

WILTSHIRE COUNTY COUNCIL

MODIFICATION ORDER DECISION REPORT

(DRAFT FOR FILE ONLY, COMMITTEE APPROVAL NOT REQUIRED –
DELEGATED POWERS TO MAKE ORDER)

December 2003

HEDDINGTON: FOOTPATH NO.8

Purpose of Report

1. To inform members of the historical and documentary evidence relating to the status of Heddington Footpath no.8 and seek approval to make a Modification Order under Section 53 of the Wildlife and Countryside Act 1981, to upgrade the path to Byway Open to all Traffic, as shown on the attached plan.

Background

2. Wiltshire County Council received an application to upgrade Footpath no.8 Heddington, to a bridleway, dated 4th February 2003, from the Wiltshire Bridleways Association. The application was supported by 13 witness evidence forms to support the fact that the path had been used on horseback for a period of 20 years or more. None of the users had ever been challenged and had only ever asked permission at the time of Foot and Mouth crisis. Users believed that the land owner was aware of the use of the way by horse riders.
3. A site visit to the path was made by Wiltshire County Council on 12th February 2003. Evidence of use by horses was found, as well as evidence of farm vehicles using the first, wider section, of the path to gain access to the fields. Farm vehicles were also found to be using part of Footpath no.10, to gain access to a field further along path no.8, Heddington. At Field Cottage cars were parked on the footpath, alongside the cottage. The path is approximately 2-2.5m wide in places, narrowing to approximately 1.5m at the most overgrown parts. It is a clear track, enclosed within hedges. There are three existing gates: one at the Church Farm entrance (with stile alongside), one halfway along first, widest part, and one near Field Cottage.
4. An initial consultation regarding the application to upgrade the footpath to a bridleway was undertaken on 11th June 2003, to which no objections were received. The Trail Riders Fellowship advised that the historical

evidence pointed to byway status and one of the land owners, who had completed a land owner witness evidence form, also believed the correct status of the path to be byway open to all traffic.

5. Wiltshire County Council have now investigated the historical evidence submitted with the application and further evidence. It has been discovered that the evidence supports the existence of vehicular rights upon the way, on the balance of probabilities.
6. Wiltshire County Council are therefore proposing to make a Definitive Map Modification Order under Section 53 of the Wildlife and Countryside Act 1981, to upgrade the path to a byway open to all traffic, based on the available historical evidence. The documentary evidence overwhelmingly points towards byway status, even though the user evidence claims that the path is a bridleway. Once vehicular rights can be alleged to exist, on the balance of probabilities, Wiltshire County Council, as the Surveying Authority, has a statutory duty to record these rights.

Evidence Relating to the Status

7. Officers have examined historical evidence relevant to the assessment of the status of the right of way.
8. Section 32 of the Highways Act 1980, states that:

“...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...”

9. The Surveying Authority must apply three tests to the available documents:
 - i) Why were the documents compiled?
 - Did the recording of the highway have a legal significance?
 - ii) How were the documents compiled?
 - The compilation process
 - Public participation
 - Accuracy (i.e. was the map surveyed accurately?)
 - iii) Who compiled it?

- What were the consequences for the compiler's rights/duties of including or not including a public right of way?
 - What were the consequences for the rights/duties of others?
 - Were there any declarations against the compiler's interest?
 - Were there any sanctions for falsifying evidence?
10. Heddington Inclosure Award of 1767 – the map shows the eastern section of the route, set out within the award itself and mentioned within the individual allotment descriptions. The rest of the route is believed to be pre-inclosure and survives this process.
 11. Andrews' & Dury's Map of 1773 - shows the whole route from the Parish Boundary to the Church. The route is shown by solid and broken lines to suggest bounded and unbounded parts.
 12. Patersons Itinerary of 1785 is a small scale map - the route is shown, in full, by double solid lines. It is unlikely that this map will show routes lower than byway status, due to the constraints of the small scale.
 13. Robertsons Topographical Survey of 1792 – the route is shown in full from the Church to the Parish Boundary, by a broken line to the south and a solid line to north, denoting bounded and unbounded parts. Again, small scale maps can only show major routes.
 14. Map of Estate belonging to Nicholas Pearse Esq. 1801 - whole route is shown, shaded brown. Solid and broken lines denote bounded and unbounded parts and the awarded section is shown to be wider than the section to the west and bounded by hedges on both sides.
 15. OS Drawing, 1808 - route shown in full, bounded and unbounded parts denoted by solid and broken lines.
 16. OS Old Series, 1817 - whole route shown, bounded and unbounded parts denoted.
 17. Greenwoods Map, 1820 - whole route shown by double broken lines as unbounded. Small scale maps can only show major routes, due to the constraints of scale.
 18. Colt Hoare's Map of 1821 - whole route shown by double solid lines. Small scale maps can only show major routes.

