

WILDLIFE AND COUNTRYSIDE ACT 1981

THE DEFINITIVE MAP AND STATEMENT FOR THE DEVIZES RURAL DISTRICT  
COUNCIL AREA DATED 1952 AS MODIFIED UNDER THE PROVISIONS  
OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL SHEET ST95SE PARISH OF CHEVERILL MAGNA  
RIGHTS OF WAY MODIFICATION ORDER NO. 16 2011

**Purpose of Report**

1. To:
  - (i) Consider and comment on the evidence and eight objections relating to the above Order to add public rights of way on foot to the Definitive Map and Statement at Great Cheverell.
  - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs and that Wiltshire Council supports the Order.

**Description of the Route**

2. The Order is attached to this report at **Appendix A** and contains a map showing the claimed way which connects public footpath Cheverell Magna 6 and Garston Lane. A location plan is attached as **Appendix B**.
3. The Order route is a grass and earth track bounded by hedgerow to the north-west and an open field to the south-east. The width of the Order route is 2.5 metres in the south-west field and 3.5 metres in the north-east field, with an approximate overall length of 360 metres.

**Background**

4. On 18 March 2009 Wiltshire Council received an application from a member of the public, Brigadier Christie, for an Order to add the route detailed above to the Definitive Map and Statement. The application was supported by the evidence of 27 User Evidence Forms (UEFs) and maps. A summary of the evidence forms is attached to this report as **Appendix C**.
5. The Council has a duty to investigate this evidence and to make an Order if, on the balance of probability, it is either reasonably alleged, or shown, that public rights subsist over the way. As a result, an initial consultation and investigation was conducted between 7 May 2010 and 30 June 2010.

6. A considerable amount of correspondence was received, both in support of, and in objection to, the application.
7. Officers considered all of the evidence available and following a Decision Report (**Appendix D**) an Order was made in June 2011 to add the claimed footpath to the Definitive Map and Statement and the Order was advertised in accordance with the statute. The Order attracted eight duly made objections.
8. Apart from modern aerial photographs there has been no other documentary evidence discovered supporting the application. The application is therefore mainly reliant on user evidence under the application of Section 31 of the Highways Act 1980. Section 31 broadly gives that where a way has been used without interruption by the public 'as of right' for a period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate, then public rights are deemed to have been dedicated. 'As of right' means without force, without permission and without secrecy.

### **Evidence In Support of the Order**

9. The application is supported by 27 witness UEF forms claiming continuous public use covering the relevant period 1988 – 2008. The relevant period is most likely to be the twenty years leading up to when the public rights over the route were brought into question by the erection of a fence and gates in the late summer of 2008 (see **Appendix D, section 11** for brief discussion on when the route was brought into question).
10. Ten of the witnesses claim to have been using the way at the start of the relevant period in 1988. By 2008, 26 witnesses were claiming use (see graph of user evidence in **Appendix C**). Claimed use goes further back than the relevant period with seven of the witnesses claiming to have used the way in the 1970's, with one witness claiming to have used it as far back as 1946.
11. Witnesses indicate that use was open and the landowners must have been aware of the use as walkers use the path from dawn till dusk and workers in the fields have seen people openly using the way, i.e. without secrecy and all witnesses recall seeing other users using the way. All witnesses have stated that they had no permission to use the way, this is disputed by one of the landowner's but he has so far been unable to produce a list of people to whom he has given permission. Use is claimed to have been without force. Therefore, according to the evidence submitted, it would seem that the general use has been 'as of right' which is defined above in paragraph 8.
12. No witnesses can recall seeing any notice on or adjacent to the way during the relevant period sufficient to indicate that the route was not a public right of way and no evidence has been submitted to the contrary.
13. No witnesses recall being challenged during the relevant period and no evidence has been submitted to the contrary.

