

WILTSHIRE COUNTY COUNCIL

AGENDA ITEM NO.

ENVIRONMENTAL SERVICES SUB-COMMITTEE
18TH JULY, 2001

WEST DEAN: LAND AT RED LION HOUSE

Purpose of Report

1. To reconsider the attached report (**Appendix 1**) concerning a query on the status of land at Red Lion House, formerly the Red Lion Inn.

Background

2. On considering the report the Environmental Services Sub-Committee on the 21st March, 2001 deferred making a decision pending a site inspection. The site inspection was held on the 9th July, 2001.
3. Mr. and Mrs. Morgan of Red Lion House and the Parish Council were invited to make further representations regarding the evidence put forward to substantiate highway rights. Submissions on behalf of both parties are attached (**Appendix 2**).
4. Revised plans are attached (**Appendices 3 and 4**) indicating existing highway/proposed change and the claimed highway/common land.

RICHARD J. LANDER

Director of Environmental Services

The following unpublished documents have been relied on in the preparation of this Report:

None

Environmental Impact of the Recommendations contained in this Report:

None

WILTSHIRE COUNTY COUNCIL

AGENDA ITEM NO. 29

ENVIRONMENTAL SERVICES SUB-COMMITTEE
21st MARCH 2001

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

1. To inform Members of the query on the status of land at Red Lion House, formerly the Red Lion Inn, and to seek approval 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 (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. West Dean Parish Council asserts that the land numbered 2 and 3 on the plan at **Appendix B** ought to be recorded as highway with public vehicular rights over it. Area 2 includes some land presently recorded as common land registered under the Commons Registration Act 1965. The land cannot be both common land and highway: highway status would take precedence. The area shown numbered 1 on the plan at **Appendix B** is the remainder of the area registered under the Commons Registration Act 1965 as common land.
3. The Parish Council wishes to see the path recorded on the highway map as highway maintainable at public expense as it believes it will have very little enforcement power, if for example Mr. and Mrs. Morgan erect gates across it, if it is recorded as a byway open to all traffic. This is not the case as the Parish Council can take action under Section 137 of the Highways Act 1980 to bring a prosecution against anyone who wilfully obstructs the free passage along any highway, including any right of way.
4. The land which the Parish Council claims is highway is owned by Mr. and Mrs. Morgan, of Red Lion House, formerly Red Lion Inn. Mr. and Mrs. Morgan recognise footpath 22 across their land as highway but dispute that any of the remainder of the land has highway status.
5. The matter has now become highly contentious and the police have become involved on a number of occasions. It is in the public interest to establish whether any part of the land in question is highway, ascertain what rights may exist over it and take steps to ensure that this status is properly recorded.
6. The Parish Council's assertion is based on both user and historical evidence which the Parish Council has submitted. Eleven user evidence forms were submitted from people that had known and used a route across the land for many years. Unfortunately one of the witnesses has since died and his evidence has not been taken into account as it is untested.

User Evidence

7. **Mr. Dawkins** completed a witness form on 26th March 1998 in which he described his use and knowledge of what he believed to be a byway open to all traffic. Mr. Dawkins was born in 1919 and has known the area by the Inn all his life. He was born in West Dean. He used a route across the ford from 1924-45 and states it was an open and distinct roadway. He used it during this time to go to and from work. He remembers horse drawn carts using the ford rather than the road bridge which used to be humpbacked. When the new bridge was being constructed 'everyone' used the ford. The ford was about 15 feet wide, shallow and easy to use. It was almost dried up in the Summer months. In the 1960's the river flooded because the hatches at Clarendon were opened. He remembers it well because he could not get to work by several modes of transport. The roadway was well used by many people on a regular basis. The banks have now been built up and it is no longer possible to use it.
8. **Mr. Gruzelier** was born at West Dean in 1940. He states he has known the ford to be highway for over 50 years. The village used the area in front of the Inn for parking. He has used a route over the river via a ford since 1947 on a bicycle, motorbike, car and tractor. The ford was very well used in Summer when the river was shallow. The postman has ridden across it. The previous bridge was humpbacked and not conducive to horses and carts which used the ford. Whilst the new bridge was being built the ford was the only means of crossing the river. In the Winter whilst rebuilding was taking place a pontoon bridge was built. In the 1960's the bank of the river was built up on the pub side and the bank on the opposite side was built up from spoil from a cottage renovation. Prior to this there was a well used road through the river. He used it most Summer weekends, its width was 6-8 metres through the ford.
9. **Mr. Haskell** has lived in West Dean since 1926 and has used a route across the area claimed as highway since 1927. He remembers the land around the ford being open ground. He enclosed an old photograph to show the ford. He worked at the saw mills from 1933. The saw mills were located on the East Dean Road. Timber from the mill was taken to the railway station by cart through the ford. He used that way because it was difficult to get the horse and cart over the humpback bridge and the horses stopped to have a drink in the river. The cart was washed down in the river. Cattle were also grazed and watered in and around the ford. Children played in the ford and rode across it on their bikes. The blacksmith's shop was near the green and carriages waited on the land in front of the pub well, horses too. The ford was well used but occasionally the area flooded as in the 1960's. The banks have been built up making it difficult to use. The last time he used it was in the early 1960's on a motorbike and sidecar, but prior to this he used it on a very regular basis on foot, bicycle, or in a vehicle.
10. **Mrs. Legg** came to live in West Dean in 1921 when she was 19. The ford appeared as a wide road in front of the Red Lion Pub and everyone used it for as long as she can remember. She has used it on foot from 1921 to the 1960's. Cows were taken to the river to drink. Horses and carts waited for their turn at the blacksmith's shop. Horse drawn carts used the ford and during the war heavy military tracked vehicles used the ford.

