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APPEAL FORM



National Rights of Way Casework Team
Government Office for the North East
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4WH

WILDLIFE AND COUNTRYSIDE ACT 1981, SECTION 53 AND SCHEDULE 14

Appeal to the Secretary of State Secretary of State for Environment, Food and Rural Affairs under paragraph 4 (1)

1. Name: DR. NICHOLAS JAMES GILBERT	
2. Address: WYCHBURY, GREAT WITCOMBE GLOS Postcode: GL3 4TS Daytime telephone: [REDACTED]	
3. Name of surveying authority: Gloucestershire County Council	
4. Title of definitive map: Gloucester Rural	
5. Description of the way: The claimed footpath commences from class 4 road number 41143 known as Witcombe Farm Lane and runs in a southerly and then south-westerly direction for 210m to its junction with existing footpath AWG 7.	
6. Date and reference of application to surveying authority: 6/09/05 ref: 573/11/101 (1)	7. Date of service of notice of decision: 6/09/05

Grounds of appeal:

Please see attached letter entitled:
" Grounds for Appeal Against A Refusal to Grant a
Modification Order for an Additional Public Footpath
Through Witcombe Farm, Gloucestershire. 30/04/07.

(please continue on separate sheet(s) if necessary)

enclose copies of:


the application made to the surveying authority
the notices associated with the application
a map showing the alleged right(s) of way
the authority's decision letter

other relevant supporting documentation:

Joint report of The Group Director: Environment And The
Head of Legal And Democratic Services. 20/03/07 x2
Minutes of The Commons and Rights of Way Committee 20/03/07 x2
Public Path evidence forms - two samples x 2
My Public path evidence form x 2
10 Photographs to demonstrate problems with alternative routes. x2
Letter to Miss Burge in support of application and rebutting Landowner
evidence 26/10/06 x2

I confirm that a copy of this appeal and supporting papers may be made available for public inspection.

I served notice of this appeal on the surveying authority on: 9/09/07 [date]

Signed  Date 30/09/07

This form should now be returned to the address shown at the top of this form.

Grounds for Appeal Against A Refusal to Grant a
Modification Order for an Additional Public Footpath
Through Witcombe Farm, Gloucestershire. 30/04/07

This was a carefully considered and weighty application made on behalf of fifty people of good standing with appropriately served notices and completed and detailed evidence forms, which took eighteen months to come to committee.

The Joint Report Of The Group Director: Environment and The Head Of Legal and Democratic Services runs to seventy pages and concludes that... "the applicant has produced credible evidence of public enjoyment of the path through Witcombe Farm for over 20 years, therefore it is reasonable to say that under Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 that a right of way is reasonably alleged to subsist. Therefore it is recommended that a public footpath be added to the Definitive Map of Public Rights of Way through Witcombe Farm from Witcombe Farm Lane to public footpath AGW 4.

A Commons and Rights Of Way Committee sat on 20th March 2007 to consider this application. Unfortunately, of the eight potential committee members only four attended and, of these Geraldene Gillespie declined to take part in the discussion and voting because she felt there was a conflict of interest because she was a member of Gloucestershire Wildlife Trust, who oversee a bird sanctuary at Wicombe Reservoirs, the main destination of the footpath in question. She did this despite being informed by the Senior Lawyer present that it was unnecessary to abstain. Thus there were only three members of the committee who took part, including a substitute Chairman.

Miss Sarah Burge, the Public Rights of Way Technician handling the case showed a video presentation of the route in question and then went through the salient parts of the Joint Group report, which took approximately an hour.

The three Councillors then spent ten to fifteen minutes considering the case, much of it spent in silence, mumbling or vacillating and appearing to look for reasons why they could refuse the application. They were heard to make such comments as, " Who are these people? What are they doing – Creeping by at night?" Another councillor said that he would, "Prefer higher powers" to make the decision, despite being advised by the Lawyer that they could not simply pass the responsibility onwards.

Nevertheless the councillors chose to turn down the application on the following grounds:

1. Much was made of a poll organized by the then chairman of Great Witcombe Parish Meeting, Mr. Trevor Buxton who, in November 2005, asked parishioners if they supported the application for the footpath to be adopted as a public right of way. The results showed a response of 51% of the 84 people asked, of whom 27 people were against it (32% of those asked) and 16 in favour (19% of those asked).

Council members seemed to lay great store in this because they took this as a yardstick of local opinion. However it was not explained to them that the organizer was himself a witness for the opposition, nor that a significant number of the people responding to the vote were employees or lessees of the landowner, such as the gamekeeper and his wife, the tractor driver and several lessees who were only temporarily resident in the village.

Also, because the footpath in question is near one edge of the village boundary, some of the people living very close to the footpath were excluded because they were not technically within the parish boundary.

In any case this unofficial poll should not have been given such attention because it did not canvass opinion from all of the people affected by the decision, especially those in adjacent parishes but, more importantly, it was only attempting to gauge public opinion and not dealing with the facts and evidence of usage of the pathway over the years.

It had been clearly explained to me at an early stage by Miss Sarah Burge that the case would depend on the evidence of consistent usage over time and not on mere opinion of a select group of people as to whether they thought it was a good idea or not.

2. The Council also were told that there was no documentary evidence in support of the application. Having said that The Joint Report stated, "The Bryant Map of Gloucestershire appears to show the claimed footpath, although it is shown running to the east of Witcombe Farm, rather than to the west as it does today (the standards of accuracy of some of Bryant's maps differ from county to county). Bryant regarded this route as a "lane or bridleway".

This shows that the claimed footpath existed as a physical feature since as early as 1824".

However I made it plain in my application that this was made on the grounds of usage over many years (in excess of twenty years) and not on documentary evidence and this should have been the prime determining factor. This was supported by The Joint Report and made clear to the councillors.

3. The councillors appeared to be most concerned that there was a conflict of evidence between the supporting witnesses and the landowner. However they were clearly directed that, "Although there is conflicting evidence between the applicant and supporting witnesses and the landowner and opposing witnesses, the applicant has produced credible evidence of public enjoyment of the path through Witcombe Farm for over twenty years, therefore it is reasonable to say that under Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 that a right of way is reasonably alleged to subsist".

