



**WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53**

**APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER TO UPGRADE  
FOOTPATH NO 44 FROM ITS JUNCTION WITH BYWAY NO. 43, SPELSBURY AT GRID  
REFERENCE SP 3414 2129 TO RESTRICTED BYWAY NO. 30, CHARLBURY AT SP  
3437 2089 TO A RESTRICTED BYWAY ON THE DEFINITIVE MAP AND STATEMENT  
FOR OXFORDSHIRE**

**PARISH OF SPELSBURY**

**DETERMINATION REPORT  
CAMS REF #03092**

## **A PURPOSE OF REPORT**

1. The Purpose of this report is to determine whether there is merit to that application, submitted by Nicholas Moon on behalf of Oxfordshire Fieldpaths Society pursuant to Section 53(5) of the Wildlife and Countryside Act 1981 to upgrade Spelsbury Footpath No. 44 between grid reference SP 3414 2129 and SP 3437 2089 to a Restricted Byway.

## **B RECOMMENDATION**

2. All evidence available to the County Council has been considered and evaluated and it is considered that: -

**There is insufficient evidence to support the application, and that the application be rejected.**

## **C LEGAL BACKGROUND**

3. The relevant statutory provisions which apply to adding a path to the Definitive Map and Statement are contained in the Wildlife and Countryside Act 1981 section 53(3)(c)(ii) which requires that the County Council, as the Surveying Authority, modifies its Definitive Map and Statement following: -

*“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description” (section 53(3)(c)(ii)).*

4. This application is unusual in that, the route was the subject of a similar application considered and determined by the County Council in 2011. For this application to succeed, the applicant is required to provide the County Council with new evidence that it had not considered previously.

## **D DETAILS OF APPLICATION**

5. On 8 July 2013, Nicholas Moon (on behalf of Oxford Fieldpaths Society) submitted an application in accordance with the Wildlife and Countryside Act 1981 section 53(5) to modify the County Council's Definitive Map and Statement by upgrading Spelsbury Footpath No 44 between grid reference SP 3414 2129 and SP 3437 2089 to a Restricted Byway. A copy of the application is attached at **APPENDIX 1**.

6. The application was supported by the following documentary evidence:

- i. Map of the Residue of the Manor of Dean in the Parish of Spelsbury in the County of Oxon belonging to Oriel College in Oxford, 1743
- ii. Charlbury & Walcott Estates Plan, 1761
- iii. Thomas Pride's Plan of Charlbury & Walcott Estates, 1770
- iv. Spelsbury Parish (Dean Hamlet) Inclosure Award, 1779
- v. Davis's Map of Oxfordshire, 1797
- vi. Bryant's Map of Oxfordshire, 1824
- vii. Ordnance Survey 1<sup>st</sup> Edition 1 Inch Map, 1833
- viii. Charlbury Tithe Award, 1847
- ix. Ordnance Survey County Series First Edition, 1880
- x. Ordnance Survey County Series Second Edition, 1898/99
- xi. Kelly's Map of Oxfordshire, 1900
- xii. Finance Act 1910 Documents
- xiii. Ordnance Survey County Series Third Edition, 1919

- xiv. Oxfordshire County Council's 'List of Streets' under Section 36(6) of Highways Act 1980
- xv. David Braham QC 'Uncoloured roads on 1910 Finance Act maps'
- xvi. Thame Sub-Division Map, 1948
- xvii. Rights of Way Appeal Decision re Charlbury Restricted Byway No. 30
- xviii. Notice of Confirmation of Modification Order from 2012 adding Charlbury Restricted Byway No. 30 to the Definitive Map.

**E DESCRIPTION OF ROUTE**

- 7. The route referred to in the application is shown on the Plan at **APPENDIX 2** running between points A and C.
- 8. The route runs from the south end of Spelsbury Byway-Open-to-All-Traffic (BOAT) No. 43 at grid reference SP 3414 2129 (point A on the map), via an intersection with Spelsbury Footpath No. 19 (point B on the map) to the north end of Charlbury Restricted Byway No. 30 at grid reference SP 3437 2089 (point C on the map).

**F LAND OWNERSHIP**

- 9. A search of the Land Registry indicates that the following landowners are affected by the application:

<b>Title Number</b>	<b>Proprietor</b>	<b>Address</b>
ON272873 (owns northern section)	Ms K E Blackwell	Hill House Dean CHIPPING NORTON OX7 3LB
ON126055 (abutting unregistered section of route on west side)	Mr S D Strong	Manor Farm East End Chadlington CHIPPING NORTON OX7 3LX
ON295907 (owns southern section)	Oxfordshire County Council	County Hall New Road Oxford OX1 1ND

**G PREVIOUS APPLICATION HISTORY**

- 10. Spelsbury Footpath No 44 was added to the Definitive Map and Statement in 2012 as a result of an earlier application made by Mr. Moon in 1991, being part of a much longer route to be added as a Byway Open to All Traffic (BOAT). See **APPENDIX 3** for a plan showing the full extent of that application including the points referred to in paragraph 10 below.
- 11. In response to that application, the County Council determined as follows: -
  - i. A – B. This section of the route is recorded as an unclassified road on the County Council's List of Streets, held in accordance with The Highways Act 1980 section 36(6). Part of the consideration determined that the character of the of the route was such that it was more likely to be used by vehicles rather than the predominant use being by horse riders and walkers and, therefore, it was not meeting the definition of

