

<b>Regulatory Committee:</b>	<b>Commons and Rights of Way Committee; Report of the Lead Commissioner Communities &amp; Infrastructure</b>
<b>Date:</b>	10 December 2024
<b>Chair:</b>	Cllr Hoyland
<b>Presenting Officer:</b>	Jaci Harris
<b>Item Type:</b>	For decision
<b>Purpose of Report:</b>	To consider evidence to enable the determination of the GCC instigated Definitive Map Modification Order investigation:  <b>THE ALIGNMENT OF PUBLIC FOOTPATH MST28, STONEHOUSE PARISH, GLOUCESTERSHIRE</b>
<b>Recommendations of the Presenting officer:</b>	<ul style="list-style-type: none"> <li>That an Order be made to delete Public Footpath MST28 from the Definitive Map and Statement of Public Rights of Way between the following points: A-B-C, on the basis that it is subject to a drafting error.</li> </ul>
<b>Background Documents:</b>	<ul style="list-style-type: none"> <li>Sub-heading 7. 'Consultations.'</li> </ul>
<b>Forthcoming Decisions:</b>	To flag those items that get referred on to Council for determination.
<b>Appendices:</b>	As listed under sub-heading 10: 'PowerPoint slides' in the report.
<b>Contact Information (For information on the report)</b>	Jaci Harris, Asset Data Officer (Definitive Map ), Highway Records & DMMO Team Telephone: 01452 328981 Email: jaci.harris@gloucestershire.gov.uk (quoting file reference)

## **1. RESOURCE IMPLICATIONS**

Average staff cost in taking an application to the Committee- £5,000. Cost of advertising Order in the local press, which must be done twice, is approximately £500 per notice. In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application. If the application were successful, the route would *not* become maintainable at the public expense.

## **2. SUSTAINABILITY & EQUALITY IMPLICATIONS**

No sustainability implications have been identified.

## **3. 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 (“DMS”) 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.

Section 56(1) of the Wildlife and Countryside Act 1981: “A Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely:-

- (a) Where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right;
- (e) Where by virtue of the foregoing paragraphs the map is conclusive evidence, as at any date, as to a highway shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at that date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date”.

Section 53(3)(c)(iii) relates to the discovery by the Authority of evidence, which (when considered with all other relevant evidence available to the authority) shows that the right of way was wrongly recorded on the Definitive Map and Statement.

## **4. CONSIDERATIONS**

- 4.1** This report considers whether Public Footpath MST28 (“MST28”), as recorded on the Definitive Map and Statement (“DMS”), which is the legal record of public rights of way for the County, is subject to a drafting error and as a consequence, should be deleted.
- 4.2** The DMS was compiled under the National Parks and Access to the Countryside Act 1949. The process was conducted in the public domain and the associated regulations required that its various stages be made subject to public scrutiny and appeal. As set out in s56(1)(a)&(e) Wildlife & Countryside Act 1981, the map is conclusive evidence as to the existence and status of any right of way shown, whilst the statement is conclusive evidence as to the position, width and limitations or conditions.
- 4.3** It follows that a higher test must be applied to investigations for the deletion of a designated public highway under s53(3)(c)(iii) Wildlife and Countryside Act 1981 (“WCA81”). The test to be considered is whether, on the balance of probabilities, there is sufficient evidence to show that the recorded public

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

- 4.4 *Trevelyan v Secretary of State For Environment, Transport & Regions [2001]* related to an order to delete a bridleway from the DMS. Lord Phillips stated: “*Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.*”

#### 4.5 EXTRACT OF RELEVANT GUIDANCE FROM DEFRA’S RIGHTS OF WAY CIRCULAR 1/09

##### **“Deletion or downgrading of ways shown on the DMS**

4.30 *The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.*

4.31 *Once prepared, and until subsequently revised, the DMS is conclusive evidence in rights of way disputes. Authorities are under a duty to make an order modifying the DMS where they have evidence that a public right of way should be downgraded or deleted. They may discover evidence themselves or evidence may be presented with an application to modify the map and statement.*