One is bound to wonder why these three councillors should go against their own department's recommendation and value the evidence of twenty opponents over fifty supporters of the application.

It is a matter of fact that all three councillors are Conservative Party members, and it is also true that the landowning family, The Hicks Beach's have a long and strong association with The Conservative Party, previous generations having represented the party as members of parliament.

Added to this, the Chairman himself lives on a farm.

Consequently, the least one can say is that there is clearly the potential for bias in this case.

4. The Councillors attached importance to the fact that no application had been made in the 1950's when the Definitive Map was first produced. However the fact that no previous application has been made has no relevance to this application. It was only when the landowner began stopping people using the pathway that it became an issue to those using it.

5. The Councillors were concerned that there were differences in the evidence of some of the witnesses for the application concerning the presence or otherwise of a gate at, 'Point A'.

In fact the explanation for this is simply that, and according to the landowner's own witness and longstanding employee, Mr. Arnold Price, (sadly recently deceased) who lived closest to this point, the gate was only present until the early 1970's. Thus many of the witnesses would not have used the path prior to that time. Since the gate was almost always open not everyone who did use the route in those days might have remembered it being there. In any case the presence of a gate does not in itself preclude the existence of a right of way.

6. The councillors were also concerned that a letter from The Environment Directorate to The Rambler's Association had not been answered. They took this to indicate that The Rambler's could not produce anyone who had walked the footpath and therefore as evidence against such usage.

Someone from The Rambler's did explain after the meeting that there was a new lady in post and that she had not managed to organize a reply in time. However, having produced fifty witnesses, which I am told is an unusually high number anyway, I cannot see why The Councillors would feel the need for even more witnesses! How does this have any bearing on the evidence already submitted?

The significance of this application lies in the fact that, although there are two other paths to Witcombe Reservoirs, these are over difficult terrain, which is not infrequently flooded (it is no coincidence that a reservoir was constructed here) and impassable to all but the most agile. These alternative routes have styles and gateways and single-plank bridges, which up until this application were overgrown and neglected. One is also likely to encounter horses, which can be aggressive, especially to those walking dogs. In contrast, the pathway applied for is a metalled, single-track road and makes easy access to the reservoirs for disabled people or wheelchair users.

The effect of a refusal of this application would be to bar many elderly or infirm people from visiting a local beauty spot and nature reservation and the countryside beyond. Consequently I would ask you sincerely to take the time to consider the evidence in a more thorough way than the committee in Gloucestershire has done, and do justice to the people who have taken the trouble to give there evidence in good faith.

In particular I would ask you if you would kindly read my letter to Miss Burge of 26/10/06, which contains the essentials of the application case.

I am the current Chairman Of Great Witcombe Parish Meeting. I attend a variety of meetings and I am left in no doubt that something improper has occurred at this committee meeting, either because of incompetence or of undue bias in favour of the landowner. In either case I feel that my application, and that of those who have supported me has not been properly and competently heard and I am grateful for your kind attention in reviewing the application.

A list of my enclosures is contained on the attached appeal form.

I am happy to answer any questions that may arise and you may find it useful to have the contact telephone number for Miss Sarah Burge of The Environment Directorate (tel. 01452 425522) who has been very helpful throughout this application procedure.

Yours faithfully,

Dr. N. J. Gilbert MBChB MRCPG DRCOG



COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Tuesday, 20 March 2007 in Meeting Room 1, Shire Hall Gloucester.

Membership:

Ron Allen	P	Geraldene Gillespie	P
Dennis Andrewartha	A	Robert Vines	A
Basil Booth	P*	Simon Wheeler	A
Mick Butler	A	Nigel Hanman	PS

P = Present: A = Apologies/Absence: S = Substitute: * = Chairperson

9. **CHAIRPERSON** – In the absence of Cllr Butler, the Chairperson, it was proposed, seconded and

RESOLVED

THAT Cllr Booth be elected as Chairperson for the meeting.

10. **MINUTES**

RESOLVED

THAT the minutes of the meeting held on 30 January 2007 be approved as a correct record and signed by the Chairperson.

11. **PUBLIC QUESTIONS** – There were no public questions
12. **MEMBERS' QUESTIONS** – There were no questions from members.
13. **APPLICATION FOR A MODIFICATION ORDER TO ADD TWO LENGTHS OF PUBLIC BRIDLEWAY AND TO RECLASSIFY PART OF EXISTING PUBLIC FOOTPATH AST 9 TO BRIDLEWAY SHEPPEY CORNER, STANTON TO SHENBERROW HILL, PARISH OF STANTON** – The committee considered a joint report from the Group Director: Environment, and the Head of Legal and Democratic Services. A video presentation was shown following the route of the claimed bridleways.

An application was made to add a section of bridleway to the Definitive Map of Public Rights of Way and to re-classify two sections of existing public footpath to the status of public bridleway.

A total of ten path evidence forms completed by ten named persons were submitted in support of the application. A summary of these evidence forms

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was considered by the Committee. A copy of part of the book Stanton and Snowhill written by E A Barnard and published in 1927, which described the construction of the Ladies' Walk was also submitted with the application.

The application was acknowledged as duly made on 11 January 2006. A map showing the landownership as well as a map showing existing and claimed routes were considered by the Committee.

The County Archivist had examined sources in the Gloucestershire County Record Office to see if this path was marked in any way and to identify other sources which might be useful in establishing the status of any right of way along this route. These sources had then been checked by the Modification Orders Officer.

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

Section 31(1) of the Highways Act 1980 stated that where a way over any land, other than a way of such character that use of it by the public could not give rise at Common Law to any presumption of dedication, had been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way was deemed to have been dedicated as a highway unless there was sufficient evidence that there was no intention during that period to dedicate it. Section 31(2) stated that the period of 20 years in sub-section (1) was to be calculated retrospectively from the date when the right of the public to use the way was brought into question through an overt act by the landowner which makes it clear to the public that their right was being challenged. The twenty years usage must furthermore be "without interruption" and the requirements of Section 31 would not be met if "there is sufficient evidence that there was no intention during that period to dedicate it".

