

REGULATORY COMMITTEE
14th FEBRUARY 2007

PRESHUTE: FOOTPATH 30 - OBJECTIONS TO MODIFICATION ORDER**Purpose of Report**

1. To consider and comment on the objections received to the making of an Order under Section 53 of the Wildlife and Countryside Act 1981 providing for the upgrading of Footpath 30 Preshute to a bridleway. The location of the path is shown on the plan at **Appendix 1** and a more detailed plan is attached at **Appendix 2**.

Background

2. In September 2003 officers received a telephone call from Mrs. Lampard of Clatford stating that on 8th September the new owners of The Hall had padlocked the gate across the right of way and removed a bridleway sign.
3. Officers explained that the way was recorded on the Definitive Map as a footpath only and Mrs. Lampard expressed the wish to claim the path as a bridleway.
4. On 9th October 2003 Mr. and Mrs. Lampard submitted an application to upgrade the path to a bridleway. This application was supported by 19 completed user evidence forms describing regular use as of right of the way since 1962. A letter was also enclosed from the previous owner who had lived in the property from 1978 to 2003 who confirmed the way was in regular use by riders in the area. She explained it was the only safe access to the bridleway on to the Downs which lie to the north of the A4. A summary of the evidence forms is attached at **Appendix 3**.

Main Considerations for the Council

5. Section 53 of the Wildlife and Countryside Act 1981 places a duty on the County Council to keep the Definitive Map and Statement under continuous review upon the occurrence of an event set out in Section 53(3). Those events include:

"the discovery by (the council) of evidence which (when considered with all other relevant evidence available to them) shows ... 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."

6. The evidence must show, on the balance of probabilities, that a way or ways shown on the Map and Statement 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 an Order should be made. If there is a conflict in the evidence 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* is taken into consideration. It is in the public interest to make an Order if there is the reasonable possible outcome of a subsequent inquiry process that public equestrian rights are found to subsist. The Council must be satisfied that the evidence available is sufficient to enable it to be reasonably alleged that equestrian rights exist.

7. This application is based on dedication whether at common law, by long user or presumed dedication under Section 31 of the Highways Act 1980.
8. There are three essential parts of Section 31 to be fulfilled for the presumption of presumed dedication to arise. These are:
 - (i) Use of the way by the public as of right without interruption.
 - (ii) Use for 20 years running back from the date on which the right of the public to use the way is brought into question.
 - (iii) No sufficient evidence that there was no intention during that 20-year period to dedicate the way to the public.
9. Use "as of right" was considered by the House of Lords in *R v Oxfordshire County Council and Oxford Diocesan Board of Finance ex parte Sunningwell Parish Council*. The issue before the House of Lords was whether "as of right" included an honest belief by the public in a legal right to use the common. Lord Hoffman rejected this subjective element.

"In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like Reg. v. Suffolk County Council, ex parte Steed when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr. J.G. Riddall's article "A False Trail" [1997] Conv. 199."

In short, providing that the public are using a way without force, secrecy or permission, they are using it as of right whether or not they believe that they have such a right. Officers have assessed the evidence of use and length of use of the way by the public openly without permission.

10. Lord Hoffman considered whether tolerance on the part of the landowner was incompatible with user as of right. He concluded that tolerance was compatible.
11. Officers have taken the 8th September 2003 as the date when the status of the way was brought into question by the landowner. The relevant 20 year period for use is from 1983 - 2003.
12. The objector believes there is insufficient evidence that the owner of the route wished to dedicate equestrian rights. As can be seen from paragraph 4 above, there is ample evidence of use over the relevant period. The previous owner throughout that period confirmed in writing that many horseriders used the way. The objector believes notices inconsistent with dedication have been erected and maintained.

13. Mention of a 'Private Road' sign where the footpath junctions with the A4 and Council footpath signs on the path have been raised by the present owner of the land. The case of *Burrows v Secretary of State for the Environment, Food and Rural Affairs* is helpful. The judge observed *"The inference as to the intention of the person who erected it is (in the absence of any evidence to the contrary) naturally to be drawn from how the notice would be likely to be understood by members of the public who saw it in its context."* The notice was erected by Mrs. Goodwin and her husband and her attitude to riders on the route is known. The private road notice did not state that horseriders could not use the way. It is not uncommon for a private road to have public rights. It is also believed that riders not knowing the landowner would conclude the same. The notice is not explicit enough.

14. Looking at the wording of Section 31 (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 absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway."

15. The presence of a public footpath sign would seem to have little relevance to the question of dedication by the landowner. The County Council has a duty under Section 27(2) of the Countryside Act 1968 to erect and maintain a signpost where a footpath, bridleway or byway leaves a metalled road. The duty relates to the status of the path as shown on the Definitive Map. The Definitive Map is conclusive evidence of the existence and status of the highway at the relevant date without prejudice to any question whether the public had at that date any right of way other than on foot, Section 56 of the Wildlife and Countryside Act 1981. The erection of the signpost was pursuant to a statutory duty to reflect the rights which had been proven when it was erected.

16. Bristow J. giving judgement in *Attorney General v Honeywill* (1972) said:

"It is not disputed and I take it to be clear law, that if a right of way was originally dedicated for use on foot it can subsequently be dedicated for use with vehicles as well."

Officers believe this principle of law is applicable to presumed dedication of a bridleway over a footpath.

Environmental Impact of the Recommendation

17. There is no provision within the relevant legislation for environmental impacts to be taken into account. Any environmental impact resulting from the use of the right of way as a bridleway, if the Order is confirmed, must be managed under other powers available to the County Council.

Risk Assessment

18. There is no provision within the relevant legislation for risk to be taken into account. The Order will be determined by the Secretary of State. Any risk resulting from confirmation of the Order must be managed separately.

Financial Implications

19. The cost of the Public Inquiry will be met within the budget allocation.

Options Considered

20. This is a statutory procedure which the Council must follow. There is no other option.

Reasons for Recommendation

21. Officers believe there is sufficient evidence of use of the claimed path by horseriders as of right throughout the relevant period and no evidence of a lack of intention to dedicate equestrian rights during the relevant 20-year period.

Recommendation

22. That the Order to upgrade Footpath 30 Preshute to a bridleway be submitted to the Secretary of State with the recommendation that it be confirmed.

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

Correspondence with the District and Parish Councils and other interested parties