

COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Tuesday 29 March 2022 at the Cabinet Suite - Shire Hall, Gloucester.

PRESENT:

Cllr Phil Awford (Chair)	Cllr Robert Vines
Cllr Beki Hoyland	Cllr Susan Williams
Cllr Mark Mackenzie-Charrington	Cllr Dr David Willingham
Cllr Graham Morgan (Vice Chair)	

Officers: Liz Kirkham, Highways Operations Manager
Clare Bonser, Lawyer
Andrew Houldey, Asset Data Officer (PROW Definitive Map)
Jaci Harris, Asset Data Officer (PROW Definitive Map)
Joanne Bolton, Democratic Services Adviser

Apologies: Cllr Alex Hegenbarth and Cllr Dominic Morris

1. MINUTES

Resolved

That the minutes of the previous meeting held on 2 December 2021 be approved as a correct record.

2. DECLARATIONS OF INTEREST

No declarations of interest were made.

At this juncture, Cllr Dr David Willingham informed the Committee that he had undertaken an informal site visit on Sunday 27 March 2022.

3. PUBLIC QUESTIONS ON APPLICATION(S)

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

4. MEMBER QUESTIONS ON APPLICATION(S)

One question had been received. A copy of the question and answer had been circulated and uploaded to the Council's website.

The Committee noted the question and answer.

- 5. 573/11/251(3) APPLICATION FOR ADDITIONAL LENGTH OF PUBLIC FOOTPATH BETWEEN HIGHWAY 50522 AND PUBLIC FOOTPATH AWB52 AT MILL FARM, GREET, WINCHCOMBE**
- 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) for an addition length of public footpath between road 50522 and public footpath AWB 52 Mill Farm, Greet, Parish of Winchcombe. The claimed route was shown running between points A and B, on the Plan attached at Appendix 1B to the report.
- 5.3 The Asset Data Officer explained that Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 related to the discovery of evidence by the Surveying Authority which (when considered with all other relevant evidence available to them) showed that a right of way which was not shown in the map and statement subsisted or was reasonably alleged to subsist over land in the area to which the map related, being a right of way such that land over which the right subsists was a public path, a restricted byway, or... a byway open to all traffic. He drew members' attention to paragraphs 14.1-14.4 of the report which detailed the case law that clarified the nature of the two tests (i.e. (a) Test A: Does a right of way subsist? (b) Test B: Is it reasonable to allege that a right of way subsists?).
- 5.4 The Committee was informed that on 19 February 2003 an application was made by the then-landowner Mr Pearce of Mill Farm, Greet, to delete the entire length of public footpath AWB 52. Path AWB 52 which ran east from Mill Farm (point B) to the main Cheltenham to Stratford road (B4632). The application to delete public footpath AWB 52 was refused by the County Council's Commons and Rights of Way Panel on 30 March 2004. The applicant appealed to the Secretary of State against the decision to refuse the application to delete the footpath. The Secretary of State upheld the County Council's decision by letter dated 22 November 2005. The Asset Data Officer informed members that the report made reference to, and included the evidence from, both the Commons and Rights of Way Panel report of 30 March 2004 and the Secretary of State's decision letter of 22 November 2005.
- 5.5 The Asset Data Officer explained that Mill Farm, located between points A and B, was a working corn mill known as Greet Mill until 1904 when it was sold as part of the Manor Farm Estate. It then operated as a creamery until it closed in 1926. Following the closure of the creamery in 1926 the farm operated as a pig farm between 1926 and 1928 when it was purchased by Mr Pearce's father. The farm had since remained in the ownership of the Pearce family.
- 5.6 The Committee noted that there was a stone slab over the ditch immediately to the north of point C, which had formed a footbridge for the path ASY 23. Path ASY 23 was deleted as the result of a judgement in the Court of Quarter Sessions on 2

August 1965 following an objection by A L Shaw to the Provisional Map of Rights of Way.

