



**OXFORDSHIRE
COUNTY COUNCIL**

Wildlife and Countryside Act 1981

**Application to modify the Definitive Map and Statement of Oxfordshire by
Adding a Byway Open to all Traffic**

Parish of Over Norton

DETERMINATION REPORT

A PURPOSE OF REPORT

1. The Purpose of this report is to investigate and determine an application to modify the Council's Definitive Map and Statement of Public Rights of Way. The application aims to show that a route, currently unrecorded, as a Byway Open to All Traffic (BOAT) in the parish of Over Norton based on historic documentary evidence.

B CONCLUSION

2. All evidence available to the Council has been considered and evaluated and it is considered that: -
 - I. **There is insufficient evidence to support the application to indicate that public rights with motorised vehicles subsist, and that the application should be rejected.**
 - II. **Public Restricted Byway rights subsist, on the balance of probabilities, which should be added to the Definitive Map of Public Rights of Way.**

C INTRODUCTION AND LEGAL BACKGROUND

3. Oxfordshire County Council is the surveying authority for rights of way and has a duty under section 53 of the Wildlife and Countryside Act 1981 (WCA) to keep its Definitive Map and Statement under continuous review and to modify it by Order where evidence is discovered which shows: -
 - That a route not recorded in the map and statement should be so recorded
 - That a route of a particular description ought to be recorded with a different description
 - That a route currently recorded is not a right of way and ought not to be shown at all
4. This report considers an application submitted on 27 March 2006 in accordance with Section 53(5) and Schedule 14 of the WCA by The Trail Riders' Fellowship (TRF) seeking to add a route to the Definitive Map and Statement as Byway Open to All Traffic (BOAT).
5. This was supported by historic documentary evidence purporting to indicate that the route has public rights which should be recognised and recorded on the Council's Definitive Map and Statement as a consequence of an event specified in WCA s53(3)(c)(i): -

"The discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54a, a byway open to all traffic"
6. A **BOAT** is defined as "...a highway over which the public has a right of way for vehicular and all other kinds of traffic, but one used mainly for the purposes for which footpaths and bridleways are used...."
7. Evidence of the existence or non-existence of a public right of way normally takes the form of documentary evidence, such as evidence from historic documents and maps and / or evidence of actual use by the public. The weight given to documentary

evidence is a matter of judgement in each case and depends upon such matters as the antiquity of the document, the status of the person by whom it was compiled, the purpose for which it was prepared and the custody in which it has been kept and from which it is produced.

8. The Council is under a duty to investigate applications and will consider all other relevant evidence which is reasonably accessible as well as any provided by the applicant.
9. The Council has a duty to record the existence of public rights and to protect them. If highway rights existed many years ago, they still exist today on the common law principle of 'once a highway always a highway'. Those rights cannot be taken away by any means other than statutory legal Order. The public cannot 'give up' their rights by lack of use and those rights cannot be denied, for example, by obstruction, no matter how long that might have been the case.
10. Recent legislative change in the form of the **Natural Environment and Rural Communities Act 2006 (NERCA)**, which came into force on 2 May 2006, impact on this case.
11. In accordance with the provisions of this new legislation, existing public rights for mechanically propelled vehicles have been extinguished if they are over a way which, immediately before commencement of the Act: -
 - (a) Was not shown in a Definitive Map and Statement, or
 - (b) Was shown in a Definitive Map and Statement only as a footpath, bridleway or restricted byway
12. In this case, as the route was not recorded on the Council's Definitive Map and Statement, then (a) above applies meaning that any previously unrecorded rights for mechanically propelled vehicles have been extinguished by the legislation and cannot be recorded as a BOAT.
13. Before the 2006 legislation there was no differentiation between types of vehicular rights, whether mechanically propelled or otherwise. Evidence of the existence of public vehicular rights would be used to add BOATs to the Definitive Map and Statement. The 2006 Act deletes rights for mechanically propelled vehicles that had, so far, not been recorded (as, say, BOATs).
14. The new category of Restricted Byway has been introduced to draw a distinction between BOATs (with rights for all vehicles) and Restricted Byways (with rights for non-mechanically propelled vehicles). In effect, the 2006 Act has drawn a line under the historic use of routes by horse drawn vehicles equating to mechanically propelled vehicles of today.
15. In this case, as the route is caught by the 2006 legislation, it is important to consider if any of the exemptions apply. If they do not, then rights for mechanically propelled vehicles have been extinguished. If an exemption applies it will be necessary to proceed further to establish whether the existence of mechanically propelled vehicular rights is supported by the evidence. As this route is not presently recorded with any public rights, it is also still necessary to investigate whether historic vehicular rights subsist as, even if the rights for mechanically propelled vehicles have been extinguished by NERCA, the route could still be recorded as restricted byway – where there is a public right of way on foot, on horseback, leading a horse, cycling and for any vehicles other than mechanically propelled ones.
16. NERCA is examined in detail later in this report.

