

WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53
SCHEDULE 14 APPLICATIONS TO

ADD A BRIDLEWAY ALONG FOUTS LANE
IN THE PARISHES OF SEAVINGTON ST MARY AND SHEPTON
BEAUCHAMP (573M)

Applications: 573M
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1. Introduction

- 1.1. On the 22nd September 2008, the South Somerset Bridleways Association, made an application under Schedule 14 and Section 53(5) of the Wildlife & Countryside Act 1981, for an Order to amend the Definitive Map and Statement by adding a bridleway. The application relates to a route known as Fouts Lane (shown A-B on plan H04-2018 at appendix 1).
- 1.2. A public bridleway is a right of way which can be used by any member of the public on foot, leading or riding a horse, or on a bicycle. In some instances, there is also a right to drive livestock.
- 1.3. The purpose of this investigation is to establish whether or not a public right already exists. There is currently no recorded public right of way on the Definitive Map along the claimed route.

2. The Application

- 2.1. The application is based on documentary evidence and includes extracts of the following documents.
 - *Current Map and Photos of each end of the route*
 - *1782 Day & Masters Map*
 - *1809-1811 OS reprint (Cassini/Timeline)*
 - *1839 Shepton Beauchamp Tithe Map*
 - *1841 Seavington St Mary Tithe Map*
 - *1846 South Petherton Inclosure Award (Q/RDE/141)*
 - *1885 OS boundary Map (0527 4739)*
 - *1898-1900 OS Reprint (Cassini/Timeline)*
 - *1901 OS Object Names Book*
 - *1910 Finance Act Maps (81-15)*
 - *1919 OS Reprint (Cassini/Timeline)*
 - *1940 OS War Revision map*
- 2.2. No user evidence was submitted with the application. No direct evidence that the general public have used the claimed route has been found during the investigation.

3. Description of Route

- 3.1. The 'claimed route' is shown coloured blue on Appendix 1.
- 3.2. Application 573M covers the length of 'Fouts Lane', as marked from 'A' to 'B' on the map.
- 3.3. The western end of application 573M (i.e. that part of the route which runs from point A in an easterly direction for around 400m), passes over the edge of a grassed field, with a shallow ditch just to the north of it. When the site was visited in February 2018 this part of the route was overgrown but passible. The eastern end of this application route (around 220m from point B back towards point A) is sunk below the level of the surrounding land. The banks on either side of this part of the route are lined by trees. The route itself is covered in vegetation and very wet in places. Near point B various drains empty onto the route. In February 2018 most of the route was passible on foot but it was obstructed by vegetation at point B.
- 3.4. Photographs of the claimed route were taken on the 12th February 2018 and the 30th August 2019, they are in Appendix 2.
- 3.5. Land Registry searches were carried out on the 15th January 2018 which identified that only the far western end of Fouts Lane is registered (Landowner F). There were no registered owners for the rest of the claimed route, although 1 further person owns land adjoining the route (Landowner C). The Common Law presumption is that, in the absence of any evidence to the contrary, adjoining landowners own up to the centre point of a highway. However, determining the current ownership of the soil is not a question this report attempts, or needs, to answer. The landownership is shown at Appendix 3.
- 3.6. The case file, including the application, accompanying evidence and consultation responses can be viewed by Members by appointment.

4. Relevant Legislation

4.1. The Wildlife and Countryside Act 1981 specifies in Section 53(2)(b), that the County Council must keep the Definitive Map and Statement under continuous review and must make such modifications as appear to them to be requisite in the light of certain specified events. In this case 53(3)(c)(i) is of particular relevance.

4.2. Section 53(3)(C)(i) states that the Map and Statement should be modified where the County Council discover evidence which, when considered with all the other available evidence, 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”.

4.2.1. Later in the same Act section 53(5) enables any person to apply to the Authority (Somerset County Council) for an Order to be made modifying the Definitive Map and Statement in respect of a number of ‘events’ including those specified in Section 53(3)(c)(i) as quoted above. On receipt of such an application the County Council is under a duty to investigate the status of the route. It was under these provisions that the South Somerset Bridleway Association made their applications.

4.3. The purpose of Section 53 of the Wildlife and Countryside Act 1981 is to record or delete rights rather than create or extinguish rights. Practical considerations such as suitability, the security and wishes of adjacent landowners cannot be considered under the legislation.

4.4. Section 32 of the Highways Act 1980 states;

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

- 4.5. The Natural Environment and Rural Communities (NERC) Act 2006, Section 66 and 67, extinguished rights for mechanically propelled vehicles (MPV's) over any routes that were recorded on the Definitive Map as footpaths, bridleways or restricted byways and over any routes that were not recorded on the Definitive Map or the list of highways maintained at public expense. There are a few exceptions to the general rule outlined above, none of which appear to apply in this case. There is therefore no question of rights for MPV's existing over the claimed route.
- 4.6. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, the decision maker must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence). The decision is a quasi-judicial one in which the decision maker must make an objective assessment of the available evidence and then conclude whether or not the relevant tests set out above have been met.

5. Documentary Evidence

- 5.1. The tables below lists the sources of the documentary evidence examined as part of this investigation. In some cases, it has not been possible to view the original copy of a document and it has instead been necessary to rely entirely on an extract supplied by the applicant. Where this is the case the words 'extract only' follow the title of the document. It may sometimes be necessary to give those documents less weight on account of them only being viewed in part. If this is the case, it will be clearly stated in the analysis of the document.
- 5.2. Throughout discussion of the evidence, comparison might be made to the way in which other routes within the immediate vicinity of the application route have been recorded. Where other rights of way, roads or physical features have been referred to, their location has been identified on the plans at Appendix 4.

5.3. Inclosure Records:
Explanation of the type of evidence
5.3.1. Inclosure Awards are legal documents that can still be valid today. They usually consist of a written description of an area with a map attached. Awards resulted from a need by the landowners to gather together their lands and fence in their common lands. A local Act of Parliament was often needed to authorise the procedure and an Inclosure Commissioner was appointed as a result to oversee the compilation of the award and map. Land was divided into individual plots and fields and redistributed amongst the existing owners. Inclosure Awards provide statutory evidence of the existence of certain types of highway. They enabled public rights of way to be created, confirmed and endorsed and sometimes stopped up as necessary. Inclosure Commissioners surveyed land that was to be inclosed and had the power to 'set out and appoint public and private roads and paths' that were often situated over existing ancient ways.
5.3.2. Document Names: South Petherton Inclosure Award 1846 References: Q/RDE/141 Source: South West Heritage Trust (SWHT) Appendix: 5

Description and interpretation of evidence

- 5.3.3. The South Petherton Inclosure Award was made under powers granted by 'An Act for Inclosing Lands within the Parish of South Petherton 1836'. That Act incorporated the Inclosure Consolidation Act 1801.
- 5.3.4. Five maps accompany the Inclosure Award. The depiction of the application route on these maps vary. Where one map might depict a route shaded brown, another will leave the same route unshaded. Some of the linear routes shown on the maps are numbered and coloured red. The numbers correspond with entries in the text of the Award which typically refer to the routes being set out as private roads. No public roads were found to be set out in this award.
- 5.3.5. One of the maps accompanying the Inclosure Award shows the eastern end of Fouts Lane, the route is not numbered or coloured red. Furthermore, the text of the Award makes no reference to it being set out as part of the inclosure process. Two important inferences can be taken from this. Firstly, the Award itself did not create any public or private rights over the application route. Secondly, the route almost certainly physically pre-dated the Award. If that had not been the case the route would not have been shown (this conclusion is supported by the OS Old Series Map, which pre-dates this award and also shows Fouts Lane).
- 5.3.6. The fact that rights were not set out by the Award does not mean that it is of no assistance in determining whether or not public rights exist.
- 5.3.7. By the time the Commissioner wrote this Award, he would have already consulted with the public and have been familiar with the area and the status of local routes. While the status of Fouts Lane was not central to the purposes of the Award, it was shown on three maps, one of which labels it 'From Seavington'. This type of 'to' and 'from' labelling is often suggestive of public status¹.
- 5.3.8. Having said this it should be noted that neither of the other two maps which show Fouts Lane labelled it in any way. In fact, one of those maps refers to David's Lane² as being 'From Seavington', rather than Fouts Lane.

¹ The Planning Inspectorate Definitive Map Orders (DMO Consistency Guidelines), 2nd revision July 2013, Section 8, page 5, 8.12. Although the guidance relates specifically to tithe maps the same mapping convention is known to apply to some other maps as well.

² See Appendix 4 for the location of David's Lane.

David's Lane would be a far more logical way to reach the Seavingtons and, given the complexity of the junction at point B, the possibility that Fouts Lane was labelled in error should not be overlooked. Having said this the fact that David's Lane may have been considered to be a public road to Seavington does not preclude the existence of public rights over Fouts Lane. It is entirely plausible that, if the Commissioner was using 'to/from' labelling to indicate routes that he considered to be public roads, he was of the view that both David's Lane and Fouts Lane were public roads leading to Seavington.

