



**WILDLIFE AND COUNTRYSIDE ACT 1981  
SWINDON BOROUGH COUNCIL  
HIGHWORTH RURAL DISTRICT DEFINITIVE MAP AND STATEMENT  
THE SWINDON BOROUGH COUNCIL  
FOOTPATH 44 WANBOROUGH MODIFICATION ORDER 2017**

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**SECOND PROOF OF EVIDENCE ON BEHALF OF  
SWINDON BOROUGH COUNCIL**

**FOR PUBLIC INQUIRY  
7, 8 AND 15 DECEMBER 2021**

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**8 NOVEMBER 2021**

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## **1.0 INTRODUCTION**

- 1.1 This proof of evidence is provided on behalf of Swindon Borough Council (“the Council”) in response to the Secretary of State’s proposal to modify The Swindon Borough Council Footpath 44 Wanborough Modification Order 2017 (“the Order”).
- 1.2 This proof should be read alongside the Council’s Statement of Case dated 14 August 2018, the Council’s first proof of evidence dated 24 June 2019 and the Council’s objection to the proposed modifications to the Order (letter of 16 January 2020). The latter serves as the Council’s Statement of Case in respect of the second inquiry into the Secretary of State’s proposed modifications to the Order.
- 1.3 I am Martin Fry, the Council’s Rights of Way and Highways Information Manager. I have worked in the field of public rights of way for over 30 years and have been involved in this matter since the informal consultation process was completed to modify the definition map to add Footpath 44. In particular, I gave evidence at the first public inquiry.

## **2.0 BACKGROUND**

- 2.1 On 21 June 2017 the Council received an application under section 53 Wildlife and Countryside Act 1981 for a path to be added to the definitive map and statement.
- 2.2 After considering the evidence submitted with the application and completing the necessary informal consultations, on 22 November 2017 the Council made the Order. A copy of the Order is attached as **Appendix 1**. The published Order received three objections and was submitted by the Council to the Secretary of State for confirmation.

- 2.3 The Secretary of State appointed an Inspector to hear the matter at a Public Inquiry (“the First Inquiry”). The First Inquiry opened on 23 July 2019 and continued on 24 July and 13 November 2019. It included an accompanied site visit on 23 July 2019.
- 2.4 On 29 November 2019 the Inspector published her decision (“the Decision”) in respect of the Order. A copy of the Decision is attached as **Appendix 2**. The Decision was to confirm the Order subject to a modification to delete all reference to the route between Points A-B-C-D from the Order and Order plan.
- 2.5 The modification proposed by the Inspector was based on her concern that the Order did not accurately reflect the route used by the public. Para 36 of the Decision states:
- It seems to me that the Order map has been prepared, and the Order schedules written, in relation to the route that is currently available on the ground, and not on the route which the mapping and aerial photography evidence shows must have been the route to which the user evidence related during the relevant period.*
- 2.6 As the Decision was to confirm the Order without part of the route shown in the Order, the proposal had to be advertised to give an opportunity for objections and representations to be made to the proposed modification.
- 2.7 The proposal to modify the Order was advertised by the Secretary of State in the Swindon Advertiser on 27 December 2019. The Council displayed and maintained notices on site at three locations, Points F and G and the junction of Public Footpath 25 and Burycroft, from 19 December 2019 to 29 January 2020.

2.8 The proposal to modify the Order attracted 16 representations or objections, which are attached as **Appendix 3**, from

1. Christopher Trybus
2. David Birley
3. Graham Finch
4. John Warr (2 documents)
5. Mark Hanson
6. Martin Savage
7. Mike Webster (2 documents)
8. Neil Stalker
9. Peter Gallagher on behalf of The Ramblers
10. Steve Savage
11. Amanda Bell
12. Katie Gurr
13. Rachel Hopper
14. Rosemary Savage
15. Swindon Borough Council
16. Wanborough Parish Council

2.9 Following the case management hearing held by the Planning Inspectorate (“PINS”) on 28 October 2021, PINS confirmed that the objectors listed at 1, 7, 12 and 16 above were asked to withdraw or modify their respective objections on the basis that they were not relevant to the proposed modification (or they were insufficient to determine whether they were relevant to the proposed modification). At the time of writing, the Council does not know the action taken by the relevant objectors in response to this instruction from PINS.

