

COMMONS AND RIGHTS OF WAY COMMITTEE

28 March 2023

AGENDA ITEM: APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO RE-CLASSIFY A LENGTH OF PUBLIC FOOTPATH ROUTE; MWH27 & PART OF MWH3 TO PUBLIC BRIDLEWAY, WHITESHILL PARISH, GLOUCESTERSHIRE

REPORT OF THE REPORT OF THE ASSISTANT DIRECTOR: TRAFFIC AND TRANSPORT

1. PURPOSE OF REPORT

To consider the following application: 573/11/246(6)

Nature of Application:	Re-classification of route comprising Public Footpath MWH27 & part of MWH3 to public bridleway
Parish:	Whiteshill
Name of Applicant:	Mr C Townley
Date of Applications:	4 April 2022
Landowners:	Ms J F King, Mr & Mrs A S Hawkins
Witness Evidence forms:	None

2. RECOMMENDATIONS OF THE CASE OFFICER

That an order be made to re-classify Public Footpath MWH27 & part of Public Footpath MWH3 to public bridleway between points A-B-C.

3. RESOURCE IMPLICATIONS

Average staff cost in taking an application to the Committee- £5,000. Cost of advertising Order in the local press, which has to be done twice, is approximately £500 per notice. In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application. If the application were successful, the route would become maintainable at the public expense.

4. SUSTAINABILITY & EQUALITY IMPLICATIONS: no such implications have been identified.

5. DEPARTMENTAL CONTACT

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6. STATUTORY AUTHORITY

Section 53 of the Wildlife and Countryside Act 1981 ("WCA81") imposes a duty on the County Council, as surveying authority, to keep the Definitive Map & Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in subsection [3]. Any

person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53(3) (b) or (c). The County Council is obliged to determine any such application that satisfies the required submission criteria in accordance with schedule 14 of the Act.

Section 53(3)(c)(ii) WCA81 relates to the discovery by the Authority of evidence that shows that a highway of a particular description ought to be there shown as a highway of a different description.

HIGHWAYS ACT 1980 - Section 31: Dedication of a way as highway presumed after public use of 20 years.

- a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 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.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

PUBLIC RIGHTS OF WAY: -

- footpaths - for walking & running, (mobility scooters or powered wheelchairs permitted under s.20(2) Chronically Sick & Disabled Persons Act 1970).
- bridleways - for walking, horse riding, bicycles, (mobility scooters or powered wheelchairs - as above).
- restricted byways - for any transport without a motor, i.e., walking, horse riding, bicycles, horse and cart, (mobility scooters or powered wheelchairs - as above).
- byways open to all traffic - for any kind of transport, including motor vehicles (but mainly used by walkers, and horse riders)

PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate the way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

REPORT

7. ISSUES TO BE DECIDED

- 7.1 This application deals with a route, comprising two designated public footpaths recorded on the Definitive Map, compiled under the statutory process, the National Parks and Access to the Countryside Act 1949. This constitutes conclusive evidence of their status but is without prejudice to higher rights. Unlike the test applied to applications to add unrecorded routes to the Definitive Map which requires evidence that a way either 'subsists' or is 'reasonably alleged to subsist', a higher test is applied to applications, such as the one subject to this report, for the re-classification under s53(3)(c)(ii) WCA81 of an existing highway. The test to be considered is whether, on the balance of probabilities, there is sufficient evidence to show that the claimed public rights subsist

or put another way, it is more probable than not that that the route has higher rights than a footpath, i.e., a probability of 51% or higher.

- 7.2 Where a Definitive Map Modification Order (“DMMO”) is made, the process allows for objections to the order to be submitted. Further evidence could potentially be put forward for examination along with an objection. In these circumstances, the County Council cannot confirm the order, and the matter would need to be referred to the Secretary of State.
- 7.3 Where an order has been made and no objections are received, the Order Making Authority (“OMA”) can confirm it.
- 7.4 In the event of an application under Section 53 being refused, the applicant has the right to appeal against the decision to the Secretary of State, who may direct the OMA to make the order that is sought.

8. BACKGROUND

- 8.1 A location map at scale 1:10,000 is attached (**JH1**). Public Footpath MWH27 & part of MWH3 (“claimed route”), are located entirely within Whiteshill Parish, approximately 2k north of the centre of Stroud and is found within Ordnance Survey Grid Squares SO84/06 & SO84/07.
- 8.2 The Definitive Map Modification Order (“DMMO”) application made by Mr Townley on 4 April 2022, included Form 1 and an accompanying map of the claimed route drawn at 1:2500 scale. Form 3 was also supplied, certifying that the application had been served upon Ms J F King, Mr & Mrs A S Hawkins. An impersonal notice was installed at the junction of Public Footpaths MWH3 & 27 due to a small, unregistered area of land. The application was accompanied by a historical report compiled by the applicant. A further report was submitted on 4 October 2022.
- 8.3 No user evidence has been submitted. This application will be considered at common law upon the documentary evidence.

9. DESCRIPTION OF CLAIMED ROUTES

- 9.1 A plan of the claimed route at a scale of 1:2500 is held (**JH2**). It is shown as a continuous black line between points A-B-C. The route was surveyed on 30 August 2022 and 21 February 2023.
- 9.2 The claimed route, commences at its junction with Public Bridleway MPC17 at the parish boundary of Whiteshill & Pitchcombe at a point marked A on the plan at Ordnance Survey Grid Reference (“OSGR”) SO 8456/ 0719. Public Footpath MWH27, continues in a generally south westerly direction for approximately 187 metres to a point marked B on the plan at OSGR SO 8443/ 0707. The claimed route continues as Public Footpath MWH3 in a generally southerly direction for approximately 130 metres to a point marked C at OSGR SO 8439/ 0694 at its junction with Public Footpath MWH30 and the 42455 public highway. A ‘Public Footpath’ signpost is located at point C, a stile is found at point B and a narrow footbridge is located at point A. Section A-B is unenclosed, crossing a pasture field whilst section B-C comprises an un-made track, approx.3m wide with a central grass strip, enclosed by hedges or stone walls. Photos of the 2 routes are held (**JH3A-L**).