- 5.3.9. To summarise, the Award does not set out (or create) public rights over the application route. Nevertheless, this document is slightly in favour of the existence of public rights over Fouts Lane in 1846.

5.4. Tithe Records

Explanation of the type of evidence

- 5.4.1. Tithe maps and the written document which accompanied them, (the apportionment) were produced between 1837 and the early 1850's in response to the Tithe Commutation Act 1836, to show which landowner owned which pieces of land and as a result how much they owed in monetary terms. The tax replaced the previous 'payment in kind' system where one tenth of the produce of the land was given over to the Church.
- 5.4.2. A map was produced by the Tithe Commissioners which showed parcels of land with unique reference numbers, and these were referred to in the apportionment document, which contained details of the land including its ownership, occupation and use.
- 5.4.3. Public roads which generated no titheable produce were not given a tithe number. Some private roads, due to use could be equally not liable to a tithe. However, public and private roads could be subject to a tithe, if for instance, they produced a crop – grazing or hay cut from the verges.
- 5.4.4. The Map and Apportionment must be considered together. Roads are often listed at the end of the apportionment; there is also sometimes a separate list for private roads.

5.4.5. Tithe maps provide good topographical evidence that a route physically existed and can be used to interpret other contemporary documents but were not prepared for the purpose of distinguishing between public and private rights and so tend to be of limited weight.

5.4.6. **Document Names:** 1839 Shepton Beauchamp Tithe Map and Apportionment
References: D/D/Rt/M/122 and D/D/Rt/A/122
Source: South West Heritage Trust
Appendix: 6

Description of evidence

5.4.7. The Tithe Commissioners produced 3 copies of each map and apportionment. The original colour document was sent to the Commissioners (now held by The National Archives). The second and third copies were deposited with the local Diocesan Registrar and the Parish. In some cases these copies have been transferred to local archives.

5.4.8. The extract of the Tithe Map at appendix 6 is the Diocesan copy of the documents for Shepton Beauchamp.

5.4.9. Fouts Lane is clearly marked on the Tithe Map indicating it physically existed at the time that these documents were drafted.

5.4.10. The route itself is shown between solid lines and is not numbered or specifically referred to within the apportionment. This indicates the land was not considered to generate any titheable produce.

5.4.11. **Document Names:** 1841 Seavington St Mary Tithe Map (extract only)
References: IR 30/30/371
Source: TNA Kew
Appendix: 6

Description of evidence

5.4.12. In the case of Seavington St Mary, the applicant has provided an extract of the Commissioners' copy of the tithe map. It is this document which is considered here.

5.4.13. The application route of Fouts Lane is clearly marked on the Tithe Map indicating it physically existed at the time the documents were drafted.

- 5.4.14. The route itself is shown between solid lines and is not numbered. This indicates the land was not considered to generate any titheable produce.
- 5.4.15. Most routes shown on this extract of the Seavington St Mary Tithe Map, including Fouts Lane, are coloured in sienna (yellow). Such colouring is not necessarily evidence of a route being a public highway³. The extract provided contains no key and only covers a small area making comparison with other routes difficult. Therefore, the shading in this case is considered to be of little evidential value.
- 5.4.16. Notably parcel number 305 is located at the Eastern end of Fouts Lane. This separate field parcel appears to narrow the width of Fouts Lane.
- 5.4.17. Additionally, the map has 'To South Petherton' on a route which leads north from point B.

Interpretation of evidence

- 5.4.18. Because the application route is on the border between parishes, it appears on two different sets of tithe documents. In each case it is shown unnumbered and between solid parallel lines suggesting that it was considered to be unproductive. Tithe documents are primarily concerned with identifying tithable land. A private right of way can diminish the productivity of land to the same extent as a highway can. As both public and private roads might be unproductive and/or produce no crop, neither would necessarily need to be numbered, valued or recorded in the apportionment. As such the fact that the application routes are unnumbered is of little assistance in determining status.
- 5.4.19. The Tithe maps in this case do show a variety of routes. Some routes shown on the Tithe maps in the same way as the application route were almost certainly public vehicular roads. However, there are also similarly portrayed routes which are more likely to have been private.

³ DMO Consistency Guidelines, 2nd revision July 2013, page 5, paragraph 8.11

- 5.4.20. The evidence submitted with the application included the Commissioner's copy of the tithe map for the parish of Seavington St Mary. Unlike the diocesan copies held by the Somerset Heritage Centre, these copies are in colour. Fouts Lane is shaded sienna. Such colouring is not necessarily evidence of a route being a public highway. In the absence of a key or any other direct information as to the meaning of the shading, it is therefore of little evidential value for the current purposes. Furthermore, the extracts provided are so small as to make a comparative exercise of limited value. To the extent that a comparison is possible it shows that, although some public roads were shaded, so were other routes which were unlikely to have been public. As an example, the cul-de-sac route slightly north of Fouts Lane is coloured sienna but appears to have been of little public utility and is unlikely to carry public rights. No weight can be given to the sienna colouring of the routes in this case.
- 5.4.21. An inference as to status might also be drawn from the labelling of the route leading north from point B as 'to South Petherton' on the Seavington St Mary tithe map. This type of labelling is suggestive of public rights⁴. However, from the map alone it is not possible to know whether the labelling in this case relates to the continuation of Fouts Lane, Frogmary Lane, Davids Lane or a combination of the three. In the circumstances it is of little assistance in terms of determining the status of the application route.
- 5.4.22. The Tithe documents provide excellent evidence as to the existence of the two routes around 1840. As they were not intended to record public rights they are less helpful in determining the status of the application route. In this case, even when read together, the map and apportionment give little indication as to why the claimed route was considered unproductive.
- 5.4.23. For all of the above reasons these documents are not considered to offer much assistance in determining the status of the application route.

⁴ DMO Consistency Guidelines, 2nd revision July 2013, Section 8, page 5, 8.12.

<p>5.5. Ordnance Survey Records:</p>
<p>Explanation of the type of evidence</p> <p>5.5.1. The Ordnance Survey (OS) are generally accepted as producing an accurate map depiction of what was on the ground at the time of a survey.</p> <p>5.5.2. OS Maps cannot generally be regarded as evidence of status; however, they indicate the physical existence of a route at the date of the survey.</p>
<p>OS ‘old series’ (extract only) Cassini Timeline reprint 1809-1811 Original scale: 1:63,360/one inch to the mile Appendix: 7</p> <p>5.5.3. Although not the original version of the OS’s map, the Cassini Timeline reprints are reliable copies.</p> <p>5.5.4. The application route is shown by solid parallel lines on this very early OS map. This line style was typically used to show ‘other routes’, these routes were distinguishable and depicted differently to ‘turnpike or main roads’. While some routes drawn in the same way as the application route are now known to carry public rights (e.g. David’s Lane), others are more likely to have been private. For example, the route near Littlefields (see appendix 4) appears to have been a cul-de-sac of little public interest. It has no public rights recorded over it today.</p>
<p>OS Boundary Remark Book (extract only) Published: 1883 Scale: not to scale TNA ref OS26 9422 Appendix: 7</p> <p>5.5.5. These maps were drawn in manuscript and show boundaries (mostly parish) and related ground features and carry the signatures of the relevant meresmen.</p> <p>5.5.6. The two maps in this case show the application route. Fouts Lane is depicted on each, but only the sections near the Fouts Cross (B-C) area.</p> <p>5.5.7. These maps show the physical existence of the route, however they are silent in terms of determining status.</p>

OS Boundary Sketch Map (extract only)

Published: 1883

Scale: 12 chains to 1 Inch

TNA ref OS27 4739

Appendix: 7

- 5.5.8. These maps were drawn in manuscript and show boundaries (mostly parish) and related ground features as originally recorded in the boundary remark books. The area covered was usually a parish or, if small, several parishes.
- 5.5.9. The map in this case shows the application route. Fouts Lane is shown highlighted in red; this red line shows the boundary of the parishes which converge over this route.
- 5.5.10. The sketch map shows Fouts Lane as part of a through route leading from Fouts Cross towards Hurcott. While this could arguably be said of other maps, what makes the Sketch Map different is that no road leads from the south east of point A (i.e. there is a gap to the south east of point A before the road is shown). The application route is therefore the only continuation of the road leading north west from point A.

