EEC/09/35/HQ

Public Rights of Way Committee 2 March 2009

Definitive Map Review 2006–9 Parish of Braunton (Part 5)

Report of the Executive Director of 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 in respect of Route 6, to upgrade Bridleway No. 18, Braunton on Hannaburrow Lane and Bridleway No. 6, Georgeham on Hole Lane to Restricted Byway, between points L-M-N shown on drawing number ED/PROW/06/114, with an amendment to its recorded line on Hole Lane at point X.

1. Summary

The report examines claims from applications arising out of the Definitive Map Review in the parishes of Braunton and Georgeham.

2. Review

The review process for Braunton parish was started in 2006, followed by consultations on proposals for suggested changes in respect of 15 routes. Previous reports taken to the Committee since 2007 have considered the proposals for 14 of those routes, including claims and formal applications. This report examines remaining applications for the upgrading of a recorded bridleway in Braunton parish, continuing as a recorded bridleway into Georgeham parish, considered together as route 6 in the consultations.

Examination of evidence in respect of a claimed footpath submitted after the consultations will be considered in a report to a future Committee meeting to conclude the review in Braunton parish.

3. Consultations

Responses to the consultations in August 2006 on the 15 routes were as follows:

County Councillor Jenkins - responded with no specific comments about

individual routes;

North Devon District Council - responded with no objection to Route 2;

Braunton Parish Council - supports claims for Routes 1 & 2, with concerns

about the claims for byways and willing to discuss creation of paths in connection with

Route 14;

British Horse Society - supports suggestions for Routes 1 – 12 and

submitting evidence collected for Routes 8 &

9:

Environment Agency - oppose addition of Route 2, pending flood

defence scheme development;

English Nature - responded in connection with Route 6, with

concerns about damage from vehicular use;

Byways and Bridleways Trust - no comment; Country Landowners' Association - no comment; National Farmers' Union - no comment; Open Spaces Society - no comment;

Ramblers' Association - responded only in connection with Route 6,

opposing its proposed upgrading to byway.

4. Conclusion

It is recommended that a Modification Order be made in respect of Route 6 to upgrade the recorded bridleways to Restricted Byways, with a minor amendment of the recorded route onto the line as used. Details concerning the recommendation are discussed in the Appendix to this report.

There are no other recommendations to make concerning any further modifications. However, should any valid claim be made in the next six months it would seem sensible for it to be determined promptly rather than deferred.

5. Reasons for Recommendation/Alternative Options Considered

To progress the parish-by-parish review of the Definitive Map in North Devon.

6. Legal Considerations

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

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Electoral Division: Braunton Rural

Local Government Act 1972

List of Background Papers

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Background Paper Date File Ref.

Correspondence file 1995 to date DMR/BRAU/1995/Parish File

ns060209pra sc/parish of braunton part 5 2 hq 170209

Background to the suggested changes Basis of Claims

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.

The Wildlife and Countryside Act 1981, Section 53 (3)(c) 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, ...;
- (ii) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or
- (iii) ... any other particulars contained in the Map and Statement require modification.

The 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 Schedule 14 of the Act.

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.

In a House of Lords appeal judgment on R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs in 2007, it was held that for such evidence of no intention to dedicate a way to be sufficient there must be evidence of some overt acts on the part of a landowner to show the public at large that there was no intention to dedicate.

The same judgment, in respect of R (Drain) v Secretary of State for the Environment, Food and Rural Affairs, upheld an earlier High Court decision that the phrase "during that period", relating to Section 31 (1) as above, did not mean that a lack of intention had to be demonstrated "during the whole of that period". It did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient. What was considered sufficient would depend upon the facts of a particular case, but if the evidence shows that the period is very short, questions of whether it is sufficiently long ('de minimis') would have to be resolved on the facts.

Common Law presumes that a public right of way subsists if, 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.

1. Route 6: Claimed upgrade of Bridleway No. 18, Braunton on Hannaburrow Lane and Bridleway No. 6, Georgeham on Hole Lane to byway, between points L-M-N shown on drawing number ED/PROW/06/114

Recommendation: It is recommended that a Modification Order be made in respect of Route 6 to upgrade the recorded bridleways to Restricted Byways on the route from L–M–N, with a minor correction to a short section of the route recorded wrongly at point X.