10. DOCUMENTARY EVIDENCE

- 10.1 Under Section 32 of the Highways Act 1980, when determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified 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 has been kept and from which it is produced.

10.2 Ordnance Survey Maps.

10.3 The original surveys were conducted by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

10.4 The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 25 inch. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpath and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1898 in Gloucestershire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

10.5 Ordnance Survey 1811 2":1 mile Pen & Ink on Paper Drawing by Robert Dawson (Cheltenham OSD172): British Library via Wikimedia Commons – Open Government License Version 1.0

This finished plan is attributed to Robert Dawson. Robert Dawson was appointed a first-class draughtsman on formation of the Royal Corps of Military Surveyors and Draughtsmen, a corps of warrant officers under the Board of Ordnance, with headquarters in the Tower of London. A government mandate was issued to map the whole country in response to military needs during the Napoleonic wars. Critical communication routes such as roads and rivers were to be shown clearly and accurately. Preliminary drawings were made at a scale of six inches to one mile for areas of particular military significance, down to two inches to one mile elsewhere. Back in the Tower of London, copies of the drawings were prepared at the scale of one inch to one mile. From these, copper plates were engraved for printing. The British Library possesses 351 of the original preliminary drawings made by the surveyors between the 1780s and 1840 – one of which is the 1811 drawing of Cheltenham by Robert Dawson.

This map shows the claimed route as part of an old through road connecting Pitchcombe with 'Pagans Hill', pre-dating the construction of the A46 Painswick turnpike in 1818. Its physical representation is similar to other known highways today such as the Main Road and Ruscombe Road. Section A-B (MWH27) is shown by double pecked lines whilst section B-C (MWH3) is shown running between solid boundaries. This is simply a reflection of what the OS Surveyor saw on the ground (a track running across open ground or an enclosed track). It is not uncommon for public bridleways, or indeed public roads, to cross open land and, where that is the case, to be shown unfenced. A further example of this is the section of Folly Lane (recorded public highway 51147). A copy of this map is held **JH4**.

10.6 Plan of the Tithing (subdivision of a civil parish) of Paganhill in the Parish of Stroud in the County of Gloucester 1819 (C. Baker) P320/VE/1/9

This ink and watercolour plan was drawn by Charles Baker, Land Surveyor of Painswick and covers the Paganhill Tithing of Stroud containing the villages or hamlets of Whiteshill, Ruscombe, Paganhill and parts of Dudbridge, Standish & Randwick. It shows buildings, mills, woods, commons, streams, roads, canal, hedges, land use. Fields are numbered. The highway network

of the time appears to be coloured brown but includes routes known today as Public Footpaths MWH6 & MWH17. The whole claimed route however is shown uncoloured. A barrier is located at point B. A copy of this map is held **JH5**.

10.7 Bryant Map 1824 (ref: Coaley.net)

Andrew Bryant's 1824 Map of Gloucestershire was drawn from an original survey. The "explanation" (or legend) lists "Turnpike and Mail Roads", "Good Cross or Driving Roads" and "Lanes & Bridleways". Bryant's map was sold to members of the public and cost 3-4 guineas. This map was produced for sale to the travelling public to help them get around and was often sponsored by wealthy local landowners. This map therefore provides evidence of the reputation of the claimed route as a highway but is not conclusive as to its status. The claimed way is shown as part of a through route connecting Pitchcombe and Whiteshill and the key to Bryant's map identifies it as a Lane or Bridleway. It should be noted that routes known today as Public Footpaths MWH32, MWH34 and MWH17 are similarly identified. The A46 Painswick turnpike road is also shown. A copy of this map is held **JH6**.

10.8 Greenwood Map 1824 (ref: Coaley.net)

Like Bryant's Map, Christopher Greenwood's 1824 Map was also drawn from an original survey and was sold to members of the public. The commercial nature of the map, as with Bryant's means that the routes shown are usually public and publicly maintainable unless there is strong contemporary evidence which shows the route is private. In *Hollins v Oldham* (1995) a comment was made with regard to Burdett's Map of 1777 which identifies the same two types of road in its key as Greenwood: firstly; turnpike roads, which are roads that could be used upon payment of a toll, and secondly; crossroads. The Justice said, "*This map was probably produced for the benefit of wealthy people who wished to travel either on horseback or by means of horse and carriage... There is no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use*".

Greenwood also shows the claimed way as part of a through route connecting Pitchcombe and Whiteshill. The key identifies the claimed route as a crossroad in the same way that Public Footpaths MWH32 and MWH34 are. In 1824 the expression "crossroad" did not have its modern meaning. The Planning Inspectorate's Advice Note No.4 states that "*In modern usage, the term "crossroad" and "crossroads" are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term "crossroad". These include "a highway running between, and joining, other highways, a byway and a road that joined regional centres*".

It was noted in the appeal court decision of *Fortune & Others v Wiltshire County Council*, March 2012 that "*the judge concluded that Greenwood's map supported the emerging picture of an established thoroughfare. In our judgement the label "crossroad" added further support*". The A46 Painswick turnpike road is shown. A copy of this map is held **JH7**.

