

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

**THE WILTSHIRE COUNCIL PARISH OF MELKSHAM PATH No. 107
AND MELKSHAM WITHOUT PATH No. 151
RIGHTS OF WAY MODIFICATION ORDER 2020**

Purpose of Report

1. To:
 - (i) Consider the two objections and thirty representations received relating to the above Order to add footpaths over land near to the River Avon, Melksham Forest, Melksham.
 - (ii) Recommend that Wiltshire Council supports the confirmation of the Order when the matter is referred to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA).

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

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 legal 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 legal 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. The Council must determine these applications by investigating all available relevant evidence and by making a modification order where it is considered it is either shown on the balance of probability (i.e. it is more likely than not) or, in this case, that there has been a reasonable allegation that a public right has been acquired, that a change in the map and statement is required.

6. In October 2017 Wiltshire Council received an application from a resident of Woodrow Road, Melksham to record lengths of public footpath over land leading from Forest Row to the River Avon, along the river bank to Murray Walk and across the River Avon to public open space land at Riverside Drive.
7. The application was supported by evidence of use from 18 members of the public for various lengths of time from 1974 to 2017. The land is owned by a number of different parties (see page 4 and 5 **Appendix B**).
8. For a public right to be acquired by use, the use must be 'as of right', that is, without force, permission or secrecy and for the purposes of establishing deemed dedication by s.31 Highways Act 1980, that use must have been uninterrupted for a period of at least 20 years. The presumption of dedication may be rebutted by the actions of the landowner which may include closing the route, erecting signs to demonstrate that they had no intention to dedicate a right of way, effectively challenging the public, creating a permissive route or by making a statutory notice or deposit under s.31(5) or (6) Highways Act 1980.
9. If incontrovertible evidence exists to show that the public had not used the claimed route for a period of 20 years or more in an interrupted manner that was 'as of right' then Wiltshire Council may not make an Order to record the claimed route.
10. Although some evidence of interruptions to use and signage was adduced during the pre-order consultation stage, this does not amount to incontrovertible evidence, and the decision was taken to make an Order to record the paths as public footpaths.

The decision report to make the Order is appended at **Appendix B**

11. The Order was advertised from March 2020 to the end of August 2020 and two objections and thirty representations to it were received.

The objections and representations are appended here at **Appendix C**

Main Considerations for the Council

12. Although the legal test contained in s.53(3)(c)(i) Wildlife and Countryside Act 1981 allows for an Order to be made where the evidence adduced only forms a reasonable allegation that a public right subsists (and there is no incontrovertible evidence to the contrary), the legal test to be applied to confirm an Order is that it is shown on the balance of probability (i.e. it is more likely than not) that a public right subsists. In other words, it is stronger test to be applied to confirm an Order. This approach was confirmed in *Todd and Bradley v SoSEFRA [2004] EWHC 1450* and upheld in *R(on the application of Roxlena Ltd) v Cumbria CC [2019] EWCA Civ 1639*.
13. In addition to the evidence adduced and investigated as part of the original application, the Council must now also consider the objections and representations to the order.

Consideration of the Objections and Representations (see Appendix C)

14. Objection 1 TLT Solicitors acting for Cooper Tire and Rubber Company Europe Ltd (owner of part of the land)

- Maintain that the black bridge (G to E on order plan) was gated 18 or 19 years ago, potentially blocked 1997 to 2017.
- Considers that access was not as order plan F to E but diagonally across the field from the gate.
- Their tenant, Mr Farthing, gave permission to people to use the route.
- Disputes user evidence and considers it insufficient.
- Not all users had used the black bridge spur.
- Includes aerial photographs to support their case.

15. Objection 2 Mr Tim Farthing, Farthing and Co (tenant and owner of part of the land)

- Point F has only been possible since 2013.
- There is a metal 'private' sign at point F – this has moved and been covered in brambles but now re-erected.
- In the last 20 years there has been three stranded barbed wire at both ends of the bridge.
- There were a pair of lockable security gates on the black bridge, locked until 2000 until they were vandalised, and one thrown in the river.
- Provides photo of one of the metal gates.
- Provides photo of sign saying, 'private Avon Angling Club Only'.
- Provides aerial photo taken 1998 showing what is claimed to be the large metal gates across the bridge.

