

EASTERN AREA PLANNING COMMITTEE

9 July 2020

WILDLIFE AND COUNTRYSIDE ACT 1981 s.53 (“the 1981 Act”)

THE WILTSHIRE COUNCIL GRAFTON 29 (PART), 29A, 30 AND 31, BURBAGE 1 (PART) AND COLLINGBOURNE KINGSTON 34 DEFINITIVE MAP MODIFICATION ORDER 2019

Purpose of Report

1. To:

- (i) Consider the objections received to the above Order recording rights of way at Grafton, Burbage and Collingbourne Kingston as restricted byways in the definitive map and statement.
- (ii) Recommend that Wiltshire Council supports the confirmation of the above Order by the Secretary of State for Environment, Food and Rural Affairs.

A copy of the Order and Order plan is appended at **Appendix A**

The decision report relating to the making of the Order is appended at **Appendix B**.

Copies of the 2 objections and 2 representations in support and subsequent correspondence are appended at **Appendix C**.

Relevance to the 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. Wiltshire Council has statutory duties to maintain the record of public rights of way in Wiltshire (excluding the Borough of Swindon), to maintain the rights of way shown therein, and to assert and protect them for the use and enjoyment of the public. These duties are not discretionary.
- 4. The definitive map and statement is the legal record of public rights and is conclusive in law as to what it shows but this is without prejudice to the existence of a more extensive public right (s.56 of the 1981 Act). The Council has a duty to keep it under continual review and make orders to modify it when evidence shows it is in error.

5. Members of the public may apply to the Council to modify the definitive map and statement and they do so under the provisions of Schedule 14 to the 1981 Act and the Council must determine these applications by investigating all available relevant evidence and by making a modification order where it is considered it is shown on the balance of probability (i.e. it is more likely than not) that a change in the map and statement is required.
6. An application has been received to record a byway open to all traffic over land at Grafton, Burbage and Collingbourne Kingston. The route is a long route linking the communities of West Grafton and Collingbourne Kingston and is currently recorded as a footpath and, in part, bridleway.
7. It is clear that in 2006 an Act of Parliament extinguished any public mechanically propelled vehicular (MPV) right that existed (s.67 Natural Environment and Rural Communities Act 2006) and that the highest public right that could exist is that of a restricted byway. A restricted byway is a route over which the public may pass and re-pass on foot, on or leading a horse, on a cycle or with a horse drawn cart or carriage. It is an offence prosecutable by the police for the public to use an MPV over one.
8. A significant amount of evidence has been investigated and the report attached at **Appendix B** explores this in detail. In considering historic public rights it is essential that the common law principal of 'once a highway, always a highway' is applied. In short, if a public right of way can be shown, on the balance of probability, to have existed in the past, no amount of disuse or neglect will extinguish that right. Only a defined legal event can stop up that right.
9. Notwithstanding evidence that suggests that parts of the application route is of Saxon antiquity it is very clear that the majority of the route was awarded to the public as a Public Carriage Road 40 feet wide in an inclosure award in 1792 arising out of an Act of Parliament in 1790.
10. Evidence of the route's physical existence is supported by a significant number of maps and documents including it being recorded as a "Public Highway", a "Road" and a "Public Road or Driftway" in plans and documents deposited with Parliament as the result of three deposited railways schemes. In all cases the route is recorded as being owned and occupied by the "Surveyors of Highways" or "Highway Surveyors".
11. Evidence arising from Acts of Parliament where the creation of public highways or the identification of public highways was part of the purpose of the award or deposit is of the highest evidential weight. A table of evidence graded by weight is given at page 82 of **Appendix B**.
12. It is likely that the route fell into disrepair or disuse in the late 1800s to early 1900s, perhaps when neighbouring roads were improved or the ground over which it led lost hedgerows or was ploughed to increase agricultural production; however, in the absence of any evidence of a legal event extinguishing the public rights it is clear that the Order is capable of confirmation whatever the recent physical history of the landscape.

13. As part of the statutory process contained in the 1981 Act, when the making of the Order was advertised, two objections and two representations of support were duly made. They have not been withdrawn and accordingly the Order may not now be confirmed by Wiltshire Council but must be sent to the Secretary of State for Environment, Farming and Rural Affairs (SoSEFRA) for determination.
14. Members are asked to consider the objections and representations and to make a recommendation relating to the confirmation of the Order to SoSEFRA.

