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Public Rights of Way Management & Consultancy Services

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## Wildlife & Countryside Act 1981 Application for Definitive Map Modification Order Claimed Restricted Byway – Paintmoor Lane, Chaffcombe & Chard

Somerset County Council Case Reference: 524

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### 1.0 Introduction

1.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), a Member of the Institute of Sports, Parks and Leisure (ISPAL), a Registered Expert Witness and I hold a Certificate in Leisure Management.

1.2 My experience is based, most generally, on an expertise that has been developed over a twenty-five year period as a Public Rights of Way practitioner.

### 2.0 Purpose of Report

2.1 The purpose of this report is to assist Somerset County Council in their determination of an application for a Definitive Map Modification Order to record restricted byway rights over the route shown A-B-C-D on Plan 1 (Appendix 1) in the Document Bundle which accompanies this report).

#### Description of the Route under Investigation

2.2 Whilst the route under investigation (the Application Route) is in the physical form of a lane, bounded on each side by fences and hedges etc throughout its length, it can be split into three distinct sections. The first section commences on Avishayes Road (Point A on Plan 1) and runs along the north-eastern boundary of Paintmoor Plantation to a point where the lane alters direction to run northwards (Point B on Plan 1). This section of the Application Route (A-B on Plan 1) is not currently recorded on the Definitive Map. The second section of the Application Route commences at Point B (on Plan 1) and runs in generally northerly direction

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past the entrances to a number of properties to Point C (on Plan 1). This section of the Application Route (B-C on Plan 1) is currently recorded on the Definitive Map as a public footpath, under reference CH 5/57 (Chard). The third section of the Application Route commences at Point C (on Plan 1) and proceeds in a generally northerly, then north-easterly direction, looping around the north-eastern end of Chard Reservoir (disused) to a point where it joins Chaffcombe Lane (Point D on Plan 1). This section of the Application Route (C-D on Plan 1) is not currently recorded on the Definitive Map. A selection of photographs of the Application Route are included in the Document Bundle under Appendix 2.

### Consultations

- 2.3 Consultations have been undertaken in accordance with the principles set out in national guidance and the usual practices of Somerset County Council. This includes consultation with land owners/occupiers, the Parish and District Council and local/national user interest groups. Any relevant evidence arising from this consultation exercise is included within the report. A list of consultees is included in the Document Bundle under Appendix 3.
- 2.4 As a further consultation exercise, involving the circulation of a full copy of this report to all known landowners/occupiers, the applicant, the parish council, local County Councillor and Chairman of the County Council's Regulation Committee was also undertaken. One response was received from an adjoining land owner and is included in the Document Bundle at Appendix 23. This response did not introduce any new evidence, but confirmed the adjoining land owners continued opposition to the application.

### Documents Consulted and Site Visits

- 2.5 As part of my investigations I have visited the archives held at the Somerset Heritage Centre in Taunton to view a range of relevant historical documentation. A list of all documents consulted as part of the investigation is included in the Document Bundle at Appendix 4.
- 2.6 I have also visited the site to look at the Application Route, and met with any land owners/occupiers who requested a meeting to discuss the case. Any photographs of the route that were submitted along with the application or taken as part of my own site visit are included in the Document Bundle at Appendix 2.