4.32 *Notwithstanding the clear starting point in relation to the possible deletion or downgrading of ways described in paragraphs 4.30 and 4.31, the powers in section 53(3) of the 1981 Act include the making of orders to delete or downgrade rights of way shown on the DMS in cases where evidence shows that rights did not exist at the time when they were first shown on the map. In making an order the authority must be able to say, in accordance with Section 53(3) (c) (ii) or (iii), that a highway of a particular description ought to be shown on the map and statement as a highway of a different description; or that there is no public right of way over land shown in the map and statement as a highway of any description.*

4.33 *The evidence needed to remove what is shown as a public right from such an authoritative record as the DMS – and this would equally apply to the downgrading of a way with “higher” rights to a way with “lower” rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*

- **the evidence must be new & cogent** (Ed’s note: “convincing & sound”).
- **the evidence must be of sufficient substance to displace the presumption that the DM is correct.**

- 4.6 Where an order to change the DMS is made, the process allows for objections to the order to be submitted. Further evidence could potentially be put forward for examination along with an objection. In these circumstances, the County Council cannot confirm the order, and the matter would need to be referred to the Secretary of State. Where an order has been made and no objections are received, the Order Making Authority (“OMA”) can confirm it.

# REPORT

## 5. BACKGROUND (all appendices take the form of PowerPoint slides).

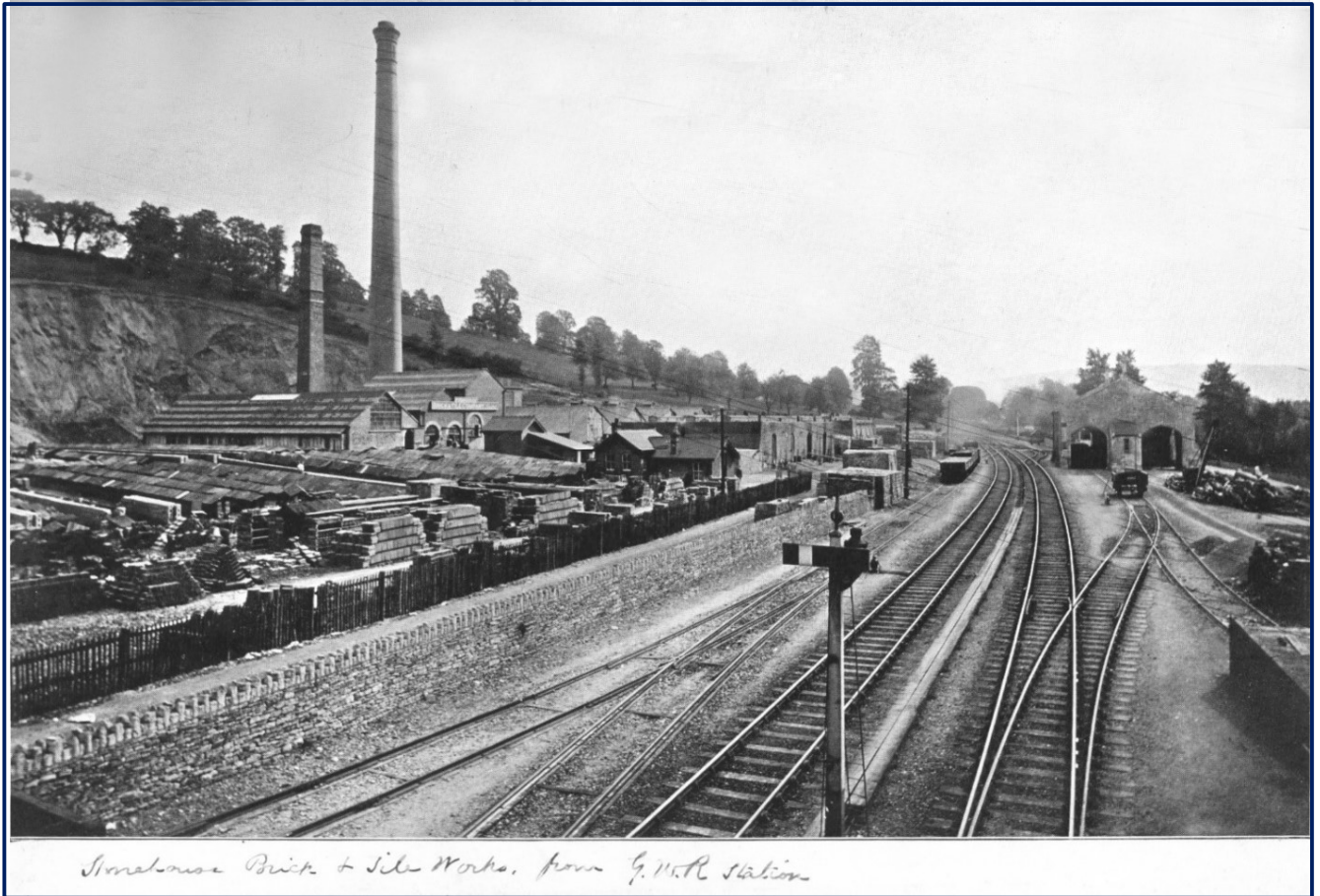
- 5.1 A map at scale 1:10,000 is attached (**slide 2**) showing the location of MST28. It is located across land historically known as Gays Hill within Stonehouse Parish. It is bounded to the west and south by a 1980s residential housing estate, the latter constructed on the site of an old quarry, owned, and worked by the Stonehouse Brick and Tile Company (1891-1968). To the north and east, MST28 abuts agricultural land. It is located within Ordnance Survey Grid Square SO 8105.
- 5.2 Gloucestershire County Council instigated this investigation following receipt of five Definitive Map Modification Order (“DMMO”) applications (573/11/212(6)(7)(8)(9)&(10)), submitted by Stonehouse Town Council on 4 July 2023. MST28 crosses land subject to these applications for which notification was served upon the affected landowners.

