

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Tuesday 12 December 2023 at the Council Chamber - Shire Hall, Gloucester.

PRESENT:

Cllr Terry Hale	Cllr Robert Vines
Cllr Beki Hoyland (Vice-Chair)	Cllr Roger Whyborn
Cllr Mark Mackenzie-Charrington	Cllr Dr David Willingham
Cllr Graham Morgan (Chair)	

Apologies: Cllr Alex Hegenbarth and Cllr Vernon Smith

1. MINUTES

Resolved

That the minutes of the previous meeting held on 3 October 2023 be approved as a correct record.

2. DECLARATIONS OF INTEREST

No declarations of interest were made.

3. PUBLIC QUESTIONS ON APPLICATION(S)

No public questions had been received on the application before the Committee.

4. MEMBER QUESTIONS ON APPLICATION(S)

No questions from members had been received on the application before the Committee.

5. APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO ADD A LENGTH OF RESTRICTED BYWAY, WILDMOORWAY LANE, PARISH OF SOUTH CERNEY (573/11/201(6))

5.1 Andrew Houldey, Asset Data Officer (PROW Definitive Map), gave a detailed presentation to the Committee aided by a PowerPoint presentation, which included photographs of the claimed route under consideration. *(For information: A copy of the presentation slides has been uploaded to the Council's website.)*

5.2 The Committee considered the application for a Definitive Map Modification Order (DMMO) to add a length of restricted byway in Wildmoorway Lane, parish of South Cerney. On the Plan attached at Appendix 1B to the report, the application route was shown between points A, B and C. Section A to B was not currently shown on either the list of maintainable highways or the Definitive Map and Statement. Section B to C was currently recorded on the Definitive Map as part of public footpath BSC 20. The application was to add a length of restricted byway between

points A and B and to reclassify the public footpath between points B and C to a restricted byway.

- 5.3 The Asset Data Officer informed the Committee that it was an established maxim that *“once a highway, always a highway”* meaning that a public right of way would not cease to exist, even if no one used it; rights could only be extinguished by a legal order.
- 5.4 The Asset Data Officer presented a series of photographs and provided members with a detailed description of the application route. He pointed out that when the application route was inspected in 2017 there was a metal field gate at point A, which was open; the gate had been removed by 2023. The metal gate was erected in autumn 2016 and was associated with the development of holiday accommodation and fishing cabins around Horseshoe Lake, which was accessed by Wildmoorway Lane.
- 5.5 The Committee was informed that the maps issued by Gloucestershire County Council to accompany the application forms and for path users to complete to show the route that they had used, did not show the whole of Wildmoorway Lane as far east as point C, but did show a section east of the River Churn, allowing officers to infer that the intention of the applicant was to include the whole of Wildmoorway Lane. The Asset Data Officer explained that this assertion was supported by the statements made by the path users. The County Council as surveying authority had a duty under Section 53 of the 1981 Wildlife and Countryside Act to keep the Definitive Map and Statement under continuous review and to make orders where there was discovery of evidence that a right of way was not shown on the map or should be shown differently; this allowed the Council to make orders that were consistent with the evidence rather than with what had been claimed.
- 5.6 He explained that Wildmoorway Lane was not registered with the Land Registry. The applicant had been given permission by Gloucestershire County Council to erect impersonal notices on site to give notice of the DMMO application. The applicant submitted the Form 3 (Certificate of Notice) and supplied photographs of the notices that they had erected to give notice of the application. As a result of these notices, correspondence was received from the solicitors representing the landowner of Horseshoe Lake, and from the solicitors of the landowner of land near to section B-C of the claimed route. He pointed out that neither landowner owned the land on which the application route was situated but they both had a legal interest as they held a private right of way along the lane.
- 5.7 The Committee was informed that under Section 32 of the Highways Act 1980, when determining whether a way had or had not been dedicated as a highway, or the date on which such dedication, if any, took place, consideration should be given to any map, plan or history of the locality or other relevant document which was tendered in evidence, and should be given such weight thereto as the court or tribunal considered justified in 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 had been kept and from which it was produced. It was explained that this was about a hierarchy of evidence,

meaning that some sources of evidence carried more weight than others, such as those that had been subject to a statutory legal process.