### **3.0 Background**

- 3.1 The centre section (B-C on Plan 1) of the Application Route is currently recorded on the Definitive Map as a Public Footpath under reference CH 5/57 (Chard). Whilst the Definitive Map provides conclusive evidence of the existence of the rights recorded upon it, its conclusive status is without prejudice to the possible existence of additional or higher rights. A copy of the Definitive Map and Statement for this footpath is included in the Document Bundle at Appendix 5.
- 3.2 On 16<sup>th</sup> June 2009 the South Somerset Bridleways Association submitted an application for a Definitive Map Modification Order to Somerset County Council. The application sought to add two sections of the Application Route (Sections A – B and C – D on Plan 1) to the Definitive Map as a Restricted Byway and to amend the status of the section of the Application Route shown B – C (on Plan 1) from Footpath to Restricted Byway. The application was accompanied by copies of historical documentary evidence which the applicant's claim supports their application. A copy of the application (less copies of the documentary evidence) is included in the Document Bundle at Appendix 6. Copies of the documentary evidence are included in the Document Bundle under Appendices 9-20 and are discussed further below.
- 3.3 If an application for a Definitive Map Modification Order is not determined within 12 months of its submission the applicants have a right to request that the Secretary of State issues a direction to the County Council requiring them to make a decision whether or not to make a Definitive Map Modification Order within a defined timescale. On 23<sup>rd</sup> September 2016 South Somerset Bridleways Association made such a request, and having considered all of the material factors the Secretary of State directed Somerset County Council to determine the applications by 31<sup>st</sup> December 2020. Copy of the Secretary of State's directions are included within the Document Bundle at Appendix 7.
- 3.4 In order to meet this deadline Somerset County Council has appointed external specialist consultants (in this case Robin Carr Associates) to undertake the necessary work to investigate the claims made within the application, and provide an advisory report to assist them in deciding whether or not to make the requested modifications to the Definitive Map and Statement for the area.
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#### 4.0 Legal Context

##### The Definitive Map and the Surveying Authority

- 4.1 Somerset County Council are the Surveying Authority for the purposes of Section 53 of the Wildlife and Countryside Act 1981 and the continuous review of the Definitive Map and Statement of Public Rights of Way. By virtue of Section 56 of the Wildlife and Countryside Act 1981 the Definitive Map and Statement provide conclusive evidence of the rights recorded within them, but this is without prejudice to the existence of any other unrecorded rights.
- 4.2 Section 53(5) and Schedule 14 of the Wildlife and Countryside Act 1981 allow any person to submit an application to modify the Definitive Map and Statement by adding routes not previously recorded, deleting routes that have been shown in error and amending the status of routes already shown. Such modifications do not create any new rights, nor do they extinguish any, they simply seek to ensure that the Definitive Map and Statement accurately records those that's that already exist.
- 4.3 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to make a Definitive Map Modification Order upon the discovery of evidence that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist. The duty to make the Order is triggered if there is a reasonable allegation that the claimed rights subsist, however such an Order can only be confirmed if the rights are shown, on balance of probability, to subsist.
- 4.4 Section 53 (3) (c) (ii) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to make a Definitive Map Modification Order upon the discovery of evidence that, on balance of probability, a highway shown on the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
- 4.5 The decision whether to make a Definitive Map Modification Order is “quasi-judicial” in nature, and as such the decision must be made having had due regard to all of the available and relevant evidence (i.e. evidence relating to the existence or otherwise of the public rights in question). Matters such a desirability, suitability, need, security and even public safety,

whilst all genuine concerns, are not matters that can lawfully be taken into account as part of the decision-making process.

4.6 When considering the available and relevant evidence the Authority should take into account the provisions of Section 32 of the Highways Act 1980, which 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”.

4.7 The burden of proof rests initially with those making the claim to prove their case.

Public Rights of Way - General

4.8 Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are public highways. A highway is a way over which the public have a right to pass and re-pass. Not all highways are maintainable at public expense, nor is there any need for a way to have been “adopted” before it is either a highway or a highway maintainable at public expense.

4.9 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.

4.10 Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of “Once a Highway, Always a Highway”<sup>1</sup> applies. Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of local authority administrative order or a Court Order.

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<sup>1</sup> *Harvey v Truro Rural District Council* (1903) 2 Ch 638, 644 and *Dawes v Hawkins* (1860) 8 CB (NS) 848, 858; 141 ER 1399, 1403

Types of Highway

4.11 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. who may use it) is dependent upon the specific type of highway status possessed by a given route.

Common Law

4.12 Under the common law there were, and indeed still are, only three types of highway. These are:

- Footpaths,
- Bridleways; and,
- Carriageways

4.13 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).

4.14 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including people leading horses) and possibly the right to drive cattle.

4.15 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including people leading horses), non-mechanically propelled and mechanically propelled vehicles.

Statute

4.16 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance, under the provisions of the Countryside Act 1968 cyclists are granted a right to use bridleways. Other legislation provides for public carriageways to be subdivided into various categories which include motorways, cycle tracks, restricted byways and byways open to all traffic.