- a BOAT. Accordingly, this section of the route is not recorded on the Definitive Map and Statement but remains on the List of Streets as a public road.
- ii. B – C. Determined as a BOAT and added to the Definitive Map and Statement accordingly, as Spelsbury BOAT No 43.
  - iii. C – D. The case for a BOAT was rejected, but the County Council accepted and determined that public footpath rights subsisted, and the route was added to the Definitive map and Statement as Spelsbury Footpath No 44.
  - iv. D -E. The claim for a BOAT was rejected and no public right of way was recorded.
11. The applicant appealed the decisions for both C – D and D – E, claiming that restricted byway rights subsisted on the route in both cases.
  12. The Secretary of State held that the applicant's appeal against the County Council's decision on section C – D was not valid. The applicant is not entitled to appeal against the County Council as it determined to make an Order for a Footpath, albeit not the status applied for. Schedule 14 of the Wildlife and Countryside Act 1981 provides only for an appeal against a decision not to make an order. Consequently, the applicant has made this application for that section of the route.
  13. The Secretary of State upheld the appeal against the County Council's determination not to record a BOAT on section D – E and directed that an Order be made to modify the Definitive Map to add the route, albeit with the status of restricted byway. This order was subsequently confirmed, and this section of the route now has Restricted Byway status.
  14. The County Council's Determination Report setting out its reasons for its conclusions in paragraph 10, above, is attached at **APPENDIX 4** and the report into the appeal by the Secretary of State is at **APPENDIX 5**.

## **H DOCUMENTARY EVIDENCE**

15. The Highways Act 1980, section 32 sets out how any court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was compiled, and the custody in which it has been kept and from which it is produced.
16. The applicant is seeking to rely on the 18 pieces of evidence listed above at paragraph 6.
17. Each of these pieces of evidence was previously considered as part of the earlier application with the exception of those listed below, none of which can be considered as being substantive new evidence.
  - David Braham QC 'Uncoloured roads on 1910 Finance Act maps' is an expert explanation and interpretation paper considering the Finance Act 1910. The Act itself and the plans and document associated with it have been considered previously by the County Council and the Secretary of State. This paper, in that sense, is not new evidence.
  - Thame Sub-Division Map, 1948. This map does not cover the area under consideration.
  - Appeal Decision re Charlbury Restricted Byway 30. This is not evidence as such as it merely sets out the decision of the Secretary of State in consideration of the

evidence previously supplied. The applicant is, though, seeking to rely on this decision as the basis of his application in that the decision is supportive evidence in this case. The County Council appreciates the position stated by the Secretary of State, but this does not constitute new evidence, merely the Secretary of State's possible alternative view of the evidence already considered.

- Notice of Confirmation of Modification Order 2012 adding Charlbury Restricted Byway No. 30 to Definitive Map. This is not new evidence, merely a consequence of the previous case.
18. In relation to the Thame Sub-Division Map of 1948 (see **APPENDIX 6**), the applicant states that they are relying on this as evidence for the reason cited in paragraph 33 of their Appeal Letter against OCC's original rejection of part of their application dated 9 September 2010.
19. Paragraph 33 of the letter reads as follows:
- 'Finally, Oxfordshire County Council's 'List of Streets' under section 36(6) of Highways Act 1980(NJM/17), which takes the form of a series of maps, is interesting as it shows A – B as 'unclassified metalled' and B – C – D and Charlbury RB1 as 'unclassified' with a gap between D and E. While the County Council rightly states that this list concerns maintenance liability and unlike the Definitive Map does not give conclusive evidence of public rights so that one can only assume the minimum status of public footpath, earlier versions of these maps such as the Thame Sub-Division Map 1948 (NJM/19) describe these categories as 'Unclassified Motor Roads' and 'Unclassified (Unmetalled) Roads' suggesting that routes shown in this way were normally assumed to be roads.'*
20. This refers to the current classifications used in Oxfordshire County Council's List of Streets maintainable at public expense and compares these with the Thame Sub-Division Map which is an earlier version of these records. This describes the classifications used on the List of Streets differently. This difference is stated as being that the current classifications described in the List of Streets are 'unclassified metalled' and 'unclassified'. The equivalent terms in the earlier Thame Map are 'Unclassified Motor Roads' and 'Unclassified (Unmetalled) Roads' respectively. The applicant states that this suggests that routes currently depicted as 'unclassified' would previously have been classed and described as 'Unclassified (Unmetalled) Roads' and the Application Route would therefore have been classified as an 'Unclassified (Unmetalled) Road' having vehicular rights, rather than as a footpath at the time when these earlier records were produced.
21. The Thame Sub-Division Map was included as an appendix to the applicant's appeal letter of September 2010. The applicant states that this dates from 1948, but there is no date shown on this map. This map does not show any evidence of the Application Route, as it does not relate to the area in question. It is therefore not relevant in establishing the status of the Application Route and cannot be treated as newly "discovered" evidence.
22. There is therefore no evidence in this case that has been produced by the applicant which constitutes *new* evidence that has been discovered, in the terms contained in section 53 (3) (c) of the Wildlife and Countryside Act 1981.