16. Representation 1 in support Mr B J Dicks and Ms S Wordley

- Regular walkers of the route since 2007.

17. Representation 2 in support Mrs S Clover

- Regular walkers since 1990.

18. Representation 3 in support Mr G Martin

- Walked the route from 1995 to 2020.

19. Representation 4 in support Ms K Hart

- Walked the route for four years.

20. Representation 5 in support Ms K Fountain

- Mr K Porter walked the route since 1970.

21. **Representation 6 in support Mr K Porter**
 - Walked the route since 1970.
22. **Representation 7 in support Mr R Edwards**
 - Has used the path for ten years, his son in law has been using it for approaching fifty years.
23. **Representation 8 in support Mr K Clover**
 - Has continually used the path since 1987.
24. **Representation 9 in support Mr and Mrs R Hubin**
 - Have walked the paths since the 1980s.
25. **Representation 10 in support Mr R Purnell**
 - Has walked 'much' of the proposed route for over fifty years.
26. **Representation 11 in support Mr G Gudmundsen**
 - Has walked the route for three months.
27. **Representation 12 in support Mr K Davis**
 - Has walked the routes from shortly after 1989
28. **Representation 13 in support Mrs S C Sprules**
 - Has regularly walked the routes for over thirty eight years.
29. **Representation 14 in support Mrs P Cooke**
 - Has walked the routes and used the concrete bridge since 1951.
30. **Representation 15 in support Mr V Morris**
 - Has walked it since the late 1960s – stopped using it when barbed wire erected on bridge at end H.
31. **Representation 16 in support Mr P D Sprules**
 - Has used the routes since 1982.
32. **Representation 17 in support Ms S Aldridge**
 - Has used the route since 1987 and learnt about it from older users.

33. **Representation 18 in support Mr P Bailey**
- Has used most of the route for thirty years and recalls playing on the bridge as a child and recalls it being blocked.
34. **Representation 19 in support Mrs J Castell**
- Walked the route from 2009 to ‘a couple of years ago’.
35. **Representation 20 in support Mr D Roderick**
- Walked it in 2017 until he was told it was private land with no right of way.
36. **Representation 21 in support Mr C Purvis**
- Has walked the route since 2009.
37. **Representation 22 in support The Bull Family**
- Generations of the family have used the routes including their grandmother in 1930 recalls standing on the bridge.
38. **Representation 23 in support Mr K Bourne**
- Has walked the route for over five years.
39. **Representation 24 in support Ms M Warren**
- Has walked the route and across the bridge since 2016.
40. **Representation 25 in support Mr P L Sidnell**
- Has walked the path since 2000.
41. **Representation 26 in support Mr and Mrs D Rae**
- Used the route FEGH (across bridge) 1970 to 1976 and others 1996 to 2020.
42. **Representation 27 in support Mr A Mockford**
- Has walked the route since 2015.
43. **Representation 28 in part support Mr A Baines**
- Supports part of the order route but does not record any actual use.
44. **Representation 29 in support Mrs F A Higgins**
- Has walked the path in 2020 only.

45. **Representation 30 Melksham Without Parish Council**

- Questions the need for path A to B as it is duplicated by an existing public footpath within 150 metres.

Officer's Comments on the objections and representations

46. The relevant twenty year period to consider use in is the period 1997 to 2017. Wiltshire Council must not take into consideration any use after 2017. A right of way could have been acquired over a different earlier period if an interruption to use had occurred at an earlier date. For example, the evidence of Mr Farthing suggests that a locked gate was across the way in the late 1990s; if this is found to have formed sufficient an interruption to use for this part of the Order, the relevant date for the section EGH would be say, 1979 to 1999. However, there is no clear date for the erection or locking of the gate and hence it is not possible to consider an earlier relevant period at this time.
47. In the initial decision report officers considered the effect of an interruption to use of a section of the claimed route leading over land owned by Wiltshire Council. Here, the route CD was subject to a partially made deposit under Section 31(6) Highways Act 1980. If this is held to be sufficient to call the route into question, then the deposit made in 1995 would require a relevant period from 1975 to 1995 to apply to that part of the route.
48. A recent decision by the Planning Inspectorate regarding an adjoining route in the field, known as Forty Acres, cast significant doubt on the effect of the Council's deposit and in any event, Wiltshire Council did not object to that Order and the route is now recorded as Melksham Without footpath number 152.

