council if this decision is seen as incorrect or unjust by them. The cost for this may be up to £50,000.

Options Considered

54. Members may resolve that:
- (i) The Order should be forwarded to the Secretary of State for determination as follows:
 - (a) The Order be confirmed without modification.
 - (b) The Order be confirmed with modification.
 - (c) The Order should not be confirmed.
 - (d) The Council takes a neutral stance with regard to the confirmation of the Order.

Reason for Proposal

55. When the Council made the Order it was considered that the application formed a reasonable allegation that public rights subsisted. This is the first stage of the legal test that can be applied to s.53(3)(c)(i) of the Wildlife and Countryside Act 1981. However, a higher standard of proof is required to confirm the Order; this is that it must be considered on the balance of probabilities that public rights subsist.

56. Since making and advertising the Order the Council has been made aware of significant amounts of additional evidence from both supporters of the Order and from the objector.
57. In *R v Secretary of State for the Environment ex p Bagshaw and Norton [1994] 68 P&CR* Owen J held that “*In a case where the evidence from witnesses as to user is conflicting if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.*”
58. Unless the objection is withdrawn the Council must send this Order to the Secretary of State for the Environment, Food and Rural Affairs for determination. This is done through the offices of the Planning Inspectorate and it is their usual practice to determine Orders where there is a conflict in evidence of use by holding a public inquiry where the evidence may be tested under cross examination.
59. It is clear that this is a case where the conflict of evidence may only be resolved under cross examination.
60. The matter to be decided by this committee, which acts in a quasi judicial capacity, is whether the Council supports the confirmation of the Order or whether it does not. However, it is considered impossible to effectively weigh the evidence without cross examination of it and accordingly the Council can consider adopting a neutral stance with regard to the confirmation of the Order.

Proposal

61. That “The Wiltshire Council Codford Path No. 15 Rights of Way Modification Order 2016” is forwarded to the Secretary of State for the Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance in the matter.

Tracy Carter

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Rights of Way Officer – Definitive Map

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

None

Appendices:

Appendix 1 - Order and Plan

Appendix 2 - Decision Report

Appendix 3 - Additional evidence of use

Appendix 4 - Supplementary submission by objector