

ROBIN CARR ASSOCIATES

Public Rights of Way Management & Consultancy Services

Wildlife & Countryside Act 1981 Application for Definitive Map Modification Order Claimed Public Bridleway – Stowell to Abbas Combe (Lily Lane)

Somerset County Council Case Reference: 646

1.0 Introduction

1.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), a Member of the Institute of Sports, Parks and Leisure (ISPAL), a Registered Expert Witness and I hold a Certificate in Leisure Management.

1.2 My experience is based, most generally, on an expertise that has been developed over a twenty-five year period as a Public Rights of Way practitioner.

2.0 Purpose of Report

2.1 The purpose of this report is to assist Somerset County Council in their determination of an application for a Definitive Map Modification Order to record public bridleway rights over the route shown A-B-C-D-E on Plan 1 (Appendix 1) in the Document Bundle which accompanies this report).

Description of the Route under Investigation

2.2 The route under investigation (the Application Route) is currently recorded on the Definitive Map as a Public Footpath. It commences at a point where it leaves the County Road (Point A on Plan 1), and proceeds in generally south easterly direction through the yard of Stowell Farm to the Parish Boundary (Point B on Plan 1). From here the Application Route continues in a south easterly direction to the south-western corner of Stowell Wood (Point C on Plan 1). From this point the Application Route generally proceeds in an easterly direction following

the southern boundaries of Stowell Wood and Square Covert, and then continues along the southern side of the field boundary to a point where it joins Lily Lane, Abbas Combe (Point E on Plan 1). A selection of photographs of the Application Route are included in the Document Bundle under Appendix 2.

- 2.3 It should be noted that between Points B and C on Plan 1 the Definitive Map alignment of the Public Footpath (and therefore also the Application Route) does not appear to follow the fenced roadway that is currently visible and physically available on the ground. Instead it appears to cut across the adjoining field in a more direct line. If this is the case, the current public footpath (and therefore also the Application Route) is obstructed by fencing. This is not a matter for consideration within the scope of this report, but is an issue which may need to be addressed by the County Council.

Consultations

- 2.4 Consultations have been undertaken in accordance with the principles set out in national guidance and the usual practices of Somerset County Council. This includes consultation with land owners/occupiers, the Parish and District Council and local/national user interest groups. Any relevant evidence arising from this consultation exercise is included within the report. A list of consultees is included in the Document Bundle under Appendix 3.
- 2.5 A further consultation exercise, involving the circulation of a full copy of this report to all known landowners/occupiers, the applicant, the parish council, local County Councillor and Chairman of the County Council's Regulation Committee was also undertaken. Responses were received from Abbas & Temple Combe Parish Council and Charlton Hawthorne Parish Council. Copies of these responses are included in the document bundle under Appendix 20 and the matters raised have been considered within the body of the report.
- 2.6 A response was also received from solicitors acting on behalf of the land owners. A copy of these representations and a copy of the Consultant's response are included in the document bundle under Appendix 21. Where appropriate the report has been updated to take into account any matters arising.

Documents Consulted and Site Visits

- 2.6 As part of my investigations I have visited the archives held at the Somerset Heritage Centre in Taunton to view a range of relevant historical documentation. A list of all documents consulted as part of the investigation is included in the Document Bundle at Appendix 4.
- 2.7 I have also visited the site to look at the Application Route, and met with any land owners/occupiers who requested a meeting to discuss the case. Any photographs of the route that were submitted along with the application or taken as part of my own site visit are included in the Document Bundle at Appendix 2.

