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## Order Decision

Site visit made on 25 July 2018

**by Alan Beckett BA MSc MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 09 August 2018**

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### **Order Ref: ROW/3191249**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Wiltshire Council Codford Path No. 15 Rights of Way Modification Order 2016.
- The Order is dated 17 May 2016 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Wiltshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is confirmed subject to the modifications set out in the Formal Decision.**

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### **Procedural Matters**

1. A public inquiry into the Order was scheduled to open on 24 July 2018. In the weeks prior to the inquiry, the applicant for the Order (the Codford Residents Group) and the agent (Mogers Drewett Solicitors) for the sole objector (J M Stratton & Co) had reached an agreement with regard to the Order which obviated the need for the inquiry to be held.
2. The agreement initially reached was that the objector would accept the confirmation of the Order subject to it being modified to show the path running on the north side of the farm road between points A and B and on the west side of the farm road between points B and C, both sections having a width of 2.5 metres, and to record a gate as a limitation at points B and C.
3. I responded to the parties that modification of the Order had to be based upon evidence and not upon what the parties considered desirable or preferable. Whilst there was evidence of a 'Wiltshire' gate having been present at B and C, there was no evidence on the papers submitted that use of the farm road had been constrained in any way. It was suggested that a restriction of the width of the path could be achieved by seeking an extinguishment order under section 118 of the Highways Act 1980 ('the 1980 Act') to extinguish public rights over 2.2 metres of the width of the farm road.
4. Following further negotiations, the sole objector has agreed to the confirmation of the Order with the width specified in the Schedule; the applicant has agreed not to object to any extinguishment order which the objector may seek to extinguish part of the width of the Order route. The parties maintain their agreement that gates at points B and C should be recorded as a limitation on the use of the path.

5. On the basis that the parties had reached agreement on the matters of contention, there was no need for the scheduled public inquiry to proceed and I have determined the Order on the basis of the papers submitted by the parties and observations made on my unaccompanied site visit.
6. Notwithstanding the agreement reached by the parties, in order for me to be able to confirm the Order, I must be satisfied that the evidence adduced is sufficient to demonstrate, on a balance of probabilities that a public right of way on foot subsists over the Order route. I briefly analyse the available evidence below.

### **The Main Issues**

7. In a case where it is claimed that a public right of way has come into existence through long use the provisions of section 31 of the 1980 Act require me to be satisfied that the public had used the claimed path as of right<sup>1</sup> and without interruption for at least 20 years prior to the right to do so being brought into question. Use by the public in such a way is sufficient to raise a statutory presumption that the owner or owners of the land crossed by the path had dedicated such a right to the public. This presumption is however rebuttable if there is sufficient evidence to demonstrate that during the 20-year period under consideration the public were made aware that there had been no intention on the part of the landowner to dedicate a public right of way.

### **When the right of the public to use the claimed footpath was brought into question**

8. On 1 April 2003 a statement and plan was deposited with Wiltshire Council under the provisions of section 31 (6) of the 1980 Act. No statutory declaration was made in connection with this deposit and it is the statutory declaration which provides sufficient evidence of a lack of intention to dedicate. However, as the 2003 statement and plan was deposited with the highway authority and was added to its register of such deposits, the statement and plan serve to bring into question the public's right to use any route not identified on the plan as already being a public right of way.
9. Accordingly, the relevant 20-year period of use for the purposes of section 31 (2) of the 1980 Act is 2 April 1983 to 1 April 2003.

### ***Whether the public have used the Order route as of right and without interruption for a period of not less than 20 years prior to their right to do so being brought into question***

10. The user evidence which accompanied the application demonstrates use of the Order route throughout the relevant 20-year period with three users having known and used the route on foot for the whole of that period. Of the remaining users, five others have walked the claimed route for between 15 and 18 years, with the remaining users claiming use for lesser periods. In total, 14 individuals had used the path during this period. All users recall seeing other pedestrians on the route when they were walking on it.
11. The reported frequency of use was daily for some individuals, 2 or 3 times a week for others, weekly for some and monthly for others. Although not a large number of individuals submitted user evidence forms, I consider that the

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<sup>1</sup> Without force, without secrecy and without permission

extent of use and its frequency would have been sufficient to alert an observant landowner that a public right to walk between Salisbury Road and Church Road was being asserted.