11. **Mrs. Parsons** has lived in West Dean for 84 years, her cottage overlooks the green. She has seen people using the ford many times and she firmly believes that the public have a right to drive across it by all modes of transport. There was a distinct road across the river and horse drawn carts used it from the saw mills to the station. Cattle were driven down to the ford to drink. The ford was used by heavy vehicles to and from the saw mills. The blacksmith's shop is off the green and the area outside the pub was used by horses and carts for parking. After the war when the roads were tarmacked, it was mainly tractors that used the ford.
12. **Mrs. Reynolds** came to West Dean in 1921 when she was 12. Her father was landlord at the Red Lion. She lived at the Inn until 1937. The land outside the pub was always open. She remembers the ford as a distinct roadway used by vehicles from the saw mills which were not able to negotiate the humpbacked bridge. Cyclists also used it. In 1932 when the humpbacked bridge was replaced, everyone used the ford. The Singer Estate who owned the land never minded people using the land around the river for recreation. Whitbread bought the pub, improved the surface of the car park and raised and curbed the bank. Cattle were grazed on the green and drank at the ford. The ford has flooded but in 1921 it was dry for 4 months during which time people walked across it as a short cut.
13. **Mr. Clifford** came to live in West Dean in 1926. Since that time he has always believed it to be a right of way. Horses, carts and cars regularly used it mainly from April to October. Vehicles from the sawmills used it as they were not able to negotiate the humpbacked bridge. The new bridge built in 1932 took a year to build and everyone used the ford. A pontoon bridge was put up in Winter to cross over. He says the land was a hive of activity. He used it every day during the Summer until about 1962-63 when the banks were built up after the great flood.
14. **Mr. Maurice Thomas** came to West Dean in 1940 as a baby, his father became landlord of the Red Lion. He lived there for 17 years and always believed there to be a vehicular right of way outside the pub across the ford. The ford has a hard surface. It was used extensively by many people, the coal merchant, horse and carts and sawmill lorries. During the time he was at the Inn the land beyond the pub wall was never enclosed by them. The ford and the green were considered the centre of the village and he used to play there as a child.
15. **Mr. Robin Thomas** lived at West Dean with his brother Maurice from 1939-57. He believes there is a public vehicular route across the river via the former ford like his brother and he has used it on many occasions on foot, cycling or riding a horse. He echoes his brother's views and memories on the route.
16. **Mrs. Warry** came to live at West Dean when she was 7 years old in 1922. She remembers the ford at that time very clearly. The route across the river was roughly parallel to the footbridge. It was used by horse and carts and agricultural machinery until the early 1930's before the humpbacked bridge was replaced. The ford was also used by American soldiers, cyclists and cattle. It was well used. The village green was larger than today with more picnic tables on it, it was reduced when the area was tarmacked by the brewery.

Historical Evidence

17. Historical evidence has been submitted by the Parish Council in support of its claim. This is summarised at **Appendix C**.
18. Copies of photographs of the area and the ford were also submitted by the Parish Council, these will be available for inspection in the **Members' Room** prior to the meeting.
19. The map annexed to the Tithe Award for West Dean is stamped with Tithe Commissioner's stamp "received Tithe Com. Nov. 9 1844." The whole area between the Inn and the river is shown open and looks to be part of the C class road. It has no apportionment number nor is braced to any other property. Plots 62, 73 and 65 are all listed as being under the ownership of Charles Baring Wall and occupied by James Beauchamp. Plot 66 is also owned by Mr. Wall and is listed as "Sundry Cottages and garden occupied by sundry tenants."
20. The deposited plan of the Salisbury, Romsey and Southampton Railway dated 1836 show the area claimed by the Parish Council as highway tinted brown as other known highways. Occupation roads are not coloured brown.
21. The deposited plans of the Salisbury Railway from Bishopstoke to Salisbury dated 1843 are relevant as part of the area in question is in the limit deviation for the line so the area in question had to be surveyed and land ownership and status of the land had to be identified. The proposed line was altered and there is a deposited plan covering this dated 7th April 1844. The Smithy and Inn and the area in question are shown and that part of it affected by the railway is included as part of plot 48. The book of reference identifies 48 as "West Dean Description of Property – Road, Owners – Surveyor of Highways, Occupiers – the Public." The whole area in question is shown and by implication it is likely to have been of the same status.
22. The 1901, 1909 and 1926 editions of the County Series 25 inches to the mile Ordnance Survey maps surveyed in 1874 both clearly show the location of the ford across the river.
23. Traditionally, Parish Councils were responsible for maintaining the highway. In 1862 a general highways bill empowered magistrates to compulsorily combine parishes into Highway Districts under the Highway Boards. These Boards were made up of Justices of the Peace, Way Wardens elected by the Parish and had a salaried surveyor. In the Highway Board schedule to the Local Government Board in 1882, a road "across the Ford from the Bridge, to East Dean road" is clearly identified; its length is 5 chains.
24. The working plan for the Inland Revenue prepared under the Finance Act 1910 show the ford and area in question uncoloured and not assessed for duty. From this it is reasonable to infer the land was regarded as highway.

