

REGULATORY COMMITTEE

11th JUNE 2003

PRESHUTE: BRIDLEWAY 12 - 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 the upgrading of Preshute bridleway number 12 to a byway open to all traffic.

Background

2. A report on the status of this right of way was considered by the Committee on 18th December 2002. Members resolved to make an Order under Section 53(2) of the Wildlife and Countryside Act 1981. The report is attached at **Appendix 1**.

Main Considerations for the Council

3. To comment on the objections and representations made to the making of the Order.
4. Objections and representations have been received from:-
 - (i) Mrs. M. Boulton, Mayor of Marlborough
 - (ii) Preshute Parish Council
 - (iii) Mr. A.C. Hawkins, Coach Inn Cottage, Bath Road, Marlborough
 - (iv) Dr. F. McKim, 14 West Manton, Marlborough
 - (v) Mrs. S. McKim, 14 West Manton, Marlborough
 - (vi) Dr. T.H. Massey, 7 Sassoon Walk, Marlborough
 - (vii) Mrs. Ripley, Trenant, Hyde Lane, Marlborough
 - (viii) Mr. and Mrs. Wroth, Stanmore Farm, Clatford, Marlborough
 - (ix) Mrs. Waterkeyn, 15 West Manton, Marlborough
 - (x) Mr. and Mrs. Pitts, 8 Bergamot Close, Manton, Marlborough
 - (xi) Mr. and Mrs. Deuchar, Harlaw, Clatford, Marlborough
 - (xii) Mr. and Mrs. Whimster, 37 Kingsbury Street, Marlborough
 - (xiii) Mrs. Burrough, 6 Forestry Houses, Great Bedwyn, Marlborough
 - (xiv) Mr. and Mrs. Blanchard, River View, Bath Road, Clatford, Marlborough
 - (xv) Mrs. L. Fernley, North Cottage, Clatford, Marlborough
 - (xvi) Mr. and Mrs. Spooner, Lexbury House, Manton Road, Clatford, Marlborough
 - (xvii) Mr. and Mrs. Frame, Westwoods, Clatford Bottom, Marlborough
 - (xviii) Mr. McCormick, Swettenham Stud, Manton, Marlborough
 - (xix) Mr. and Mrs. Mills, Langside, Clatford, Marlborough
 - (xx) Mr. W. Riley, 141 Bath Road, Bradford on Avon
 - (xxi) Mrs. Weatherill, Wiltshire Bridleways Association
5. Copies of the above letters will be available for inspection in the **Members' Room** prior to the meeting.

6. The reasons for objecting to the Order fall within the following headings:-
- (i) Road safety at the A4 junction
 - (ii) Suitability for vehicular use
 - (iii) Need
 - (iv) Environmental
 - (v) Vehicular use will conflict with equestrians and walkers
 - (vi) Money could be better spent on maintaining other rights of way
 - (vii) A Road Traffic Regulation Order should be made to restrict vehicular traffic using the way
 - (viii) Could impact on training 150 of the UK's best racehorses
7. Mr. Riley and Mrs. Weatherill have made formal representations in support of the Order as it will:-
- Correct an anomaly on the Definitive Map and Statement and assist in progressing towards an up to date Definitive Map by 2026 as required by the Countryside and Rights of Way Act 2000.
 - Will preserve the character of the way and enhance the local public rights of way network.
 - The correct recording would provide one of the few straight crossings of the A4 available for horse-drawn carriages.
8. Arguably, the main considerations for members are the legal points to consider and these are set out in the following paragraphs. Members must consider the issue on these grounds alone in order to avoid serious and costly legal implications.
9. 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."

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

11. 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.
12. 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."
13. 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.
14. 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.
15. 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."
16. 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 and 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.

Comments on the Objections

17. The legal issues are set out in paragraphs 9-16. 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 what rights of passage the public have over this highway. The County Council is entitled to take into account the historical evidence.
18. The objections cited such as safety, need and environmental grounds are irrelevant to the test determining what public rights may exist but these concerns can be addressed if the Order is confirmed and a problem arises through management measures.
19. Orders that have been objected to have to be determined by the Planning Inspectorate. Once received, the Inspectorate assess the objections and those deemed to be legally irrelevant receive a very forceful letter advising the objector of the irrelevance of their objection. Objectors are asked to withdraw their objection or reconsider it or risk the possibility of costs being awarded against them. A copy of this standard letter will be available for inspection in the **Members' Room** prior to the meeting.

Environmental Impact of the Proposal

20. Objectors have raised environmental concerns such as damage to the fragile downland eco-system by tyres cutting up the surface of the way.
21. As the photographs show (which will be displayed at the meeting), almost all of the length of the way has old hard metalling along it, not all of which is visible under the seasonal and side growth. This would certainly be very difficult to cut up should the track attract much vehicular use.
22. In 1990 the County Council made a Modification Order under Section 53 of the Wildlife and Countryside Act 1981 providing for the upgrading of a bridleway in Easton Royal to a byway open to all traffic. As in this case, there was sound historical evidence to justify the change in status. There was wide-scale opposition to the Order as Easton Royal village street is a cul-de-sac unclassified County road.
23. The proposed byway runs from the end of the village street in a southerly direction, up to the downs, past a wildlife site (Easton Clump). This right of way connects with a wide network of interconnecting byways shown on **Appendix 2**. Interconnecting in this manner, they provide a choice of routes which could have resulted in quite heavy vehicular use. This was the fear of the objectors.
24. Preshute 12 does connect with another byway which leads over Clatford Down but this only connects with bridleways, shown on **Appendix 3**. It could be argued that if upgraded to a byway with such limited use, the track would not actually prove to be very attractive to vehicular users. Fears of environmental damage from the exercise of vehicular use could prove groundless.
25. The Order in relation to the Easton Royal bridleway was confirmed by the Secretary of State following a Public Inquiry.

26. Officers are not aware of any subsequent problems following the upgrading. Photographs taken in May show the upgraded bridleway to be in very good condition, even though heavy agricultural vehicles use it.
27. The environmental impact feared in the case of Easton Royal, and indeed in other locations in the County such as Win Green, has not arisen.
28. If Preshute bridleway is upgraded to a byway open to all traffic, Officers can monitor its use and, with advice from experts, make regular assessments of any damage. Appropriate action can be taken through the use of Traffic Regulation Orders to ameliorate any problems which might arise.

Risk Assessment

29. There is a potential conflict which could arise between the different categories of user. Use of the right of way can be monitored and the Council has the requisite powers to manage the public rights. If conflict between the different types of user does arise there is a risk of third party claims. However, this cannot be taken into consideration when deciding whether to make the Order. Members must make the decision on the evidence put before them.

Financial Implications

30. If the bridleway is upgraded to a byway open to all traffic and management of the exercise of public vehicular rights is required, financial provision has been allocated in a specific budget for this.

Options Considered

31. 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 County Council cannot rule the objections irrelevant. The objections do not appear to overturn the evidence of public vehicular rights.

Reasons for Recommendation

32. To clarify the status of public rights over the right of way by following the statutory procedures relating to Orders made under Section 53(2) of the Wildlife and Countryside Act 1981.

Recommendation

33. That:-
 - (i) The Order upgrading Preshute bridleway number 12 to a byway open to all traffic be submitted to the Secretary of State with the recommendation that it be confirmed without modification.

- (ii) Officers be requested to monitor use of the way should the Order be confirmed, with a view to taking appropriate measures to deal with any issues which might arise.

GEORGE BATTEN

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Report Author

BARBARA BURKE

Senior Rights of Way Officer

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

Correspondence with objectors.