

HAM: OBJECTION TO MODIFICATION ORDER

Purpose of Report

1. To consider and comment on objections received to the making of an Order under Section 53 of the Wildlife and Countryside Act 1981, providing for a bridleway known as Pills Lane to be added to the Definitive Map and Statement, and a further bridleway from road C198 to Three Cornered Copse also to be added. Pills Lane is shown as route A and the other bridleway as route B on the plan attached at **Appendix A**.

Background

2. On the 3rd March 1998, Ham Parish Council applied for an Order under Section 53 of the Wildlife and Countryside Act 1981 to add the bridleways shown on **Appendix A**.
3. In support of the application, the following documents were tendered in evidence:-
 - (i) The Ham Inclosure Award dated 1823;
 - (ii) The 1910 land survey in connection with the Finance Act 1910;
 - (iii) An extract from "A History of Wiltshire";
 - (iv) Five user evidence forms in relation to Pills Lane, summarised at **Appendix B**.
4. Officers considered the evidence and concluded that, in connection with Pills Lane, only a very short section, approximately 290 metres, at its westerly end had been used by the witnesses and some of this use appears to have been of a permissive nature.
5. From the mapping evidence Pills Lane appears to be of some antiquity, for example the beginning of it is shown on Andrews and Dury's map of Wiltshire dated 1773. It is not shown as part of a direct through route.
6. The Ham Inclosure Award of 1828 was made under the general provisions of the 1801 Inclosure Act and the local Act of 1827. Pills Lane lies on land already enclosed. This is significant because under Section 8 of the 1801 Act the Inclosure Commissioners had "to set out and appoint the public carriage roads and highways, through and over the lands and grounds intended to be divided, allotted and enclosed so as such Roads and Highways shall be and remain thirty feet wide at the least." The land adjoining Pills Lane had already been enclosed, which meant the Commissioners had no authority to create a right of way on the lane, shown as route A on **Appendix A**.

7. Route B on **Appendix A** is affected by the Award as it fell on land to be enclosed. The Commissioners set out a "public bridle and footway of the breadth of eight feet branching out of the private carriage road and driftway into the ffosbury and Inkpen Road." The extent of the Award private carriage road is marked on **Appendix A**.
8. Although the description may suggest that only private rights exist over the awarded private carriage road, the Commissioners did require it to be kept in repair in the same manner as public carriage roads, ie the lane was to be maintained at public expense. Following on from the case of *R v Inhabitants of Cottingham* in 1794, a private right of way cannot be publicly maintained. It must follow from this that the Awarded bridleway referred to in paragraph 7 above was not a cul-de-sac as the public had equestrian and pedestrian rights over the private road.
9. The Commissioners were bound by the General Inclosure Act of 1801 in setting out highways. Judges have, since 1926, complained that the 1801 Act, and in particular Section 8, was almost impossible to comprehend. The judge in the High Court case of *R v Secretary of State for the Environment ex parte Andrews* (1993) was called upon to interpret the complex wording of Section 8 of the 1801 Act. In this case the issue was whether the Inclosure Commissioners had the power under the 1801 Act to set out a four foot wide footpath. The Department of the Environment's Guidance Notes to Inspectors stated the view that only public rights of way which could be created under the 1801 Act were thirty feet wide carriageways. The judge in the *Andrews* case also concluded this was the case and the Inclosure Act did not give the Commissioners powers to set out public footpaths (and by implication, although it was not expressly decided in the case, public bridleways).
10. Officers concluded on the basis of the *Andrews* decision that the Commissioners executing the Ham Inclosure Award had acted ultra vires in awarding public bridle rights over route B and the application was refused. On reflection, however, officers concluded that the 1801 Act is only a general clauses Act which the draughtsmen of the 1827 local Act could choose to incorporate or modify as they saw fit. The local Act did give the Commissioners power "to set out and appoint, any public or private roads, tracks, ways or paths within the said parish of Ham, or in or over any of the ancient Inclosures within the same parish as to them shall deem proper".
11. The Parish Council decided to exercise its right of Appeal to the Government Office for the South West (GOSW).
12. During the Appeal process, officers reconsidered all the evidence relating to both claimed routes and concluded that the 1801 Act did not limit what can be included within a local Act. The Commissioners for the Ham Inclosure Award were not acting ultra vires in setting out a bridleway on route B shown on **Appendix A**. In relation to Pills Lane, route A (**Appendix A**), officers still feel there is a lack of convincing evidence that Pills Lane is a bridleway.

13. GOSW considered submissions from the Parish Council, legal representatives of landowners and the County Council in making its decision. In relation to Pills Lane, route A on **Appendix A**, the Secretary of State took the view that the documentary evidence in support of the claim was not wholly conclusive as regards its status. He agreed with both the Parish and County Councils that the westernmost 290 metres had been used by walkers and horse riders. In relation to route B on **Appendix A**, the Secretary of State agreed with the Parish and County Councils that this should be added to the Definitive Map and Statement.
14. On the 5th March 2001 the County Council was formally directed to make the Order in respect of both bridleways.

