

REGULATORY COMMITTEE
18th DECEMBER 2002

PRESHUTE: BRIDLEWAY 12

Purpose of Report

1. To inform Members of the historical records relating to the status of Preshute bridleway number 12 and to seek approval to the making of an Order under Section 53 of the Wildlife and Countryside Act 1981 to upgrade it to a byway open to all traffic.

Background

2. Between 1998 and 2000 Preshute Parish Council made complaints regarding vehicular use of this bridleway. It was alleged that four-wheel drive vehicles and motorcyclists were damaging the surface of the way, making walking difficult in places.
3. To protect the surface of the bridleway a horse-friendly vehicle barrier was erected at one end of the way.
4. Complaint was made to the Council concerning the erection of a barrier on the grounds that public vehicular rights exist over the bridleway, the barrier is an obstruction and also prevents disabled access. Wiltshire Bridleways Association also pointed out that given the uneven stone surface of the bridleway on a downhill slope, the gate poses a danger to riders. The gate has therefore been removed.
5. A site plan is attached at **Appendix A**.

Evidence relating to the status

6. Officers have examined historical records relevant to assessing the status of the right of way.
7. Before describing the documentary evidence it will be helpful to Members to outline three tests to be applied to ensure that any information contained in any documents is relevant. The tests are as follows:-
 - (i) Why were the documents compiled?
 - Did the recording of the highway have any legal significance?

- (ii) How were the documents compiled?
 - The compilation process
 - Public participation
 - Accuracy (for instance was the map surveyed accurately?)
 - (iii) Who compiled it?
 - What were the consequences for the compiler's rights/duties of including or not including a public right of way?
 - What were the consequences for the rights/duties of others?
 - Were there any declarations against the compiler's interest?
 - Were there any sanctions for falsifying evidence?
8. There is an Inclosure Award for the Manton Tithing of Preshute dated 1792. The Award was made under the provisions and authority of an Act of Parliament granted during the reign of King George III in 1790.
 9. Inclosure Awards are unique documents as they took effect as legal documents. If a right of way is shown properly in an Award, it is considered to be a "legal event" which conclusively declares the rights described to exist at the date of the Award. They are arguably the most important source of documentary evidence of public rights of way.
 10. Preshute 12 is described in the Preshute Inclosure Award as:-

"One other public Carriage Road and Drift way of breadth of fferty ffeet branching out of the Turnpike Road between Bath and Marlborough at a public House known by the Sign of Lord Bruces Arms and from thence extending Northward in its usual Course and direction at the west side of the Barrow ffield to the South-West corner of an old inclosure belonging to Thomas Brown where it enters the Lane the same being a Public Carriage Road and Drift way between the said Turnpike Road and Manton North Down Lands."
 11. The enabling Act authorising and giving lawful legitimacy to the Award also states:-

"All public Roads and Highways (except Bridleways and Foot Ways) shall be and remain Forty Feet broad at the least and the said public Roads and Highways, so set out, shall at all Times for ever after be repaired and kept in Repair in such manner as other public Roads and Highways are directed to be repaired by the Laws of this Realm."
 12. In medieval times, maintenance of the King's Highway was placed on the Manor. The public has 'the right of good passage', not only on the beaten track and deviation was permitted if necessary. By the 14th and 15th centuries there was a tremendous increase in travelling in the country but with the breakdown of manorial institutions in the 15th and 16th centuries highways became badly neglected. This led to the passage of an Act in 1555 which, until the Highways Acts of 1835, formed the basis of organisation of road maintenance.

13. This 1555 Act placed the obligation to maintain all existing public highways on the parish and all the inhabitants thereof, a new post of parish surveyor of highway (unpaid), on Justices of the Peace (JPs) at Quarter Sessions and owners of adjoining land.
14. The parish surveyor came under the jurisdiction of the JPs who, amongst other things, audited the accounts. A justice could present to Quarter Sessions that a highway was out of repair. Many presentments may be found in the Quarter Sessions records, relating to individual highways.
15. Travel was very much centred on London. In the latter half of the 17th century, for example, 2,000 animals a day arrived at Smithfield Market and were driven on foot, over mainly unsurfaced highways. In 1793 two gentlemen travelling from Glasgow to London found no hard road until Grantham, 110 miles from London. The poor condition of highways was not uncommon.
16. The Court of Quarter Sessions was statutorily responsible for highway maintenance. It follows that any record of a highway in these records will be definitive as to its existence at that time. Any evidence discovered is of good quality because any authority with its limited resources would not have willingly maintained a way which it did not feel satisfied or convinced was a highway.
17. The records of the Quarter Sessions held in the County Record Office have been indexed for highway references because they are important evidence and, being a Court of Law, there can be no question as to their reliability.
18. In the Quarter Sessions Great Rolls in 1794 the following presentment can be found:-