4.17 When determining the status of a specific route one must first consider the common law situation, and then apply any necessary restrictions to status imposed by statute in respect of

restricted byways and byways open to all traffic. Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case.

How Highways Come into Being – Basic Principles

Dedication and Acceptance

- 4.18 Subject to a small number of exceptions, before any highway over land can come into being there must be an act of dedication by the landowner followed by the acceptance of the strip of land as a highway by the public, usually (but not always) demonstrated by the public using the way.
- 4.19 The act of dedication may be express or implied depending upon the actions or inactions of the land owner. Acceptance is usually demonstrated by public user, however acceptance of a way as a highway by the Highway Authority may also suffice. The principles of how rights can come into being are further discussed in more detail below.

Statute

- 4.20 It is possible for highways to be created as a result of statutory processes such as enclosure awards, or in more modern times various types of statutory creation order.
- 4.21 The Highways Act 1980, Section 31 has also, to a certain extent, codified the common law (discussed below) by identifying a specific set of circumstance whereby a presumption of dedication may arise. Section 31 provides that:

*(1) Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*

*(2) The period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise.*

(3)Where the owner of the land, which any such way as aforesaid passes-

(a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the first January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

4.22 Section 31(1) has two ‘limbs’: the first provides that proof of twenty-years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention to dedicate the way as a highway defeats the claim. It is for those claiming the existence of rights to first discharge their burden of proof, before an objector is obliged to provide any evidence of lack of intention to dedicate.

#### Common Law

4.23 The establishment of highway rights under the common law is not bound by the “20 year rule” referred to above, with the courts having ruled<sup>2</sup> that rights can be established in a very short period of time. It may therefore be helpful to look at this area in more detail.

4.24 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates* [1938] 2 All ER 237, both quoted with approval by Laws J in *Jaques v SSE* [1995] J.P.L. 1031, who described Scott LJ’s summary as “a full and convenient description of the common law”. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC* [1956] 2 Q.B. 439, *Mann v Brodie* (1885) 10 App. Cas. 378 and *Poole v Huskinson* (1843) 11 M & W 827. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute. Dyson J’s judgment in *Nicholson v Secretary of State for the Environment* [1996] EWHC Admin 393 comments further on aspects of these differences.

4.25 Halsbury<sup>3</sup> states – “Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An

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<sup>2</sup> *North London Railway Co v Vestry of St Mary, Islington* (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18 month period



*intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.*

4.26 The inference of dedication may arise in three ways:

- i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example, in *North London Railway Co v Vestry of St Mary, Islington*<sup>4</sup> the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public cab rank had been established on part of the bridge. The Justices’ conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages some time after receiving notice of the proceedings before the Justices merely evoked the comment from Blackburn J. that *“As to the erection of the barriers by the appellants, that was done too late to do away with the dedication”*.
- ii) Second, the inference has been drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the

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<sup>3</sup> Halsbury’s Laws of England (Volume 55 ‘Highways’)

<sup>4</sup> (1872) 27 L.T. 672

facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred<sup>5</sup>.

- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact<sup>6</sup>.

*Natural Environment & Rural Communities Act 2006*

- 4.27 Section 67(1) of the Natural Environment & Rural Communities Act 2006 extinguished, on commencement, public motor vehicular rights over every highway that is not already shown on the definitive map and statement, or is there shown as a footpath, bridleway, or restricted byway. In effect, this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the definitive map and statement as a byway open to all traffic.
- 4.28 In the absence of further qualification this provision would extinguish public rights of way for mechanically propelled vehicles over virtually the whole of the existing highway network. But subsection 67(2) introduces a series of exceptions to protect certain highways from such extinguishment under subsection 67(1). Any way that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished.
- 4.29 Because clause 67(1) explicitly extinguishes public motor vehicular rights over every highway that was not shown on 2nd May 2006 [in England] on the definitive map and statement as a byway open to all traffic, there is a clear presumption that this will be the case unless it can be shown that one (or more) of the five exceptions in subsections 67(2) or the transitional arrangements in subsection 67(3) apply.