3.0 Background

- 3.1 The Application Route is currently recorded on the Definitive Map as a Public Footpath under references WN 7/28 (Stowell), WN 29/18, WN 29/17 and WN 29/16 (Abbas Combe). Whilst the Definitive Map provides conclusive evidence of the existence of the rights recorded upon it, its conclusive status is without prejudice to the possible existence of additional or higher rights. A copy of the Definitive Map and Statement for this footpath is included in the Document Bundle at Appendix 5.
- 3.2 On 2nd April 2009 the South Somerset Bridleways Association submitted an application for a Definitive Map Modification Order to Somerset County Council. The application sought to amend the status of the Application Route from Footpath to Bridleway and was accompanied by copies of historical documentary evidence which the applicant's claim supports their application. A copy of the application (less copies of the documentary evidence) is included in the Document Bundle at Appendix 6. Copies of the documentary evidence are included in the Document Bundle under Appendices 9 - 17 and are discussed further below.
- 3.3 If an application for a Definitive Map Modification Order is not determined within 12 months of its submission the applicants have a right to request that the Secretary of State issues a direction to the County Council requiring them to make a decision whether or not to make a Definitive Map Modification Order within a defined timescale. On 23rd September 2016 South Somerset Bridleways Association made such a request, and having considered all of the material factors the Secretary of State directed Somerset County Council to determine the

application by 31st December 2018. A copy of the Secretary of State’s direction is included within the Document Bundle at Appendix 7.

- 3.4 In order to meet this deadline Somerset County Council has appointed external specialist consultants (in this case Robin Carr Associates) to undertake the necessary work to investigate the claims made within the application, and provide an advisory report to assist them in deciding whether or not to make the requested modifications to the Definitive Map and Statement for the area.

4.0 Legal Context

The Definitive Map and the Surveying Authority

- 4.1 Somerset County Council are the Surveying Authority for the purposes of Section 53 of the Wildlife and Countryside Act 1981 and the continuous review of the Definitive Map and Statement of Public Rights of Way. By virtue of Section 56 of the Wildlife and Countryside Act 1981 the Definitive Map and Statement provide conclusive evidence of the rights recorded within them, but this is without prejudice to the existence of any other unrecorded rights.
- 4.2 Section 53(5) and Schedule 14 of the Wildlife and Countryside Act 1981 allow any person to submit an application to modify the Definitive Map and Statement by adding routes not previously recorded, deleting routes that have been shown in error and amending the status of routes already shown. Such modifications do not create any new rights, nor do they extinguish any, they simply seek to ensure that the Definitive Map and Statement accurately records those that already exist.
- 4.3 Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to make a Definitive Map Modification Order upon the discovery of evidence that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist. The duty to make the Order is triggered if there is a reasonable allegation that the claimed rights subsist, however such an Order can only be confirmed if the rights are shown, on balance of probability, to subsist.
- 4.4 Section 53 (3) (c) (ii) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to make a Definitive Map Modification Order upon the discovery of
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evidence that a highway shown on the map and statement as a highway of a particular description ought to be shown as a highway of a different description.

- 4.5 The decision whether to make a Definitive Map Modification Order is “quasi-judicial” in nature, and as such the decision must be made having had due regard to all of the available and relevant evidence (i.e. evidence relating to the existence or otherwise of the public rights in question). Matters such as desirability, suitability, need, security and even public safety, whilst all genuine concerns, are not matters that can lawfully be taken into account as part of the decision-making process.
- 4.6 When considering the available and relevant evidence the Authority should take into account the provisions of Section 32 of the Highways Act 1980, which 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 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”.
- 4.7 The burden of proof rests initially with those making the claim to prove their case. The standard of proof is the civil test of the balance of probability.

Public Rights of Way - General

- 4.8 Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are public highways. A highway is a way over which the public have a right to pass and re-pass. Not all highways are maintainable at public expense, nor is there any need for a way to have been “adopted” before it is either a highway or a highway maintainable at public expense.
- 4.9 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.
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4.10 Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of “Once a Highway, Always a Highway”¹ applies. Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of local authority administrative order or a Court Order.

Types of Highway

4.11 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. who may use it) is dependent upon the specific type of highway status possessed by a given route.

Common Law

4.12 Under the common law there were, and indeed still are, only three types of highway. These are:

- Footpaths,
- Bridleways; and,
- Carriageways

4.13 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).

4.14 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including people leading horses) and possibly the right to drive cattle.