OS County Series 1st Edition Map

Sheet No: LXXXI.15

Survey Date: 1886

Published: 1887

Scale: 1:2500

Appendix: 7

- 5.5.11. The 25 inch OS maps show more details of the potential character of a route. This map shows Fouts Lane.
- 5.5.12. Along the route there are dots shown, these indicate the Parish boundary. Also, Fouts Lane is shown to increase and decrease in width at various places along the route.
- 5.5.13. Within the outer casing lines there are pecked lines in various places along Fouts Lane. These are likely to depict a change of surface. This could mean a better or worse metalled surface, it may also mean a change from grass to mud. The actual reason is unknown.
- 5.5.14. At both ends of Fouts Lane, a pecked line also crosses the application route. At the western end the line is partly obscured by a depiction of a tree. This is most likely to indicate a feature which would not have been an obstruction to pedestrians⁵.

OS Revised New Series Map (extract only)

Sheet No: 312

Survey Date: 1886

Published: 1898

Scale: 1:63,360

Appendix: 7

- 5.5.15. Although based on the same survey and published at a smaller scale than the first edition county series map, the revised new series map does include more detail regarding the character of the ways shown on it.
- 5.5.16. The application route is shown on the map as an 'Unmetalled Fenced Road'. The OS used this labelling to include; 'public roads, occupation roads and old metalled roads not kept in repair or roughly metalled or not metalled'⁶. This would suggest that the symbol was used to depict private as well as public roads.

⁵ Oliver, R [2005]. Ordnance Survey maps: a concise guide for historians, 2nd ed. London: Charles Close Society. Page 97.

⁶ Hodson, Y. (1999) *Popular Maps: The Ordnance Survey Popular Edition One-Inch Map of England and Wales 1919-1926* Charles Close Society for the Study of Ordnance Survey Maps, London, page 132.

OS Country Series 2nd Edition

Sheet: LXXXI.15

Revised 1901

Published: 1903

Scale: 1:2500

Appendix: 7

5.5.17. The application route is largely shown in the same way as on the first edition map, with the pecked line across the route at points A and B.

5.5.18. In addition to Fouts Lane, the Western end of Frogmary Lane is also shown. It is annotated 'Union & R.D. Bdy' meaning that it formed the boundary of the Poor Law Union and Rural District.

OS Popular Edition Map (extract only)

Cassini Timeline reprint

Published: 1919

Scale: 1:63,360

Appendix: 7

5.5.19. Although not the original version of the OS's map, the Cassini Timeline reprints are reliable copies.

5.5.20. The popular edition maps were produced for sale to the public and included a grading for roads and tracks.

5.5.21. The result is much the same as the previously referred to Revised New Edition. Fouts Lane is uncoloured and classified as a minor roads. The map includes the statement 'Private Roads are uncoloured'. Therefore, the symbol used for the application routes would have been used for both public and private roads.

OS 5th Edition Style War Revision Map (extract only)

Published: 1940

Appendix: 7

5.5.22. Fouts Lane is not shown on this map. A dotted line is shown between A and C. However, this denotes the parish boundary rather than a physical route.

OS Provisional Edition

Sheet No:ST41

Published: 1958

Scale: 1:25,000

Source: National Library of Scotland website

Appendix: 7

- 5.5.23. Fouts Lane is depicted broadly in the same style as the nearby Frogmary Lane. Whilst it is not labelled 'F.P.', it is shown by lightly coloured parallel lines in the same way as routes which are labelled F.P.

OS Object name books (ONB) 1885 & 1901

National Archives (Extract only)

Appendix: 7

- 5.5.24. In preparing the second edition County Series map, the Ordnance Survey produced object names books. The primary purpose of which was to ensure the various names recorded on the maps (e.g. names of farms, roads, places etc) were accurate and correctly spelt. Each book contained a list of those names and a description of the feature to which they related, which was later corroborated by a prominent member of the local community (e.g. landowner or clergyman).
- 5.5.25. The descriptions for Fouts Lane matches the location of the said route.
- 5.5.26. The application route is described as an occupation road. In this context the normal meaning of the term 'occupation' is for the use of those who occupy the adjacent land. While it is not impossible that such a term could have been used in relation to a public way, it is far more likely it was used to indicate private, rather than public, vehicular rights.
- 5.5.27. This provides evidence that the Ordnance Survey surveyor, and possibly the local person who corroborated the entry, believed the route to carry private vehicular rights rather than public vehicular rights.

Description and interpretation of evidence

- 5.5.28. Looked at in isolation, the Boundary Sketch Map, as discussed above, suggests Fouts Lane carries public rights as it appears to be the only easterly continuation of Muckleditch Lane. However, the weight to be given to this is affected by the fact that the Sketch Map is the only map which shows this configuration of routes; all other maps before and after the sketch map show another route continuing in a south easterly direction from point A. This might be explained by the fact that the Sketch Map was only a sketch which was concerned primarily with the location of boundaries. Unlike the application route, no parish boundary runs over the 'missing' section of road and, as such, it would have been of less interest to the surveyor. Seen in the context of other mapping it is likely that a route did continue south past point A even in 1883. In the circumstances, this map offers very little assistance in determining the status of either application route beyond demonstrating their physical existence.
- 5.5.29. With the exception of the 1940 War Revision Map, the application route is shown on each of the OS maps produced since 1809-11. While they appear to show that the application route has not always been in good condition, it would historically have been physically capable of taking the vehicular traffic of the day. However, by the time of the 1958 Provisional Edition, Fouts Lane was shown as footpath. While weak evidence of status, this maybe is indicative of these routes no longer being capable of vehicular use.
- 5.5.30. Beyond showing the physical existence and character of the application route, the OS maps are of little assistance. Since 1888, all OS maps have carried a disclaimer to the effect that they should not be used as evidence of a public right of way. Furthermore, case law⁷ has shown OS maps are only indicative of the physical qualities of a way and should not be treated as direct evidence of status. In the circumstances, it is concluded they offer little assistance in terms of determining its status.

⁷ Moser v Ambleside UDC (1925) 89 JP 118

- 5.5.31. The application route was listed in the object name book as an occupation road. This weighs in favour of it having been considered a private, rather than a public, road. However, the description is silent in relation to the possible existence of lower public rights. It is entirely possible for a route described as an occupation road to have been a private road over which there were also public rights on foot or horseback.
- 5.5.32. To conclude the OS maps provide excellent evidence as to the physical characteristics of Fouts Lane. However, they do not provide direct evidence of status. The Object Name Book on the other hand does suggest that the route had the reputation of a private road in the early 20th century.

5.6. 1910 Finance Act

Explanation of the type of evidence

- 5.6.1. The Finance Act of 1910 provided, among other things, for the levy and collection of a duty on the incremental value of all land in the United Kingdom.
- 5.6.2. Land was broken into ownership units known as hereditaments and given a number. Land could be excluded from payment of taxes on the grounds that it was a public highway and reductions in value were sometimes made if land was crossed by a public right of way. Finance Act records consist of two sets of documents which are;
- Working Plans and Valuation Books. Surviving copies of both records may be held at the Local Records Office. Working maps may vary in details of annotation and shading. The Valuation Books generally show records at a preparatory stage of the survey.
 - The record plans and Field Books (small bound books) are the final record of assessment and contain more detail than the working records. The Record Plans and Field Books are deposited at The National Archives, Kew.
- 5.6.3. While the Valuation and Field Books were generally kept untouched after 1920, many of the working and record maps remained in use by the Valuation Offices and sometimes information was added after the initial Valuation process.

5.6.4. The 1910 Finance Act material did not become widely available until the mid 1980's. It cannot therefore have been considered during the Definitive Map making process and can be considered "new evidence". This is of particular importance for meeting the requirements of section 53(3) of the Wildlife and Countryside Act 1981 which requires the 'discovery' of new evidence (i.e. evidence not considered when the Definitive Map was originally drawn up or last reviewed) before an order to amend the definitive map can be made.

5.6.5. **Document Names:** 1910 Finance Act Record Plan and Field Book (Extract only)
References: Sheets; IR 128/9/997 + IR 128/9/998
Source: National Archives
Appendix: 8

Description and interpretation of evidence

5.6.6. Fouts Lane is clearly marked on the OS base map. Although part of the border is marked in green rather than the normal red, the application route is excluded from the surrounding hereditaments. Towards the western end of the route the fields either side of Fouts Lane are braced suggesting they fall within the same hereditament.

5.6.7. Case law has shown that the exclusion of a route from the 1910 valuation raises the strong possibility that the route was considered to be a highway⁸. Ordinarily one would expect highways recorded in this way to carry public vehicular rights as routes with lower rights (i.e. footpaths and bridleways) were typically dealt with by deductions recorded in the field books.

5.6.8. It should be noted that there may be other reasons to explain the exclusion of a route. For example in some cases unproductive occupation roads were excluded. Similarly, routes set out in an inclosure award with multiple private rights over them could also be excluded⁹. There is no evidence that the application route in this case were set out by such an award.

5.6.9. The Finance Act records, in some cases, may be very strong evidence of the existence of public rights. However, in attributing weight in any particular case it is important that this type of documentation is considered in conjunction with all of the other relevant documents.