Section 31(9) of the Highways Act 1980 said that nothing in this Section operated to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years. Paragraph 12 of Annex B of the Department of Environment Circular 2/93 stated that before making an order the surveying authority must have been satisfied that the evidence showed on the balance of probability that a right of way of a particular description existed.

In order to see whether there had been a full 20 years use by the public firstly it has to be ascertained whether there had been an overt act on the part of the landowner to bring it home to users that their right was being challenged. The 20 years use, for the purposes of Section 31, was to be dated retrospectively from this date of challenge.

The methods by which the public's right to use the way might be brought into question could include: the locking of a gate; putting up a notice denying the existence of a right of way; seeking a declaration that there was no highway over the land in question or physically preventing a walker from proceeding

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along a path. Whatever means were employed, it should be sufficient *"to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway... The persons to whom the challenge has to be brought home are the users of the way."* (Lord Dyson in *R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset CC* (1999))

The twenty years' use must be "without interruption" and this must be proved by the claimant. "An interruption" has been defined as "an actual and physical stopping of the public's enjoyment" (*Mersham Manor Ltd v Couldson Urban DC [1937]*) as opposed to an act which merely challenges the public's right. It is not a mere absence in the continuity of use. Moreover, such interruption must be with the intention to prevent public use. It is not sufficient if the interruption is for some other purpose.

There were two possible dates of challenge. The owner of Shenberrow Farm, clarified with Gloucestershire County Council what rights of way existed over his land, erecting new hand gates on the definitive footpaths that ran over his land and taking steps to prevent use by horses over the non-definitive ways that ran over his land in 2004. This included the erection of a sign which read *"Gloucestershire County Council NO HORSES Public Footpath Only"* and the chaining of the gate at the bottom to a peg concreted in the ground. This allowed the gate to be opened to allow walkers using AST 8 to pass through but not sufficiently widely to allow horses that might have been using the Ladies' Walk to pass through. The hunting gate between points B and E was also chained and padlocked at this time.

Another possible challenge to the public's use of the path as a bridleway was made by the applicant herself in 1992/3. On 18 November 1992 a complaint was received by Gloucestershire County Council about a locked gate on footpath AST 9 at SP 076339 (between points A and B). It was reported by the Cotswold Voluntary Warden Service that the landowner had trouble with people leaving the gate open, possibly deliberately, and horses escaping. She stated that she locked the gate from dusk to dawn, but admitted that occasionally it might be the middle of the morning before it was unlocked. There were complaints from Severn Trent who relied on the way to gain access to their reservoir that was being re-constructed further up the valley. The applicant was aware that AST 9 was the Cotswold Way and a well used footpath, but her concern was for her horses and that until the offenders were apprehended, she intended that the gate would remain locked from dusk to dawn. She suggested that a stile could be erected beside the gate and she stated that she was prepared to pay for one to be supplied by the County Council.

A complaint was received by a member of the public, who had checked the route on 25 January 1993 and noted a sign worded *"Private Property Access for Landowners and Vine Riders Only Warning Trespassers will be Prosecuted. J Gabb"* on the gate. The words *"+ walkers Cotswold Way"* had been added in small letters above the word *"warning"*. On 11 March 1993, the Public Rights of Way Unit wrote to the applicant warning that the County Council would not authorise any changes to gates and that the field gate should remain unlocked.

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She was also warned that the sign on the gate deterred public use and should be removed or re-worded so that it was clear that a public footpath existed. The Cotswold Wardens Service wrote to the County Council on 15 March 1993 noting that the intimidating notice relating to users of the right of way had been removed. In the public path evidence form that she had completed in support of this application, she stated that she was an owner of some of the land, and that "I have always allowed public access over my portion of the land".

When asked to account for her decision to lock a gate across a public right of way, the landowner defended her actions by stating that the gate was locked overnight to prevent her stock from straying from the field as a result of the gate being left open either by accident or on purpose. She also stated that she was willing to erect a stile next to the locked gate to allow walkers to continue using the way.

The primary intention of the landowner, in locking the gate at the end of their drive, was apparently to enhance security. An interruption within the meaning of Section 31(1) of the Highways Act 1980 must be with the intention of preventing public rights and this is confirmed by case law over a long period. In *Lewis v Thomas 1950* it was held that the locking of a gate with the intention of preventing cattle straying was not an interruption in fact of the user of the way by the public. Similarly, *Owen v Buckinghamshire County Council 1957* confirmed that the ploughing of the path was not an act which brought into question the right of the public to use the path. This principle has been upheld in a more recent case *Rowley and Cannock Gates Ltd v Secretary of State for Transport, Local Government and the Regions 2002*. In this case evidence was given by the landowner that a gate had been locked at night during the lambing season and the Inspector had drawn an analogy with *Lewis v Thomas*. In the *Rowley* case the Court concluded that the Inspector was justified in drawing this analogy as the gate had not been locked with the purpose of hindering use of the pathway.

Although the landowner stated, when questioned, that she had locked the gate to safeguard her livestock, a notice was erected and attached to the locked gate that suggested otherwise. The positioning and wording of the sign, about which complaints were received by Stanton Parish Council, Severn Trent and members of the public, makes it clear that the intention was to call into question the right of horse riders to use the path between Sheppey Corner and the reservoir. Thus the combination of a locked gate and a notice forbidding public use could be taken to be the act that made it clear that the right of the public to use the path was being called in to question and showed clearly the applicant's intention not to dedicate the claimed path as a bridleway. For the purposes of section 31 of the 1980 Highways Act, the twenty-year period could be taken to be 1972 to 1992.

In total, 10 user evidence forms were completed by people who had used the claimed route. It was not essential for the path or way to have been used for the full period of 20 years by the same persons; the period may accrue as a result of use by different persons for shorter periods. Nor did it matter that the use was not continuous in the sense that it may not have occurred everyday.

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For long usage to give rise to a presumption of dedication, user had to be without force, without secrecy and without permission. Use would not be prevented from being without permission by reason of the fact that neither users nor the landowner were aware that permission existed (*R v Secretary of State of the Environment ex parte Billson* (1998)).

Three of the witnesses benefited from express permission from the former owners of Shenberrow Farm, to ride over land belonging to the farm. A letter to the County Council of 28 November 2004 stated that there had been a verbal agreement with the family to use the claimed paths over Shenberrow Farm for thirty years.