## 6. DESCRIPTION OF PUBLIC FOOTPATH MST28 AS RECORDED ON DEFINITIVE MAP

- 6.1 The 1:2500 scale plan (**slide 3**) shows MST28 commencing at a point marked A at Ordnance Survey Grid Reference (“OSGR”) SO 8120/ 0534, at its junction with Public Footpath MST30. It runs in a west south westerly direction for approximately 79 metres across a grass field to a field boundary stile (recently removed) at a point marked B at OSGR SO 8118/ 0531. It continues in a south south westerly direction across a further grass field for approximately 44m before crossing an area of excavated quarry. The lower end of the quarry was later subject to development. Two properties; No’s 67 & 52 Rosedale Avenue, were built across the official alignment of MST28. The route terminates at Public Footpath MST27, abutting the railway, at a point marked C at OSGR SO8106/ 0509.
- 6.2 Nature has reclaimed much of the quarry since its closure in 1968. The scrub and woodland make it impossible to appreciate its extent and scale. The two photos below, ©1936, courtesy of the Stonehouse History Group, provide some perspective as to its size. Contemporary maps of this time will show that MST28 had been overtaken by the quarry.



The photograph below, is taken from a lower point, allowing for the scale and depth of the quarry to be appreciated.



## 7. CONSULTATIONS

On 25 July 2024, the following organisations, user groups and landowners (as identified by Land Registry) were consulted regarding this application: Stonehouse Town Council, Ms Maiik, Mr & Mrs Godsell, Taylor Wimpey (Melbourne Investments) Stroud District Council, County Councillor Housden, The Ramblers Association, The British Horse Society, Cycling UK, Open Spaces Society, and the Trail Riders Fellowship. The only response (beyond electronic email read receipt) was received from Mr Townley, representative of the Open Spaces Society on 8 September 2024. His letter is held as a background paper and can be read in full.

Comments made by Mr Townley include; *“...Whether or not there is a statutory diversion of either the route shown on the 1921 or 1938 maps there is a longstanding common law right to deviate when a route has been obstructed. Riddell and Trevellyn draw attention to this stating “If the obstruction is by the holder of the land crossed by the way, there is an undoubted right onto other land belonging to the same landowner in order to get round the obstruction”. The authors draw attention to two cases Stacey and Sherrin(1913) and Dawes and Hawkins (1860) to support this position noting in respect of Dawes that the obstruction is “more than temporary”..... “It is therefore contended that in addition to the original route which has been added to the definitive route as MST28, there are two other routes that should be added to the DEFINITIVE MAP – the 1921 diversion route and the 1938 route. They are not in any stretch of the imagination “permissive” paths – they are paths which were accepted by the then owner (Stonehouse Brick and Tile Works Limited and their successors) as public rights of way because of their criminal and illegal actions as landowner to obstruct rights of way.*

