

**Schedule 14 Application: Willing Lane
Parish of Rattery**

Report of the Director for Environment, Economy and Culture

Please note that the following recommendation is subject to consideration and determination by the Committee before taking effect.

Recommendation: It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding a Byway Open to All Traffic between points A – B – C as shown on drawing number ED/PROW/07/80a.

1. Summary

The report details the determination of a claim under Schedule 14 of the Wildlife and Countryside Act 1981 to record a Byway Open to All Traffic.

2. Background

On modern highway records the claimed route is indicated as an Unclassified County Road which extends through Willing Farm, linking the county highway at Rattery with the county highway at Willing Gate (route A – B – C – D – E – F – G on attached plan no. ED/PROW/07/80a). The owner of Willing Farm, Mr Woodley, has always maintained that no right of way existed through the farmyard. In 2005 it came to light that earlier highway maintenance records appeared to agree with the owners claim and an investigation was initiated by the former Ivybridge Local Service Group to consider the status of the route and with a view to reporting to the Highways and Traffic Orders Committee. In February 2006 the Devon Trail Riders Fellowship submitted a Schedule 14 application to record a Byway Open to All Traffic along the whole route.

The general review for the parish of Rattery was undertaken in the 1990s. It is usual policy that any new claims in a parish for which the review has already been completed should be deferred until the whole of the relevant district has been completed. However, given the pre-existing anomaly concerning the status of the route it was considered appropriate to deal with this application out-of-turn.

The following consultations have been carried out and the responses were as follows:

County Councillor Trevor Pennington	-	no comment.
South Hams District Council	-	support use on foot and by horse but not by motor vehicles.
Rattery Parish Council	-	do not support application.
Country Land & Business Assoc.	-	no comment.
National Farmers' Union	-	no comment.
Ramblers' Association	-	no comment.
British Horse Society	-	support opening route for use on horseback.
Byways & Bridleways Trust	-	no comment.
Trail Riders Fellowship	-	supports the application.
British Driving Society	-	no comment.
Auto Cycle Union	-	supports the application.
Cyclists Touring Club.	-	no comment.

3. Basis of Claims

Wildlife and Countryside Act 1981, Section 53 (5) enables any person to apply to the surveying authority for an order to modify the Definitive Map. The procedure is set out under WCA 1981 Schedule 14.

Common Law presumes that at some time in the past the landowner dedicated the way to the public either expressly, the evidence of the dedication having since been lost, or by implication, by making no objection to the use of the way by the public.

The Highways Act 1980, Section 31 (1) states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been 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.

The Highways Act 1980, Section 32 states that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan, or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

The Wildlife and Countryside Act 1981, Section 53[3] [c] [i] enables the Definitive Map and Statement to be modified if the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that:

(i) a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

The Wildlife and Countryside Act 1981, Section 56[1] states that the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein but without prejudice to any question whether the public had at that date any right of way other than those rights.

4. Description of Route

The route is shown on the attached plan ED/PROW/07/80a. At the western end it is well defined and open to vehicular traffic up to the South West Water sewage treatment works (Points A - B on the plan) but from this point a field gate has been erected which restricts access by vehicles. A wooden kissing-type gate allows access on foot only beyond this point. The route beyond this point is now only defined on one side by a hedge and therefore appears to form part of the adjacent fields. Continuing generally east northeastwards across a stream and towards Willing Farm the route is obstructed by several field boundaries as a result of the alteration of historic field boundaries and is no longer defined on the ground. The route continues northeastwards through the farmyard where it turns sharply westwards then northwards along a metalled lane/drive to join the county road at Willing Gate at Point G (this section was upgraded by the landowners more than ten years ago).

5. Documentary Evidence

Benjamin Donn's One Inch to the Mile Map of Devon (1765)

Benjamin Donn's prize winning map shows main roads and settlements. The claimed route is not shown.

Greenwood's one inch to the mile map of the County of Devon of 1827

The route in its entirety is shown as a cross-road.

Rattery Tithe Map and Apportionment (1841)

All tracks/roads in the parish appear to be colour washed regardless of status. In the Devon Record Office leaflet on Rights of Ways Records it states under Tithe Maps and Apportionments that where a track is numbered on the map and listed with the holdings of a private individual, it was regarded as of essentially private character. It is possible that the private character referred to maintenance rather than use. However, in Rattery Parish current county roads are not apportioned whereas private roads/farm tracks are.

