

REGULATORY COMMITTEE
8th SEPTEMBER 2004

**ROUNDWAY/POTTERNE/STERT: FOOTPATHS/BRIDLEWAYS -
ROUNDWAY 19, POTTERNE 127 AND 128 AND STERT 6 (PART) AND 11 (PART)****Purpose of Report**

1. To consider and comment on objections and representations received to the making of an Order under Section 53 of the Wildlife and Countryside Act 1981 providing for the upgrading of Roundway bridleway 19, Potterne bridleway 127, Potterne footpath 128, part of Stert bridleway 6 Stert and part of Stert footpath 11 to byways open to all traffic, as shown on the plan at **Appendix 1**.

Background

2. On 12th April 1996 **Hodge and Co.** on behalf of **Mr. Greenburgh** of Old Mill Cottage, Stert, applied to the County Council for an Order under Section 53 of the Wildlife and Countryside Act 1981 to upgrade part of Stert Valley Lane to a bridleway. The section in question is Potterne footpath 128 and Stert footpath 11.
3. In support of the application, nine evidence forms were submitted by users of the lane. Their evidence is summarised at **Appendix 2**. The user evidence submitted gives evidence of use of the route principally on foot and horseback, but also describes vehicular use. Vehicular use has been observed by Mrs. V. Greenburgh and she has driven along Stert Valley Lane in a pony and trap – no dates given. Multiple use by the public on a daily basis has been observed since 1972 by Mr. M. Greenburgh. Mr. Mundy has known the order route since 1951 and has observed multiple use.
4. **Mr. Swaffer** and **Mr. Strudwick**, owners of Byde Farm, the access to which is along Stert Valley Lane, wrote on 7th May 1996 to object to the application. They believed the change in status could cause a conflict with their commercial traffic. Mr. Strudwick informed the Council that Stert 6 had been used in the past by the milkman on his horse and cart and also by a local farmer. Valley Lane has also been used by vehicles.
5. On 13th May 1997, **Mr. David Jemson** of Manor Cottage, Stert, wrote to the Council stating that horse riders were using Stert Valley Lane and suggesting it should be recorded as a bridleway.
6. **Jenny Lund**, on behalf of the Ramblers Association, has no knowledge of equestrian use.
7. **Kennet District Council** has no objections to the application.
8. Officers were put in contact with **Mr. Mundy** who has known the area since 1947. He has worked in the past as a gardener at Old Mill Cottages and has seen horse riders and motor-cycles along Stert Valley Lane.

9. **Mr. Butcher** of Sleight Farm owns the western end of the lane (Roundway bridleway 19 and Potterne bridleway 127). Whilst he acknowledges horse riders use the lane, he believes this is due to part of Stert 6 behind Old Mill Cottage being obstructed. He would object to the lane being recorded as a bridleway.
10. **Mr. B. Riley** drew officers' attention to historical records which he believed showed that the lane which is Roundway bridleway 19, Potterne 127 and 128, and Stert 6 and 11 ought to be recorded on the Definitive Map as byways open to all traffic.
11. **The Chairman of Stert Parish Council** confirmed on 7th June 1997 that whilst no members of the Parish Council had ridden along Stert Valley Lane, it was aware that members of the public did regularly ride the way.
12. **Potterne Parish Council** raises no objection to the application provided it links in with the network of bridleways and forms a circular route.
13. **Wiltshire Bridleways Association** supports the application.
14. **The British Horse Society** states that **Admiral Sir Stephen Bertham**, who lives in the Stert area, confirms the lane is frequently used by riders.
15. Officers have examined historical records relevant to assessing the status of highway.
16. Before describing the documentary evidence, it is helpful to outline three tests to be applied to ensure that information contained in any documents is relevant. The tests are as follows:-
 - (i) Why were the documents compiled?
 - Did the recording of the highway have any legal significance?
 - (ii) How were the documents compiled?
 - The compilation process
 - Public participation
 - Accuracy (for instance, 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?
17. In medieval times, responsibility for the maintenance of the King's Highway was placed on the Manor. The public has "the right of good passage", not only on the beaten track and deviation was permitted if necessary. By the 14th and 15th centuries there was a tremendous increase in travelling in the country but with the breakdown of manorial institutions in the 15th and 16th centuries highways became badly neglected. This led to the passage of an Act in 1555 which, until the Highways Act of 1835, formed the basis of organisation of road maintenance.