⁸ Fortune & Ors v Wiltshire Council & ANR

⁹ DMO Consistency Guidelines – 5th revision 2013, Section 11, pages 3+4, 11.7

<p>5.7. Highway Road Records held by Somerset County Council Appendix 9</p>
<p>Explanation of the type of evidence</p> <p>5.7.1. Over time responsibility for the maintenance of highways has passed between various different authorities. On each occasion a map was typically produced showing those highways which were considered publicly maintainable.</p>
<p>1929 Handover Map and Schedule, Chard and Yeovil Districts</p> <p>5.7.2. In 1929 responsibility for the maintenance of many highways was transferred from Rural District Council's to the County Council. To facilitate this, the Rural District Council's produced maps showing the highways which they considered maintainable at public expense.</p> <p>5.7.3. Fouts Lane is shown on the base map of the documents relating to Chard Rural District. It is shaded pink with black hatching to the north. Comparison with the rest of the map shows that this was intended to indicate a parish boundary as opposed to the existence of a publicly maintainable highway. Similarly, Fouts Lane is included in an area shaded pink on the Yeovil Rural District Map but this shading is also to indicate the district boundary rather than a highway.</p> <p>5.7.4. In conclusion, Fouts Lane is not coloured in such a way as to indicate that it was considered to be a publicly maintainable highways on either the Yeovil or Chard handover maps.</p>
<p>1930 Road Records</p> <p>5.7.5. Shortly after the 1929 Handover Maps the County Council produced working records of routes which were considered to be highways maintainable at public expense.</p> <p>5.7.6. The application route is shown on the base map but is not coloured in (other than to show the rural district boundary). This indicates it was not considered to be a highway maintainable at public expense at the time of this map.</p>

1950 Road Records

- 5.7.7. The 1930 Road Records were updated and new versions were produced in the 1950s. Like their predecessors these maps show highways considered to be maintainable at public expense.
- 5.7.8. The application route is shown on the base map and is uncoloured.
- 5.7.9. This indicates the route was not considered to be a highway maintainable at public expense at the time of this map.

Modern Road Records

- 5.7.10. The application is not currently recorded on the County Council's road records as a highway maintainable at public expense.

Description and interpretation of evidence

- 5.7.11. According to the Planning Inspectorate's consistency guidelines 'The evidential strength of handover maps and similar documents is that they are conclusive evidence of the highway authority's acceptance of maintenance responsibility, a commitment which would not normally have been undertaken lightly'¹⁰. However, they were not public documents and cannot be regarded as conclusive (for the status of a road) due to, amongst other things, the possibility that they might be an incomplete record, as mistakes may have been made.
- 5.7.12. In this case, the application route has not been recorded as a highway maintainable at public expense. Despite being good evidence of the status of routes which are shown on the road records, it would be unsafe to hold that the fact that a road does not appear to have been accepted by the highway authority necessarily suggests that it cannot have been a highway. It is possible that they were simply unaware of the existence of highway rights or that the route was considered to carry public vehicular rights but not be maintainable at the public expense. Furthermore, the road record documents did not typically record public bridleways or footpaths. Thus, the omission of a route does not necessarily indicate that it was not a highway at the time the documents were produced.

¹⁰ DMO Consistency Guidelines – 3rd revision May 2013, Section 6, page 4, 6.9

5.7.13. To summarise, the lack of colouration of the application route on any of the road record maps indicate neither route was considered at the time to be a public vehicular highway maintainable at public expense. As such, while not necessarily inconsistent with public rights, these documents are certainly not supportive of them.

5.8. **Definitive Map and Statement preparation records**
Somerset County Council
Appendix 11

Explanation of the type of evidence

5.8.1. The Definitive Map and Statement were produced after the National Parks and Access to the Countryside Act 1949 placed a duty on County Councils to survey and map all public rights of way in their area. The process was undertaken in a number of stages:

- Walking survey cards and maps - Parish Councils were required to survey the paths they thought were public paths at that time and mark them on a map. The route was described on a survey card, on the reverse were details of who walked the route and when. Queries for the whole parish are often noted on a separate card.
- Draft Map – Somerset County Council produced the Draft Map from the details shown on the survey map. These maps were agreed by the County Works Committee and the date of this Committee became the ‘relevant date’ for the area. The map was then published for public consultation; amongst other things this included parish and district councils being contacted directly and notices appearing in local newspapers. Any objections received were recorded in a Summary of Objections found in the District file.
- Draft Modification Map – This stage in the process was non statutory. SCC produced a map to show any proposed changes as a result of objections to the Draft Map. Any objections received were recorded in a summary of Counter Objections to the Draft Modification map, found in the District file.

<ul style="list-style-type: none"> • Provisional Map – This map incorporates the information from the Draft Maps and the successful results of objections to the Modification Maps. These were put on deposit in the parishes and district council offices at this point only the tenant, occupier or landowner could object. • Definitive Map and Statement – Any path shown is conclusive evidence of the existence and status of a public right of way until proved otherwise. The Definitive Map is without prejudice to other or higher rights.
<p style="text-align: center;">Survey Map and Card – Seavington St Mary CP</p> <p>5.8.2. Although Fouts Lane is shaded red this is to indicate the approximate position of the parish boundary. The application route was not claimed as a public right of way by the Parish.</p>
<p style="text-align: center;">Survey Map and Card – Shepton Beauchamp CP</p> <p>5.8.3. Although Fouts Lane is shaded red this is to indicate the approximate position of the parish boundary. The application route was not claimed as a public right of way by the Parish.</p>
<p style="text-align: center;">Survey Map and Card –South Petherton</p> <p>5.8.4. The survey map has not been found for this Parish.</p> <p>5.8.5. No relevant survey cards were found in relation to Fouts Lane.</p>
<p style="text-align: center;">Draft Map – Chard</p> <p>5.8.6. Although the entire length of Fouts Lane is shown on the base map the application route is not shaded on this map.</p>
<p style="text-align: center;">Draft Map – Yeovil</p> <p>5.8.7. Although the parish and district boundaries are highlighted, the application route is not shaded as rights of way on this map.</p>

<p style="text-align: center;">Draft Modification Maps – Chard +Yeovil</p> <p>5.8.8. The application route is not shown on the Chard Modification Map.</p> <p>5.8.9. No Modification Map for the Yeovil area was found.</p>
<p style="text-align: center;">Provisional Map – Chard</p> <p>5.8.10. The application route is not shaded on this map.</p>
<p style="text-align: center;">Provisional Map – Yeovil</p> <p>5.8.11. Though it is not normal practice, there are 2 maps labelled ‘Provisional’ for the Yeovil area.</p> <p>5.8.12. The application route is shown on the base maps. The application route is not shaded on either map.</p>
<p style="text-align: center;">Definitive Map - Chard</p> <p>5.8.13. The Definitive Map was required to show; Footpaths as a purple line, Bridleways as a green line and RUPPs as a dashed green line (Road used as a Public Path).</p> <p>5.8.14. The Definitive Map for the Chard area does not show the application route in any of these ways. Therefore, the application route is not shown as a public right of way.</p>
<p style="text-align: center;">Definitive Map – Yeovil</p> <p>5.8.15. The application route is not recorded as a public right of way.</p>

Description and interpretation of evidence

- 5.8.16. The Definitive Map is only definitive in relation to the information it contains relating to public rights of way. It does not prove, by omission, public rights do not exist.
- 5.8.17. The application route does not appear coloured on any of the Definitive Map preparation documents nor are they coloured on the Definitive Map itself.
- 5.8.18. In this case, the application route is not shown as a public right of way. While this is not evidence that public rights do not exist, it certainly cannot be seen as supportive of them.

5.9. Local Authority Documents

Explanation of the type of evidence

- 5.9.1. As mentioned above, over the course of the past two hundred years, responsibility for the maintenance of highways has passed between various different authorities. Furthermore, even where a local authority was not directly responsible for rights of way then, as representatives of the local people, they would have maintained an interest in the rights of way network. This could have particularly been the case for parish councils.
- 5.9.2. In light of the above, evidence as to the status of a route can sometimes be found in local authority records and minute books.