10.9 Ordnance Survey 1st edition 1":1-mile sheet 44, Published 1828, National Library of Australia, via The Charles Close Society (Published at the Tower of London)

This map was "*Engraved at the Ordnance Map Office in the Tower under the Direction of Lieutenant Col. Colby" ... "Published 24 November 1828"* at a scale of 1":1mile. The map was drawn up from the pen and ink drawings of the Royal Corps of Military Surveyors and Draughtsmen as referred to in para 10.6. As with the Bryant and Greenwood Maps, the commercial nature of this map means that routes shown are usually public and publicly maintainable, unless there is strong contemporary evidence which shows that routes are private. The claimed way is shown as part of a through route connecting Pitchcombe with Whiteshill and is depicted in a similar way to the roads

around Pitchcombe village, which today are designated as class 4 roads. The A46 (Painswick) turnpike road is also shown. A copy of this map is held **JH8**.

10.10 Standish Tithe Map 1844 (P305/SD/2/1)

Although not produced to record public rights of way, Tithe Maps provide important evidence as to the physical existence of such routes. The maps (original and two copies) were drawn up under statutory authority by the Tithe Commissioners under the provisions contained in the Tithe Commutation Act of 1836 to record and number all cultivated land, arable and pasture, as tithe was payable on land producing crops to support the local parish church and its clergy. The originals were retained in the custody of the Commissioners and are now held by The National Archives. The copies were deposited with the Registrar of the diocese and the incumbents and churchwardens of the parish. It is unlikely that a tithe map will show public footpaths and bridleways as their effect on the tithe payable was likely to be insignificant. They were required to show wasteland and roads, because tithe was not payable on these, although this is not necessarily an indication that the land was public. Lord Denning said in *Kent County Council v Loughlin 1975* “*If a road passed over a man’s land, he would naturally require it to be shown so as not to pay tithe on it*”. Thus, a distinction is made between tithable and untithable land, with roads clearly marked as untithable.

An 1837 amendment to the Act provided for Tithe Maps to be either first or second class. First class maps, being signed and sealed by the commissioners, are considered to be a true record of matters relating to the purposes for which the map was designed. Second class maps, signed but not sealed, which failed in some, often minor way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view. Both first and second-class maps have been accepted by the courts as evidence (*Smith v Lister 1895*).

The Standish Tithe Map was first class. The part of Pitchcombe, which includes Public Bridleway MPC17, the *continuation of the claimed route* north of Whiteshill, was historically included within the Oxlynch tithing of Standish Parish until a boundary change in 1884 which transferred it to Pitchcombe Parish. This map shows the northern section of the old road (from point A northwards towards Pitchcombe village) to be an enclosed for which no tithe rent-charge was apportioned. Further the map annotates both the old road connecting Pitchcombe and Whiteshill, which incorporates the claimed way, and the A46 Painswick Road at the parish boundary: “To Stroud”. A named destination suggests it was a through route and although not necessarily constituting evidence of public vehicular rights, the annotation of a road ‘from’ or ‘to’ a named settlement is suggestive of public rights. A copy of this map is held **JH9**.

10.11 Bisley & Stroud Tithe Map 1842 - Part 2 (P47/SD/2/3)

The Bisley & Stroud Tithe Map 1842 (Part 2) is also first class. Whiteshill was part of Paganhill Tithing of Stroud Parish until 1894 when the new civil parish of Whiteshill was created. The Bisley & Stroud Tithe Map does not show the section of claimed route, A-B (MWH27), across field No.124, known as ‘Lower Slad Ground’, perhaps suggesting that it was considered to have a lower status than road, i.e., a footpath/ bridleway for which tithe would be negligible. Public Footpath MWH30 and the continuation of MWH3 to Kites Nest Farm are similarly not shown. The section of claimed route, B-C (MWH3) is shown as the continuation of the road known today as the 42455 public highway and is identified in a similar manner, i.e., coloured, un-numbered, and excluded from the adjacent fields. A barrier is located at this point C. A copy of this map is held **JH10**.

10.12 1835 Highways Act - parishes required to appoint Surveyor

Each parish was required under this Act, to appoint a surveyor, who had powers to levy a rate on occupiers of land to keep the roads in good order. Surveyors could be convicted and fined by the

county justices for failing to keep the highways in good repair. The British Newspaper Archive details the surveyors appointed for the tithings of Stroud for the years 1852 & 1853.

10.13 Cheltenham Journal & Gloucestershire Fashionable Weekly Gazette: Monday 29 March 1852 (ref British Newspaper Archive)

STROUD

“.... HIGHWAYS: - The surveyors appointed for the highways for the ensuing year are as under: - Mr Thomas Shill of Fennels Farm, for Upper Lypiatt Tithing; Mr Thomas White, for Lower Lypiatt Tithing, Mr Robert Chandler, for Steanbridge; and **Mr Edwin Phipps for Paganhill**”.

10.14 Cheltenham Journal & Gloucestershire Fashionable Weekly Gazette: Saturday 9 April 1853 (ref British Newspaper Archive)

“STROUD

“.... Highway Surveyors – The surveyors for the year ensuing are: - Mr Thomas Shill of Fennels Farm, for Upper Lypiatt Tything; Mr William Tanner of the Thrupp for Lower Lypiatt Tything; Mr Robert Chandler of the Slade for Steanbridge Tything; and **Mr Edwin Phipps of Stokenhill for Paganhill Tything**”.

10.15 1862 Highways Act- Highway District Boards

Under this legislation, Justices of the Peace of a county set up Highway Districts, which were groups of parishes, represented on a Highway Board which in turn employed one or more waywardens to oversee the maintenance and repair of highways. Notice of the setting up of the Stroud Highway District, which included Pitchcombe & Whiteshill, was advertised in the Cheltenham Mercury newspaper on 1 July 1865 with the first meeting taking place on 11 April 1866. The highway boards took over the property and liabilities of the parish surveyors in its district and met the costs of repairing highways by levying a highway rate on the individual parishes. The following articles and minutes refer to the old road connecting Whiteshill and Pitchcombe and suggest that Mr Phipps was no longer the highway surveyor but a landowner refusing to pay his portion of the highway rate and requesting maintenance of part of the route.