## **I CASE LAW**

23. There are three cases of relevance in this matter:
- *Mayhew v Secretary of State for the Environment, 1992*
  - *Kotarski v Secretary of State for Environment, Food and Rural Affairs, 2010*

- *R. (on the application of Roxlena Ltd) c Cumbria County Council, 2019*

24. In *Mayhew* it was held that the word ‘evidence’ in section 53 (3) (c) of the Wildlife and Countryside Act must be given its full and natural meaning and should not be restricted to “new evidence” or to “evidence not previously considered”. The “event” which triggers a Surveying Authority’s duty to make an Order is concerned with the finding out of some information which was not known to the Authority when the earlier Definitive Map was prepared.
25. In relation to the Application Route, the County Council would have been aware of its records of highways maintainable at public expense. The recording of the Application Route as an unmetalled unsurfaced road on the records of the time may well have been the reason why no public right of way was recorded on the first Definitive Map.
26. In *Kotarski*, it was held that Devon County Council had acted properly in treating a conflict between the Definitive Map and the Definitive Statement as recently discovered evidence which triggered the County Council’s duty to deal with the case under section 53 (3) (c) (iii) of the Wildlife and Countryside Act.
27. In *Roxlena*, it was held that evidence that has been previously discovered *but not yet considered* could be taken into account by an authority in discharge of its statutory duties under section 53 (2) (b) of the Wildlife and Countryside Act.

## **J CONSULTATION RESPONSES**

28. The draft version of this report was sent to interested parties including the applicant and landowner on 6 April 2020, with a deadline for responses of 4 May 2020. All consultation responses are at **APPENDIX 7**.
29. County Councillor Leffman, who is the County Councillor for this area responded to thank the case officer for the consultation.
30. The applicant, Mr Moon responded on 12 April 2020. They stated that their application had arisen as a result of the previous appeal made by them against the rejection by the County Council of a previous application of theirs. Their previous appeal had been upheld by the Secretary of State and the County Council was directed to make an Order. The effect of the Order was that the section of the route subject to this application remained as having footpath status, meaning that an anomaly resulted where there was a gap for bridleway and restricted byway users between the adjoining stretches of Byway-Open-to-All Traffic (BOAT) at the northern end and Restricted Byway at the south-eastern end.
31. The applicant further explained that they had used the Inspector’s decision report relating to their appeal in support of the current application, because this constituted a legal precedent and is documentary evidence that was not available to the County Council at the time. In conclusion, the applicant states that if the County Council is not prepared to reconsider the previous evidence of the Inspector’s decision, they intend to appeal against any rejection of this application.
32. Mr G Beacham responded on 4 May 2020 to say that he had lived in Spelsbury since 1988, had walked the Application Route on occasions and had done so recently. He objected to the proposed change in status of the route, as the route would suffer as there would be a big increase in traffic through the wood and feared off-road vehicles using it. He had been informed there were orchids near the route, which he subsequently provided photos of.

33. Spelsbury Parish Council responded on 13 May 2020 to say that they agree with the County Council's recommendation regarding the application, that the application be rejected.

## **K DISCUSSION AND CONCLUSIONS**

34. It is clear in this case that the applicant has not adduced any new evidence of which the Surveying Authority was previously unaware in support of their application.
35. The Appeal Decision and Notice of Confirmation regarding Charlbury Restricted Byway No. 30 is not evidence as such, as it merely sets out the decision of the Secretary of State in consideration of the evidence previously supplied with the applicant's earlier application. The County Council appreciates the position stated by the Secretary of State, but this does not constitute new evidence, merely the Secretary of State's possible alternative view of the evidence that has already been considered. The Notice of Confirmation is a consequence of this appeal decision.
36. The paper concerning maps produced under the Finance Act 1910 concerns the significance of these documents as evidence of rights of way status generally and cannot be said to be 'new evidence' relating to this route.
37. The Thame Sub-Division Map does not relate to the geographical area in which the route concerned is situated and does not therefore constitute 'new evidence'.
38. No new evidence has therefore been produced in this case which would count as the 'discovery by the authority of evidence' which shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description. Accordingly, the application should be rejected.

... ..... Date .....13 May 2020.....  
Laurence Smith  
Countryside Records Officer  
On behalf of Countryside Records

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

..... Date .....13 May 2020.  
Nicole Olavesen, Solicitor  
On behalf of Legal Services

## **APPENDICES**

1. Application Form and Map
2. Map showing Application Route
3. Plan showing effect of 1991 application
4. Determination Report of August 2010
5. Appeal Decision of July 2011
6. Thame Sub-Division Map of 1948
7. Consultation Responses



APPLICATION FORM
FOR A MODIFICATION TO THE DEFINITIVE MAP AND STATEMENT
Wildlife and Countryside Act 1981

To: Definitive Map & Commons, Countryside Service, Oxfordshire County Council, Signal Court, Old Station Way, Eynsham, Oxford OX29 4TL

I/We\*(i) NICHOLAS JOHN MOON ON BEHALF OF OXFORD FIELDPATHS SOCIETY
of (ii) c/o CPRE OXFORDSHIRE, UNIT 1 LONDON ROAD, WHEATLEY OXON OX33 1JH.

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

(a) Deleting the footpath / bridleway / restricted byway / byway open to all traffic that runs\* from: to:

(b) Adding the footpath / bridleway / restricted byway / byway open to all traffic that runs\* from: to:

(c) Upgrading/downgrading to a footpath / bridleway / restricted byway / byway open to all traffic the footpath/bridleway/restricted byway/byway open to all traffic that runs\* from: GROVE LANE, DEAN (SPELSBURY BOAT #3) AT SP 3414 2129 to: CHARLBURY RB 30 AT SP 3437 2089

(d) Varying/adding to the particulars relating to the footpath / bridleway / restricted byway / byway open to all traffic \* from: to: By providing that:

and shown on the map annexed hereto (see overleaf).

