

**COMMONS AND RIGHTS OF WAY COMMITTEE
6 JUNE 2023**

**APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER FOR AN
ADDITIONAL LENGTH OF BRIDLEWAY
OLD RAILWAY LINE, FOX HILL (B4014) TO PRESTON PARK,
PARISHES OF TETBURY AND LONG NEWNTON**

REPORT OF THE LEAD COMMISSIONER, COMMUNITIES & INFRASTRUCTURE

1. PURPOSE OF REPORT

To consider the following application:

Nature of Application:	Additional Bridleway
Parish:	Tetbury
Name of Applicant:	Paul Lockley
Date of Application:	30 March 2022

2. RECOMMENDATIONS

- (a) That the application to add a length of public bridleway to the Definitive Map and Statement between points A and B (as shown on map 1B) be refused
- (b) That an order be made to add a length of restricted byway to the Definitive Map and Statement between points A and B (as shown on map 1B)

3. RESOURCE IMPLICATIONS

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 path would become maintainable at the public expense.

4. SUSTAINABILITY & EQUALITY IMPLICATIONS

No sustainability or equality implications have been identified.

5. STATUTORY AUTHORITY

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub section (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.

6. DEPARTMENTAL CONTACT

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REPORT

7. DESCRIPTION OF PATH

- 7.1 A location map at scale 1: 10,000 is attached (numbered **1A**) showing the position of the claimed path at Tetbury. The claimed path is within the town of Tetbury, with the exception of a short section at the eastern end which is in Long Newton parish. Until at least 1979, most of the claimed route, including the station, was in Long Newton parish. Long Newton formed part of Wiltshire until 1930. The area of interest is within Ordnance Survey Grid Squares ST 8993 and ST 9093.
- 7.2 A map showing the whole of the claimed route at 1: 6,000 scale is attached (numbered **1B**). The way is shown running between points A and B. Reference is made to the points shown on map 1B throughout the report.
- 7.3 The path follows the trackbed of the former Tetbury to Kemble railway, running from Fox Hill, next to the Old Rope Walk, at point A, in a roughly north then north-easterly direction through the former Tetbury railway station and then along the course of the former railway line to Preston Park, at point B, where it joins public bridleway NLN 21 and public footpath NTE 6A. Public bridleway NLN 21 runs along the former railway to Newton Hill and then on to the Trouble House.
- 7.4 The claimed route was inspected on 9 April 2010, 12 March 2021, 16 June 2022 and 26 April 2023. Photographs taken during the site visit of 16 June 2022 can be seen at **appendix 1F**. Their position can be seen by reference to **appendix 1E (i) to (iii)**.
- 7.5 The claimed way was walked from its southern end, at the junction with the B4014 at Fox Hill, Tetbury (ST 894929), at **A** on the detailed map at **appendix 1E (i)**. There are two gates at this junction: a large double gate (see **Photos 1, 2 and 3**) at **B** on **map 1E (i)**, which was locked, leading straight on to a wide tarmacked path and a smaller access gate (**Photos 4 and 5**), at **A** on the map, leading on to a compressed stone path. The opening through the smaller hand gate was approximately 170cm wide.
- 7.6 There is a fingerpost sign next to the hand gate at **A**, **map 1E (i) (Photo 4)**, including a sign with pedestrian, horse rider and cycle symbols referring to "TETBURY TRAIL" and a 48 symbol in a red square indicating National Cycle Route (NCR) 48.

7.7 There is a board advertising a café at the Tetbury Goods Shed next to the small access gate (**Photo 5**). There was a railway history board on the gate itself (**Photo 5**), part of a series of small history boards entitled “Track Tales”, attached to fencing along the route of the path up to the Goods Shed.

7.8 There is a short well-trodden link between the two paths very close to the start of each path (**Photos 6 and 7**), general location runs between **C** and **D**, **map 1E (i)**. At approximately point **E** on **map 1E (i)**, there is a notice from Tetbury Town Council with the title “Permissory Path Only”. It is stuck on a board attached to a small wooden stake and was surrounded by nettles (**Photo 8 and 9**). The notice reads:

*“Tetbury Town Council
Notice
Permissory Path Only*

The existence of a path across land is not evidence of a public right of way and any access over this land is by the permission of Tetbury Town Council.

Tetbury Town Council accept no responsibility for any loss, injury or damage occasioned or caused to persons or property by the use of the path and bridge.

*Signed
Tetbury Town Council”*

7.9 There is a pedestrian access opening in a stone wall on to The Old Rope Walk; there is a small footpath sign on this opening (**Photos 10 and 11**), at **F** on **map 1E (i)**.

7.10 The compressed-stone path runs for approximately 65m (**Photo 12**) before turning West to link up with the main wider tarmacked path (**Photo 13**) at point **G** on **map 1E (i)**. A “TETBURY TRAIL”, NCR 48 sign is visible at this point (**Photos 14 and 15**) and located approximately at **H**, **map 1E (i)**.