10.16 STROUD JOURNAL – Saturday 25 September 1869 (British Newspaper Archive)

STROUD POLICE Friday Sept 17th – Disputed Highway Rate

“Mr Edwin Phipps was summoned for non-payment of a Stroud highway rate. Mr Phipps said that the parish had repaired the road for 38 years and now they refused to do it any longer... Mr Capel, as Chairman of the Highway Board, explained that that matter had been brought before the Board twice. It was a road leading from the church at Whiteshill to Mr Phipps farm. There was a branch road which led to the Slad Fields which was a public bridle road but a private carriage road....”

The branch road fits the description of the claimed route A-B (MWH3) leading to the field recorded as ‘Lower Slad Ground’ (referred to in paragraph 10,12) over which the section of claimed route B-C (MWH27) crosses.

10.17 STROUD JOURNAL – Saturday 2 October 1869

A CORRECTION - To the Editor of the Stroud Journal

“Sir, I beg leave to correct a mistake made in the police report concerning a highway road leading from Whiteshill to Pitchcombe. It was stated in your Journal of last week that the road from Whiteshill was a road leading to Stokenhill Farm, and a branch road leading to Pitchcombe. It is just the reverse to this. It is a public carriage road leading from Whiteshill to Pitchcombe and only a branch road to Stokenhill Farm. Yours respectfully Edwin Phipps”. This article confirms that in Mr Phipps opinion, the road between Pitchcombe and Whiteshill, which included the whole claimed route, A-B-C, was a public carriage road.

10.18 Stroud Highway District; board minutes

Meeting of the Board on 8 May 1868.

Pg 46 - Stokenhill Road: "*Messrs Thomas Phipps, Richard Gay and James Cleaver asked the Board to cause a road leading to their properties at Kitesnest to be repaired – the Board not considering it to be a Parish Road declined to comply with their request*". This would have included section A-B of the claimed route.

Meeting of the Board on 13 August 1869.

Pg 71 – Road to Stokenhill: "*The repair of the lane leading from Whiteshill to Stokenhill was mentioned by the surveyor, and he was directed not to repair such road, as the Board consider it to be an occupation road for the use of Stokenhill Farm*".

Meeting of the Board on 12 November 1869.

Pg 74 – Road to Stokenhill: "*Mr Edwin Phipps of Stokenhill attended the meeting to ask the board to order the repair of the road mentioned by the surveyor at the meeting held on 13 August last, but the board declined to undertake the repair*".

Meeting of the Board on 11 December 1874.

Pg 178 – Road to Stokenhill: "*Mr Edwin Phipps attended the meeting and requested that the road between Whiteshill Church and Pitchcombe might be repaired – adjourned*".

Meeting of the Board on 24 December 1874.

Pg 179 – Road to Stokenhill: "*Mr Edwin Phipps again brought the repair of the Stokenhill Road before the meeting, and it was declined on the grounds that the evidence was in favour of it being a private cart road*".

10.19 W. H. C. Fisher (Surveyor) Map 1874.

W.C.H. Fisher, Surveyor of Stroud. Map, drawn at 26.6 inches - 1mile, shows buildings in block plan, roads, track, stream, pond, and orchard. Shows the claimed way as part of a through route, without barriers, between Pitchcombe and Whiteshill. The route of the A46 Painswick Turnpike Road as also shown. A copy of this map is held **JH11**.

10.20 Ordnance Survey First Edition; 25"1 mile, Map sheet 41.11 - published 1885- (National library of Scotland).

This first edition sheet used colouring. As with other documents, this map also shows the old road of which the claimed way forms part as a through route between Pitchcombe and Whiteshill. The section of claimed route A-B (MWH27) is shown uncoloured and unenclosed whilst section B-C (MWH3) is shown coloured, denoting a metalled surface (historically, quarried crushed rock or stone), and numbered with its own parcel number which was one of the conventions used by the Ordnance Survey for public highways and is shown running between solid boundaries in a similar manner as other known highways today such as Main Road and Ruscombe Road in Whiteshill. This representation of the claimed route, part coloured (surfaced)/ uncoloured (unsurfaced), is replicated by several other routes in Whiteshill. One such is the route known today as dual classified Public Bridleway MWH28/ 45702 public highway which is initially shown coloured and enclosed, but which continues uncoloured and unenclosed across the neighbouring field. This representation does not appear to suggest however that the surfaced and unsurfaced sections necessarily enjoy the same status. The coloured route known today as the 41187 public highway near Whiteshill

Primary School continues uncoloured as Public Footpath MWH17 Physical features are located at points B & C. A copy of this map is held **JH12**.

10.21 Ordnance Survey; Second and Third Editions, 25":1 mile, Map sheet 41.11 – published 1902 & 1923: (National library of Scotland).

Like the first edition map, the claimed way is shown as a through route connecting the parishes of Pitchcombe and Whiteshill. Section A-B is shown as an unenclosed track across an open field with a physical feature at point A whilst Section B-C is shown with a solid boundary to one side with an unfenced boundary to the other. A physical feature is recorded at point B.– (**JH13 & JH14**).

10.22 Inland Revenue, maps compiled under the Finance Act, 1910, based on Ordnance Survey 25": 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files. Map sheet 41.11.