Objections and representation to the Order

15. **Burges Salmon** on behalf of the landowners Wansdyke Farms - question whether there is evidence to conclude that the whole of route B on **Appendix A** was dedicated as a public bridleway as they submit there is no evidence that the Inclosure Commissioners intended that the bridleway would continue along the awarded private carriage road.
16. **Mrs. J.M. Weatherill** on behalf of Wiltshire Bridleways Association - supports the Order. Mrs. Weatherill believes the historical evidence for route B on **Appendix A** is overwhelming and entirely convincing, whilst for Pills Lane, route A, it should be recorded as a bridleway on the balance of probabilities.
17. **Mr. L.J. Hanwell** of Greensands Cottage, Wansdyke Farms, Ham - objects to the Order. He has worked on the farm as Gamekeeper for 2½ years, and recording these paths as rights of way would affect the pheasants and brown hare and generally disturb the estate. He believes Pills Lane would more likely to have been a way used by farm workers and occupants of Spray House.
18. **Mrs. J.H. Phillips** of Manor Farm House, Ham - has lived in Ham for almost 30 years and “believes it is untrue that these are public footpaths and people would not have used them”. She also believes the Council is riding roughshod over local opinion and relying, presumably, on stated untruths.
19. **Mr. J.H. Phillips** of Manor Farm, Ham - since living in Ham from 1971, the proposed bridleways have never been public rights of way. The subject of Pills Lane arose when he was a Parish Councillor but it was never proven. He believes it is unfair on farmers to open-up possible footpaths.
20. **Mr. A.J. Couling** of Goldenlands Cottage, Burbage - worked on Wansdyke Farm Estate from 1921-1973. At no time did he see or know of anyone using the Pills Lane, route A.
21. **Beachcroft Wansboroughs** have objected to the Order on behalf of **Mr. M. Barnwell** who lives at Brook House, Ham which is situated at the western end of Pills Lane, route A. Mr. Barnwell believes there is insufficient evidence, both historical and user to support adding Pills Lane to the Definitive Map and Statement.

Legal points to consider

22. Section 53 of the 1981 Act imposes on the County Council, as a surveying authority, a statutory duty to keep the Definitive Map and Statement up to date. Section 53(3)(c) requires that an authority issues a modification order where:

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

(i) that a right of way which is not in the Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the Map relates, being a right of way to which the Part applies."

Schedule 14 of the 1981 Act sets out the procedure to be followed, where a party requests the surveying authority to modify the Definitive Map and Statement. If the authority refuses an application to modify, there is a right of appeal to the Secretary of State for the Environment. In the event of a refusal by the Secretary of State, there is no further right of appeal.

If the application under Schedule 14 is granted, by either the authority or the Secretary of State, then Schedule 15 requires the authority to issue notices. If objections are received that cannot be resolved, these must be referred to the Secretary of State who can confirm or refuse the Order. It is usual for him to hold a Public Inquiry. Any substantial issues would be determined at that stage.

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

"A court or tribunal before determining whether a way has or has not been dedicated as 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 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.

24. 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 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 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 was 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 6 inches to 1 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 lodgment 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."

25. 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.

26. 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.

27. 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.
28. The use of the way must be without interruption. Once the 20 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.
29. The County Council must, in accordance with *R v Secretary of State for Wales ex parte Emery* (1998) and *R v Secretary of State for the Environment ex parte Bagshaw* (1994), consider whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. This does not require the County Council to find that a right of way actually exists.
30. In the case of *R v Secretary of State for Wales ex parte Emery* (1998), under Section 53(3)(c)(i) of the 1981 Act, the Court had to consider whether there is evidence that:
 - (i) a right of way subsists or
 - (ii) a right of way is reasonably alleged to subsist.
31. The latter test is inevitably less onerous than the former.
32. Where there is no credible evidence of 20 years use at all, or there is incontrovertible evidence that the landowner had no intention, during the period, to dedicate the way to the public, the authority should declare that there is no evidence that a right of way as claimed subsists at all. A problem arises, however, where there is conflicting evidence on one or other or both issues.
33. The Court of Appeal confirmed in *Emery* that the correct approach is that which was set out by the High Court in *R v Secretary of State for the Environment ex parte Bagshaw* (1994) 68 P and CR 402. In *Bagshaw*, the High Court explained the difference in approaching the two tests. For the first test, it is necessary to show that on balance of probabilities a right of way exists. For the second test, it is only necessary to show:

"that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist."
34. If, looked at objectively, the evidence from the witnesses conflicts, but that, by reasonably accepting one side's evidence and reasonably rejecting the other side's, the right would be shown to exist, then, according to *Bagshaw*, it is reasonable to allege such a right. Effectively, the authority does not have to find that a right actually exists, only that it is reasonable to claim one.