The Inspector's report addressing this issue is appended at **Appendix D**

49. In any event, in the case of this Order, Wiltshire Council has been able to demonstrate its willingness to dedicate this section of route (CD) by making a dedication agreement (also agreed with the tenant of the land) for this section. However, the need for this falls away as the Council has not objected to this Order and is clearly in acceptance of the non-application of the Section 31(6) deposit in 1995. Hence, it is considered that the relevant period 1997 to 2017 applies for this section as much as for the route ABCDEF and possibly EGH. The evidence supporting the Order may be considered as a whole.

A copy of the Dedication Agreement is appended at **Appendix E**

50. There are very clear differences in the evidence of the users of the path and the objectors, not least the effect of any gating or fencing arrangements on the bridge or the effect of signs at points H and F. As given in the objection from Cooper Tire and Rubber Company Europe Ltd, not all of the users used the section over the bridge EGH and the representations received, although boosting the numbers who had walked the route, added to the problem of interpreting the effect of any obstruction with some people referring to it and some not.

51. As a result of this, officers carried out a second consultation to obtain clearer evidence to bring before this committee. A total of twenty six users were written to (being those who appeared to have used the bridge in the relevant period) and further clarification on matters at the bridge was sought.
52. A total of eleven responded and their responses are appended at **Appendix F**. A summary table is included.
53. The responses are helpful for interpreting the evidence adduced by both the objectors and the supporters of the Order. Although the initial application was supported by evidence of use from eighteen people, the advertising of the Order brought forth further evidence from an additional twenty seven people, all of whom had walked the whole of, or parts of, the order route. Of those twenty seven additional users, twenty two had used the path for some, or all, of the relevant period (1997 – 2007). This takes the total number of users to forty.
54. Of those, it appears that three people (B Purnell, S Aldridge and V Morris) were prevented from using the route when the gates were across the route. Purnell and Aldridge confirmed this in their second consultation responses, but V Morris did not respond giving further details.
55. No-one recalls having been prevented from using the route by barbed wire and one witness describes the gates as being passable at the ends even when in place and closed. Other users describe the gates only being closed when cattle were grazing in fields separated by the river though another user recalls the gates being open with cattle accessing both fields. This is consistent with another witness recalling a cow falling from the bridge into the river.
56. Many users do not recall the gates at all though this may be explained by their relatively short life, their being open if cattle were not grazing fields on either side of the river independently or the gates being overgrown and unrecognisable (A Cooke).
57. Some users describe the bridge being used by school children linking the Forest estate with George Ward School (this would certainly have been a direct and attractive route for them in dry conditions) and some users refer to the need for the bridge to be open and available for anglers.
58. Very few users refer to the signs, though J Campbell remembers a sign near point F referring to 'Angling Club water'. In 2018 there was no sign at or near point F and the sign at point H was unreadable but the first word appears to have been 'private'.

Overview and Scrutiny Engagement

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

Safeguarding Considerations

60. 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

61. 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

62. 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

63. 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

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

Risk Assessment

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

Financial Implications

66. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
67. 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.
68. 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 and the Council takes a neutral stance the costs will be related only to venue hire. If the Council objects to or supports the Order the costs are likely to be in the region of £6,000 (for a 2-day inquiry).
69. 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

70. 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.
71. 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

72. That:
- (i) Wiltshire Council support the confirmation (either wholly or in part with modification) of the above Order by SoSEFRA.
 - (ii) Wiltshire Council objects to the confirmation of the above Order by SoSEFRA.
 - (iii) Wiltshire Council takes a neutral stance when the above Order is submitted to SoSEFRA.