1.1 Background and description of the route

A large number of Schedule 14 applications were submitted on behalf of the Trail Riders' Fellowship (TRF) to record routes as claimed Byways Open to All Traffic (BOATs) in advance of the Natural Environment and Rural Communities (NERC) Act 2006. Several applications were made for routes in Braunton before the review process had been opened in the parish, which have been considered in previous reports. Two of the applications, dated in November 2005 and with accompanying copies from historical map evidence, were received in December for the upgrade of connecting routes recorded as bridleways to BOATs in Braunton and Georgeham parishes.

Bridleway No. 18, Braunton starts from the section of maintainable highway leading towards Saunton Court from the B3231 Braunton—Croyde road in Saunton near St. Anne's Church. It continues northwards as Hannaburrow Lane, with the first section surfaced as a driveway providing vehicular access to other properties at Lankham. It continues from the drive as a narrow unsurfaced and hedged track climbing to run along the edge of woodland on Lankham Brake and then between grass fields. Hannaburrow Lane ends on the top of the hill at the parish boundary with Georgeham on a junction with Long Lane, which was recorded in 2005 as a cul-de-sac BOAT from the Definitive Map Review process in that parish following a public inquiry.

The route continues northwards from the junction with Long Lane into Georgeham parish as Bridleway No. 6 running downhill along a narrow hedged track, Hole Lane, between grass fields. The course of the track follows a bend, where the definitive line of the bridleway is recorded cutting straight across through a clump of trees and back onto the track. It continues on the track passing the buildings of South Hole Farm and turning downhill to end near Forda on the unclassified county road, Hole Cleave Road, leading into Croyde village from Darracott.

1.2 The Definitive Map and Statement and maintainable highways records

The claimed routes were included with those surveyed originally by Braunton and Georgeham Parish Councils in 1950 for putting forward as public rights of way to record on the Definitive Map. They were not recorded as Roads Used as Public Paths (RUPPs), although Bridleway No. 18 is described in the survey by Braunton Parish Council as a "C.T. [Cart Track] through Hannaborough Lane to South Hole, near Croyde". It appears to have been considered initially as a footpath on the track, in line with what was put forward by Georgeham Parish Council for the route's continuation in their parish.

Bridleway 6 is described in the survey for Georgeham parish as "Lancombe or Hole Lane to Saunton Entry". Its status was not specified then, but it was considered initially as a footpath over an accommodation road. The status of both routes was recorded later by the District

Surveyor as bridleways, agreed by both Parish Councils in 1957, with descriptions as recorded in the Statements. No objections were made at the Draft and Provisional stages to the routes being recorded as bridleways, so that they were recorded with that status on the Definitive Map and Statement in both parishes.

Neither of the routes was shown on the earliest and later maps of maintainable highways, to indicate that they were considered to be publicly maintainable roads, with only the connecting link from the B3231 towards Saunton Court recorded as a section of unclassified road.

1.3 Historical maps and aerial photography

1.3.1 Early historical mapping – 17th/18th/early19th century:

- Ogilby's map 1675
- Bowen's map 1754
- Donn's map 1765
- Ordnance Survey Surveyors' Drawings 1804/5; 1"/mile map 1809 & later
- Cary's map 1821
- Greenwood 1827

Earlier historical maps at smaller scales show Hannaburrow Lane and Hole Lane as part of a route running north past Saunton Court towards Georgeham and Ilfracombe. It was a continuation of the route crossing Braunton Burrows from the ferry across the Taw estuary from Appledore and Instow, considered in the report to the last committee on the review process as Route 3. Historically, it was therefore included as part of one of the main transport routes through North Devon during that time, particularly from Torridge towards Georgeham and Ilfracombe. It was also part of a route to Croyde, as there was then no coastal road from Braunton through Saunton.

1.3.2 Later 19th century historical mapping:

- Georgeham Tithe Map & Award 1839
- Braunton Tithe Map & Award 1841
- Ordnance Survey 25"/mile late 1880s

Later maps at larger scales show both parts of the route in more detail, included in with the network of routes later recorded as public roads. It is shown coloured on the Braunton Tithe Map in the same way as all roads, with Hannaburrow Lane named leading to the end of Long Lane, labelled as 'Hole Gate'. Hole Lane is shown on the Georgeham Tithe Map as a continuation from the end of Long Lane, with no bend as a track across a wider section at point X, passing South Hole to meet the road at Forda.

On the Ordnance Survey maps they are named, with their own parcel numbers and acreages, connected with the routes recorded later as public roads, but not shown in the same way as those were with the darker highlighting of one line. Hole Lane is shown with a bend at that date at point X around where the line of the bridleway was recorded later in a straight line. Most junctions of the route with other roads are shown open, or with dashed lines indicating a numbered land parcel boundary or change in surface rather than an obstruction or barrier. The start of Hannaburrow Lane from the road at Saunton has a solid line across it, suggesting that there may have been a barrier or gate there at that time.

