

Hampshire County Council	Item
Regulatory Committee	
3 September 2008	
Reconsideration of this Committee's determination of an application following the decision of the Court of Appeal in the case of R (on the application of Winchester College and Humphrey Feeds Limited) v Hampshire County Council and the Secretary of State for Environment, Food and Rural Affairs	
Report of the Director of Recreation and Heritage	

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WILDLIFE AND COUNTRYSIDE ACT 1981

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 reasonable 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

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

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 subsections (2) to (8)

- (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 (s.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 1st December 1930.
- (3) Subsection (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 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, 20th January 2005

1 Summary

This item considers a decision made by this Committee on 27th June 2007 in light of the Court of Appeal Judgement in R (on the application of Winchester College and Humphrey Feeds Limited) v Hampshire County Council and the Secretary of State for Environment, Food and Rural Affairs (as discussed at the meeting of this Committee on 21st May 2008). The original Report and the Minutes of the 2007 meeting are attached to this report as Appendices 1 and 2.

2 Recommendation

Application for a Map Modification Order to the Definitive Map to record Damerham Footpath 20 and part of Rockbourne Footpath 31 as a Byway Open to All Traffic

- That the decision contained in Minute 129(a) to the meeting of 27th June 2007 be rescinded.
- That, insofar as it relates to route A-F (as shown on Map 1 to this report), the application for a Map Modification Order to record A-F as Byway Open to All Traffic be refused but, following the discovery of evidence which shows the Definitive Map and Statement require amendment, an Order be made under section 53(2) of the Wildlife and Countryside Act 1981 to record route A-F as a Restricted Byway with a width of 9.14 metres.

3. Background

- 3.1 The June 2007 report sets out in detail the historic and documentary evidence which relates to this route (A-F). It concluded that there was good evidence that the route was an all-purpose highway, and Members concurred with this view when making their 2007 decision for this route to be recorded as a byway open to all traffic.
- 3.2 The Natural Environment and Rural Communities Act 2006 ('the 2006 Act) had the effect of extinguishing the right of way for mechanically propelled vehicles over the route unless one of the exemptions contained within this Act applied. Until the Court of Appeal decision in the Winchester case, officers thought that the exemption detailed in s.67(3)(a) applied to protect the mechanically propelled vehicular rights from extinguishment over the route, and thus, that the recording of this section as a byway remained appropriate. The judgement in the Winchester case has shown this view to have been wrong.
- 3.3 This report therefore asks the Committee to rescind their decision of 27th June 2007 and decide whether or not Hampshire's Definitive Map and Statement require modification. It is, therefore, necessary to consider whether any of the other exceptions within the 2006 Act applies to preserve the public right of way for mechanically propelled vehicles. If not, this route cannot be recorded as a byway open to all traffic.
- 3.4 In advance of the June 2007 meeting, the applicant was asked which exemption, if any, in the 2006 Act he considered to apply to each route in question. The applicability of each exemption to the route was considered in each Officer Report put before the Committee at the 2007 meeting [the 2007 Report].

- 3.5 The application in question did not comply with Schedule 14 to the Wildlife and Countryside Act 1981, in that it was not accompanied by copies of the documents which the applicant wishes to adduce in support of the application. In order that the previous decision of this Committee can be corrected and the application closed, it is proposed that these procedural defects be waived, as previously.

4. The Application

4.1 Application for a Map Modification Order to the Definitive Map to record Damerham Footpath 20 and part of Rockbourne Footpath 31 as a Byway Open to All Traffic

- 4.2 The route subject to this application is shown on Map 1 as A-F.

- 4.3 The Committee's previous decision on this item is recorded as Minute 129(a) to the meeting of 27th June 2007 (Appendix 1). At that meeting, Members considered that A-F carried vehicular rights prior to the 2006 Act. Nothing in the recent judgement affects this element of the Members' decision. However, Members further considered that mechanically propelled vehicular rights over A-F were saved from extinguishment by virtue of section 67(3)(a) of the 2006 Act. Members are asked to rescind this decision, as it is now clear the original application does not qualify for exemption under section 67(3)(a) of the 2006 Act.

- 4.4 In the 2007 report, each of the exemptions within the 2006 Act was considered, and it was found that none [apart from section 67(3)(a)] applied to these routes. No further evidence as to the application of the remaining exemption has been received since the original report.

- 4.5 Route A-F is currently recorded on the Definitive Map and Statement as a Footpath. It is considered that mechanically propelled vehicular rights over this route have been extinguished by section 67(1) of the 2006 Act and therefore A-F should be recorded as a Restricted Byway.

5. A matter arising from the previous report

- 5.1 Part of the route being claimed has been the subject of a diversion, which was discussed in the previous report (paragraphs 9.53 to 9.59).

- 5.2 An argument has been expressed concerning the diversion order, made by magistrates, affecting the path between points F and E. This view is that the presumption of regularity should be applied inferentially to the section of the path between points A and F, as well as to the section between points F and E, thereby requiring that A to F should be recorded as a footpath only. It is the view of the County Council that the magistrates' court was obliged to consider solely the position of a path between points E and F, and the existence of higher rights between those points was not addressed. Neither did the order affect the path

between points A and F. It is the view of the officers that the section between points A and F carried public carriage road rights, albeit not recorded, created by an unchallenged inclosure award. There is no evidence that these higher rights have ever been extinguished. It has been accepted by the person putting forward this argument that it is legally debatable.

6. Conclusion

There being evidence that Damerham Footpath 20 and part of Rockbourne Footpath 31(A-F on map 1) were old rights of way for vehicles, and no evidence that any of the exceptions in s.67(2) and 67(3) of NERC apply, s.67(1) will have extinguished any public right of way with mechanically propelled vehicles. The route A-F can therefore, at most, be shown the Definitive Map as Restricted Byway.

Section 100 D – Local Government Act 1972 – background papers

The following documents disclose facts or matters on which this report, or an important part of it, is based and has been relied upon to a material extent in the preparation of the report. NB The list excludes: (1) Published works; (2) Documents which disclose exempt or confidential information as defined in the Act.

File: Application for the upgrading of footpaths in the Parishes of Damerham and Rockbourne, ref. 474
Rights of Way Office, Mottisfont Court, Winchester