Landowners' Comments

25. Mr. and Mrs. Morgan dispute that the claimed land is highway and have stated in correspondence that the user evidence “is contradictory and some of it untrue. The fact that some of the witnesses are not prepared to deliver their evidence at a public inquiry speaks volumes for its credibility.”
26. Mr. and Mrs. Morgan referred the County Council to their own witnesses and suggested that contact should be made with Mr. Hamilton of Salisbury and Mr. and Mrs. Chandler of Snowdrop Cottage, West Dean about the land.
27. In a letter to the County Council dated the 13th August 1999, Mr. Hamilton stated:-
- “During the past 40 years I became acquainted with most of the primary, secondary and vernacular historical sources for the Deans, the Grimsteads and other villages in the vicinity.
- These were inspected in the original documents in archives, both local and national and copies were taken or supplied as appropriate.
- No evidence came to light of the existence of a village ford used for wheeled traffic, nor did any of the older residents of West Dean (with memories going back to the 1880s) mention the use of a vehicular river crossing other than the road bridge, whose present site is recorded on an Estate Map of 1722.
- This contrasts with the ford and bridge at East Grimstead, which were included in the Schedule of Rights of Way recorded in compliance with the 1949 Act.”
28. Mr. and Mrs. Chandler have known West Dean for 30 years and have never seen anyone use the ford since the latest road bridge was built.

Legal Points to Consider

29. 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.
30. 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.”*

31. The events referred to in Section 53(2)(b) 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:*

(i) *that a right of way not shown 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 this part applies.*

(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.*

32. The words “is reasonably alleged to subsist” in c(i) above place the burden of proof on a balance of probabilities. If Members are satisfied that the available evidence is sufficient to enable it reasonably to be alleged that an old track enjoys vehicular rights, but which will be more suitable for use by walkers and horseriders an Order should be made under Section 53 of the Wildlife and Countryside Act 1981.

33. 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.”

34. 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 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 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 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.”

35. 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.
36. 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.

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

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.

37. 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 and Dyson J’s interpretation in the *Nettlecombe* case.
38. 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 horseriders. 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 horseriders than by vehicles.
39. 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 horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders 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.”
40. 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 or horseriders 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 or type and in particular whether it is more suitable for use by walkers and horseriders than vehicles.

Conclusion

41. The witnesses all state that they have used the way as of right without permission or challenge. The usage spans a time period from 1921 until 1962-63 when the river banks were built up. The use was regular, daily in some cases, such as Mr. Haskell who used the route on a horse and cart going backwards and forwards between the timber mill and the railway station.
42. As can be seen from paragraph 34 above, dedication of a way as highway may be presumed after use over 20 years unless there is sufficient evidence that there was 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.

43. The historical evidence submitted by the Parish Council has been considered. It strongly suggests that all the land shown on the County Series map between the river and the Inn at **Appendix B** is highway but this is not conclusive. However, when taken together with the user evidence, it is clear that there was a vehicular highway from the C323 along the route of part of Footpath 22 and across the ford to rejoin the C323. The user evidence only supports this as a through route and it would therefore not be reasonable to include the whole of Area 3 in **Appendix B** as highway. The user evidence suggests that the ford had a width approximately 15 feet, which is the proposed width for the new byway as being the route used and enjoyed by the public.
44. The Red Lion Inn at the time of the Commons Registration Act 1965 belonged to Strong & Co., Brewery of Romsey. Whitbread Brewery took over the land in the late 1960s. The County Council is not aware of any acts which these companies took to show they had no intention to dedicate the way as highway. The witnesses have given no evidence of being challenged.
45. After the flooding in 1962-63, Whitbread Brewery built up the bank of the river across the ford. Clearly, in doing this the landowner closed the route across the river and this has therefore been taken as the date of challenge. The user evidence between 1942-63 of a through route from C323 road leading south across the River Dunn via the ford to the spur of C323 road which leads to East Dean is sufficient to satisfy the presumption of dedication under Section 31 of the Highways Act 1980.

Recommendation

46. 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 add a byway open to all traffic from 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**.

RICHARD J. LANDER

Director of Environmental Services

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

Correspondence with District and Parish Council owners of land affected and other interested persons.

Environmental Impact of the Recommendations contained in this Report:

Enhancement of the rights of way network.