D DETAILS OF THE APPLICATION

17. This application dated 27 March 2006, was submitted by Mr P Cole on behalf of the Trail Riders' Fellowship to add a Byway Open to All Traffic to the Definitive Map and Statement. A plan showing the route in question is at **APPENDIX 1**. A copy of the application is at **APPENDIX 2**.
18. Notice of the application was served at the time by the applicant on those with an interest in the land crossed by this route. A copy of the Certificate of Service of Notice is at **APPENDIX 3**.
19. The applicant submitted documents as evidence in support of the application. These documents need to be considered and evaluated to determine whether or not public rights could be determined or inferred from them, in order for the Council to come to a decision about the case. In this case, the evidence is intending to show that, historically, public rights for mechanically propelled vehicles subsist on the route.

E DESCRIPTION OF ROUTE

20. The route referred to in the application is shown on the Plan at **APPENDIX 1** running between points A and B. Point A is the junction of the application route with the A44. Point B is at the Over Norton / Chipping Norton parish boundary, forming a junction with existing restricted byway number 5 in Chipping Norton. In effect, this is the short residue of an overall lengthy section of restricted byway.
21. A site inspection of the route was undertaken on 12 June 2008. A copy of the report of that inspection together with the photographs taken at the time are at **APPENDIX 4**. (The site inspection report and photographs also include details of adjoining routes Chipping Norton 4 & 5 and Spelsbury 32, undertaken at the same inspection).
22. The route forms part of a route referred to as 'Saltway'.

F LAND OWNERSHIP

23. A search of the Land Registry indicates that none of the land affected by this application is registered. Adjoining registered owners are as follows: -
 - I Title Number ON315251 is registered to Adam Robert Gough and Kelly Ann Gough of 24a Quarry Close, Enstone, Chipping Norton OX7 4LJ
 - II Title Number ON328725 is registered to Adam Robert Gough and Kelly Ann Gough of 24a Quarry Close, Enstone, Chipping Norton OX7 4LJ
 - III Title Number ON315546 is registered to Christina June Brown of Chapel House Farm Cottage, Chapel House Grounds, Chipping Norton OX7 5SZ.
 - IV Title Number ON241636 is registered to Peter Green of Manor Farm, Little Rollright, Chipping Norton, Oxford OX7 5QA.
24. Copies of the Title documents are at **APPENDIX 5**.

G DOCUMENTARY EVIDENCE

25. The Highways Act 1980, section 32 sets out how any court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified

by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was compiled, and the custody in which it has been kept and from which it is produced.

26. The investigation into this claim includes the following types of document. Consideration of the documents is reviewed below.

Inclosure Award

27. Inclosure awards are legal documents that recorded the ownership and distribution of land. They may also detail roads and rights of way. These can be extremely important documents and, in many cases, if an inclosure award has created a right of way, and there is evidence that the correct legal procedures were carried out, this can be conclusive legal evidence for the existence of the right of way unless other evidence exists that the right has been later stopped up by some other process.

Chipping Norton Inclosure Award 1770

28. The applicant submitted an extract of the plan accompanying this Award, which has been inspected at The Oxford History Centre. It is entitled: -

'The Township of Chippin (sic) Norton according to the Award under the Inclosure Act, bearing date 9th July 1770.'