The approximate width of the right of 5-19 METRES (AS DETAILED IN 2012 MODIFICATION ORDER)

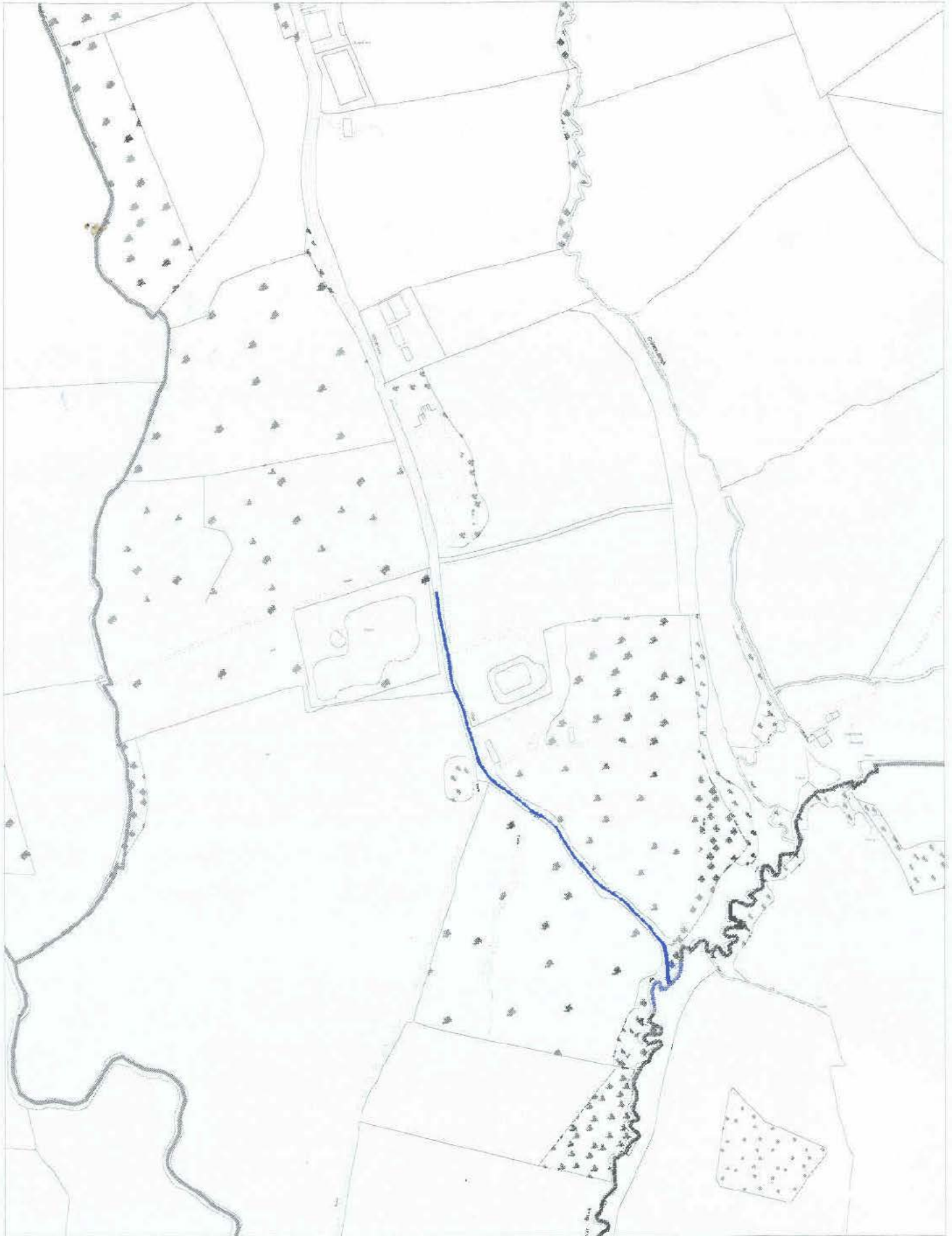
I/We attach copies of the following documentary evidence [including statements of witnesses] in support of this application:- (Please list documents, continue on a separate sheet if necessary)