4.15 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including people leading horses), non-mechanically propelled and mechanically propelled vehicles.

Statute

4.16 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance, under the provisions of the Countryside Act 1968 cyclists are granted a right to use bridleways. Other legislation provides

¹ *Harvey v Truro Rural District Council* (1903) 2 Ch 638, 644 and *Dawes v Hawkins* (1860) 8 CB (NS) 848, 858; 141 ER 1399, 1403

for public carriageways to be subdivided into various categories which include motorways, cycle tracks, restricted byways and byways open to all traffic.

- 4.17 When determining the status of a specific route one must first consider the common law situation, and then apply any necessary restrictions to status imposed by statute in respect of restricted byways and byways open to all traffic. Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case.

How Highways Come into Being – Basic Principles

Dedication and Acceptance

- 4.18 Subject to a small number of exceptions, before any highway over land can come into being there must be an act of dedication by the landowner followed by the acceptance of the strip of land as a highway by the public, usually (but not always) demonstrated by the public using the way.
- 4.19 The act of dedication may be express or implied depending upon the actions or inactions of the land owner. Acceptance is usually demonstrated by public user, however acceptance of a way as a highway by the Highway Authority may also suffice. The principles of how rights can come into being are further discussed in more detail below.

Statute

- 4.20 It is possible for highways to be created as a result of statutory processes such as enclosure awards, or court orders; and in more modern times various types of statutory creation order.
- 4.21 The Highways Act 1980, Section 31 has also, to a certain extent, codified the common law (discussed below) by identifying a specific set of circumstance whereby a presumption of dedication may arise. Section 31 provides that:

(1) Where a way over land, other than a way of such character that use of it by the 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 twenty years, the way is 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 twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise.

(3)Where the owner of the land, which any such way as aforesaid passes-

(a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the first 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 the way as a highway.

- 4.22 Section 31(1) has two ‘limbs’: the first provides that proof of twenty-years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention to dedicate the way as a highway defeats the claim. It is for those claiming the existence of rights to first discharge their burden of proof, before an objector is obliged to provide any evidence of lack of intention to dedicate.

Common Law

- 4.23 The establishment of highway rights under the common law is not bound by the “20 year rule” referred to above, with the courts having ruled² that rights can be established in a very short period of time. It may therefore be helpful to look at this area in more detail.
- 4.24 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates* [1938] 2 All ER 237, both quoted with approval by Laws J in *Jaques v SSE* [1995] J.P.L. 1031, who described Scott LJ’s summary as “*a full and convenient description of the common law*”. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC* [1956] 2 Q.B. 439, *Mann v Brodie* (1885) 10 App. Cas. 378 and *Poole v Huskinson* (1843) 11 M & W 827. *Jaques* is a particularly helpful exposition on the differences between dedication at

² *North London Railway Co v Vestry of St Mary, Islington* (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18 month period

common law and under statute. Dyson J's judgment in *Nicholson v Secretary of State for the Environment* [1996] EWHC Admin 393 comments further on aspects of these differences.

4.25 Halsbury³ states – “Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.

4.26 The inference of dedication may arise in three ways:

i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example, in *North London Railway Co v Vestry of St Mary, Islington*⁴ the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public cab rank had been established on part of the bridge. The Justices' conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages some time after receiving notice of the proceedings before the Justices merely evoked the comment from Blackburn J. that “As to the erection of the barriers by the appellants, that was done too late to do away with the dedication”.

³ Halsbury's Laws of England (Volume 55 'Highways')

⁴ (1872) 27 L.T. 672

- ii) Second, the inference has been drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred⁵.
- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact⁶.

4.27 A summary of the generic guidance on the legislation etc that is usually found within Somerset County Council Decision Reports may be found at Appendix 8 in the document bundle which accompanies this report.

