

**WILTSHIRE COUNCIL**

**WESTERN AREA PLANNING COMMITTEE**

**6 NOVEMBER 2013**

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**WILDLIFE AND COUNTRYSIDE ACT 1981**

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

**The Wiltshire Council Parish of Holt (Holt Path No. 71) Rights of Way Modification  
Order 2013**

**The Wiltshire Council Parish of Holt (Holt Path No. 72) Rights of Way Modification  
Order 2013**

**Purpose of Report**

1. To:
  - (i) Consider the evidence and duly made objections relating to the above Orders adding public footpaths to the Definitive Map and Statement at Holt Manor, Holt.
  - (ii) Recommend that the Orders be submitted to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that they be confirmed.

**Description of the Routes**

2. The Orders are attached to this report at **Appendices A and B** and contain maps showing the claimed routes.
3. The routes lead across farm land to the south of Holt Manor and link a minor road with existing recorded public footpaths.

**Background**

4. On 1 November 2012 Wiltshire Council received two applications for Orders to modify the Definitive Map and Statement by adding two footpaths over land at Holt Manor. The applications were numbered 2012/07 and 2012/08 with 2012/07 supported by eleven user evidence forms (UEFs) and 2012/08 supported by seven UEFs.
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 ways. Pursuant to this duty, consultations and investigations were carried out between 26 March and 3 May 2013. This was extended for a short period at the request of the landowner.

6. Correspondence was received, both in support of, and in objection to, the application.
7. Officers considered all of the evidence available and on 24 June 2013 a decision was made to make Orders. The Decision Reports are appended here at **Appendices C and D**.
8. The Orders were made on the basis that it is reasonably alleged that Section 31 of the Highways Act 1980 applies. Broadly, this gives that where a right of 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.
9. In deciding to make the Order the Council was bound by the case of R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P and CR 402 which gives that the Council must apply one of 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 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 that there is no incontrovertible evidence to the contrary.
10. Test B is the weaker of the two tests and was applied to make this Order.
11. The Orders have been advertised in accordance with the regulations and objections to them have been received. There are three objections to the Order for Path No. 72 (application number 2012/07) and five objections to the Order for Path No.71 (application number 2012/08).
12. The Orders must now be forwarded to the Secretary of State for determination. The tests for confirmation of the Orders that will be applied by The Secretary of State will be Test A; i.e. that, on the balance of probabilities, a right of way subsists.

### **The Evidence in Support**

13. Eleven UEFs regarding order route 72 and seven UEFs regarding order route 71 have been adduced. A summary of this evidence is appended at **Appendices C(A) and D(A)**.
14. Photographs showing some people using one of the claimed paths were additionally submitted.
15. UEFs were all accompanied by a map showing where the witnesses had walked.

16. Witnesses all claim to have used the routes without challenge until fences were erected in 2011 by the new owner of Holt Manor. This challenge precipitated the application and has been taken as the date that the use was called into question.
17. If 2011 is taken as the date that the public use was called into question then the relevant period for the consideration of 20 years use is between 1991 and 2011. All users have used the routes within this 20 year period, without interruption to use, challenge or permission.
18. Nearly all of the witnesses for both Orders have used the routes for the entire 20 year period.
19. The land has been owned by the Spreckley family, Mr Clarke, Mr Fisher and Mr Harris during this period. No evidence has been received from Mr Spreckley but Mr Clarke has submitted that he was aware that the public used the claimed routes when he owned the land between 1996 and 2002.

### **The Evidence Against the Orders**

20. Prior to making the Orders, evidence was adduced by the current landowner. This can be found at Section 5.1 of the Council's Decision Reports at **Appendices C and D**.
21. Nothing in this evidence was considered incontrovertible (i.e. not able to be denied or disputed) and capable of defeating Test B referred to at paragraph 9 above, hence, the Orders were made.
22. The Orders were advertised from 1 August 2013 to 13 September 2013 and attracted a total of eight duly made objections.
23. The objections are appended in full at **Appendix E**.
24. The basis of the objections is that no-one had seen people using the claimed routes. These included Mr Hillier, who farmed the land for an undisclosed period ("in all the years"), and the estate manager, for the period 2001 to 2011, Mr Holmes. Additionally, three users of the adjacent definitive map routes claim never to have seen anyone on the claimed routes, though one objector (Mrs Oliver) did not start walking in the area until after the fence was erected and use ceased.
25. Mr Fisher (the owner of the land from 2002 to 2011) states that "there were times when we had to reprimand some walkers who were not following the appropriate route".
26. Only some aerial photographs show a trodden route (the 2006 photo shows a line corresponding to the route of Path No. 72 where it cuts across the corner of the field) but other images show either no route or a trodden route in a different place.

## **Main Considerations for the Council**

27. 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 applications made by Holt Parish Council. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.

28. 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.”*

29. 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.”*

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

31. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31(1) 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.”*

32. 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.

33. 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.