*The other point I would made is that the Bruton Knowles file for the proposed auction by the liquidators of the Stonehouse Brick and Tile Works company in 1963 includes a plan of the site showing the boundary of the land to be sold and within it includes a diverted route for a path east of the quarry workings. As you will note this curves round the quarry workings and re-joins MST28 to the north of the quarry, on its original route. It is therefore submitted that whatever happens to the route across the Quarry, the council should work to preserve this section of MS28 AND maintain a connection from MST28 close to the top of the quarry edge to MST62, which would require an additional route to those the subject of DMMO claims to also be added to the Definitive Map . A copy of this map is included in appendix D.*

## **8. DOCUMENTARY EVIDENCE**

- 8.1 Section 32 of the Highways Act 1980, states that “a Court or other tribunal, when determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified in the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced”.**
- 8.2** The County Archivist has examined sources in the Gloucestershire County Record Office to see if this route is marked in any way and has identified other sources which might be useful in establishing the status of any right of way along this route. These sources have then been checked and added to by the Asset Data Officer. They are listed in chronological order.
- 8.3** Some of the slides show an image digitally overlaid with another. This is achieved through a process called “georeferencing”. Georeferencing involves aligning a digital copy of, say, a map or aerial photograph over another by matching specific points, such as field edges, landmarks or street corners, so they overlap correctly. This process is informative as it allows us to compare and analyse changes over time.
- 8.4 Ordnance Survey Maps;** The original surveys were conducted by Royal Engineers at the time of the Napoleonic wars to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county’s Definitive Map .

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (© 1898 in Gloucestershire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is not evidence of a public right of way.

- 8.5 Ordnance Survey 1811 2”:1 mile, Pen & Ink Old Series preparatory drawing, attributed to Robert Dawson (Cheltenham OSD172) Wikimedia** - This drawing shows Doverow Hill but does not identify any routes in the vicinity of MST28.
- 8.6 1824 Bryant & Greenwoods Maps** – do not show any routes in the vicinity of MST28.
- 8.7 Ordnance Survey 1<sup>st</sup> edition 1”:1 mile 1830 (Published at the Tower of London) Sheet 35 (National Library of Australia)** - This is a colour washed first edition 1”:1mile map “engraved at the Drawing Room in the Tower under the Direction of Lieut. Col. Colby of the Royal

*Engineers”...”Published 1 May 1830” from the pen and ink drawings of the Royal Corps of Military Surveyors and Draughtsmen as referred to in para 8.5 above. Doverow Wood is shown but MST28 is not identified.*

- 8.8 Stonehouse Tithe Map 1839 (Gloucestershire Archives - GDR/T1/172) - evidence of ‘original’ track;** MST28 came into existence due to the quarrying of a track (“original track”) across a field to the west on a different alignment. This map appears to show this original track.
- 8.9 Stonehouse Inclosure Map & Award 1844 (Gloucestershire Archives – Q/RI/139)** Does not cover the area of MST28 (or the original track).
- 8.10 Ordnance Survey Second Edition; 6”1 mile, Map sheets 49NW & 41SW; published 1903 - (National Library of Scotland);** This edition shows a track across agricultural fields (annotated F.P) abutting a quarry (**slide 6**). The route has been georeferenced against a modern map to show its alignment at this time.
- 8.11 Stonehouse Parish Council minutes (Gays Hill): Regarding the diversion of this ‘original’ route; 17 Jan 1908;** *“The Council accepted a plan (slide 7) submitted by the Brick & Tile Co.in 1904 and are willing to meet them to further discuss this, failing which they will feel obliged to take measures to protect the public rights”.*

**25 March 1908;** Members of the parish council met Mr Davies, of the Brick & Tile Co. and advised that *“ they were willing to come to terms as to the path, which would satisfy the Council. These terms are contained in a letter from the Brick & Tile Co. dated 23 March as follows: To give a right of way up Gays Hill as suggested in place of the present one and undertake not to divert that way without the consent of the Parish Council as the Local Authority for the time being, provided the Parish Council will join us in persuading the public to use the new way....”*

**15 April 1908;** *“A letter dated 4 April 1908 was read re the right of way up Gays Hill and it was proposed by G.W.Sibley & seconded by C.Smith, that the clerk write and say that we accept the terms contained in the letter as far as we can as a parish council”.* By georeferencing the plan submitted by the Stonehouse Brick & Tile Co. with a modern map (with public rights of way layer), it appears that the proposed ‘new red’ diverted route was the route known today as MST28; A-B-C.