(iv) SEE ATTACHED LIST

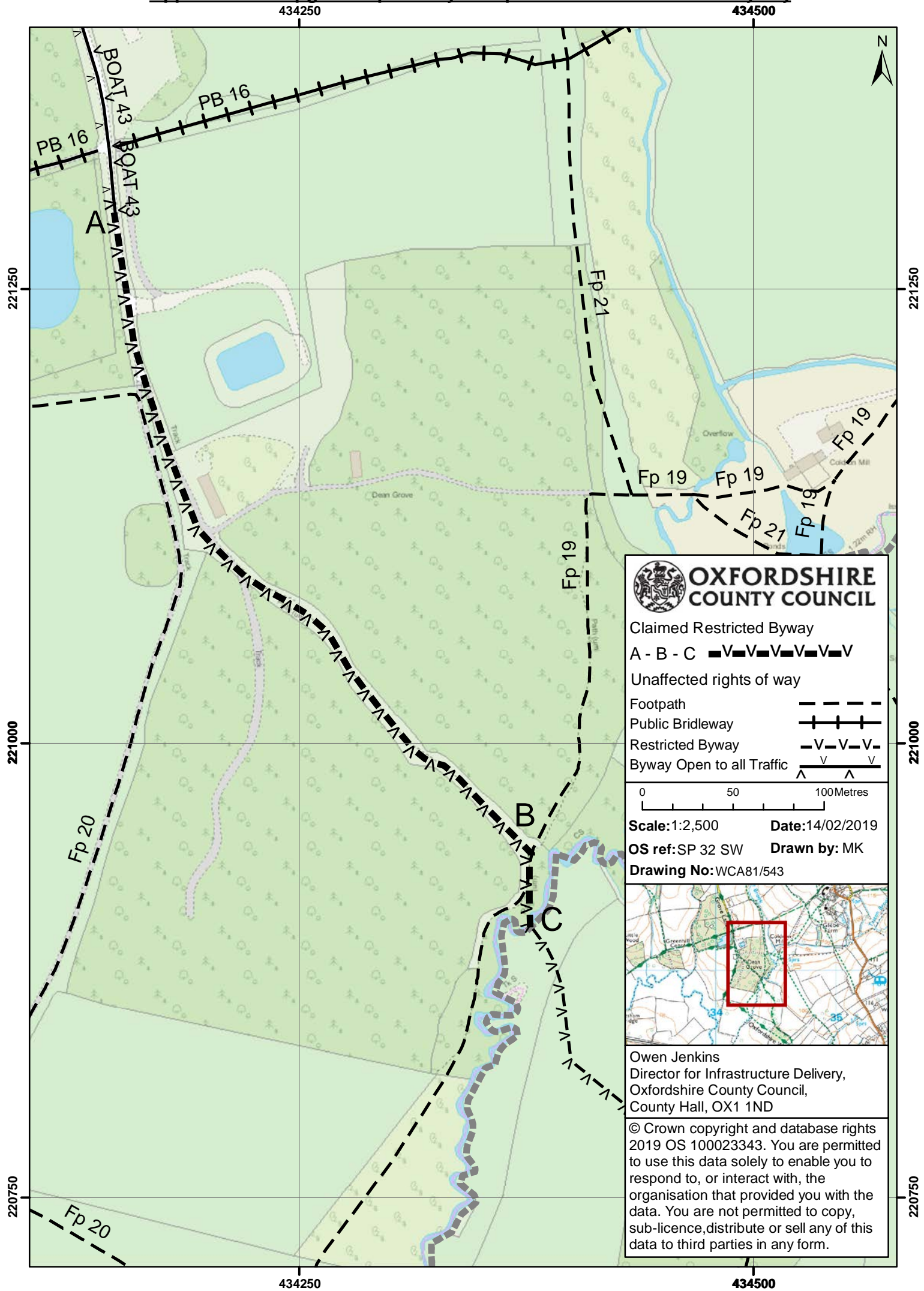
Data Protection Act and evidence collection: This application form and the details contained therein will be considered by Oxfordshire County Council to establish whether a right of way exists and will be disseminated widely for these purposes and made available to the public.

Signed: Date: 08-07-2013

- (i) Insert name of applicant(s) (ii) Insert address of applicant(s) (iii) Delete as appropriate (iv) Insert list of documents \*Delete as appropriate



**Application to upgrade Spelsbury Footpath No.44 to Restricted Byway**



**OXFORDSHIRE COUNTY COUNCIL**

Claimed Restricted Byway  
 A - B - C

Unaffected rights of way

Footpath

Public Bridleway

Restricted Byway

Byway Open to all Traffic

0 50 100 Metres

Scale: 1:2,500 Date: 14/02/2019

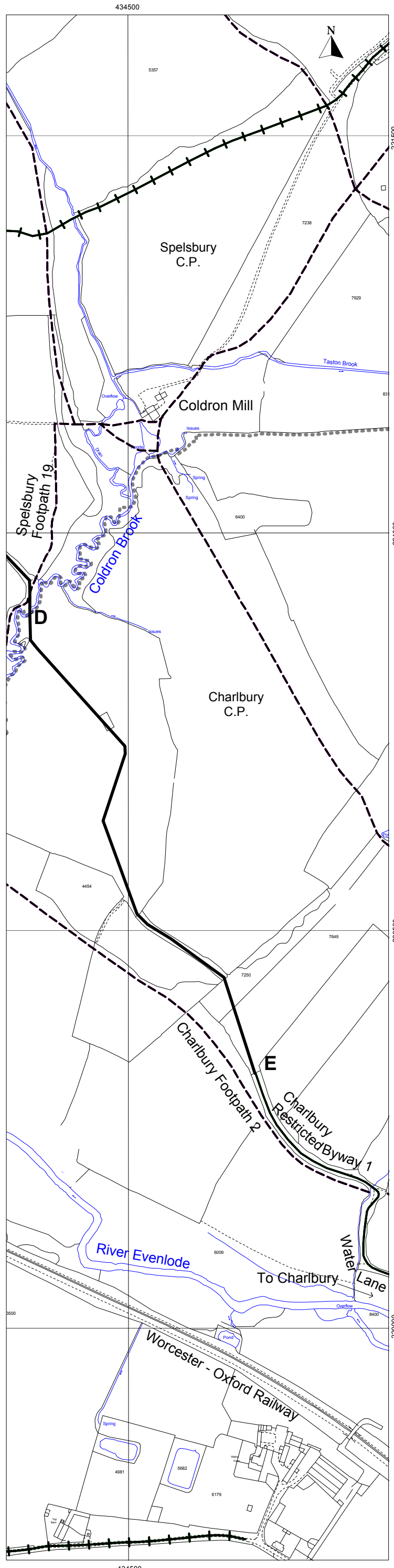
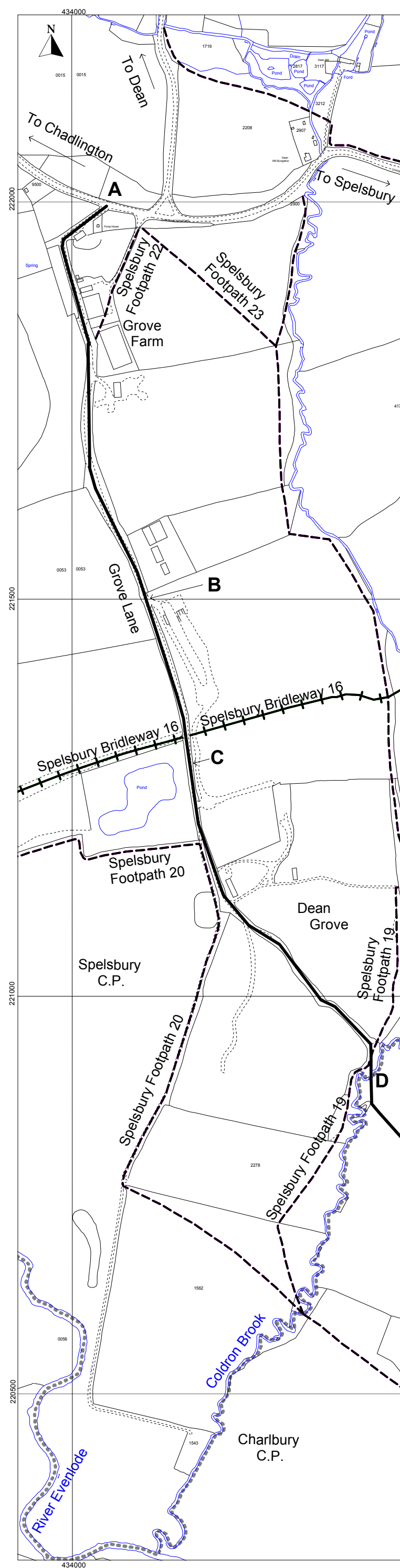
OS ref: SP 32 SW Drawn by: MK