18. This 1555 Act placed the obligation to maintain all existing public highways on the parish and all the inhabitants thereof, a new post of Parish Surveyor of Highway (unpaid), on Justices of the Peace (JPs) at Quarter Sessions, and owners of adjoining land.
19. The Parish Surveyor came under the jurisdiction of the JPs who, amongst other things, audited the accounts. A Justice could present to Quarter Sessions that a highway was out of repair. Many presentments may be found in the Quarter Sessions records relating to individual highways.
20. The Court of Quarter Sessions was statutorily responsible for highway maintenance. It follows that any record of a highway in these records will be definitive as to its existence at that time. Any evidence discovered is of good quality because any authority with its limited resources would not have willingly maintained a way which it did not feel satisfied or convinced was a highway.
21. The records of the Quarter Sessions held in the County Record Office have been indexed for highway references because they are important evidence and, being a Court of Law, there can be no question as to their reliability.
22. In the Quarter Sessions Great Rolls in 1673, the following presentment can be found:-

"The presentment of ye said hundred Jury att the General Quarter Sessions held at Marlborough the Seventh of October the Year of our Lord One Thousand Six Hundred and Seventy Four in the Twenty Fifth Year of his Magistys Reign that now is -

We present Richard Green of ye Devizes Green yeoman for not repairing of the King high way commonly called by the name of Killbrook lying in Nursteed Tything which is very much in decay ye way from Stert to ye Devizes."

23. Killbrook is identified on the first edition 6" Ordnance Survey Map, surveyed in 1884, as a property about 20 metres to the south of the junction of Roundway 19 and Potterne 127.
24. In the view of officers the order route must be the one described in the presentment. The way is described as a highway, not a bridleway, connects with the turnpike road and joins the communities of Stert and Devizes.
25. From early case law, it would appear that the term 'highway' seems to have meant a full highway or carriageway. Bridleways and footpaths were referred to in the exception. For example, in:

- (a) R v Hatfield in 1736, Lord Hardwicke stated:-

"But I do not remember any authority that holds it necessary to say, it is a highway for this or that particular carriage, for if it is a common highway, it is a highway for all manner of things."

- (b) R v Saintiff, in 1795, Justice Holt said:-

"The word highway is the genus of all public ways, as well as cart, horse and footways, and yet an indictment lies for anyone of these ways if they be common to all the Queen's subjects having occasion to pass there ... and these are not altae regiae viae, for that is the great highway common to cart, horse and foot, that please to use it."

- (c) In Salkeld, 1795:-

"Adjudged that where a way leads to a market town, or communicates with a great road, it is a highway, but if it leads to a church, or to a village, or to a particular house, it is a private way and in highway, which is called Via Regia, the King has only the passage for himself and the people."

- (d) In Bailey v Jamieson, 1876, Justice Coleridge stated:-

"The common definition of highway that is given in all the text books of authority is that it is a way, leading from one market town or inhabited place to another inhabited place, which is common to all the Queen's subjects."

- (e) In R v Aldborough, 1876, Justice Crompton stated:-

"Prima facie it may be that a public highways a way for carriages."

26. In the Quarter Sessions Order Book for the Trinity Session in 1739 the following relevant extract can be found:-

"That at the General Q___ S_____ of the Peace of our Lord the King held at Warminster in and for the said County on Tuesday the Fourth day of July in the Thirteenth Year of the Reign of our Sovereign Lord George the Second by the Grace of God of Great Britain France and Ireland Defender of the ffaith and so forth Before Walter Hungerford Thomas Ripps Thomas Gennett Esquires and others their follows Justices of the Said King Assigned to keep the Peace of the Said King in the County afoursaid and also to hear and Determine Diverse Ffelonies Trespasses and other Misdemeanours done and Committed in the Said County It Is Ordered as follows (that is to say).