- 5.8 The Asset Data Officer informed the Committee that the South Cerney Inclosure Award and Map, 1814 (Q/RI 36) showed the lane, named as Leather Mill Lane, and annotated “No.II, 30 feet”. The Award set out the following: *“Road No.II And one other Public Carriage Road and Highway No II on the said map or plan of the breadth of thirty feet extending from the east end of the Leather Mill Lane in its present track over Wildmoor Way field to an Inclosure belonging to William Davis called Wildmoor.”* He explained that this set out the claimed route at section B-C as a new road and it re-set out section A-B as an existing road. The 1814 Award was made under an 1808 Local Act which was based on the national 1801 Inclosure Consolidation Act. The significance of inclosure awards arose from their evidential value as legal documents giving effect to the creation or extinguishment of public highways, depending on the powers given to the Inclosure Commissioners. He directed the Committee to note that prior to 1835 the term “highway” did not usually include footpaths or bridleways. Awards and maps may also provide supporting evidence of other matters, such as the existence or status of public rights of way over land adjacent to but outside the awarded area. He drew members’ attention to paragraphs 14.25 -14.26 of the report which provided details on the legal importance of inclosure awards.
- 5.9 He explained that Sections 8 and 9 of the 1801 Inclosure Consolidation Act included a set of provisions relating to public carriage roads including a minimum width requirement (30 feet). The claimed route was set out at 30 feet and therefore met this stipulation.
- 5.10 The Asset Data Officer informed members that it was important to ensure that what was set out in the legal documents of the Inclosure Award, was reflected through later sources of evidence, in that they showed a route had been physically created. This application was supported by a series of maps. The first map being the Ordnance Survey 2” to 1 mile Surveyor’s Drawing (Cirencester, OSD 64, 1816), whereby Wildmoorway Lane was shown by two full lines, crossing the River Churn and then terminating by the Thames and Severn Canal.
- 5.11 He reported that in the Greenwoods’ Map of Gloucestershire, 1824 (D10820/Maps/1/1), Wildmoorway Lane was shown by two full lines, uncoloured, leading from South Cerney, crossing the River Churn and then dividing into two routes, one of which crossed the Thames and Severn Canal (named) and the other terminating at the side of the canal. The key identified the way as a Cross Road. Greenwoods’ Maps had been subject to decisions of courts of record; members’ attention was drawn to paragraph 14.33 of the report which set out the decision on the case *Fortune v Wiltshire Council* Court of Appeal (2012), and the Planning Inspectorate’s Advice Note No.4 at paragraph 14.34 of the report.
- 5.12 Bryant’s Map of Gloucestershire, 1824, showed Wildmoorway Lane by two full lines, uncoloured, leading from South Cerney, crossing the River Churn and then the Thames and Severn Canal at “Lower Wilmore Bridge” before terminating. The key identified the way as a lane or bridleway.