### **Objections to the Order**

14. On advertising the Order, eight objections were received, they are attached as **Appendix E** and are summarised and commented on as follows:

Name	Nature of Objection	Officer's Comments
<b>Brigadier Rawlings</b>	<p><i>"The path as it currently exists is more than adequate in width for any legitimate use as a pedestrian right of way. If it gets a little overgrown at times, this merely reflects how little use it gets".</i></p> <p>The Brigadier points out that 3.5 metres is unnecessarily wide for a footpath, representing an unwarranted limitation of the landowner's legal right to enjoy his property and asks to reconsider a width of 2 metres. He also points out that the stout fence and gates not only clearly identify the right of way, but also provide protection to users and their pets from cattle or livestock.</p>	<p>Under the Order legislation the width and positioning of the path must be determined through user evidence and cannot be considered with regard to necessity or convenience. Some witnesses claimed a width for the path and a distance of the path out into the field. The proposed measurements were determined by a mathematical average from available witness evidence.</p>
<b>Lady Hawley</b>	<p><i>"I entirely agree with the points made by Brigadier Rawlings"</i></p>	<p>With regard to the fence and gates, safety or effects on the environment or on the community cannot be taken into consideration.</p>
<b>Major N.Haines</b>	<p>Major Haines objection is identical to Brigadier Rawlings objection but asks to reconsider a width of 1.5 metres.</p>	
<b>Mr &amp; Mrs Gammond</b>	<p><i>"We have used the path frequently over the years, particularly when walking our dogs and have never felt that it should be any wider. The fence down the open field side is perfectly adequate and sufficient to protect walkers from livestock, should there be any".</i></p>	<p>The level of use outside of the relevant period is not an applicable consideration under the Order legislation.</p>
<b>Mr V. Gaiger</b>	<p><i>"I wish to Object to the making of the Order, the proposed width of the footpath &amp; the stated distance of the footpath centre from the edge of the field".</i></p>	
<b>Mr M. Gaiger</b>	<p>Ditto</p>	
<b>Mr B. Beddow</b>	<p>Mr Beddow points out that the proposed positioning of the footpath would make it necessary for Mr Kavanagh to move that fencing he has already generously put in place.</p> <p><i>"The width of 3.5 metres is just not consistent with other footpaths in the area".</i></p> <p><i>"I do not believe that 'on the balance of probabilities' a footpath exists".</i></p>	<p>This is not a relevant consideration under the Order legislation</p> <p>The existence or otherwise of a footpath will now be determined by the Secretary of State.</p>
<b>Mr Kavanagh</b> (Principle Objector and Landowner).	<p><i>"I write to object to the Order in respect of the existence of a footpath itself, the proposed width and the proposed distance from the edge of the field".</i></p> <p><i>"In respect of the existence of a right of way we do not feel that you have come to the right conclusion in your consideration of the prolonged periods each year when access was not available. We do not feel that the case law quoted is sufficiently relevant enough for you to rely on the conclusions you now draw from it in this instance".</i></p>	<p><i>'The interruption must be with intent to prevent public use of the way.<sup>28</sup> It will not be sufficient if the interruption is shown to have been for some other purpose...'</i> (Rights of Way A Guide to Law &amp; Practice (4<sup>th</sup> Edition) Ridall, J and Trevelyan, J pg.46 para 3)</p> <p>In Lewis v Thomas [1950] 1 KB 438 it was held that the locking of a gate across a right of way at nights to keep livestock in (and not with the express intention to prevent public rights being established) did not constitute an interruption of use (Sauvain, S (Q.C.) Highway Law, 4th Edition p 61 section 2-70 Sweet &amp; Maxwell).</p> <p>The Department of Food &amp; Rural Affairs (DEFRA) 'Rights of Way Advice Note 15'</p>