"At the General Quarter Sessions of the Peace ... Joseph Townsend, Clerk, one of the Justices of our said Lord the King ... upon his own view Doth present that from the Time, whereof the Memory of Man is not to the contrary, there was, and yet is a certain common and ancient King's Highway, leading from Clatford in the County of Wilts towards and unto the parish of Swindon in the County of Wilts used for all the King's Subjects, with their Horses, Coaches, Carts, and Carriages, to go, return, and pass at their Will; and that a certain Part of the said King's common Highway, situate, lying and being in the Parish of Preshute in the said County of Wilts (that is to say) from the road called the London turnpike road situate in the said parish of Preshute to a certain place called Rockley otherwise Ruckley in the same County containing in Length one Mile and in Breadth twenty Feet ... was and yet is very ruinous, deep, broken, and in great Decay, for want of due Reparation and Amendment, so that the Subjects of the King, through the same Way, with their Horses, Coaches, Carts, and Carriages, could not, during the Time aforesaid, nor yet can go, return or pass, as they ought and were wont to do, to the great Damage and common Nuisance of all the King's Subjects through the same Highway going, returning, or passing, and against the Peace of our said Lord the King; and that the Inhabitants of the Parish of Preshute aforesaid, in the County of Wilts aforesaid the said common Highway so in decay ought to repair and amend when and so often as it shall be necessary ..." (etc)

"The Original presentment removed by Writ of Certiorari into His Majesty's Court of King's Bench in Hilary Term 1795."

19. The way being described is along Preshute 12. It is described as an ancient highway in 1794. The highway was for all classes of user, an all purpose highway.
20. At the time of the presentment the parish was the highway authority responsible for maintaining highway, as described in paragraph 13 above. The Quarter Sessions Court was the body responsible for ensuring the parish carried out this duty. The Court found the way to be a highway with vehicular rights over it and the parish had consequently to repair it, which it did.
21. Tithes were the duty to pay one-tenth of annual produce of land to the Church. Under the Tithe Act of 1836 the remaining tithes were commuted to money rents. To carry this out, all titheable land had to be assessed for its annual produce value. This was done on a parish basis and large scale maps were produced.
22. Rights of way are shown on the maps because the existence of a right of way could affect the productive value of the land, thereby reducing the liability to pay rent to the Church. The Tithe Commissioners had an interest in ensuring that public rights of way were clearly delineated.
23. The Preshute Tithe Award is dated 1847, the map enrolled with it being dated 1843. Preshute 12 is shown as part of a longer route, coloured brown in common with the other known recorded public roads in the parish inscribed "106". In the Apportionment Roll of the Award 106 is described as *"Part of Parish Roads from the Down to the Bath Road inclusive of Waste."*
24. Obviously, with the increasing need to make travelling easier for both commercial and pleasure traffic, Parliament made several changes to the bodies responsible for highway maintenance. In 1862 a Highways Act was passed which compelled Quarter Sessions to group parishes into highway districts, but this did not universally take effect until the 1872 Public Health Act divided the country into Urban and Rural Sanitary Authorities.
25. In 1888 the newly created County Councils became responsible for main roads. In 1894 elected parish councils were created, highway districts were abolished and Rural and Urban District Councils were created. Until 1929 there was a split in responsibility for maintenance of main and other roads between County and these District Councils.
26. Documentary evidence therefore exists in records required to be kept by the above described statutory bodies, or as a result of individual Acts of Parliament.
27. In the records of the former Marlborough Rural District Council there is a survey of rights of way dated 1905. The map shows Preshute 12 coloured yellow and numbered 72 and inscribed *Waterway awarded 40' 0"*. The map key denotes that ways coloured yellow were *Highways repaired by The District Council*. The report with the survey states *PRESHUTE 72. The Waterway was awarded 40' 0" wide, but this Road has been neglected for the more commodious road called Manton Hollow.*

28. The following surveyor's report dated 7th February 1908 can be found in the Marlborough Rural District Council records:-

"Gentlemen, I submit a letter from Mr. A. Taylor of Manton House, in which he complains of the condition of the Highway up Manton Waterway. It may be remembered that an application was made by the late Mr. T. Taylor asking you to make Manton Hollow a good Road in lieu of repairing the Waterway, because of its easier gradients. Considerable money was spent, and since, very little has been done to the Waterway. The Road is still a Highway and has not been legally closed "as unnecessary" therefore, to prevent accidents & claims for them I have ordered the Road Foreman who had plenty of materials, to make the Road safe but not to do more than absolutely necessary." "Your Obed't. S, J.W. Brooke."