5.9.3. **Document Names:** 1862 Crewkerne Highway District Map
Source: DD/SB/MAP/3/1
South West Heritage Centre
Appendix: 12

Description and interpretation of evidence

- 5.9.4. Although not titled, this map appears to have been drafted as a record of those roads which were considered maintainable by Crewkerne Highway Board when it was formed in 1862. Linear routes shown on the map appear to fall into one of three categories

- 5.9.5. Firstly, some routes (the 'coloured routes') have been allocated colours other than pink/red. An analysis of the map shows that the coloured routes in each parish are all the same colour but that each parish has been allocated a different colour. For example, all the coloured routes in South Petherton are green whereas the coloured routes in Wayford are yellow. In the bottom left hand corner of the map there is a list of routes ordered by parish. Each route is identified both by a brief description and by reference to lettered or numbered points which appear on the map. The length of the route is also recorded. There is a strong correlation between those routes listed and those shown coloured on the map. Given the purpose of the map, and the fact that the Highway Board felt it necessary to list them and record their length, it seems very likely that they were considered highways maintainable at public expense at the time.
- 5.9.6. The second category of route shown on this map are those shaded red/pink. These appear to have been turnpike roads¹¹.
- 5.9.7. The third, and final, category of route are those which have been left uncoloured (i.e. white roads). This category includes all that part of Fouts Lane which is shown on the map. However, as Fouts Lane did not fall within the area covered by the Crewkerne Highway Board only the very far eastern end is shown.
- 5.9.8. Ordinarily, there would be some uncertainty as to the inference to be taken from a route being shown on this map as a white road. In general the purpose of the map was to identify those routes which were maintainable by the Highway Board. However, there are a large number of white roads which are cul-de-sacs many leading to individual properties. Furthermore, the contemporaneous Town Tithing of Crewkerne map¹² depicts a network very similar to that shown on the relevant part of the Highway Board map. The vast majority of routes which appear as white roads on the Highway Board Map are depicted as occupation roads on the Town Tithing Map. In the circumstances it seems likely that some, if not all, of the white roads were shown for a reason other than them carrying public vehicular rights.

¹¹ The list in the bottom corner of the map refers to a number of routes terminating either at a turnpike road or a toll gate. In each case the turnpike road referred to, or the road on which the toll gate is located, is coloured pink.

¹² The 1862 Parish and other Road in the Town Tithing of Crewkerne (SHC reference CC/SB/MAP/3/2).

5.9.9. However, the small part of Fouts Lane which is shown is on the very edge of the map, possibly outside the Highway Boards area, and is labelled 'From Seavington'. David's Lane, which runs south from point B, is labelled 'From Hurcott'. It seems likely that these labels were the wrong way around and that Fouts Lane should have been annotated 'From Hurcott'. It has been suggested that the labelling is in error and this weakens the evidential value of the map. However, it seems clear that there was an intention to annotate Fouts Lane with the word 'from' even if an error was made in the destination which was recorded.

5.9.10. The Highway Board used this type of 'from' labelling numerous times on their map. It typically appears where a coloured road (i.e. those maintainable at public expense) leaves the area for which the Board was responsible. Often, having crossed the border, the coloured road becomes white before being labelled (presumably because although it continued to be a public highway it was no longer the Boards responsibility). This indicates that the 'from' annotation was habitually used for routes which were considered to carry public vehicular rights but which fell outside of the Boards area of responsibility and were therefore not maintainable by them.

5.9.11. In conclusion, the fact Fouts Lane (to the extent that it appears) is uncoloured would not normally be strong evidence in support of public rights. In fact in some cases it might even be indicative of the existence of private rights. However, the Board annotated Fouts Lane in the same way as it did other highways which were leaving its area of responsibility. As such this document is in favour of public rights over the application route. Whilst it is acknowledged that the map is unlikely to have been subject to public consultation, it was drafted by independent officers with a knowledge of highway law and the Highway Board are unlikely to have accepted liability for a route lightly. In the circumstances this map is given weight in favour of the existence of public vehicular rights.

5.9.12. Document Names:	1924 Chard Rural District Council Minutes
Source:	D/R/CH/2/2/10 South West Heritage Centre
Appendix:	12

Description and interpretation of evidence

- 5.9.13. At their meeting of 17 March 1924 the clerk to the Rural District Council reported that a complaint had been made with regards to Fouts Lane being closed. The fact that it came before the Rural District Council suggests that someone considered the matter to be a public (rather than a private) one. However, the Council do not appear to have resolved to take any action but instead relied on the fact that the County Surveyor was looking into the matter. The most likely reason for the County Surveyor's involvement is that the route was alleged to be a public highway. However, as there is no indication as to who reported it to the Surveyor, on what basis they considered the route to be public or the Surveyors conclusions, the weight to be given to the evidence is very limited.
- 5.9.14. Later in the same year the Rural District Council discussed Fouts Cross on two separate occasions (18 August and 17 November). In each case reference is made to funding improvement works in the Fouts Cross area. However, it is impossible to know to what, if any, extent those works affected Fouts Lane. As such these later minutes are given no weight at all.

5.10. Sale Documents

Explanation of the type of evidence

- 5.10.1. Evidence as to the status of a route can sometimes be found in sale maps and accompanying records. Each document should be addressed individually as they vary greatly.

- 5.10.2. **Document Names:** 1807 Map of Auction
Source: DD/SAS/C795/SE/2
South West Heritage Centre
Appendix: 13

Description and interpretation of evidence

- 5.10.3. This map relates to the sale of a number of plots of land forming part of Shepton Beauchamp Estate. Although Fouts Lane itself was not for sale it is shown on the map. The route is coloured yellow but there is no key indicating the meaning of such colouring. While it is clear that some public roads were coloured this way there is no reason to believe that private roads would not have been shown in exactly the same way.

5.10.4. This map for the reasons listed above cannot be given much weight.

5.10.5. **Document Names:** 1884 Sale of Lands
Source: DD/S/SBY/36
South West Heritage Centre
Appendix: 13

Description and interpretation of evidence

5.10.6. This map is entitled 'Plan of Farms and Accommodation Lands' and relates to land in a number of parishes including those in which the application route is situated. It shows the land which was to be sold by auction on 1 July 1884.

5.10.7. Land to the south of Fouts Lane is coloured green as is much of the land to the north of that route. This land formed part of Lot 8 in the sale.

5.10.8. The application route is depicted on this map. It is coloured brown but there is no key to indicate the meaning of such colouring. As with the sale map of 1807 discussed above, some public roads were coloured this way but there is no reason to believe that private roads would not have been shown in exactly the same way. Therefore, while this map does show the application route' physical existence, it does not assist in determining their status.

5.11. **Other Sources**
Appendix 14

Document Names: Map of Manor Owed Land 1755
Source: DD/X/LT/3
South West Heritage Centre
Appendix: 14

5.11.1. This map was produced to show the land owned by the manor. It is cartographically very similar to the 1807 map above and possibly the prequel to it (it may well be that the 1807 map was based on the same survey as this one).

5.11.2. Fouts Lane is shown on the map as is the very start of Frogmary Lane. It is notable that Davids Lane, is not present on this map.

5.11.3. Some routes and field markings are labelled. Fouts Lane has 'To Petherton' written on it, which indicates it could potentially be a public route used to travel to (South) Petherton. This is given some weight in favour of public rights. However, the weight to be given to this evidence is limited for much the same reasons as those given in relation to the 1807 map.

Document Names: Day and Masters 1782
Source: Somerset County Council
Appendix: 14

5.11.4. Published in 1782, this commercial map included very little detail typically only depicting settlements, major roads (particularly those in and between settlements), and rivers.

5.11.5. The full length of the application route is shown on the map. This suggests that it must have been either a very prominent physical feature or a route of some importance (or both). Based on this assumption it is maybe more likely that it would have carried public rights. However, little is known about the basis upon which Day and Masters selected the features which were to be shown on their maps. Furthermore, even if they did consider it to be public, this can only be taken as the view of the individual surveyor rather than the wider public. In the circumstances this map can be given some, but not a great deal of, weight.

Document Names: Map of Seavington 1815
Source: DD/PT/MAP/12
South West Heritage Centre
Appendix: 14

5.11.6. Published in 1815, this map shows Fouts Lane but contains little relevant information to assist in determining its status.

5.11.7. It shows Fouts Lane as a white route which connects to roads of which are public today. The map does not include a key making it difficult to know whether the status of a route was given any consideration by the draftsmen. White routes could potentially have been public or private.

5.11.8. The map shows that Fouts Lanes physically existed but does not assist with the status of the route.

Document Names: Greenwoods 1822
Source: Somerset County Council
Appendix: 14

- 5.11.9. Despite some criticism relating to the positional accuracy of Greenwood's maps they can provide good evidence of a route's physical existence at the time of the survey and also that the surveyor considered it to be of some importance. As the map was produced for use by members of the public it is likely that the surveyor would have focused on those roads that he believed to be publicly accessible or that were useful for the public in some other way.
- 5.11.10. Two types of road are shown on the key accompanying Greenwood's map. Turnpike Roads, which are shown with one thickened or shaded casing line (whether solid or broken) and Cross Roads, which are shown with casing lines of equal thickness (whether solid or broken). The key also suggests that roads through Heaths and Commons are shown with broken casing lines.
- 5.11.11. The map shows the application route as a 'cross road'. Although not specifically defined on the map, this term was being used to refer to more than just the point at which two roads cross. In one prominent case the courts defined a cross road as 'a **public** road in respect of which no toll is payable'¹³ (my emphasis). However, in that case the judge was considering a map produced 55 years earlier than Greenwood's and by a different cartographer. Therefore, while consideration should be given to this legal precedent, it is important to consider the term 'cross road' in the context of any individual map before drawing any inferences¹⁴.
- 5.11.12. While the majority of cross roads shown on Greenwood's map are now recognised as public vehicular roads, there are many which are not. Many of those which are not now public vehicular roads are shown on Greenwoods Map as cul-de-sacs (e.g. the route running south opposite 'Littlefields Farm' off of 'Littlefields Lane', see appendix 4) which were unlikely to have carried public vehicular rights. A similar picture emerges when analysing other extracts of the same map. In fact, in some cases Greenwood shows as cross roads routes which only a few years earlier had been set out as private roads by an inclosure award. In the circumstances it seems as though Greenwood either did not consider all 'cross roads' to be public vehicular routes, or that he did not make very careful checks about the public status of the routes he recorded.