- 8.12 National Archives - Inland Revenue, maps compiled under the Finance Act, 1910, based on Ordnance Survey 25”:** 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files. Map sheets 49.2 & 41.14.

The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. To ascertain the value of all land as of 30th April 1909, a survey was conducted assessing each piece of land. The OS 2nd Edition Plans (1898 -1902 in Gloucestershire) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or ‘hereditament’ number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The entire process was conducted under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry an important level of evidential weight as to the routes which they show to exist but are unlikely to be good evidence that rights of way do not exist.

Georeferencing the Finance Act map sheets with a modern map, suggests that the 'original' route described in paragraph 8.11, crossed hereditament 998 whilst the newly diverted route, MST28, crossed hereditament 1047. Both fields were in the ownership of the Stonehouse Brick & Tile Co. No deduction of tax was claimed for a public right of way across 998 whilst a £15.00 deduction was claimed across 1047. As no other tracks were identified across 1047, it would be reasonable to attribute the deduction to MST28 (slide 8).

- 8.13 Ordnance Survey; Third Edition, 25":1 mile, Map sheets 49.2 & 41.14; published 1923- (National library of Scotland)- (slide 9);** As per the earlier 6inch editions, this 25inch edition shows the northern section of MST28 across land adjacent to Bramble Lane with the same alignment. The quarry however has been extended and this edition shows the 'original' route along its diverted 'new' (annotated F.P) alignment abutting the quarry at this point. Georeferencing this map on the Definitive Map identifies this route as MST28.
- 8.14 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 ("NPACA 1949"); Glos Archives (any paperwork referred to is held as a background paper to this report).**
- 8.15** Under this legislation, all highway authorities were required to draw up a DMS which together would form the legal record of public rights of way. Gloucestershire County Council initially provided parish councils with Ordnance Survey 6":1 mile, 1923 edition maps to record their local public path networks. The returned documents are referred to as 'Parish Surveys' or 'Original Submissions.'
- 8.16** Stonehouse Parish Council's original submission included a written report along with two maps. A covering letter dated 19 September 1950, stated, "*...please find Maps showing all footpaths in the parish of Stonehouse as at present known and which have been approved by a Parish Meeting held on June 5<sup>th</sup> last, together with a Schedule giving number and location*".
- 8.17** The road network was marked in brown whilst the public footpaths were coloured red. MST28 was claimed by the parish council and numbered initially as No.18. The route was described in the schedule as follows, "*From footpath 16 (now MST27 (Ed's note)) up the side of Gays hill and over two stiles effect a junction with footpath 10 (now MST30 (Ed's note))*".
- 8.18** The surveys once completed were sent to the Divisional Surveyor's Office at the County Council where officers would examine the returned maps, making queries and seeking clarification where necessary before publishing the Draft Map (based upon revised maps 1936-38) on 8 May 1953 and made subject to public consultation for nearly 9 months until 31 January 1954. The Draft Map covering Stonehouse including sheets 4 and 10. An extract from No.4 is held (slide 10). Sheet 10, covering the southern end of MST28 appears to have been lost. The footpaths are now coloured purple and have been re-numbered, i.e., No.18 (now MST28), No.10 (now MST30) & No.16 (now MST27). MST28 is identified as the 'new' route adjacent to the quarry, subject to the agreed diversion in 1908, the Finance Act and the 1923 third edition OS map. The Draft Written Statement describes MST28 as a footpath connecting MST27 & MST30 across field parcels; 185,184 & 173 (1936 edition).
- 8.19 Draft Map - 1954 objections re obstruction of MST28**

The Draft Map was based upon a 6" OS County Services revised map, published 1938. It did not therefore record the true extent of the quarry at that time. The 6" OS County Series Map, published 1954 (slide 11) shows its true extent and its effect on MST28. Two objections were received to the Draft Map regarding MST28.

