

**REGULATORY COMMITTEE**  
**10<sup>th</sup> APRIL 2002**

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**WEST DEAN: LAND AT RED LION HOUSE****Purpose of Report**

1. To consider and comment on objections and representations received to the making of an order under Section 53(2) of the Wildlife and Countryside Act 1981 to upgrade part of Footpath No. 22 West Dean to a Byway Open to All Traffic (BOAT) and add a BOAT to the Definitive Map and Statement from West Dean No. 22 leading southerly across the River Dunn to join a spur of the C323 road leading to East Dean, as shown on the plan at **Appendix A**.

**Background**

2. On the 21<sup>st</sup> March 2001, the Environmental Services Sub-Committee considered a report on land at Red Lion House. The Sub-Committee resolved to withdraw the report in order to invite written representation from the two main parties and to carry out a site inspection.
3. The site inspection took place on the 4<sup>th</sup> June 2001.
4. On the 18<sup>th</sup> July 2001, the Sub-Committee reconsidered the report concerning the status of land at Red Lion House, formerly the Red Lion Inn. A copy of this report is attached at **Appendix B**.
5. The Sub-Committee resolved:-
  - (1) *To make an Order under Section 53(2) of the Wildlife and Countryside Act 1981 to upgrade part of Footpath No. 22 West Dean to a byway open to all traffic and to add a byway open to all traffic from Footpath No. 22 leading south across the river Dunn to join a spur of the C323 road which leads to East Dean with a width of 15 feet as shown on the plan at Appendix A to the Director's report.*
  - (2) *To advertise the County Council's intention to make a Traffic Regulation Order providing for the exclusion of motorised vehicles from this byway.*
  - (3) *To ensure that the two above mentioned Orders come into effect concurrently.*
6. On the 6<sup>th</sup> September 2001, an Order was made under Section 53(2) of the Wildlife and Countryside Act 1981 in accordance with the Sub-Committee's resolution.
7. The Order was duly advertised and the following objections were received.

**Objections received to the making of the Order**

8. **Mrs. Weatherill** on behalf of the Wiltshire Bridleways Association wrote on the 20<sup>th</sup> September 2001 to formally support the Order. Mrs. Weatherill stated that her organisation would not wish to make any objection to the proposed Traffic Regulation Order excluding vehicles from this byway.

9. **Birketts, Solicitors**, on behalf of Mr. and Mrs. Morgan, objected to the making of the Order on the grounds that there is insufficient evidence to add a BOAT to the Definitive Map. In a letter dated the 9<sup>th</sup> October 2001, Birketts stated:-

*"We have previously explained that we do not think the user evidence can be relied on. This is because it is an offence under the Road Traffic Act 1988 to drive on common land or on a footpath. It is not possible to acquire a right by long use where that use is contrary to statute.*

*The documentary evidence as you yourself acknowledge in paragraph 43 of your report of 21<sup>st</sup> March 2001 is inconclusive."*

10. In a letter dated the 31<sup>st</sup> October 2001, **Whitehead Vizard, Solicitors, on behalf of West Dean Parish Council**, gave the grounds of objection of the Parish Council to the Order:-

1. *The evidence upon which the Order Making Authority's (OMA) decision is based is primarily of use. This objection deals only with the evidence referred to in the report to the Sub-Committee.*

*It should be noted, however, that the WDPC has submitted an application for the registration of land, including land within the Modification Order, as a village green, Under Section 13 of the Commons Registration Act. That application is supported by a large body of user evidence suggesting that the land including the new byway has been used for the purposes of a village green and reference will be made to that evidence at the Enquiry into this Modification Order.*

2. *In addition, WDPC will argue that the OMA, by failing to take account of the evidence submitted by it in respect of the village green application, has failed to have sufficient regard to its duty under Section 53(3)(c) of the Wildlife and Countryside Act 1981. When considering the discovery by the authority of evidence as to the existence or status of a highway, it should have regard also to "all other relevant evidence available to it." The WDPC will argue, therefore, that the Modification Order is unlawful.*

3. *As to the evidence submitted and referred to in the report to the Sub-Committee, the WDPC says that, whilst this is prima facie evidence of the existence of a public highway, the nature of much of it is as referable to the existence of the village green as it is to a highway, especially one of only 15 feet width.*

- *Mr. Haskell refers to animals stopping, grazing and waiting and to children playing and to the land around the ford being "open". The activities are not consistent only with a highway.*
- *Mrs. Legg refers to not dissimilar activities. The same comment applies.*