¹³ Hollins v Oldham (1995)

¹⁴ DMO Consistency Guideline – 5th revision July 2013, Section 2, page 7, 2.24

5.11.13. Furthermore, any inference to be drawn from Greenwood's map needs to be viewed in light of *Merstham Manor Ltd v Coulsdon UDC* in which the judge concluded that 'there is nothing in the map(s) to show whether or not the topographer-author was intending to represent the road on his map as a public highway'.

5.11.14. In the circumstances it seems as though Greenwood either did not consider all 'cross roads' to be public vehicular routes, or that he did not make very careful checks about the public status of the routes he recorded. This map therefore confirms the physical existence of the application route in 1822 but is of very limited weight in support of public rights over the application route.

Document Names:	Aerial photograph 1946
Source:	Somerset County Council
Appendix:	14

5.11.15. The aerial photograph shows the application route as defined on the ground. The surface type is not clear in this photograph.

5.11.16. The aerial photograph is evidence for the physical existence of the route. The shape of the route is consistent with the maps already viewed in this report. However, it does not provide evidence for or against public rights.

5.12. Document sources not included

Other sources of Primary Documentary Evidence which either did not cover the relevant area or did show the claimed route but do not assist in determining the status, area as follows:

- Parish Files (held by Somerset County Council (SCC) and relating to PROW issues)
- Tithe apportionment – Shepton Beauchamp (D/D/Rt/A/122)
- 1946 OS New Popular Edition Map – sheet 177
- Ilminster Turnpike – Act, Bill, Notices and Deeds (D/T/ilm)
- Quarter Sessions records – Shepton Beauchamp + Seavington St Mary (Q/SR/315/288)
- 1830 Langport, Somerton & Castle Cary Turnpike
- 1838 Somerset Sessions

6. Landowner Evidence & from those against the application

- 6.1. Consultations regarding the claimed route were sent out to all landowners and relevant local and national user group organisations in June 2018. A further consultation was undertaken on a draft report in September 2019. The table below sets out the evidence and comments received from the landowners and their representatives. Responses from other parties are summarised in section eight.
- 6.2. Landowners are identified by letter (i.e. Landowner A, Landowner B etc) which correspond with the references on the landownership plan at appendix 3. Where responses were received from individual members of the public (as opposed to organisations) who are not landowners, they have been referred to as respondent 1, respondent 2 etc.
- 6.3. Factual first hand evidence, whether provided by landowners or others, is given more weight than personal opinion, hearsay or third party evidence.

Landowner	Response
Landowner A	<p>6.2. Landowner A's comments relate to Fouts Lane only. They refute the conclusions reached by the applicant and make the following points:</p> <p>6.2.1. It is for the applicant to demonstrate that public rights exist.</p> <p>6.2.2. The evidence presented does not demonstrate the existence of a public right of way of any kind. It is a difficult task to refute such a modification order as it involves having to prove something doesn't exist.</p> <p>6.2.3. The lengthy process of creating the Definitive Map would have provided evidence from the local residents during the public consultation period. Some residents could attest to public rights and some may well have given evidence which was contrary to the existence of a public right of way. Much of that evidence is no longer available.</p>

	<p>6.2.4. A large amount of documentary evidence would also have been considered during the preparation of the Definitive Map.</p> <p>6.2.5. At the time neither the Parish Council nor the County Council were of the view that the evidence before them was sufficient to demonstrate that Fouts Lane was a public right of way. Furthermore, no objections were made to the omission of the route from the Definitive Map.</p> <p>6.2.6. It is not inconceivable to assume that, if a right of way existed at the time that the Definitive Map was being produced, evidence of some sort would have been found. The fact that it was not found is demonstrated by that fact that Fouts Lane was not claimed at the time. The omission of the route from the original Definitive Map may even be taken as an indication that there was evidence contrary to the existence of public rights even if that evidence may have since been lost. This is supported by the Trevelyan case¹⁵. While that case related to the removing of rights from the Definitive Map it was ruled that, "... In the absence of evidence to the contrary, it should be assumed that the proper procedures had been followed, ... Evidence of some substance had, however, to be put in the balance, if it was to outweigh the initial presumption..."</p> <p>6.2.7. Therefore, the principal issue is, has new evidence been discovered. An inquiry cannot simply re-examine evidence already considered. Only if there is new evidence should all of the available evidence be considered in order to ascertain whether rights exist. In this case there is no new evidence.</p> <p>6.2.8. In addition to the general comments above, Landowner A also makes multiple comments on specific documents. Each of these is discussed in the documentary evidence sections above. In summary they suggest that, despite the volume of evidence, none of it suggests that Fouts Lane had vehicular rights.</p> <p>6.2.9. The majority of the maps produced with the</p>
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¹⁵ Trevelyan v Secretary of State for the Environment, Transport and the Regions (CA) [2001] EWCA Civ 266, [2001] 1 WLR 1264 (BBE)

	<p>application depict topographical features and show an unnamed track or lane without indicating its status. Not one of the documents seems to refer to the lane as being used as a public route whereas there is evidence that it was a private occupation road. Furthermore, Fouts Lane had no name until 1901. Under section 69 of the Highways Act 1773 all common highways had to be named before indictment for obstruction or disrepair could take place. Therefore, the fact that the application route had not previously had a name suggests it can't have been a common highway.</p> <p>6.2.10. Landowner A has lived close to Fouts Lane since 2004. During that time they have never seen the route used on foot, bicycle, horse or any other means nor has there been any attempt to use the route in these ways.</p> <p>6.2.11. They are of the view that Fouts Lane seems to act more as a drove or a ditch or drain. A number of drains flow into Fouts Lane including those from the nearby road and Fouts Cross Farm. The Lane is often underwater.</p> <p>6.2.12. The lane is very narrow (5 foot at the base). It would therefore be inaccessible to any horse drawn vehicle.</p> <p>6.2.13. Fouts Lane has been fenced off for years and it is a haven for wildlife.</p> <p>6.2.14. In addition to his own evidence, Landowner A supplied statements from two further individuals each of whom have previously owned nearby land. These statements are summarised as Respondent 1 and 2 below</p>
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Respondent 1	6.3. Respondent 1 has lived in the immediate vicinity of Fouts Lane since 1951. During that time they have never seen the route used on foot, bicycle, horse or any other means nor has there been any attempt to use the route in these ways. They are also of the view that the route had not been used since at least 1918. This opinion was based on information obtained from their father who had also lived close to Fouts Lane.
Respondent 2	6.4. The author of statement 2 lived in the immediate vicinity of Fouts Lane between 1982 and 2003. During that time they have never seen the route used on foot, bicycle, horse or any other means nor has there been any attempt to use the route in these ways. They also state that when they purchased the property their solicitor found no evidence of the route being used.
Landowner C	6.5. Landowner C lived within a kilometre of the application route between 1939 and 1960. During that time they never saw anyone using the route.
Respondent 3	<p>6.6. Landowner A has appointed Respondent 3 as their representative. In this capacity they made lengthy submissions on the draft version of this report. Given the scale of those submissions, a full copy is included at appendix 15. However, they can be summarised as follows:</p> <p>6.7. They refute the conclusions reached by the applicant.</p> <p>6.7.1. It is for the applicant to demonstrate that public rights exist.</p> <p>6.7.2. To be successful the applicant needs to displace the presumption that the Definitive Map is correct and (when producing the Definitive Map) all procedures were followed correctly.</p> <p>6.7.3. The procedures for the original Definitive Map listed the documents to be viewed and allowed for corrections to be made.</p>