12. Use by the public appears to have taken place at all times of the day and in full view of anyone who cared to look. There is no evidence that users sought or were given permission to walk along the Order route. I conclude that use was not secret, nor with permission.
13. There is also no evidence that users had to break down or scale fences in order to pass along the route. I saw from my site visit that the route is fenced along its length to separate it from the adjacent fields, that the surface was of tarmac and that there was no restriction on access at points A, B or C. However, there is evidence that the physical characteristics of the route were different in the 1970s and 1980s in that there was no fencing alongside the route which was only fenced at points B and C to prevent the egress of livestock. Incorporated in that fence at points B and C was a 'Wiltshire' gate; a section of the fence which could be moved to one side and replaced once the pedestrian had passed through.
14. Statements submitted by witnesses for both parties together with photographic evidence show that the Order route was unfenced until around 1988/1989 when new fences were erected alongside the Order route and the fences and 'Wiltshire' gates at points B and C done away with. Other photographs taken around 1989/1990 show the existence of field gates at points B and C; these gates were in the open position when the photographs were taken; no evidence has been submitted to show that these gates were ever locked.
15. The available evidence demonstrates that at the start of the 20-year period access over the Order route at points B and C was via a 'Wiltshire' pedestrian gate within a fence which at some point in or around 1989/1990 was replaced by a field gate which was not locked. Use by the public which did not require the breaking down of scaling of fences is not use by force.
16. No evidence has been submitted to suggest that the claimed use has been interrupted during the relevant 20-year period.
17. I conclude that the claimed use during the relevant 20-year period was as of right and uninterrupted. It follows that I also conclude that the evidence of use adduced in this case is sufficient to raise a presumption that the Order route has been dedicated as a public right of way on foot.

***Whether there is sufficient evidence of a lack of intention to dedicate***

18. In the case of *R oao Godmanchester and Drain v SSEFRA* [2007] UKHL 28 Hoffmann LJ held that "*intention*" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* (1855) to "disabuse [him]" of the notion that the way was a public highway."
19. There is no evidence that during the relevant 20-year period notices had ever been erected which stated that pedestrian use was by permission or which served to convey to the users that the landowner had no intention of dedicating

a public right of way on foot. I conclude that there is insufficient evidence to rebut the presumption of dedication raised by the user evidence.

20. It follows that I am satisfied that the evidence before me is sufficient to show that, on a balance of probabilities, a public footpath subsists over the Order route.

### **Other matter**

21. As noted above, the agreement reached by the parties is that the Order should be modified to include gates at points B and C as a limitation on use. The evidence before me is that a 'Wiltshire' pedestrian gate was present at points B and C at the start of the relevant 20-year period and remained in place until around 1989/1990 when the fencing in the vicinity of the Order route was re-organised with the 'Wiltshire' gates being replaced by unlocked field gates.
22. The purpose of a limitation or condition being included in a Section 53 Order is to record those features of the path present when the right of way was first dedicated. In this case, public use of the route which demonstrated acceptance of the deemed dedication would have commenced with a pedestrian gate in place at points B and C. I therefore consider it appropriate to record a pedestrian gate at points B and C as a limitation on the use of the path.
23. The presence of the 'Wiltshire' gates would have introduced pinch points in the path at these locations which would have been sufficient to allow pedestrians to pass through. I consider that in such circumstances the width of the path at points B and C is likely to have been 1.5 metres in width and not the 4.7 metres set out in the Order schedule. I consider that the Order schedule should be modified accordingly.

### **Conclusion**

24. Having regard to these and all other matters raised in the written representations I conclude that the evidence discovered is sufficient to satisfy the requirements of presumed dedication under Section 31(1) of the 1980 Act. Accordingly, I conclude that the Order should be confirmed with modifications as the evidence demonstrates, on the balance of probabilities that a way not shown on the Definitive Map and Statement subsists over the land in question.

### **Formal Decision**

25. I confirm the Order subject to the following modifications:

in the Schedule Part I, amend the width to be recorded to read "Width 4.7 metres except at points B and C where width is 1.5 metres;

in the Schedule Part II, amend the width to be recorded to read "Width 4.7 metres except at ST 9750 3971 (1.5 metres) and ST 9743 3955 (1.5 metres)";

insert: Part III Limitations: Pedestrian gate at ST 9570 3971 and ST 9743 3955".