35. The Court of Appeal in Emery underlines that the Schedule 14 procedure and issuing a Modification Order is only the first stage. Any party who objects has the right, under Schedule 15 of the 1981 Act, to refer the matter to the Secretary of State for the Environment. If an applicant produces sufficient evidence to justify that the right of way subsists, the proper approach is for an authority to make a Modification Order under Schedule 14 of the 1981 Act and then follow the procedures set out in Schedule 15. If there are still objections, the 1981 Act provides for any factual dispute to be resolved at the Schedule 15 stage, but submitting the Modification Order to the Secretary of State for confirmation.

Comments on the objections

36. Officers cannot agree with Burges Salmon's conclusions. Their conclusion would result in the bridleway forming a cul-de-sac with no link to the main road into the village. The entire route forms a useful route from the ridgeway into the village of Ham from the east. Once one comes to that conclusion, it is logical that a bridleway should extend along the whole of route B.
37. Mrs. Weatherill's support is welcomed.
38. As Members will be aware, the law does not permit the suitability of the way for users who have a right to use it, or the nuisance that they are alleged to cause, or to be likely to cause. Mr. Hanwell is only speculating about the use of Pills Lane.
39. The Parish Council has submitted the application which is supported by local people and it is incorrect to say the Council is riding roughshod over local opinion. Mrs. Phillips was seemingly unaware of the background to this case which has now been provided to her. The same is true of her husband.
40. Mr. Couling has obviously known the estate for many years but throughout that time he would not have been able to observe the alleged use of the way over 24 hours and 365 days of the year. Lack of user evidence on route B does not preclude it from being added to the Definitive Map.

Conclusions: Options Considered

41. Officers do not waver from the view that there is a lack of convincing evidence that Pills Lane is an ancient public highway. The evidence is equally consistent with the lane being a private road serving the adjacent inclosures. In this respect, the Council agrees with the points made by the objectors.
42. The alternative case put forward by the Parish Council is that route A by implication, has been dedicated as a public bridleway as a result of at least 20 years use, in accordance with Section 31 of the Highways Act 1980. The Council took 1972 as the date the right of way was first called into question, when the owner of the land at the western end of Pills Lane erected a gate across the lane. This would leave the Parish Council to prove at least 20 years' use prior to that date. The use must be of right and not with the permission, express or implied, of the landowner.

43. The date of 1972 has been taken from Mr. Wood's statement although, in his letter dated 11th December 1999, he confirms that this date was in fact incorrect. He now recalls that the gate was erected in October 1984 to enclose farm animals. He is the only witness to refer to a notice on the gate marked "Private" at that time.
44. It is possible for a landowner to interrupt the 20 year period of use and so defeat a claim to dedication. In itself, however, the erection of an unlocked gate does not necessarily imply that the landowner intended to prevent public access. It is equally consistent with the landowner seeking to keep in stock, a point that is made by Mr. Wood in his letter. If this date is not accepted, the next challenge to use of Pills Lane by members of the public, on which there is any evidence, would appear to be in 1994. According to his Statutory Declaration, Mr. Brown, who owned Brook House through which the western part of Pills Lane ran, wrote to the Parish Council noting that the claim to a right of way along Pills Lane had been dropped through lack of evidence. If that date is adopted, then more evidence can be taken into account.
45. In the case of the statements from the landowners, Mr. Brown can only give evidence of matters within his own period of ownership from 1986 to 1996; Mr. Barnwell from 1996 onwards. There is no evidence to contradict the Parish Council's witnesses on the period of use prior to 1986.
46. Officers agree that it is not possible from simply reading the witness statements to conclude whether a public bridleway definitively exists. The evidence of many of the witnesses is rather vague. There is a factual dispute as to whether the owner of Brook House did indeed assert his right to prevent public access and, if so, when. Nevertheless, there is a common theme that access was gained along part of Pills Lane to reach the adjacent fields. It is not clear whether permission was given. It is not possible, however, to dismiss the evidence out of hand. The evidence needs to be tested but it is noted that many of the witnesses are not prepared to give evidence at a Public Inquiry.
47. It would appear that there is sufficient evidence to argue a public right of way is reasonably alleged to subsist over part of route A, ie the westernmost 290 metres.
48. The Wildlife and Countryside Act 1981 provides for any factual dispute to be resolved once the Order has been submitted to the Secretary of State for determination. It is anticipated that this Order will be the subject of a Public Inquiry.
49. As far as route B is concerned, there appears to be significant evidence to suggest that the Inclosure Commissioners, in 1828, intended to dedicate the whole of the route as a bridleway.
50. No other options available, the Order has to be submitted to the Planning Inspectorate.

Recommendation

51. That the Order be submitted to the Planning Inspectorate, together with the comments made to the objections and representation and a list of the legal points the Council has considered.

Reason for Recommendation

52. Complying with the law.

RICHARD J. LANDER

Director of Environmental Services

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

Correspondence with the Parish Council and other interested persons.

Environmental impact of the Recommendations contained in this Report:

None.