

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Jonathan Woods – Countryside Access Group Manager
Title:	Application for a Definitive Map Modification Order to record a restricted byway between Mill Lane and The Devil's Highway, Parish of Heckfield
Report From:	Director of Culture, Communities and Business Services

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1 Recommendation

- 1.1 That authority is given for the making of a Definitive Map Modification Order to record a restricted byway varying between 8 and 11 metres in width, on the route shown between A – B on the location map.

2 Executive Summary

- 2.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a restricted byway between Mill Lane and The Devil's Highway, in the parish of Heckfield. The claim is supported by historic documentary evidence.
- 2.2 It is considered that the evidence submitted in support of this application is sufficient for it to be inferred that, on the balance of probabilities, the route has been dedicated as a public carriageway and that an order should be made to record the route on the Definitive Map. It is also considered that the provisions of the Natural Environment and Rural Communities Act 2006 have extinguished any motorised vehicular rights that subsist on the route, and as a result the appropriate status to be recorded a restricted byway.

3 Legal framework for the decision

WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

- b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

(3) The events referred to in sub-section (2) are as follows: -

- c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –
 - i) that a right of way which is not shown on 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....

PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 – Section 67: Ending of certain existing unrecorded public rights of way

- (1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—
 - (a) was not shown in a definitive map and statement, or
 - (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.
- (2) Subsection (1) does not apply to an existing public right of way if—
 - (a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,
 - (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),
 - (c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,
 - (d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or
 - (e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.
- (3) Subsection (1) does not apply to an existing public right of way over a way if—
 - (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,
 - (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or
 - (c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles—
 - (i) was reasonably necessary to enable that person to obtain access to the land, or
 - (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

4 Description of the Route (please refer to the map attached to this report)

- 4.1 The claimed route, shown running between Points A and B on the accompanying map, links two other routes that are adopted public highways - The Devil's Highway, which runs along the county boundary with Berkshire and meets the claimed route at Point A, and Mill Lane, which proceeds south-eastward from a junction with The Devil's Highway to meet the southern end of the claimed route at Point B. The route runs between boundary hedges, and has a width varying between 8 and 11 metres (which has been taken from historical Ordnance Survey mapping).
- 4.2 Documentary evidence indicates that the claimed route runs through an area that was previously known as 'Riseley Common' (or 'Heckfield Common'), which was crossed by a number of unenclosed routes. The available evidence indicates that the claimed route itself was unenclosed until the mid-nineteenth century, when large portions of the common were enclosed.

5 Issues to be decided

- 5.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on route A-B.
- 5.2 Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. The primary issue to be decided by this Committee is whether there is clear evidence to show that public rights subsist or are reasonably alleged to subsist.
- 5.3 If it can be demonstrated that this is the case, consideration must also be given to whether any of the exemptions contained in Sections 67(2) and (3) of the Natural Environment and Rural Communities (NERC) Act 2006 apply to those rights. If exemptions under NERC can be shown to apply, the County Council would be under duty to recognise those rights by making an order to record the route as a Byway Open to All Traffic (BOAT). In the event that no exemptions apply, the route may still be recorded as a right of way, and if vehicular rights can be shown to have been dedicated at some point in the past, the appropriate status for the route to be recorded at would be a restricted byway (enabling legal use by pedestrians, cyclists, horse riders and non-motorised vehicles).
- 5.4 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 County Council must be satisfied that public rights have come into being at some time in the past. This might be the distant past (proved by historical or documentary evidence) or in the recent past (proved by witness or documentary evidence).
- 5.5 Historical documentary evidence has been examined to see whether the depiction of the route point to it having acquired public rights as a result of dedication in the

past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficient evidence to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.

7 Documentary Evidence

7.1 Ordnance Survey 'Old Series' – 1810 (1 inch to 1 mile)

The Old Series map of 1810 is the earliest to depict the claimed route, which is shown running close to the eastern boundary of Riseley Common, on an alignment that reflects what is shown on contemporary mapping. In keeping with many of the other routes shown crossing the common, the route is depicted by parallel pecked lines, indicating that it was unenclosed at the time of survey. The route continues on its north-eastward trajectory from Point A, crossing the Devil's Highway and proceeding on an enclosed route that cuts across the land now occupied by Barossa Farm to meet what is now School Road.

No junction with Mill Lane is shown at Point B, and instead the claimed route continues southward from Point B, along the current line of Mill Lane towards Riseley Mill. A little way to the north of the mill, another route is shown branching off from Mill Lane in a north-westerly direction, on an alignment that continues into what is now recorded as Trowes Lane, north of the county boundary. The part of Mill Lane that now lies to the north-west of Point B is not shown.

