

REGULATORY COMMITTEE
18th DECEMBER 2002

**FOVANT AND SUTTON MANDEVILLE:
OBJECTIONS TO DEFINITIVE MAP MODIFICATION ORDER**

Purpose of Report

1. To consider and comment on objections made to an Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and to consider the future management of the way.

Background

2. The Order, which the Council was directed to make, seeks to upgrade Fovant footpath 15, Sutton Mandeville footpath 4 and part of Sutton Mandeville footpath 3, collectively known as Hole Lane to byways open to all traffic, with a width of 4.75 to 14 metres in Sutton Mandeville and 4.5 to 7.25 metres in Fovant. Hole Lane is shown on the plan at **Appendix 1**.
3. A report, which was considered by the former Rights of Way and Commons Sub-Committee on 22nd November 1995, on an application made by Mrs. Weatherill, Chairman of Wiltshire Bridleways Association, to upgrade Hole Lane to a byway open to all traffic, is attached at **Appendix 2**.
4. The Sub-Committee resolved not to make an Order.
5. On 15th February 1996 Mrs. Weatherill exercised her right to appeal to the Government Office for the South West (GOSW) against the Council's decision.
6. On 10th January 2001 GOSW directed the County Council to make an Order under Section 53(2) of the 1981 Act to upgrade Hole Lane to a byway open to all traffic. In summary it was found:-

"In conclusion, the Secretary of State agrees with the Council that the documentary evidence suggests, on the balance of probabilities, that Hole Lane is an old public road. However, despite its portrayal on early C20th maps as a road and possibly, on the 1903 and 1927 Bartholomew Maps, as a driving road, the Secretary of State considers it improbable that it has ever been used by motorised vehicular traffic, particularly as this was uncommon until World War 2. Nonetheless, he considers the evidence of Mr. Davies to be important; he states that it was known to be a public lane, he used the route by bicycle and it is reasonable to conclude that he was not the only cyclist to use it. As you point out, bicycles could only be ridden on public vehicular highways before the 1968 Countryside Act came into force.

Additionally, in view of the route's clear longevity, its portrayal on so many early maps as part of the public road network, particularly those maps linked to statutory procedures, and its physical nature, the Secretary of State considers it probable that it was used in the C18th and C19th by public wheeled traffic as a through route. The Secretary of State is satisfied, therefore, that the character of the way is such as to meet the test of criteria now set by the Masters judgement. He therefore concludes that, on the balance of probability, the provisions of Section 53(3)(c)(i) and (ii) have been met."

7. On 2nd August 2001 an Order was made and advertised providing for the proposed upgrading of Hole Lane to a byway open to all traffic.

Objections and Representations received to the making of the Order

8. **Mrs. E.C. Williams** wrote on 24th July to express her *"anxiety that the Council has made an Order providing for the upgrading of Sutton Mandeville No. 4 and Fovant 15 to a Byway open to all traffic. Also that the Order seeks to amend the widths of both paths. It offers a valuable habitat to all sorts of wildlife in the immediate area, and is a pleasant source of exercise for many people and families and their dogs which lots of people enjoy. Perhaps it might be possible to obtain a Traffic Order to restrict the possible future use of the lovely footpath as a Byway open to all traffic in the general benefits of the local community."*

9. **Mrs. J.M. Longden** wrote on 24th July to object to the Order in her capacity as co-ordinator for Fovant and Sutton Mandeville Parish Councils. In her letter she states:-

"Reluctantly the Parish Councils accept that, as the law stands at present, they have to accept the Secretary of State's decision (conveyed in the Inspector's report) that the above Right of Way should be redesignated on historical grounds as a Byway Open to All Traffic. We are not therefore objecting to the substance of the proposed Modification Order."

10. Mrs. Longden expressed concern about the width of the lane, in particular in relation to an oil tank at the western end of the track at Glebe Cottage which protrudes into the highway, and the future maintenance of the lane.

11. **Mrs. J.M. Weatherill, on behalf of Wiltshire Bridleways Association**, wrote on 25th July to reiterate the Association's support for the making of the Order.

12. **Mr. B. Riley** wrote on 30th July to support the Order. He made the following comment:-

"The historical evidence is very persuasive and the recommendation of the County Secretary and Solicitor to the Sub-Committee in November 1995 was clearly correct. The perverse and irresponsible resolution of the Sub-Committee merely succeeded in delaying matters for nearly six years, causing unnecessary trouble and expense for all concerned."

13. **Mrs. Barrow**, owner of land adjoining the lane, wrote on 2nd August to express concern about the width of the lane.