- 5.13 The Committee was informed that the Ordnance Survey 1" to 1 mile, First Edition, 1830 map, showed Wildmoorway Lane by two full lines, crossing the River Churn and then the Thames and Severn Canal where it terminated.
- 5.14 Ordnance Survey 2" to 1 mile Surveyor's Drawing (Cirencester, OSD 64, 1816), showed Wildmoorway Lane by two full lines, crossing the River Churn and then terminating by the Thames and Severn Canal. A branch was shown leading north (by double pecked lines) to the canal. The main route seemed to be shown continuing along the Gloucestershire side of the county boundary, but this was unclear.
- 5.15 It was reported that the Ordnance Survey 25-inch to 1 mile, 1900 edition, Glos 59.8, showed Wildmoorway Lane (named) by two full lines and open at the western end, running from Cerney & Ashton Keynes railway station east to Wildmoorway Lock and Wildmoorway Bridge where it terminated. No boundary features were shown across the way, although it crossed the River Churn by a ford. A path shown by twin pecked lines and annotated "F.P." was shown running parallel to the lane on the southern side, re-joining the lane to the east of the ford. Wildmoorway Lane crossed the canal and connected to a path annotated "F.P." at its eastern end.
- 5.16 The Asset Data Officer explained that Ordnance Survey maps carried a disclaimer that any representation of a road, track or path was no evidence of the existence of a right of way over it. However, they did provide evidence of the physical existence and extent of a way, suggesting (but not proving) that the path had been in use for a longer period than that for which user evidence was available. The 1816 Surveyor's Drawing showed the whole length of the claimed route in a manner consistent with other known highways.
- 5.17 The Asset Data Officer explained that the whole length of Wildmoorway Lane was shown coloured out and outside of hereditament boundaries on the draft valuation plan drawn up under the 1910 Finance Act. The Finance Act of 1910 imposed a tax on the incremental value of land when it changed hands. In order to levy the tax, the Board of Inland Revenue was required to ascertain the site value of all land in the United Kingdom, which meant plotting and recording every piece of land. The Inland Revenue Instructions to Valuers indicated that land shown 'coloured out' was because it was held by a rating authority, and that was evidence that the way was a public highway, probably but not necessarily a carriageway. He added that the Finance Act records needed to be used with other sources, and it was possible that colouring out had another explanation, the most usual being that the road or track was owned or maintained by a parcel of landowners or occupiers. In this case, the colouring out of Wildmoorway Lane was consistent with its setting out as a public carriage road and highway by the 1814 Inclosure Award, and its depiction in the public scheme books of reference as a highway in the ownership of the Surveyor of Highways.
- 5.18 The Committee was informed that the draft valuation plan had significant evidential weight as it had gone through the statutory legal process and had been subject to a right of appeal by the landowners. If the claimed route had been a private road

then it would have been included within the hereditament boundaries and subject to a reduction recorded in the valuation books. The evidential weight that could be attached to the public scheme books of reference and valuation plans had been the subject of three relevant court cases as outlined in paragraph 14.47 of the report.

- 5.19 The Asset Data Officer reported that the Map of Parish of South Cerney, 1831 (D1388/box13581/1) R Hall Surveyor, showed the whole parish and landownership by naming and colouring. Sienna was used to show 'roads' which were annotated and named in a different hand. The claimed route was shown by two full lines coloured sienna. It was numbered II, 30 feet. In a later hand it was named Wilmoor Lane. The claimed route provided access to land held by fourteen different proprietors.
- 5.20 The Committee was informed that Wildmoorway Lane was shown and described in a series of railway schemes: the Manchester and Southampton Railway schemes of 1845 and 1847, Thames and Severn Canal (to build a railway along the course of the canal) of 1866 and the Swindon Extension Railway of 1880. The requirements for railways were expanded in the 1845 Act, with public rights of way which crossed the route of a railway to be retained unless their closure had been duly authorised. Both canal and railway deposited documents were in the public domain. The statutory process required for the authorisation of railway schemes was exacting and the book of reference and deposited plans made in the course of the process needed to be of a high standard.
- 5.21 It was reported that the process for the authorisation of railway schemes provided for scrutiny of the plans by involved parties. Landowners would not have wished unnecessarily to cede ownership, Highway Authorities would not have wanted to take on unwarranted maintenance responsibilities, and parish councils would not have wished their parishioners to lose rights. Therefore, an entry in the book of reference that a way was in the ownership of the "Surveyor of Highways" may be persuasive evidence of a public right of some description. However, the weight to be given to this could only be determined when it was considered alongside all the other evidence.
- 5.22 The Asset Data Officer informed members that railway plans and cross-sections usually differentiated between public and private roads. The plans being considered as part of the documentary evidence for this application differentiated between public roads, occupation roads, and footpaths.
- 5.23 He reported that parcel number 98 was identified in the book of reference as "highway" and owner given as "Surveyor of Highways". The Committee was directed to note that a distinction was made between private and public roads. For example, parcel number 118, which was annotated on the map as "Occupation Road" was described in the book of reference as "Occupation Road" and the owner listed as the Dean and Chapter of Bristol Cathedral. Other ways were annotated on the map as "footpath" indicating that a distinction was made between footpaths and 'highways', i.e. public roads.