The court considered a report by three JPs in "relation to certain ffrauds and Abuses Committed by persons Eluding the payment of the Tolls payable at the Turnpikes or Gates Erected Pursuant to the Acts of Parliament made for Repairing the Highways between Shepards Shard and Devizes and the Top of Ashlington Hill and Rowd Hoors in the County and the Said Three Justices having Reported to this Court by Writing under their Hands bearing date the Second day of this Instant July That they had taken a view of the said Turnpike Roads And found there were Great Abuses and ffrauds Committed by Waggons Carts Horses Coming upon Part of the Said Turnpike Roads and Unloading Corn Etc. near the Said Gates whereby the Said Roads were very much Worn and no Profitt Accurred thereby to the Said Turnpike And likewise that these were Daily fresh ffrauds found out to Elude the payment of the Said Toll by Artfull and Designing Persons Engaged in the said Abuse That Part of the said Abuses were Committed by divers Waggons Loaded with Wheat etc. being brought every Week from Upavon and the Adjacent County to a Flour Mill Situate at the Bottom of Ashlington Hill aforesaid next to the said Turnpike Road and within One Hundred Yards or thereabouts of the Turnpike Gate now for which no Toll or Duty

had been paid And that the Owners or possessors of the said fflouer Mill Did Ussually bring such Meal fflouer etc. as Occasion from time to time required from the Said Mill to the Devizes aforesaid in A Cart wherewith they Passed and Repassed Severall times in A Day carrying Each time near A Sufficient Load for a Waggon for which only Sixpence a Day was Usually Paid By which means they Eluded the Payment of a very Considerable Sum of Money Yearly which otherwise would necessarily have been paid towards the Tolls and Duties for the Reparation of the said Highways And upon Considering how the Said Abuses Should be Remedied."

They judged it necessary that a further Gate should be Erected about the Bottom of Ashlington Hill and Some Small Distance from the Said Mill And they thereby further Apprehended that another Gate should be Erected at the Side of Said Turnpike Road across a Lane that Leads to Stert Street there being Severall Waggons Continually Passing out of the Said Turnpike Way in and through Stert Street in Order to Elude the payment of the Said Tolls and Dutys And they further Judged that another Gate Should be Erected near the House of Thomas Shurwood Gloover near the Devizes for the uses and intents last above mentioned. This Court in pursuance of the Authority to them Given by the Severall Acts of Parliament for the purpose Do therein Order to prevent the said ffrauds for the future Order Such New Gates to be Erected on the Said Highway at such places as are mentioned in the said Report Provided nevertheless and it is hereby Ordered that no Toll or Duty Shall be Demanded or taken of any of the Inhabitants of the said Parish of Stert at the Gate to be Erected across the Lane that Leads to Stert Street aforesaid.

27. Amongst other documents, Ashlington can be identified on Andrews and Dury's Map of Wiltshire dated 1773 as Etchilhampton. Ashlington Hill is now known as Monument Hill, several mills are identified off Stert Valley Lane and the turnpike gate at Nursteed at the top of Sleight Road, unclassified 7037, can be identified on Andrews and Dury's Map. People dodging the turnpike tolls were obviously using Stert 6 and Stert Valley Lane as an alternative vehicular route.
28. In the Quarter Sessions Rolls for the Hilary Quarter in 1770, the following presentment may be found:-

"Wilts to Wit. The Jurors for our Lord the King upon their Oath present, That there is, and from the time whereof the memory of man is not to the contrary that hath been, a Common Highway leading from the Parish of Potterne in the County of Wilts aforesaid in, by, and through the Tything of Stert, in the County of Wilts aforesaid, to the parish of All Cannings in the County aforesaid for all Persons with their Horses, Cattle, Carts and Carriages: And that on the Sixth Day of January in the Tenth year of the Reign of our Sovereign Lord George the Third, by the Grace of God, King of Great Britain, etc. and continually afterwards to this time Part of the Said Highway (that is to say) Half a Mile in Length, and Twenty ffoot in Breadth thereof, lying on the said Tything of Stert (that is to say) from a place called Church Hill to the Turnpike Road leading from Devizes to New Sarum in the Said County was, and yet is, in great Decay, and not passable without great Difficulty and Danger, to the great Damage and common Nuisance of all the liege Subjects of our said Lord the King passing that way, and against the Peace of the Said King, his Crown and Dignity: And that the Inhabitants of the Said Tything of Stert ought to repair that part of the Said Highway."