5.0 Summary Description of Available Relevant Documentary Evidence

Tithe Map 1839 (Appendix 9)

5.1 The Tithe Map for Abbas Combe shows the road known as Lily Lane coloured in brown, and in the same manner as other roads in the area. On this map Lily Lane extends almost to the south eastern corner of Square Covert and appears to run on an alignment that is consistent with the section of the Application Route running between Points D and E on Plan 1 (Appendix 1). The Remainder of the Application Route (A-B-C-D on Plan 1) is not shown.

Quarter Sessions Records (Appendix 10)

5.2 The Quarter Sessions Order book for 1880/81, refers to an application to divert footpaths and halter paths onto an alignment that is broadly consistent with the Application Route between points B and E on Plan 1. This application was made with the consent of the then land owner and was subsequently approved and implemented. A plan included within this document set shows the routes to be closed and the new route to be created.

⁵ See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA), 318-9, 325, 327-8, 331

⁶ See e.g. Parker J in *Webb v Baldwin and others* (1911) 75 JP 564 at p565

Ordnance Survey Maps (Appendix 11)

- 5.3 The Ordnance Survey County Series Maps (1st to 3rd Editions) show the Order Route as a path or track but do not attribute it any status.

Ordnance Survey Object Names Book (Appendix 12)

- 5.4 The Ordnance Survey Object Names Book refer to Lily Lane, describing it as a public road and heading towards Stowell. The authority cited for the information contained within the document is the District Surveyor (of Highways).

Commercial Maps (Appendix 13)

- 5.5 The Cassini reprint of the Ordnance Survey 1st Edition 1-inch map (1811-17) shows a road which appears to correspond with the Application Route for the majority of its length. Later maps by Cassini, which are also reproductions of the Ordnance Survey, show the Application Route as a path or track. Bartholemew's map (1927) is again based upon the Ordnance Survey and shows the Application Route as a path or track.

Highway Authority Records (Appendix 14)

- 5.6 The Ordnance Survey base map used for the 1929 Handover Map shows the full length of the Application Route as a road. Only the eastern end of Lily Lane (from point E to Abbas Combe) has been coloured up as being highway maintainable at public expense.
- 5.7 The 1930's Highway Authority maps use an 1888 Ordnance Survey 6inch Map as their base. This base map shows the Application Route as a path or track but does not attribute it any status. The eastern end of Lily Lane (from point E to Abbas Combe) has been coloured up as being highway maintainable at public expense.
- 5.8 The 1950's Highway Authority maps use an Ordnance Survey 6inch Map of unknown date as their base. This base map shows the Application Route as a path or track but does not attribute it any status. The eastern end of Lily Lane (from point E to Abbas Combe) has been coloured up as being highway maintainable at public expense.

County Council Public Rights of Way Correspondence Files (Appendix 15)

- 5.9 Correspondence dating from 1969 on the County Council’s Public Rights of Way files relates to an enquiry regarding the status of Lily Lane, and confirmation that it is a highway maintainable at public expense. The length of Lily Lane, to which this enquiry refers, is not specified.
- 5.10 Further correspondence from these files, dated 1990, refers to enquiries made by the land owners about the possible diversion of the Application Route between points A and C on Plan 1 (Appendix 1). These enquiries refer to the route as a footpath.
- 5.11 In 2010 the County Council was consulted on a planning application for works at Stowell Farm. The County Council responded that the footpath (i.e. the application Route) was not affected by the proposals.

Definitive Map Records (Appendix 16)

- 5.12 The Application Route appears to have been claimed under the provisions of Part IV of the National Parks and Access to the Countryside Act 1949 as a public footpath and is shown consistently as such throughout the Definitive Map preparation process.

Aerial Photographs (Appendix 17)

- 5.13 The 1946 Aerial photograph of the area appears to show the physical existence of parts of the Application Route

6.0 Submissions made by (or on behalf of) the Landowners/Occupiers

- 6.1 Initially, only limited submission were made by the owners of the land crossed by the Application Route. The issues raised relate the practicalities of the route being designated as a bridleway, and quite understandably include concerns over safety. Whist these are genuine concerns, they are not matters that can lawfully be taken into account as part of the decision-making process. Such matters are not therefore discussed further within this report. Copies of this correspondence is included in the Document Bundle at Appendix 18.
- 6.2 Further submissions were received from the solicitors representing the land owners following consultation on the draft report. These submissions did not include any additional evidence
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but sought to place a different interpretation on some of the evidence. By and large this alternative interpretation is not accepted and is not considered to be sustainable. A copy of the submissions, and the Consultant's detailed response explaining why the submissions are not considered to be sustainable is included in the document bundle under Appendix 21.