29. Extracts of the plan, which are a tracing of the Award Plan, are at **APPENDIX 6**.
30. The Award was prepared in accordance with an Act of Parliament dated 1769.
31. Extracts from the Award plan are at **APPENDIX 6** which shows the route as part of a road, the northern end of which is annotated "From Hook Norton".
32. The Award Sets out the route as part of the public road from Charlbury to Hook Norton. All public roads were to have a width of 60 feet.
33. An extract of the Award at **APPENDIX 7** refers to widths of public roads as follows: -

"Now therefore we the said Commissioners have ascertained set out and appointed both publick and Private Roads through the new Inclosures with the Assizes and breadth thereof in manner following do hereby describe the same as they pass over by or adjoin to the several Allotments afterwards made in Obedience to and Pursuance of the Powers vested in us by the said Act and do hereby ratify award Order and direct that all such Publick Roads Except for bridleroads shall be and remain of the breadth of sixty feet in every part thereof as the same are now staked and set out (that is to say)"

34. This route is described in the Award as follows: -

"Also one other publick road leading from Charlbury in the said County of Oxford to Hook Norton in the said County of Oxford having Allotments to the said Joseph Walker the said Dean and Chapter and their successors and their lessee the said Joseph Walker John Phillips an allotment for stone pitts Allotments to the said Thomas Kirby and to the said Principal and Scholars and their lessee the said Thomas Kirkby Old Inclosures belonging to Chapple House Allotments to the said Principal and Scholars and their lessee the said John Ingram and the said Henry Dawkins on the west side thereof and Chalford Old Inclosures and Allotments to the said Dean and Chapter and their successors and the Feoffees [?] and Trustees of Long Marston school aforesaid John Lock Thomas Kirby the said

Principal and Scholars and their lessee the said John Ingram and Henry Dawkins on the East side thereof."

Printed Extract of Inclosure Award 1903

35. The Oxfordshire History Centre holds this document entitled 'Inclosure Awards being true extracts relating to the roads, bridleways, footways.....within the rural district of Chipping Norton, dated 1903. Extracts of this are at **APPENDIX 8**.
36. This includes the extracts from the Award referred to above.

Tithe Award and Map

37. There is no Tithe Award for the parish of Over Norton.

Finance Act 1910

38. The 1910 Finance Act provided for the levying of a tax upon the incremental value of land. The tax was to be paid every time the land changed hands. Every piece of land was recorded and given a holding number. Information regarding ownership and occupation was also recorded.
39. The survey was carried out under statutory authority by the Valuation Department of the Inland Revenue, giving little argument about the authenticity or legal validity of the resulting plans and records. Tax relief was given to land containing public rights of way with a deduction made for the amount by which the gross value would be diminished if sold subject to any public rights of way.
40. Public roads were generally not included within the parcels of private land and were therefore untaxed. If a lane or track was excluded from the taxable land holding, it was probably considered as a public road at that time and as such was vested in the highway authority. Other private tracks and footpaths are not shown in this way and are, instead, shown within the respective land parcels.
41. In this case, the copy of the Finance Act map, held at the Oxford History Centre, **APPENDIX 9**, shows the length of the route in question as uncoloured and, therefore, untaxed given the inference that it was excluded by virtue of being a public road in the same manner as other recognisable public roads.

Commercial Mapping

42. In the 18th and 19th centuries map makers started to produce county maps. Individual surveyors saw an opportunity to produce small-scale maps of counties which could be purchased by individuals and were, effectively, the road atlases of their day. A surveyor was generally concerned to show on these maps only those routes which the traveller could use. These showed features such as turnpike roads, cross roads and lanes and bridleways. They can be useful supporting evidence in rights of way claims.

Jeffreys' Map 1766

43. Thomas Jeffreys, Geographer to King George III, was the leading map publisher of his day. He produced large scale maps of several English counties, including Oxfordshire. He expected high standards of his surveyors but relied on the patronage of the major landowners and therefore more prominence was given to their properties. Nevertheless, the Oxfordshire Map was produced in response to a competition, instigated by the Royal Society of Arts 1759 to produce the best 1 inch to a mile

county survey. It shows towns, parishes, farms, cottages, hills, commons and parks and roads.