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<sup>5</sup> See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA), 318-9, 325, 327-8, 331

<sup>6</sup> See e.g. Parker J in *Webb v Baldwin and others* (1911) 75 JP 564 at p565

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A summary of the five exceptions

4.30 The five exceptions may be summarised as follows:

- *Subsection 67(2)(a)* excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the ‘ordinary roads network’.
- *Subsection 67(2)(b)* excepts ways that are both recorded on the “list of streets” as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the ‘ordinary roads network’.
- *Subsection 67(2)(c)* excepts ways that have been expressly created or constructed for motor vehicles.
- *Subsection 67(2)(d)* excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
- *Subsection 67(2)(e)* excepts 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’.

4.31 Section 67(4) of the 2006 Act provides that where a public vehicular right existed, but has now been extinguished by virtue of the provisions of the Act, a private right of way is retained, whether previously used or not.

4.32 A summary of the generic guidance on the legislation etc that is usually found within Somerset County Council Decision Reports may be found at Appendix 8 in the document bundle which accompanies this report.

## 5.0 Summary Description of Available Relevant Documentary Evidence

### *Inclosure Award (1819) (Appendix 9)*

- 5.1 The Application Route is shown on the Inclosure Map as being 30 feet wide and given reference number 40. The Inclosure Award sets out the Application Route as a Private Road.

### *Deposited Plans and Documents relating to the Reservoir (circa 1833) (Appendix 10)*

- 5.2 Plans relating to the construction of the Chard Reservoir (circa 1830's) show the Application Route and reference it under hereditament 103. The accompanying book of reference lists hereditament 103 as a "Parish Road".

### *Tithe Map (1840/1) (Appendix 11)*

- 5.3 The Tithe Map for Chard shows part the Application Route. The map does not include any colouration. The Tithe Map for Chaffcombe shows part of the Application Route and it appears to be shaded in the same manner as other roads in the area.

### *1910 Finance Act Records (Appendix 12)*

- 5.4 The 1910 Finance Act Index maps show that the Application Route were excluded from valuation.

### *Ordnance Survey Maps (Appendix 13)*

- 5.5 All of the editions of the Ordnance Survey maps show the Application Route as a track or roadway, naming it as Paintmoor Lane.

### *Ordnance Survey Object Names Book (1903) (Appendix 14)*

- 5.6 The Ordnance Survey Object Names Book cites authority for the naming of Paintmoor Lane as the Agent of the owner of the surrounding land and does not attribute it any status beyond a "road".

### *Commercial Maps (Appendix 15)*

- 5.7 The Application Route is shown on Greenwood's Map (1822) and Bartholemew's Map (1927)

Property Sale Details (1944) (Appendix 16)

- 5.8 Documents relating to the sale of lands forming part of the Hinton Unsettled Estate in 1944 show that land in the vicinity of the Application Route was for sale, and the sale catalogue refers to Paintmoor Lane by name. It does not however attribute the lane any status.

Definitive Map Records (Appendix 17)

- 5.9 These records show that the Application route was not originally claimed by the respective Parish/Town Councils at the initiation of the Definitive Map preparation process. The centre section (B-C on Plan 1) was however subject to an objection (due to its omission) at the draft stage of preparation. The grounds stated for its inclusion are that it was shown on the Tithe Map.

1929 Hand Over Maps & Other Highway Authority Records (Appendix 18)

- 5.10 These documents use an Ordnance Survey map as their base and therefore show the Application Route. It is not however coloured up on any of the records as being highway maintainable at public expense.

County Council Rights of Way Files (Appendix 19)

- 5.11 The County Council's Rights of Way Files contain correspondence relating to the Application Route from 1993 - 1997. This correspondence suggests that the status of the route was in question at that time.

Aerial Photographs (Appendix 20)

- 5.12 The Application Route is visible on the 1946 Aerial photographs

**6.0 Submissions made by (or on behalf of) the Landowners/Occupiers**

- 6.1 Only limited submission have, so far, been made by the owners of the land adjacent to the Application Route. They have however requested copies of the evidence, and will be consulted on the content of this report, at which time they may wish to make further submissions. They generally consider the lane to be private, with public footpath rights existing only over Section B – C (on Plan 1). Copies of correspondence from the land owners is included in the Document Bundle at Appendix 21.