7.0 General Interpretation of Evidence

- 7.1 A summary of the generic guidance on the interpretation of evidence etc that is usually found within Somerset County Council Decision Reports may be found at Appendix 8 in the document bundle which accompanies this report.
- 7.2 Further general guidance on the interpretation of evidence etc may be found within the Planning Inspectorate's Definitive Map Consistency Guidelines, relevant extracts from which may be found at Appendix 19 of the document bundle

8.0 Discussion

- 8.1 It must be stressed that the decision to be made, over what public rights exist, is quasi-judicial in nature, and as such the decision makers must base their decision upon all of the available and relevant evidence. Issues such as desirability, security, need, future maintenance liabilities, and even public safety, whilst undoubtedly genuine concerns, are not matters that can lawfully be taken into consideration as part of the decision-making process.
- 8.2 It must also be understood that a decision to make a Definitive Map Modification Order to amend the status of the Application Route from footpath to bridleway will not result in the creation of any new rights. It will simply seek to record those rights that, albeit currently unrecorded, already exist.
- 8.3 Whilst the standard of proof required to be satisfied is only that of the balance of probability, the fact that the Application Route is already recorded on the Definitive Map as a public footpath will have a significant bearing on the weighting and interpretation of the evidence. This is because the entire Application Route is already an acknowledged public highway (of footpath status) and it is already a highway maintainable at public expense (not least because of its inclusion on the original Definitive Map). As a result, any evidence that is simply indicative of the Application Route being a public highway, but which is silent on the matter of

the status of such a highway (e.g. footpath, bridleway or carriageway) may be reasonably interpreted as being consistent with the routes currently recorded status of public footpath.

Tithe Map 1839 (Appendix 9)

- 8.4 The tithe map indicates that in 1839 Lily Lane physically extended further westwards from Abbas Combe than it does today. The tithe map does not, however, provide any commentary on the status of the route, and its brown colouring is not indicative of highway status, it simply indicates that it was not subject to tithe (i.e. it was non-productive land).
- 8.5 It should also be noted that the Tithe Map pre-dates the Quarter Sessions Records discussed below by approximately 40 years. As a result, this and any other documents which pre-date the Quarter Sessions Records may be of limited value and must be considered in the appropriate context.

Quarter Sessions Records (Appendix 10)

- 8.6 These records are the most important document set in this particular case. Section 6.3 of the Planning Inspectorate’s Definitive Map Consistency Guidelines advises:
- “Quarter Sessions records go back a long way. They may provide conclusive evidence of the stopping up or diversion of highways. Presentments or indictments for the non-repair of highways may also be found here and may provide strong evidence of status where they are confidently identifiable. It should be borne in mind that Quarter Session records are conclusive evidence of those matters the Court actually decided, but are not conclusive in relation to other matters. Reliance on orders alone can be misleading and evidence of completion may be required. Petty Sessional records may also be a source of evidence.”*
- 8.7 The entries in the Quarter Sessions Order Book in respect of the extinguishment and diversion of various footpaths and halter paths; and their replacement by the creation of a route that is similar, but not wholly identical, to the Application Route between Points B & E on Plan 1 (Appendix 1) are somewhat lengthy and must be read in their entirety to be fully understood. They confirm a number of matters, including the fact that:
- a. all procedural matters in advertising the proposed changes had been undertaken;

- b. the Justices inspected both existing and proposed routes;
- c. the Justices were satisfied that the legislative criteria of the time had been satisfied;
- d. the landowner had given his written consent;
- e. the new path (a footpath and halter path) could be used with or without horses; and,
- f. the Justices had inspected the new route and confirmed that it had been created to the required standard.