- 1) Stonehouse Parish Council (recorded; No.27) raised objections to various routes shown on the Draft Map by letter dated 11 January 1954.. One of the objections was described as follows: "*.....A further point has arisen since Mr Conway's visit with regard to Footpath No.28. The Brickworks Claypit is now much larger in area than that shown on the map, and in consequence*

*the footpath as at present shown on the draft map, does not exist, it should be moved to the right to occupy the track marked "footpath" (or FP) on the map slightly to the left of the windpump, thence continuing on or almost straight line to meet footpath no.30".*

The County Surveyor added the following handwritten note with regard to MST28, "*This can be adjusted at Prov (Provisional Map (Ed's note)) stage*".

- 2) The Ramblers' Association raised several objections and comments under a letter dated January 1954, "*.... With regard to the draft map and statement for the Rural District of Stroud.*" One of these related to a route shown on maps 4 & 10 and described as follows: "*Stonehouse: From path No27 (alongside railway) on Map 10 by enclosed footpath at east side of Stonehouse Brick & Tile Works, as per Provisional Edition O.S. to path No28 on Map 4 (1924 edition) at stile at north end of first field from bottom of Map 4*". The Reason for this objection was given as "*Path appears to have been diverted eastwards between 1924 survey & Provisional edition survey (author's note - Ordnance Survey, 1:25,000 maps:1945-1973). Path 28 on Map 10 is now part of the quarry, whereas the path claimed has been used for many years*".

**8.20** Mr W.G. Milne QC, a Barrister-at-Law, and an Acting County Justice, was appointed to hear the representations and objections made to the County Council in connection with the Footpath Survey and to submit his recommendations. A copy of the Highways Committee Report dated 8 June 1959 included Mr Milnes report: Under (1) it stated, "*The following objections and claims in respect of the Draft Map were resolved by negotiation between the Parish Councils and Objectors, hence no hearings were necessary, and my recommendations are as follows:-*

- Under part (iv) – In the Rural District of Stroud – Part objection No.27 by Stonehouse parish Council – "*That part of footpath MST28 which is shown across the Brickworks Claypits be re-aligned to follow the track marked F.P. on the O.S. map slightly to the east of its present position*".

The Highway Committee resolved "*That the Highways Committee, in pursuance of the powers delegated to them by the County Council as Surveying Authority, hereby determine to modify the particulars contained in the Draft Map and Statement in accordance with the foregoing Report and Recommendations of Mr W.G.Milne; further, that the Clerk of the County Council be authorised to take all such action in connection with the determination of the Committee as is referred to in the provisions of the National Parks & Access to the Countryside Act 1949.* The Definitive Statement was not updated to reflect this resolution.

### **8.21 Draft Map - 1959 'Claim 2' (SUGGESTED DRAFTING ERROR)**

**8.22** On 10 June 1959, the Deputy County Surveyor wrote to Stonehouse Parish Council advising them that "*During the deposit of the Draft Map of Public Rights of Way, I received several objections concerning footpaths in the Parish of Stonehouse*"....." In addition to the above, (Ed's note- described objections) *the Ramblers Association have made three claims, these are as follows:...*Claim 2 – "*A length of footpath from MST27 (alongside the railway) via enclosed footpath on east side of Stonehouse Brick & Tile works to footpath MST28 at a stile at north end of first field*". An attached map identified the location of claim 2 (**slide 12 – Map 1**). Claim 2 fits the description of Stonehouse Parish Council's 1954 objection and the subsequent agreed diversion of MST28, "*That part of footpath MST28 which is shown across the Brickworks Claypits be re-aligned to follow the track marked F.P. on the O.S. map slightly to the east of its present position*". This was corroborated by Stonehouse Parish Council, who responded by letter dated 27 October 1959 and stated regarding Claim 2, "*This path has been diverted to the south with the agreement of the Parish Council.....*".