- 5.24 The Committee was informed that the 1866 scheme in contrast described the eastern end of Wildmoorway Lane as an “occupation road and bridge over canal”, with the owners given as Company of Proprietors of the Thames and Severn Canal Navigation, John Keylock, George White, James Davis, Elizabeth Moss. It was the Thames & Severn Canal Company who were promoting the railway scheme, to replace the canal. The 1880 scheme plan showed Wildmoorway Lane as plot 65, which was identified in the book of reference as “highway” with the owner given as “The Highway Board for the District of Cirencester (William Lawrence Cooke, clerk).”
- 5.25 Members were informed that the action that brought the right of the public to use the path into question was considered to be the erection of a gate across the way at point A by the adjacent landowner in 2016. The gate and the accompanying notice were taken by the path users to be a challenge to their right to use this way and were the catalyst for an application to record the way as a restricted byway in March 2017. The period of 20 years for the purposes of Section 31(1) of the 1980 Highways Act was therefore taken to be 1996 to 2016.
- 5.26 The Asset Data Officer drew members’ attention to the user evidence set out at Section 10 of the report. All 20 public path evidence forms attested to use on foot, with eight of the witnesses also having used the way by bicycle. In addition, one form referred to use by vehicle, which use dated to 1982. Of the eight cyclists, seven had used the claimed way for at least 20 years prior to the bringing into question of use in 2016. Use dated back to 1953 with another user claiming use since 1968. Taking the bringing into question as 2016, 17 of the 20 witnesses claimed use over the full period of 20 years, five of whom had used the path for at least 40 years. He advised the Committee that this should be considered to meet the tests of sufficiency.
- 5.27 The Asset Data Officer also advised the Committee that there was no evidence that any of the exemptions to extinguishment of unrecorded public motor vehicular rights had been met under the provisions set out under Section 67(2) of the 2006 Natural Environment and Rural Communities (NERC) Act.
- 5.28 The Asset Data Officer concluded his presentation by advising the Committee that considering the user and documentary evidence, in his view, a length of restricted byway between points A and B should be added to the Definitive Map, and public footpath BSC 20 between points B and C should be upgraded to a restricted byway.
- 5.29 The Asset Data Officer explained that the provisions of the Highways Act 1959 meant that rights of way created by deemed dedication after this Act came into force, would not give rise to them becoming a highway maintainable at public expense. However, the historical documentary evidence set out that the route had been created as a public carriageway before the 1835 Highways Act came into force and therefore if the Committee was to support the officer’s recommendation resulting in the direction that an Order be made, the application route would become maintainable at public expense.

- 5.30 One member asked whether the section of the application route between points A and B would be brought up to the same standard as the section between points B and C, if the Committee determined that an Order be made. In response, it was pointed out that the Council was responsible for maintaining public rights of way so that the surface was at an acceptable standard for the usual flow of people who used the route. The section between points A and B had a hard stone surface and a drainage ditch running alongside it; when a site visit had been undertaken in 2017 the route was not covered in water like it had been during the latest site visit in 2023. This indicated that the route was currently particularly wet due to the recent heavy rain. If the current level of water on the route was more typical of its general state and not just due to heavy rainfall then the Council's Rights of Way Team would look at whether drainage improvement works were needed to make it into an acceptable route for walkers and cyclists.
- 5.31 One member questioned whether the gate at point B would need to be unlocked if the Committee determined that an Order be made. In response, the Asset Data Officer explained that when making the Order, officers would need to consider what was in place at the time of when the application route was first dedicated as a highway. The Inclosure Award pointed to it being first dedicated as a highway in 1808. Whilst the historical documentary evidence had revealed that there never used to be a gate at point B, the Council would not insist upon the removal of the gate, only that it be unlocked to prevent an obstruction.
- 5.32 Further questions were raised around the locked gate at point B, including whether it was material to the Committee's considerations. In response, the Asset Data Officer informed members that it did constitute evidence in terms of the character of the application route and that vehicular use along the route would be impossible. If there was a locked gate and no stile/kissing gate then this could be considered as bringing into question the public's right to use the route. However, in this case, the evidence set out that the route had been created by a statutory process, the 1808 Inclosure Award, so the locked gate held much less evidential value. He added that the user evidence supported the documentary evidence. The Committee would need to consider whether an Order should be made primarily on the basis that rights had been created by the Inclosure Award and this had been evidenced by a subsequent trail of other sources of evidence such as the railway plans and Finance Act Map.
- 5.33 In response to a question, it was clarified that as section B-C of the route was already recorded on the Definitive Map as a footpath, it was publicly maintainable under the provisions of the 1949 National Parks and Access to the Countryside Act.
- 5.34 One member asked at what stage a footpath evolved into a route of a higher status. In response, the Asset Data explained that riding a bicycle or horse and cart along a footpath would constitute a trespass against the landowner. This was a civil and not a criminal matter. Although there was no legal right to cycle on footpaths, some were regularly used by cyclists "as of right" on the assumption of higher status. If enough cyclists used the footpath in this way without the