8.8 The Quarter Session Order Book and the accompanying plan, which shows both the old and new routes may, in light of the advice contained with the Planning Inspectorate’s Definitive Map Consistency Guidelines, therefore be considered conclusive as to the creation of a route that is similar, but not wholly identical to, the Application Route between Points B – E on Plan 1.

8.9 These documents may also be considered to meet the necessary “discovery of evidence” test within Section 53 of the 1981 Act. Due to their almost conclusive evidential effect, had they been considered during the original Definitive Map process the route would undoubtedly have been recorded as a bridleway.

8.10 If, however, it was to be argued that the Quarter Sessions Order Book does not have such evidential value and effect; and that the diversion referred to did not create the new route that it sets out, this document set would provide strong evidence in support of the continued existence of the various routes that were proposed to be stopped up,

8.11 Notwithstanding the above, this document set does raise two issues which should be given due consideration. In the first instance, the diversion proceedings did not create any rights over the section of the Application Route Shown A – B on Plan 1 (Appendix 1). The second issue is the reference to the creation of a footpath and halter path, rather than a bridleway (or bridle path) thus raising the question of what was meant by the term “halter path”. Both of these issues are discussed below.

The effect of the Quarter Sessions Records on Section A – B (on Plan 1) of the Application Route

- 8.12 It is clear that the diversion which was approved by the Justices during the Quarter Sessions did not create any rights over Section A – B (on Plan 1) of the Application Route. This document set cannot therefore be afforded the same evidential value for Section A-B as it is afforded Section B – H (i.e. it provides conclusive evidence of the creation of rights over a route similar to Section B-H, but not over Section A-B).
- 8.13 In view of the above, the question that arises is what public rights existed over Section A – B (on Plan 1) prior to the diversion proceedings? None of the documentary evidence gives a clear indication of status, other than the Definitive Map records which indicate the route is a footpath. Notwithstanding this, there is no suggestion that in 1880/81 the Justices created a cul-de-sac “Halter Path” which ran from Point E to Point B on Plan 1 (Appendix 1) and then terminated. On the contrary, they were replacing an existing “Halter Path” with a new one, and in all probability the original (now extinguished) “Halter Path” continued from Point B to the Public Carriageway at Point A (Plan 1). This section of “Halter Path” (B-A on Plan 1) was not extinguished by the Justices, and would therefore remain. It may therefore be reasonable to conclude that Section A – B (Pan 1) of the Application Route was a Halter Path prior to the 1880/1 Quarter Sessions proceedings and remains one today.

The meaning of the term “Halter Path” within the Quarter Sessions Records

- 8.14 A further consideration is what the Justices (and all other parties involved at the time) meant by the term “Halter Path”. The proceedings referred to in the Quarter Sessions Order Book were only used for the diversion of public highways. There would be no need for such proceedings if the route was not public (i.e. it was private).
- 8.15 Under the Common Law there were (and indeed still are) only three classifications of public highway. These are Footpaths, Bridleways and Carriageways. It is clear that the term “Halter Path” was not meant to refer to a way used only by pedestrians, not least because the terms is used in conjunction with reference to footpaths (i.e. “foot and halter path”). Furthermore, within the text (bottom of Page 145) the Justices certify that:

“.....upon such view they found that the said proposed new foot and halter path coloured red on the said plan would be nearer for the public and all persons using and travelling along the same with or without horses.....”