Three of the other witnesses all acknowledged on their public path evidence forms that their use of the claimed path on horseback was with the permission of the previous owner / tenant.

An employee of the Stanton Estate until 1969, continued to use the claimed way on foot and horseback after employment ended. Use of the path while an employee of Stanton Court would not be as of right and could thus be discounted for the period prior to 1969. It was unclear as to whether use after 1969 was with the permission of the estate. Another claimed only to have used the path on-foot.

The fact that some people used the way with permission would not necessarily prevent use by the public in general from being without permission (*Beresford Trustees v Secretary of State for the Environment and Cumbria CC, 1995*). Consideration of the evidence of the remaining witnesses in establishing whether rights had come into being over the claimed route was given.

Two witnesses remained, whose use did not appear to have been with permission: one used the path since 1990, and another since 1968.

There was no statutory minimum level of user required for the purpose, and the matter did not seem to have been tested in the courts. However it was clear in case law that there had to be a sufficient level of use for the landowner to have been aware of it, and to have had the opportunity to resist it if he chose.

Use of the way should also have been by a sufficient number of people to show that it was used by the public, that was the people as a whole, or the community in general, and this may well vary from case to case. Very often the quantity of valid user evidence was less important in meeting these sufficiency tests than the quality.

The claimed route followed a track known as the New Road or Ladies' Walk between Sheppey Corner and the top of Shenberrow Hill and returned along a route that partly followed the course of public footpath AST 9. The Ladies' Walk was apparently laid out between 1921 and 1923 by Sir Philip Stott, the then owner of Stanton Court. Other sources suggested that the way was constructed between 1916 and 1918. The Ladies' Walk was constructed to

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provide a vehicular access from Stanton village to Shenberrow Farm and replaced a cart track that was now recorded on the Definitive Map as public bridleway AST 10 as the principal vehicular access from Stanton village to the farm. At that time all of the land over which the Ladies' Walk passed formed part of the Stanton Court Estate.

The parish survey of footpaths under the 1949 National Parks and Access to the Countryside Act questioned whether FST 9 should be included as a bridleway. There were objections from the tenant at Shenberrow Farm to the Draft Map and a hearing was held to consider his objections to this and other paths that ran over his land. The parish council supplied four witnesses (including the previous tenant of Shenberrow Farm) who gave evidence that the status of the path was that of footpath, and the hearing concluded that the path should be recorded on the Definitive Map as a public footpath. There were no subsequent appeals against either the Modified Draft or the Provisional Maps. Also amongst the evidence submitted for the hearing in 1954 was a document that listed the footpaths in the parish in 1881 which made reference to a route between Stanton and Shenberrow, but it was unclear as to its exact route, or the authority under which the document was compiled.

There was no objection to the Draft Map concerning its exclusion, despite the existence and status of paths across land in Mr Crump's tenancy at Shenberrow Hill being questioned by the Parish Council, Cheltenham Rural District Council, the North Cotswold Hunt and the Ramblers' Association at the hearing held into objections to the Draft Map in 1954.

Ordnance Survey maps carried a disclaimer that any representation of a road, track or path was no evidence of the existence of a right of way over it. However they did provide evidence of the physical existence and extent of a way, suggesting (but not proving) that the path had been in use for a longer period than that for which user evidence was available. The most westerly section of the Ladies' Walk was first shown, as a physical feature, on the 1923 25" to 1 mile map. The whole of the Ladies' Walk was shown on the 1955 6" to 1 mile Ordnance Survey map and on all subsequent editions. The way from Shenberrow Hill to the reservoir was not shown on the 1923, 1955 or 1970s maps.

The documentary evidence did not assist greatly in determining the status of the paths, but it did allow to trace the development of the claimed way as a physical feature.

It was the view of the Officers that no Order be made, as the majority of the user was by deemed or actual permission and hence not as of right. The remaining evidence, of which only one witness could claim use on horseback over the whole of the twenty-year period, and only one other alleged use over part of this period, did not meet the tests of sufficiency of user outlined above.

In response to questions members were reminded that the financial implications of upgrading the physical aspects of routes was not relevant. The existence or not of rights was what the members should consider in making a decision.

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Members of the Committee considered all the evidence, it was proposed, seconded and

RESOLVED

THAT no Modification Order be made to add the claimed bridleway to the Definitive Map of Public Rights of Way or to upgrade the existing public footpath to a bridleway due to insufficient evidence.

- 14. APPLICATION FOR A MODIFICATION ORDER FOR AN ADDITIONAL FOOTPATH THROUGH WITCOMBE FARM, PARISH OF GREAT WITCOMBE** – The Committee considered a joint report of the Group Director: Environment and the Head of Legal and Democratic Services. The Committee was also shown a video of the route in question.

The application was submitted on The 6th September 2005. The claimed footpath was described as being added from 'public road just south of Hillview Cottages' to public footpath at Witcombe Reservoirs.

Forty-nine Public Path Evidence Forms were submitted in support of the application, on behalf of 50 named witnesses, a summary of which was considered by the Committee. A number of comments, statements and witness evidence forms in opposition to the application on behalf of the landowner were also submitted. A summary of the opposing evidence forms and statements was also considered by the Committee.

The County Archivist examined sources available in the Gloucestershire Record Office, specifically Tithe, Inclosure, Ordnance Survey and Inland Revenue maps, to see if the footpath was marked in any way, and to identify other sources which might have been useful in establishing the existence of a footpath along the route.

A number of organisations and councils were consulted on the 12th October 2005 regarding the application, and their comments were considered by the Committee.

The applicant submitted comments in response to the Summary of Documentary Evidence and the Summary of Landowner Comments in October 2006. He says that after receiving the Summary of Landowner Comments, he spoke to most of the witnesses in support of the application and comments, "they were quite astounded by the landowner's denials of their evidence". Dr Gilbert collected a further 24 statements on behalf of 27 of the same witnesses specifically addressing comments made by the landowner. All comments were included in the report considered by the Committee.

