

WILTSHIRE COUNCIL

EASTERN AREA PLANNING COMMITTEE

1 DECEMBER 2022

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE WILTSHIRE COUNCIL NORTH TIDWORTH PATH NO.11
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2022**

Purpose of Report

1. To:
 - (i) Consider three objections to The Wiltshire Council North Tidworth Path No.11 Definitive Map and Statement Modification Order 2022 made under Section 53 of the Wildlife and Countryside Act 1981 (See **Appendix 1** for a copy of the Order).
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs (**SoSEFRA**) with a recommendation from Wiltshire Council that the Order is confirmed as made.

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. Wiltshire Council received an application dated 31 March 2004 for an Order to upgrade footpath North Tidworth 11 (NTID11) to a byway open to all traffic (BOAT) from its junction on the A3026 Ludgershall Road at OS Grid Reference SU 2389 4933 leading in a generally northerly direction to its junction with bridleway Collingbourne Ducis 21 (CDUC21) at SU 2446 5128. The application also applied to add a new section of BOAT from SU 2446 5128, the northerly junction of NTID11, leading north, northeast across Sunnyhill Down and the A342 to its junction with BOAT CDUC19 at SU 2459 5184. See full application route at page 3 of Decision Report at **Appendix 2**.
7. 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 was submitted by the applicant and has been investigated, the report attached at **Appendix 2** 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. The application was considered in two sections, one to upgrade the route of footpath NTID11 to a BOAT and one to add a section of unrecorded BOAT north of footpath NTID11 leading into the parish of Collingbourne Ducis across the A342 and meet byway CDUC19. As per paragraph 7, the highest status capable of being recorded is now a restricted byway.
10. When considering historic documentary evidence officers categorise evidence based on its evidential weight and have drawn up a categorisation system. This system of categorisation has been devised by officers with regard to The Planning Inspectorate's Consistency Guidelines (last revised April 2016) and Chapter 6 of the book 'Rights of Way A Guide to Law and Practice – Fourth Edition' by John Riddall and John Trevelyan. Evidence is graded A through F, with documents in category A holding the most weight down through F. Examples of category A evidence are Inclosure Acts and awards, Acts for railways, waterways or roads and orders creating, extinguishing, or diverting highways as these documents document a legal creation, extinguishment, or diversion of a public highway. Other documents may demonstrate the reputation of a way or the physical existence of a way, but the purpose of that document may not have been to show the legal status of a highway or have any powers to do so. For example, although a way may appear on many commercial maps it does not necessarily carry as much evidential weight as if the way is shown in two publicly consulted documents or created, say, as the result of an Act of Parliament. (See section 8 of **Appendix 2**, from page 55).

11. The applicant adduced documents to demonstrate the route of NTID11 should be upgraded to a restricted byway. None of these documents fell within category A, one fell within category B, with most documents adduced being commercial maps which fall within category E. The category B evidence affecting NTID11 is the 1844 North Tidworth Tithe map which shows the route of NTID11 as un-tithable land, which may indicate it was considered a public road but not necessarily so. The purpose of the tithe map is to show which land was tithable, as the Planning Inspectorate guidelines state at 8.2.13 "*both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe*" and at 8.2.14 "*They may not necessarily be good evidence either of public rights or the nature of any public right that may exist*". The route is annotated with a location at its northern end "*to collingbourne*" which may be indicative of a public highway; however, the map includes other routes with annotations which are not excluded from tithable land and are not recorded public rights of way at this time. The map also depicts other un-tithable tracks which are not currently recorded as public highways. The 1844 North Tidworth map is described as having "*an amateurish appearance*" in the book *The Tithe Maps of England and Wales* by Roger J.P Kain and Richard Oliver on page 560. Roger Kain being a professor specialising in Historical Geography and Map History and a fellow of the British Academy. The track shown on the North Tidworth Tithe map of 1844 should naturally continue into the parish of Ludgershall; however, no track is shown on the Ludgershall Tithe Map of 1841 at all. Overall, the only category B evidence in this case can be described as wholly inconclusive as to the rights over the track in question and in the words of Professor Roger Kain in reference to the 1844 North Tidworth map, "*amateurish*".
12. The vast majority of evidence in this case in support of the application are commercial maps which fall into category E. The Planning Inspectorate Guidelines state at 14.2.43 in reference to commercial maps "*They may not necessarily be good evidence either of public rights or the nature of any public right that may exist*" and at 14.2.46 "*Most maps are potentially helpful evidence of the physical existence of routes, especially if consistently shown. However, they are less helpful in terms of determining the status of the routes shown, and all mapping evidence is more helpful in conjunction with other evidence.*" Officers acknowledge there are a number of commercial maps showing the route in question as a road of various descriptions; however, it is clear commercial maps are not good evidence of the status of a way, rather the physical existence of a route, which is not in question. They may be used as supporting evidence in conjunction with other evidence, which in this case is lacking or where there is some evidence it is of weak or low evidential weight.
13. The '*amateurish*' grade B evidence, snippets of references to the route as an "old road" in parish council minutes and swathe of grade E evidence clearly shows a physical way has existed for many years in the general vicinity of the current recorded footpath. However, to amend the definitive map and status of the way the decision must be made on the balance of probabilities that the evidence is sufficient to justify such a change. The definitive map process in the early 1950s and subsequent inquiry into the route's status, which included the landowner and Parish Council, agreed that the way should be recorded as a footpath in 1956. The Finance Act 1910 maps, which can be considered category B evidence, do not indicate the way was recorded as a public highway.