1.3.3 Later historical mapping, from early 20th century:

- Ordnance Survey 25"/ mile early 1900s
- Finance Act map & records 1910
- Bartholomew's mapping 1924–44

• Later Ordnance Survey maps 1920s-1976

The later edition of the Ordnance Survey 2nd edition 25"/mile map from 1905 records the route in the same way as in the 1st edition, but also shows that the road between Braunton and Croyde around the coast below Saunton Down had been built by then, passing near Saunton Court. The 1910 Finance Act maps drawn up for a survey to ascertain the value of land for the purpose of taxation show the whole route excluded from adjoining hereditaments, or assessment areas of land, in the same way as all other routes now recorded as public roads. Its exclusion from adjoining land could suggest that it may have been considered as public at the time and if not a public road, at least carrying public rights but giving no indication of its status.

Details of the associated Field Books for adjoining hereditaments do not record any deduction for Public Rights of Way or User that can be related specifically to the route, or information that might have been in connection with it, as would be expected where excluded on the maps. It provides some evidence suggesting that the route may have been considered at that time to be some kind of public road, perhaps with a status of more than footpath or bridleway. That would add weight in supporting any other historical evidence suggesting the existence of higher public rights on the route.

Some maps at smaller scales from the earlier 20th century, including Ordnance Survey and Bartholomew's editions from the 1920s to the 1940s, show the route with thin double solid lines as an uncoloured track, not in the same way as most roads are indicated in the key. It connects the roads at Saunton Court and beyond South Hole, with the end of Long Lane, which is shown in the same way. The keys for some of the editions of Bartholomew's maps indicate such routes as "inferior roads and not recommended". The Ordnance Survey 1"/mile New Popular edition in 1946 shows the route in the same way, indicated in the key as an "Unmetalled Road". Some of the later maps show the routes of footpaths and bridleways, but where the route is shown it is not recorded in that way.

Later Ordnance Survey larger-scale mapping from 1958/9 shows the route at those dates in the same way as in earlier editions, with double solid lines. The Ordnance Survey 1"/mile 1976 edition shows the start of the route with solid lines and Hannaburrow Lane continuing as a black dashed line, indicated in the key as a "Path", not coloured red for a bridleway as a "Public Path". Hole Lane is shown with double solid lines in the same way as Long Lane, continuing from its end to the road at South Hole.

The showing of the route on early and later maps records its physical existence at those times and until more recently. They do not indicate on their own the existence of a public right of way with a higher status, which would require other more significant supporting evidence. That is in accordance with the disclaimer carried by Ordnance Survey maps since 1889, which states that: "The representation on this map of a road, track or footpath is no evidence of a right of way" and may be presumed to apply to earlier and other commercial maps as well.

1.3.4 Aerial photography

Earlier aerial photography from 1946–9 shows the route as an open hedged track, wooded in parts and clearer where it was worn from vehicular access to adjoining properties, farmland and connecting to Long Lane. More recent aerial photography between 1999–2000 and 2007 shows the whole route in the same way and more wooded in parts.

1.4 Other historical sources

Rural District Council records from 1923 refer to investigations about maintenance of the route as an occupation road, named as "Lancombe Lane", from the end of Long Lane to Saunton and Forda. It was said to have not been used by vehicular traffic for some time and was overgrown, causing a barrier to traffic, with a decision made to serve notice on the occupiers. The issue was raised again in the early 1930s by the Parish Council, complaining about its condition and enquiring whether it was on the list of Parish Roads being taken over by the Rural District Council from the old Highway Board.

In 1936, the Parish Council asked for the occupiers adjoining Hannaburrow Lane and Hole Lane to be asked to trim the hedges as the road was reported to be almost impassable from Long Lane. In 1940 Long Lane was said by the County Council to be not publicly maintainable and it could not be adopted as a public road. No expenditure could be authorised on its repair and upkeep, so it was for adjoining owners to repair as an accommodation road to make lands more accessible and carry out the works at their own expense.