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

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Section 31 (1) of the Highways Act 1980 stated that where a way over any land, other than a way of such character that use of it by the public could not give rise at Common Law to any presumption of dedication, had actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way was deemed to have been dedicated as a highway unless there was sufficient evidence there was no intention to during that period dedicate it. The period of 20 years in sub-section (1) was to be calculated retrospectively from the date when right of the public to use the way was bought into question. Through an overt act by the landowner which made it clear to the public that their right was being challenged. The twenty years usage must furthermore be "without interruption" and the requirements of Section 31 would not be met if "there is sufficient evidence that there was no intention during that period to dedicate it".

Section 31 (9) of the Highways Act 1980 said that nothing in this Section operated to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years. Paragraph 12 of Annex B of the Department of Environment Circular 2/93 stated that before making an order the surveying authority must have been satisfied that the evidence showed on the balance of probability that a right of way of a particular description existed.

Consideration was given to whether there had been a full 20 years use by the public and whether there had been an overt act on the part of the landowner to bring it home to users that their right was being challenged. The 20 years use, for the purposes of Section 31, was to be dated retrospectively from this date of challenge.

There was no fixed method by which the public's right was brought into question, though one (the erection of a notice) was expressly referred to in Section 31. The words "or otherwise" in Section 31(2) left the matter at large.

The sign at point A of the claimed footpath, stated: 'PRIVATE ROAD. NO UNAUTHORISED VEHICLES', and was erected over 25 years ago. A number of opposing witnesses had commented on this sign as proof that the claimed footpath was not a public right of way. However, Section 31 of the Highways Act 1980 stated that for a notice to be effective, its wording must clearly deny a public right of way. The words 'Private road' were of doubtful adequacy because of their ambiguity: the words could have been interpreted as showing an intention to deny the existence of a carriageway, but not that of a right of way on foot. As the applicant correctly pointed out, "the fact that it says, "Private Road" and specifically refers to "Vehicles" would not preclude there being a right of way to walk there". Furthermore, eleven of the forty-nine witnesses had commented in their Public Path Evidence Forms that they believed this notice to indicate the route leading to the pumping station rather than the claimed footpath, or that they were unsure which of the two routes the notice referred to.

The notices at points A and B of the claimed footpath, stated, "WITCOMBE ESTATE, PRIVATE LAND, NO PUBLIC RIGHT OF WAY", and clearly denied it

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was a public right of way. However, there was some uncertainty as to when these signs were erected. Two of the witnesses in support of the application believed the notices were erected in 2001, whereas ten believed this occurred in 2002. Two witnesses said that they were erected between 2001 and 2002 and one says it was between 2002 and 2003. A further three witnesses believed that the notices were erected in 2003 or later. Of the witnesses in opposition to the application, one witness believed that the notices were erected in 2001 and two witnesses said it was 2001 to 2002. A further three believed this occurred in 2002. The landowner was unsure as to exactly when the notices were erected but believed that it was approximately 8 years ago (1999).

The twenty years' use must have been "without interruption" and this must have been proved by the claimant. "An interruption" had been defined as "an actual and physical stopping of the public's enjoyment" (*Mersham Manor Ltd v Couldson Urban DC [1937]*) as opposed to an act which merely challenged the public's right. It was not a mere absence in the continuity of use. Moreover, such interruption must have been with the intention to prevent public use. It was not sufficient if the interruption was for some other purpose. A number of witnesses in this case had been challenged whilst using the claimed footpath. The majority of witnesses, both in support of the application and opposed to the application who had stated in their evidence the date that the restriction notices were erected, agreed that this was between 2001 and 2002. Although the landowner estimated that the notices were erected approximately 8 years ago, this estimate was uncertain. In this case, the evidence strongly suggested that the notices were erected between 2001 and 2002, so to be cautious the date of challenge was taken as 2001.

For long usage to give rise to a presumption of dedication, user must have been without force, secrecy or permission. The fact that some people used the way with permission would not necessarily prevent use by the public in general from being without permission.

Case law provided that if there was "conflicting evidence which could only be tested or evaluated by cross-examination an order would seem to be appropriate". If an applicant could produce credible evidence of public enjoyment of a path for 20 years, then even though there may have been conflicting evidence, it was reasonable to say that a right of way was deemed to exist.

In this case there was conflicting evidence. The applicant had provided well over 20 years evidence of use of the claimed footpath from at least 42 witnesses (and possibly 46 witnesses) who had used the path as of right, prior to the date of challenge in 2001 and use had been regular. Use of the claimed path dated back to the 1930s, and approximately 25 of the witnesses began using the path before the 1980s when the current landowner took up residence at Witcombe Farm. However, the evidence of the applicant and supporting witnesses was strongly disputed by the landowner, who stated that she had never seen approximately twenty-seven of the supporting witnesses walking the claimed footpath (excluding a couple of noted occasions) and the majority of the remaining supporting witnesses she claimed to have seen only on rare

Subject to agreement at the next meeting

occasions when they were turned back. This was supported by the nineteen witnesses who were in opposition to the Modification Order application; approximately thirteen of these opposing witnesses had known the claimed footpath and claimed to have knowledge about the use of the path before the landowner moved into Witcombe Farm in 1981/82.

Under Section 32 of the Highways Act 1980, when determining whether a way had or had not been dedicated as a highway, or the date on which such dedication, if any, took place, should have taken into consideration any map, plan or history of the locality or other relevant document which was tendered in evidence, and should give weight thereto as the court or tribunal considered 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 had been kept and from which it was produced.

There was no documentary evidence to support this application, however there was strong user evidence dating back to the 1930s. Although there was conflicting evidence between the applicant and supporting witnesses and the landowner and opposing witnesses, the applicant had produced credible evidence of public enjoyment of the path through Witcombe Farm for over 20 years, therefore it was reasonable to say that under Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 that a right of way was reasonably alleged to subsist. Therefore it was recommended by officers that a public footpath be added to the Definitive Map of Public Rights of Way through Witcombe Farm from Witcombe Farm Lane to public footpath AGW 4.

It was noted that the 5th line of 14.23 on page 41 of the report should read "1960s" and not "1950s".

The Committee noted that a letter included in the papers was from Great Witcombe Parish Meeting and not Great Witcombe Parish Council as stated in the report.

In response to members questions it was not known whether Severn Trent Water or the Fishing Club had a right to use the road.