7.11 The tarmacked path leading up to the Goods Shed continues for a further 200 metres, flanked by a watercourse and paths connecting to Tetbury town to the West and a linear park area to the East. Features of this section include:

Feature	Photo reference	General location reference on Maps 1E
Community Tile Pavement made by residents to mark the site of the former station	Photo 16	I , Maps i and ii
Open access gates and steps to the paths to the West (example)	Photo 17	J , Map ii
Dog waste bins (example)	Photo 17	J , Map ii
Exercise trail	Photo 18	Area around point K , Map ii
Picnic and children’s play area with benches, waste bins, picnic tables and	Photos 19 and 20	Area around point M , Map ii

a community garden		
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7.12 The tarmacked path (which forms part of the claimed route) continues to the West side of the Goods Shed, see **Photo 21**, taken from approximately point **L**, **map 1E (ii)**. To the East side of the Goods Shed there is a Finnish railway carriage used as a café extension, with picnic benches. See **Photos 22 and 23**, showing the area around point **N**, **map 1E (ii)**.

7.13 The tarmacked path continues past the West side of the Goods Shed. There are picnic benches for café customers and a number of other benches and waste bins. There are four fingerpost signs in the vicinity of the Goods Shed and the free car park:

Fingerposts	Photo reference	General location reference on Maps 1E (i) to (iii)
Town Centre via Wiltshire Bridge Town Centre via Gumstool Hill	Photo 24	O , Map ii (close to cycle hire stands)
Town Centre via Gumstool Hill Tetbury Trail 48	Photo 25	P , Map ii
Town Centre via Wiltshire Bridge Cyclepath/Footpath to Preston Park Tetbury Trail Trouble House 2 (48, horse rider, pedestrian and cycle symbols)	Photo 26	Q , Map ii
Cyclepath/Footpath to Preston Park	Photo 27	R , Map ii

7.14 There is a double-sided information board close to the main West entrance to the Goods Shed, **Photos 28 and 29**, **S** on **map 1E (ii)**. One side is headed Tetbury Goods Shed and includes the following information about the Tetbury Trail:

“The Trail follows the line of the old railway. As of 2019, it runs from the Shed to the site of the former Trouble House Halt. Open to walkers and cyclists, it is hoped that one day it will reach Kemble.”

The other side is headed Visit Tetbury - A Royal Welcome – Tetbury Town Council and includes the following information:

“Walk, cycle, explore

The countryside around Tetbury is perfect for walking, cycling and outdoor activities. TETBURY VISITOR INFORMATION CENTRE stocks books, local maps and walking routes, including the TETBURY TRAIL starting from the picnic area by the Goods Shed.”

7.15 The route signposted as the Tetbury Trail continues to the East of the car park through a gap in some iron bollards (**PHOTOS 30 and 31**, **T**, **map 1E (ii)**.) The gap is approximately 135 cm wide. The claimed route here runs through the car park before joining the Tetbury Trail.

7.16 Just after the car park the path continues in a north-easterly direction and there is another picnic and park area which includes the following features:

Feature	Photo reference	General location reference on Maps (Appendix 1E)
Paths Around Tetbury Rail Lands information board	PHOTO 32	Area around U , Map iii

Welcome to Tetbury information board	PHOTO 33	Area around U , Map iii
Tetbury's Railway Lands information board	PHOTO 34	Area around U , Map iii
Picnic benches and bins (example)	PHOTO 35	Area around U , Map iii
Memorial benches (example)	PHOTO 36	Area around U , Map iii
WWI centenary memorial stone and planting	PHOTO 37	Area around U , Map iii
Platinum Jubilee Queen's Green Canopy tree planted	PHOTO 38	Area around U , Map iii
Bridleway arrow sign in direction of Goods Shed	PHOTO 39	Area around U , Map iii
Tetbury Trail sign in direction of Goods Shed	PHOTO 40	Area around U , Map iii

7.17 The Paths Around Tetbury Rail Lands information board gives a schematic map of the area and highlights the Tetbury Trail route which is described as,
"Former railway line open to walkers, cyclists and horses. Wheelchair accessible as far as Preston Park".

The board includes a Tetbury Town Council logo.

7.18 The Welcome to Tetbury board gives a circular walk which includes the Tetbury Trail branded as "Cotswold Gateways" a Cotswold National Landscape project. Readers are also directed to a website address (<https://www.cotswoldsaonb.org.uk/visiting-and-exploring/walking/cotswold-gateways/>) and are advised that,

"The trails are marked with "Gateway Route" discs".

7.19 The Tetbury's Rail Lands information board describes the project as,
"A community project by Tetbury Town Council, the Tetbury Feoffees and Tetbury Rail Lands Regeneration Trust."

A section headed, "Picnic area and Tetbury Trail" reads,

"The former railway track bed is now a trail for walkers, joggers, cyclists and horse riders. The Tetbury Trail runs to Preston Park and then on to the site of Trouble House Halt. It's hoped that it will one day become an off-road link from Tetbury to Kemble."

As the route continues in a north-easterly direction away from the Park, there is a Tetbury Town Council sign re: dog exercise on the Tetbury Trail (**Photo 41**).

There is an exercise trail (ten items) along the East side of the path as the route goes towards Trouble House (example shown in **Photo 42**).

7.20 The following signs feature along the route between the picnic area East of the car park and the point where it meets the junction of Public Bridleway NLN 21 and Public Footpath NLN 22 (point B on map 1B):

Sign	Photo reference	General location reference on Maps (Appendix 1E)
Fingerpost: Rail Yard Car Park, Tetbury; Herd Lane, Tetbury; Preston Park, Tetbury Trail 48 NCN sign; Gateway Route Cotswold AONB disc sign.	PHOTOS 43 and 44	Near footbridge linking route to Public Footpath NTE 6, point W , Map iii.