- 5.7 The Asset Data Officer drew members' attention to the summary of the user evidence forms at Appendix C. He reported that the application was supported by 6 public path user evidence forms, completed by 6 individuals. Only two of the six users had used the path for more than three years, and two of the six had only used the path once. It was evident from the user evidence that use through the farmyard had been challenged. There were signs in place in 2003 at point A which read "Dead End Public Footpath" and "Private Road to Mill Farm only". The "Private Road" sign was also in place at the eastern end of public footpath AWB 52 and the "Dead End" sign was in position to the east of point B. The signs replaced earlier signs that were in place during the 1990s.
- 5.8 The Asset Data Officer explained that the previous landowner, Mr Pearce, had indicated in his comments on the application to delete public footpath AWB 52, that he had locked the gate when it was located at point B and also when the gate was moved to its present position (between points B and C).
- 5.9 The Asset Data Officer advised the Committee that there was insufficient user evidence to raise a presumption of dedication. The Committee would therefore need to consider the documentary evidence for adding the section of path A to B to the Definitive Map. He stressed to members that there were a number of contradictions within the documentary evidence and that some sources of evidence were capable of more than one interpretation.
- 5.10 The Asset Data Officer explained that on the 1815 Greet and Sudeley Inclosure Map, Mill Lane was shown by two full lines running along its present course. It was then shown continuing into the farmyard right up to the Mill Race (i.e. roughly halfway between points B and C) which at that time was not culverted, before continuing as a path in a north easterly direction, past a building roughly on the site of the current farm house, across plot number 20 ("Mill and Monkbridge Mead") to "Monks Bridge" where it crossed the River Isbourne. The section of the current path AWB 52 from point B to C to the Stratford Road was not depicted and no bridge was shown over either the Mill Race between points A and B or over the River Isbourne between what were now points B and C.
- 5.11 The Committee was informed that Mill Farm was shown as "Mill" on the 2" to 1 mile Ordnance Survey Surveyor's Drawing of 1811, but no road, track or path was shown connecting it to other ways shown on the map.
- 5.12 The Asset Data Officer reported that in regard to evidence of the route on commercial maps, Greenwood's Map, 1824, showed the route by two full lines, as a continuous route running between two buildings at what was now Mill Farm continuing east to the Stratford road. The claimed path was identified in the key as a "cross road", and shown connecting to the wider road network. It was also shown on Bryant's Map of Gloucestershire, 1824, identified by two full lines, running along Mill Lane and then continuing eastwards, immediately to the south of the parish

boundary with Hailes, along the course B to C and then east to the main Cheltenham to Stratford road. The key and colour scheme suggested that it was regarded as a lane or bridleway.