At this juncture Cllr Gillespie declared an interest as she was a member of the Gloucestershire Wildlife Trust and withdrew from the meeting.

Members noted that there was no documentary evidence to show the status of the route. The Great Witcombe Parish Meeting had never requested that the route be added to the Definitive Map. No further response had been received from the Ramblers Association. It seemed that there was animosity within the community concerning usage of the route.

Members were advised that due to the lack of documentary evidence they had to balance the user evidence in order to make a decision.

Subject to agreement at the next meeting

Members acknowledged that case law indicated that if there was a conflict of user evidence then on balance the application should be accepted. They made the point that the parish survey indicated, by a small majority that people who lived in the parish and had responded felt the path was private. They also noted that no previous application had been made to add the path to the definitive map.

In response to a question members were informed that if they did not support the application then the applicant could appeal and an independent Inspector would make a decision. The presence of this course of action should not cloud the Committee into not making a decision on the application. They should decide based on the evidence they had on the balance of probabilities. The reason there was this opportunity to add to the Definitive Map was in order to rectify past anomalies and in this case the Committee should provide good reasons if it wished to refuse the application.

Members felt the evidence was clouded and confused, the majority of the local public were apposed to it, there was no documentary evidence, there was an avenue of appeal, there were anomalies with the use of gates.

It was proposed, seconded and

RESOLVED

THAT no Modification Order be made to add a public footpath through Witcombe Farm from Witcombe Farm Lane to public footpath AGW 4.

CHAIRMAN

Meeting ended at 12.30pm



Environment Directorate
17.3

Duncan Jordan

Group Director: Environment
Shire Hall
Gloucester GL1 2TH

Fax: (01452) 42

Dr Nick Gilbert
Wychbury
Great Witcombe
Gloucester
GL3 4TS

email:
www.gloucestershire.gov.uk

Please ask for: Miss Burge

Phone: 01452 425522

Our Ref: 573/11/101(1)

Your Ref:

Date: 20th March 2007

E-Mail: sarah.burge@gloucestershire.gov.uk

Dear Dr Gilbert

**Wildlife and Countryside Act 1981, Section 53
Application for a Modification Order for an additional public footpath
through Witcombe Farm
Parish of Great Witcombe**

Further to my previous correspondence on this matter, I am writing to let you know that the above application was considered by the County Council's Commons and Rights of Way Committee at its meeting held on the 20th March 2007.

Committee Decision

The Committee Members resolved that:

- No Modification Order should be made to add a public footpath to the Definitive Map of Public Rights of Way from Witcombe Farm Lane to existing public footpath AWG 4.

Reasons for the Decision

The reasons for the decision given by the Committee include the following:

- The survey conducted by Great Witcombe Parish Meeting showed a majority vote of 63% of residents against the claimed footpath.
- There is no documentary evidence in support of the application.
- There is a conflict of evidence between the supporting witnesses and the landowner.
- The claimed footpath was not claimed in the 1950s when the Definitive Map was produced.
- There are anomalies in the evidence in support of the application such as the existence of gates at point A.



Certificate No. PS12163
Development Co-ordination



Recycled Paper



INVESTOR IN PEOPLE

The minutes of the meeting will be agreed at the next Commons and Rights of Way Committee meeting, scheduled for the 18th June 2007, but if you would like to see the draft minutes when they become available, please let me know. If you would like a copy of the full report showing all the evidence please let me know.

What Happens Next?

As the applicant, you have the right to appeal against the decision made by the Commons and Rights of Way Committee. I have enclosed an information sheet explaining how this is done. If you wish to appeal, you must inform Gloucestershire County Council as well as the Secretary of State of your intention to appeal in writing within 28 days of receipt of this letter. You do not need to state your grounds for appeal at this stage. This is explained in the information sheet.

Should you have any queries about this, please do not hesitate to contact me.

Yours sincerely

A solid black rectangular box used to redact the signature of Sarah Burge.

Sarah Burge
Public Rights of Way

FORM 1

FORM OF APPLICATION FOR MODIFICATION ORDER

Wildlife and Countryside Act, 1981
The Definitive Map and Statement of Public Rights of Way
For the former Rural District of TEWKESBURY in the County of Gloucestershire

To: The Director of Environment, Gloucestershire County Council

Of: Shire Hall, Gloucester, GL1 2TH

I/We, DR. NICHOLAS JAMES GILBERT of WYCHOURY
GREAT WITCOMBE, GLOS GL3 4TS

hereby apply for an Order under Section 53(2) of the Wildlife and Countryside Act, 1981
modifying the Definitive Map and Statement for the area by:

*deleting the (footpath) (bridleway) (byway open to all traffic)
from
to

*(adding the (footpath) (bridleway) (byway open to all traffic)
from PUBLIC ROAD JUST SOUTH OF HILLVIEW COTTAGES - MARKED 'A'
to PUBLIC FOOTPATH AT WITCOMBE RESERVOIRS - MARKED 'B'

*(up-grading) (down-grading) to a (footpath) (bridleway) (byway open to all traffic) the (footpath)
(bridleway) (byway open to all traffic) (Road Used as a Public Path)
from
to

*(Varying) (adding to) the particulars relating to the (footpath) (bridleway) (byway open to all
traffic)
from
to
by providing that

and shown on the Map annexed hereto

*I/We attach copies of the following documentary evidence (including statements of witnesses) in
support of this application

Dated 6th / September / 2005

Signed N. J. GILBERT

*Delete as necessary

FORM 3

FORM OF CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR MODIFICATION ORDER

Wildlife and Countryside Act, 1981
The Definitive Map and Statement of Public Rights of Way
For the former Rural District of TEWKESBURY in the County of Gloucestershire

Certificate of Service of Notice of Application for Modification Order

To: The Director of Environment, Gloucestershire County Council

Of: Shire Hall, Gloucester, GL1 2TH

I/we, Dr. NICHOLAS JAMES GILBERT of WYCHOURY
GREAT WITCOMBE, GLOS GL3 9TS

hereby certify that the requirements of Paragraph 2 of Schedule 14 to the Wildlife and Countryside Act, 1981 have been complied with. (Note: This paragraph states that the applicant shall serve a notice (Form 2) stating that the application has been made on every owner and occupier of any land to which the application relates, or that, having received permission from the Surveying Authority, notice has been served impersonally.)