## **7.0 General Interpretation of Evidence**

7.1 A summary of the generic guidance on the interpretation of evidence etc that is usually found within Somerset County Council Decision Reports may be found at Appendix 8 in the document bundle which accompanies this report.

7.2 Further general guidance on the interpretation of evidence etc may be found within the Planning Inspectorate’s Definitive Map Consistency Guidelines, relevant extracts from which may be found at Appendix 22 of the document bundle.

## **8.0 Discussion**

8.1 It must be stressed that the decision to be made, over what public rights exist, is quasi-judicial in nature, and as such the decision makers must base their decision upon all of the available and relevant evidence. Issues such as desirability, security, need, future maintenance liabilities, and even public safety, whilst undoubtedly genuine concerns, are not matters that can lawfully be taken into consideration as part of the decision-making process.

8.2 It must also be understood that a decision to make a Definitive Map Modification Order to amend the status of the Application Route from footpath to restricted byway (B – C on Plan 1), or to add a restricted byway to the Definitive Map (A - B and C - D on Plan 1) will not result in the creation of any new rights. It will simply seek to record those rights that, albeit currently unrecorded, already exist.

8.3 With regard to section B – C (on Plan 1) of the Application Route, whilst the standard of proof required to be satisfied is only that of the balance of probability, the fact that it is already recorded on the Definitive Map as a public footpath will have a significant bearing on the weighting and interpretation of the evidence. This is because this part of the Application Route is already an acknowledged public highway (of footpath status) and it is already a highway maintainable at public expense (not least because of its inclusion on the original Definitive Map). As a result, any evidence that is simply indicative of the Application Route being a public highway, but which is silent on the matter of the status of such a highway (e.g. footpath, bridleway or carriageway) may be reasonably interpreted as being consistent with the routes currently recorded status of public footpath.

- 8.4 The situation regarding the remainder of the Application Route (A – B and C - D on Plan 1) is somewhat different. The duty to make an Order is triggered if there is a reasonable allegation over the existence of public bridleway rights. This is a lower test than the balance of probability test discussed above, which only has to be met, in this instance, at confirmation stage.
- 8.5 Before the duty to make an Order is triggered there must be the discovery of evidence which warrants the making of an Order. Such evidence must not have been taken into consideration as part of any previous legal proceedings to clarify the status of the route, and also positively support the existence of the alleged bridleway rights. In this case we do know that the stated grounds for the inclusion of the centre section of the Application Route (B-C on Plan 1) was stated as being the inclusion of the route on the Tithe Map. An examination of the Tithe Map (Appendix 11) suggests that the entire route of what is now Footpath CH 5/57 was not, in fact shown on the Tithe Map, but it is not for the Authority to now re-open an investigation into whether or not this footpath was correctly recorded on the Definitive Map in the 1950's. The reference to the Tithe Map (whether correct or not) does however mean that it cannot be relied upon for the purposes of the discovery of evidence.
- 8.6 In many instances documents relating the 1910 Finance Act (Appendix 12) can be considered new evidence because they were not publicly available at the time of the production of the Definitive Map in the 1950's. The Application Route was excluded from the valuation survey and this is often considered to be strongly supportive of the proposition that a route was a public highway of some description. Taking this into account they may be relied upon to constitute the required "discovery".

*Inclosure Award (1819) (Appendix 9)*

- 8.7 The Inclosure Award clearly sets out the Application Route as a Private Road with a width of 30 feet. Documents of this nature carry considerable evidential weight and may be considered to be conclusive as to their content at the date of their production. It would therefore be reasonable to conclude that a) in 1819 the Application Route did not carry any public highway rights and b) any pre-existing public rights (if indeed they existed at all) would have been extinguished by the Inclosure Award process.
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*Deposited Plans and Documents relating to the Reservoir (circa 1833) (Appendix 10)*

- 8.8 This document set suggests that by circa 1833 the Application Route was considered to be a “Parish Road” and documents of this nature do carry a high degree of evidential weight because they formed part of a Parliamentary process that was open to public scrutiny and objection.
- 8.9 A “Parish Road” may be considered to be a road that was the responsibility of the Parish to maintain (i.e. a public carriageway). At the time of the production of the documents (pre-1835 Highways Act) all public highways were maintainable by the Parish. This does however appear to be contradictory to the Inclosure Award which set out the route as a private road which was maintainable by the owners and occupiers of land being set out within the award. It is however possible that the Application Route became a public highway at some point during the fourteen-year period between the Inclosure Award coming into effect (1819) and the Plans for the Reservoir were drawn up (1833).