The Pewsey Rural District Council Takeover Map c.1930 does not show the way as a public road at that time. Officers appreciate there is a balance of evidence in this matter and several documents may support the higher status of the route but the weight of those documents, in terms of evidential value, officers consider, is not heavy enough to tip the scales of the balance of probabilities for the reasons summarised in this report and fully explored in the decision report at **Appendix 2**.

14. Footpath NTID11 did not have a recorded width in the definitive statement and as a result of the thorough investigation officers undertook into the route it was clear a width could be recorded from the evidence of the physical appearance of the way. As such an Order was made, which is subject to this report, to record a width for the way. This also gives the applicant and any other parties the opportunity to object to the decision not to upgrade the status of the way, by objection to this Order, as is their right.
15. A separate Order was made to record a new section of restricted byway north of footpath NTID11 in the parish of Collingbourne Ducis, as a result of the same DMMO application. Higher evidentially weighted documents were found for that section of the route, hence the different decision in comparison to the route subject to this Order. That order to record a new section of restricted byway (also diverted to a more practical route) was made and confirmed without objection, that order is not subject to this process or report.
16. The Wiltshire Council North Tidworth Path No.11 Definitive Map and Statement Modification Order 2022 was duly advertised, and attracted three duly made objections, one objection not duly made (made outside of the statutory objection period) and one representation. A copy of the Order is appended at **Appendix 1**.
17. Where objections are received to a Definitive Map Modification Order Wiltshire Council may not confirm or abandon the Order and must forward it to SoSEFRA for determination. However, it must first consider the representations and objections to the Order and make a recommendation to SoSEFRA regarding the determination of the Order.

Main Considerations for the Council

18. Section 53(2) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the definitive map and statement of public rights of way under continuous review.
19. The Order is made under Section 53(3)(c) of the Wildlife and Countryside Act 1981, based on:

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-

(iii)that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.”

20. Evidence is the key and therefore objections to the making of the Order must, to be valid, challenge the evidence available to the Surveying Authority. The Authority is not able to consider other considerations, such as the suitability of the way for use by the public, the proximity of any other paths or facilities, environmental impacts and any need or desire for the claimed route.

21. **Objections and Representations:**

(1) Mr Bill Riley (applicant) – Objection

The Wiltshire Council North Tidworth Path No.11 Definitive Map and Statement Modification Order 2022

I object to the order.

Background: As you are aware, I applied for the order on 31 March 2004. As submitted, the application sought inter alia to upgrade North Tidworth Path No.11. On 27 January 2022 I was informed by the Council that the upgrade was refused, and subsequently, that I had no right of appeal, but that when the order was made and advertised, I would have the opportunity to make representations.

My objection is made on the grounds that the Council has discovered no evidence that the way was only ever a footpath historically, and cogent historical evidence (much of it in the Council's own archives) shows clearly that the way is an ancient public road for all traffic. Consequently, the order should be modified to record North Tidworth Path No.11 as a restricted byway.

(2) Mr Alan Kind – Objection

Dear Sir

The Wiltshire Council North Tidworth Path No.11 Definitive Map and Statement Modification Order 2022

Reference your order of 14 June 2022, to add a width to the definitive statement, I object on the following grounds.

You have made this order consequent on an application to modify the status of the way from footpath to restricted byway. You rejected that application, choosing instead to make this order.

I have seen the evidence in support of the application and have carried out some additional map research of my own. Based on all that evidence, and (importantly) on a proper construction of the view of the courts (which has barely been touched on in your report to committee), the correct status of the way is restricted byway, and the order should be modified accordingly.

(3) Michelle Haley – Objection

Dear Mr Harlow

North Tidworth 11 Definitive Map and Statement Modification Order 2022

I write to object to this order.

As you are aware a DMMO application was made in 2004 to upgrade this path and add a width.

Historical evidence clearly shows that the way is an ancient public road for all traffic and no evidence has been produced by Wilts Council to show that it was ever historically a footpath.

The order should be modified to record North Tidworth Path 11 as a restricted byway.

(4) Norman Beardsley (on behalf of Wiltshire Bridleways Association) - Objection made outside of statutory period

Dear Mr Harlow.

I write on behalf of f Wiltshire Bridleways Association to register the committee's OBJECTION to the Order as made on 14 June 2022, dated as being published on 23 June 2022.

The available sections of the Wiltshire Council Decision Report relating to the Definitive Map Modification Order, application number 2004/09 appears, without any written or documented explanation, to give little regard to the volume of historical evidence supporting the existence of a Byway Open To All Traffic.

