

WILDLIFE AND COUNTRYSIDE ACT 1981

**WILTSHIRE COUNCIL HEDDINGTON 5 (PART) RIGHTS OF WAY
MODIFICATION ORDER 2014**

Purpose of Report

1. To:
 - (i) Consider a Definitive Map Modification Order (DMMO) which, if confirmed, will record the width of a section of footpath Heddington No. 5 (see **Appendix 1**).
 - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination and that Wiltshire Council supports the confirmation of the Order as made.

Description of the Route

2. Footpath Heddington No. 5 is a footpath leading from the Heddington Wick to Heddington Road (C.247) in a north-easterly and easterly direction to join footpath No. 4, north of Ivy Inn.
3. Although the path leads predominantly across fields, the short section near the C.247 leads between fenced and hedged boundaries.

Background

4. The route was claimed by the Parish Council in 1950 and added to the Definitive Map and Statement as a footpath in 1953. Reviews of the Definitive Map occurred in 1958 and 1972 (and post 1981 by continual review). Heddington footpath No. 5 has not been altered since its initial recording.
5. In March 2012 Wiltshire Council received an application to record the section of the path nearest to the C.247 as a byway open to all traffic. The Council was unable to consider this application within the statutory time frame of one year (it has over 180 of these applications outstanding) and the applicant appealed to the Planning Inspectorate to make Wiltshire Council determine the application.
6. In July 2013 The Planning Inspectorate directed Wiltshire Council to determine the application by the end of July 2014 (see **Appendix 2C**).

7. Officers of the Council have considered all relevant evidence available to them and have refused the application to record the short section of footpath No. 5 as a byway open to all traffic. The Council's decision report in this matter is at **Appendix 2**.
8. Officers considered there was an insufficiency of evidence to support that public vehicular rights subsisted over the application route and the application was refused.
9. However, where the Council finds evidence that shows that on the balance of probability the Definitive Map requires amending, it must, by order, proceed with that process. As a result of evidence investigated (see **Appendices 2, 2A and 2B**) it was considered that the public rights extended over the entire width of the route defined by the hedge and fenced boundaries and an Order was made to record the extent of public rights over that section (see **Appendix 1**).
10. The Order was duly advertised and has attracted one representation in support and one objection. As a result, unless these are withdrawn, Wiltshire Council may not proceed and confirm the Order. The Order must now be forwarded to the Secretary of State for Food, Environment and Rural Affairs, who, through the offices of the Planning Inspectorate, will determine the Order.

Main Considerations for the Council

The statutory requirements

11. In considering a DMMO made under Section 53 of the Wildlife and Countryside Act 1981 the Council must only consider the evidence available to it and may not consider matters such as desirability, need, the environment, suitability or health and safety.
12. 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 evidence initially adduced with the application and any other relevant evidence available to it. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
13. 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.”
14. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(iii):

“(c) 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.

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

16. Section 32 of the Highways Act 1980 permits the Council to consider historical evidence:

"32. A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified, by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

17. It is necessary for the Council to decide whether it considers that the evidence investigated continues to support that the public's right to pass and repass on foot extends across the entire width of the enclosed section of Heddington No. 5. The legal test is the balance of probability. A full report on the evidence investigated can be found at **Appendix 2**.

The Representation

18. This was made by the Wiltshire and Swindon Area Ramblers and states:

"On behalf of the Ramblers I support this Order on the grounds that it is in the public interest to have the footpath width accurately recorded on the definitive statement. This is in line with the duty of the Council under s.53(2) the Wildlife and Countryside Act 1981 to keep the Definitive Map under continual review."

The Objection

19. This was made by the adjoining property owner (The Coach House) and applicant for the application to record this section of path as a byway open to all traffic.

"1. A DMMO cannot lawfully change the start Point of a footpath.

2. This footpath starts and has always started at the point B on your Order Plan as per ALL OS maps from 1886 up to being 1st recorded on the DM and statement in 1953 and for decades afterwards. (2 excerpts from OS maps dated 1886 and 1961 provided).

3. In law a footpath must always start at the original 'Start Point'. A DMMO or Diversion Order cannot lawfully change this Start Point.