29. The highway being described is a common highway, ie a vehicular right of way for "Horses, Cattle, Carts and Carriages." Stert Valley Lane lies within the parish of Potterne and Stert bridleway 6 and 11 lead from the ford up the hill towards Stert church. The turnpike road is the A342.
30. At the time of the presentment the parish was the highway authority responsible for maintaining highway. The Quarter Sessions Court was the body responsible for ensuring the parish carried out this duty. The Court found the way to be a highway with vehicular rights over it and the parish had consequently to repair it, which it did. On a 1638 Map of the Manor of Stert surveyed by Edward May identifying field names, acreages, tenants and adjoining landowners, the continuation of the village street, Stert 6, 11 and Stert Valley Lane are shown in the same manor as the A342, open, ie not gated, part of the local highway network. This is a useful map as it confirms the route's existence at that time pre-dating the routes described in the Quarter Sessions presentment. No other route on the map fits these descriptions.
31. A further plan of the "Manor of Stert situate near the Devizes in Wiltshire belonging to New College, Oxford, surveyed 1766 by Edward John Eyre of London" clearly shows the same route.
32. John Andrews and Andrew Dury's 1773 large scale county map shows the route. The development during the 18th century of the system of triangulation and improvements made in the construction of surveying instruments led to widespread surveying projects being carried out on scientific lines. Cartographers, moreover, were undoubtedly given great encouragement by the annual premium offered in 1759 by the Society of Arts for an accurate survey of any English County on a scale of one inch to a mile.
33. Andrews and Dury's Map of Wiltshire is the first map of the county after the work of Christopher Saxon (1579) and John Speed (1611) to be based on an original survey and not upon the work of those two cartographers. The map is on a scale of approximately two inches to the mile and shows a through route from the A342, Turnpike road through Stert back to the Nursteed Turnpike gate on the approximate route of Stert 6 and 11, Potterne 127 and 128, Roundway 11 and Sleight Lane.
34. On sheet 77 of the David and Charles edition of the Old Series one inch to the mile Ordnance Survey map the through route described above is shown in the same manner as other known roads. The survey of Wiltshire began in 1793 by military surveyors and draftsmen, probably assisted by local surveyors hired for the task. The original Ordnance Survey production of the Devizes sheet, numbered 14, was published on 14th August 1817. It is worth noting that in *Kent County Council v Loughlin*, 1975, Lord Denning commented "*maps up to 1820 were on too small a scale to show more than public carriage roads.*" Greenwoods map of Wiltshire dated 1820, another original highly regarded survey, also shows the route.
35. Tithes were the duty to pay one-tenth of annual produce of land to the Church. Under the Tithe Act of 1836 the remaining tithes were commuted to money rents. To carry this out, all titheable land had to be assessed for its annual produce value. This was done on a parish basis and large scale maps were produced.
36. Rights of way are shown on the maps because the existence of a right of way could affect the productive value of the land, thereby reducing the liability to pay rent to the Church. The Tithe Commissioners had an interest in ensuring that public rights of way were clearly delineated.

37. The plan annexed to the Tithe Award for Urchfont, Stert Tithing date stamped by the Tithe Commissioners 31st March 1846, shows the village street, its continuation as Stert 6 and 11 over the ford leading into the parish of Potterne, coloured brown in the same manner as other vehicular highway. The way was not subject to tithes.
38. On the Tithe Map of the Chapelry of St. James in the parish of Bishop Cannings, dated 1841, the western section of the track comprising Sleight Lane and Roundway 19 is shown coloured brown, part of the local road network.
39. On a map of the Estates belonging to George Elgar Sloper, dated 1840, the first part of Stert Valley Lane is shown coloured brown as far as Killbrook then tinted green to Killbrook Mead but separate from adjoining plots.
40. The first edition 25" to the mile Ordnance Survey map sheet 40/2 surveyed in 1884 shows a short section of Roundway 11, coloured brown like Sleight Lane, an unclassified county road and is numbered separately from adjoining land 383 and measured 2.315 acres. The Section within the parish of Potterne is numbered 230 and separately measured. Stert 6 to the mill is treated in the same manner and coloured brown. There are also spot heights along its route.
41. In J.B. Harley's book Ordnance Survey Maps a Descriptive Manual (1975), he states with regard to the county series 1:2500 scale maps:-