*Alan Beckett*

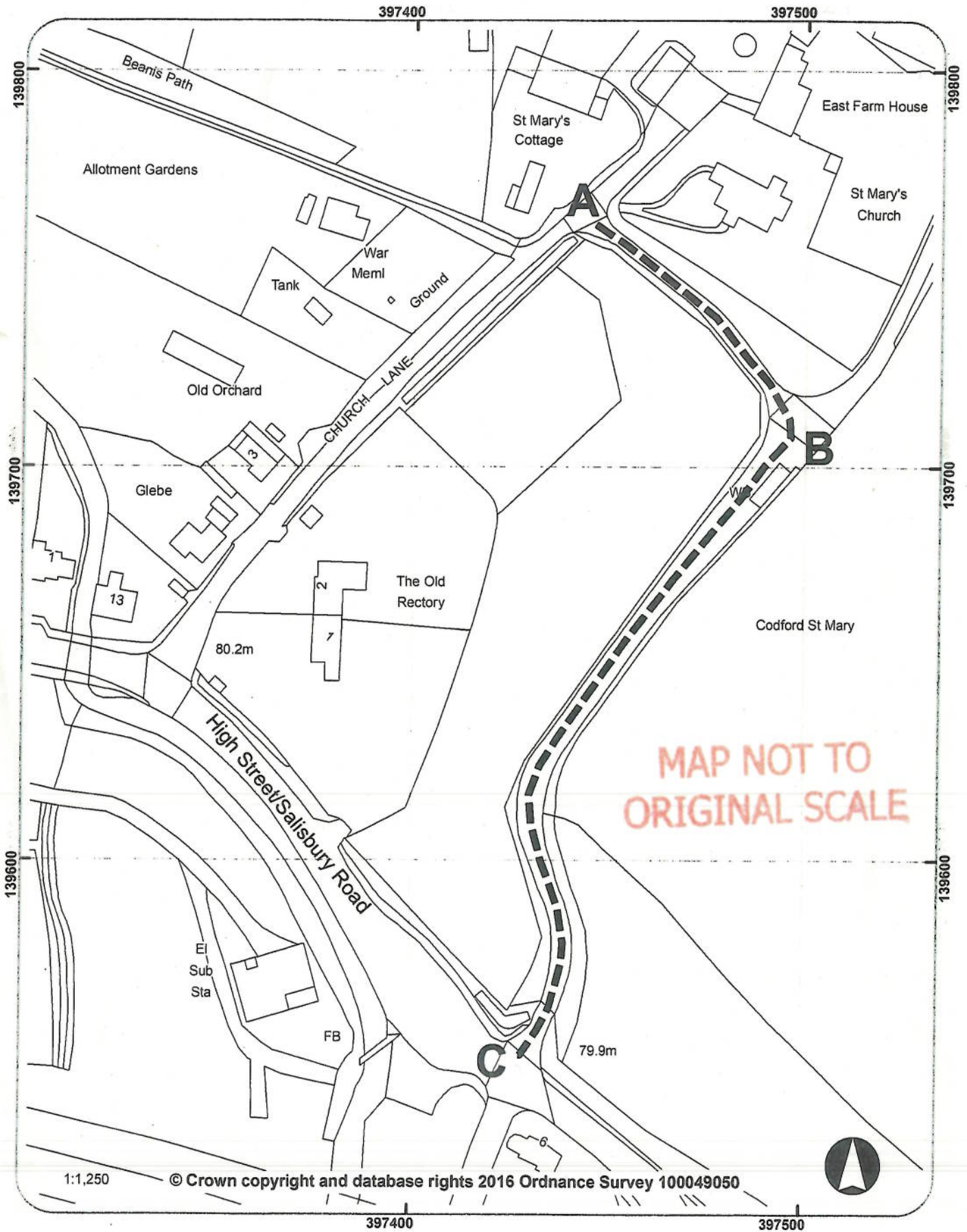
Inspector



# Order Plan Codford St Mary



Footpath to be added A - - - - B - - - - C



1:1,250

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