44. This map was referred to by the applicant and an extract is at **APPENDIX 10**. This shows the route in question as an uncoloured road with pecked boundaries. The map does not contain a key, but the route is shown in the manner consistent with how other, minor roads are shown.

Davis' Map 1797

45. Richard Davis earned a premium of 50 Guineas from the Royal Society of Arts, producing the first ever large scale (2" to 1 mile) survey of Oxfordshire. He took full advantage of the larger scale to depict almost every house and farm in villages and rural areas and even the blocked layout of towns is correct. The road system is extensively shown, including minor routes, bridleways and milestones.
46. An extract of this map is at **APPENDIX 11** and shows the route in question quite clearly as a road bounded by solid lines in the manner of all public roads.

Bryant's Map 1823

47. Bryant's Map is to the larger scale of 1½ inches to the mile and includes a key. He produced well-made maps based on actual surveys carried out as opposed to copying or plagiarising other maps. The Planning Inspectorate's Consistency Guidelines refer to Bryant's use of surveyors and a triangulation system. The map depicts county, hundred and parish boundaries and, at the time, was ahead of Ordnance Survey in providing that level of detail. The road system is carefully depicted to distinguish between turnpike, main, cross and driving roads, lanes and bridleways. Bryant was among the last generation of private county surveyors, his business later declining with the growth of the Ordnance Survey.
48. This map was referred to by the applicant and an extract is at **APPENDIX 12**. The route is shown as an uncoloured road and, in accordance with Bryant's map key, this indicates it to 'lane'.

Ordnance Survey Mapping

Ordnance Survey Drawing 1815

49. The route in question is clearly shown on this early OS production, **APPENDIX 13**. It is bounded on both sides by solid lines and gives the impression of being a route of significance shown as it is in the manner of other recognisable roads and shows it existed as a physical feature at the time of the survey.

Ordnance Survey First Edition 1833

50. This one-inch OS map, **APPENDIX 14**, shows the route in significant detail and identifies the physical feature of the route similar to the above and of a width similar to other roads.

Ordnance Survey County Series 1883

51. This 25-inch map, **APPENDIX 15**, shows the route in detail. It is indicative of the full extent of its width and shown in the manner of all other roads.

Ordnance Survey County Series 1922

52. This map, **APPENDIX 16**, shows the route in detail, bounded by solid lines and indicating by double pecked lines, the 'running' carriageway / track of the route in question.

The Definitive Map – Parish Submissions

53. As the first stage in the preparation of the first Definitive Maps, the National Parks and Access to the Countryside Act 1949 required parish councils to conduct surveys of the public rights of way in their area. Typically, the submissions include a map of the parish showing all the paths that the parish intended to claim accompanied by handwritten forms which describe each path. These documents were sent to the County Council, which then assessed whether the route should be included in the initial Draft Map.
54. The **Chipping Norton Parish Submission** is dated August 1952. The submission map is at **APPENDIX 17** and claims the whole of the route within the parish area as CRF 5, with its starting point as A44 and continuing to the borough boundary 200 yards prior to joining the Oxford – Birmingham road A34. A CRF is a carriage road, mainly used as footpath. The submission record sheet, **APPENDIX 18**, describes the route: -

“This is an old highway connecting the London Road with the Oxford-Birmingham Road. At London Road (A44) it starts opposite 4 CRB and proceeds northwards along a green lane known as “Swing Swang” to the Municipal Borough Boundary 200 yards prior to joining the Oxford Birmingham Road (A34). This highway is mainly used as a footpath.

Grounds: This way has been used by the public for a great number of years and is shown as a highway on an Inclosure Award map for the Borough, dated 1826”

55. The **Over Norton Parish Submission** map is at **APPENDIX 19** and it will be seen that the parish did not claim the final segment of the route in its parish.

First Definitive Map 1953 and Subsequent Maps

56. As a consequence of the parish submissions above, the route was recorded on the first Definitive Map of Oxfordshire only within Chipping Norton and not Over Norton. It was originally referred to as CRF, then RUPP (Road Used as Public Path) before its recording, as currently, Restricted Byway, as legislation and terminology changed over the years. Whilst this 'anomaly' has been looked into at stages over the years, no actions appear to have been taken to address the problem as it exists on the Definitive Map.