Dated 6th / September / 2005

Signed  N.J. Gilbert


Notice of Application for a Modification Order (Form 2) has been served on the following landowner(s)/occupier(s):

Please list names and addresses (continue overleaf if required)

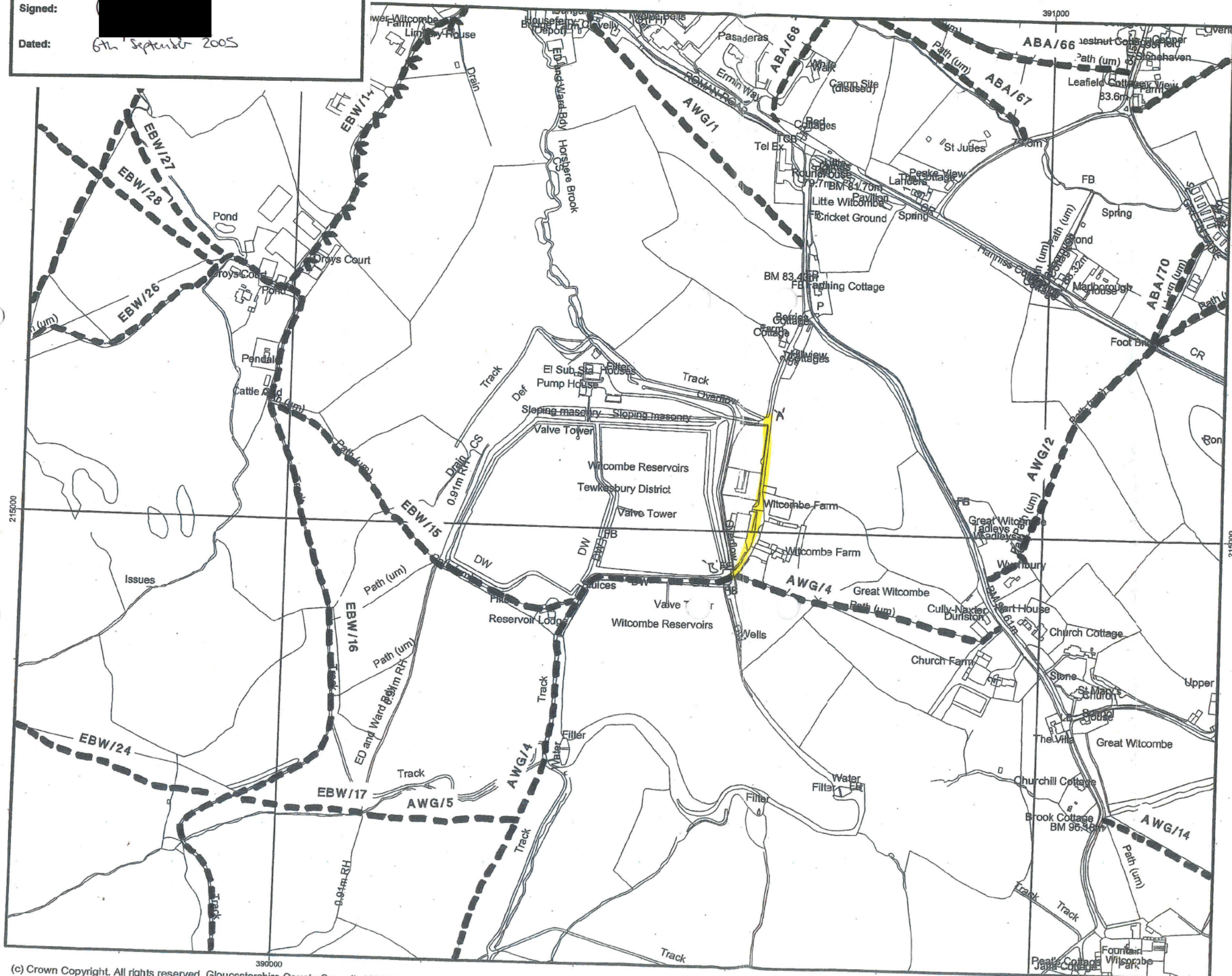
Mrs. CELIA HICKS - BEACH } WITCOMBE FARM
Mr. FREDDIE HICKS - BEACH } GREAT WITCOMBE
GLOS

**MAP ANNEXED TO MODIFICATION ORDER
APPLICATION OR TO NOTICE TO LANDOWNER**

Name of Applicant:
(Please print) **DR NICHOLAS JAMES GILBERT**

Signed: 

Dated: **6th September 2005**



**PARISH OF
GREAT WITCOMBE**

**PLEASE MARK ON
MAP THE PATH
YOU WISH TO CLAIM**

KEY

- EXISTING FOOTPATH
- EXISTING ROAD USED
AS A PUBLIC PATH
- PUBLIC RIGHTS OF WAY

PUBLIC RIGHTS OF WAY
Shire Hall, Westgate Street,
Gloucester GL1 2TG
Tel: 01452 425576
www.gloucestershire.gov.uk

DRAWN BY: S BURGE
SCALE: 1:5,000
DATE: 15/05/2005
DRAWING NO:

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Application letter

Wychbury
Great Witcombe
Glos GL3 4TS
Tel [REDACTED]
26/06/05

Dear Madam,

The reservoirs at Great Witcombe have been a natural focal point for villagers and walkers over many years and, in the late 1960's, The Gloucestershire Wildlife Trust (of which I am a member) established a bird reserve there.

I have walked frequently on the roadway past Witcombe Farm since 1975. At this time the farm was occupied by tenant farmers: Mr and Mrs Paget, and they never told me, nor anyone I know, not to use this route, which was also used as a bridleway.

A few years later the local landowners, Mark and Celia Hicks-Beach took up residence at the farm but, even though they saw me walking along the roadway, I was not requested to avoid doing so until this year.

There is a sign on a white wooden board near point 'A' which says, "Private Road, no unauthorized vehicles" I do not remember when this was put up and it is unclear whether it refers to the route in question, or to the road to the pumping station which bears off at a right angle from point, 'A'. In any case, this sign only refers to vehicles and the fact that the land is, "Private" does not preclude a right of way over it.