### 3.0 THE COUNCIL'S PROPOSED APPROACH

- 3.1 After considering the contents of the Order Decision, and, reviewing the evidence received as part of the original application and heard during the Inquiry, the Council objected to the proposed modification (**Appendix 3** item 15).
- 3.2 As is apparent from the Council's objection, the Council accepts that the Order requires modification because the route of A-B-C-D as marked on the Order (**Appendix 1**) does not reflect accurately the route as actually used by the public during the qualifying 20 year period. In particular, the route of A-B-C-D as marked does not reflect the full width of the route as used and the alignment of the route as used is also slightly different.
- 3.3 Accordingly, the Council invites the Inspector to confirm the Order but with a different modification. Rather than a modification which deletes the route of A-B-C-D, the Council's proposed modification shows a slightly different route for A-B-C-D which reflects the route as actually used. The Council's proposed modification is set out in the attached at **Appendix 4**.
- 3.4 The Council's considers that the above proposal is an entirely appropriate exercise of the Inspector's power to confirm an order "with or without modifications" (see paragraph 7(3) of Schedule 15 to the Wildlife and Countryside Act 1981). In this regard the Council relies on PINS' Advice Note 20, dated 14 October 2021. In so far as relevant, this states:

*3.5 Thus if an order [made under s.53(2) of the Wildlife and Countryside Act 1981] contains an error that does not (i) prejudice the interests of any person, (ii) render the order misleading in its purpose, or (iii) appear to result in incorrect information being recorded on the definitive map (hereafter a 'minor' error), it may be corrected by modification. However, if the error is 'substantive', the correct approach is for the order to be rejected and returned to the relevant surveying authority with a written explanation as to why the*

*order was rejected, together with a written recommendation that the surveying authority should notify all relevant parties of such rejection and of the reasons for such rejection.*

*3.6 Of course, paragraph 8(1) of Schedule 15 to the 1981 Act provides that the Secretary of State shall not confirm an order with modifications so as: (a) to affect land not affected by the order; (b) not to show any way shown in the order to to show any way not so shown; or (c) to show as a highway of one description a way which is shown in the order as a highway of another description, except after complying with the requirements of sub-paragraph (2). Paragraph 8(2) requires the Secretary of State to give such notice as appears to him requisite of his proposal so to modify the order; there is then an opportunity (the minimum period being 28 days from the date of the first publication of the notice) for representations and objections to be made and, in certain circumstances, a local inquiry may be held. In such circumstances, there is clearly no question of a person's interests being prejudiced, of the order being misleading in its purposes, or of incorrect information being recorded on the definitive map.*

*3.7 As Lord Phillips made clear in *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 266 “the scheme of the procedure under Sch 15 to the 1981 Act is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry.” [...] (Emphasis added).*

- 3.5 It follows that this is exactly the sort of scenario in which modification to the Order is envisaged by the statutory regime. The error is “minor” and can be corrected by the Inspector having considered the new evidence which has emerged. There is no question of any person affected by the Council's proposed new modifications being prevented from making representations, as provision for them to do so is made by paragraph 8 of Schedule 15.

#### **4.0 THE EVIDENCE FOR A PUBLIC RIGHT OF WAY BETWEEN POINTS A-B-C-D**

4.1 In so far as relevant, section 31 Highways Act 1980 provides:

*“(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 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.*

*“(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 it mentioned in subsection (3) below or otherwise.”*

4.2 As for when the route at A-B-C-D was brought into question, this was considered by the Inspector at paragraphs 23 to 26 of the Decision, with the conclusion that the route was brought into question in early 2017. No new evidence has since been obtained which indicates that the Inspector was wrong in this regard.