References to a range of other historical material were submitted by several individuals in response to the consultations, mainly relating to the route's role in the wider historical road network and the nature of traffic using it and, in one case, against any proposed amendment of the recorded line at point X. Other references were made to technical details concerning the physical nature and characteristics of the route, particularly in terms of its gradient and surface. Those had been examined closely and were presented in considerable detail to support views that although the route was historically a significant transport link, it had not been convenient or suitable for use by horse-drawn wheeled vehicles. In suggesting that the highest possible level of use will have been only by packhorses, with no evidence for use by any vehicles, it was put forward that there could be no basis for recording the route as a byway to allow vehicular use, not even as a Restricted Byway.

1.5 Definitive Map reviews and consultations

Braunton Parish Council did not include any reference to the route with their suggestions in May 1978 for changes in the parish for the Definitive Map review started at that time but not completed. The claimed upgrading was included in the consultations in 2006, on the basis of the applications submitted in 2005. The responses included concerns expressed by the Parish Council about all of the applications made for BOATs leading to routes being recorded as available for use by motorised vehicles. The British Horse Society supported it with most of the routes put forward, but only if it is recorded as a Restricted Byway and not as a BOAT. The Ramblers' Association responded with an objection to any upgrading of the routes.

There were specific responses from the agent on behalf of the owners of the affected land and its lessees, from the occupier of an adjoining property objecting to any upgrade to byway for vehicular use, also from individuals connected with the Parish Council submitting the additional historical and other research evidence. Other responses were received from individuals in the parishes of Braunton and Georgeham, also from elsewhere in North Devon, all in objection to any upgrading and some with similar references to that evidence.

1.6 User evidence

No user evidence was submitted with the applications, but two completed user evidence forms were sent in following the consultations by the occupier of an adjoining property near Saunton Court and one of the people who had also submitted other research evidence. They provided details relating to their own use of the route, one on foot only and one on foot and horseback, in support of their views that the recording of the route as bridleways is correct

and they should not be upgraded. No further evidence of use has been submitted to be included for consideration in this report.

1.7 Landowner & rebuttal evidence

A landowner evidence form was submitted in response to the consultations by the occupier of a property adjoining the route, who indicated that the surfaced part of Hannaburrow Lane provided vehicular access to the property and also completed a user evidence form. A letter was received from the agent on behalf of the main owners of the land affected, Christie Estates and its lessees. Both provided details of their ownership and tenancy, knowing that the route was a bridleway, reporting that they had seen people using it on foot, horseback and bicycles and that they had turned back people using it illegally on motorcycles.

The agent for the owners referred to other evidence available showing that there could not have been continuous user for the creation of additional rights for such use, including locked gates. He did not believe that the route has been used in a way to support its upgrading to byway and he would provide further evidence against any attempt to record it as a right of way for use by vehicular traffic.

1.8 Summary and conclusions – consideration under Statute and Common Law

Statute Law

The applications in 2005 to upgrade the bridleways on the route to BOATs were not made in response to any particular event acting as a significant challenge to their use, or as the result of any action taken by a landowner that had obstructed or prevented access to them from a specific date. There is, therefore, no evidence of any significant actions by a landowner having called into question their use at a specific time for consideration under statute law.

However, Section 69 of the NERC Act 2006 has clarified the position on a formal Schedule 14 application for a definitive map modification order being, of itself, sufficient to bring a right of way into question for the purposes of section 31(2) of the Highways Act 1980. It would provide the date of an event that can be taken as calling the public's right to use a route into question, but only if there are no more significant earlier events or actions having done so at a specific earlier time that may have led to or resulted in the application being made. There is no evidence of any previous significant actions in this case to provide an earlier date for consideration of user evidence under statute law. It means that the period for considering the applications for upgrading on evidence of use is the 20 years from November 1995 to the date of the application in November 2005.

No evidence of use was submitted with the applications in support of upgrading the bridleways, so that there is no support for recording the route with a higher status by presumption of dedication from use under statute law. There is, therefore, no need to consider whether there were actions taken by the landowners during that period to provide evidence of any lack of intention to dedicate the route at a higher status than that recorded of bridleway. However, there are references to actions or efforts taken by the landowners and occupiers to turn people back on motorcycles or prevent such use to indicate a lack of intention to dedicate the route specifically for use by vehicles that can be taken to be within the 20 year period.

The evidence is, therefore, considered insufficient to support the upgrading of the bridleways by presumption of dedication from use under statute law. Their use by the public will have been on foot, horseback and bicycles, in line with their recorded status as bridleways. There is no additional evidence of use to consider whether or not it meets the requirements under the provisions in the NERC Act of 2006 to record them as Restricted Byways, or as BOATs in accordance with its specific exceptions.