**8.23** The County Surveyor appears to have considered claim 2 to be an entirely separate additional route and on 6 November 1959, he wrote to the Stonehouse Brick & Tile Company regarding the claims. The company was asked to confirm that they crossed land in their ownership and "*...I shall be glad if you will confirm .....whether or not you are agreeable to the paths being marked on future maps prepared*

*under the Public Rights of way Survey.*” The Stonehouse Brick & Tile Company responded on 19 November 1959 stating “ *Thank you for your letter and Draft Map of Public Rights of Way. We are agreeable to the paths being marked on future maps. You will notice we have made a slight variation of the path near the edge of our quarry. This diversion was made some three years ago in co-operation with the Parish Council, due chiefly to its dangerous nature*” (**slide 12 – Map 2**). (*This is the route referred to by Mr Townley shown on the alleged 1963 conveyance map prepared by the liquidators for the Stonehouse Brick & Tile Co. & Halls-Keck Investments*). The County Surveyor responded on 21 November 1959 to say, “*Thank you for your letter of the 19<sup>th</sup> instant confirming that you are agreeable to the paths claimed by the Ramblers’ Association and the Stonehouse Parish Council being marked on future maps.....I will arrange for the path near the edge of the quarry to be marked on the line which you indicated on the plan*”.

- 8.24** The Highway Committee minutes of 7 December 1959 included; “*That an additional footpath be marked in Stonehouse Parish on a line previously agreed between the Stonehouse Brick & Tile Co. Ltd, and the Parish Council along the eastern perimeter of the Claypitts, Stonehouse*”.
- 8.25** **Claim 2, which was the agreed diverted route of MST28, appears to have been overtaken by the County Surveyor’s agreement to the landowner’s subsequent request to further divert it to the position known today as MST62. The effect of this was to extinguish MST28.**
- 8.26** Gloucestershire County Council produced a Modified Draft Map to reflect the amendments in response to the Draft Map (**slide 13**). This map was drawn across two map sheets; No’s 4 & 10. Sheet 4 (northern half), shows the original route of MST28 unaffected by the quarry. A pencil line is drawn along what appears to be the first agreed diversion as claimed by the Ramblers Association (*connecting with MST28*). The route of No.62 (pencil annotation on this sheet) is however shown connecting with MST30 as opposed to MST28 (point B) (perhaps because Stonehouse Parish Council described the alignment of MST28 as: “*...it should be moved to the right to occupy the track marked “footpath” (or FP) on the map slightly to the left of the windpump, thence continuing on or almost straight line to meet footpath no.30*”). Sheet 10 (southern half) shows the obstructed route of MST28 across the quarry, the first agreed diversion of MST28, (tippexed out), which perhaps suggests an acknowledgement by the County Surveyor that it was superseded by the landowner’s subsequent request to further re-align the route, also shown and numbered MST28 on this map. This does not explain however, why the obstructed route of MST28 was retained.
- 8.27** This Modified Draft Map was placed on deposit on 7 May 1965 and was open to further public consultation until 21 June 1965. An extract of the London Gazette, dated 7 May 1965, included the following changes for Stonehouse Parish, apparently confirming the County Surveyor’s confusion with regard to the alignment of MST28.
- Maps No.4 & 10. Add footpath along the eastern perimeter of the Claypitts commencing at its junction with MST27 and extending north to its junction with MST30.
  - Map No.10. Re-align that part of footpath MST28 which is shown across the Brickworks claypitts such that it follows the track marked F.P. on the O.S.Map, slightly to the east of its present position.
- 8.28** The next stage of the process was the Provisional Map and Statement (produced 1971) (**slide 14**). The apparent error on the Modified Draft Map was transposed onto the Provisional Map, i.e., the original route of MST28 across the quarry is retained, along with the route subject to the extended diversion, ultimately identified as 62. The accompanying Written Statement located the route of MST62 across field parcels; 184a & 184, which is the alignment of the original MST28 across the quarry and referenced the Highway Committee resolution of 7 December 1959 against the entry for MST62. It is noted that the entry for MST28 in this document did not reference the first Highway Committee agreement of June 1959, further illustrating the confusion. The Provisional Map was made subject to consultation by landowners/ representatives only before the final stage which was the DM (**slide 14**). No further

comments or objections were made and therefore the drafting error on the Modified Draft Map which was transposed onto the Provisional Map was subsequently copied onto the DM.