The Finance Act 1910 provided for the levying of a tax upon the incremental value of the site itself. The tax was to be paid every time the land changed hands. A Land Valuation Officer was appointed for each income tax parish, and they were given the responsibility of plotting and recording every piece of land, assign every land holding a number and provide ownership and occupation details for valuation purposes. The initial part of the process was the completion of a 'Form 4' by the landowner. This form asked whether the relevant unit of land ownership (hereditament) was subject to any public rights of way or any public rights of user. Information from the Form 4 was copied into Field Books in the District Valuation Office before the valuers went into the field to inspect and assess the hereditaments. Deductions were awarded for public rights of way across land. All private land *including private roads* were assigned an assessment number. Valuers would have been extremely reluctant to show any land as a public road if it could be assessed for duty. Landowners and occupiers would be anxious to ensure that public rights of way were recorded correctly because the existence of such a way reduced the value of the land and thus their tax liability. The exclusion of a route from surrounding parcels was the common way of showing public highways.

Section 11 of the Planning Inspectorates Consistency Guidelines (2nd revision June 2008) says in paragraph 11.7; "*The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i.e., they will be shown uncoloured and unnumbered. So, if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpath and bridleways were usually dealt with by deductions recorded in the forms and Field Books; however, there may be other reasons to explain its exclusion*".

The physical representation of the claimed route as shown on the Valuation Plan is as per the 25" Second Edition OS County Map (paragraph 10.22), i.e., as part of a through route connecting the parishes of Pitchcombe and Whiteshill. Section A-B (MWH27) is shown across hereditament 2985 whilst section B-C (MWH3) is shown across hereditament 3039. Both plots were subject to tax. The connecting route from point A northwards towards Pitchcombe is uncoloured and excluded from tax. This could be evidence that the connecting route was a public vehicular highway, or it could be suggested that it was used as a private track by more than one landowner to access fields but wasn't directly owned by anyone.

The Field Book records that hereditament 2985 was in the ownership of Lt. Col John Carruthers and the tenancy of Robert Kilminster. Under sub-heading 'Fixed Charges, Easements and Restrictions', two separate handwritten notes record, '*2 Public Footpaths and 1 bridle road*' & '*All footpaths as shown on O.S.M. are public except the one leading to buildings. The buildings are situated half a mile from main road and approached by private road*'. Several tracks are shown on the OS base map across this hereditament. There is no identification of the bridle road or of the

route considered to be a private road. A deduction of £25.00 was recorded under 'Public Rights of Way or User' but none for 'Easements'. There are four designated public footpath routes on the Definitive Map within the boundary of this hereditament, but no bridleways; MPC12, MWH24A/MPC18, MWH27 & MWH3. The existence of other tracks shown on the base map across this hereditament makes it impossible to attribute part of this deduction to the section of claimed route; A-B.

The Field Book records that hereditament 3039 was in the ownership of Richard Bullock and the tenancy of W. L. Phipps. A handwritten note states "*Land is much trespassed by footpaths*". A deduction of £60.00 was recorded under 'Public Rights of Way or User' but none for 'Easements' which suggests that these routes were not considered to be private. There are 5 routes shown on the OS base map across hereditament 3039 but 4 officially designated public footpaths on the Definitive Map today: MWH33, MWH32, MWH30 & MWH3. It is therefore impossible to attribute part of the deduction to the section of claimed route; B-C. An extract of Finance Act Map is held (JH15).

10.23 Kite's Nest Farm, sale particulars- 1851/ 1910 & 1950 (ref: D2299/ 9945 Heritage Hub)/ The British Newspaper Archive.

The British Newspaper Archives detail the proposed sale of Kites Nest Farm in August 1851. Mr Mark Thomas was the owner at that time and the tenant was Mr Edwin Phipps, appointed burgess (*a representative of a borough, corporate town in the British Parliament*) for Stroud in that year (address stated as Stokenhill Farm). The Finance Act 1910 indicates that Kites Nest Farm was in the ownership of Lt. Col. John Carruthers-Little and the occupier was Robert Kilminster. In 1910 however, Mr J. P. Phipps (Edwin's son) purchased the property and in 1950, Kites Nest Farm was sold at auction by Mr J.L. Phipps to F.T. King.

The 1910 sale plan indicates that the section of claimed route, A-B (MWH27), (plot No.61 on the sale catalogue and described as pasture), was included. The section of claimed route, B-C however, and the continuing route from point A northwards to Pitchcombe, designated Public Bridleway MPC17/ Lurks Lane were not. The 1950 sale plan shows that the land for auction was the same at that subject to the 1910 sale but included the lane (plot No.93) known today as Public Bridleway MPC17/ Lurks Lane. A question was raised regarding plot 93 "*Does any part of the lane, O.S.No.93, between Nos 107 and 108 belong to anyone?*" The Land Agents, responding on behalf of the owner, Mr Phipps, had no information.

10.24 County Surveyor: papers relating to survey of footpath under National Parks and Access to Countryside Act, 1949 ("NPACA 1949").

Under this legislation, all highway authorities were required to draw up a Definitive Map and Statement which together would form the legal record of public rights of way. Gloucestershire County Council initially provided parish councils with Ordnance Survey 6":1 mile, 1924 edition maps to record their local public route networks.

The returned documents are referred to as 'Original Submissions'. Photographs of Whiteshill & Pitchcombe Parish Council's original submissions are shown as (JH16 & 17 respectively).

Whitehill's Original Submission shows the road network coloured brown. The claimed route A-B-C is shown coloured purple and extending from one of these roads, annotated '*City Road. Mr Cooke*'. The sections of claimed route are separately numbered: 27(A-B) & 4(B-C). Handwritten annotation in either purple or green ink identifies all connecting routes and their status in the neighbouring parishes of Randwick, Stroud and Pitchcombe. The connecting route for the claimed way in the neighbouring parish of Pitchcombe is shown as a Road Used as a Public Path (green/ white broken line) and is annotated B.P (bridle path).