Main Considerations for the Council

15. The representations and objections are appended at **Appendix C** along with copies of letters sent by the case officer seeking the withdrawal of the objections.
16. The two representations both support the making of the Order and the recording of the route as a restricted byway. They are from the British Horse Society and The Ramblers.
17. The two objections are from two of the affected landowners. Neither objection raises any evidence to challenge the interpretation of the historical evidence or adduces any evidence of a legal event extinguishing public rights. The landowners' express concerns relating to the ability of the Council to manage the route, problems arising from the management of the greater width where it crosses arable land, seasonal flooding and illegal incursions from MPVs, especially hare coursers.
18. The case officer has written to the objectors (**Appendix C**) explaining that the Council is meeting its statutory duty in recording the route in the definitive map and statement and that matters relating to need, desirability, the environment or health and safety are not relevant concerns for the purposes of s.53 of the 1981 Act. It has no power to take these factors into account.
19. It is anticipated that in the event the Order is confirmed the Council will make very few changes on the ground. The northern end is likely to remain as it was when inspected in October 2019 and likewise the southern terminus with restricted byway Collingbourne Kingston 6A. The confirmation of the Order is therefore not likely to make the route any more accessible for MPVs than it currently is.
20. It is noted that a permissive route is provided for walkers who wish to avoid walking the definitive line of Grafton 29A and 30 across an arable field. This provides a reasonable alternative but does not negate in any way the landowners' duty to keep the definitive line open and available, even if across an arable field. To resolve concerns like this, Wiltshire Council accepts applications to divert public paths and restricted byways and it has been suggested that the owner of the land considers this option if management of the route across the field is difficult.

Overview and Scrutiny Engagement

21. Overview and scrutiny engagement is not required in this case.

Safeguarding Considerations

22. There are no relevant safeguarding considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Public Health Implications

23. There are no identified public health implications which arise from the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Corporate Procurement Implications

24. There are no additional procurement implications associated with this recommendation. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Environmental and Climate Change Impact of the Proposal

25. There are no environmental or climate change considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Equalities Impact of the Proposal

26. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

Risk Assessment

27. Wiltshire Council is acting within its statutory duty and there is no risk associated with the pursuit of this duty.

Financial Implications

28. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
29. The Order must be sent to SoSEFRA for determination and this may incur costs for the Council. The Order may be determined by written representations, at a public local hearing or a public inquiry.
30. In the event that SoSEFRA decides to determine the Order by written representations there is a minimal cost to the Council in officer time. Where a hearing is held there are costs associated with hiring a venue, these will be in the region of £200. Where a public inquiry is held it is usual to have legal representation and accordingly a cost in the region of £5,000 is possible.
31. Costs may be claimed against the Council if it is found by SoSEFRA to act unreasonably at an inquiry. The Council may seek costs against the objectors if they are found by SoSEFRA to act unreasonably at an inquiry.

Legal Implications

32. Any decision of the Council is open to an application for judicial review in the high court. An appeal may be made by any aggrieved party and may be the result of a decision to either support or not support the confirmation of the Order.
33. If the appeal is allowed to be heard in the High Court and the Council loses its case, all costs would be paid by the Council. If the Council wins its case, all costs would be paid by the opposing party. Further appeal may be made by either party. If the court finds against the Council in judicial review proceedings, the potential costs to the Council would potentially be in the region of £50,000.

Options Considered

34. That:
 - (i) Wiltshire Council support the confirmation of the above Order by SoSEFRA.
 - (ii) Wiltshire Council objects to the confirmation of the above Order by SoSEFRA.

Reason for Proposal

35. There is a substantial body of evidence which officers consider shows, on the balance of probability, that a public carriage road was created in 1792 along the majority of the claimed route and that although the public right to use the route with an MPV was extinguished in 2006, the remaining public rights have not been extinguished over this route.
36. The route is currently recorded as a footpath in the parishes of Grafton and Collingbourne Kingston and as a bridleway in the parish of Burbage. It is clear that the recording of the route in Burbage is an error, notwithstanding the question of its status. It was not only awarded and consistently recorded in the parish of Grafton but is today in this position on the ground.
37. Where the definitive map and statement are found to be in error the Council has a duty to correct the records by making a definitive map modification order and where the evidence continues to be supportive, to either confirm or support the confirmation of the Order.

Proposal

38. **That The Wiltshire Council Grafton 29 (part), 29A, 30 and 31, Burbage 1 (part) and Collingbourne Kingston 34 Definitive Map Modification Order 2019 is submitted to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that the Order is confirmed as made.**

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

None

Appendices:

Appendix A Order

Appendix B Decision report to make the Order

Appendix C Objections and representations and associated correspondence