

**HAMPSHIRE COUNTY COUNCIL****Decision Report**

<b>Decision Maker:</b>	Regulatory Committee
<b>Date:</b>	8 January 2014
<b>Title:</b>	Application for a Definitive Map Modification Order to record Damerham Footpath 20 and Rockbourne Footpath 31 as a Byway Open to All Traffic
<b>Reference:</b>	5473
<b>Report From:</b>	Director of Culture, Communities and Business Services

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## **1. Executive Summary:**

- 1.1. An application to record Damerham Footpath 20 and Rockbourne Footpath 31 as a byway open to all traffic on the Definitive Map was made on 29 July 2002. This application was investigated and a report brought to the Regulatory Committee on 27 June 2007. That report recommended that a byway open to all traffic should be recorded on the Definitive Map over Damerham Footpath 20, a restricted byway over Rockbourne Footpath 31, with an additional byway open to all traffic recorded over the route of Martin Footpath 16, for which evidence had been found during the investigation.
- 1.2. A second report was brought to this Committee, on 3 September 2008. This reconsidered the first report in the light of a decision of the Court of Appeal on a separate case which had a bearing on the view of the officers in relation to the exemptions contained in the Natural Environment and Rural Communities Act 2006, as they applied to this application. This resulted in the original Regulatory Committee decision being rescinded and two orders for restricted byways over all three footpaths. The Orders drew objections, which were heard at a public hearing on 25 January 2011. The Inspector decided to confirm the change in status for Damerham Footpath 20 and Rockbourne Footpath 31, but did not confirm the change for Martin Footpath 16. The confirmation order was advertised, and drew further objections. These objections were heard at the High Court, on 7 June 2011, and the order was quashed by consent, in that the inspector had acted outside her powers. The effect of the High Court decision is to return the applications for Damerham Footpath 20 and Rockbourne Footpath 31 to this Committee for redetermination. Legal advice has been sought and, on the strength of the arguments set forward in this advice, it is recommended that the application to record Damerham Footpath 20 and

Rockbourne Footpath 31 on the Definitive Map as a byway open to all traffic should be refused.

## **2. Legal framework for the decision:**

### 2.1. WILDLIFE AND COUNTRYSIDE ACT 1981:

s.53 Duty to keep definitive map and statement under continuous review:

(2) As regards every definitive map and statement, the surveying authority shall:

(b) .... keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] 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.

(3) The events referred to in sub-section (2) are as follows: -

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

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.

### 2.2. PRESUMED DEDICATION AT COMMON LAW:

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

### 2.3. NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006:

s.67 Ending of certain existing unrecorded public rights of way:

(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 subsection (2) –

(2) Subsection (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<sup>st</sup> December 1930

### **3. Claimant:**

3.1. The application was made by Mr. D. Tilbury, on 29 June 2002.

### **4. Landowners:**

4.1. Viscount Folkestone of Longford Castle, Salisbury.

4.2. F. Wallis and Son of Down Farm, Rockford.

4.3. Mr. C. de Pas of Knapp Barrow Farm, Martin.

### **5. Background to the claim:**

5.1. Mr. Tilbury submitted his claim in 2002, and the application was investigated in 2007.

5.2. This report is concerned with historic and documentary evidence. The investigation resulted in a report to the Regulatory Committee on 27 June 2007, attached at **Appendix 1**. This recommended that an order be made to modify the Definitive Map to show a byway open to all traffic over Damerham Footpath 20, a restricted byway over Rockbourne Footpath 31 and a restricted byway over Martin Footpath 16. Before an Map Modification Order could be made, a case in the Court of Appeal showed that officers' view, that a clause (s.67(3)(a)) in the Natural Environment and Rural Communities Act protected the motorised vehicular rights over Damerham Footpath 20 from the effects of that Act, was wrong. This led to a second report to the Committee, dated 3 September 2008 (at **Appendix 2**), requesting that the Members' decision of 27 June 2007 be rescinded, in so far as it related to Damerham Footpath 20 and a small part of Rockbourne Footpath 31. However, following the discovery of evidence showing that the Definitive Map and Statement required amendment, Members were asked to resolve to make an Order under section 53(2) of the Wildlife and Countryside Act 1981 to record Damerham Footpath 20 and part of Rockbourne Footpath 31 as a restricted byway, which they did.