Pitchcombe's Original Submission also identifies the road network coloured brown. The public ways are coloured blue. Two of these routes have been highlighted in yellow. One is MPC17, annotated BR (Bridle Road), which is the continuation of the claimed way. Pitchcombe Parish Council supplied a key to the colouring used: Blue: *Recognised and accepted footpaths and Rights of Way*. There is then a description of the routes coloured red which are irrelevant to this application and Yellow: *Bridle Track*.

The surveys once completed were sent to the Divisional Surveyor's Office at the County Council where officers would examine the returned maps, making queries and seeking clarification where necessary before publishing the Draft Map.

The next stage of the process called for the highway authority to collate the original submissions and produce a 'Draft Map & Statement' which would be made subject to public consultation. Footpaths were coloured purple and bridleways were coloured green. The Draft Map identifies the claimed route as footpath 4, then extending to the parish boundary as footpath 27, at which point it becomes bridleway 17. The Draft Statement for Whiteshill Parish records Public Footpath MWH27 connecting to Public Bridleway MPC17 at the parish boundary. The Draft Statement for Pitchcombe Parish records Public Bridleway MPC17 connecting with Public Footpath MWH27 at the parish boundary.

Objections were raised by the owner of Kitesnest Farm regarding routes 4,5,25,26,39 & 40 in Whiteshill Parish and routes 13,14 & 19 in Pitchcombe as shown on the Draft Map. This was on the basis that they were "*either private cart tracks or are for the use of private tenants only*". Whiteshill Parish Council were consulted by the County Surveyor and responded by letter of 14 October 1959 to the effect that "*The unanimous opinion was that Mr King's objections would be challenged.... Most of the footpaths referred to have been in use for as long as members can remember*". Ultimately, the Whiteshill and Pitchcombe Parish Councils withdrew their objections to all of the ways being removed from the Draft Map apart from MWH4 and its continuation MPC13.

A Modified Draft Map was drawn up and again made subject to public consultation. The alignment of route 4, in the vicinity of Kites Nest Farm, as shown on the Draft Map, was changed (although the section subject to this application was unaffected) and as a result, it was re-numbered No.3 on the Modified Draft. On 24 August 1953, the Ramblers Association ("RA") appealed the deletion of the routes on the Modified Draft Map subject to Mr Kings objection. Although the proposed deletion of these ways is outside the remit of this application, a handwritten comment was added to the RA's letter regarding the claimed route when detailing one of the proposed ways to be deleted, i.e., MPC19. It said "*It (MPC19) crosses stream, no footbridge and then into plot No.61 by way of metal gate and stile in conjunction with access from F.P.27 to bridleway 17*". This objection was withdrawn by letter of 16 October 1970.

The Provisional Map was made subject to consultation by landowners/ representatives only before the final stage which was the Definitive Map. The Provisional and the Definitive Maps showed the claimed route unchanged, as Public Footpath route MWH3 & 27 connecting at the parish boundary with public Bridleway MPC17.

10.25 Whiteshill Parish Minutes

1950, pg8: Survey of Public Paths

"The clerk read a letter from the Rural District Council ("RDC") with regard to the National Parks & Access to the Countryside Act 1949 ("NPACA 49")"

8 May 1950, pg11: Survey of Public Paths

"It was agreed a sub-committee be elected to carry out the work on the NPACA 49.... The first meeting to take place on Tuesday 23rd May 1950 at 7:30pm".

Pg 24: Survey of Public Paths

"The clerk was instructed to request the RDC to mark the parish boundary on the Ordnance Map supplied for the surveys of public paths". A further record indicates that this was done.

17 January 1951, pg. 29: Survey of Public Paths

"The clerk read a letter from the RDC requesting an Ordnance Map supplied by RDC be marked and returned at the earliest possible moment. It was argued the matter should lie on the table until the better weather when the Survey of Public Paths Committee should carry out the necessary work to complete the information required". A further minute shows that a meeting to discuss the marking of the public path on the maps took place on 4 May 1951.

20 February 1952, pg. 59: Survey of Public Paths

"The Chairman said that he had been visited by an official of Gloucestershire County Council with reference to a dozen queries they had encountered with the public footpath plan sent in by the council in 1951. Mr Smith told the council he had spent considerable time in walking the footpaths with the official, and he was satisfied with the results. The plan was submitted to the council for approval, which was agreed upon. Mr Smith said the plan would be returned to the County Council authorities".

10.26 Public Rights of Way documentation:

A complaint monitoring log dated 25 July 1991, details the following complaint: *"no stile where MWH27 joins MWH3 (just an old, fixed gate)".*

A letter from the Public Rights of Way Team dated 5 November 1992 to Mrs King of Kitesnest Farm advises of the various problems affecting her land. A worksheet dated 20 November 1992 details the work carried out including laying a footbridge at the parish boundary (point A on **JH2**).

11. DOCUMENTARY EVIDENCE CONCLUSIONS

11.1 The maps considered for this report dating back to 1811, suggest that the claimed route was part of an old road, the origins and status of which, are unknown. Lord Diplock summed up the status of dedicated highways in *Suffolk CC v Mason* [1979] *"In the case of ancient highways dedication by inference from public use is the most common method of establishing the existence of a highway"*. No modern-day user evidence was submitted in support of the claimed route subject to this report, but consideration of the status of the old road itself suggests that it was used by the public as more than a footpath as shown by the following points: -

11.2 a) The OS Pen and Ink OS Drawing of 1811 shows the old road to be the only visible and established track connecting the parishes of Pitchcombe and Whiteshill prior to the construction of the Painswick 'turnpike' Road (A46) of 1818.