"Some features are always separately numbered and measured irrespective of their size. They include railways in rural areas (in built-up areas they may form part of 'Town Areas'), all public roads, whether fenced or unfenced, and foreshore and tidal water"
42. Mr Irwin, Director General of the Ordnance Survey in May 1974, said of Dr Brian Harley of the Department of Geography, Exeter University:-

"This definitive work of reference, for which we are indebted to Dr Brian Harley, a leading authority on the subject, will it is hoped fulfil the widespread desire for more detailed knowledge about our maps and thereby contribute not only to their usefulness but also to the pleasure which may be derived from their use."
43. In the County Record Office there is a 19th century road map prepared by John Hayward, a local surveyor from Devizes. It was prepared to illustrate the difference in routes in connection with a Quarter Sessions highway presentment. The routes in question were between Stert and Potterne, one taking in Stert street, Stert 6 to the mill and Stert 11 to Coxhill Lane, as opposed to the indicted route via Fullaway Farm and Bridge Farm on Grookwood Lane.
44. A bridle track from Potterne to Stert was admitted at the Potterne Parish Council annual meeting in 1903. The following may be found in the Minutes of 7th April 1903:-

"Gates - it was reported that certain gates leading from the top of Sleight Lane to Stert were fixed and could not be opened. Mr. Stancombe undertook to inspect the matter and admitted the existence of a bridle track this way from Potterne to Stert."
45. Examined in relation to the other mapping evidence, it is suggested this bridle track ran along Stert Valley Lane.

46. According to an information sheet produced by the Public Record Office, The Finance Act 1909 - 10 provided for the levy and collection of a duty on the increment value of all land in the United Kingdom. The main object of this legislation was to tax that part of the capital appreciation of real property which was attributable to the site itself, i.e. excluding that arising from crops, buildings and improvements paid for by the owners. In this way, private owners were required to surrender to the State part of the increase in the site value of their land which resulted from the expenditure of public money on communal developments such as roads or public services.
47. Increment value duty, as this levy was called, was based on the difference between the amount of two valuations. Section 26 (1) of the Act required the Board of Inland Revenue to ascertain the site value of all land in the United Kingdom as on the 30th April 1909. The value so ascertained constituted the 'datum line' for the purposes of increment value duty. Any subsequent sale or grant of a lease, or transfer of an interest in a piece of land, or any subsequent death of a land owner, provided the occasion for a potential payment of incremental value duty. The site value as on the date of such occasion had then to be determined.
48. The Valuation Office was set up and the County divided into valuation districts. The original valuation was completed in the Autumn of 1915 by local valuers. The working plans are kept in the County Record Office.
49. Land held in public ownership was exempt from the tax and not therefore given a hereditament number or coloured on these plans. Public highway stands out on the working plans as it is uncoloured except for rights of way for which a rebate could be claimed. The route under discussion was shown uncoloured on the plans in the record office in the same manner as known public roads.
50. The Local Government Act of 1929 placed a duty on the County Council to maintain all roads. In the minutes of the Roads and Bridges Committee, dated the 6th April 1934, it is stated:-

"Minute 112 Accounts Sub Committee Report. On reading the report of the Accounts Sub Committee printed as an appendix to these minutes

(c) That the other recommendations in the report be approved and adopted."

In the report of the Accounts Sub Committee:-

"4 Complaints from Parish Councils. On considering the following matters, the Sub-Committee made the recommendation contained in column three.