The claimed route is shown with an open junction to the road at Rattery village (point A) and the western section of the route is un-numbered. A solid line is marked across the route to the west of 'Willing Barton' at point C and again at its junction with the county road at point G (Willing Gate), which may indicate gates. Between these points the route is shown with bracing symbols to Apportionment number 574 and described as 'House, Bartons, Waste' under the landholding of Willing Barton, owned by Richard Browne Esquire.

Ordnance Survey Maps

Ordnance Survey mapping convention is to mark the primary roads with solid lines, with the line to the east or south marked in bold.

The 1st edition 1 inch to the mile OS map, surveyed 1809 shows the route without boldening.

The 1st Edition 25 inch OS map (1884-86) shows the western section of the route, leading from the village to Willing, as a double hedged lane with the southern hedge boundary drawn with a bolder line. Any solid lines across the route to the west of Willing, which might indicate gates, are obscured by tree notation. The section through the farm is not shown with any boldening. A solid line across the route at its junction with the county road at point G indicates a gate, as the name 'Willing Gate' would suggest.

The 1st Edition 6 inch to one mile OS map (1890) again shows the western section as a double hedged lane, with the southern hedge boundary drawn with a bolder line. A solid line across the route at point C suggests a gate present. A solid line is also shown across the junction with the county road at Willing Gate at point G. The section between the farm buildings and Willing Gate (E – F – G) is shown without any boldening.

The 2nd Edition 25 inch OS map (1904-06) shows the entire route now without any boldening. Again gates are indicated at points C and G.

1919 OS One-inch Popular Edition Contoured Road Map of Torquay and Dartmouth shows the route as a "road under 14' wide". It is uncoloured which, according to the key, could indicate either a bad surface or that it was considered a private road. A solid line at point C and another further to the west indicate gates.

1946 OS One-inch New Popular map of Torquay (full revision 1929 with later corrections) shows the route as "Under 14ft of metalling – bad".

1:2,500 A edition OS mapping (1954) as 2nd Edition 25".

Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: "The representation on this map of a road, track or footpath is no evidence of a right of way".

Finance Act 1910

The 1910 Finance Act maps drawn up for a survey to ascertain the value of land for the purpose of taxation shows section A – B – C excluded from adjoining numbered hereditaments, or assessment areas of land. Its exclusion from adjoining land suggests that it may have been considered as a form of public road at the time, or at least a route carrying public rights.

The section between points C and G is included within hereditament no. 78 for Willing. The official Field Book for that hereditament does not record any deduction for Public Right of Way or User that might be connected with the route. A deduction has been made however, for a public path across OS field no. 491 to the west of Willing and terminating on the claimed route, between points x and y as shown on the plan.

Sales Particular – undated, estimated 1918

This plan for the Estate of Willing shows the western section of the route (A – B – C) excluded from the landholding. Several adjoining fields are identified as belonging to the Misses Carew. At the western end the route is noted as leading to Rattery, Brent and Marley. The section through the farm to Willing Gate is included within the landholding and a solid line shown at Willing Gate.

Indenture 19 February 1919

This agreement referring to lands at Willing makes no mention of the route. The accompanying plan however indicates the landholding, shaded and outlined in pink. The western section of the route (A – B – C) is excluded from the landholding. The remaining section through Willing is included however and shown with solid lines across it at either end.

Rattery Parish Council Minutes

There are several references between 1903 and 1915 regarding 'dangerous places on the Willing Road' and request made re same to the District Council.

It is not clear whether these references relate to the claimed route or the road leading from the village to Willing Gate. There is no report of any action having been taken.

On 26 September 1960 it was reported that the Bidwell Brook had burst its banks and was flooding Willing Lane and that a letter had been sent to the divisional surveyor asking that the bank be repaired.

Further minutes of 7 December 1960 and 28 February 1961 indicate that the brook was receiving attention and later, in November 1963, that a meeting was held with the divisional surveyor regarding the brook, which was still leaking.

Given the location of the claimed route adjacent to the Bidwell Brook, it seems reasonable to assume that it is the route referred to as Willing Lane.

Totnes Rural District Council Highway Committee Minutes

13 December 1946 – Report that the banks retaining the leat adjacent to the Willing Road had collapsed and caused flooding to the road. The owner (Mr Shilston) had the bank rebuilt and the watercourses cleared.

The reference to a leat suggests that the report relates to the claimed route, which is adjoined by a stream/leat.