b) Mapmakers such as Ordnance Survey, Bryant and Greenwood consistently showed the old road as a through route connecting other highways and settlements and being part of the highway network of the day. As commercial maps, there would be an expectation that the public could use the routes. Further, Greenwood identified the old road as a crossroad (*Fortune & Others v Wiltshire County Council*, March 2012; *"the judge concluded that Greenwood's map supported the emerging picture of an established thoroughfare"*). This evidence could suggest use by public vehicles of the day, i.e., cart and carriages. Caution needs to be applied however because routes recorded as public footpaths today were also identified on these documents as being part of the highway network. Further, there are no records of maintenance to indicate the status of this old road. These maps although providing valuable evidence of the reputation of the claimed route as a highway, are not conclusive as to its status.

c) For the most part, the old road is shown to be enclosed and excluded from adjacent land, with one section in the middle, identified as section A-B of the claimed route, unenclosed. The OS maps show physical barriers on one or both sides of this unenclosed section. This would not prevent the old road being a through route in the same way that some public through routes today i.e., the entrance to Minchinhampton and Rodborough Commons, and Quarhouse Lane in Brimscombe & Thrupp Parish, have barriers across them in the form of cattle grids for livestock control.

d)The Standish Tithe Map 1844 was annotated, '*To Stroud*' at the end of Public Bridleway MPC17 in Pitchcombe at the parish boundary where it connected to point A of the claimed route. This annotation is exactly same as applied to the A46 Painswick. This is good evidence of its status as a public highway.

e) Edwin Phipps of Stokenhill, appointed Highway Surveyor in 1851 & 1852 and tenant farmer in 1851 of Kitesnest Farm stated in 1869 that he believed the old road was a public carriage road which had been maintained by the parish for 38 years which would take the public status back to approximately 1831.

f)Mr Capel, the Chairman of the Stroud Highway Board in 1869 considered the old road to be a "*branch road which led to the Slad Fields which was a public bridle road but a private carriage road*".

- 11.3** Essentially, only one piece of documentary evidence of sufficient weight and authority has been identified which ascribed a status to the old road, prior to the National Parks and Access to the Countryside Act 1949 which designated MPC17 as public bridleway and MWH27 & MWH3 as public footpaths on the Definitive Map and this status was disputed.
- 11.4** In 1869, Mr Phipps was summoned for non-payment of his highway rate. Mr Capel, Chairman of the Highway Board, described the old road at this time as "*... a branch road which led to the Slad Fields which was a public bridle road but a private carriage road....*". This is important evidence because Mr Capel was officially representing the highway authority of the time.
- 11.5** Mr Phipps of Stokenhill, tenant of Kites Nest Farm and more importantly appointed Highway Surveyor in the years 1852 & 1853, which would suggest that he had a good knowledge of the old road, refused to pay his highway rate rebutting Mr Capel's statement. His understanding of the old road was as follows "*.... It was stated in your Journal of last week that the road from Whiteshill was a road leading to Stokenhill Farm, and a branch road leading to Pitchcombe. It is just the reverse to this. It is a public carriage road leading from Whiteshill to Pitchcombe and only a branch road to Stokenhill Farm*". He further added that "*the parish had maintained it for over 38 years*" (this would date back to 1831).
- 11.6** With two opposing comments ascribing the status of this old road and thus the claimed route, we can consider the Bisley & Stroud Tithe Map 1842. Being drawn up under a statutory provision and signed and sealed by the Tithe Commissioners as First Class, i.e., considered to be a true record of matters relating to the purposes for which the map was designed and also being in the public domain, this document can be considered to have a good evidential weight. Usefully, this document was drawn up less than 30 years before the disagreement between Mr Capel and Mr Phipps and covers the time period according to Mr Phipps that the parish were maintaining the old road as a public carriage road. Although not drawn up to identify footpaths and bridleways, as their effect on the tithe payable was likely to be insignificant, this process did require roads to be identified, whether public or private, because they were not subject to tithe. This map does not show the section of claimed route, A-B (MWH27), across the field called Lower Slad Ground, which was subject to tithe, suggesting that it had a lower status than that of a road, i.e., a footpath or bridleway.
- 11.7** Lastly, we have Mr Phipps' four requests between May 1868 and December 1874 to the Stroud Highway Board for maintenance of the section of old road from Whiteshill to Stokenhill (point C),

which may have been for use with vehicles. They were all turned down and the minutes of 13 August 1869 record that “*the Board consider it to be an occupation road for the use of Stokenhill Farm*”. As stated previously, this route was considered by the Highway Board to be a public bridleway, co-existent with the private occupation road.

11.8 We can infer, perhaps due to the construction of the Painswick turnpike, that this old road became less well used over time to the point that by the Finance Act 1910, the claimed route was considered to be at most a bridleway and by the 1950s when the Definitive Map and Statement was being compiled, Whiteshill Parish claimed the route subject to this report as a footpath to the parish boundary, acknowledging by annotation, that the connecting route in Pitchcombe was a bridleway. The Whiteshill Parish Council minutes of 20 February 1952 indicate that a meeting took place during the process of drawing up the Definitive Map, between the Chairman and an official of Gloucestershire County Council “*with reference to a dozen queries they had encountered with the public footpath plan sent in by the council in 1951. Mr Smith told the council he had spent considerable time in walking the footpaths with the official, and he was satisfied with the results. The plan was submitted to the council for approval, which was agreed upon. Mr Smith said the plan would be returned to the County Council authorities*”. This process did not address the anomaly of a footpath connecting to a bridleway at the parish boundary. Further, the Ramblers Association made an objection relating to the deletion of routes in the Whiteshill/ Pitchcombe Parish area. As stated in paragraph 10.24, the association noted the “*stile in conjunction with access from F.P.27 to bridleway 17*”. This anomaly was not raised as an issue by this user group either. Evidence that the claimed route became less well used over time is corroborated by responses to the consultation detailed under section 12 of this report. One of the landowners, Mr Hawkins, whose family owned horses, claimed that he has never seen anyone using the claimed route on horseback and there was a complete lack of response from the British Horse Society. This needs to be tempered however by the fact that an old gate existed at point B prior to its replacement by a stile and the installation of a footbridge at point A in the early 1990’s. There are no records of objection however to this work.