4.3 The next question is whether the use of the route at A-B-C-D (whatever its parameters) meets the tests in section 31(1) of the Highways Act 1980. The Council considers that it does for the following reasons.

4.4 First, the Council relies on the Inspector’s findings following the First Inquiry. At paragraph 30 of the Decision the Inspector states, in the context of her consideration of the whole Order route, “I am satisfied that that, for convenience and safety, a route across this piece of land has been used by local people.”. Also, at paragraph 62 of the Decision the Inspector found “a public footpath can be presumed to have been dedicated” between F-E-D-G.



Similarly, the test for common law dedication was also met (paragraph 69 of the Decision). The Council considers that it should be inferred from this that the same conclusion applies to A-B-C-D. In other words, if the test in section 31(1) Highways Act 1980 is met in respect of F-E-D-G, it is likely that it is also met for A-B-C-D.

4.5 Although at paragraph 22 of the Decision the Inspector noted that the use of each “half” was “frequently quite distinct and separate”, the Council considers that these observations need to be considered in light of the records of the user evidence which in fact indicate little distinction between the users of the two “halves”. For example, John Shirreff in his User Evidence Form states that this path ran between Burycroft and a stile and footbridge over the Liden Brook whilst Peter Waldron in his User Evidence Form states that he used the path to go to Stratton or the A419. It follows that much the same findings in respect of user as applied to F-E-D-G can be inferred for the route between A-B-C-D given that the majority of the user evidence relied on by the Inspector did not differentiate between the two sections of the route. As such, if F-E-D-G was used in a certain way, it can and should be inferred that A-B-C-D was used in the same way.

4.6 Secondly, even without the Inspector’s findings referred to above, there is significant evidence of uninterrupted use as of right by the public from 1997 (and earlier) to 2017. This evidence is summarised in the Council’s Statement of Case dated 14 August 2018, and especially sections 11 and 12 of that document. In particular the Council relies on:

1. 19 user evidence forms signed by 23 individuals. These show that the route was used between 1957 and 2017. 13 of those individuals used the route from 1997 to 2017 with a further 6 individuals using it for at least 13 years during the same period. The use varied from daily to occasionally.
2. The proof of evidence from the First Inquiry submitted by John Warr contained written evidence that included:

- a) At page D31 an email dated 6 August 2013 from Annie Ellis, the Council's former Rights of Way Officer, to a Planning Officer, Rhian Morris, states "The landowner unofficially diverted the path along the route shown as a series of black dots and this route has now been in existence for 20 years or more."
  - b) At page S28 an email dated 26 April 2014 from Andrew and Rachel Hopper that states "My wife and I also used the footpath through the caravan site for the last 18 years ..." and continues "... this was also a very safe route, thus negating the need to use the rather dangerous corner ...".
3. The evidence from the First Inquiry submitted by Wanborough Parish Council included a walks booklet published in 1994 that states "Ducksbridge has replaced an old squatters cottage fronting the narrow part of the road which often flooded. Just past Ducksbridge is a public footpath which we will take. It leads past the garden and aviaries of Ducksbridge to the driveway to Wrightsbridge."
  4. Mr Hanson's letter of objection dated 22 January 2019 (attached as **Appendix 3** item 5) states that the current owners of the land crossed by the route in the Order agree that the public have used a route between Points A and D.
  5. The letter of Robert Fisher (the stepson of Mr Sadler) dated 12 May 2017 (included as Appendix 4 of the Council's Statement of Case dated 14 August 2018) states that Mr Sadler actively encouraged the use of the route between Points A-B-C-D.
  6. Bower Mapson, the landowners of this section of the route at the time of the Order being made, did not object to the Order.
- 4.7 What is more, to date the Council is not aware of any evidence which indicates that the public use of A-B-C-D did not meet the test in section 31(1)

of the Highways Act 1980. For example, at present there is no evidence that the use of A-B-C-D was interrupted and/or that the route was used with force, secrecy or permission. Indeed, while at the First Inquiry the correctness of the route at A-B-C-D as marked in the Order was challenged, none of the objectors gave evidence that the quality of user was insufficient to meet the relevant statutory test.