Reason for Proposal

73. Where an Order is made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 the burden of proof needed to make the Order is weaker than that needed to confirm it (see paragraph 17). The Council must now decide on the stance it will take when the Order is forwarded to SoSEFRA.
74. There seems little doubt from the evidence adduced by all parties that at some time around the late 1990s (evidence of Mr Farthing states 1999) there were gates on the bridge across the River Avon (affecting route EGH only) and that from time to time there was also barbed wire either across the bridge or alongside it (acting as a parapet). However, it is not clear how long these features were in existence or whether they formed an actual barrier to public use. It is not clear whether the gates were vandalised or merely fell in the river owing to a lack of reasonable fixing (evidence of K Porter). It is unlikely that public use was by force as the gates were never reinstated and besides, we do not know if they fell or were vandalised by just one individual.
75. It is clear that the purpose of them was to control cattle and not to prevent public use and it is also apparent that they were short lived. Some witnesses recall them, some don't; some did not use the bridge when the gates were across but one person said he could just go round it. Everyone recalling the wire said you could just step over it. Additionally, it is clear that people with dogs would stay away from the area when the cattle were using the fields rather than risk a conflict. It is pivotal to the determination of route EGH whether the gates on the bridge formed an actual interruption to public use or not. If use continued in a manner whereby the shared use was tolerated then use would still be 'as of right' and uninterrupted.

76. It is difficult to judge, without the benefit of the cross examination of parties, on the balance of probabilities, whether there was an interruption, and, if there was, when it happened.
77. It is also a possibility that if the gates are to be taken as an interruption to public use then there is the added possibility that the removal of them and the reinstatement of free access across the bridge can be taken as an act of dedication at common law. A possibility given the additional presence of a stile facilitating access at point H (there was also a stile at point D).
78. For signage to be effective at defeating the presumption of dedication by s.31(1) Highways Act 1980 it must be clear that it shows the owners' non-intention to dedicate a public right of way. Signs saying land is private are not sufficient (since most land carrying rights of way is in private ownership) and besides, since the land to the west of point H is Public Land, it is not unreasonable to mark the boundary between public and private, especially where fishing rights are concerned. It is not known who erected the large metal signs, though it is clear that they were not maintained and by 2018 had fallen into total disrepair and were largely unreadable. The signs do not appear to have made specific reference to the owners' non-intention to dedicate a public right of way and may be taken as referring only to fishing rights.
79. It must also be borne in mind that although the route across the River Avon may have been subject to an interruption, this would not have affected use of the majority of the route and any Inspector would have the power to amend an Order to record a footpath only along the route ABCDEF.
80. Additionally, it is considered that nothing in the objectors' submissions demonstrates that the landowners brought their lack of intention to dedicate a public right of way to the attention of the relevant audience, that is, a considerable number of local users of the path. This is despite the landowners' stated intention not to dedicate and a limited range of grants of permission to some users. There was no satisfaction of any statutory process to demonstrate a negative intention to dedicate the land.
81. There is no doubt in this case that there is considerable conflict in the evidence, especially with regard to the effect of the gates and fences on the bridge and to effect, interpretation and longevity of the sign. Objectors also cast doubt on the routes that users took or the period in which they took them. The evidence from both sides would best be tested under cross examination at an inquiry.
82. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton* [1994] 68 P & CR 402 Owen J "*In a case where the evidence of 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 witnesses at the inquiry.*"
83. In making this Order the Council considered that a reasonable allegation as to the acquisition of public rights had been made. No further evidence has been adduced to suggest that the decision was incorrect and in the absence of further testing of the evidence under cross examination it is reasonable to consider that,

on the balance of probability, a public right has been acquired. Clearly, the testing of witnesses from both sides will be key to the final decision of SoSEFRA in this case but the Council's duty remains with supporting the Order based on the evidence it has before it.

84. The Order plan contains a small drafting error in the symbol used in the key. Any Inspector appointed by SoSEFRA has the power to correct that and it is recommended that they do.

Proposal

85. That the Wiltshire Council Parish of Melksham Path No. 107 and Melksham Without Path No. 151 Rights of Way Modification Order 2020 is forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed with a modification to the Order plan correcting the symbol used in the key for points C to D.

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

None

Appendices:

Appendix A	Order and Plan
Appendix B	Decision report to make the Order
Appendix B.1	Landownership plan
Appendix B.2	Consultation response from T Farthing
Appendix B.3	User evidence summary
Appendix B.4	Wiltshire County Council s.31(6) Highways Act 1980 deposit
Appendix B.5	Draft Order
Appendix C	Objections and representations to the Order
Appendix D	Inspector's report relative to adjoining path MELW152
Appendix E	Dedication agreement affecting Wiltshire Council land
Appendix F	Second consultation responses