12 CONSULTATIONS

12.1 On 30 August 2022 letters of consultation were sent to representatives of the Open Spaces Society, Cycling UK, The British Horse Society, The Ramblers Association, Whiteshill Parish Council, Stroud District Council, County Cllr Williams, and the affected landowners. The following responses were received:

County Councillor Williams: 25 October 2022.

Dear Jaci

I attended the Parish meeting regarding this path.

There did not appear to be additional information regarding previous use by horses.

The councillors were going to make further enquiries however did not have subjective information. I understand they were not against the approval, however felt it too steep for horses.

I apologise for not being clearer on the position.

I personally think that if it opens the path route to members of the public who might not normally use it or have been unable to use it and would now be able to do so can only be a positive way forward. I therefore support the application.

Whitehill & Ruscombe parish Council: 17 October 2022.

“Good afternoon Jaci,

Both the Parish Councillors and members of our footpath group have no historical knowledge of this footpath being a bridleway. However, they would like to support the application to be

changed as they believe it would allow greater access to the countryside by a wider range of users.

It was also suggested that Pitchcombe Parish Council is contacted to see if they have any knowledge of its previous use if you haven't already done so".

Mr & Mrs Hawkins, owners of Stokenhill: 20 September 2022.

"Dear Jaci

Re reclassification of footpaths MWH3 & MWH27 to public bridleways we would like to make the following comments in relation to your enquiries.

A few people use MWH3 and MWH27 on foot (Mrs Hawkins included).

Mr Hawkins (age 80) was born here on Stokenhill Farm (MWH3) and has been here every day of his life (always having had livestock) and has never seen anyone on horseback use either MWH3 or MWH27. This includes our eldest daughter who had horses and ponies at Stokenhill and rode up until her 20's. And includes the next-door farmers daughters (Kitesnest farm on which is MWH27), who have ridden their entire lives (now in 50/60's) and still have horses".

The Open Spaces Society representative: 1 September 2022.

"Thanks, Jaci - no comment to make.

Gerry"

The Ramblers Association: 1 September 2022.

"Hi Jaci

Thanks for this notification.

Currently I am helping to support the South Cotswold Ramblers Group which covers this parish. I understand Ramblers would have no objection to the upgrading of these paths to bridleway, but we would have concerns about the suitability of the surface of the path.

Assuming that the application progresses will there be an opportunity for Ramblers to express their concerns about the path surface later in the process?"

Stroud District Council: 7 September 2022.

"Hi Jaci,

Thanks for your email with attached letter and plan. I can confirm on behalf of SDC that it has no comments upon, nor objection to, the DMMOA.

As this application is to re-classify the claimed route to bridleway, a second email was sent on 20 September 2022 to the British Horse Society, as follows:

I contacted you a few weeks ago regarding an application to re-classify a current public footpath route to bridleway in Whiteshill, as shown in the attached paperwork. There is no user evidence, there is a stile and a footbridge across the route and the landowner says that there has been no evidence of the path being used as a bridleway for 80 years, having been born at the farm adjacent to the path. Could you please consult your riders and let me know if you have any evidence of use".

The following response was received on 20 September 2022.

"Dear Jacki,

Thanks for your email to the BHS about this proposed upgrade. I am in the process of contacting local riders and awaiting any feedback and evidence from potential users". Nothing further was received".

13 CONCLUSIONS

- 13.1** Section 53(3)(c)(ii) WCA81 relates to the discovery by the Authority of evidence that shows that a highway of a particular description ought to be there shown as a highway of a different description.
- 13.2** Considering the evidence as a whole, it is sufficient to suggest, on the balance of probabilities, or it is more probable than not, that the route shown on the definitive map and statement has a higher status than that of a footpath but is not sufficient to establish that historic public carriage or vehicular rights exist. If it was, s67(1) of the Natural Environment and Rural Communities Act 2006, would have extinguished these rights and unless an exemption under s67(2) could be shown to apply, would give rise to a restricted byway.
- 13.3** We are left therefore with evidence suggesting a public status of more than footpath but less than restricted byway. This report suggests that the evidence, on the balance of probabilities, is sufficient to show the claimed route should be re-classified to a public bridleway. Following the principle "*Once a highway, always a highway*", if the way is shown to have carried highway rights at any time in the past, the public's rights will still exist today (unless there is evidence of formal closure). Simple disuse of a right of way does not mean that the right no longer exists, just that the right is not being exercised. On the balance of probability therefore, it is submitted that the claimed route A-B-C must now be protected by being recognised on the Definitive Map as a public bridleway.
- 13.4** If the interpretation of the evidence is accepted, it is recommended that that an order be made to re-classify Public Footpath MWH27 & part of Public Footpath MWH3 to public bridleway between points A-B-C.

14. APPENDICES:

JH1	1:10,000 location map
JH2	Plan of claimed route; 1:2500 scale
JH3 A-L	Photos
JH4	Ordnance Survey 1811 2":1 mile Pen & Ink on Paper Drawing
JH5	Plan of the Tithing of Paganhill 1819
JH6	Bryant Map 1824
JH7	Greenwoods Map 1824
JH8	Ordnance Survey 1828, 1 st edition 1":1-mile
JH9	Standish Tithe Map 1844
JH10	Bisley & Stroud Tithe Map 1842
JH11	Fisher (Surveyor) Map 1874
JH12	OS 25" First Edition 1885
JH13	OS 25" Second Edition 1902
JH14	OS 25" Third Edition 1923
JH15	Finance Act 1910
JH16	Whiteshill Original Submission
JH17	Pitchcombe Original Submission