29. In the minutes of the Marlborough Rural District Council for the 8th February 1908 the following is recorded:-

"At a Meeting of the Rural District Council of Marlborough held at the Board Room of the Workhouse on Saturday, the 8th day of February, 1908. A Report by the Surveyor was read. (2nd item) Upon further reading such Report it was Resolved that the Council approve of the action of the Surveyor in repairing the highway known as Manton Waterway."

30. In 1929 the County Council became statutorily responsible for the maintenance of all highways. The Rural District Councils prepared plans of all the highways which they had up to that time maintained. These maps are referred to as Take Over Maps, as the County Council was taking over the maintenance responsibility.
31. On the Marlborough Rural District Council Take Over Map Preshute 12 is coloured blue as a maintained County Road "C5060".
32. There are innumerable maps upon which Preshute 12 is shown in the same manner as public roads are shown. Indeed, many of the maps were prepared for travellers needing to exercise public vehicular rights. These are listed at **Appendix B**.
33. The way also appears on Ordnance Survey Maps. Ordnance Survey Maps are useful as a guide when researching the history of the status of a right of way as they contain many useful points of reference. The manner in which features such as roads are shown on certain editions and scales of maps does provide useful supporting information regarding the status of highway. This was at a time before the current disclaimer on Ordnance Survey Maps which states *"The representation on this plan of a road, track or footpath is no evidence of the existence of a right of way."*
34. The 25" to the mile Ordnance Survey Map, County Series, Sheet 28/12, 2nd Edition 1900, revised in 1899, shows the boundary lines of Preshute 12 thickened, a convention known as shading. In accordance with Ordnance Survey instructions to surveyors, ways shown thus were "metalled public roads for wheeled traffic kept in good repair by highway authority." Spot heights and Bench marks show the way separately measured and numbered and again conventions are always shown on public roads, but not just public bridleways, footpaths or private roads. A guide post is also shown.

35. The way is shown as a public road on the following sample list of Ordnance maps:-
- **25" scale County Series, Sheet 28/12, 1924 Edition, revised 1922** - Shows Spot Heights and "GP" (Guide Post). Separately numbered and measured.
 - **6" scale County Series, Sheet 28, 1st Edition 1889, surveyed 1885-7** - Shows Bench Marks, Spot Heights and "Guide Post".
 - **1" scale Old Series, Sheets 14 and 34, 1817 and 1828** - Minor road.
 - **1" scale New Series, Sheet 266, 1892** (map folder) - Shaded, "*Ordinary Metalled Road*".
 - **1" scale Third Edition, Sheet 266, 1905** - Shaded, coloured red. "*Metalled Road, Second Class*".
 - **½" scale Sheet 33, 1910** - Coloured sienna, "*Road, Second Class*".
 - **¼" scale Sheet 9, 1912** "*Road, Second Class*".
 - **¼" scale, Sheet 11, 1919, 1934 and 1945** - "*Other Metalled Road*" (ie other than main road).
36. The County Record Office contains records relating to the Finance Act 1909-10. This Act placed a tax upon the incremental value of land. It required an accurate valuation of all landholdings to be taken upon which to calculate the increment in value. The survey was carried out by Inland Revenue Inspectors working in an area of the county of which they were knowledgeable. Every individual piece of land in private ownership was recorded and mapped and, because tax was to be levied based on area, highways and common land were carefully identified and included in the documentation.
37. The process, carried out in a blaze of publicity, was not public but landowners obviously participated. One can imagine that the Inland Revenue pursued the task with its usual vigour. There were criminal sanctions for falsifying evidence to the Inland Revenue. All these factors give confidence in placing reliance on evidence found in these documents.
38. On the relevant Ordnance Survey Sheet utilised for surveying and noting ownership, Preshute 12 is identified as an untaxed county road.

Legal Points to Consider

39. Section 53 of the Wildlife and Countryside Act 1981 places on the County Council a **duty**, not a discretionary power, 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."*

40. 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.*

41. The words "is reasonably alleged to subsist" in (c)(i) above places 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.

42. 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."

43. 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.
44. 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.
45. 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."*
46. 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: Options Considered

47. Officers have carefully considered the historical evidence and this very strongly suggests that public vehicular rights subsist over Preshute 12 and this is the legal consideration to be satisfied.

Recommendation

48. That an Order be made under Section 53(2) of the Wildlife and Countryside Act 1981 to upgrade Preshute bridleway 12 to a byway open to all traffic with a width of 40 feet.

Reason for Recommendation

49. To comply with the County Council's legal duty.

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

Correspondence with representative of User Group and some historical documentation.

Environmental impact of the Recommendation contained in this Report:

Enhancement of the rights of way network.