Devon County Council Roads Committee – Report of Southern Division Sub-Committee

7 February 1950 – Refers to the flooding of Willing Lane and reports that to prevent flooding of the County Road it was necessary to clean the adjoining leat and repair its banks. The surveyor recommended that the Council use their discretionary powers to carry out the repair works as there was no liability on any person to do it. The recommendation was accepted.

The reference again to a leat suggests that the report relates to the claimed route.

Highway Handover Map and Book

In 1929, the Local Government Act changed the rural district boundaries. At the same time, responsibility for roads was transferred from the Rural District Councils to Devon County Council. As a result a map, thought to date from that time, was produced by the County Council depicting the routes, which were believed to be maintainable vehicular highways. The claimed route is coloured blue on the map and numbered 1028.

The book to accompany the map shows that a 'correction' was made on 17 May 1950 removing a section through the farmyard from the map and creating two culs-de-sac. The mileage has been corrected accordingly.

Original Definitive Map Survey 1950

Rattery Parish put forward for inclusion on the Definitive Map a footpath, referred to as Footpath No. 5, leading from the county road approximately 200 metres west of Willing Gate (at point x on the plan) and terminating on the claimed route (at point y). The path is shown on the submission map as running across OS parcel number 491 and is consistent with the route for which a deduction was made for valuation purposes under the Finance Act. The submission states that the path had been 'used by the public 30 years ago' but also that it had not been used for many years. The Rural District Council commented that the path was registered as R.O.W. No.1 under the 1932 Highways Act.

The Parish Council subsequently objected to the inclusion of the path on the draft map on the basis that it 'had not been used for more than 20 years' and it was subsequently omitted from the Definitive Map on the basis that it served no useful purpose.

Deed of Gift 25 March 1959

This deed relates to the gift of Willing Farm from William Henry Shilston to his daughter Heather Mary Woodley. The farm is gifted together with a right of way for all purposes as coloured green on the accompanying plan. This refers to a short section of the claimed route to the west of the farm. It also requires the Donee and Grantor to share the costs of maintaining the same right of way. The section of the route leading from the farm to Willing Gate is included in the landholding, shaded pink. The western section from Rattery village almost to the farm is excluded from the landholding.

Commercial Maps

The Trail Riders Fellowship has submitted copies of several commercial maps in support of their application.

Gall and Inglis 1890 half inch to the mile map for cyclists and tourists shows the claimed route in its entirety. A solid line is shown at its junction with the county road at Willing Gate and also to the west of Willing. These may indicate the presence of gates. The Trail Riders Fellowship submit that the routes shown would have been all purpose highways. There is no key available to assist with the interpretation of the map. However, in Rattery parish several

current county roads and private roads/tracks are shown in the same manner. Similarly some current county roads as well as private roads are shown with closed junctions.

Geographica 3 inch to the mile maps published 1922 and 1923 show the route in its entirety as an "other road (subject to a right of way)". If the routes referred to are subject to a right of way the map does not clarify what status.

Aerial Photography

1946 – 1949 RAF aerial photography shows the route as a defined double hedged lane as far as the farm on both sections. The section leading from Willing Gate to the farm appears to be wider than the section leading from Rattery village.

1999 – 2000 OS aerial photography shows that by this time many of the previous field boundaries have been removed or altered. Traces of the original route are still visible in places.

Local History

Willing is described in 'The Book of Rattery' as an ancient manor of Rattery. In Saxon times it would have probably been the Lord of the Manor's home farm, with smaller estates in the area held by subordinates.

Modern Highway Records

The whole route is coloured blue to indicate an unclassified county road. The colouring for the section through the farm differs slightly from that used for the rest of the route.

6. User Evidence

No user evidence has been submitted in respect of the claim. However, there are several complaints on the South Area Office files concerning attempted use, which was prevented by various obstructions.

A letter from the Trail Rider Fellowship dated 28 June 2002 refers to an earlier complaint from at least one member.

In April 2003 a complaint was received from a local Ramblers group, whose group had been turned back by the landowner. The response indicates that the matter had also been raised some ten years previously.

There was a further complaint from the Trail Riders Fellowship in December 2004, which again refers to an earlier complaint.

In January 2005 a letter was received from the North Devon Off Road Club reporting that their progress was stopped by a locked gate at Willing and that they were told by the landowner that there was no right of way through the farm.

Representations have been received from local residents, some of whom comment that the western section, as far as the sewage works and back, is used by locals for exercising dogs or as a 'safe' walking route. These are included in the appendix to this report as consultation responses.

One local resident, who has lived at a neighbouring farm for seventy years, recalls using the deleted footpath across the fields and then along the western section of the claimed route to go to church and school in the 1930s and 1940s.