H THE EFFECT OF THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 (NERCA)

57. Section 67(1) of NERCA explicitly extinguished public mechanically propelled vehicular rights over every highway that was not shown on 2nd May 2006 on the Definitive Map and Statement as a BOAT. This is the case unless it can be shown that one or more of the exemptions in subsections 67(2) or 67(3) applies.
58. Thus for an application made after 20 January 2005 (the relevant date as set out in Section 67(4) of NERCA the application would have to show both that a public right of way for mechanically propelled vehicles existed at the commencement of section 67 (2 May 2006) i.e. applying the law prevailing before 2 May 2006 and that those rights had not been extinguished, because one of the exemptions in 67(2) or 67(3) applies.

The five exemptions in subsection 67(2)

59. As stated above, NERCA has extinguished the mechanically propelled vehicular rights on these routes unless any of the exemptions apply.
60. **Subsection 67(2)(a)** exempts ways that have been lawfully used more by mechanically propelled vehicles than by other users (e.g. walkers, cyclists, horse riders and horse-drawn vehicles) in the five years preceding commencement (2 May 2006). The intention of this subsection is to exempt highways that are part of the 'ordinary roads network' but where the exemption at Section 67(2)(b) does not apply.
61. This is, effectively, a user test. Section 66 of Wildlife and Countryside Act 1981 sets out the definition of a BOAT (see paragraph 4 above) and as specified in paragraph 26 of the Government Guidance. If a highway satisfies the user test in subsection 67(2)(a) of NERCA, it should not satisfy the BOAT definition in section 66 of the Wildlife and Countryside Act 1981.
62. Government Guidance states that relevant authorities should adopt a pragmatic approach and arrive at a judgement as to what has been the main use of the way by the public in the five years leading up to 2 May 2006. Where necessary an assessment should be made of the available evidence on the relative volumes of walkers, horse riders, cyclists and mechanically propelled vehicles to see whether it can be shown, on the balance of probabilities, that lawful use of the routes by the public over the five years up to 2 May 2006 has been predominantly by mechanically propelled vehicles.
63. If this cannot be shown, public rights of way for mechanically propelled vehicles can be assumed to have been extinguished.
64. The Council should not undertake a detailed investigation or survey of 'main lawful use' on every way. The onus is on anyone seeking to use a mechanically propelled vehicle on the way to prove that rights have not been extinguished where they disagree with the judgement made by the local highway authority.
65. It should be noted that for this exemption to apply, the main lawful use must have been 'by the public'. It is irrelevant for the purposes of this test that the way might have been used during the relevant period by landowners or their visitors under any form of licence or easement by any means whatever, whether on foot, horseback or mechanically propelled vehicle.
66. **Comment: In this case the route is not currently shown on the Definitive Map. The Council has no evidence of its own as to comparative public user, and none has been provided, to indicate that the route has been predominantly used by the public with mechanically propelled vehicles in the 5 years prior to NERCA commencement. Therefore, this exemption has not been triggered.**
67. **Subsection 67(2)(b)** exempts ways that are both recorded on the Council's 'List of Streets' as being maintainable at public expense and are not recorded on the Definitive Map and Statement as rights of way.
68. This is to exempt roads that do not have clear mechanically propelled vehicular rights by virtue of official classification but are generally regarded as being part of the 'ordinary roads network'.
69. **Comment: In this case the route is neither recorded on the Definitive Map and Statement or on the List of Streets. Therefore, this exemption has not been triggered.**

