

WILDLIFE AND COUNTRYSIDE ACT 1981
SECTION 53, EBBESBOURNE WAKE NO. 24
RIGHTS OF WAY MODIFICATION ORDER

Purpose of Report

1. To:
 - (i) Reconsider and comment on the objections received following the making of the Modification Order under Section 53 of the Wildlife and Countryside Act 1981 to add a byway open to all traffic (BOAT) at Ebbesbourne Wake.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that the Order be confirmed, subject to the status of the additional way, and be modified from BOAT to Restricted Byway.

Background

2. The Regulatory Committee of the former Wiltshire County Council considered a report on the objections received to the making of the Order to add a BOAT to the Definitive Map and Statement in Ebbesbourne Wake on 12 July 2006 (attached at **Appendix 1**). The Committee resolved:

“To forward the Modification Order made under Section 53 of the Wildlife and Countryside Act 1981, to add a byway open to all traffic at Ebbesbourne Wake, to the Secretary of State for decision, with a recommendation from the County Council that the Order be confirmed without modification.”

3. Pressure of work in the Definitive Map team prevented the Order from being submitted to the Secretary of State. Throughout subsequent months, following the recommended decision, the owner of the land crossed by the BOAT, Mr. G.L. Foyle, questioned the validity of the application. The Green Lane Protection Group commissioned opinion from leading counsel on what constitutes an application which is compliant with Schedule 14 to the Wildlife and Countryside Act 1981 (the 1981 Act). The opinion it received suggested an application of the nature of the one submitted to this Council, seeking this additional BOAT in Ebbesbourne Wake, was not validly made. Defra did not agree with this opinion. Other authorities were also dealing with applications to add BOATs to their respective definitive map in accordance with Defra guidance. It was clear that it would be only a matter of time until the High Court clarified this point of law.

Main Considerations for the Council

4. In April 2008 the Court of Appeal held in the case of R (Warden and Fellows of Winchester College and Humphrey Feeds Limited) v Hampshire County Council that the requirements contained in paragraph 1 of Schedule 14 to the 1981 Act had to be complied with where:

- (i) An application is made to modify a definitive map and statement under Section 53(5) of and paragraph 3 to Schedule 14 to the 1981 Act, and
- (ii) Section 67(3)(a) of the Natural Environment and Rural Communities Act 2006 (the NERC Act 2006) applies.

Where such an application is found to be invalid, rights which are extinguished under Section 67(1) of the NERC Act 2006 are not saved by the provisions of Section 67(3) of the NERC Act 2006. This case is known as the Winchester case.

5. Section 53(5) of the 1981 Act provides:

“Any person may apply to the Authority for an Order under sub-section (2) which makes such modifications as appear to the Authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of sub-section (3), and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this sub-section.”

6. Section 67 of the NERC Act 2006 – Ending of certain existing unrecorded public rights of way states:

“(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement:

- (a) was not shown in a definitive map and statement, or*
- (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.*

But this is subject to sub-sections (2) to (8).

(2) Sub-section (1) does not apply to an existing public right of way if:

- (a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles;*
- (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under Section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense);*
- (c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles;*

- (d) *it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles; or*
 - (e) *it was created by virtue of use by such vehicles during a period ending before 1 December 1930.*
- (3) *Sub-section (1) does not apply to an existing public right of way over a way if:*
- (a) *before the relevant date, an application was made under Section 53(5) of the Wildlife and Countryside Act 1981 (c.69) for an Order, making modifications to the definitive map and statement so as to show the way as a byway open to all traffic;*
 - (b) *before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or*
 - (c) *before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles:*
 - (i) *was reasonably necessary to enable that person to obtain access to the land, or*
 - (ii) *would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.*
- (4) *“The relevant date” means:*
- (a) *in relation to England, 20 January 2005;*
 - (b) *in relation to Wales, 18 May 2005.*
- (6) *For the purposes of sub-section (3), an application under Section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.”*

Sub-sections (5), (7) and (8) do not apply in this case.

7. The principal issue of law before the Court of Appeal was what was meant by “an application made in accordance with paragraph 1 of Schedule 14 to the 1981 Act” within the meaning of Section 67(6) of the NERC Act 2006. For Section 67(3)(a) of the NERC Act 2006 to apply, an application had to have been made in accordance with Section 53(5) of the 1981 Act and all the requirements of paragraph 1, Schedule 14 to the 1981 Act. This means the application had to have been made in the prescribed form, accompanied by a map drawn to the prescribed scale and showing the way to which the application related, and accompanied by copies of any documentary evidence, including statements of witnesses, which the applicant wished to adduce in support of the application. The Court found that these words were expressed in clear and ordinary language and were to be given their plain and ordinary meaning. An application, which was not accompanied by copies of the evidence that the applicant wished to use as proof in support of the application, was not made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

8. The application made under Schedule 14 to the 1981 Act which triggered the making of the Order which is the subject of this report was submitted with a summary of historical evidence and three extracts from small scale county maps. Copies of the documents of key evidential weight were not supplied. Following the judgement of the Court of Appeal of the Winchester Case, the application no longer meets the requirements to justify an exemption from the extinguishment of the right to use a mechanically propelled vehicle on the order route.
9. Although the County Council had previously recommended that the Order which is the subject of this report be submitted to the Secretary of State to be confirmed as made, it has now, in the light of the Winchester Case, to review this recommendation. In a case where the rights to use a mechanically propelled vehicle have been extinguished by the effect of this case law, but where historically a BOAT would have been recorded, a Restricted Byway could be recorded. A Restricted Byway is a way over which the public have a right of way on foot, horseback or leading a horse, together with a right of way for non-mechanically propelled vehicles (for example a horse and carriage).
10. There are five exceptions to the extinguishment of vehicular rights for mechanically propelled vehicles, listed under Section 67(2) of the NERC Act 2006, as set out in paragraph 6 above. Officers have investigated whether or not any of these exceptions apply to the Ebbesbourne Wake Order. No evidence that they do has been provided.
11. The main considerations for the Council, given in paragraphs 12-30 of the report attached at **Appendix 1** are all still relevant. A Highway Authority is entitled to make a Modification Order under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 on the basis that the existence of a highway of a particular kind is “reasonably alleged to subsist”. It was established in the High Court case of Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs in 2004 that confirmation of an Order under Section 53(3)(c) depends on discharging the normal civil burden of proof that such a way subsists on the balance of probabilities. Although vehicular rights can be shown to exist, the rights to drive a mechanically propelled vehicle over the Order route have been extinguished by Section 67(1) of the Natural Environment and Rural Communities Act 2006 and so the Order route should be shown as a Restricted Byway.

Environmental Impact of the Recommendation

12. There are no significant environmental implications arising from the recommendations set out within this report.

Risk Assessment

13. Failure to apply the law correctly in determining applications and Orders under the 1981 Act could lead to the Council being exposed to legal action.

Financial Implications

14. The processing of applications under the 1981 Act is a statutory function of the Council for which budgetary provision is made.

Options Considered

15. Having found that vehicular rights exist on the Order route, the legal tests for making the Order are met. Once an Order has objections made to it, the Council cannot abandon the Order. There is no other option but to forward the Order to the Secretary of State for decision.

Reasons for Recommendation

16. The Order and the modification to be made to it now proposed comply with current legislation.

Recommendation

17. That the Order be forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation it be confirmed, subject to the status of Ebbsbourne Wake 24 being modified to that of Restricted Byway.

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

Correspondence with interested parties