		<p>states that it is DEFRA’s opinion that closures of rights of way during foot and mouth outbreaks do not constitute an “interruption” of use as intended by s.31 of the 1980 Act, because unlike wartime requisitioning of land, the landowner’s ability to dedicate is not removed. Similarly, in the Great Cheverell case, although the closures were for other reasons, i.e. the grazing of sheep, the landowner’s ability to dedicate was not removed. When Wiltshire’s rights of way were closed for the foot and mouth outbreak in 2001 it was for a longer period of time than the period closed off for grazing. DEFRA goes on to say that ‘Over a period of 20 years or more there may well be periods when, for a variety of reasons, a way has not been used’.</p> <p>Further to these arguments, some witnesses claim to have still used the footpath during the time of sheep grazing.</p> <p>The correct platform to argue if “interruption” as intended by s.31 of the 1980 Act has taken place is at public inquiry where all evidence can be tested by cross examination.</p>
	<p><i>“With regard to the width and positioning of the path we can only comment that there is no mathematical conclusion to be drawn in support of this from the evidence sent to us to date....Equally the evidence put forward itself suggests that walking took place further away from the edge of the field mainly due to the condition of the boundary. This does not appear to have been properly taken into account”.... “We would also comment that most of the evidence upon which the Council have relied especially in regard to width and positioning are based on a relatively short time period i.e. post 2001 to presumably when the fence was erected...in 2008...The evidence prior to that is far less certain indeed most of those quoting earlier years are either silent on the issue of width or state 1m. Certainly the pictorial evidence does not support anything approaching 3.5m”.</i></p>	<p>Of those witnesses that gave a width for the path, a mathematical average was extracted.</p> <p>The pictorial evidence Mr Kavanagh presumably refers to are photographs that are post relevant period.</p> <p>I agree with Mr Kavanagh that the path is some distance out from the edges of the fields and overall, the evidence suggests that the centre line of the path is 3.5 metres from the edge of the lower field and 2.5 metres from the edge of the upper field.</p> <p>There will be chances for both sides to give evidence on the width and positioning of the path before and at the public inquiry, where the inspector has powers to modify the Order in those respects, should he decide to confirm the Order.</p>

The Applicant’s comments on the objections are attached as **Appendix F**.

**Main Considerations for the Council**

15. The Council, as the surveying authority for the County of Wiltshire, excluding the Borough of Swindon, has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Brigadier Christie. Section 53 of

the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.

16. Section 53(2)(b) states:

*“as regards every definitive map and statement, the surveying authority shall: “as from that date (the commencement date), keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event”.*

17. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(i):

*“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows: that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies.”*

18. In considering and determining the application, Wiltshire Council must have regard to ‘*all other relevant evidence available to them*’, as the statute demands.

19. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31 of the Highways Act 1980. The Section states:

*“where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.*

20. The Section provides that where a way has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate the way.

21. The term 'as of right' means without force, secrecy and permission. People using the way must do so openly without damaging the property and not be reliant on being given permission to use the path by the owner of the land over which the path runs.

22. The case of *R. v. Oxford County Council ex parte Sunningwell Parish Council* (1999) considered the issue of public use of a way. Lord Hoffman presiding stated, “...*the actual state of mind of the road user is plainly irrelevant*”, it is immaterial therefore whether the public thought the way was a 'public' path or not. The case concluded that it is no longer necessary to establish whether the users believe they have a legal right to use the land. Instead, it should be shown that use has been without force, secrecy and permission.

23. The use of the way must be without interruption. Once the 20 year uninterrupted use 'as of right' has been proved, the burden then moves to the landowner to show there was no intention to dedicate, i.e. evidence of any overt acts by the landowner

to deter the public from using the way, or conversely to permit the public to do so. Overt acts are covered in Section 31 (3)(4)(5) and (6) below:

24. Section 31 of the Highways Act states as follows:

25. **31. Dedication of way as highway presumed after public use of 20 years**

*(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*

*(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes –  
(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and  
(b) has maintained the notice after the 1<sup>st</sup> January 1934, or any later date on which it was erected.*

*(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.*

*(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.*

*(6) An owner of land may at any time deposit with the appropriate council-  
(a) a map of the land on a scale of not less than 6 inches to 1 mile and  
(b) a statement indicating what ways(if any) over the land he admits to having been dedicated as highways;*

*And, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time –*

*(i) within ten years from the date of deposit*

*(ii) within ten years from the date on which any previous declaration was last lodged under this section,*

*to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.*

*(7) For the purpose of the foregoing provisions of this section, 'owner', in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above 'the appropriate council' means the council of the county, metropolitan district or London Borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.*

*(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an Order making modifications so as to show the right on the definitive map and statement.*

*(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.*

*(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over the land as a highway would be incompatible with those purposes.*

26. The recent appeal case – Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs drew the following conclusion regarding non-intention to dedicate: ...*'Sufficient evidence of no intention on the part of the landowner to dedicate a way as a highway required evidence of overt acts coming to the attention of users of the way'*.
27. It is noted that no witnesses record being aware of overt acts prior to 2008.
28. There have been no Highways Act 1980 Section 31(6) statutory deposits declaring non-intention to dedicate the claimed route deposited with the Surveying Authority during the relevant period. No notice under Section 31(5) has been given to Wiltshire Council during the relevant period (or at any other time).

