

**WILTSHIRE COUNCIL**

**WESTERN AREA PLANNING COMMITTEE**

**14 DECEMBER 2016**

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**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL GREAT HINTON PATH No. 34 RIGHTS OF WAY  
MODIFICATION ORDER 2016**

**Purpose of Report**

1. To:
  - (i) Consider the two objections received to the making of The Wiltshire Council Great Hinton Path No. 34 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 supports the confirmation of the Order.

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 that is fit for purpose, making Wiltshire an even better place to live, work and visit.

**Background**

3. Bridleway Great Hinton No. 34 leads from Cold Harbour, Great Hinton in a southerly direction to properties at Bleet and then in a westerly direction to join the Haghill to Steeple Ashton Road. It has no recorded width but leads along an enclosed private road known as "Bleet Lane".
4. Wiltshire Council received an application for a definitive map modification order to record a width for bridleway Great Hinton No. 34 in 2004. Owing to a significant backlog of these applications the Council failed to determine the application within the statutory timescale and in 2015, acting on an appeal made by the applicant, the Secretary of State for the Environment, Food and Rural Affairs directed Wiltshire Council to determine the application by August 2017. The application has therefore been processed out of chronological order of receipt.
5. The application is for a definitive map modification order to record the width of the bridleway Great Hinton No. 34 as extending between the hedgerows of the ancient lane. This has a variable width as the line of the lane is bounded by a number of properties and fields which have irregular boundaries.

6. The applicant relies on an Ordnance Survey map of 1924 showing the lane. It is estimated that on this map the width varies between 21 metres at the northern end at Cold Harbour, narrowing to approximately 8 metres in the middle before widening again to 15 metres at the western end.
7. The case relies on historical evidence and not on evidence of public use in recent times. During the process of determining this application officers carried out a full investigation of historical documents relating to this lane and this can be found in the Council's Decision Report at **Appendix 2**.
8. Bleet Lane was created in 1818 during the process of inclosure of Steeple Ashton Common. This was a procedure directed by Acts of Parliament which laid out the roads and land boundaries in the parish which largely continue to exist today. Bleet Lane was awarded as a "Private Carriage road and Driftway" "20 feet wide" for the use of the owners and occupiers of the adjoining properties. No public rights were awarded along it.
9. Bleet Lane itself is an enduring physical feature that has not significantly altered since 1818 (although the northern end now leads through commercial premises, some of which it is alleged by the applicant encroach on the historic lane). It is considered that public rights were acquired over the lane through public use at sometime after 1818. The nature of the public right has been recorded as public bridleway and is not disputed but the extent or width of these rights remain unrecorded and is the subject of the Order before this Committee.
10. On 25 August 2016 Wiltshire Council made an Order to record the width of bridleway Great Hinton No. 34 as 6.1 metres (20 feet). The Order was duly advertised and has attracted two objections.
11. Unless these objections are withdrawn the Order cannot be confirmed by Wiltshire Council and the Order must be sent to the Secretary of State for Environment, Food and Rural Affairs for determination.

### **Main Considerations for the Council**

#### **12. Objection No. 1 S Noad Received 18 October 2016**

*"I am still concerned that if the width of 20 ft is recorded it will have an impact on the future of our properties, as the over laid plan clearly shows that the shaded width effects buildings, fences etc and unless excluded or a current useable width is recorded I feel we must object. As I understand an opportunity was made in 1949, under the Wildlife and Countryside Act, for the Parish Council to record a width to supersede the recorded width in 1844 to reflect what the actual width of the bridleway was. If an order has to be made and no objections, other than Mr Fields, have been made in, the last 50 years then surely it is not reasonable to have the new width recorded as what is actually used at its narrowest point which is approximately 13 – 14 ft in places, midway and at the lower part of the lane. I find it hard to see that the lower part has changed at all as you have a brook one side and the ditch on the other. Please find attached letters from myself, my mother and from Mr and Mrs Newman. If you require the hard copies please email me and I will either drop them in or post them."*

Three identical letters were submitted with Mr Noad's objection. These were from Mr S Noad himself, Mrs Y Noad and Mr and Mrs Newman. The content of the letters is set out below.

***"The Wiltshire Council Great Hinton Path No. 34 Rights of Way Modification Order 2016.***

*I have inspected the plan attached to the above Order and also the plan which you sent me with your letter of 28 June 2016 showing the bridleway coloured green.*

*The markings on the plan attached to the Order appear to encroach on to my buildings, hedge, land and for this reason I must object to the Order.*

*If, however you can confirm to me in writing that Path 34 does not encroach on to my property or any of my buildings on it, and/or they will be excluded from the Order then I will withdraw this objection."*

13. **Objection No. 2 Mr G Field (applicant) Received 21 October 2016** submitted by Mogers Drewett acting for Mr Field

***"Great Hinton Bridleway 34***

*We are writing on behalf of Mr G Field the Applicant to object to your Order (that the width be 20 ft throughout its length).*

*We repeat what we said in our submission of 5<sup>th</sup> August 2016.*

*It is Mr Field's assertion that the public right exists across the full extent of the available width, and that it is not limited to a uniform width of 20 ft throughout its length.*

*The 20 ft width is that which was awarded in 1818, but referable to a private carriage road. The extent of the width which has been used by the public since then, and thus dedicated as a bridleway, is wider than 20 ft and extends to the whole available width.*

*It is self-evident from the OS Map evidence, as coloured green on the map accompanying our submission, and on the base map for the Finance Act 1910 for example, that the area of the public right widens out as you go north. That is the extent of the used and dedicated width and it is more than 20 ft.*