34. 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.
35. 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 their use has been without force, secrecy and permission.
36. 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.
37. Section 31 of the Highways Act states as follows:

**“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 1 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."*

38. The Supreme Court (House of Lords) recently considered two cases which hinged on the intention to dedicate and the application of Section 31 of the Highways Act 1980. In the judgement delivered 20 June 2007 [2007] UKHL 28 Lord Hoffman reasoned:

*“It should first be noted that s.31(1) does not require a tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be a difficulty in satisfying such a requirement without any evidence at all. It requires ‘sufficient evidence’ that there was no intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner’s consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J, in Billson’s Case [R v S of S for the Environment ex p. Billson [1999] QB374 it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.”*

### **Safeguarding Considerations**

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

### **Public Health Implications**

40. Considerations relating to any public health implications of the making and confirmation of an Order made under s.53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be confirmed based on the evidence alone.

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

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

### **Risk Assessment**

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

### **Financial Implications**

43. It is considered that with this case, and the need to test the evidence of witnesses from both sides, a Public Inquiry is unavoidable. However, the decision whether to determine an Order by Written Representations, a Public Hearing or a Public Inquiry rests with the Secretary of State.
44. The Council has a duty in law to support Orders where it is considered that on the balance of probability public rights subsist as shown in the Orders. Budgetary provision has been made for this duty.
45. It is rare for a Council to object to an Order, though it may do so. An example of this may be when an Order has been made and during the advertisement period evidence against the Order is brought to its attention that is incontrovertible or compelling. This would attract a similar cost to supporting an Order and could be in the region of £3,000 to £10,000.

## **Options Considered**

46. That:
- (i) The confirmation of the Orders is supported as made.
  - (ii) The confirmation of the Orders is supported with modifications.
  - (iii) The confirmation of the Orders is objected to.

## **Reasons for Recommendation**

47. The application adduces evidence that shows that on the balance of probability the routes have been used by the public at large for a period of at least 20 years without interruption in a manner that is 'as of right'.
48. The objectors to the Orders dispute this evidence on a number of grounds.
49. Wiltshire Council is not aware of any incontrovertible evidence to defeat the application of s.31(1) HA80 and has no evidence of any statements or deposits being made in respect of s.31(5) and (6) HA80 or of any signs or notices being placed to satisfy s.31(3) or (4).
50. There is no requirement to demonstrate an intention to dedicate with the application of s.31(1) HA80. It is for the landowner to demonstrate a *lack* of intention to dedicate the way as a public right of way to the relevant audience and Wiltshire Council has no evidence before it that this was done.
51. The case against the Order has been made on the basis that there has been little or no use of the ways. This is based on the evidence given by the tenant farmer (for some of the time), the estate manager (2001 - 2011), the landowner (2002 - 2011), users of adjacent paths and the lack of tracks shown on aerial photographs.
52. This must be weighed against the evidence of use contained within the UEFs and the statement of the landowner (Mr Clarke 1996 – 2002) and the appearance of a track on the 2006 aerial photograph coincident with Path No 72.
53. The appearance or non-appearance of a track on an aerial photograph is not evidence of great weight (as any track may be made by animals or farm workers or conversely the time of year and grazing regime could mean that a track did not show up).
54. However, it is clear that it will be the evidence given by witnesses from both sides that determines this case and without the benefit of cross examination of these witnesses this committee is undoubtedly disadvantaged.
55. The decision must be whether, on the balance of probabilities, s.31(1) is satisfied and officers consider that the UEFs form a small but cogent body of evidence that cannot be ignored.



56. Given that the use was not conducted in secret, light use would be easy to miss. A farmer may only tend his stock at a remote location (the farm house is not here) when they are on the land and even then for a short period of the day. Because of the fall of the land the routes are hidden from neighbouring properties and being relatively short only take a few minutes to traverse. Additional to this there are two existing definitive footpaths crossing the land and it would not be easy for someone to notice whether people were on a definitive line or not. It is suggested that Mr Hillier's building company, who worked at the Manor and did not see anyone using the routes, would fall into this category. They would also have been heavily pre-occupied with what they were doing for the majority of the time they were on site
57. It is accepted that whilst evidence from both sides would benefit from cross examination, it is considered that on the balance of probability s.31(1) of the Highways Act 1980 has been satisfied.

### **Recommendation**

58. That the Wiltshire Council Parish of Holt (Holt Path No. 71) Rights of Way Modification Order 2013 and the Wiltshire Council Parish of Holt (Holt Path No. 72) Modification Order are forwarded to the Secretary of State for Environment, Food and Rural affairs for determination with the recommendation that the Order be confirmed.

### **MARK SMITH**

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### **Appendices:**

Appendix A - The Wiltshire Council Parish of Holt (Holt Path No. 71) Rights of Way Modification Order 2013 (*Pages 35-38*)

Appendix B - The Wiltshire Council Parish of Holt (Holt Path No. 72) Rights of Way Modification Order 2013 (*Pages 39-42*)

Appendix C - Decision Report Application 2012/07 (Holt Path No. 71) (*Pages 43-66*)

Appendix C(A) - Evidence Summary Application 2012/07 (*Pages 67-70*)

Appendix D - Decision Report Application 2012/08 (Holt Path No. 72) (*Pages 71-96*)

Appendix D(A) - Evidence Summary 2012/08 (*Pages 97-98*)

Appendix E - Objections to the Orders (*Pages 99-112*)

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

Correspondence with Parish Councils, user groups, other interested bodies and members of the public