2 x Bridleway – Blue Arrow disc	PHOTO 45	On both sides of post of Livestock Gate at entrance to Feoffees’ land, point X , Map iii.
Feoffees of Tetbury “use at own risk” sign	PHOTOS 45 and 46.	At X , Map iii.
Fingerpost: Rail Yard Car Park, Tetbury; Herd Lane, Tetbury; Tetbury Trail 48 NCN sign; Gateway Route Cotswold AONB disc sign.	PHOTO 47	Near access gate to field, paths and public footpath (Herd Lane), Point Y , Map iii. Close to bench positioned on edge of route to enjoy view across fields.
“Please close the gates” sign on access gate to fields and paths.	PHOTO 48	Point Z , Map iii
Feoffees of Tetbury “use at own risk” sign; three warning signs: barbed wire, livestock in area, keep dogs under control and Cattle triangle sign; GCC yellow public footpath disc, GCC Public Right of Way sign.	PHOTO 49	On gate access to Public Footpath NTU 46 in area of point Z , Map iii.
Fingerpost sign: Rail Yard Car Park, Tetbury; Herd Lane, Tetbury; Tetbury Trail 48 NCN sign	PHOTO 50	Next to gate access to Public Footpath NTU 46 in area of point Z , Map iii.
Gateway Route Cotswold AONB disc sign; GCC “Footpaths follow yellow arrows, Bridleways follow blue arrows” sign.	PHOTO 51	On South side of former gateposts at entrance to Public Bridleway NLN 21, in area of point Z , Map iii
GCC Public Footpath and Public Bridleway discs	PHOTO 52	On North side of former gateposts at entrance to Public Bridleway NLN 21, in area of point Z , Map iii

7.21 At point **X** (on map iii) the claimed route passes through a field gate, and goes into land owned by the Tetbury Feoffees. At point **Z** on map iii, the claimed route joins the existing bridleway NLN 21, which continues along the course of the old railway line. This is point B on **map 1B**. The path passes between gateposts at this point but the gate has been removed. There is a sign erected by the Feoffees of Tetbury on the gate leading to footpath NTU 46, close to point **Z** that reads “The areas of Preston Park, Berkeley Wood and Herd Lane have been provided and maintained as leisure and amenity facilities for use by the public at their own risk and all due care should be taken when using these facilities by order of the Feoffees of Tetbury.”

7.22 The claimed route is approximately 1,524 metres in length

8. BACKGROUND

8.1 The claimed path runs for the most part over the trackbed of the former Tetbury to Kemble railway; the remaining section, close to point A, runs over the footway that formerly led from the town centre to the railway station, and is former railway land. The railway line terminated at Tetbury. The Tetbury branch opened to the public on 2 December 1889 and closed on 4 April 1964. The railway line was dismantled

from July 1964 and the main station building was demolished in the early 1970s, with the sleepers being used in pathways.

- 8.2 British Rail retained the land at Tetbury, and the goods shed was rented out and used as a warehouse by coal merchants and a tyre company. In 1996 British Rail agreed to sell the rail lands to the Feoffees of Tetbury, an historic charitable organisation dating to the 17th century. Tetbury Town Council would rent the land from the Feoffees for a peppercorn rent; Cotswold District Council would develop the north end of the goods yard as a car park. In the end, Tetbury Town Council acquired 3.5 acres of Tetbury's former railway land in 1997; Tetbury Town Council own most of the land affected by this claim.
- 8.3 The plans for the former railway land in 1998 were to provide a public car park, a millennium green, new housing, a landscaped park, refurbishment of the goods shed, a children's play area and a cyclepath to Kemble. The former goods shed was converted into an arts centre in a joint programme by Tetbury Town Council and Tetbury Rail Lands Regeneration Trust (TRLRT.) When the Rail Lands were first developed in 2000, a cyclepath and footpath was built along the sections of the old railway line owned by the Town Council and the Feoffees. This ran from the Malmesbury road (Fox Hill) and the goods shed to the far end of Preston Park where it came to a dead end (at point B on map B.)
- 8.4 The Tetbury Rail Lands Regeneration Trust has been working to extend the cyclepath ever since. In 2006 they applied for a Sustrans Connect 2 grant to extend the cyclepath to Kemble, but the bid was unsuccessful. A year later the Trust obtained a £14,000 grant which was used to commission a feasibility study from Sustrans for creating a cyclepath along the whole route.
- 8.5 The Charity Commission register states that the Tetbury Rail Lands Regeneration Trust is "a charity and rural social enterprise established to regenerate the land and buildings comprising the former Tetbury Branch Line in Gloucestershire...." The Tetbury Feoffees are trustees of three charities within Tetbury: the Tetbury Charity Estate are empowered "to use the assets under their control for the best possible benefit of the people of Tetbury, which includes the advancement of education and the provision and maintenance of the open areas and recreational spaces under their control." (Taken from the Feoffee's website.)
- 8.6 A Definitive Map Modification Order application was prepared in 2010, to add a length of bridleway east from Preston Park at point B along the old railway to the Trouble House Inn, along the course of the former railway. Gloucestershire County Council came to agreements with the three landowners concerned, and dedication agreements were completed in 2016 and 2017 to add a length of public bridleway to the Definitive Map of rights of way east to the Trouble House Inn.
- 8.7 The claimed section of the old railway trackbed and the continuation to Long Newnton railway bridge and then to the Trouble House Inn form part of a multi-user path known as the Tetbury Trail, which has been designated as part of National Cycle Network (NCN) Route 48.