- 5.13 The Asset Data Officer drew members' attention to paragraphs 14.12 -14.15 of the report which detailed the case law concerning cross roads. He referred to the most recent appeal court decision of *Fortune & Others v Wiltshire County Council*, March 2012 which stated "the judge concluded that Greenwood's map supported the emerging picture of an established thoroughfare. In our judgement the label "cross road" added further support."
- 5.14 The Committee noted that the Ordnance Survey First Edition 1" to 1 mile map (1830) showed a through route, depicted by two full lines, running from Greet along Mill Lane and then continuing through points A to B to C and then east to the main road from Cheltenham to Stratford, south of Ireley Farm.
- 5.15 The Asset Data Officer referred to the Cheltenham Examiner, 8 May 1889, report on Winchcombe Highways Board. This indicated that Greet Mill Lane was a publicly maintainable road in 1889, but not a through road.
- 5.16 The Asset Data Officer explained that the First Edition 25" to 1 mile Ordnance Survey map Gloucestershire 20.3 (1884), which covered the route in question, was a coloured edition. The route was shown running along Mill Lane and then continuing from point A through to the main road. The whole of this route was shown coloured sienna and the key identified this as a metalled road.
- 5.17 The Asset Data Officer reported that the Ordnance Survey 3rd edition 1" to 1 mile map, revised in 1903-04 and published in 1906 was an outline map with roads coloured in brown. Mill Lane and a continuation eastward from point A to the main Cheltenham to Stratford road was shown coloured in brown. The key identified this as a Metalled Road, Second Class. He explained that from around 1886 onwards, Ordnance Survey maps carried a disclaimer that any representation of a road, track or path was not evidence of the existence of a right of way over it. However, internal memos from within the Ordnance Survey indicated that Highway Boards had been asked by Ordnance Survey to provide information on whether or not a road track or path was available for use by the public. It appeared that Ordnance Survey took account of this information when producing the maps. He advised members that whilst the maps indicated that from 1903 the public had access to the claimed route, they should bear in mind the Ordnance Survey Map's disclaimer that any representation was not conclusive evidence of a right of way.
- 5.18 The Committee was informed that Bartholomew's maps relied on information from the Ordnance Survey. The whole route was shown on the Bartholomew's Half Inch to One Mile map (1924). It was depicted by a red and white dashed line, the key indicated that this marking denoted "Motoring Road, Secondary". A lower category was styled in the key as "Indifferent Road (Passable for Cyclists)". There was evidence that from 1898 the Cyclists' Touring Club collaborated with Bartholomew in regard to routes used by their members; this was shown by a note on their maps which confirmed that the roads had been revised by The Cyclists' Touring Club.

The Asset Data Officer explained that it could be inferred from the map that the route was available for use by the public in 1924.

- 5.19 The Asset Data Officer informed members that the map accompanying the 1904 sale particulars for the Manor Farm Estate, Greet included Greet Mill. The claimed route was shown running through the farmyard as a continuation of the road rather than as part of the land to be sold. He considered that this could be in error but if correct carried weight as it was effectively an admission against interest. The sales particulars described Greet Mill as “Approached by drive from Greet and a private drive from Irely Road” indicating that the route east from Greet Mill was considered to be a private road. He pointed out that this was a year after the Ordnance Survey 3rd edition 1” to 1 mile (1903/04) map, showed the entire route as a Metalled Road, Second Class.
- 5.20 The Committee was informed that the 1910 Finance Act Inland Revenue valuation plan differed from the 1904 Sale Particulars in its depiction of the extent of highway between points A to B. The Finance Act map showed the section A to B (and the continuation east to the Stratford road) as forming part of the hereditament. It was explained that the Finance Act Map was produced by the Inland Revenue as part of a statutory process and was based on information supplied by the landowner; there were penalties for false information being supplied. In the book accompanying the Financial Act Map it detailed a £50 reduction for rights of way against Greet Mill. The Asset Data Officer explained that due to there being another path that ran across the property, it could not be confirmed that the reduction related to the claimed route. However, it did appear to be to a large reduction for a cross-field path away from the main farm buildings. Such reductions were usually for significantly less than £50 so it could be suggested that there was more than one right of way and/or that another right of way was significantly more inconvenient for the landowner.
- 5.21 The Committee was informed that Ordnance Survey 25” to 1 mile map, 3rd edition Glos 20.3 (1923) was very similar to the Ordnance Survey 25” to 1 mile, 2nd edition Glos 20.3 (1903). There was a boundary feature shown at point B, and none at point A. The route was shown between points B and C by a solid and a dashed line as far as the River Isbourne, and then continuing eastwards as a double pecked line to Stratford road. A path was shown running northwards from point C marked “F.P”.
- 5.22 The Asset Data Officer presented to the Committee an article from the British Newspaper Archives on a Cheltenham Rural District Council meeting, reported in the Tewkesbury Register, from 15 October 1938. The article referred to the fact that the landowner had erected a sign “Private Road Greet Mill only” on the side of the main road. The landowner had been advised by the Rural District Council that the route should form part of a public footpath leading to Toddington. The landowner had then subsequently added “Public Footpath Only” to the sign. The Asset Data Officer explained that this showed that the route carried on to the footpath to Toddington, but it did not necessary imply that the footpath also continued through the farmyard.