7. Landowner Evidence

The land adjoining both sides of the route between points B and G is currently owned by Mr Woodley of Willing Farm.

In January 2006 Mr & Mrs Woodley sent a letter to the Ivybridge Local Service Office with enclosures in support of their claim that the route did not carry public rights and that it had not been publicly maintained.

Included was a copy of Greenwood's 1825 Map of Roads (referred to by the TRF) which they have annotated to indicate other roads shown by Greenwood and which are regarded as private today. Also enclosed were copies of Ordnance Survey maps with known gates marked, photographs indicating stone gate pillars and a copy of a tenancy agreement dated March 1985 indicating that the farm access road was privately maintained. Also enclosed were extracts of The Book of Rattery referred to above.

In response to the recent Schedule 14 application consultation Mr Woodley completed a Landowner Evidence Form. It confirms that the land crossed by the route has been owned by his family since 1943 (when purchased by his grandfather, William Shilston). He does not believe the route to be public and has on occasion in recent years stopped people from the using it. In response to the question of whether he had erected any notices on the route he replied that yes, for one month in 1993 stating private land. On the accompanying plan he has marked eight gates and states that one was occasionally locked.

Mr Woodley's father wrote a letter to the Ivybridge Local Service Office in January 2006. In it he states that during his occupancy at Willing (1952 – 1983) the lane was always considered part of the farm with private access only. He states when he came to the farm in 1952 there was a gate at the entrance (Willing Gate) and that the route was also gated in several places between the farm and the sewage works to allow access to different fields. He adds that, believing it to be private and their responsibility, they had the entrance from Willing Gate tarmaced in the 1950s and then resprayed in the 1960s. He states that, to his knowledge, no maintenance has ever been undertaken by any council of any part of the lane.

8. Responses to Consultations

In January 2006 several local residents wrote to the Ivybridge Local Service Office, having become aware of the Schedule 14 application.

Mr Coaker has lived at Brownston for seventy years. He states that he used the church path (closed in the early 1950s), which incorporated half of the claimed route, to walk to church and school in the 1930s and 40s. He states that the gated farm lane, which was not part of the path, was used by the farmers at Willing. The lane from Rattery sewage works was for access to fields belonging to Bulkamore Farm at that time and not used by the general public. He recalls three gates on the route; one at Willing Gate until the 1960s, one approx 100 yards west of Willing Farm and another much nearer the sewage works which he believes probably defined Bulkamore Farm boundary. He describes the surface of the lane as stone in places with earth and mud in others. He adds that during his lifetime he has never known any vehicular use of the lane by the public.

Mrs Terry has lived in Rattery since 1943 and at Ferndale, at the western end of the lane since 1963. She states that to her knowledge it has never been a through-route, used only for access to Willing Farm fields, Glebe fields and the sewage works. She believes that there has always been a gate across the lane past the sewage works. She has seen people using the lane in latter years for exercising dogs and either coming back the same way or through the Glebe fields. She is concerned about noise and danger if motor vehicles are allowed to use the lane.

Mr and Mrs Hutchison of the Old Smithy strongly object to the establishment of a right of way through Willing Farm. They provide no further evidence.

Rattery Parish Council also wrote at that time expressing their belief that the lane was never a right of way. They have since confirmed their view that it has only given access to adjoining fields.

Further letters have been received recently from local residents, expressing their concern to any use of the route by vehicles.

All consultation responses are included in full in the background papers to this report.

9. Discussion

Map evidence shows that the claimed route has been depicted on maps since Greenwoods map of 1827.

Greenwood's depiction of the route as a 'cross road' may suggest that the route was considered a public road at that time. However, inspection of the map shows several cul-de-sac lanes, driveways and farm access tracks in the Rattery area similarly shown as cross roads. It does not therefore assist in clarifying whether routes shown were considered public or private, only that the route physically existed at the time of the survey.

Similarly, Ordnance Survey mapping provides evidence of the physical existence of the route over time but not of status. Little weight can be given to the western section being shown on the 1st edition 25" and 6" OS maps (1884-90) with a bolder line marking the southern hedge boundary, as earlier and later maps do not show any such boldening. OS maps also indicate that the route was gated to the west of Willing and at the Willing Gate junction.

The Rattery Tithe map and apportionment, Finance Act records and later documents relating to the transfer and sale of Willing consistently suggest that the western section (A – B – C) was considered to be a public highway. The depiction of the route in the same manner as other currently recorded public roads would suggest that it was an all-purpose highway.