- 8.8 A number of signs were erected in late 2021 alongside the claimed path by Tetbury Town Council. These read:
*“Notice Permissory Path Only. The existence of a path across land is not evidence of a public right of way and any access over the land is by the permission of Tetbury Town Council. Tetbury Town Council accept no responsibility for any loss, injury or damage occasioned or caused to persons or property by the use of this path and bridge.
Signed Tetbury Town Council.”*
- 8.9 In response to the erection of these signs, application forms were requested by the eventual applicant, Paul Lockley, on 16 December 2021.

9. APPLICATION

- 9.1 An application for an additional length of public bridleway was made by Paul Lockley of Cirencester Road, Tetbury dated 30 March 2022. Notice was served by the applicant on the landowners, Tetbury Town Council, Mr Simon Preston and the Feoffees of Tetbury. The applicant advised the County Council of this and submitted the Form 3 (Certificate of Notice).
- 9.2 The application was accompanied by 23 user evidence statements, completed by people who had used the claimed path.
- 9.3 User Evidence Statements relating to three of the witnesses had been printed in one continuous page, meaning that the County Council were unable to separate the statement of truth (within the declaration), which was on the same page as the statement (which is available to the public.) The declarations contained personal information, such as signature, email address and telephone number and are normally not disclosed to the public. In addition, one of the plans completed by a path user did not show the claimed path accurately (despite referring in his evidence to having used the former railway track) and he was requested to resubmit his map.
- 9.4 The County Council, as surveying authority, confirmed on 6 April 2022 that the application was fully compliant with both schedule 14(1) and 14(2) of the 1981 Wildlife and Countryside Act.
- 9.5 A further user evidence statement was submitted in support of the application on 22 June 2022.

10. USER EVIDENCE

- 10.1 The application was supported by 24 user evidence statements, completed by 24 individuals. The evidence statements include a statement of truth as to the matters contained. A summary of these evidence forms is provided at **appendix 1C**.
- 10.2 Public path evidence forms had been submitted in support of a previous potential application in 2010, for a bridleway along the former railway line, from Preston

Park (point B) east to the Trouble House Inn. Although the previous application did not include that section of the old railway from Fox Hill to Preston Park (point B), the evidence forms detail use along the old railway from either Tetbury or the Goods Shed, so are relevant to this application. These evidence forms are summarised in **appendix 1D**.

- 10.3 The 2010 application was supported by 42 evidence forms, mostly relating to use on foot, but eight evidence forms included use on bicycle or horse. The sole evidence form relating to horse use (number 26) states that use was daily from 1969, for exercising horses, but it would appear that more recent use was on foot. User evidence forms 16, 28, 38, 39, 40, 41 and 42 relate to use by bicycle (seven in total), although the use detailed in form 42 relates to the section east from point B only (i.e., the section of the old railway already recorded on the Definitive Map as a bridleway.) User evidence form 39 refers to one single use, c.1992, when the Corinium Cycling Club used the path as part of an organised club event. The old-style public path evidence forms make it difficult to determine frequency of use where it is on foot and by bicycle, but the eight evidence forms that refer to bicycle and horse use add to a picture of use that is long-standing and without challenge.
- 10.4 Use has been on foot, by bicycle and on horseback. The current application is supported by 22 evidence forms supporting use on foot, 20 on bicycle and 7 on horseback. Use on foot and bicycle dates back to 1970 (witness 12) and also 1972 (witness 10); use on horseback dates back to 1980 (witness 6) and also 1985 (7).
- 10.5 If we take the erection of the signs by Tetbury Town Council in 2021 as the date of the bringing into question, then for the relevant period of 2001-21, there are 15 witnesses who have used the path on foot during the whole 20-year period, 14 by bicycle and 3 by horse.
- 10.6 Taking the period before 2006, when it was first clarified in s.68 of the 2006 Natural Environment and Rural Communities (NERC) Act that long use by bicycles gave rise to restricted byway rights, then we have 13 witnesses who have used a bicycle and 4 who have ridden a horse.
- 10.7 The more detailed questions contained within the user evidence statement allow witnesses to clarify their level of use, and how this has varied in intensity during their period of use. Typically, use on foot was more frequent than that by bicycle, and could be categorised as daily on foot, weekly by bicycle, or weekly on foot and monthly by bicycle. Amongst those giving evidence of use by bicycle, 8 witnesses used the claimed way weekly and one daily, and of these 9, 5 used the route throughout the whole of the relevant period. The extent and quality of use by bicycles is considered to be sufficient to alert an observant owner to the fact that a public right is being asserted (for which see *Powell v Irani*, which is discussed in more detail in the Legal Comments and Conclusions.)
- 10.8 The user evidence statements are consistent in describing a path that had a gate at point A against the road at Fox Hill (the former station entrance) and the erection of a gate for stock control in around 2012 at point X **in appendix 1E (iii)**.

The users state that they have not been challenged in their use of the path or given permission at any time to use the path.