- 5.23 The Asset Data Officer informed members that the list of streets, showed county road 50522 terminating at point A. An earlier set of maps accompanying the list of streets dating to the early 1950s showed the same extent of highway. However, Winchcombe Parish Council's submission map from circa 1952, showed road 50522 continuing through the farmyard. This may have been an error as the contemporary maps accompanying the list of streets held by Gloucestershire County Council also showed the road terminating at point A. The maps supplied to parish councils by the County Council for marking up rights of way that they wished to claim, showed the road extending to point B. He suggested that whilst there was no conclusive evidence, it was most likely for this reason that Winchcombe Parish Council claimed what later became AWB 52 to point B only, instead of a continuation through to point A. He was therefore of the view that Winchcombe Parish Council did not intend to claim a cul-de-sac footpath leading only to Mill Farm, and that the intention was for the claimed footpath to connect with the road leading to Mill Farm from the west.
- 5.24 In response to a question, the Asset Data Officer reported that the Divisional Surveyor had confirmed in 2004 that there were no records to suggest that the road extending to point B had been publicly maintained.
- 5.25 The Asset Data Officer referred to the relevant case law concerning cul-de-sac public rights of way, which was Moser v Ambleside UDC (1925) 23 LGR 533 540, whereby Atkin LJ said: "I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise." The Committee was advised therefore that cul-de-sac public rights of way could exist.
- 5.26 A member made reference to cul-de-sac paths normally leading to a "place of popular resort" and questioned whether it could be considered that the farm was a "place of popular resort". In response, the Asset Data Officer explained that the purpose of public footpaths back in the 1850s was different to that of today in that they were more for functional use, to travel to a particular place. He added that there was now a wider range of places that were considered to be places of popular resort and a farm could be such a place. However, a Mill (which Greet Farm had previously been) would certainly have been a place of popular resort which locals would have needed to go to regularly.
- 5.27 The Asset Data Officer explained that the former landowner Mr Pearce, had indicated in the application to delete public footpath AWB 52, that both he and his father had consistently stopped people walking along the track at point B, making it clear to them that there was no right of way between points A and B across the farmyard. Mr Pearce has also asserted that the footpath AWB 52 had never been a right of way and that the length of path B to C was only claimed once the path ASY 23 had been removed from the Definitive Map. The Asset Data officer explained however, that this was not correct as AWB 52 featured on the initial parish submission made by Winchcombe Parish Council c.1952, and ASY 23 was not deleted until 1965. The path ASY 23 was found to be outside of the Winchcombe

parish boundary, and in the parish of Stanway. It was subsequently included in Stanway Parish Council's submission.