Drawing No: WCA81/543



Owen Jenkins  
 Director for Infrastructure Delivery,  
 Oxfordshire County Council,  
 County Hall, OX1 1ND

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**Wildlife and Countryside Act 1981 Sec 53**  
**Definitive Map Modification Order Application**

**To Add a Public Byway Open To All Traffic in Spelsbury and Charlbury**

**Claimed Byway Open To All Traffic**

**A - B - C - D - E**

**Length:** 1,933 m approx.  
**Width:** 40 feet

**Unaffected rights of way**

**Parish boundary**



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OS Reference: SP 3321, SP 3420, SP 3421  
 Scale 1:5000

Drawn by: DJP Date: 20 November 2008  
 Drawing No: WCA 1981 / 371a

**DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY  
THE OXFORDSHIRE COUNTY COUNCIL  
APPLICATION TO ADD A BYWAY OPEN TO ALL TRAFFIC IN THE  
PARISHES OF SPELSBURY AND CHARLBURY**

**1 THE LEGISLATION**

- 1.1 Under Section 53(2)(b) of the Wildlife and Countryside Act 1981, the County Council, as surveying authority, is under a duty to keep the Definitive Map and Statement under continuous review and make such modifications as appear to be requisite in consequence of the occurrence of any of the events specified in Section 53(3). One such event, is

*Section 53(3)(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 in the map and statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates."*

- 1.2 This report is concerned with an application to record a Byway Open to all Traffic. Under s.67(1) of the Natural Environment and Rural Communities Act 2006 ("NERC Act") all existing public rights for mechanically propelled vehicles were extinguished. However there are exemptions to this automatic extinguishment. Those which are relevant to this determination are as follows:

*s.67(2): "Subsection (1) does not apply to an existing public right of way if ... (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 (c66) (list of highways maintainable at public expense).*

*s.67(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 for an order making modifications of the definitive map and statement so as to show the way as a byway open to all traffic”.*

## **2 BACKGROUND**

- 2.1 The application was made on the 28<sup>th</sup> Oct 1991 by Mr Rowland Pomfret. He applied for a Byway Open to all Traffic from the north end of Grove Lane (Grid Reference SP 3404 2199) to the start of Water Lane where the Route meets Charlbury Restricted Byway 1 (Grid Reference SP 3466 2032). The application form is included at **Appendix 1**. Nick Moon has taken over this application on behalf of the Oxford Fieldpaths Society.
- 2.2 Various maps (including an inclosure map) were listed in the application, but no copies of any of the maps were included with the application. This is discussed further in paragraph 27 below. A copy of one piece of evidence listed, a Traffic and Works Sub Committee report 1980, was included, which mentions Grove Lane (see **Appendix 1**).

## **3 THE CLAIMED ROUTE**

- 3.1 The claimed route (“the Route”) is described in four sections (see consultation plan drawing number WCA 1981/371a at **Appendix 1**). The northern part (**A-C**) of the Route runs in a general southerly direction from the Chadlington road, along Grove Lane past Grove Farm, to just south of Spelsbury Bridleway 16. The middle section (**C-D**) runs through Dean Grove to the stone bridge over Coldron Brook. The Route then leaves Spelsbury parish and enters Charlbury parish. The southern section (**D-E**) leads across some fields to a field gate at the entrance to Charlbury Restricted Byway 1, known as Water Lane.

## **4 SITE INSPECTION**

- 4.1 On April 22<sup>nd</sup> 2008 the Route was inspected (see site inspection report, map and photos in **Appendix 2**). The surface of the Route remains metalled until just after the entrance to the County Council Dean Pit

Recycling Centre (point B), and several cars were witnessed there. Beyond this point the Route has a crushed stone surface. Beyond the junction with Spelsbury Bridleway 16 the Route surface becomes muddier and rutted. No evidence is visible of a track south of the brook (points D to E).

4.2 A field gate is present immediately over the brook after the crossing. Looking back north towards Dean Grove a 'Keep out' sign is attached to a tree and no obvious tracks can be seen leading south in the direction of the Route. There is no evidence of the Route meeting up with Charlbury Restricted Byway 1; however a gate is present where the two routes would meet.