11. DOCUMENTARY EVIDENCE

11.1 Inclosure Award

No award for Tetbury or Long Newton.

11.2 Tithe Maps and Apportionments

Long Newton, 1838 (P229/SD/1/1), Tetbury, 1838 (GDR/T1/178)

P229/SD/1/1 – Area not shown

GDR/T1/178 – No evidence of the claimed route, but map predates the railway.

11.3 Ordnance Survey 1" to 1 mile, 1st edition, surveyed c.1817

Area not shown in detail, map predates construction of the railway.

11.4 Ordnance Survey 25" to 1 mile Glos 58.13, second edition, 1900

Railway line still in use, route claimed not shown.

11.5 Ordnance Survey 25" to 1 mile Glos 31.8, third edition, 1923

The 3rd edition OS map of 1923 shows the same features.

11.6 Ordnance Survey 1: 2,500 National Grid ST 8983 (1978), ST 9093 (1979)

ST8993 (1978) & ST9093 (1979) show the route with the line discontinued. There is an F.W. marked close to the western commencement of the route, but it's unclear whether that relates to the currently claimed route or not. As the route heads east, two more F.W.s are marked, but these seem to be just apart from the route.

11.7 Bryant's Map of Gloucestershire 1824

Area not shown in detail

11.8 Greenwood's Map of Gloucestershire 1824

Area not shown in detail

11.9 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 (D2428).

D2428/3/58/13 – There are two maps under this reference. The railway line is unnumbered on one, and partly unnumbered and partly numbered 40 on the other. Form 37 sheet 40 for Long Newton is not relevant (D2428/2/101); Tetbury Form 37 for this hereditament is missing.

11.10 Maps deposited with County Planning Officer under Rights of Way Act, 1932 S1, 3 (CP/D).

CP/C/1 – Checked; not relevant

11.11 Parish Council file, Rights of Way Act, 1932.

Nothing deposited for Long Newton. Records possibly held at Wiltshire and Swindon History Centre.
Tetbury – P328a/PC/1/1-24 – minutes, 1976-2011 (24 volumes). Not checked.
Nothing else relevant

11.12 Duplicate copies of tithe or inclosure awards

PC1812/175 – modern hand drawing of Long Newton tithe map
P328/SD/2/2 – parish copy of Tetbury tithe map (poor condition)
D674b/P67 – tracing of tithe map
PC1812/178 – modern hand drawing of tithe map

11.13 Private estate maps:

D1571/P4 – Plan of the Estcourt estate in west Long Newton & east Tetbury, 1865. Railway not then constructed.
D587/accession 587/map/13320 – Charlton Estate, Tetbury, 1799
D587/accession 587/map/13320 – Grange Fields, 1812
D587/accession 587/map/13320 – estate for sale at Tetbury, 1880
D587/accession 587/map/13320 – auction, Tetbury, 1892
All checked, not relevant

11.14 Footpath or highway diversion orders deposited with Clerk of the Peace (Q/SRh).

Long Newton – nothing held (probably held at Wiltshire and Swindon History Centre)
Tetbury – Q/SRh – 1796B/1, 1812A/1; Q/SR – 1814A, 1852B
Checked, not relevant (all pre-date the construction of the railway.)

11.15 Plans of public schemes deposited with Clerk of Peace (Q/RUm).

Long Newton – 311, 316, 324, 382, 429, 454 (all railway plans)
Tetbury – 46, 47, 51, 64, 65, 72, 74, 79, 174*, 195*, 311*, 316*, 324*, 349, 382*, 429*, 431*, 450*, 454*, 630 (* indicates a railway plan)
Checked, no evidence of right of way pre-existing the railway.

11.16 District Council Clerk's correspondence

DA36/100/1-11 – minutes 1872-1966

11.17 County Council Solicitor's correspondence.

Nothing appears relevant

11.18 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 (K687).

K687/1/12 – Original submission. Route not claimed
K687/2/10 – no relevant objections
K687/3/19 – provisional map. Route not claimed

11.19 Tony Drake archive (Ramblers' Association) (D12676)

D12676/2/1/75 – Tetbury parish file. Nothing relevant
D12676/2/1/76 – Tetbury Upton file. Checked, not relevant

D12676/4/3/4 – Survey of rights of way under the 1949 Act file. Checked – not relevant

D12676/12/1/6 – Tetbury jigsaw map, including rights of way in Long Newnton. Checked - not relevant

These files included Tetbury material, but weren't checked: D12676/1/1/33; 1/6/5; 2/1/91; 2/1/92; 3/8/1; 3/8/2; 4/1/5 and 7/1/3

12. LANDOWNER'S EVIDENCE

12.1 Simon Preston

Simon Preston was consulted by letter on 21 July 2022; no response has been received.

12.2 Feoffees of Tetbury (the Romney Charity (Tetbury Charity Estate))

The Feoffees responded on 30 August 2022, stating that they had no strong objections to the modification order. They queried whether the Feoffees might incur additional costs as a result and who would be responsible for any additional signage required.

12.3 Tetbury Town Council

Tetbury Town Council responded on 24 August 2022 that they were keen to encourage more walking and cycling but have health and safety concerns about making the route from the Wiltshire Bridge to Newnton Hill a bridleway due to the use of facilities in and around the Goods Shed. Use by cyclists could be a health and safety hazard and discourage pedestrians. A survey of pedestrians is suggested.