19. Cary's Map of 1832 – whole route shown by double broken lines, suggesting an unbounded route. Again, due to the constraints of the small scale of the map, bridleways and footpaths are unlikely to be shown.
20. Map of the parish of Heddington belonging to Brice Pearse Esq. 1835 - whole route shown, hedged on either side. The awarded section is shown wider than the route to the west.
21. Heddington Tithe Award Map, 1841, certified copy of the map referred to in the apportionment – whole route shown uncoloured apart from awarded section which is very slightly tinted brown. The awarded section is shown wider than the route to the west. The edges of the route are coloured brown or green as the boundaries of the numbered allotments. The road itself is not numbered and is not referred to in apportionment itself.
Roads = a10 r1 p20
Roads and Waste = a39 r2 p31
22. Bromham Tithe Award, 1847, certified to be the map referred to in the apportionment - shows the southern section of route, coloured brown and labelled "*to Heddington*".
23. OS Map, 6 inch, Sheet no XXXIV, 1889 - the western section of the route is shown by double solid lines, as a fenced, main road according to the key. The awarded section is shown in rough pasture and as an unfenced, minor road. This could denote the area of highway waste and the area of carriageway itself.
24. OS Second Edition Map, 25 inch, Sheet no XXXIV – I, 1900 - the western section of the route is shown by double solid lines, bounded on either side. The awarded section is shown wider than the western part of the route, again differentiating between the area of highway waste and the carriageway itself.
25. Finance Act and Map, 1910 - Map is based on 1900 OS Second Edition Map, 25 inch (as above) – route shown uncoloured and not numbered, as are other known roads. Footpaths (from base map) are included within the colouring of the appropriate plot, suggesting that Heddington no.8 is higher in status than a footpath. Within the "Valuation Book for the Parish or Place of Heddington" deductions are made for "Public Rights of Way or User". Heddington 8 is surrounded by plot no's 8,14,15,19,21,25,28,39,46,56,115,120 and 128. Only plot no's 8,19,25,28,56 and 128 have deductions for rights of way, but if this related to Heddington path no.8, all plots would all have deductions. The fact that the route is not coloured suggests that it is a public carriageway, already excluded from the individual plots, as having no value for tax purposes.

26. Church Farm Sale Particulars, 1911 - Lot 6 – “Lane” with friends burial ground.
27. OS Edition of 1924, 25 inch, Sheet no XXXIV – I, 1924 – the western section of the route is shown by double solid lines, suggesting that it is bounded on both sides. The awarded section is shown wider than the rest of the route, again differentiating between the highway waste and the carriageway itself.
28. OS Edition of 1926, 6 inch, 1926 – the western section of path no.8 is shown by double solid lines, suggesting that this part of the route is bounded on both sides. The awarded section is shown wider than the rest of the route and the area of highway waste is shown separately from the carriageway itself. Bridleways and footpaths are labelled separately. Path no.8 is not labelled as either, suggesting that it is a public carriageway, like the Turnpike Road.
29. Devizes Rural District Council Minutes, January 1934, “List of Unmetalled Lanes or Tracks which are Public Highways” – at Bromham 3, “Bridletrack” refers to the track from Beacons Hill to Heddington “via Hitching Lane” which is Bridleway no.53. Path no.8 Heddington, is separately referred to as “Hitching Lane”.
30. Parish Claim, 1950 Survey - no objections recorded, referred to as a “Green Road”. In the final statement “BR” is crossed out and replaced by “FP”.
31. Victoria County History – route shown on map, as at 1841, by double solid lines, suggesting a route bounded on both sides. In the eighteenth century the Devizes Road led north/south across the village in the west. Part of the north/south course was replaced by Hitching Lane, c.1713, apparently to force the Calne/Devizes traffic to pass through a turnpike gate on the London to Bath Road.

Legal Points to Consider

32. Section 53 of the Wildlife and Countryside Act 1981, places on the County Council, as the Surveying Authority a duty, not a discretionary power, to keep the Definitive Map and Statement under continuous review as follows (Section 53(2)(b)):

“As regards every Definitive Map and Statement, the surveying authority shall:-

(b) as from that 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.”

33. The events referred to in Section 53(2)(b) above which are relevant to this case 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.”

34. “Ought to be there shown” places the burden of proof on the balance of probabilities. If the evidence is sufficient to enable it to be reasonably alleged that Footpath no.8 Heddington enjoys vehicular rights, a Modification Order should be made under Section 53 of the Wildlife and Countryside Act 1981.

35. Section 56 of the 1981 Act states that the definitive map is conclusive evidence of the public rights of way shown, but this is without prejudice to higher rights, as follows:

“(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely-

(b) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right.”

Options Considered

36. Officers have carefully examined the historical evidence which, on the balance of probabilities, supports the existence of vehicular rights on Footpath no.8 Heddington. We therefore have no option open to us, as the Surveying Authority, other than to make an order under Section 53 of the Wildlife and Countryside Act 1981, as this is our statutory duty, a matter in which we have no flexibility.

Recommendation

37. That a Modification Order be made under Section 53 of the Wildlife and Countryside Act 1981, to upgrade Footpath no.8 Heddington to a Byway Open to all Traffic.

Reason for Recommendation

38. To comply with the County Council's statutory duties to record vehicular rights on a path, where historical evidence has been discovered to suggest that vehicular rights can be alleged to exist, on the balance of probabilities.

George Batten
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The following unpublished documents have been relied upon in the preparation of this report:

None.