14. **Mr. T. Turner** of Glebe Cottage wrote on 10th August to object to the Order for the following reasons:-
- (i) Since 1959 his family has maintained the tarmac surface by the entrance to his house.
 - (ii) Designation as a Byway open to all traffic would cause severe desecration in an Area of Outstanding Natural Beauty.
 - (iii) The cost.
 - (iv) Proximity to the rear wall of his house which he believes is keeping the right of way in place and therefore motorised traffic could easily cause structural damage.
 - (v) The path is walked daily by locals, visitors and children and their safety would be put in jeopardy.
 - (vi) The ancient boundary stone on the parish boundary restricts the width even for horse-drawn vehicles.
15. **Mr. M.A. Stockton** of Brock House, Fovant, wrote on 17th August to object to the Order for the following reasons:-
- (i) Need.
 - (ii) Upgrading would inevitably put the lives of current users at risk.
 - (iii) Access for vehicles at the eastern end of the way would be difficult and necessitate the Council undertaking 'unwarranted expenditure'.
 - (iv) Detrimental to wildlife.
16. **Dr. M. Darby, County Recorder of Coleoptera, Wiltshire Biological Records Centre**, wrote on 29th August to object to the Order. He has drawn officers' attention to two nationally rare species of beetle found in Hole Lane, *Carabus monilis* F and *Catopidius depressus*. There are records of other interesting coleoptera in Hole Lane, some of which are associated with particular plants. He believes *"any developments to the lane which affected the flora would put this and related populations or other species at risk."*

Legal points to consider

17. 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.

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."

18. 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:-

(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.

19. 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.

20. 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."

21. 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 in the *Nettlecombe* case.

22. 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 horseriders than by vehicles.

23. 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."

24. 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.

25. Traffic Regulation Orders may be made under the Road Traffic Regulations Act 1984 for the following reasons:-

1. [The traffic authority for a road outside Greater London may make an order under this section (referred to in this Act as a "traffic regulation order") in respect of the road] where it appears to the authority making the order that it is expedient to make it:-
 - (a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or
 - (b) for preventing damage to the road or to any building on or near the road, or
 - (c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians), or
 - (d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or
 - (e) (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or
 - (f) for preserving or improving the amenities of the area through which the road runs, [or
 - (g) for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995 (air quality)].

Comments on the Objections

26. The legal issues are set out in paragraphs 17 - 25. 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 the evidence available to decide on the balance of probabilities the highway rights of the public. The County Council is entitled to take into account the historical evidence.
27. The objections raised which cite environmental grounds or question the need for the Order are irrelevant in determining what public rights may exist but may be relevant, if the Order is confirmed, in managing those rights.
28. In Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981, the test to be applied is "... ought to be there shown as a highway of a different description." 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. It is clear that the Parish Councils understand this.
29. Issues raised by objectors which may not be taken into account in determining whether or not the Order should be confirmed may be taken into account in deciding management of use of the land by a Traffic Regulation Order.

Conclusions: Options Considered

30. Members are 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. The objections do not appear to overturn the evidence of highway status.
31. If the Order is confirmed officers feel that it would be 'expedient' to make a Traffic Regulation Order prohibiting vehicular use for the following reasons:-
 - (i) To prevent and avoid danger to persons using the road.
 - The way is well used on foot by local and visiting members of the public.
 - The lane is narrow, vehicles other than motorcycles would not be able to pass each other easily, and in some places passing walkers or horseriders would be difficult and conflicts probable.
 - (ii) To prevent damage to the road or any building on or near it.
 - Unsuitable vehicular use would damage the surface and verges of the lane, which could cause environmental damage.
 - The lane is narrow by Glebe Cottage and the building could be damaged by vehicular use.

- (iii) To prevent use by vehicular traffic having regard to the existing character of the road.
 - As Members will see from the photographs, the lane is a peaceful, narrow, green lane, especially suitable for the main users of a byway open to all traffic, walkers and horseriders. Vehicular traffic would disrupt that existing character.
- (iv) For preserving the character of the road in a case where it is especially suitable for use by persons on horseback or on foot.
 - The present character of Hole Lane is suitable for walkers. Children from Fovant Rainbow Centre use it, horseriders, especially young children on ponies wishing to avoid the tarmac roads which can often be hazardous for young riders. This present character should be preserved and any vehicular use could disturb it.
- (v) For preserving or improving the amenities of the area through which the road runs.
 - This is an environmental objective simply related to improve the amenity of the area. As a result of consultations, information has been obtained regarding the flora and fauna in the area which officers believe needs protecting and given an environment in which to flourish, thus increasing the enjoyment of the way for walkers and horseriders. Prohibiting vehicular use of the way would assist this process.

Recommendation

- 32. That the Order be submitted to the Secretary of State with the recommendation that it be confirmed without modification.
- 33. If the Order is confirmed the intention to make a Traffic Regulation Order be advertised prohibiting vehicular traffic from Hole Lane for the reasons described in paragraph 31 above.

Reasons for Recommendation

- 34. The evidence supports the confirmation of the Order the Council was directed to make by the Government Office for the South West and the objections do not outweigh the evidence.

35. The advertising of the intention to make a Traffic Order will assist the Council in preserving the character and amenity of the way in the interests of the principal users of the way and the environment.

RICHARD J. LANDER

Director of Environmental Services

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 Recommendation contained in this Report:

Enhancement of the rights of way network and the natural beauty of the area. To afford better opportunities for walkers and horseriders to enjoy the amenities of the area for recreation or the study of nature in a safe environment, without conflict with vehicular traffic.