

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

**THE WILTSHIRE COUNCIL PARISH OF WESTBURY PATH No. 68
RIGHTS OF WAY MODIFICATION ORDER 2020**

Purpose of Report

1. To:
 - (i) Consider the two objections and one representation received relating to the above Order to add a footpath leading from footpath Westbury 15 to Westbury railway station.
 - (ii) Recommend that Wiltshire Council takes a neutral stance when the matter is referred to the Secretary of State for Environment, Food and Rural Affairs.

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 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 change in the map and statement is required.

6. On 8 March 2017 Wiltshire Council received an application from Cllr Russell Hawker for a definitive map modification order to add public footpaths at Westbury Station to the definitive map and statement. The application adduced evidence of use by the public over a short path linking Station Road with Station Approach, over Station Approach itself and over another path linking Station Approach with footpath Westbury 15 leading past the railway station itself, along an access road to sidings and sheds now used by DB Cargo and a section of path skirting the outside of the land used by DB Cargo, but within, Network Rail's site.
7. Officers of Wiltshire Council considered the application and evidence and a decision was made on 12 June 2018 to refuse the application. A copy of that decision report is appended here at **APPENDIX B**.
8. The applicant exercised their right to make an appeal against this decision (under Schedule 14 Wildlife and Countryside Act 1981) and on 14 April 2020 an Inspector from the Planning Inspectorate, appointed to act on behalf of the Secretary of State for Environment, Food and Rural Affairs, issued a direction to Wiltshire Council to make an Order to record part of the application route as a footpath. A copy of the Appeal Decision and Direction is appended here at **APPENDIX C**.
9. In his decision the Inspector found that although historical documentary evidence clearly supported the physical existence of the claimed routes from 1848 (in the case of Station Approach) and 1915 (in the case of the path linking Westbury 15 with the railway station), none of the available historical documentary evidence indicated the existence of public rights over the routes (paragraph 13 Appendix C).
10. The Inspector went on to say that accordingly, the determination of the appeal depended entirely on the evidence of public use of the route, either by deemed dedication under the provisions of s.31 of the Highways Act 1980 or inferred to have been dedicated at common law.
11. In considering evidence of public use of the way, both Wiltshire Council and Network Rail had submitted that the provisions of s.57 of the British Transport Commission Act 1949 applied and that post 1949, it had not been possible for the public to acquire rights over any road or footpath forming an access to a station.
12. The Inspector upheld that this was the case over Station Approach, as this was clearly an access road to the station, but he considered that where people had used the route from Westbury 15 through to Station Road via Station Approach as a through route and not as access to the station, that the provisions of s.57 may not apply. He also considered that a public right may have been acquired prior to the 1949 Act, but that little evidence had been adduced to support that possibility.
13. If that was the case, and in the absence of any evidence of action by the landowner before 2016 that would evidence a lack of intention to dedicate, the Inspector found that the application formed a reasonable allegation that public rights subsisted over part of the route and directed Wiltshire Council to make an Order accordingly.

14. Wiltshire Council made the Order as directed on 17 July 2020 and advertised it between 7 August 2020 and 2 October 2020. During this time two objections and one representation were received. Copies of these are appended here at **APPENDIX D**.
15. The Order must now be forwarded to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA) for determination as Wiltshire Council may not confirm an Order where there are outstanding objections or representations.
16. This committee is asked to consider the evidence relating to this case and any adduced by duly made objections and representation and recommend what stance Wiltshire Council should take when the matter is sent to SoSEFRA.

Main Considerations for the Council

17. 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*.
18. In addition to the evidence adduced and investigated as part of the original application, the Council must now also consider the objections and representation to the Order.

Consideration of the Objections and Representation (see Appendix D)

19. L B and Co on behalf of DB Cargo (UK) Ltd 21 September 2020

Key points:

- (i) DB Cargo objects to the making of the Order.
- (ii) DB Cargo is the UK's largest rail freight operator. DB Cargo operates sidings adjacent to Westbury Railway Station and the claimed footpath runs through its freight transshipment operation.
- (iii) DB Cargo considers that the provisions of the British Transport Commission Act 1949 apply.
Specifically, Section 57:
"As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or harbour premises of the Commission."
- (iv) DB Cargo maintains that this clearly applies to "any" route forming an access or approach to any station, goods yard etc and does not specify that the route must exclusively provide access to those facilities. Hence it is irrelevant that some people used it as a through route, since it clearly was an access route to the station, goods yard, etc.