5.3. Two Orders were made on 4 June 2009, one covering Damerham Footpath 20 and Rockbourne Footpath 31, and the other Martin

Footpath 16. Both were for restricted byways. During the notice period, two objections were received, and the Planning Inspectorate decided to resolve these by the holding of a local public hearing.

- 5.4. The hearing, on 25 January 2011, examined all the issues, and a decision letter was issued by the Inspector on 9 March. The inspector confirmed the order for Damerham Footpath 20 and Rockbourne 31, but refused to confirm the order for Martin 16. The confirmation order for Damerham and Rockbourne was advertised, and an objection was made to the High Court on behalf of the Viscount Folkestone and Mr. Wallis. The grounds were errors of law in the Inspector's decision, namely: incorrect interpretation of inclosure legislation and/or misapplication of presumption of regularity; as to inclosure legislation and *Cubitt v Lady Maxse*; the fairness of the Inspector taking her own evidence as to the route of historic carriageway in Rockbourne without consultation with the parties; *Wednesbury* unreasonableness; the Inspector's factual finding as to the route of historic carriageway in Rockbourne.
- 5.5. The defendants, The Secretary of State for Environment, Food and Rural Affairs, conceded that the order decision should not be allowed to stand, because it had acted unfairly, and the Map Modification Order was quashed by a consent order dated 7 June 2011.
- 5.6. The effect of this quashing order is that the application still requires to be determined.
- 5.7. On 22 May 2012, instructions were given to Counsel (Vivian Chapman QC) to provide advice as to the strength of the evidence, and was furnished with the reports and statement of case from the hearing, along with submissions by the objections. Counsel's advice is discussed in section 7.

## **6. Issues to be decided:**

- 6.1. The issue to be decided by this Committee is whether there is evidence to show, on a balance of probability, that higher public rights exist over the recorded public on route A-B-C as shown on the attached plan.
- 6.2. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence).
- 6.3. Historic and documentary evidence has been examined to see whether the past history and use of the paths points to them having footpath, bridleway or vehicular rights as a result of dedication in the distant past. Any such rights are not lost merely through disuse. Unless stopped up by due process of law any rights previously dedicated will still exist, even

if they are now neither used nor needed (subject to any statutory extinguishment under Natural Environment and Rural Communities Act 2006). This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficiently cogent evidence to justify a change to the definitive map and statement. The County Council is under a duty to record such rights as are found to exist.

- 6.4. Evidence forms and statements taken from those who have used the path or have knowledge of it in living memory can show that higher rights have been acquired as a result of a recent dedication at common law, or a deemed dedication under s.31 Highways Act 1980. It may not be necessary to examine this type of evidence if the historic and documentary evidence shows that higher rights were dedicated in the past and still subsist, although the user evidence may add credibility to the earlier evidence of dedication. This type of evidence is also useful in determining the width of the path.
- 6.5. The burden of proof in these matters is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive before a change to the definitive map can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, Members should make an order so that the evidence can be tested at a public inquiry. However, this is not a step which should be taken simply to avoid making a difficult decision.
- 6.6. The originals of many of the documents referred to in this report are only available in public record offices, but copies, transcripts or tracings of most documents are available for inspection in the offices of the Countryside Access Team, as are witness evidence forms and statements. Members are invited to inspect these, or the originals, when considering this report.