<i>Parish</i>	<i>Subject</i>	<i>Sub Committee's Report or Recommendation</i>
<i>Stert</i>	<i>Calling attention to the dangerous condition of the footbridge over the Stream which crosses the bridle track from Stert to Stert Valley and then to Devizes</i>	<i>This will be dealt with during the current year.</i>

The way being described was a bridleway from Stert through the valley then on to Devizes, ie the order route.

Main Considerations for the Council

51. To comment on the objections and representations received to the making of the Order from the following:-
 - Potterne Parish Council
 - Mr. A. Swaffer, Byde Farm, Sleight
 - Mr. B. Riley
 - Mr. G.W. Murley
 - Stert Parish Council
 - Beachcroft Wansboroughs on behalf of Mr. and Mrs. Greenburgh
52. Copies of letters from the above will be available for inspection in the **Members' Room** prior to the meeting.
53. **Potterne Parish Council** - believes that "in a time when the public is being invited and encouraged to use the countryside rights of way by means other than motor vehicles, this proposal seems totally wrong." It also believes that to encourage traffic through Stert village would be a retrograde step.
54. **Mr. A. Swaffer** believes the historical evidence produced to support the Order is inaccurate and fails to support, on the balance of probabilities, the existence of byway status.
55. **Mr. B. Riley** - supports the making of the Order.
56. **Mr. G.W. Murley** - supports the making of the Order.
57. **Stert Parish Council** and **Beachcroft Wansboroughs** - object for reasons similar to those cited by Mr. Swaffer.
58. There is a difference of opinion in the interpretation of some documents, the full extent of which has not been explained by objectors who reserve their right to cross-examine the Council's expert witness at a Public Inquiry and to present their own case at an Inquiry.
59. The reasons cited by Potterne Parish Council in objecting to the Order are not matters which the County Council or the Inspector on behalf of the Secretary of State can take into consideration in determining the Order.
60. Arguably, the main considerations for Members are the legal points to consider and these are set out in the following paragraphs.
61. Section 53 of the Wildlife and Countryside Act 1981 places on the County Council a duty to keep the Definitive Map and Statement under continuous review.
62. Section 53 (2) (b) states:-

"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."*

63. The events referred to in Section 53 (2) above which are relevant to this case are:-
- (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.*
64. The evidence here must show, on a balance of probabilities, that a way or ways shown on the map as of one description "ought to be there shown as a highway of a different description." If the evidence supports the existence of higher rights then an Order should be made. If there is a conflict in the evidence then the principle established in *R v Secretary of State for the Environment ex parte Bagshaw* and *R v Secretary of State for Wales ex parte Emery* come into play. It is in the public interest to make an Order if there is the reasonable possible outcome of a subsequent inquiry process that public vehicular rights be found to subsist. The Council must be satisfied that the available evidence is sufficient to enable it reasonably to be alleged that Stert Valley Lane and Stert 6 enjoys public vehicular rights, but which will be more suitable for use by walkers and horse riders in deciding to make an Order under Section 53 of the Wildlife and Countryside Act 1981.
65. In the case of *R v Secretary of State for the Environment, Transport and the Regions ex parte Masters* (2000), the Court of Appeal considered the definition of "byway open to all traffic" in Section 66 of the Wildlife and Countryside Act and Dyson J's interpretation of the *Nettlecombe* case.
66. The Court of Appeal's view was that Parliament's intention was to preserve rights of way to give access to the countryside for walkers and horse riders. Parliament also intended to include ways over which the public had vehicular rights, even if the rights were rarely, if ever, exercised by the public. The definition of "byway" is referring to a type of highway. It does not seek to limit byways open to all traffic to those which are currently and actually used. It would cover, for example, public carriage roads that have fallen into disuse but whose character makes them more likely to be used by walkers and horse riders than by vehicles.
67. Lord Justice Roch upheld the judgement of Hooper J. He stated:-
- "Parliament did not intend that highways over which the public have rights for vehicular and other kinds of traffic should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic because they were more suitable for use by walkers and horse riders than by vehicles. Indeed, where such ways were previously shown in the maps and statements as roads used as public paths, Parliament made it obligatory that they continue to be shown on maps and statements when these were reviewed after 28th February 1983."*
68. The decision has now clarified the "user test" to be applied. A Modification Order adding a byway open to all traffic will be appropriate where historical evidence of vehicular use exists but recent public use was exclusively by walkers and horse riders or both or such use exceeded all the other public use. The test for a carriageway to be a byway open to all traffic relates to its character type and in particular whether it is more suitable for use by walkers and horse riders than vehicles.