	<p>6.7.4. Fouts Lane was not classed as public by any of the adjoining Parish Councils, the district or county council at the time that the Definitive Map was being prepared.</p> <p>6.7.5. The Parish Councils covering Fouts Lane (at the time of the definitive map) did not believe it to be public.</p> <p>6.7.6. Therefore, new evidence needs to be provided with the application. Evidence considered during the preparation of the definitive map may not be recycled. Evidence used in the preparation of the Definitive Map should be identified and ignored.</p> <p>6.7.7. There is no new evidence in this case.</p> <p>6.7.8. Only maps prepared for the purpose of identifying and recording public highways are 'relevant evidence'.</p> <p>6.7.9. The historical evidence submitted with the application only show what physical features exist on the ground and none were relevant to status.</p> <p>6.7.10. The OS Object Name Book classed Fouts Lane as an Occupation Road, defined in law (1785 – Halsbury's Volume 21 'Highways') as a road where the right of use is limited to occupiers of land and premises served by the road.</p> <p>6.7.11. 'No evidence that section 23 of the Highway Act 1835 or a certified adoption by the Highways Authority has been produced'. Nor is there an express dedication statement.</p> <p>6.7.12. In addition, the OS map show a gate against the application route at point B. This 'OS symbology records it as an occupation road'.</p> <p>6.7.13. OS Maps are not admissible as to legal status.</p> <p>6.7.14. Finance Act documents need supporting evidence before they can be read as being in favour of public rights.</p> <p>6.7.15. No evidence of use (i.e. horse riding) was submitted with the application.</p>
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7. Comments on Landowner Evidence

- 7.1. Landowner A and Respondent 3 have quite rightly pointed out that, on the basis of the evidence before them at the time of preparing the Definitive Map, the relevant parish councils, the district council and the county council were not of the opinion that Fouts Lane was a public right of way (had they been then they would have put it forward for inclusion on the Definitive Map). However, that does not mean that no public rights exist but only that the evidence before them at the time did not demonstrate the existence of those rights. Where evidence which was not considered by those authorities is discovered it might cast a different light over the evidence which they had available to them.
- 7.2. This is reflected in section 53 of the Wildlife and Countryside Act 1981 which states that an order can only be made to modify to Definitive Map and Statement on the 'discovery of evidence'. That is evidence which was not available when the Definitive Map was last reviewed (see paragraph 4.2 above).
- 7.3. In this case, the application route was excluded from the Finance Act 1910 valuation. The inference to be drawn from this is considered in more detail below. However, it does raise a strong possibility that the application route was considered to be highway. As explained in the Finance Act section, these documents were not made public until the 1980s and as such were not available during the production of the definitive map. In the circumstances these documents are considered sufficient to satisfy the need for a discovery of evidence.
- 7.4. Having discovered new evidence it is necessary to consider it alongside 'all the other relevant evidence available'¹⁶ in order to ascertain whether or not rights subsist or are reasonable alleged to subsist. In this context 'all other relevant evidence' can include those documents which may have been considered when the Definitive Map was first being produced.

¹⁶ Section 53(3)(c)(i) of the Wildlife and Countryside Act 1980.

- 7.5. Landowner A and Respondent 3 are also correct to point out that there is a rebuttable presumption that statutory procedures were correctly followed when drafting the Definitive Map and Statement. Furthermore, the Map and Statement are conclusive evidence of what they show. Therefore, when seeking to delete or downgrade a right of way shown on the Definitive Map, evidence of some substance is needed to displace the presumption that a route is correctly shown. This was confirmed in the Trevelyan case quoted above.
- 7.6. However, the evidential effect of the Map and Statement (i.e. that it is conclusive evidence of what it shows) is without prejudice to the existence of additional rights which are not yet recorded. 'This proviso protects other rights, where they exist, against the conclusive evidential effect of the definitive map'¹⁷. There is therefore no presumption that the Definitive Map was correct in omitting the application route and no such presumption needs to be displaced. The test for making an order is simply that set out in paragraph 4.2 above.
- 7.7. Turning to some of the evidence which the landowners and others have touched upon, it is true that Fouts Lane was classed as an 'Occupation Road' in the OS Object Name book. As one of the landowners correctly implies this weighs in favour of private status. However, it cannot be seen in isolation and needs to be considered with the rest of the evidence. This is done in section nine below.
- 7.8. It is true that Section 69 of the Highways Act 1773 required 'common highways' to be named in certain circumstances. However, it is wrong to suggest that Fouts Lane was not named until 1901. Fouts Lane and Frogmary Lane are both found to be named on the OS map of 1887. Earlier maps produced as evidence in this case tended not to be annotated with road names. Therefore, the fact that the name 'Fouts Lane' does not appear on those maps should not be taken as evidence that they had not been given a name. Furthermore, as stated in the Consistency Guidelines¹⁸, road names over time can be corrupted or even disappear completely, with sometimes new names taking their place. Therefore, of themselves, road names are not persuasive evidence of public status and in this case do not assist in determining the status.

¹⁷ Paragraph 2.2 of Rights of Way Circular 1/09. Version 2 October 2009.

¹⁸ DMO consistency Guidelines, 5th revision July 2013, Section 2 page 8, 2.31 to 2.33

- 7.9. In relation to the Finance Act, it is agreed that these documents should be seen as corroborative and therefore given weight in light of all of the other evidence. This is done in section nine below.
- 7.10. It is also agreed that no signed document amounting to an express dedication by the landowner has been found. Nor has an adoption agreement or any evidence that procedures were followed for transferring maintenance liability to the parish¹⁹ been found. However, this is hardly unusual and there is no pre-requisite for evidence of this type to be available before it can be concluded that a public right of way exists.
- 7.11. If rights of way can be shown to have existed at some point in the past then, unless they have been legally stopped up, they will still exist today. Therefore, the fact that the route is unsuitable for particular types of traffic today is not necessarily of any relevance to the current investigation. What can be relevant is the historic condition and character of the route. For example, if historic documents have consistently shown a route to be too narrow to take vehicles then this might be considered evidence against it being a public vehicular road. The relevance of the historic character of the application route is discussed below.
- 7.12. It is noted that the landowners and respondents who submitted evidence have never witnessed any users on foot, horseback or in a vehicle. Collectively their recollections stretch back to 1951. Furthermore, one of the landowners vouches that Fouts Lane has not been used since 1918. This view is based on information obtained from their late father who moved to the area aged 4 in 1918. Overall this is consistent with the fact that no user evidence has been submitted in this investigation.
- 7.13. However, the applicant's case is that rights have historically existed. If this is the case the maxim 'once a highway always a highway' needs to be applied. In other words, the fact that a route has not been used in more recent times does not in itself extinguish any rights which may have existed in the past. The key to this investigation is therefore to determine what, if any, public rights have historically existed over the application routes.

¹⁹ As set out in section 23 of the Highways Act 1823.

7.14. Several other comments were made regarding safety, security, convenience, the effect on the natural habitat or the desirability of public rights existing over the application routes. Though these concerns are understandable they are not relevant to this investigation as they do not assist in determining if a right of way exists. This investigation is to determine what, if any, public rights already exist over the application route and therefore whether or not the Definitive Map and Statement needs to be changed to accurately record those rights. Only relevant evidence can be considered.

8. Consultations and other submissions

8.1. The table below shows other individuals and organisation who were consulted and gives brief details of replies that were received.

South Somerset Area Highways Office	8.2. Replied confirming they have no information relating to these two routes.
Ramblers	8.3. Replied confirming they have no relevant information on the applications.
Seavingtons Parish Council	8.4. Replied stating; path under discussion is shown as a track and they have no documentary evidence of it ever being bridleway.

No response was received from the following organisations.

- Local Member
- Trail Riders Fellowship – Somerset Office
- All Wheels Drive Club
- Open Spaces Society – National Office
- Open Spaces Society – South Somerset Office
- Somerset Environmental Records Centre
- Somerset and Avon Constabulary
- English Nature – Somerset Office
- British Horse Society – National Office
- British Driving Society – National Office
- Ramblers' Association – Local Area Representative
- British Horse Society – Local Area Representative
- CPRE – Somerset Office

9. Discussion of the evidence

- 9.1. As discussed in paragraph 4.1 above, the County Council is under a duty to modify the Definitive Map on the discovery of evidence that it is in error. The standard of proof to be applied in cases such as this (i.e. where the route of a claimed right of way is not already shown on the Definitive Map and Statement) consists of two limbs. An order should be made to modify the Definitive Map if the evidence shows that a right of way;
- a) subsists; or
 - b) is reasonable to allege to subsist.
- 9.2. Importantly, the above paragraph describes the test for making an order. Such an order can only be confirmed (and therefore the Definitive Map modified) if the evidence meets the higher 'balance of probabilities' test.
- 9.3. It is noted that some pieces of evidence are ambiguous and there is no single document which categorically proves or disproves the existence of public rights. However, when looked at in its totality the evidence supports the conclusion that public rights can be reasonably alleged to subsist over Fouts Lane for the following reasons.
- 9.4. Taken together the evidence clearly shows that Fouts Lane has existed since at least 1755. While many of the documents submitted as evidence do not necessarily directly assist in identifying the status of the routes, they do indicate the physical characteristics at the time the maps were drafted. They demonstrate that although the route may have declined over time, it is likely that it was capable of carrying horse and cart traffic from 1782 up to at least 1919. Of particular value in this respect are the Day and Masters map, Tithe documents, Greenwoods map, sale documents, 1755 Manorial Map, the 1815 Map of Seavington and OS Maps.
- 9.5. This evidence of character is useful in that it shows that the physical nature of the application route was not inconsistent with the existence of public rights (vehicular or otherwise). Furthermore, despite the fact that today Fouts Lane is narrow and wet (partly as a result of long standing drains emptying into the lane), it would appear to have been physically capable of taking vehicular traffic in the past. However, while certainly not evidence against public rights, the route's physical character cannot be taken as directly supportive of them either. Both public and private roads may be of a size and standard capable of carrying horse and carts.