7.2 Christopher Greenwood's Map of Hampshire – 1826 (1 inch to 1 mile)

Greenwood's map differs from the Ordnance Survey map in that it does not show any detail north of the county boundary, but it is similar in most other particulars. Again, the claimed route is depicted by parallel pecked lines, on the same alignment to that shown on the earlier OS map. Further, the absence of a junction with Mill Lane at Point B, and the depiction of the route heading north-westward to meet Trowes Lane, also mirror the 1810 map.

7.3 Heckfield Tithe Map and Award - 1840

The Tithe Award for Heckfield reflects a similar position to the preceding 1 inch maps - the claimed route's alignment (depicted by pecked lines) is unchanged, and no junction with Mill Lane is shown at Point B. The route running north-westward across the common to meet Trowes Lane is also shown branching off Mill Lane, north of Riseley Mill. The beginning of the route heading north-eastward from Point A towards School Road, shown on the OS Map of 1810, is shown on the northern periphery of the map. No lines appear at either end of the route, and indicating that it was unobstructed at both ends.

Unlike the adjacent plot, Riseley Common itself was not subject to tithing, and the claimed route does not appear in the award. As a result, this document offers no insight as to the route's status (public or private, vehicular or otherwise), though it does provide evidence of the existence of an unenclosed route running between Mill Lane and the Devil's Highway, with a straight-on connection to a highway leading to School Lane.

7.4 Bristol and Dover Direct Junction Railway – 1845

The plan shows the intended line of the proposed railway crossing the Devil's Highway, immediately to the north of its intersection with the claimed route at Point A. No through route is shown connecting to School Road, and the only connection between this route and the Devil's Highway is situated approximately 100 metres to the east (as is the case today). This section of the Devil's Highway has the parcel number '27', described in the accompanying book of reference as 'Parish Road', and the section running along the county boundary is annotated with the parcel number '4', described as 'Road'.

The north-westerly spur of Mill Lane, which now runs from the Devil's Highway to meet the claimed route at Point B, is shown for the first time by parallel pecked lines (recorded as '7' and listed as 'Parish Road' in the book of reference). Pecked lines across the end of this route separate it from the claimed route at Point B indicating that A-B was considered to form part of one continuous route along with the continuation southward to Riseley Mill (as is shown on the maps of the OS and Greenwood). The claimed route itself is also shown by parallel pecked lines but, as is the case with a number of other parcels in the immediate vicinity, it has no parcel number ascribed to it - parcel numbers 8 through 12, though listed in the book of reference, are not annotated on the plan. The plan resumes with parcel number '13', shown further east along the road running along the county boundary (recorded as 'Boundary Road' in the book of reference).

Given that there are no other roads listed in the book of reference, and no others shown on the plan, it seems reasonable to infer that the claimed route is described in the book of reference by the entry against '10', ('Parish Road', occupied by the 'Surveyors of Highways'). Whilst this cannot be said with certainty, this inference would support the depiction of the route in other documentary evidence. Further, this route appears to have pre-dated the newly established northern section of Mill Lane (which *is* listed as a parish road) by over thirty years, and it seems implausible that the new route could be considered as public whilst the pre-existing route (which formed a direct link between Riseley Mill and the eastbound Devil's Highway) was not.

7.5 Heckfield Inclosure Award – 1860

Some areas of the parish of Heckfield, including a large area of Riseley Common, were inclosed in 1860 under the provisions of the General Inclosure Act 1845. Section 62 of the 1845 Act authorised the commissioners to set out and make, divert or stop up roads and ways.

The Heckfield Inclosure Award deals in the main with existing highways which cross Riseley Common, specifically, the stopping up of three public footpaths, ten public bridleways and three carriage roads. Significantly, the claimed route, which is depicted on the inclosure map as falling within the area to be inclosed, is unaffected by the award. It is now shown as being enclosed (as depicted by parallel solid lines) and is coloured ochre, in identical fashion to Mill Lane, and the nearby Odiham Road and Riseley Mill Road, all of which are vehicular highways maintainable at public expense. Though the continuation of the route running over the county boundary is not shown on the map, the claimed route is shown as being unobstructed at Points A and B.

Given that the commissioners had the power to stop up highways, the fact that the claimed route was left intact by the 1860 award is a good indication of public highway status.

7.6 Ordnance Survey County Series Map and Book of Reference (First Edition) – 1871 (25 inches to 1 mile)

A-B is shown by solid parallel lines varying between 8 and 11 metres in width, unobstructed at each end. Pecked lines across the route's junction with Mill Lane at Point B indicate the extent of the area measured by the surveyor. In contrast to the Dover and Bristol Railway Plan, Mill Lane is shown on this map as a continuous route, suggesting its growing significance as part of the highway network. The parcel number allocated to the route ('25') is described in the accompanying Book of Reference as 'Road', a description which is also ascribed to Mill Lane, Riseley Mill Lane and Odiham Road, all of which are now public vehicular highways. The triangle of land that separates the claimed route from Mill Lane is recorded as 'Rough Pasture'.