20. **Dentons on behalf of Network Rail Infrastructure Limited 02 October 2020**

Key points:

- (i) Network Rail objects to the making of the Order.
- (ii) Network Rail considers that the provisions of Section 57 of the British Transport Commission Act 1949 apply.
- (iii) Section 57 of the 1949 Act applies not just in relation to land forming an access or approach to a station, but also in respect of accesses or approaches to *inter alia* a goods-yard or depot.
- (iv) Additional use of the route as a through route does not negate the effect of the route providing access to the station and does not negate the effect of s.57 of the 1949 Act.
- (v) Network Rail adduces a Great Western Railway (GWR) document stamped by a Deeds department stamp in 1911 and re-stamped in 1940 by the Divisional Engineers Office. The document is a plan of the engine shed site. Point C on this plan is on the Order route (Westbury 68). The plan is annotated “*On Good Friday barriers to be placed at the points A, B, C and D*”. From this, Network Rail maintains that it is evident that the rail operator (then GWR) intended to exercise control over the route by closing it for one day every year. This would be sufficient to interrupt use of the way and demonstrate a lack of intention to dedicate the route as a public right of way.
- (vi) Network Rail recognises that safety concerns are irrelevant to the confirmation of the Order but wishes to highlight concerns of public safety relating to conflict with DB cargo vehicle movements and increased use of the level crossing used by the adjoining footpath Westbury 15 at Oldfield Road.

21. **Mr Francis Morland 02 October 2020**

Key points:

- (i) Mr Morland wishes to make this representation to the Order.
- (ii) He supports the addition of the footpath to the definitive map and statement.
- (iii) Considers that the Order should be modified by SoSEFRA to include the through route to Station Road (including Station Approach).
- (iv) Considers that the Inspector had not adequately considered the historical evidence relating to the through route.
- (v) Disputes the relevant date of the Order as being the date of the decision.
- (vi) Refers the Council to the case of *Network Rail Infrastructure Ltd v Welsh Ministers [2020] EWHC 1993 (Admin)*.

Officer’s Comments on the objections and representation

22. **L B and Co on behalf of DB Cargo (UK) Ltd.**

This objection relies on the action of s.57 of the British Transport Commission Act 1949 applying to the claimed route. If they are correct in this, the effect would be that it was not possible to acquire a public right by prescription at anytime after 1949. Their objection does not address the existence of the route prior to 1949 or the possibility that a public right may have been acquired over it before that time.

23. Their comments relating to the suitability of the route or matters related to health and safety concerns are irrelevant for the purposes of s.53 of the Wildlife and Countryside Act 1981.
24. Their view relating to the British Transport Commission Act 1949 is in agreement with that of officers of the Council when the application was originally refused but conflicts with the view of the Inspector who considered that use of the route as a through route rather than just a route to the station, goods yard or depot would amount to qualifying use.

25. **Dentons on behalf of Network Rail Infrastructure Limited**

This objection also considers that the action of s.57 of the British Transport Commission Act 1949 has prevented a public right being acquired after 1949. They also adduced evidence of control being exerted over the route to prevent a public right being acquired before 1949. The plans submitted show clearly an intention of the Great Western Railway Co. to lock a barrier across the route on Good Fridays. The action of locking a gate or barrier across a route has long been a means by which a landowner could interrupt public use and so stop a public right being acquired by prescription.

26. It is not known whether rail services operated on a Good Friday or whether the engine shed and depot was open on that day, but if they were not, then additionally this could be supportive of the route being considered an access route to the station or depot – in other words, the route was closed on a day when no inconvenience would be felt by users of the station or by workers at the engine shed or depot.
27. The concern expressed by Network Rail relating to an increase in use of a nearby level crossing is irrelevant for the purposes of s.53 Wildlife and Countryside Act 1981.

28. **Mr Francis Morland**

Although Mr Morland agrees with the making of the Order to record part of the applicant route as a public footpath he does not agree with the Inspector's report and finding that the route known as Station Approach should not be included in the Order, or the small section that is already recorded in the Council's highway record. Although officers do not agree with Mr Morland on this point, if he is able to convince any subsequent Inspector that the first inspector erred on this matter, that Inspector has the power to modify the Order by making additions.

29. Mr Morland also considers that at the appeal stage the Inspector did not give sufficient weight to the historical evidence relating to the path. He adduces no further evidence to support this though likens the argument to being similar to a recent judgement (*Network Rail Infrastructure Ltd v Welsh Ministers [2020] EWHC 1993 (Admin)*). In this case, the railway line was found to post date the existence of a public highway and accordingly, the highway rights prevailed over the railway land as they had not been lawfully extinguished.