13. CONSULTATIONS

13.1 Tetbury Town Council

Tetbury Town Council were consulted as the landowner, and their comments can be found in section 12 of this report.

13.2 Long Newnton Parish Council

Long Newnton Parish Council was consulted on 25 July 2022; no response was received.

13.3 Cotswold District Council

The Planning Officer for Cotswold District Council responded on 25 July 2022 that the council had no observations to make, and they would not want to stand in the way of the promotion of fitness and wellbeing.

13.4 County Councillor

Councillor Hirst was consulted on 25 July 2022; no response was received.

13.5 District Councillor

District Councillor Nikki Ind commented saying that she supported the formalising of the route. Thought it was already a bridleway or at least a footpath, as has been used for walking for almost 20 years. Part of a circular route used by residents for exercise and to improve their health and wellbeing.

13.6 Ramblers' Association

Consulted on 25 July 2022; no response was received.

13.7 Open Spaces Society

Mr G Stewart, the local correspondent for the Open Spaces Society, was consulted on 25 July 2022; no response was received.

13.8 British Horse Society

Consulted on 25 July 2022; no response was received.

13.9 Cheltenham and County Cycling Club

Consulted on 25 July 2022; no response was received.

13.10 Cycling UK

Consulted on 25 July 2022; responded that they had no comment to make at present.

14. LEGAL COMMENTS AND CONCLUSIONS

14.1 Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

14.2 As made clear by the High Court in *Bagshaw and Norton*¹ s.53(3)(c)(i) involves consideration of two tests;

- (a) Test A: Does a right of way subsist? Test A requires clear evidence in favour of the applicant and no credible evidence to the contrary.
- (b) Test B: Is it reasonable to allege that a right of way subsists? For this possibility to arise it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way to subsists. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

14.3 In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*², Roche LJ held that "...*The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14*

¹ (*R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

² *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."

- 14.4 Roche L J also held that *"Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s.31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication"*.
- 14.5 Section 31(1) of the Highways Act 1980 states that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- 14.6 Section 31(2) states that the period of 20 years in sub-section (1) is to be calculated retrospectively from the date when the right of the public is brought into question whether by a notice or otherwise. The twenty years usage must furthermore be "without interruption".
- 14.7 Paragraph 12 of Annex B of the Department of Environment Circular 2/93 states that before making an order the surveying authority must be satisfied that the evidence shows on the balance of probability that a right of way of a particular description exists.
- 14.8 The provisions of section 31 of the 1980 Highways Act do not supersede the principles of implied dedication that existed at common law before 1932, these principles being preserved by Section 31(9) of the 1980 Act which says that nothing in this Section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years.
- 14.9 If there is no presumption of dedication under Section 31 of the 1980 Act, then we will also consider whether the evidence is such as to establish, again on a balance of probabilities, dedication at Common Law. The inference drawn at common law will depend on the facts of the case. *"Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication"*. (Dyson J, *Nicholson v Secretary of State for the Environment* (1996).
- 14.10A requirement for a claim of presumed dedication is that the path joins a highway at both its start and end points or connects with a highway at its start point and with a place of popular resort at the other. Public user cannot give rise to a presumption of dedication if it does not. The section of path A to B connects to a highway at each end.

- 14.11 In considering whether there has been a full 20 years use by the public of the claimed route, we must ascertain whether there has been an overt act on the part of the landowner to bring it home to users that their right is being challenged. The 20 years use, for the purposes of Section 31, is to be dated retrospectively from this date of challenge (s.31(2)).
- 14.12 There is no fixed method by which the public's right is brought into question, though one (the erection of a notice) is expressly referred to in Section 31(3). The House of Lords in *R (on the application of Godmanchester and Drain) v SSEFRA [2007]* is the most recent case addressing the meaning of s.31(2) as to what act or acts constitute "bringing into question". *Godmanchester* endorses earlier judgments in this regard.
- 14.13 The words "or otherwise" in Section 31(2) leave the matter at large. In *R v SSETR ex parte Dorset County Council (1999)* Dyson J stated that the challenge had to be communicated to the user and that the test to be applied is that set out by Lord Denning in *Fairey v Southampton CC (1956)*. Denning said, "*In order for the right of the public to have been brought into question, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it*".
- 14.14 The methods by which the public's right to use the way might be brought into question could include: the locking of a gate; putting up a notice denying the existence of a right of way; seeking a declaration that there is no highway over the land in question or physically preventing a walker from proceeding along a path. Whatever means are employed, it should be sufficient "*to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway... The persons to whom the challenge has to be brought home are the users of the way*". (Lord Dyson in *R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset CC (1999)*).
- 14.15 It is not necessary for it to be the landowner who brings into question the right of the public to use the way. The date of calling into question is simply the date when, as the result of some action, the public's entitlement to use the way was put in issue. There are no words in Section 31(2) of the 1980 Highways Act confining this action to be by or on behalf of the landowner. It simply sets the date from "... when the right of the public to use the way is brought into question". This view is confirmed by *Applegarth v Secretary of State for the Environment, Transport and the Regions (2001)* in which it was stated that anybody with an interest could bring into question the right of people to use the path and this needn't necessarily be the landowner. The burden lies on whoever needs to rebut the presumption to show that the owner of the path had not intended to dedicate the path as a public highway. Whilst in practical terms, the bringing into question will be by or on behalf of the landowner, it does not have to be so.
- 14.16 In late 2021, Tetbury Town Council, the landowners, erected a series of signs along the claimed route, which read