- 8.16 This clearly indicates that the public were entitled to use the route with horses, and the lowest classification of public highway that allows such use is that of a public bridleway. The only other alternative (at common law) would be a public carriageway, but there is no reference to the public being entitled to use the route with vehicles (e.g. carriages).
- 8.17 In view of the above factors it may be reasonable to conclude that the references to “Halter Path” or “Foot and Halter Path” refer to what we would now normally refer to as a public bridleway.
- 8.18 In response to the second round of consultations Charlton Hawthorne Parish Council expressed the view (Appendix 20) that as there is no legal definition of a “halter path” and as the evidence is so finely balanced the status should remain unchanged. The evidence is not however particularly finely balanced. On the contrary, the quarter sessions records (Appendix 10) provide compelling, if not conclusive, evidence of the status of the route at the time of the court proceedings. Furthermore, for the reasons set out above, it is clear that the diverted route was subject to higher rights than a footpath because it was available for use with horses. This means that it must be either a public bridleway or a public carriageway as these are the only two remaining common law types of highway. There is no suggestion that the route was available for vehicular traffic therefore bridleway is the only remaining status of highway (at common law) that is available. For these reasons the Parish Council’s submissions are not considered to be sustainable.
- 8.19 In a similar respect the solicitors representing the landowner submitted that the term “halter path” may refer to the leading of animals by the halter (rather than riding them). Whilst this is possible, the lowest category of public highway that such use can take place is public bridleway. The submission may therefore be considered, albeit unintentionally, supportive of bridleway status.

Ordnance Survey Maps (Appendix 11)

- 8.20 Ordnance Survey maps provide excellent and accurate evidence of the existence of the physical features that existed at the time of their survey. They are, however, generally silent on the issue of the status of any path, track or way, and carry a disclaimer to that effect.
- 8.21 In this particular case the Application Route is shown, to varying degrees, on all of the Ordnance Survey maps that have been consulted. The route is not however attributed any status on these maps, but they are entirely consistent with other documents that refer to and/or show the Application Route (e.g. the tithe map, the quarter sessions documents, aerial photos etc). They also entirely consistent with the depiction of the route on the Definitive Map as a Public Footpath. As a result, they are of little assistance in the determination of the application under consideration.

Ordnance Survey Object Names Book (Appendix 12)

- 8.22 The Ordnance Survey Object Names Book provides the provenance for the inclusion of the naming of Lily Lane on the Ordnance Survey maps. It does not however clarify the extent of Lily Lane beyond what can be reasonably inferred from the subsequent Ordnance Survey Mapping, namely that Lily Lane ran from Abbas Combe in a westerly direction and stopped at Point E on Plan 1. This is entirely consistent with the later highway authority records.

Commercial Maps (Appendix 13)

- 8.23 The origins of all of the commercial maps that have been considered in this case can be traced back to the Ordnance Survey and therefore they cannot be afforded any greater value than their original source documents. They provide evidence of the physical existence of a path or track of indeterminate status along the Application Route.

Highway Authority Records (Appendix 14)

- 8.24 These records add little, if anything, to the case. They confirm the extent of the public maintenance liability along Lily Lane and consistently show that ending at Point E on Plan 1. They are consistent with various other documents (e.g. the Ordnance Survey Object Names Book, Definitive Map records etc) but provide no evidence of the status of the Application Route.

County Council Public Rights of Way Correspondence Files (Appendix 15)

- 8.25 Whilst the correspondence in the Council’s Public Rights of Way files refers to the Application Route as a public footpath, this is understandable in view of the fact that it is currently recorded as such on the Definitive Map. This cannot be interpreted as being evidence that the alleged bridleway rights do not subsist, nor of course does it provide any evidence in support of the application.

Definitive Map Records (Appendix 16)

- 8.26 This document set suggests that at the time of the compilation of the Definitive Map the Application Route had the reputation of being a public footpath, rather than a public bridleway. This must be considered in context of the fact that in the seventy-year period between the Quarter Sessions diversion (1880/81) and the start of the Definitive Map process (1949 – 52) there had been two world wars with massive loss of life, major social change, and mechanisation. Whilst it may be arguable that the Quarter Session proceedings were within living memory of the initial stages of preparation of the Definitive Map, it is therefore perhaps unlikely that enquires (made 1949-52) of the oldest inhabitants of the area would result in any recollection of the diversion proceedings and the creation of a bridleway.
- 8.27 The recording of the Application Route as a footpath was probably entirely consistent with the use that it was receiving at the time (post World War 2). This does not however alter the fact that if public bridleway rights were created by the Quarter Sessions in 1880/1, in the absence of evidence of formal legal closure, those rights would still exist today, even if they have not been exercised for a number of decades.