## **5.0 THE ALIGNMENT OF THE ROUTE BETWEEN POINTS A-B-C-D**

5.1 The Inspector in her Decision states at paragraph 18:

*“In the process of developing his [Mr Sadler’s] menagerie a legally recorded public footpath (Footpath 25) which ran across the land was obstructed, and it was generally agreed at the inquiry that Mr Sadler had provided for continued access across the land in question by ‘moving’ the path further south. He later created a small caravan site on the parcel of land adjacent to his house and garden, and he accommodated the altered line of the path within that site on a track”.*

5.2 It is therefore clear from the Decision that the location of the aforementioned “track” through the former caravan park represents the route of access as it appeared on the ground (and therefore the route that in all likelihood the public actually used). Indeed, that the public actually used this “track” is apparent from the written evidence provided by Peter Waldron attached to John Warr’s proof of evidence as S17 and Michael Jenner’s attached to the same proof as S16.

5.3 Therefore, to establish the correct positioning of A-B-C-D, one must first establish the location of the former “track”.

5.4 In the Council’s view the most reliable evidence in this regard is the Ordnance Survey map used for the informal consultation process on the proposed addition to the definition map which took place between 7 July and 4 August

2017. This is attached as **Appendix 5**. The base maps used for the Council's plans are electronic versions of the Ordnance Survey maps that are loaded onto the Council's GIS and regularly updated when new data is released by the Ordnance Survey. While it is undoubtedly useful to consider the various aerial photographs too, the photographs do not necessarily show the actual extent of properties or boundaries because much detail can be obscured by trees and other vegetation. It is therefore suggested that the Ordnance Survey map used for the informal consultation process should be the base map for any modifications to the width of the Order route.

- 5.5 In the Council's view the approach above is further supported when regard is given to the various aerial photographs which show a very similar route to that marked on the Ordnance Survey map. This is apparent from the attached aerial photograph dated 2012 at **Appendix 6** on which the Council has marked what appears to be the relevant track. When one then compares the map to the aerial photographs it is apparent that the differences are minimal and in all likelihood are explained by the factors mentioned above.

### **Explanation of the Council's proposed modifications**

- 5.6 As explained above, the Council has provided details of the modifications it proposes to the A-B-C-D route as set out in **Appendix 4**.<sup>1</sup> The rationale for the modifications is explained below.
- 5.7 First, the width of the route has been increased from A-B-C to reflect the width of the track as marked on the map used for the informal consultation. The Council considers it likely that the public used the full width of the track given that (a) no evidence has been submitted which indicates that the public limited their passage to particular parts of the track, and, (b) when walking with

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<sup>1</sup> This differs slightly from the area of red cross-hatching shown as part of the Council's objection to the Inspector's proposed modification (at Appendix X) in that it omits the part of the route from A to Burycroft. This area has been omitted given that is already covered by Public Footpath 25.

others, when space allows, it would be unusual for walkers to continue walking in single file.

- 5.8 The width stated in the Order for the route between Points A-B-C-D was the width available on the ground and left by the developer of Suters Lane, Bower Mapson. It was a pragmatic width that would be acceptable to the Council for the width of this route as a public footpath and a width that did not affect the buildings or gardens of the properties laid out by Bower Mapson. However, the Council accepts that it does not correspond to the full extent of the path actually used by the public.
- 5.9 Secondly, an approximately 5 metre length of the Order route near Point C has been realigned approximately 3 metres to the south to coincide with the original junction of the caravan site track and the track to Honeyfield Farm.