Common Law

Considering the applications in relation to common law requires taking into account the historical and other documentary evidence submitted and discovered, with evidence of use. Older historical maps and more recent mapping indicate that the route has existed on its current line since at least the second half of the 17th century. Historically, it was a continuation of a longer route from Torridge and the ferry over the River Taw estuary, across the Braunton Burrows, considered in the report to the last committee for Route 3, passing Saunton Court to Georgeham and further on to Ilfracombe.

The Tithe Map and Finance Act records add support to that evidence for the route still being considered up to the 19th and early 20th centuries as some form of a public highway. It also provided a route from Braunton to Croyde before the new road around the coast from Saunton had been built by the time that the 2nd edition Ordnance Survey 25"/mile map was surveyed in 1903. It continued to be shown on later smaller scale maps in the same way as other minor and unsurfaced roads, not as other paths including footpaths and bridleways were shown.

By the 1920s–40s, the route was said not to have been used by vehicular traffic for some time and was considered not to be publicly maintainable, but repairable by the occupiers. They were reported to have been served notice to make it passable from Long Lane, which other records have shown was considered then to be a public highway, leading to its being recorded more recently as a BOAT. As a continuation from the end of Long Lane, it was therefore available for use in vehicles, including for access to adjoining land and by the public. By the time of the survey for the Definitive Map in 1950, Braunton Parish Council considered Hannaburrow Lane to be a 'Cart Track' and although both parts of the route were considered initially only to be footpaths they were agreed later to be recorded as bridleways.

Earlier historical map evidence suggests that it was available for use by the public for all types of traffic in earlier times as part of a significant longer route with the highest level of status then, as well as connected to the local network of minor roads from the end of Long Lane and to Croyde. Later maps and other evidence indicate that its importance as part of a longer route had declined with developments in the wider road network, as well as locally by the early 20th century with the building of the road from Saunton to Croyde. That is reflected in its more recent use being mainly on foot and horseback, leading to it being considered in 1950 for recording as a bridleway.

Although references have been made to evidence against the route being used historically by vehicular traffic, particularly in terms of its character, it is reasonable to presume that it will have been available for use by all forms of transport for the initial test of whether it ought to be recorded with a higher status than bridleway for making an Order. Similarly, map evidence indicates that the route of Hole Lane had become established on the bend at point X by the time of the survey for the First Edition Ordnance Survey 25"/mile map in 1885–6, since its recording in a straight line as a track within a wider piece of land for the Tithe Map nearly 50 years earlier. It appears to have been recorded on the smaller-scale 6"/mile map for the Definitive Map without attention to the detail for its exact line at that point.

Considering all available evidence, particularly earlier historical map evidence, dedication with a status higher than that of bridleway can be inferred at common law. The evidence suggests that, historically, there had been an intention by the landowner to dedicate the route as a public highway and that the public accepted the dedication and used it on that basis. It is in the light of this assessment that it is considered reasonable to allege that a public right of way subsists on the route with a higher status than bridleway that ought to be recorded on the Definitive Map. That is in line with the legal definition of a BOAT as a highway over which the public have had a right of way for all kinds of traffic, but is now mainly used on foot and horseback. It is also considered reasonable to allege that the particulars relating to the route

on Hole Lane at point X require modification to show the correct line in accordance with map evidence.

From consideration under common law, there would previously have been the possibility of making an Order for the route to be recorded as a BOAT. However, provisions in the NERC of 2006 introduced more restricted criteria required to be met for recording BOATs for use by the public in motorised vehicles on the basis of evidence suggesting that they were used historically by non-motorised, horse-drawn vehicles. It would otherwise have been considered sufficient, but can result now in the recording of routes only as Restricted Byways, which have rights for use by the public on foot, horseback, bicycles and in horse-drawn vehicles, but not in or on motorised vehicles, including motorcycles. Most of the objections at the consultation stage were against the possibility of the route being recorded as a BOAT and available for public vehicular use, particularly on motorcycles, before the effects of the NERC Act were brought into force to prevent such use.

It would mean that the routes on Hannaburrow Lane and Hole Lane would continue to be available for public use up to the level of horse-drawn vehicles, but not by motorised vehicles. It would also clarify their status as a link to the end of the cul-de-sac BOAT recorded on Long Lane.

Accordingly, it is not possible on that basis to recommend the making of an Order for BOAT on the route, leading to the recommendation that an Order be made to upgrade the recorded bridleways on the route to Restricted Byways between points L–M–N, with an amendment to the recorded line on Hole Lane at point X.