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landowner challenging them, over a period of normally 20 years, then a restricted byway may be claimed through 'presumed rights' under Section 31 of the 1980 Highways Act.

- 5.35 In response to a question, the Committee was informed that most of the rights of way on the Definitive Map and Statement were maintainable at public expense, but not all. Whether a right of way was publicly maintainable was dependent upon when it was first deemed to have been dedicated as a highway. Following the implementation of the National Parks and Countryside Act 1949, footpaths and bridleways that were recorded on the Definitive Map and Statement under the Act became maintainable at public expense whilst roads used as public paths (RUPPs) did not. However, in 2006, RUPPs were reclassified as restricted byways and from that point onwards became maintainable at public expense. He added that paths created by use wholly after the provisions of the Highways Act 1959 came into force would not be publicly maintainable and that if a route was already on the Definitive Map and an Order was made to change it to a route of a higher status, for example footpath to bridleway, then this would not automatically give rise to it becoming maintainable as a bridleway at public expense unless there was evidence of use by horses prior to 1959. It would still be publicly maintainable as a footpath.
- 5.36 Members of the Committee considered all the evidence, it was proposed, seconded and

Resolved

- (a) that a length of restricted byway between points A and B (as shown on map B) be added to the Definitive Map; and**
(b) that the public footpath BSC 20 between points B and C on the said map be upgraded to restricted byway.

6. PUBLIC QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

- 6.1 One public question had been received on the matters which were within the powers and duties of the Committee. A copy of the question and answer had been circulated and uploaded to the Council's website.
- 6.2 The Committee noted the question and answer.
- 6.3 Mr Giles asked the following oral supplementary question:

"Firstly I'd like to thank Phillip Cameron for his prompt response to my original question and say how pleased I am to hear of the imminent move to stage 2 regarding the Town Green application.

If the town green application moves to stage 2 just prior to Christmas could the allotted time period for public consultation please start after the holiday period in the new year to allow maximum public awareness.

Minutes subject to their acceptance as a correct record at the next meeting

With regard to the MST62 modifications, particularly in the path width, we ask that deadlines with strict enforcement action to be set if further delaying tactics and obstructions are employed by the landowners.

The lack of defined clarity of boundaries of the land ownership is magnifying problems, and may be being exploited particularly in the areas earmarked for maple syrup production and the cliff face leading to Rosedale where a diversion of MST28 runs.

MST 28 is live and passable but considered extinguished by the owners who have denied access.

As a matter of priority can the true physical boundaries be established and access to MST28 and its diversion be reinstated by the removal of obstacles (barbed wire/fencing etc) allowing continuity of the public right of way?"

- 6.4 In response to the question, the Traffic Manager explained that the works to MST62 were currently under a formal temporary closure and the Public Rights of Way Team were liaising with the owners over the works. The closure was currently in place until the New Year, but the works were weather dependent. Any issues with regard to the land ownership boundaries would need to be directed to Land Registry, as they dealt with those matters. The route of MST28 was currently severed by an old Quarry, and the Council was in the process of investigating its status and options.

7. MEMBER QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

No questions from members about the matters which were within the powers and duties of the Committee had been received.

CHAIRMAN

Meeting concluded at 11.20 am