In 2001 there was the foot and mouth epidemic and a temporary sign went up to ask that people avoid walking past the farm, which I respected.

A year or so later, a small wooden sign was placed at point 'A' and point 'B' saying, "Witcombe Estate, Private Land, No public right of way". It was at this time that I began to hear that some people were being told not to walk along the road to the reservoirs. I myself was only requested not to go there in May this year; by telephone.

Unfortunately the alternative routes are virtually impassable at times, either because of standing water and deep mud in the fields or from horses, which sometimes take exception to dogs. Certainly closure of this way precludes disabled persons from reaching the reservoirs.

I regard it as important that this route is established on 'The Definitive Map' as a public right of way for all time, so that everyone can enjoy the reservoirs and the scenery beyond.

Thank you for your attention,

Dr. N.J.Gilbert

PUBLIC PATH EVIDENCE FORM

You should be aware that your reply may be used in the production of an Agenda item to go to the appropriate County Council Panel and as such would be designated a "background paper" and kept available for public inspection for a period of four years. Information contained in the form may also be sent to any landowner or occupier affected by the application.

Name: DR. NICHOLAS JAMES GILBERT

Address: WYCHOURY, GREAT WITCOMBE, GLOS, GL3 9TS

Telephone Number: [REDACTED]

Date of Birth: [REDACTED] 60 Occupation: [REDACTED]

1. Description of Path:

From: PUBLIC ROAD JUST SOUTH OF HILLVIEW TO: PUBLIC FOOTPATH AT WITCOMBE COTTAGES - MARKED 'A' RESERVOIRS - MARKED 'B'

Believed Status of Path (eg footpath): FOOTPATH (although there are witnesses to its use as a bridle way)

2. Usage:

Have you used the above path? YES

If so, (a) During which years? 1975 - 2005

(b) Where were you going to and from? From my house or from my parents horse: "PASADERAS" in Little Witcombe, to Witcombe Reservoirs

(c) For what purpose? Leisure - walking or running, often with our dog

(d) How many times a year? Several times per week in the 1970's and 1990's as well as approximately 2002 when signs were posted. Less after in 1980's whilst dog

(e) By what means (eg on foot, on horseback)? Foot. I mediated train

(f) What is the (approximate) width of the path you have used? Single vehicle width

Route:

Has the way always run over the same route? If not give details and dates of any changes YES

4. Stiles:

Have there to your knowledge ever been any Stiles on the path? NO

If so, give details including location

5. Gates:

Have there to your knowledge ever been any gates on the path? NO

If so, give details including location

6. Notices:

Have there to your knowledge ever been notices on the path? YES. ABOUT THREE YEARS AGO a Sign was

Posted at Points 'A' and 'B' saying, "Witcombe Estate, Private Land, No public right of way." There is an

If so, where were they and what did they say? older Sign near Point 'A' saying "Private Road No unauthorized vehicles". However this appears to relate to a small road which runs off at right angles from point 'A' to the Reservoir pumping station.

7. **Obstructions:**

Have you ever known any obstructions on the path?..... NO.....

If so, please give details including location.....

8. **Verbal Notice:**

(a) Were you ever told by an owner or tenant of the land crossed by the path or anyone in their employment that the path was not public?..... YES..... If so, give details:

This year (2005) I received a telephone call from Mr. Freddie Hicks-Beach asking that I not use this route.

(b) Have you ever been stopped or turned back when using the way?

If so, state when and give details:..... NO.....

(c) Were you working for any owner or occupier of land crossed by the path at the time you used it or were you a tenant of any such owner?.. NO.....

If so, did you ever receive instructions from him regarding the use of the way by the public?

If so, what were they?

(d) Have you ever been given permission to use the path?..... YES.....

In May 2005 I complained to Mrs. Celia Hicks-Beach that the alternative footpath was obstructed by a large horse and she asked me to use the roadway through the farm on that occasion.

9. **Other Information:**

Please give any other information that you think is relevant .. Many people in Great Witcombe, Little Witcombe and beyond have used this route to Witcombe Reservoirs for a great many years (some as many as seventy years). Not all wish to provide testimony for fear of upsetting the Landowners. (Continued on separate sheet)

(continue on a separate sheet if necessary)

10. **Declaration:**

I hereby declare that to the best of my knowledge and belief my answers to the above questions are true.

I am ~~am~~ not willing to attend a Hearing, Public Inquiry or Court to give evidence on the matter, if this should prove to be necessary.

*Please delete

Signature:..... ..... Date:..... 28/05/05.....

Witness to Signature:..... To be signed on final draught.....

Question 9 Continued

The reservoirs at Great Witcombe are a bird sanctuary overseen by The Gloucestershire Wildlife Trust (of which I am a member) and provide a natural place for people to enjoy a walk

Unfortunately the alternative pathways are prone to flooding with surface water and from Springs (unsurprisingly perhaps being adjacent to a reservoir) and can become virtually impassable at times.

Added to this there are sides which are particularly difficult to negotiate, and horses are kept in the fields and they occasionally take exception to a dog and will chase the dog and owner out of the field!

In truth, all but the most able bodied of people are therefore effectively unable to reach the reservoirs.

The land owner uses three arguments as to why they have decided to restrict access. Firstly they say that if they allow one person through, they will have to let everyone through. Secondly they say they do not carry insurance for people using this route and thirdly they say they have had items stolen from the farm.

I know that the landowners do allow certain people to still use this way, as well as fishermen and users of their stables. Consequently the arguments about precedent and insurance hold seem unconvincing.

I sympathize with them about theft, which is a problem which affects the wider community. I was The Neighbourhood Watch officer for Great Witcombe for over five years, and until recently, and I would have thought that having myself
Please turn over

and other responsible citizens walking through the farm would have enhanced security rather than reduced it. The fact is that much of the crime occurs at night and is performed by people who will not pay any attention as to whether the route is a public right of way or not.

In Summary, I hope that the testimony provided will demonstrate that this route has been regarded as a public right of way for over twenty years prior to any restriction being started and that it is of great benefit to people to use this route and especially the less able bodied.

Dr. [REDACTED]