*Tithe Map (1840/1) (Appendix 11)*

- 8.10 The tithe maps indicate that in 1840/1 the Application Route physically existed. It does not, however, provide any commentary on the status of the route, and any brown colouring is not indicative of highway status, it simply indicates that it was not subject to tithe (i.e. it was non-productive land).

*1910 Finance Act Records (Appendix 12)*

- 8.11 Documents produced as part of the 1910 Finance Act valuation process can provide very good evidence in support of the existence of public rights of way. It is generally accepted that the exclusion of a route from valuation can provide strong evidence in support of the proposition that it is a public highway of some description. However, as indicated in the Planning Inspectorate’s consistency guidelines on the subject (Appendix 22) there are alternative interpretations. For instance, where a route is used by multiple land owners/occupiers for access to land and property (as in this case), and it is set out in the Inclosure Award as a private road (as in this case), such exclusion has been interpreted, albeit not consistently, as not being supportive of the existence of public highway rights. The documents must be considered in the context of the other evidence.



Ordnance Survey Maps (Appendix 13)

- 8.12 Ordnance Survey maps provide excellent and accurate evidence of the existence of the physical features that existed at the time of their survey. They are, however, generally silent on the issue of the status of any path, track or way, and carry a disclaimer to that effect.
- 8.11 In this particular case the Application Route is shown on all of the Ordnance Survey maps that have been consulted. They are entirely consistent with other documents that refer to and/or show the Application Route (e.g. the Tithe Map, Inclosure Award, the Deposited Plans and aerial photos etc). As a result, they are of little assistance in the determination of the application under consideration.

Ordnance Survey Object Names Book (1903) (Appendix 14)

- 8.12 The Ordnance Survey Object Names Book provides the provenance for the inclusion of the naming of Paintmoor Lane on the Ordnance Survey maps. Had the Application Route been considered to be a public highway of some sort, one may have expected the Surveyor of Highways to have been listed as the person who confirmed the details. In this case it was the agent for the land owner. This may be considered to be indicative that the route was considered not to enjoy any public highway status at that time.

Commercial Maps (Appendix 15)

- 8.13 Whilst Greenwood produced maps based upon his own surveys, Bartholemew's maps can be traced back to the Ordnance Survey. Greenwood is known to have included both public and private ways on his maps, and therefore must be treated with a degree of caution, especially in view of the fact that the Inclosure Award was produced only three years prior to its publication. Bartholemew's map cannot be afforded any greater value than its original OS source document. These maps provide evidence of the physical existence of a path or track along the Application Route but are silent on the matter of status.

Property Sale Details (1944) (Appendix 16)

- 8.14 Whilst the property sale catalogue makes reference to Paintmoor Lane it is completely silent on the matter of its status. This document adds nothing to support the application.

Definitive Map Records (Appendix 17)

- 8.15 This document set suggests that at the time of the compilation of the Definitive Map the Application Route had, in part, the reputation of being a public footpath, and that the remainder of the route was either considered not to be public, or to enjoy rights higher than those to be recorded on the Definitive Map (i.e. public carriageway).
- 8.16 The recording of section B – C (on Plan 1) of the Application Route as a footpath was probably entirely consistent with the use that it was receiving at the time, but would not preclude the possible existence of higher rights.

1929 Hand Over Maps & Other Highway Authority Records (Appendix 18)

- 8.17 These records provide no evidence of highway status, but when considered alongside the Inclosure Award, may be considered to be supportive of the proposition that the Application Route does not enjoy any public highway rights (other than footpath rights over B-C on plan 1).

County Council Rights of Way Files (Appendix 19)

- 8.18 The correspondence of these files show that the issue of the status of the Application was the subject of some discussion and speculation in the 1990's but are of limited evidential value in the determination of the application.