4.3 A further site visit was carried out in December 2009 to familiarise the reassigned case officer with the route on the ground and to clarify the position of Point D on the Route, which had not been correctly identified at the time of the April 2008 inspection. Subsequently the location of the crossing over the brook at Point D was pinpointed, which fitted in with the alignment of the claimed Route. The remains of a possible route through Dean Grove could be identified in alignment with the claimed Route.

## **5 CONSULTATION RESPONSES**

5.1 The County Council sent out letters for the first consultation in December 1991, asking for observations by 10<sup>th</sup> January 1992. The second consultation began in June 2008.

5.2 **Charlbury Parish Council** objected when consulted on both occasions. Points raised by them include the 'excessive' requested width and the feared problem of vehicular use that this would lead to, as well as the lack of local need for the path, since other 'better' routes exist. The surface of the path was also felt to be unsuitable for vehicles: 'Water Lane is a very badly rutted surface at present and liable to flood – hence

its name and is quite unsuitable for motor vehicles'. However it was felt that 'Walking or riding of horses only would be acceptable'.

- 5.3 In response to the first consultation, **Spelsbury Parish Council** 'approved the reinstatement of the footpath as drawn on the plan'. However the 'proposal to widen the path to 40 feet' was strongly objected to, as this was felt to encourage camping by travellers and could encourage its use 'by vehicles to the detriment of pedestrians'.

### **Objections**

- 5.4 In a letter received 18.11.91 **Mr. G. N. Avis** expressed his concern that if the lane was opened up to vehicles it would spoil the countryside and affect wildlife. He also mentioned safety concerns for pedestrians from speeding vehicles. He felt that there are already plenty of footpaths linking Dean and Charlbury – including three that cross twelve acres of his own land.
- 5.5 **Mr. Avis** telephoned (16.06.08) in response to the second consultation to say that he was unhappy with the idea that route might become a BOAT, but not necessarily with it becoming a Right of Way of a different classification.
- 5.6 In a telephone conversation on 25.03.10 **Mr Avis** stated that he used to ride the claimed route and knew of others who had used it. The possibility of collecting user evidence was discussed and user evidence forms were sent to him. However no user evidence forms were returned in response to this.
- 5.7 The National Farmers Union, on behalf of **Mr. J. M. Timbs**, stated their objection to the application in a letter received 11.11.91. A second more detailed objection was received from the N.F.U. on 09.01.92. This stated that *'it is quite clear that the path in question is just a footpath. It has been that way for over 50 years and the idea that it should have a width*



*of 40' is completely ridiculous. The path has not been used in that period as it has been impassable.'*

5.8 **Mr. Timbs** responded to the second consultation (letter received 15.07.08) to state the proximity of two existing footpaths to the claimed route, claiming that there was therefore no need for the path. He mentioned the age of the maps given in evidence to the application and questioned their reliability. He also states *'The land between Watery Lane and Dean Grove has belonged to my family since 1936 and to my knowledge the proposed right of way has never been claimed or used as a right of way in that time until this application.'*

5.9 **Mrs K. Blackwell** objected to the application in a letter received 17.07.08, stating that she did not think *'that a BOAT is either possible or viable'*. *She expressed concern at vehicular use of the route and raised the problem seasonal flooding that occurs at the Charlbury end of Watery Lane.*

5.10 **Trevor Jones** wrote to object on behalf of the Thomas Gifford Charity (letter received 14.07.08). The reasons for objecting were that the trustees were *not aware of any twentieth century evidence of the existence of the claimed route, and were therefore 'concerned at the idea of mechanically propelled vehicular use along the stretch of the proposed route which has not hitherto been used for the purpose.'*

### **Supporters**

5.11 **Mrs. E. Crossley** wrote in support of the application on behalf of the British Horse Society in a letter received 10.01.92. She felt it would be *'most welcome to horse riders and carriage drivers in the area, providing a link with bridleway Spelsbury 16 and other bridleways and by-ways in the area.'*

5.12 **Ms T. Wells** responded to the second consultation on the British Horse Society in an email received 16.08.08, giving similar reasons for her support.

5.13 **Ms. S. Cox** emailed in support on 18.07.08:

*'I have always thought that this route should be a bridleway, or may have been once as Watery Lane at Charlbury is a bridleway which ends suddenly. On the ground I feel there is a route and I know a number of people who used to ride this way in the past.'*

Ms Cox was contacted to investigate whether user evidence could be collected in connection with this case. However Ms Cox stated that those people had now moved away and she could not trace them.

#### **Other relevant responses**

5.14 Mr. G. Garraway of Campaign for the Protection of Rural England wrote in favour of the existence of a right of way being determined, but did not support the creation of a byway open to all traffic. He considered there to be no need for one, and that it would be impractical for the route to end in a cul-de-sac for motor vehicles. He also mentioned the Winchester case and the possible implication it might have on this application.

#### **Conclusion**

5.15 The body of objections to the application as collected through both consultations show concern for vehicular use, the physical creation of the Route on the ground and its maintenance, and the claimed width of forty feet. However no evidence was provided that could be considered in determining this case.

## **6 DOCUMENTARY EVIDENCE**

6.1 A wide range of documentary evidence was investigated and is described below. There was no user evidence in relation to this case. All documentary evidence is in **Appendix 3**.