North Tidworth Path number 11 would, if upgraded in accordance with the evidence presented, open a route for equine use of approximately 2000mtrs, (1250yds) to connect with Collingbourne Ducis bridleway 21, also subject to a Definitive Map Modification Order under application number 2005/061.

This will lead on and connect to other Public Rights of Way, thus assisting the quest to provide additional, much needed safe off-road riding.

(5) Peter Gallagher (Ramblers) – Representation

Dear Craig

We have no objection to these orders

Comments on the objections

22. All three objections made in the statutory period from Mr Riley, Mr Kind and Ms Haley are of a very similar nature (as is the main body of the non-statutory objection from Mr Beardsley on behalf of Wiltshire Bridleways Association). The reasons for making the Order set out in paragraphs 10-13 of this report and fully in the decision report at **Appendix 2**. Those being summarily, and in response to the objections, that the evidence is delicately balanced, but officers believe the weight of the evidence is not sufficient to make and confirm an order to upgrade the status of this route on the balance of probabilities. The point raised by Mr Beardsley regarding the benefit to off road users cannot be taken into consideration. The objectors have not raised any additional points to consider to those that were considered at the order making stage. An independent inspector appointed by The Planning Inspectorate on behalf of the Secretary of State will

determine the order and officers are content to be guided by that judgement on such an evidentially balanced case.

Overview and Scrutiny Engagement

23. Overview and Scrutiny Engagement is not required in this case. The Council must follow the statutory process which is set out under Section 53 of the Wildlife and Countryside Act 1981.

Safeguarding Considerations

24. Considerations relating to safeguarding anyone affected by the making of the Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and determined based on the relevant evidence alone.

Public Health Implications

25. Any public health implications arising from the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and determined based on the relevant evidence alone.

Corporate Procurement Implications

26. In the event this Order is forwarded to SoSEFRA there are several opportunities for expenditure that may occur, and these are covered in paragraphs 30 to 33 of this report.

Environmental and Climate Change Impact of the Proposal

27. Any environmental or climate change considerations arising from the making of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and determined based on the relevant evidence alone.

Equalities Impact of the Proposal

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

Risk Assessment

29. Wiltshire Council has a duty to keep the definitive map and statement of public rights of way under continuous review and therefore there is no risk associated with the Council pursuing this duty correctly. Evidence has been brought to the Council's attention that there is an error in the definitive map and statement of public rights of way which ought to be investigated and it would be unreasonable for the Council not to seek to address this fact. If the Council fails to pursue its duty it is liable to complaints being submitted through the Council's complaints procedure, potentially leading to complaints to the Ombudsman. A request for

judicial review could be made with significant costs against the Council where it is found to have acted unlawfully.

Financial Implications

30. 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.
31. Where there are outstanding objections to the making of the Order it must be determined by the Secretary of State. 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. A one-day public inquiry could cost between £1,500 and £3,000 if Wiltshire Council continues to support the making of the Order (i.e., where legal representation is required by the Council) and around £300 to £500 where Wiltshire Council no longer supports the making of the Order (i.e. where no legal representation is required by the Council and the case is presented by the applicant).
32. Where the Council objects to the Order, the Order must still be forwarded to the SoSEFRA 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 31 above.
33. As the case is considering documentary evidence, with no witness evidence to cross examine, officers will request the Order to be resolved by written representations. However, this is subject to other parties' requests and SoSEFRAs decision on how to determine the Order.

Legal Implications

34. 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 he sees it as incorrect or unjust by them. The cost for this may be up to £50,000.

Options Considered

35. Members should now consider the objections received and the evidence to determine whether Wiltshire Council continues to support the making and confirmation of the Order. The making of the Order has been objected to; therefore, the Order must now be submitted to the SoSEFRA for determination and members of the committee may determine the recommendation (which should be based upon the evidence) to be attached to the Order when it is forwarded to the SoSEFRA as follows:
 - (i) The Order be confirmed without modification
 - (ii) The Order be confirmed with modification
 - (iii) Take a neutral stance on the determination of the Order.

- (iv) The Order should not be confirmed

Reason for Proposal

36. Unless the objections and representations are withdrawn the Order must be forwarded to the SoSEFRA for determination.
37. No new evidence has been presented in the objectors' submissions that has not been considered fully by officers during the initial investigation and decision process and subsequent decision report (**Appendix 2**).
38. The documentary evidence in officers' opinion failed to meet the balance of probabilities test to upgrade the status of the route, as discussed in detail at 10-13 of this report and at **Appendix 2**. The evidence did show that, where the route had no recorded width, a width could be taken from the documentary evidence and recorded, hence the making of this Order.
39. The Council's duty remains with supporting the Order based on the evidence it has before it.

Proposal

40. That The Wiltshire Council North Tidworth Path No.11 Definitive Map and Statement Modification Order 2022 is forwarded to the SoSEFRA with the recommendation that it is confirmed as made.

Samantha Howell

Director – Highways and Transport

Report Author:

Craig Harlow

Definitive Map Officer

Appendices:

Appendix 1 - "The Wiltshire Council North Tidworth Path No.11 Definitive Map and Statement Modification Order 2022"

Appendix 2 - Decision Report