## **The Order**

29. It is important to note that this Order is made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (see paragraph 17 of this report).
30. Further to the case of R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402 it is clear that an Order may be made under this section by applying one of the following two tests:
  - TEST A: Does a right of way subsist on the balance of probabilities? This requires that there is clear evidence in favour of public rights and no credible evidence to the contrary.
  - TEST B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? This requires that the allegation of public rights is reasonable and there is no incontrovertible evidence to the contrary.
31. The evidence adduced in this case, from both supporters and objectors, forms at least a reasonable allegation that public rights subsist over the ways applied for, hence the Order was made.

32. To confirm the Order the stronger test needs to be applied, that is, essentially that contained within Test A. In *Todd and Bradley v SoSEFRA* [2004] EWHC 1450 (Admin), Evan-Lombe J held that the burden of proof to be applied by the Secretary of State when confirming Orders modifying the Definitive Map and Statement was the civil burden of proof, namely the balance of probabilities.
33. No further evidence, either in support of the Order or in objection to it, has been brought to the Council's attention since the making of the Order and Wiltshire Council must consider whether it considers that, on the balance of probabilities, Test A applies to the evidence (in which case the Order would be supported), whether it considers that, on the balance of probabilities, Test A does not apply to the evidence (in which case the Order would be opposed).

### **Environmental Impact of the Recommendation**

34. Effects on the environment cannot be taken into consideration for an Order decision.

### **Risk Assessment**

35. Risks or safety cannot be taken into consideration for an Order decision.

### **Financial Implications**

36. It is considered that with this case, given the number of objectors and supporters and the need to test the evidence of both, a local Public Inquiry is the most probable route that the appointed Inspector will take.
37. The Council has a duty in law to support Orders where it is considered that on the balance of probability the Order public rights subsist as shown in the Order. Budgetary provision has been made for this.
38. The confirmation would be decided either by written representations, a Hearing or a local Public Inquiry. Written Representations would result in minimal cost to the Council, a Hearing would cost an estimated £850.00 and in the region of £2,500 for a two-day local Public Inquiry which is likely, or higher costs for a longer inquiry.

### **Options Considered**

39. That:
  - (i) The confirmation of the Order is supported as made.
  - (ii) The confirmation of the Order is objected to.
  - (iii) The Council remains neutral as regards confirmation (see **Appendix G**).
  - (iv) The Council supports the Order with the modification that the centre-line of the footpath is 2.5m out from the hedge in Mr Alexander's field and 3.5m out from the hedge in Mr Kavanagh's field (see points 2 and 3 on page 11 of the decision report (**Appendix D**)).



## **Conclusions**

40. The evidence from users shows that on the balance of probabilities the route has been used by the public 'as of right' for a full period of twenty years. Therefore, in accordance with Section 31(1) of the Highways Act 1980 (subject to paragraph 41 below) the way would be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate it.
41. There is some dispute over whether the erection of temporary sheep fencing in the fields, which was sometimes across the way, constitutes an interruption of use. It is Officer's opinion that there has been no "interruption" (as intended by Section.31 of the 1980 Act) of use.
42. There has been no evidence given by objectors that any notices sufficient to rebut the presumption of dedication were in place during the relevant period and no other incontrovertible evidence against deemed dedication has been submitted.
43. There is some dispute over the width of the route and over exactly how far the route is out from the hedge. These points should be determined at local Public Inquiry by the Inspector who can test the evidence under cross examination. The Inspector has powers to modify an Order accordingly, should the need arise.

## **Reason For Recommendation**

44. That, on the balance of probability, the legal criteria for confirmation of the Order have been met namely: *that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates* (see paragraphs 17, 29 and 32 above).

## **Recommendation**

45. That the Wiltshire Council (Sheet ST 95 SE) (Parish of Cheverell Magna) Rights of Way Modification Order No 16 2011 is forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and that Wiltshire Council supports the Order with modification at Public Inquiry.

## **MARK BODEN**

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## **The following unpublished documents have been relied upon in the preparation of this Report:**

Correspondence with landowners, parish councils, user groups, other interested bodies and members of the public