*In para 16.16 of your report, you refer to the significant development at the northern end, and indeed the 1980 National Grid Series Map shows how much encroachment/obstruction there has been at that end. This is what gave rise to Mr Field's original complaint and correspondence, that that encroachment and obstruction ought to have been removed. It is within the extent of the dedicated width of the bridleway.*

*In para 27.23 of your Report you mention the encroachments which have given the route an “irregular appearance”. Those encroachments cannot reasonably be described as de minimis. They substantially cut in to the dedicated width of the bridleway and should be removed.*

*We concur with paras 27.4 and 27.5 of your Report. We also concur with para 27.19 of your Report and, of the two alternatives mentioned in that para, we assert that the public have acquired a right over the entire available width. The available width varies significantly in different sections of the route. In the lower, southern section it is at least 20 ft and may be 24 ft or 25 ft; in the higher, northern end, it is wider than that, in parts significantly wider than that.*

*On the balance of probabilities it must surely be more likely that the public have acquired a right across the whole of the available width, and did not limit themselves to a strict blanket width of 20ft; to suggest that they did would be irrational.*

*In conclusion, it is the basis of Mr Field’s objection to the Order, that the public have acquired a right across the whole available width, that that available width varies significantly, and that it is more than 20ft.”*

### **Comments on the objections**

14. Members of the Committee are now required to consider the objections 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
16. Both objections refer to alleged encroachments on the right of way. The presence of any buildings, fences or hedges on or beside the right of way are irrelevant to the determination of this Order where they have occurred after the public right was acquired.
17. Although it is not known when the public right was acquired along Bleet Lane it is clear that it was after 1818 (when the lane was created) and before 1934 (when in a survey of public rights of way Great Hinton Parish Council submitted that the lane at Bleet was a Green Lane not repairable by the public). None of the buildings or fences referred to by either objector were constructed within the period 1818 to 1934 and accordingly their presence or any actions that the council may need to take with regard to them are not relevant considerations for the determination of this Order.

18. Neither objector brings any new evidence to the Council's attention to support their case. Objector No. 1 considers that the recorded width should be narrower than 20 feet based on the presence of recent buildings, fences and hedges and Objector No. 2 considers that the recorded width should be greater than 20 feet based on a public right having been acquired between the historical boundaries of the route.
19. It is the Council's case that the public have acquired a right over the land that was available to them and that it is more likely than not that this extended to the width created at inclosure for the use of adjoining landowners. There is no certainty that a wider width was available for use (owing to the need for drainage ditches) and it is not likely that a narrower width was provided during the process of inclosure when it was clear that a legal event created one that was at least 20 feet wide.
20. It is a rebuttable presumption that public rights extend between the physical boundaries of a public road ('the hedge to hedge presumption') but this may only apply where the fences were erected to separate private land from a public right of way and this is not the case here. In the case of Bleet Lane the fences and hedges that originally defined the lane were erected to separate private land from a private road. It is not known why Bleet Lane was created wider than it needed to have been (it may have been for reasons of drainage or convenience when fencing enclosures) but it is considered likely that the public acquired its rights after the lane was built. Accordingly, it is considered unwise to proceed on the basis of the 'hedge to hedge presumption' where it is possible that from its creation the entire width of the lane was not available to the public to use.
21. The principles of common law dedication are fundamental to this case. For a dedication to succeed at common law there must be an act of dedication by the landowner and whilst it may be argued that the separation of the enclosed land into the highway was an act of dedication, there is no evidence (and considerably less likelihood) that the second requirement of a dedication at common law (the acceptance by the public) occurred over the greater width rather than the available awarded width (of 20 feet).

### **Safeguarding Considerations**

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

### **Public Health Implications**

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

### **Procurement Implications**

24. 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 paragraph 29 of this report.

## **Environmental and Climate Change Considerations**

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

## **Equalities Impact of the Proposal**

26. Matters relating to the equalities impact are not relevant considerations in accordance with section 53 of the Wildlife and Countryside Act 1981.

## **Risk Assessment**

27. 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**

28. The making and determination of Orders made under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.
29. 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).
30. Where the Council objects to the Order (i.e. it no longer supports making it, or wishes it be modified to record a restricted byway) 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 29 above.
31. 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 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**

32. 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’s decision if this is seen as incorrect or unjust by them. The cost for this may be up to £50,000.

### **Options Considered**

33. Members may resolve that the Order should be forwarded to the Secretary of State for determination as follows:
- (i) The Order be confirmed without modification, or
  - (ii) The Order be confirmed with modification.
  - (iii) The Order should not be confirmed.
  - (iv) The Council takes a neutral stance with regard to the confirmation of the Order.

### **Reason for Proposal**

34. Wiltshire Council has a duty to record a width for this right of way and accordingly is not in a position to adopt a neutral stance in this instance. Additionally, no further evidence has come to its attention after the Order was made which may cause officers to amend the initial decision (see **Appendix 2**).
35. Officers consider that encroachments on the historic lane post date the acquisition of public rights and accordingly it is not appropriate to record a width for public rights that excludes an area now covered by them which was previously available for the public. It is therefore not appropriate to seek to modify the Order to record a narrower width.
36. It is considered that a width of 20 feet was created at inclosure and was, in all likelihood available for people to use, whether they were exercising their private right or the public acquiring theirs.
37. It is recognised that Bleet Lane was created at a width wider than 20 feet but officers consider it likely that the extra width included drainage features and ditches that would not have been available for anyone to use in the way they would have used the more central section of the lane.

### **Proposal**

38. It is recommended that The Wiltshire Council Great Hinton Path No. 34 Rights of Way Modification Order 2016 be forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed as made.

### **Tracy Carter**

Associate Director – Waste and Environment

Report Author:

**Sally Madgwick**

Rights of Way Officer – Definitive Map

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**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