*“Notice Permissory Path Only. The existence of a path across land is not evidence of a public right of way and any access over the land is by the permission of Tetbury Town Council. Tetbury Town Council accept no responsibility for any loss, injury or damage occasioned or caused to persons or property by the use of this path and bridge.
Signed Tetbury Town Council.”*

- 14.17 This statement shows that the landowners admit that the way is being used but assert that such use is with their permission. This notice challenges the public’s right to use this way and was the catalyst for an application to record the way as a public bridleway in March 2022. The period of 20 years for the purposes of section 31(1) of the 1980 Highways Act is taken to be 2001 to 2021.
- 14.18 It is not essential for the path or way to have been used for the full period of 20 years by the same persons; use by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more. So you could, in theory, have half the forms covering the first 10 years and half the second. What can be problematic is if there were more User Evidence Statements for one particular period than for the rest. So, say only 2 forms for the first two years, but 13 others which then (taken together) cover the remaining 18 years. There is then a risk of insufficient user evidence for the early period of use.
- 14.19 Nor does it matter that the use is not continuous in the sense that it may not have occurred everyday. Use should be by a number of people who together may sensibly be taken to represent the community. Coleridge LJ in *R v Southampton (Inhabitants) 1887* said that “user by the public must not be taken in its widest sense...for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.”
- 14.20 There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by ‘the public’ and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility, and consistency with other evidence, etc.)
- 14.21 It was held in *Mann v Brodie 1885* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. Lord Watson said: “If twenty witnesses had merely repeated the statements made by the six old men who gave evidence that would not have strengthened the respondents’ case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence.
- 14.22 Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. *R. v. SSETR (ex p. Dorset)* [1999] accepted that, although the evidence within five user evidence forms was truthful,

it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.

- 14.23 The application is supported by 22 evidence forms supporting use on foot, 20 on bicycle and 7 on horseback. Use on foot and bicycle dates back to 1970 (witness 12) and also to 1972 (witness 10); use on horseback dates back to 1980 (witness 6) and also 1985 (7). For the relevant period of 2001-21, there are 15 witnesses who have used the path on foot during the whole 20-year period, 14 by bicycle and 3 by horse.
- 14.24 The more detailed questions contained within the user evidence statement allow witnesses to clarify their level of use, and how this has varied in intensity during their period of use. Typically, use on foot was more frequent than that by bicycle, and could be roughly categorised as daily on foot, weekly by bicycle, or weekly on foot and monthly by bicycle. Amongst those giving evidence of use by bicycle, 8 used the claimed way weekly and one daily, and of these nine, 5 used the route throughout the whole of the relevant twenty-year period.
- 14.25 If we look at the period before 2006, when it was first clarified in s.68 of the 2006 Natural Environment and Rural Communities (NERC) Act that long use by bicycles gave rise to restricted byway rights, then we have 13 witnesses who have used a bicycle and 4 who have ridden a horse.
- 14.26 In *R (Lewis) v Redcar and Cleveland Borough Council* UKSC 11 (3 March 2010) Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in *Sunningwell* that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In *R (Powell and Irani) v SSEFRA* [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in *Lewis* were not authority for an additional test beyond the tripartite 'as of right' test. The judgements in *Lewis* confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication arises from acquiescence in the use.
- 14.27 The extent and quality of use by bicycles is considered to be sufficient to alert an observant owner to the fact that a public right is being asserted (for which see *Powell and Irani*.)
- 14.28 The judgment *R (on the application of Godmanchester Town Council) v S of S for Environment, Food and Rural Affairs; R (on the application of Drain) v S of S for EFRA, 2007* affirms that it is not the case that any evidence of a lack of intention to dedicate is sufficient; there has to be an overt act or acts on the part of the landowner to show the public at large that he has no intention to dedicate.
- "A landowner's intention not to dedicate a way as a highway had to be established objectively and 'intention' meant what users of the way would reasonably have understood his intention to be; that 'sufficient evidence' that there has been no intention to dedicate required evidence of some overt acts on the part of the landowner such as to come to the attention of the public*

who used the way and demonstrate to them that he had no such intention, and it was not sufficient for him simply to give evidence that he had not so intended; that...the landowner's intention did not have to be continuously manifested 'during' the whole of the 20 year period but merely at some point during that period..."

14.29 Section 36 of the Charities Act 1993 provides that no land held by or in trust for a charity shall be conveyed, transferred, leased or otherwise disposed of without an order of the Court of the Charity Commission. 'Land' includes any estate, interest, easement, servitude or right in or over land, and thus the dedication of a right of way over land would seem to qualify as a means of 'disposal'.

14.30 However, even in the absence of such an order, and/or where dedication is to be presumed by virtue of long use, it is considered there is nothing to prevent the statutory dedication of public rights of way over land held for charitable purposes, provided always that such a dedication would not be contrary to the stated purposes of the charity concerned, by reference to Section 31(8) of the Highways Act. This provides that the incapacity of a body or person in possession of land for public and statutory purposes to dedicate a way over land is not affected by Section 31 provisions as a whole, if the existence of a highway would be incompatible with those purposes. It is not considered that the charitable status of the Feoffees or the Rail Land Regeneration Trust means that they are incapable of dedicating land as a right of way within the context of section 31 of the 1980 Highways Act. At common law, the lack of any owner with the capacity to dedicate could be a bar to the necessary finding of an actual intention to dedicate.