Conversely, the section through the farm to Willing Gate (C – D – E – F – G) appears to have been considered a private road. A privately maintainable highway may carry public rights. However, in this instance no deduction for public rights over this section of the route was made for Finance Act valuation purposes.

Parish Council minutes suggest that the Council believed the western section to be publicly maintainable, having referred maintenance issues to the Rural District Council.

The County Council Roads Committee minutes indicate that the Council carried out repair works on the leat to prevent flooding of the County Road, Willing Lane. It is assumed that this relates to the claimed route, which is adjoined by a stream/leat between points A and B.

Although Footpath No. 5 was omitted from the Definitive Map, its submission by the Parish Council and registration under the 1932 Act does provide evidence of reputation that the western section of the claimed route, which it joined at point y, was used by the public at least on foot and was considered by the Council at that time to be a public highway.

The only documents to show the claimed route as a through-route is the County Council's highway records. The earliest records, the handover map and schedule, originally showed the route as a through-route but were later 'corrected' in 1950 to remove the section D – E – F and leave two culs-de sac leading to Willing. These records were principally for internal administrative use as a list of those routes considered to be publicly maintainable. They were not readily available to the public and did not purport to be a record of public rights.

It is possible that the inclusion of the route in the highway records was challenged in 1950 either during the Definitive Map process or as a result of the flooding issue. The fact that the

records were corrected indicates that the Divisional Surveyor considered the inclusion of the section through Willing to be in error. There is no evidence of a formal stopping-up order but it is likely that they did not feel this to be necessary if they considered the records to be incorrect in the first place.

It is not clear however, why only that section was removed when all other contemporaneous evidence indicates that the section from C through to G was not publicly maintainable and was included within the landholding of Willing. There is no evidence that this section has been maintained at public expense, either before 1950 or subsequently. The landowner and his father both state that their family have maintained it since moving to the farm in the 1940s.

The modern records show the entire route to be an unclassified county road. It is certainly possible that a mistake was made in copying the handover maps. The colouring for section D – E – F is different from the rest of the route, suggesting that it might have been coloured in at a different time.

There is no evidence of actual use of the route by the public in vehicles, although there have been several attempts reported in recent years. The only observed use by vehicles has been for access to properties at the western end and the sewage treatment works. One person has submitted evidence that they used the western section on foot in connection with the omitted footpath. Other local residents have used, or observed use, of the western section on foot only.

Historical documentary evidence consistently shows the route as a cul-de-sac highway, there being no evidence to suggest a public right of way continuing through Willing. It is commonly held that a rural cul-de-sac highway would be so pointless that the remaining stretch is likely to be highway also. However, as a cul-de-sac the route could clearly have met a local need in the past, i.e. for inhabitants of the parish to pay tithes and rent at Willing and for access to adjoining fields, even if the route is of little current importance. As an important, ancient manor of Rattery since Saxon times, Willing would have been at the heart of the community. There are many examples of cul-de-sac unclassified county roads in Devon.

Recent mapping and aerial photography shows that many of the boundary hedges have been removed during the last 50 years and that much of the route is no longer open and available on its original line.

10. Conclusion

There is no evidence to suggest that the claimed route has ever been considered a public through-route and it is considered likely that the highway records are incorrect in this respect.

There is however, sufficient historical documentary evidence to reasonably allege that a public right of way subsists on the section A – B – C, and to suggest that such rights are most likely to have been vehicular.

It is therefore recommended that a Modification Order be made to amend the Definitive Map and Statement so as to add a Byway Open to All Traffic between points A – B – C as shown on plan no. ED/PROW/07/80a.

As the route is recorded on the County Council's list of maintainable highways, the NERC Act extinguishment of rights for mechanically propelled vehicles does not apply in this case.

There is no reason why the recording of section A – B – C as a Byway Open to All Traffic on the Definitive Map should conflict with it remaining on the highway records. Consequential amendments to the highway records concerning the remaining section through Willing will need to be made on confirmation of the Modification Order.

11. Reasons for Recommendation/Alternative Options Considered

To clarify the legal status of the route referred to as Willing Lane.

12. Legal Considerations

The implications/consequences of the recommendation have been taken into account in preparing the report.

Edward Chorlton

Electoral Division: South Brent & Dartington

Local Government Act 1972

List of Background Papers

Contact for enquiries: Mike Jenkins

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Background Paper
Correspondence File

Date
2006 to date

File Ref.
DMR/Rattery

hb231007pra
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2 hq 301007