- *Mrs. Parsons* refers, in addition to evidence suggesting a highway, to the area outside the pub being used for parking. This suggests the existence of something in addition to a highway.
  - *Mrs. Reynolds* states "The land outside the pub was always open" and to the use of "the land around the river for recreation." This is not evidence exclusively referable to the existence of a highway.
  - *Mr. Maurice Thomas* refers expressly to "the ford and the green" being "considered the centre of the village." It is unlikely that a highway, being merely a means of passage, could be so described.
  - *Mrs. Warry* gives evidence consistent with the existence of a village green.
4. In summary, the evidence is equivocal and should be viewed in the light of the village green material referred to in 2 above.
5. Even if it is concluded that the evidence points exclusively to the existence of a highway, none of the evidence submitted to the OMA justifies a Modification Order creating a highway of 15 feet width. The weight of the evidence as it relates to a highway points to a much greater width possibly extending to the entire area of the land in front of the former pub. If confirmed, therefore, the highway should be of a far greater width. The WDPC's case is that the width of the highway extends over the whole area from the outside of the Red Lion pub garden wall right down to the river on all sides to the north, south, east and west."
11. In a letter dated the 24<sup>th</sup> September 2001, Mr. Sanders gave the following reasons for objecting to the Order:-
- safety, mud and debris on the roadway
  - cost and use of public funds - it is not necessary as there is an alternative route
12. Copies of the objections and representations made to the Order will be available for inspection in the **Members' Room** prior to the meeting.

### **Comments on the objections and legal points to consider**

13. The legal issues are set out in paragraphs 29 to 40 of the report attached to **Appendix B**. The County Council, as surveying authority, has a duty to record all public rights of way on the Definitive Map and Statement. The Council must look at all of the evidence available to it to decide on the balance of probabilities the highway rights of the public. The County Council is entitled to take into account both user and historical evidence.
14. The objections raised by Mr. Sanders are irrelevant in determining what public rights may exist but may be relevant, if the Order is confirmed, in managing those rights.
15. As can be seen from the plan at **Appendix A**, the Modification Order includes an upgrade of an existing right of way and a length of new byway. The relevant sections of the Wildlife and Countryside Act 1981 are set out at paragraph 31 of the report attached to **Appendix B**. In Section 53(3)(c)(i), the test to be applied to a new right of way is "...subsists or is reasonably alleged to subsist" whereas for an upgrade in

status the test at sub-section (ii) is "..... *ought to be there shown as a highway of a different description.*"

16. With respect to the upgrade of part of Footpath 22, if the evidence supports the existence of higher rights, then these ought to be recorded, and on the balance of probabilities the Order was correctly made.
17. With respect to the new length of byway, guidance has been given by the Court of Appeal in the case of R v Secretary of State for Wales ex parte Emery (1996) on the correct approach for Committee to adopt when considering whether the evidence shows that a right of way *"is reasonably alleged to subsist."*
18. The Court confirmed 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). In Bagshaw the High Court stated that the test is whether *"a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist."*
19. If, looked at objectively, the evidence from the witnesses conflicts, but by reasonably accepting the evidence of one party and by reasonably rejecting the other party'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 could reasonably subsist.
20. In relation to Birketts' objection that it is an offence under the Road Traffic Act 1988 to drive on common land and that it is not possible to acquire a right by long use where that use is contrary to statute, the Courts have again been helpful. In Stevens v Secretary of State for the Environment (1998), the court decided that where vehicular user is partly pre 1930 and partly post 1930, the evidence (including the documentary evidence) must be looked at as a whole. Only if there is no evidence sufficient to prove dedication of a way for vehicular use prior to 1930 should post 1930 user evidence be excluded. Where there is no evidence of vehicular user in the years immediately pre 1930 but satisfactory documentary evidence of historic user by carriages or carts, the vehicular rights of way might be considered to be established by 1930. Any post 1930 motor vehicle user could then be taken into account as buttressing or confirming the existence of the vehicular right of way.
21. In this case there is both user and historical evidence of use by carriages and carts pre dating 1930.
22. In relation to the Parish Council's objections, these are mainly in support of its application for village green status. This is a separate application made under the Commons Registration Act 1965 and Members will be asked to consider the application in due course. It is therefore not appropriate to include in this report issues which relate to village green status.
23. At paragraph 3 of their ground of objection, Whitehead Vizard state *"As to the evidence submitted and referred to in the report to the Sub-Committee, the WDPC says that, whilst this is prima facie evidence of the existence of a public highway, the nature of much of it is as referable to the existence of the village green ....."* Whilst no decision has yet been made on the village green application, it would appear that the Parish Council continues to maintain that the evidence supports public highway status. Furthermore, land can be both highway and village green.

### **Conclusion: Options Considered**

24. Members should be aware of the background to this matter. Officers have been dealing with this case for several years, trying to mediate between the parties yet to resolve the rights of way case within the statutory framework of the Wildlife and Countryside Act 1981. An enormous amount of officer time, from the Chief Executive downwards, has been taken up on this matter and the cost to the County Council of processing first the highway and subsequently the village green application, runs into tens of thousands of pounds.
25. Members are now asked to consider the objections received and decide whether or not the Order should be confirmed. If Members resolve that the objections are duly made and should be accepted, the Order must be submitted to the Secretary of State for determination. However, the objections do not appear to overturn the evidence of highway status.

### **Recommendation**

26. That the Order be submitted to the Secretary of State with the recommendation that it be confirmed without modification.

### **Reason for Recommendation**

27. The evidence supports the resolution made by the Environmental Services Sub-Committee on 18<sup>th</sup> July 2001 and the objections do not outweigh the evidence.

### **RICHARD J. LANDER**

Director of Environmental Services

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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, owners of land affected and other interested persons.

### **Environmental impact of the Recommendations contained in this Report:**

Enhancement of the rights of way network.