## **7. Counsel's advice:**

### **7.1. Problems to be addressed in the advice**

Counsel was asked to address the following issues:

- the effects of the '*Cubitt v Maxse*' legal decision cited by the objectors, where there was a pre-existing pre-inclosure route. [At Damerham, the public carriage road set out was described as '*near its present track through and over Knoll Down to its usual entrance into the parish of Rockbourne*'.]
- the significance of a lack of a Justices' Certificate following the setting out and making up a public carriage road at inclosure.
- the effects of the diversion of a public footpath, particularly of stopping up all recorded and unrecorded public rights on the former route in perpetuity, or whether they are transferred to the new route and lying dormant?
- The application of the presumption of regularity.

7.2. Cubitt v Maxse and its effect

- 7.2.1 Counsel examined the maps and other documents listed in the investigation, and finds that some documents support the existence of the Order route in Damerham before the inclosure, and others do not. Counsel concludes that, on balance, there was *'physically a route in the approximate position of the order route'*, on the Wiltshire map (Damerham was in Wiltshire until 1895). Counsel concludes that there is *'no substantial evidence that it was a public right of way save that it was a through route joining the Damerham/Tidpit road with the Salisbury/Poole road'*, though there is *'some evidence that it was a vehicular route'*.
- 7.2.2 The South Damerham Inclosure Award of 1830 was examined by Counsel. He notes that *'there is evidence that the inclosure commissioners followed the statutory procedure concerning the setting out of public carriage roads'*, which include the Order route marked *'No. 4 Damerham and Salisbury Road'*.
- 7.2.3 In *Cubitt v Maxse* (1873), the defendant was sued by the plaintiff for trespassing on the route of a public road set out in an inclosure award incorporating the 1801 General Act. The defendant used the defence that she was exercising her public right to use the road, which had been claimed by the plaintiff through adverse possession. The road had been set out in the award and fenced, but never made up in accordance with the procedure set out in the 1801 Act, which required a justices' certificate. In this case, the court held that the road did not become a public right of way because it was set out, but only when made up and certified, thus rejecting an argument that certification was *'only to do with public maintenance of the road'*. Counsel also comments that none of the cases he has examined *'suggest that it can be presumed that a justices' certificate was issued regardless of whether or how the award was subsequently implemented'*. It is the opinion of Counsel that the decision in *Cubitt v Maxse* *'is clear that the road becomes a public highway only when it is made and certified by the justices'*. Counsel does not agree with a submission that this case does not apply where there is a pre-existing public highway, set out in an inclosure award. However, he does say it is *'very arguable...that the pre-existing public highway is not extinguished until the new highway set out under the inclosure award is made up and certified. It would be very odd and inconvenient if the pre-existing right of way was extinguished before the new right of way came into effect, leaving an interregnum of uncertain length when there was no public right of way at all'*. Further, he says it is consistent with the reasoning in *Cubitt v Maxse* that *'an inclosure road was not "set out and made" for the purposes of s.XI of the 1801 Act until it was made up and the justices' certificate was obtained'*.
- 7.2.4 On the *Cubitt v Maxse* question, Counsel suggests that, if the Order route had been a public road before the award, he *'would accept that it was not extinguished if the public carriage way set out by the 1830 award was never made up, repaired and certified'*. He agrees with the Inspector that the *'pre-inclosure evidence, although establishing that the*

*order route existed as a physical feature on the ground before inclosure, falls short of proving that it was a public vehicular right of way.*

### 7.3 Significance of Justices' Certificates

7.3.1 The submissions to the hearing discussed whether the presumption of regularity would allow it to be presumed that a justices' certificate was issued, even though none could be found in the archives. While Counsel considers that *'it is not always necessary to produce a justices' certificate in order to establish the creation of a public right of way by an inclosure award'*, it may be possible to infer that one has been issued if it was in fact made up as a public vehicular road, and was subsequently used as such by the public. Counsel takes the view that *'the application of evidential presumptions is rarely helpful'*. He sees the issue as *'simply whether it is more probable than not that the order route within Damerham was **not** fully and sufficiently formed, completed and repaired and so certified and declared by the justices'*. Cited to support Counsel's view are the following evidence points:

- No justices' certificate has been produced.
- There are existing certificates for two of the other public carriage roads set out in the Damerham inclosure award 1830.
- In 1822 only the first 4 chains of the Order route are recorded as public highway.
- The 1871 OS map shows most of the allotments unfenced, the route went across open downs classified as pasture and there was no significant physical route across Rockbourne to meet it.
- The handover map does not show the order route in Damerham as a public highway.
- There is no direct evidence of maintenance as a public vehicular right of way.

In favour of the contrary view:

- Maps of 1835, 1846 (tithe) and Church Commissioners' maps show the route going to Salisbury, though none of these maps were specifically designed to show the highway network and appear to be based on the inclosure map.
- There is no evidence that the surveyor suffered the £20 forfeiture for failing to comply with section 1X of the 1801 Act.

On balance, Counsel considers that the evidence *'points to the fact that the order route in Damerham was never fully made up and certified'*.

### 7.4 The effects of the 1988 diversion of part of Rockbourne Footpath 31

7.4.1 Counsel begins by quoting section 116 of the Highways Act 1980, under which, if *'it appears to a magistrates' court...that a highway...can be diverted so as to make it nearer or more commodious to the public, the court may by order authorise it...to be so diverted'*. Part of Rockbourne

Footpath 31 was diverted by magistrates in 1988, and there is apparently no authority on this point. Counsel lists the alternatives rehearsed in the public hearing material. It is his view that *'the only sensible answer is that all rights are transferred to the new route. All other answers produce inconvenient and irrational results. Section 116 authorises the justices to divert "a highway" and not particular rights over a highway'*. If this reasoning is accepted, Counsel takes the view that the justices diverted all highway rights to the new route and, though the order of 1988 refers to the highway as Rockbourne Footpath 31, in the context of the statutory authority conferred by section 116, this reference must be read as being to the highway on the route of Rockbourne Footpath 31.

7.4.2 It is therefore the conclusion of Counsel that *'if the relevant stretch of Rockbourne FP31 was a public vehicular right of way, the effect of the 1988 order was to extinguish all highway rights over the old route and to render the new route a public vehicular highway'*.

#### 7.5 The effect of the presumption of regularity

7.5.1 Counsel's view having read the Inspector's Order Decision is that *'she did **not** apply a presumption of regularity and held that the 1830 inclosure award did **not** create a public vehicular right of way over the order route in Damerham'* and agrees with her on this point. (See letter written by Knights Solicitors, dated 28 April 2011, at **Appendix 3**).

### **8. Counsel's opinion of the historic documentary evidence available to the hearing:**

- 8.1. Counsel agrees with the Inspector that there is enough pre-inclosure evidence to establish that *'there was physically a route on the ground corresponding with the order route but insufficient to establish that it was a public vehicular right of way'*.
- 8.2. Had the Order route been a public vehicular right of way before the Rockbourne inclosure award of 1802, that section of it in Rockbourne would have been extinguished by the inclosure award for that parish.
- 8.3. The available evidence from the period between the Rockbourne inclosure award and that for Damerham is *'sufficient that the order route existed as a physical feature on the ground but not that it was a public vehicular right of way'*.
- 8.4. Counsel is of the opinion that the section of the Order route in Damerham was not converted to a public vehicular right of way by the inclosure award *'since the evidence suggests, on the balance of probabilities, that the award road was not made up and certified by the justices'*.
- 8.5. Counsel takes the view that the evidence available post-inclosure is not sufficient to demonstrate that the Order route became a public vehicular right of way after the inclosure, apart from the first 4 chains in

Damerham. He disagrees with the Inspector on her findings on the Order route in Damerham and Rockbourne, and does not understand '*on what basis the Inspector concluded that the route as diverted in 1988 became a public vehicular right of way*'.