The depiction of the route on the map mirrors its appearance on the Inclosure Map of 1860, and the description in the Book of Reference is indicative of vehicular status (though this document does not record whether the route was public or private). The route's depiction remains unaltered on subsequent editions of the County Series map running to 1909.

This map (and subsequent large-scale Ordnance Survey mapping) has been used to calculate the width of the routes between boundaries defined by solid line features.

7.7 Ordnance Survey County Series Map (First Edition) – 1871 (6 inches to 1 mile)

Due to limitations of scale, the six inch OS map provides a less detail than the 25 inch map from the same period, but nevertheless shows the claimed route as an unobstructed link between the Devil's Highway and Mill Lane. The map reflects the situation depicted on the deposited railway plan 1845, showing no onward connection to School Road, instead simply depicting the eastward continuation of the Devil's Highway, which meets School Road approximately 100 metres to the east.

7.8 Finance Act 1910

The Finance Act 1910 caused every property in England and Wales to be valued for the purposes of taxation, and the process to be followed was set out by legislation. The map for the area shows the claimed route as a 'white road' (ie uncoloured) excluded from the adjacent hereditaments. The northern spur of Mill Lane is shown in identical fashion (the eastern part of Riseley Common is also shown as being excluded). The exemption of the route from valuation indicates that it was vested in the highway authority (as opposed to being privately owned), and is good evidence that at the time route was considered to be a public vehicular highway.

7.9 Bartholomew's Half Inch to the Mile Map - 1920

Bartholomew's map was made for sale to the public, particularly tourists and cyclists, and it is therefore considered by some that the map was unlikely to show

routes that the public could not use. The 1920 edition of the map shows the route as an uncoloured route running between solid boundaries, running on the same alignment as today. The symbol for the county boundary obscures the northern junction at Point A, but the southern junction with Mill Lane at Point is unobstructed. The key for the map describes uncoloured roads as *“inferior and not to be recommended to cyclists”*. Significantly, the key also details Footpaths and Bridleways, which are shown by a single pecked line - the depiction of the claimed route as an uncoloured road indicates that it was not considered to be either, but whilst it might subsequently be inferred that the route was a public road, Bartholomew’s map also includes a disclaimer which states that *“the representation of a road or footpath is no evidence of the existence of a right of way”*. This notwithstanding, the depiction of the claimed route on Bartholomew’s map provides support to other evidence indicating that the route was a public carriageway.

7.10 Highways Handover Map – Hartley Wintney Rural District – 1929

This map was prepared by Hartley Wintney Rural District Council to show those routes that it considered publicly maintainable highways at the time responsibility was transferred to the County Council. The map purports to show public footpaths as well as carriageways. The claimed route is not highlighted in any way, which indicates that the Rural District Council did not consider it to be a publicly maintainable highway. This was an internal working document, and little is known about how it was compiled and the researches undertaken as part of its preparation – it may not have been subject to research into the tithe, Inclosure or other documents. Unlike the Inclosure or Finance Act documents, it was not subject to public scrutiny, and so is unlikely to be a comprehensive record of public rights in the locality at this time.

7.11 Ordnance Survey One Inch Popular Edition - 1946

The OS map of 1946 shows the route in similar fashion to Bartholomew’s map. The route is shown by solid parallel lines (significantly narrower than Mill Lane, perhaps reflecting the shift in hierarchy between the two routes). The northern end of the route is again obscured by the county boundary symbol, but is unobstructed at its southern end. As on Bartholomew’s map, the legend indicates that the route is distinct from a footpath or bridleway, which are shown by a pecked line. The legend marks the claimed route out as falling within the category *“Minor Roads in towns, Drives and Unmetalled Roads”*. A similar disclaimer to that on Bartholomew’s map appears on this plan, but again, this map shows the route as an unobstructed road, and provides limited support to the application.

7.12 National Parks and Access to the Countryside Act 1949

As part of the preparations for drafting the first Definitive Map of Public Rights of Way (as required by the 1949 Act), all parishes in Hampshire were asked to submit a plan showing the routes that they wished to be included on the map. The claimed route is not shown on the maps submitted by Heckfield Parish Council, and thus it was not included on the Definitive Map for the area, which was published in 1955. It is possible that the parish considered the route to be a vehicular highway, and therefore unsuitable for inclusion on the Definitive Map,

but the reason for its omission is unclear, and there is no reference to it in any of the parish correspondence held by the County Council.