- 5.28 The Committee was informed that the Definitive Map showed footpath AWB 52 as running west from road B4632 to Mill Farm where it stopped at point B, leaving a gap between the western end of the footpath and the eastern end of the road. However, the Statement, which was a document describing the paths on the Definitive Map, described the footpath AWB 52 as running from the B4632 to connect to road number 50522. Although this appeared to be an anomaly, this was not in itself evidence to show that the length of footpath shown on the map should be deleted. The Statement could be taken as evidence to show that the intention at the time when the Definitive Map was drawn up was to have a through route connecting from one highway to another. The County Council's decision to refuse the application to delete the footpath AWB 52, was upheld by the Secretary of State in November 2005. The resulting decision was based on the evidence which demonstrated that Winchcombe Parish Council had carried out a very thorough exercise in performing all of the required actions under Section 28 of the National Parks and Access to the Countryside Act 1949.
- 5.29 The Committee was reminded of the process by which the Definitive Map was drawn up. A procedure for the compilation of the maps was laid down which enjoined upon county council's consultation with district and parish councils before the production of a draft map. It was required that the draft maps and statements were advertised in the local press and the London Gazette. The draft maps were made available for inspection for a period of four months and members of the public were given the opportunity to object to the draft maps. There was no provision in the legislation for notification of individual owners and occupiers, and members noted that the landowner did not submit an objection.
- 5.30 In response to a question, the Asset Data Officer confirmed that on Winchcombe Parish Council's submission map, the use of red colouring was to show to the County Council what the Parish Council considered to be rights of way. The maps the parish councils used were supplied by the County Council with the roads already marked in brown. He clarified that the yellow/brown line on the parish submission map indicated that the maps supplied by the County Council showed the road 50522 continuing further than it should have done. He reiterated that this could explain why when claiming path AWB 52 the Parish Council only claimed to point B, when logically if it was to be a through route the Parish Council would have claimed to point A.
- 5.31 In response to a question on whether there was any record which could confirm if road 50522 had been maintained at public expense, the Asset Data Officer explained that the list of streets was an internal document and was not subject to public scrutiny or objection. The list of streets was essentially two documents: the register of highways maintainable at public expense which carried the legal weight; and a map, the purpose of which was solely for assisting in identifying the highways. The list of streets was based on earlier records, however the earlier maps produced by the previous rural district councils before the County Council took over responsibility were no longer in existence. He advised members that

whilst the Divisional Surveyor had confirmed in 2004 that the road had not been publicly maintained beyond point A, there was no evidence to confirm whether or not it had been maintained to point B in previous years. In response to a further question he confirmed that the road had not been publicly maintained between A and B since 2004.

- 5.32 A member referred to the Manor Farm Estate Sale Particulars, 1904 map, on which the claimed route was shown running across the farmyard as a continuation of the road and excluded from the land designated as forming part of the sale. He suggested that this would have been an important established route providing access to the Mill and used by the public at large. He commented that logically the aim would have been to include as much land as possible within the sale of the estate; consequently, there must have been a reason as to why the claimed route was not included as part of the land to be sold.
- 5.33 A member made reference to the previous landowner closing the gate. He was of the view that this action would not carry much evidential weight in regard to use being challenged, as he was aware of other gated roads in the county that did not preclude public access to a way. It could be implied that the then landowner had taken the reasonable step of closing the gate to prevent livestock escaping, and this action would not necessary prevent people from using the path. The Asset Data Officer advised the Committee that the act of closing a gate was not usually considered as bringing into question the public's right to use the path. Rather the reason as to why the gate had been closed was the significant factor. The act of closing the gate had to be specifically directed at the users of the path for rights to be brought into question.
- 5.34 The Asset Data Officer advised the Committee that the Mill would have been considered a place of resort within the local community and would have been a common place that people wished to access. He indicated that there were sufficient pieces of information within the documentary evidence presented, to infer that over the years the claimed route at points A-B had carried public status at some stage as either a road or a public footpath.
- 5.35 In response to a question, the Asset Data Officer confirmed that the building on the south side of the farmyard was where the Mill had been located. A member suggested that it would therefore be reasonable to infer that the highway came right up to the Mill to facilitate the unloading of goods.
- 5.36 In response to a question, the Asset Data Officer confirmed that it was not unusual for farmyards, particularly those located around a Mill, to have public rights of way running through them.
- 5.37 In response to a question, the Asset Data Officer explained that based on the evidence obtained from the maps, the path came into being between the years 1815 and 1824. However, despite an extensive search at Gloucestershire Archives, he had not come across any records to confirm who had created the path.