- 8.6. He therefore concludes, on the balance of probabilities, that the Order route is not a public vehicular right of way.
- 8.7. As the Order for a restricted byway in Damerham and Rockbourne has been quashed in the High Court, it can be argued that this application still requires to be determined.
- 8.8. When making an Order under the Wildlife and Countryside Act 1981 section 53(2)(a) and section 53(3)(c)(ii), the less onerous test of 'reasonably alleged to subsist', under section 53(3)(c)(i), does not apply. The application is to upgrade an existing highway, and whether the Order route in Damerham and Rockbourne should be shown on the Definitive Map as a '*highway of a different description*'. Before such an Order is made, Members should be satisfied, on the balance of probabilities, that Damerham Footpath 20 and Rockbourne Footpath 31 should be shown on the Definitive Map as restricted byways.
- 8.9. Counsel was asked for his opinion, after the evidence had been tested in a public hearing and at the High Court, on the question of whether a new Order for the routes in Damerham and Rockbourne should be made. In his view, the test outlined in paragraph 8.8 cannot be fulfilled, and therefore a new order should not be made.
- 8.10. Counsel raises a point about the effect, in practical terms, of the course of events so far in relation to this application. He takes the view that '*it is not entirely clear what was the effect of the quashing order on the application. Was the application finally disposed of by the 2009 orders or can it be argued that the quashing of the Damerham/Rockbourne order on procedural grounds revives the 2002 application in relation to the order route across those parishes?*'
- 8.11. Counsel's opinion is that the legal tests for the making of a Map Modification Order cannot be met in any case. It is open to the applicant to make a fresh application for these routes, or to make representations to the Secretary of State.

## **9. Conclusions:**

- 9.1 That the Order route in Damerham did not become a public vehicular right of way by virtue of the inclosure award until the justices had issued a certificate that the way to be fully and sufficiently formed, completed and repaired, under the terms of the 1801 General Inclosure Act incorporated in the Damerham South Inclosure local Act. It is considered that the available evidence is that it was not a pre-existing public vehicular right of way, and that the justices did not make the required declaration under the 1801 Act.

- 9.2 That, even if the Order route in Damerham had been a public vehicular right of way prior to the Rockbourne inclosure award, the latter would have extinguished it.
- 9.3 That the required legal test to make an Order upgrading Damerham Footpath 20 and Rockbourne Footpath 31 to restricted byway cannot be met, on the balance of probabilities, for the reasons stated.

**10. Recommendation:**

- 10.1 That the application to record Damerham Footpath 20 and Rockbourne Footpath 31 on the Definitive Map as byways open to all traffic be refused.

**ORPORATE OR LEGAL INFORMATION:****Links to the Corporate Strategy**

<b>Hampshire safer and more secure for all:</b>	
Corporate Improvement plan link number (if appropriate):	
<b>Maximising well-being:</b>	
Corporate Improvement plan link number (if appropriate):	
<b>Enhancing our quality of place:</b>	
Corporate Improvement plan link number (if appropriate):	
<b>OR</b>	
<b>This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because the County Council, in its capacity as 'Surveying Authority', has a legal duty to amend the definitive map on the discovery of evidence that a right of way which is shown on the definitive map and statement as a highway of a particular description ought to be there as a highway of a different description.</b>	

**Section 100 D - Local Government Act 1972 - background documents**

**The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)**

<u>Document</u>	<u>Location</u>
File x 4 - Claim Reference 474	Room 0.01 Castle Avenue Winchester SO23 8UL

## **IMPACT ASSESSMENTS**

### **1. Equalities Impact Assessment:**

1.1.

### **2. Impact on Crime and Disorder:**

2.1.

### **3. Climate Change:**

- a) How does what is being proposed impact on our carbon footprint / energy consumption?
  
- b) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

**This report does not require impact assessment but, nevertheless, requires a decision because the County Council, in its capacity as the 'surveying authority', has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.**