69. Section 32 of the Highways Act 1980 states:-

"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."

70. Highways come into existence through dedication of a right of way to the public by a landowner and acceptance by the public of that dedication. Dedication of a way as highway may be presumed after public use over 20 years. This is given statutory effect under Section 31 of the Highways Act 1980:-

"1. *Where a way over any land, other than a way of such character that use of it by 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 twenty 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 twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

3. *Where the owner of the land over which any such way as aforesaid passes:*

(a) *has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway; and*

(b) *has maintained the notice after the 1st January 1934, or any later date on which it was erected*

the notice, in the absence of proof of a contrary intention is sufficient evidence to negative the intention to dedicate as a highway ...

6. *An owner of land may at any time deposit with the appropriate council:*

(a) *a map of the land on a scale of not less than six inches to one mile and*

(b) *a statement indicating what ways (if any) over the land he admits to having been dedicated as highways; and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time:*

(i) *within six years from the date of deposit; or*

- (ii) *within six years from the date on which any previous declaration was last lodged under this section*

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."

71. It was established in *R v Secretary of State for the Environment ex parte Blake* (1984) that the word "enjoyment" means having the amenity or advantage of using.
72. Proof of 20 years enjoyment calls for evidence of use by members of the public generally. Lord Parke observed in *Poole v Huskinson* (1843) that:-
- (i) there cannot be a dedication to a limited part of the public
 - (ii) the trial judge should not have told the jury that, as such a partial dedication in favour (only) of the residents of a particular parish and their visitors would nevertheless operate, against the intention of the owner of the soil, in favour of the public.
73. The term "as of right" means that the use of the way must not rely on permission to use the path given by the owner of the land it crosses.
74. The use of the way must be without interruption. Once the twenty year uninterrupted use as of right has been proved, the burden then moves to the landowner to show that there is sufficient evidence that there was no intention to dedicate. A twenty year period has been established.
75. Dedication of public rights may be presumed after use over twenty years unless there is sufficient evidence that there is no intention during that period to dedicate it. It is not sufficient for a landowner to say that in his own mind, he had no intention to dedicate. There must be some overt act on the part of the landowner to challenge public use of the way.

Environmental Impact of the Recommendation

76. There is only a very short section of the Order route along which vehicular use could potentially have an adverse effect on flora and fauna. This section is between Old Mill Cottage across the ford to Stert Valley Lane at point E on the plan at **Appendix 1**. The remainder of the route is surfaced and is used by vehicles including commercial vehicles travelling to the furniture factory at Byde Farm.

Financial Implications

77. Members must consider the legal points set out in paragraphs 61-75 above in order to avoid serious and costly legal expenses.

Options Considered

78. Statutory procedure requires that the Order must be referred to the Planning Inspectorate for determination because objections have been received. The Council must advise the Planning Inspectorate:-
- (i) whether it considers that the Order should be:
 - confirmed, or
 - not confirmed
 - (ii) that the Council has adopted a neutral stance towards confirmation.

Reasons for Recommendation

79. To comply with the County Council's legal duty.
80. The historical evidence strongly suggests a highway for all purposes along the order route but which is now mainly used by walkers and riders, thereby fitting the user test to be satisfied in recording the route as a byway open to all traffic.

Recommendation

81. That the Order and the objections and representations be forwarded to the Planning Inspectorate with the recommendation that it be confirmed without modification.

GEORGE BATTEN

Director of Environmental Services

Report Author

BARBARA BURKE

Senior Rights of Way Officer

The following unpublished documents have been relied on in the preparation of this Report:

Correspondence with Parish and District Councils and other interested parties