70. **Subsection 67(2)(c)** exempts ways that have been created (by an enactment or instrument or otherwise) on terms that **expressly** provide for the way to be for mechanically propelled vehicles.
71. This exemption ensures that where a public right of way for mechanically propelled vehicles was expressly created by primary or secondary legislation, or by an instrument, it will not be extinguished by the operation of section 67. There must be express words for this exemption to apply.
72. **Comment: In this case no evidence has been discovered by the County Council that the route came into being for use by mechanically propelled vehicles by an express dedication for use by such vehicles or by statute or other documentation providing expressly for use by motorised vehicles.**
73. **Subsection 67(2)(d)** exempts ways that have been created by the construction, in the exercise of powers conferred by statute, of a road intended to be used by mechanically propelled vehicles.
74. This exemption ensures that a public right of way for mechanically propelled vehicles will not be extinguished where it was created by the construction of a road intended to be used by mechanically propelled vehicles. This inextricably links the construction (of a road intended to be used by such vehicles) to the creation and so these must have taken place at the same point in time. Therefore, any subsequent re-construction or maintenance, to whatever standard, of a way that had not already been created for mechanically propelled vehicles would not qualify a way from exemption.
75. **Comment: There is no evidence to suggest that this route was constructed with the specific intention that it be used by mechanically propelled vehicles.**
76. **Subsection 67(2)(e)** exempts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive 'off-road'.
77. For this exemption to apply, the right for mechanically propelled vehicles must have been created, by inference of dedication at common law, of use by mechanically propelled vehicles before 1st December 1930. Evidence of long use by mechanically propelled vehicles before 1930 does not, of itself, except rights of way from extinguishment. Where pre-1930 use relied upon an earlier creation of vehicular rights (through use by non-mechanically propelled vehicles, by express dedication, or by some other means), then the pre-1930 use by mechanically propelled vehicles cannot be regarded as having created the right of way for mechanically propelled vehicles and the exception will not be engaged.
78. **Comment: In this case no evidence has been provided to infer that any highway rights were created at common law by mechanically propelled vehicular use prior to 1 December 1930. There is evidence that the route existed well before mechanically propelled vehicles became commonplace, so it cannot be said that the public vehicular right of way was created as a result of use by such vehicles.**
79. NERCA also contained some transitional arrangements designed to address any outstanding applications for BOATs.

The Exemption contained in Subsection 67(3)(a)

80. **Subsection 67(3)(a)** exempts highways that are the subject of an application for a Definitive Map Modification Order, made before 20 January 2005. So, any application

made before that date is preserved and can be dealt with under the law as it previously stood.

81. **Comment:** In this case the application was dated after the cut-off date and is, therefore, not protected by this subsection.

I CONSULTATION

82. A draft of this report was sent to following by way of consultation: -

- I. The applicant, Mr P Cole
- II. The adjoining registered landowners
- III. Chipping Norton Town Council
- IV. Over Norton Parish Council
- V. West Oxfordshire District Council
- VI. Local Member

83. The only response received was a telephone call from a Mr Tom McFarlane of Little Rollright. He stated that Mr Peter Green (one of the registered adjoining owners) had not owned land for at least 20 years. (The Land Registry record of December 2018 stated that he did).
84. He also stated that there is a large, established badger set along the route. We responded that this was not something that could be taken account of it as part of this investigation. He concluded that he had no concerns with the report.
85. The letter sent to Mr and Mrs Gough, one of the adjoining owners, was returned by Royal Mail with the comment 'moved away' on the envelope.

J CONCLUSIONS

86. From the evidence it would appear to be clear that this route forms part of an old road that ought to be recognised on the Definitive Map and Statement.
87. The Chipping Norton Inclosure Award sets out the route in full as a carriageway in 1770. This in itself is sufficient evidence that the route ought to be added to the Definitive Map and Statement but is, nonetheless, strongly supported by the other documentary evidence, notably the 1910 Finance Act and the commercial mapping.
88. The route at the Over Norton end (the A44 road) has been (and remains) signposted as a Restricted Byway which is something that must be clearly recognised by users and by adjoining landowners.
89. Section H above refers to the impact on applications such as this by the Natural Environment and Rural Communities Act 2006 (NERCA). The effect is that any mechanically propelled vehicular rights have been extinguished.
90. This means that the application, as it stands, for a Byway Open to All Traffic must be rejected. Nevertheless, it also means that the evidence strongly supports the existence of the route as a vehicular carriageway and the route, therefore, defaults to that of Restricted Byway. That, therefore, is the status that should be recognised on the Council's Definitive Map and Statement and an Order should be made to that effect.



On behalf of Countryside Records

Date 12th August 2019

I have reviewed this report and confirm that I agree with the legal analysis set out in the determination report and its appendices.



On behalf of Legal Services

Date 2 September 2019