Aerial Photographs (Appendix 20)

- 8.19 Aerial photographs, like the Ordnance Survey maps, provide excellent evidence of the existence of physical features on the ground on the day they were taken. They are, however, completely silent on the matter of status. In this case they are of little assistance.

Landowner Submissions (Appendix 21)

- 8.20 The submission by the land owners provide a brief but useful insight into their views on the Application Route at this time, but offer little in the way of evidence. It should, of course, be noted that the burden of proof rests with those claiming the alleged public rights, and those opposing such a claim need not make any case in opposition until such time as said burden of proof is deemed to have been discharged.

## 9.0 Conclusions

### 9.1 In conclusion:

- a) The evidence of the Inclosure Award clearly shows that in 1819 the Application Route was a Private Road.
- b) The Deposited Plans relating to the construction of the Chard Reservoir suggest that by 1833 the Application Route was considered to be a “Parish Road”. Such a status may reasonably be interpreted as meaning a public highway (probably carriageway).
- c) The exclusion of the Application Route from valuation under the 1910 Finance Act procedure may provide strong evidence in support of public highway status, but there are alternative interpretations which need to be considered.
- d) The remaining evidence is strongly supportive of the historic physical existence of the Application Route, but is silent on the matter of status.

### 9.2 When considering the evidence in this case the decision maker must be mindful of the fact that the duty to make an Order:

- a) in respect of sections A-B and C-D (on Plan 1) of the Application Route is triggered if there is a “reasonable allegation” over the existence of the claimed Restricted Byway rights;
- b) in respect of section B-C the duty is only triggered if the claimed Restricted Byway rights are shown, “on balance of probability” to subsist; but,
- c) before any Order can be confirmed the claimed rights must be shown, “on balance of probability” to subsist.

### 9.3 In view of the above it is possible that the duty to make an Order may be triggered, albeit the Order is subsequently incapable of confirmation, or that an Order may have to be made for some parts of the route (e.g. A-B and C-D) and not others (e.g. B-C). Furthermore, where there is a conflict of credible evidence which cannot be reconciled, the Courts have ruled that an Order should be made to test the evidence through the full Order process.

### 9.4 Having considered all of the above it is the Consultants view that whilst some of the evidence may be considered to be supportive of the existence of public carriageway (restricted byway)

rights, when it is considered in the whole it is insufficient to trigger the Authority's duty to make an Order.

## 10.0 Decision Required

### Sections A – B and D - C (on Plan 1)

10.1 If the County Council is satisfied that the claimed restricted byway rights are reasonably alleged to subsist over Sections A – B and C - D of the Application Route they should resolve to:

- a) Make a Definitive Map Modification Order to add the route shown A – B and C - D on Plan 1 (Appendix 1) to the Definitive Map as a Restricted Byway;
- b) and if no objections are received, confirm the Order;
- c) If objections are received, which are not subsequently withdrawn, that the Order be referred to the Secretary of State for Confirmation.

10.2 If the County Council are not satisfied that the claimed restricted byway rights are reasonably alleged to subsist over sections A – B and C – D of the Application Route they should refuse the application and advise the applicants of their rights of appeal.

### Section B - C (on Plan 1): Public Footpath CH 5/57

10.3 If the County Council is satisfied, on balance of probability, that the claimed restricted byway rights do subsist over Section B - C of the Application Route they should resolve to:

- a) Make a Definitive Map Modification Order to amend the status of the route shown B – C on Plan 1 (Appendix 1) from footpath to Restricted Byway;
- b) and if no objections are received, confirm the Order;
- c) If objections are received, which are not subsequently withdrawn, that the Order be referred to the Secretary of State for Confirmation.

10.4 If the County Council are not satisfied, on balance of probability, that the claimed restricted byway rights subsist over section B - C of the Application Route they should refuse the application and advise the applicants of their rights of appeal.

**11.0 Recommendation**

11.1 Whilst it is the consultant's opinion that the case in favour of the registration of Restricted Byway rights over the Application Route has not been made, it is for the County Council to make its own decision based upon all the available and relevant evidence.

*Robin Carr*

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Date: 23<sup>rd</sup> April 2018