## 9. CONCLUSIONS

- 9.1 On the balance of probability, the documentary evidence is considered to be of sufficient substance to displace the presumption that the alignment of MST28 on the DMS, is correct. MST28 was part of the multi-stage process, which took place over a number of years, and was subject to consultation with parish councils, the landowner and the public. In tandem with this process was the ever expanding quarry, which the evidence in this report suggests, resulted in a previously agreed diversion having to be re-negotiated. It is considered that the DMS does not reflect the first agreed diversion from MST28 between points B-C or the fact that it was subsequently overtaken by the effects of the quarry's further expansion and the landowner's request to extend the route eastwards to the route known today as MST62 and northwards, as claimed by Stonehouse Parish Council, to connect with MST30. There appears to have been much confusion regarding the alignment of MST28 and this report cannot explain why the County Surveyor considered that 2 independent routes had been dedicated.
- 9.2 When considering whether MST28 should be deleted from the legal record (even though it is for the most part physically unusable), it is accepted that any use of this path after its inclusion on the Definitive Map, whether rightly or wrongly, *cannot give rise to a claim* of presumed dedication under statute or inferred dedication at common law for the reason that by virtue of the path being shown on the legal record, people had a right to use it. Use therefore would be 'by right' and not 'as of right'.
- 9.3 It has been claimed that MST28 was obstructed by the quarry on the 1921 OS edition & then again on the 1936 revision, giving rise to the inference at common law that highway rights were established along them under the "*right to deviate*" principle. First, this report has shown that by georeferencing the 1921 OS map onto a modern-day base map with the addition of public rights of way, MST28 abutted the quarry and was not obstructed by it at this time. Georeferencing the 1936 OS edition, however, did show MST28 lost to the quarry. The 'right to deviate' however is not deemed to apply because there was no route to deviate from due to the fact that MST28 had been permanently lost to the quarry and could not be returned to unlike the case in *Dawes v Hawkins* 1860, albeit nearly 20 years later. It could be inferred however that highway rights were dedicated at common law along the approved 'diverted' section B-C (slide 11- Map1) on the basis of the claimed use by Stonehouse Parish Council in 1954 and by the Ramblers Association's claims of 1954 & 1959, subsequently approved by the Highway Committee in June 1959. However, these discussions took place as part of the statutory process of compiling the DMS. The evidence suggests that consultation with the landowner, the Brick & Tile Co. in 1959, resulted in their rejection of the approved diverted route, seeking its extension further east. This was approved, giving rise to MST62. If we accept the evidence that MST28 was subject to a further approved diversion, this time connecting MST27 at the railway with MST30, this would have had the effect of extinguishing all highway rights along MST28, and also along the first approved diversion (subject to the 1936-38 editions) between points B-C.
- 9.4 Mr Townley also suggested that dedication could be inferred along the connecting route between MST62 and MST28 (B-D – slide 11 (Map 2)) on the basis that this route was claimed by the Ramblers Association in 1954 & 1959 stating that "*the path claimed has been used for many years*". The Stonehouse Brick & Tile Co. appeared to support this connection when they identified their preferred route, and the 1963 conveyance plan prepared by the liquidators for the Stonehouse Brick & Tile Co. & Halls-Keck Investments identified the same alignment. However, the route added to the DMS reflects the route recommended by Stonehouse Parish Council that "*..it should be moved to the right to occupy the track marked "footpath" (or FP) on the map slightly to the left of the windpump, thence continuing on or almost straight line to meet footpath no.30*". No further comments or objections have been found regarding this omitted section from the Ramblers Association. Following the presumption of regularity, we may infer that this alignment issue was considered at the time as part of the DMS process and the route B-D was rejected in favour of the alignment connecting point D with MST30.

**9.5** If the foregoing conclusion is accepted, this leaves us with the question of how we address MST28 'erroneously' remaining on the Definitive Map . The Court of Appeal in R v Secretary of State for the Environment, ex parte Burrows, and Simms (1990) held that sections 53 and 56 could be reconciled once the purpose of the legislation as a whole was understood. The map was, under section 56, conclusive evidence of the existence of a public right of way, unless and until there was a modification of the map under the provisions of section 53 of the 1981 Act.

**9.6** Thus, the recommendation is as follows:

- That an Order be made to delete Public Footpath MST28 from the Definitive Map and Statement of Public Rights of Way between the following points: A-B-C, on the basis that it is subject to a drafting error.