4. *The highway coloured purple on the Order Plan is not a footpath it is a Public Vehicular Way – this point is the subject of an imminent appeal which is to be submitted in 2 weeks.*
5. *The Order Plan is based on an out of date OS map which has also changed significantly.*
6. *The measurements you have included fail to record the width of the narrowest point – that at the front right hand corner of the Industrial building. This is essential to properly record the extent of the road.*

I require this inaccurate and unlawful DMMO be submitted to the Secretary of State for his determination if not first withdrawn by you.”

Comments on the Objection

20. Point 1: The purpose of a DMMO is to modify the Definitive Map. Any way shown in the Definitive Map is without prejudice to the existence of any higher or other right.
21. Point 2: The Definitive Map and Statement has always recorded the footpath as starting at the road and provides conclusive evidence in law of what is shown therein (s.56 Wildlife and Countryside Act 1956). Although Ordnance Survey maps show a path labelled “F.P.” commencing from a point north of the road, this is a function of the O.S.’s instructions to surveyors rather than a recording of public rights. The purpose of OS maps is to accurately record topography and not public rights and all Ordnance Survey maps carry a disclaimer relating to public rights and the representation of any road or track. It is the purpose of the Definitive Map to accurately record public rights and it is this document that is conclusive in law. Full details of both Definitive Map procedures and Ordnance Survey representation may be found at **Appendix 2**.
22. Point 4: An appeal against the Council’s decision in respect of the byway open to all traffic has now been filed with the Planning Inspectorate. This is irrelevant to this procedure.
23. Point 5: The Order is based on historical evidence relating to the width of the highway. In more recent times boundaries have changed at the north-eastern end of the enclosed section and there is less evidence to support that the full highway width extends to the section at the most easterly extent shown on maps today. It is therefore considered better to use an older map for the Order Plan.
24. Point 6: Representing the width in purple fully demonstrates the extent of the public right over the varying width of this path and is in line with the Planning Inspectorate’s Advice Note 16. The Advice Note does not recommended including reference to walls, buildings and so on as these features may change.
25. Once a DMMO is made there is no power to withdraw or abandon it and it must be forwarded to the Secretary of State for determination.
26. It is noted that the objector considers that the public right does extend across the full highway width but disagrees with the status recorded in this Order.

Safeguarding Considerations

27. Considerations relating to safeguarding anyone affected by the making and confirmation of an Order made under Section 53 of the Wildlife and Countryside Act 1981 are not relevant considerations for this Order.

Public Health Implications

28. Considerations relating to any public health implications of the making and confirmation of an Order made under Section 53 of the Wildlife and Countryside Act 1981 are not relevant considerations for this Order.

Environmental Impact of the Recommendation

29. No environmental impact has been identified and environmental considerations are not relevant to these Definitive Map processes.

Risk Assessment

30. There is no risk associated with processing this Order in accordance with the 1981 Act as it is the Council's duty to do so.

Financial Implications

31. It is the Council's duty to maintain the Definitive Map and Statement and financial provision has been made for this.
32. Once the Order has been sent to the Secretary of State the Council will be advised by the Planning Inspectorate on how they wish to determine it. They may decide to use written representations (in which case there is no additional cost for the Council), to hold a local public hearing (in which case a small cost covering room hire of around £300 would be incurred) or a public inquiry (in which case costs arising from room hire would be incurred along with costs for legal representation of around £5,000).
33. Failure to adhere to process or acting in an unreasonable manner could result in an application being made against the Council for judicial review. Costs relating to judicial review processes can be in excess of £50,000.

Options Considered

34. To:
- (i) Forward the Order to the Secretary of State with the recommendation that it is not confirmed.
 - (ii) Forward the Order to the Secretary of State with the recommendation that it be confirmed with modifications.
 - (iii) Forward the Order to the Secretary of State with the recommendation that it be confirmed as made.

Reasons for Recommendation

35. No further evidence has been adduced to alter the Council's decision when it made the Order and accordingly it is appropriate that the Council supports the confirmation of the Order as made.

Recommendation

36. That the Wiltshire Council Heddington 5 (part) Rights of Way Modification Order 2014 be sent to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed as made.

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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

Appendices:

Appendix 1 - Order

Appendix 2 - Decision report

Appendix 2A - Appendix A to decision report – Investigation dated 10.08.11

Appendix 2B - Appendix B to decision report - Investigation dated 06.09.11

Appendix 2C - Appendix C to decision report – Inspector's Direction