30. A full investigation into the documentary historical evidence for this area has been carried out by officers of the Council (see **Appendix B**). The appeal Inspector was in agreement with the officers' finding that there was an insufficiency of evidence to support the notion that the claimed route was part of the footpath "Brook Footway" as awarded by Act of Parliament at inclosure in 1808. Officers consider that this footpath, now part extinguished where it crossed the railway line and part diverted at the site of the engine shed, is now recorded as footpath Westbury 15, the linking path to the claimed route.
31. Historic Ordnance Survey maps (paragraph 11.53 **Appendix B**) show a footpath existing within the GWR land alongside the railway linking Penleigh and the station and this path was interrupted by the building of an engine shed (completed 1915). However, the Ordnance Survey maps carry a disclaimer to the effect that any roads or paths therein shown are not to be assumed to be public. The Ordnance Survey records topographic detail and hence recorded the path (as it did exist), but they were not in a position at that time to know what rights existed over it.
32. As this path was interrupted by the building of the engine shed, it seems likely that the claimed path (i.e. the order route) is the replacement path installed by Great Western Railway.
33. The deposited plan for the alteration of public rights of way can be seen at page 35 of **Appendix B** and clearly shows the diversion of the public right of way across the site to a route south of the site, forming what is now Westbury 15. The claimed route is not shown.
34. Additionally, support of the claimed route being a diversion of a 'private' GWR route can be found in the extract from R J Cogswell's book on Westbury Ironworks. The author remembers the building of the engine shed and after a lengthy discussion regarding the existing footpath across the site and its replacement (now part of Westbury 15 and as shown on the deposited plan) also records that: "...Elsewhere, an existing GWR owned footpath from the station to Dilton Marsh and long known as the Penleigh Footpath, was diverted across the, by then, filled in section of the Station Minehole to the kissing gate opposite to the pedestrians' entrance to the new depot. From there is continued round to the old level crossing for Brook Mill..."
35. In that description Cogswell describes the order route as being a "GWR owned footpath" which, supported by the fact that its diversion did not form part of the deposited plan, suggests to officers that this was not a historic public footpath but one that was constructed by GWR for railway purposes.

Overview and Scrutiny Engagement

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

Safeguarding Considerations

37. 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

38. 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

39. 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

40. 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.
41. Though not relevant to the Council's decision in this matter it is noted that a pedestrian and cycle route leading parallel to the claimed route and linking footpath Westbury 15 with the railway station has been provided for within the adjacent 'Spinnaker' housing development. Although this development is not yet complete, the new shared use path will enable pedestrian and cycle access to the station for not just residents of 'Spinnaker' but also for anyone who would previously have used the Order route. The proposed new route avoids any conflict with vehicular traffic accessing the station or D B Cargo's site and meets a range of objectives including SO2,11,12,13 and 14 In the Wiltshire Local Transport Plan 2011 – 2026.

Equalities Impact of the Proposal

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

Risk Assessment

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

Financial Implications

44. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
45. 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.
46. 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).

47. 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

48. 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.
49. 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

50. That:
- (i) Wiltshire Council supports the confirmation 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

51. 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. In the Council's original decision to refuse to make an Order, it was considered that there was an insufficiency of pre-1949 evidence of a public right subsisting over the route and that the provisions of s.57 of the 1949 British Transport Commission Act had prevented a public right being acquired after 1949.
52. At the appeal stage the Inspector supported much of that view but considered that there was a reasonable allegation (in the absence of incontrovertible evidence to the contrary) that a right had been acquired over some of the claimed route post 1949 and the Council was directed to make the Order before this committee.
53. Since that time, very little further evidence has been adduced for the committee to consider. Both the landowner and tenant consider that the Inspector was incorrect in his view of the applicability of the 1949 Act, effectively agreeing with officers at the application stage. The only new evidence adduced at this stage is the plan of the Engine Shed works showing that it was the intention of GWR to erect a barrier across the order route once a year (on Good Fridays). The evidence suggests that this was in the pre-1949 period.

54. In consideration of the clear differences in opinion officers are guided by The Planning Inspectorate's Rights of Way Advice Note No. 1 *Conduct of Inquiries and Hearings into Rights of Way Orders where Order Making Authorities Do Not Actively Support an Order.*

“Background

4. *In most cases, an OMA will not make an order unless it is satisfied that the circumstances justify it. Exceptions to this occur when an OMA declines to make the requested order but the applicant successfully appeals to the Secretary of State. This will result, in the case of definitive map orders, in the OMA being directed to make the order under Schedule 14 of the Wildlife and Countryside Act 1981.*

5. *In such circumstances, where an OMA has previously assessed the facts of the case and decided the making of an order is not justified, it may opt to oppose confirmation of the order or it may choose to adopt a neutral stance whereby it neither supports nor objects to confirmation.”*

55. Owing to the clear differences in opinion and the possible need to hear the evidence of use at a public inquiry where it can be tested, officers do not consider it appropriate to recommend actively opposing this Order, but instead to take a neutral stance, leaving the interested parties to present their cases to an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs. Where the Council takes a neutral stance it neither supports or objects to the Order but acts in a manner to facilitate any hearing or inquiry (for example making the initial submission, managing papers for public deposit, booking venues and liaising with the Planning Inspectorate).

Proposal

56. That the Wiltshire Council Parish of Westbury Path No. 68 Rights of Way Modification Order 2020 is forwarded for determination to the Secretary of State for Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance at any hearing or inquiry.

Jessica Gibbons

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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 Refuse the Application
Appendix B.A	Network Rail objection at consultation stage
Appendix B.B	User evidence
Appendix C	Planning Inspectorate Appeal Decision
Appendix D	Objections and representation to the Order