7.13 Quarter Session Records

A thorough search of Quarter Session and other highway records has been undertaken, and no evidence has been discovered to indicate that public rights on the claimed route have ever been formally extinguished.

8 Consultations

8.1 The following people and organisations have been consulted on this application: The Ramblers, Auto Cycle Union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Cyclists' Touring Club, Open Spaces Society, Trail Riders Fellowship, All Wheel Driving Club, Heckfield Parish Council, Basingstoke and Deane Borough Council, County Councillor David Simpson, Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager).

8.2 **The Open Spaces Society** was aware of no evidence in respect of the application, but supports the addition of the route to the Definitive Map.

8.3 **The British Horse Society** supports the application.

8.4 **County Councillor David Simpson** is aware of the application

No other comments have been received.

9 Conclusions to be reached from the evidence

9.1 The claimed route has physically existed since at least the early part of the 19th century. It is shown on early maps, initially as an unenclosed route, but subsequent to the Inclosure of Riseley Common, as enclosed.

9.2 The inconsistencies on the Bath and Dover Direct Railway documents of 1845 mean that it is not possible to positively identify the route in the Book of Reference. However, by a process of elimination it can be inferred that the route was recorded as a 'parish road' at the time, which would be consistent with its depiction on other documents which indicate that the route was a public highway.

9.3 The Heckfield Inclosure Award of 1860 followed an open and transparent process pursuant to an Act of Parliament, and as such, the fact that the claimed route was preserved by this process (whilst numerous other public routes were stopped up) is good indirect evidence that it was an existing public highway retained following Inclosure.

9.4 The route was exempted from valuation under the Finance Act 1910, in keeping with other public vehicular highways in the locality. This evidence is strong

evidence that the claimed route was a public vehicular highway, because it was produced under statutory authority, following a process set out by legislation.

- 9.5 The evidence viewed suggests that by the early 20th century, the claimed route's significance as part of the local highway network had diminished, as suggested by its depiction on maps produced by the Ordnance Survey and Bartholomew, and its omission from internal working documents maintained by the local highway authorities. However, no evidence has been discovered to indicate that there has been a legal extinguishment of any rights on the claimed route.

10 Natural Environment and Rural Communities Act 2006

- 10.1 There remains to be considered whether motorised vehicular rights have been extinguished by the NERC Act 2006. They will have been unless one of eight exceptions contained within Sections 67(2) and 67(3) of the Act applies. These exceptions are set out in Section 2 and are examined in turn below. In the event that none of the exemptions can be shown to apply to this route, the highest status at which the route can be recorded is restricted byway.

- 10.2 Section 67(2) – rights for mechanically-propelled vehicles will not have been extinguished on an existing public right of way if:

- (a) ***it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles.***

Officers are aware of no evidence which documents use of the route by the public in motor vehicles during the period 2001-2006.

- (b) ***immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense).***

The route was not recorded on the Definitive Map on 2nd May 2006, nor was it recorded on the List of Streets on this date.

- (c) ***it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles.***

The claimed route has existed since as a physical feature since at least the early part of the 19th century, and as such, there is no evidence of its coming into existence as a result of an express dedication or by statute.

- (d) ***it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.***

The route was not constructed as a road specifically for use by motorised vehicles. There is clear evidence to suggest that the route was in use as a public carriageway prior to the advent of the motor vehicle.

- (e) ***it was created by virtue of use by such vehicles during a period ending before 1st December 1930.***

There is evidence that the route existed as a public highway before mechanically-propelled vehicles became commonplace, so it cannot be said that public vehicular rights were *created* as a result of use by such vehicles. They are more likely to have been created as a result of use by horse-drawn vehicles.

- 10.3 The exceptions in Section 67(3), which require that the application to record the route as public be made to the County Council prior to 20th January 2005, do not apply in this case.

11 Comments by the Landowner

- 11.1 The landowner is aware that the route has been used by non-motorised users in living memory, but has no evidence to either support or rebut the application based on historical evidence. They do not oppose the application.

12 Conclusions

- 12.1 There is evidence that the claimed route has existed as an unobstructed physical feature in the landscape since at least the beginning of the 19th century.
- 12.2 There are numerous documents which, when taken as a whole, indicate that the route formed part of the local public highway network. It is apparent that the route's significance had diminished by the early part of the 20th century.
- 12.3 The documentary evidence demonstrates that, on the balance of probabilities, the claimed route was once a vehicular highway. The provisions of the NERC Act 2006 have extinguished rights for mechanically propelled vehicles, and none of the exemptions within the Act can be applied, so the route cannot be recorded as a BOAT. There is no evidence to suggest that public rights on the route were extinguished prior to the enactment of the NERC Act 2006, and so it is appropriate for the route to be recorded as a restricted byway.