- 5.38 In response to a question, the Asset Data explained that the current Land Registry record for Mill Farm showed the claimed route between points A and B as being part of the farm, and that this corresponded with the 1910 Finance Act map. It was likely that the Land Registry record was based on the 1910 Finance map. However, it was not known on what evidence the 1910 Finance Act map had included the claimed route as part of the hereditament.
- 5.39 A member suggested that the stone built bridge located at point C was a substantial bridge and would not have been built by a farmer but would have been built by the owners of the Mill from the time when the Mill Race was initially culverted. He questioned whether the allotment gardens could be considered a place of resort. In response, the Asset Data Officer agreed that people may well have used the claimed route to reach the allotment gardens.
- 5.40 Cllr Dr David Willingham informed members that when undertaking a site visit on 27 March 2022, he had commenced at the side of the road B4632 and that the claimed path was not evident by signage in that area. The path was still metalled and there was a sign on the gate (located between points B-C) which read "Please Close the Gate"; however, the gate had been left open. There appeared to be a lock on the bottom of the gate and going through the gate there was another sign to indicate that the gate must be kept shut. He had walked the route up to the stone bridge, and could clearly see from the bridge that it was a through route. Around the other side of the claimed route he saw the existing signs and the gate which had been left open. He commented that having considered all of the information he was of the view that Winchcombe Parish Council had intended to create a through route in their parish submission to connect to road 50522. He was of the view that the information presented supported the recommendation that rights were reasonably alleged to subsist between points A to B.
- 5.41 A member made reference to the article from the British Newspaper Archives on a Cheltenham Rural District Council meeting, Tewkesbury Register, from 15 October 1938. In response to a question, the Asset Data Officer clarified that the Finance and General Purposes Committee was most likely referring to the footpath which headed north to Toddington from point C that which had been deleted. There was no indication from this article that the path leading to Toddington formed part of the *public* footpath to Greet. If there had been, it would be good evidence to infer that in 1938 the claimed route was considered to be a public right of way. He added that there was evidence of the landowner's lack of intention to dedicate, but the wording of sign and amendment indicated that it was directed towards vehicles, and could be argued not to bring into question use on foot.
- 5.42 The Asset Data Officer emphasised the point that documentary evidence could never provide conclusive evidence of public rights of way as typically the purpose of each piece of documentary evidence was not to show that rights of way existed. Consequently, it could be used only to *infer* that rights of way existed. He suggested that whilst the evidence was contradictory, ultimately in his opinion the evidence was more in favour than not of showing that the intention at the time when the Definitive Map was drawn up was to have a through route, connecting from one highway to another.

5.43 The Asset Data Officer reiterated that the test for making an order to add a length of public path was that rights either subsisted or were reasonably alleged to subsist. He informed the Committee that in his opinion given the conflicting nature of the evidence, only the lower test (reasonably alleged to subsist) could be argued to have been clearly met and the higher test, that rights subsisted, was more questionable. The higher test would require proving that the route existed on the “balance of probabilities”. This was more difficult and very finely balanced. However, at this stage being able to show that the route was reasonably alleged to subsist, which was a lower test than that for the “balance of probabilities”, was sufficient. Therefore, the recommendation was that an order be made to add the claimed section of path A to B (as shown on map 1B) to the Definitive Map and Statement as a public footpath.

5.44 Karen Pearman, Asset Data Team Leader (Highways Records), queried whether it would be possible to change the officer’s recommendation in the report for the claimed path between points A to B to be recorded as a class 5 road instead of a public footpath, if members were of the view that there was sufficient evidence to support this. The Asset Data Officer suggested that members of the Committee could vote against the recommendation, and instead propose that the claimed route could be added as a class 5 road to the list of streets if they considered that there was enough evidence to support this. Jo Bolton, Democratic Services Adviser, advised against making changes to the recommendation given that the report had been published with the recommendation for a public footpath and that there had been no discussion about changing the recommendation. She advised that members should vote either in favour of the recommendation or against it. There was no indication from members that they wished to consider this further.

5.45 Having considered all of the information before it, the Committee:

Resolved that an order be made to add a length of public footpath to the Definitive Map of public rights of way between points A and B (as shown on map 1B).

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

No public questions had been received on the powers and duties of the Committee.

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

Two questions had been received. A copy of the questions and answers had been circulated and uploaded to the Council’s website.

The Committee noted the questions and answers.

CHAIR

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

Meeting concluded at 12.01 pm