- 9.6. Of those documents referred to in paragraph 9.4 the one which maybe offers most in terms of determining status (as opposed to character) is the 1782 Day and Masters Map. The small scale of this map makes it likely that only prominent landscape features or routes of importance would have been depicted. While it is not inconceivable that a private vehicular road could fall within one (or both) of these two categories, it seems far more likely that the application route was included on account of it being considered public. While there are important caveats to this conclusion (set out in paragraph 5.11.5) Day and Masters Map remains slightly supportive of public vehicular rights over the application routes. Of similar weight in support of public vehicular rights is the 1755 manorial map.
- 9.7. Although produced over 100 years later the March 1924 Rural District Council minutes also provide some evidence of that the route continued to have a reputation of a public right of way. However, the weight attributed to these is also limited particularly in light of the witness evidence supplied by Landowner A.
- 9.8. A document which offers more help in determining the status of the application routes is the Inclosure Award for South Petherton. The Award was made under 'An Act for Inclosing Lands within the Parish of South Petherton' dated the 7th June 1836. Awards of this nature are often of assistance in determining the status of the route because the Commissioners responsible for them had powers to, amongst other things, create new public and private rights. Where this is the case it provides very strong evidence as to the status of a given route at the time of the Award. In this case the Award does not legally create any rights over the application route. However, that is not to say that it offers no assistance.
- 9.9. While the Award did not legally 'set out' the route, Fouts Lane was labelled as a route 'to Seavington'. The status of existing roads would have been of great significance to the Commissioners as they needed to ensure that the network that they were creating complimented that which already existed outside of the Award area. Furthermore, the Award itself would have gone through a public consultation exercise and there is no evidence to suggest that any objection was raised to the way in which Fouts Lane was depicted or labelled. Two of the accompanying maps in this document are therefore of some assistance.

- 9.10. One of those maps labels Fouts Lane as a route 'From Seavington'. On the other map Fouts Lane is left unlabelled whilst a neighbouring road is labelled instead with the same 'From Seavington' annotation. The reason for the difference between the two maps is unclear. The possibility that a mistake has been made on one, or maybe both, of the two related maps cannot be overlooked. However, it is entirely plausible that the Commissioner did consider both routes to be public roads leading to Seavington.
- 9.11. Therefore, while the inclosure evidence for Fouts Lane is not strong, it remains supportive of public vehicular rights.
- 9.12. The 1862 Highway Board Map shows routes considered publicly maintainable highways. Fouts Lane falls outside of the area that the Highway Board were responsible for and would therefore not have been their responsibility. This might explain why the route is uncoloured. However, Fouts Lane is annotated with 'from Seavington' while Davids Lane is labelled 'from Hurcott'. As referred to previously in this report, these annotations are probably the wrong way around. Despite this apparent error, it remains likely that there was an intention to label Fouts Lane (probably with 'From Hurcott'). This type of labelling was typically used for the continuation of publicly maintainable routes where they left the Highway Board's area. Therefore, the labelling of Fouts Lane is also good evidence of the existence of public rights.
- 9.13. When viewed in light of the evidence referred to above and, in particular the Inclosure Award and 1862 Highway Board Map, the exclusion of the routes from the Finance Act documents provides evidence in favour of public rights, probably vehicular, over Fouts Land. In reaching this conclusion it is acknowledged that there is a case for the application routes having been excluded on account of the existence of private, rather than public, rights. However, in this case, the evidence in favour of it being excluded on account of public vehicular rights is considered stronger and is therefore preferred.
- 9.14. However, as indicated by Landowner A and Respondent A, not all of the available documents are in favour (or assist) in showing public rights over the application route.
- 9.15. Of particular note in this respect is the Object Name Book.

- 9.16. In the OS Object Name Book of 1901 (5.5.26), the application route was described as an occupation road. This is evidence that the OS and at least one local person (possibly more) believed the application route to carry private vehicular rights. This is very useful evidence in that it is reasonably clear as to the perceived status of the route. However, it is far from conclusive and is silent in relation to the existence of lower public rights (i.e. footpaths and bridleways can and do exist over private roads).
- 9.17. The evidence of the Object Name Book is, to some extent, supported by the witness evidence provided by the Landowners. Collectively, they suggest that the route has not been used since at least 1918. However, evidence that the route was not used prior to the early 1950s is based on a second hand account, which is very difficult to verify and therefore cannot be given much weight.
- 9.18. The reported lack of use in more recent times is entirely consistent with the fact that no user evidence has been submitted in this case. However, a lack of recent use does not, in itself, extinguish rights of way which are found to already exist.
- 9.19. The Object Name Book evidence, and to a lesser extent, the respondent's witness evidence, is supportive of the argument that the application route was excluded from the 1910 Finance Act valuation on account of it being an occupation road. It is accepted that this is a plausible interpretation of the Finance Act. However, as mentioned above, exclusion from the valuation raises a strong possibility that a route was a highway, probably vehicular. When viewed in light of the rest of the evidence (summarised above) this can be considered the more likely explanation for the exclusion of the application route in this case.
- 9.20. Of the remaining documents, the Handover Map/Road Records, while not supportive of public rights is not inconsistent with them.
- 9.21. The Definitive Map preparation records do not show the route as a public right of way. Therefore, the Definitive Map evidence is certainly not in favour of the existence of public rights. However, it does not disprove the existence of such rights either.

- 9.22. Overall, there appear to be a number of contradictions in the evidence. However, the 1755 Manorial Map, Day and Masters' map, the 1807 auction map, the Inclosure Award, the 1862 Highway Board map, the Finance Act valuation and the March 1924 Rural District Council minutes, alongside evidence of the character of the route is considered sufficient to reasonably allege that public vehicular rights have historically existed over Fouts Lane. This is the case even when evidence to the contrary, and the Object Name Book and witness evidence in particular, is taken into account.
- 9.23. The Natural Environment and Rural Communities Act 2006 extinguished mechanically propelled vehicular rights over all routes not recorded on the Definitive Map as a BOAT. There is no evidence to suggest that either of the application routes in question meet one of the exceptions set out in the 2006 Act. As such, since the coming into force of the 2006 Act, only those rights commensurate with a restricted byway have remained.

10. Summary and Conclusions

- 10.1. As mentioned above, the County Council is under a duty to modify the Definitive Map where evidence comes to light that it is in error. Importantly, the standard of proof to be applied in cases such as this is: do public rights subsist or can they be reasonably alleged to subsist.
- 10.2. The application routes in this case have been shown to have physically existed and to have been capable of carrying vehicular traffic in the past. The South Petherton Inclosure Award shows Fouts Lane is labelled in such a way as to provide evidence which leans towards public status.
- 10.3. The inclosure evidence is supported by the evidence of the 1862 Highway Board Map and the Finance Act valuation amongst others. The Finance Act is classed as new evidence, which is required for the order to be made, as discussed in section 7.
- 10.4. Taken as a whole, the evidence is considered to provide enough weight to reasonably allege the historic existence of public vehicular rights over Fouts Lane. This is the case even when considered alongside the evidence of the Object Name Book and witness statements.

11. Recommendation

I therefore recommend that:

- i) An order be made the effect of which would be to modify the Definitive Map and Statement by adding a restricted byway over the route shown A-B on plan H04-2018 (i.e. Fouts Lane).
- ii) If there are no objections to such an order, or if all objections are withdrawn, it be confirmed.
- iii) If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs.

12. List of Appendices

Please note that the document reproductions in the appendices are not to scale. The report writer has added the red letters A and B present on Appendix 1 to maps to help the reader identify the sections of the route the document is depicting. Red circles have also been added to some appendices to indicate the area of the claim where lettering is not appropriate.

1. Plan showing claimed route
2. Photos of the claimed routes
3. Land Registry Search
4. Map of Area – with reference points from the report
5. Inclosure Award
6. Tithe Records
7. OS Maps
8. Finance Act
9. Highway Road Records
10. *Not used*
11. Definitive Map and related documents
12. Local Authority Documents
13. Sale of Lands
14. Other Sources (additional related documentary evidence)
15. Respondent 3's objection