14.31 There is no evidence of a lack of intention to dedicate on the part of the landowner. On the contrary, the Rail Land Regeneration Trust and Tetbury Town Council have encouraged use by the setting out, surfacing, and signposting of waymarked paths through the former railway station site and along the former railway to Preston Park. The public have been actively encouraged to use the claimed route and the RLRT have expressed an intention that it form part of a longer multi-user path making use of the former railway trackbed from Tetbury to Kemble. The claimed route and its continuation to the Trouble House Inn form part of the signposted National Cycling Network path number 48 and the Tetbury Trail.

14.32 Section 31(1) of the Highways Act states that the 20 years use must be without interruption. An "interruption" has been defined as "an actual and physical stopping of the public's enjoyment" (*Merstham Manor Ltd v Coulsdon and Purley UDC (1937) 2KB 77*) as opposed to an act that merely challenges the public's right. It is not a mere absence in the continuity of use. Moreover, such interruption must be with the intention to prevent public use. There is no evidence of any interruption in the use of this path.

14.33 Given that the evidence of use is enough to satisfy the tests of what constitutes sufficiency of use, the question then is whether it should be recorded on the Definitive Map and Statement as a bridleway or as a restricted byway. Section 68 of the 2006 Natural Environment and Rural Communities (NERC) Act inserts a new subsection 31(A) into the 1980 Highways Act, which confirms that use of a

way by a non-mechanically propelled vehicle (such as a pedal cycle) is capable in appropriate circumstances of giving rise to a public right of way for non-mechanically propelled vehicles (a restricted byway.)

- 14.34 The application is supported by 20 evidence forms supporting use by bicycle and 7 on horseback. Use on foot and bicycle dates back to 1970 while use on horseback only dates back to 1980. For the relevant period of 2001-21, there are 14 witnesses who have used the path by bicycle during the whole 20-year period, and only 3 by horse.
- 14.35 The case of *Whitworth v Secretary of State for the Environment, Food and Rural Affairs [2010] WWCA Civ 1486* is often quoted where there is evidence of use on horseback and pedal cycle. Section 30 of the Countryside Act 1968 gave pedal cyclists the right to ride on a bridleway; consequently, any use from 1968 onwards is said to be “by right”. In *Whitworth* the route was found to have pre-existing bridleway status, i.e., it was decided the status was a bridleway prior to 1968. It was suggested that subsequent use by cyclists of an accepted, but unrecorded, bridleway, where use of the bridleway would have been permitted by virtue of section 30 of the Countryside Act 1968, could not give rise to anything other than a bridleway. The judge in the *Whitworth* case, Carnwath LJ, went on to discuss what the outcome would have been had there been no pre-existing bridleway status. His view is predicted on user evidence dominated by equestrians, a ratio of 8 equestrians to 2 cyclists (8 v 2). He accepted that regular use by horse riders and cyclists might be consistent with dedication as a restricted byway, it was also consistent with dedication as a bridleway. In such an instance of statutory interference with private property rights, he determined, it was reasonable to infer the dedication “least burdensome to the owner”. In these circumstances, Carnwath LJ could equally have decided bridleway or restricted byway status but opted for bridleway as equestrian was the dominant user evidence and he did not want to inflict a more burdensome way on the landowner.
- 14.36 When determining whether the status should be bridleway or restricted byway, consideration needs to be given to the dominant user between cyclists and equestrians. In this case, the predominant users are cyclists, by a ratio of 20 : 7 (or 14 : 3 for the relevant twenty-year period), this distinguishes the current application from the *Whitworth* case. A more comparable case to the current application is a decision of the Planning Inspectorate dated 6th April 2017; this concerned a Definitive Map Modification Order made by East Riding of Yorkshire Council. The Order was for the addition of a Restricted Byway. In that case no pre-existing bridleway status was found, the Order route was created as a private road; however, from the 1950s there was evidence of use by the public. The dominant user was pedal cyclists (19 claimed use with a cycle and 3 on horseback). The Inspector determined that the facts were different to the facts in *Whitworth*; that the evidence of use by cyclists supports the establishment of a restricted byway and concluded that there is no basis from which a less burdensome bridleway can be inferred. In the present case, where there is much less evidence of equestrian use it is appropriate to record the status as a restricted byway. Unlike the *Whitworth* case there is no need to be cautious and record the least burdensome way for the landowner; there is clear dominance by cyclists in this case, therefore the appropriate status is that of restricted byway.

14.37 The recommendations are that:

- (a) The application to add a length of bridleway to the Definitive Map and Statement between points A and B on map B be refused;
- (b) That a length of restricted byway be added to the Definitive Map and Statement between points A and B on map B.

15. APPENDICES

- A. Location Map, 1: 10,000 scale
- B. Map showing claimed route, 1: 6,000
- C. Summary of public path evidence forms, 2022
- D. Summary of public path evidence forms collected in 2010
- E. Detailed plans showing position of photographs, taken 16 June 2022 (i) to (iii)
- F. Photographs of claimed route, taken 16 June 2022