Aerial Photographs (Appendix 17)

- 8.28 Aerial photographs, like the Ordnance Survey maps, provide excellent evidence of the existence of physical features on the ground on the day they were taken. They are, however, completely silent on the matter of status. In this case they are of little assistance.

Other Matters

- 8.29 In response to the second round of consultations Abbas and Temple Coombe Parish Council submitted (Appendix 20) that Section B-C of the Application Route does not follow the

current route of the existing track, and suggest that any bridleway should follow the route of the current established footpath (i.e. along the existing tack).

8.30 An examination of the Definitive Map for the area (Appendix 5) reveals that the current line of the public footpath does not follow the track that is currently available on the ground, but cuts the corner of the field in a more direct line. The Application Route therefore does follow the line of the existing definitive map footpath. This does not, of course, invalidate the issue raised by the Parish Council, however a realignment of the route onto the current track would require a separate legal order process (e.g. a Public Path Diversion Order). Such a diversion process is not currently under consideration, nor is it a material factor in the determination of the current application. In fact, any realignment of the route should not be undertaken until such a time as the issue of its status has been determined.

8.31 The Solicitors representing the landowners also raised an issue with regard to the alignment of the route. They have noted that the route set out in the Quarter Sessions Order (Appendix 10) is not entirely consistent with the alignment of the Application Route.

8.32 Whilst these differences in alignment are relatively minor, this is an important point. If the Authority are minded to make a Definitive Map Modification Order, to record public bridleway rights, they should ensure that the Order depicts the alignment as set out in the Quarter Sessions Order rather than the Application Route.

9.0 Conclusions

9.1 In conclusion:

- a) whilst a number of historical documents show the Application Route, they are of little assistance in determining its status, not least because it is already recorded on the Definitive Map as a public footpath
- b) the Quarter Sessions Order Book provides extremely strong, if not conclusive, evidence of the creation of a “foot and halter path” over a route similar, but not identical, to Section B – E of the Application Route
- c) there is no evidence to suggest that B – E (or the route set out by the Quarter Sessions Order) was a cul-de-sac highway terminating at Point B, and it would be reasonable to

conclude that a pre-existing (i.e. pre-Quarter Sessions) “foot and halter path” existed from Point B westwards to meet the road at Point A.

- d) the proper interpretation to be placed on the term “foot and halter path” is a way that is available for both pedestrians and horse riders/people leading a horse, and therefore a bridleway.

10.0 Decision Required

10.1 If the County Council is satisfied, on balance of probability, that the claimed public bridleway rights do subsist they should resolve to:

- a) Make a Definitive Map Modification Order to add a bridleway/upgrade from footpath to bridleway, the route shown A-B and then along the alignment set out in the Quarter Sessions Order to E on Plan 1 (Appendix 1);
- b) and if no objections are received, confirm the Order;
- c) If objections are received, which are not subsequently withdrawn, that the Order be referred to the Secretary of State for Confirmation.

10.2 If the County Council are not satisfied, on balance of probability, that the claimed public bridleway rights subsist, then they should refuse the application and advise the applicants of their rights of appeal

11.0 Recommendation

11.1 Whilst it is the Consultant’s opinion that a Definitive Map Modification Order should be made to record public bridleway rights along the route shown A-B and then along the alignment set out in the Quarter Sessions Order to E on Plan 1 (Appendix 1), it is for the County Council to make its own decision based upon all the available and relevant evidence.

Robin Carr

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Robin Carr FIPROW
Principal

Robin Carr Associates
Meadow Barn, Main Street, Kneesall, Newark, Nottinghamshire NG22 0AD
Tel: 01623 835798 Mob: 07976 624029
Email: robin.carr1@btinternet.com

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