## **Structures**

- 5.10 The First Inquiry was presented with considerable evidence regarding the gates, stiles or gaps at Point C and at the junction of the footpath with Burycroft. As the Order route does not join Burycroft, but joins Public Footpath 25, the type of structure at the junction with Burycroft is not a matter to be decided by the Secretary of State. The structure at that location was in place for users of Public Footpath 25 and not for the Order route.
- 5.11 The evidence provided on the user evidence forms in respect of structures at Point C is not conclusive and records the existence of a stile, a gap and a gate at different times. In this regard the Council notes the following:
- (a) To date at least, no evidence has been submitted of any structure at any point along A-B-C-D prior to 1984 when Mr Sadler purchased the land.
  - (b) Some of the reports of a stile at Point C after 1984 may actually refer to a stile installed by Mr Stalker in 2009 when “the race” was constructed and

when a stile was provided by Mr Stalker at Point E (in other words, a stile at point E has mistakenly been confused with a stile at point C).

(c) The walks booklet, A Walk Around Lower Wanborough, originally published in 1994 and revised in 2012, and submitted by Wanborough Parish Council to the Inquiry does not mention a stile at Point C in either edition. Both editions, however, do mention crossing a stile on the other side of the drive to Wrightsbridge, Point E on the Order plan. It could therefore be assumed that by 1994 the stile installed by Mr Hunt at Point C no longer existed.

(d) Photographs 1 (Google Streetview November 2010) and 4 (Google Streetview October 2012) previously submitted by the Council at the Inquiry only show a field gate at Point C. These are attached for ease of reference at **Appendix 7**.

5.12 Based on the above evidence, the Council considers that – depending on the basis on which the Order may be confirmed (as modified or otherwise) – the following options in respect of structures are open to the Inspector:

(a) If the Order is to be confirmed based on a common law dedication prior to when Mr Sadler purchased the land in 1984 there is no evidence for any type of structure to be recorded in the Order at Point C.

(b) If the Order is to be confirmed based on a common law dedication after Mr Sadler purchased the land in 1984, it would be reasonable to assume that a stile existed for no more than 10 years, alongside a field gate, at Point C and both structures should be recorded in the Order at Point C.

(c) If the Order is to be confirmed based on presumed dedication under section 31 of the Highways Act 1980 based on user by the public between 1997 and 2017, there is evidence of a gap and a field gate at Point C which should be recorded in the Order.

## 6.0 SUMMARY

- 6.1 The Council requests that the Secretary of State does not modify and confirm the Order as proposed in the Order Decision dated 29 November 2019.
- 6.2 The Council considers that the evidence included in the initial application and objections to the Order prove that the path has been enjoyed by the public between Points A-B-C-D as of right without interruption for more than 20 years until 2017 during which time there was no evidence of any intention not to dedicate it. However, a relatively minor modification to the Order is required so that the route A-B-C-D as marked on the Order reflects accurately the actual use by the public which has given rise to the right of way. The Council therefore requests that the Secretary of State modifies the Order as per the attached **Appendix 4**. In summary, this shows a slightly wider route at A-B-C-D and a slightly different alignment around Point C.

## LIST OF APPENDICES

- 1 Definitive Map Modification Order made 22 November 2017
- 2 Order Decision and Plan dated 29 November 2019
- 3 Representations and Objections to Proposed Modification from
  1. Christopher Trybus
  2. David Birley
  3. Graham Finch
  4. John Warr (2 documents)
  5. Mark Hanson
  6. Martin Savage
  7. Mike Webster (2 documents)
  8. Neil Stalker
  9. Peter Gallagher on behalf of The Ramblers
  10. Steve Savage
  11. Amanda Bell
  12. Katie Gurr
  13. Rachel Hopper
  14. Rosemary Savage
  15. Swindon Borough Council
  16. Wanborough Parish Council
- 4 Councils Proposed Modifications to Order
- 5 Informal consultation plan
- 6 Aerial Photograph
- 7 Photographs submitted by the Council to First Inquiry