**7 Map of the Residue of the Manor of Dean in the Parish of Spelsbury in the County of Oxon belonging to Oriel College in Oxford 1743 (A-D)**

- 7.1 The map was surveyed by Stephen Jeffreys of Minchinhampton Gloucestershire and is dated 1743. The map covers the northern section of the Route from the Spelsbury to Chadlington road south to Coldron brook. The route is shown as a double pecked line and is shaded. The Route continues south towards 'Dean Wood' with a number of gates along it. 'Mare Bridge' is labelled as the crossing over Coldron brook and the Route looks to continue on after this. A gate is also marked at this point. The Route appears to continue on the opposite side of the brook. This map suggests that a route was present on the ground at this time.

**8 Charlbury & Walcott Estates Plan, 1761 (D-E)**

- 8.1 The map covers the Charlbury section of the Route (the section south of Coldron brook). A track can be seen in an almost identical alignment to the Route. The existing Restricted Byway (Water Lane, Charlbury Restricted Byway 1) at the southern end of the Route is labelled Chadlington Way. The Route continues to Coldron brook with some sections bordered by pecked lines and other solid lines. It then appears to end at the brook, whilst other footpaths and ways on the map are shown as continuing over the brook.
- 8.2 The area the Route crosses is labelled as 'the common' and the Route appears to run between several inclosures (parcels 23,26,82,83,86,94,96,146 & 147). The way the inclosures are laid out, with an uneven track between them, suggests this could have been the access route to various parcels.
- 8.3 The map does not provide evidence of whether or not the Route is public. It is a map of the estates belonging to the Duke of Marlborough, which provides some evidence that any ways over the map are private and could explain why there is no inclosure award relating to the area.

**9 A Plan of Charlbury and Walcott Estates belonging to his Grace the Duke of Marlborough, also the Free and Copyholds lying in the County of Oxford. Drawn 1770, by Thomas Pride (D-E)**

9.1 The area the Route passes over is labelled as 'The Common' and a track is present in almost the same alignment as the Route, up to Coldron brook (the extent of the map) and is marked 'to Chadlington'. As the Route passes through various compartments, it is sometimes bounded by solid and sometimes by pecked lines.

9.2 This map appears to be the map produced as the proper record of the Duke of Marlborough's estates (as opposed to the previously mentioned map of 1761 which was titled as showing the 'Intermediate Free and Copyhold Lands'). Again there is no evidence of whether or not the route is public. There is no written statement available to accompany this map.

**10 Dean Hamlet Inclosure Award 1779 (A-C)**

10.1 The only map available with this award is a sketch map that does not relate to the relevant area. The Inclosure Award was made under 'an act of parliament made in the nineteenth year of the Reign of his present Majesty King George the third entitled "*an act for dividing allotting and inclosing the open and common fields, common meadows and other common lands in the manor and hamlet of Dean in the parish of Spelsbury in the County of Oxford*".

10.2 The section that deals with roads includes a description that reads as follows: '*One public Road of the breadth of forty feet branching out of the last described road near the east side of clay sands and extending in its present direction to the north end of a lane at the north west corner of a piece of land called Walkers little sands leading into Dean Grove the same being part of the public road from Chadlington and Dean aforesaid to Charlbury in the said County of Oxford*'

10.3 The description of the "last described road" reads as follows:

*'One public Road of the breadth of forty foot beginning at it's usual entrance into the west side of the said Hamlet of Dean and extending Eastward in its usual direction to its present entrance into the said township of Spelsbury the same being part of the Public Road leading from Chadlington in the said County of Oxford to Spelsbury aforesaid'.*

This appears to correspond to the current road from Chadlington to Spelsbury.

- 10.4 Although there was no map with this award, the map of the land belonging to Oriel College from 1743 (mentioned previously) shows the parcels of land referred to in the Inclosure Award. It appears from this map that the first public road mentioned above corresponds to Grove Lane. The road starts at the Chadlington to Spelsbury road and continues south to 'the north west corner of Walkers little sands' (point C on plan). The Oriel college map shows an area called Joseph Walker's Little Sands to the north of and adjacent to Dean Wood.
- 10.5 The fact that it reads *'extending in its present direction'* implies that the road was already a feature on the ground. This is supported by its presence on the Oriel college plan from 1743. It goes on to read *'the same being part of the public road from Chadlington and Dean aforesaid to Charlbury'*. This suggests that there is a road between Chadlington and Charlbury, but this does not provide evidence that the road follows the Route through Dean Grove. The Finance Act Maps and the plan of the Charlbury and Walcott Estates show that there were other possible routes from point C to Charlbury, including due east towards Coldron Mill, then turning south eastwards along The Mill Way towards Charlbury. The entries in the Finance Act Field Books refer to a "cartroad" in parcels 259 and 137 which could be the public road referred to in the Inclosure Award.
- 10.6 This inclosure award provides conclusive evidence of the existence of a Route with associated public vehicular rights from A to C but not onwards to D.

**11 Davis map 1797 (Surveyed 1793 & 1794) (A-E)**

- 11.1 A track can be seen when the two sections of the map are placed together along a similar alignment as the Route. This suggests there was a route open on the ground at the time of the survey.

**12 Ordnance Survey Surveyor's Drawing 1810**

- 12.1 The map is damaged where Grove Lane would run, but the very northern end of the Route appears to be present on the map. However there is no track visible on the map beyond Dean Grove, running south from Coldron brook.

**13 Bryant's Map 1824 (A-E)**

- 13.1 There is a track on the map in roughly the same alignment as the Route. The northern section appears longer on the map and looks to go around the west of Dean Grove rather than through it. The southern section appears to stop short of Water Lane, ending abruptly at the River Evenlode. Examining the Route on the map and the associated key it appears that the Route is marked as a 'lane'. This suggests there was a route open on the ground that approximately followed at least some of the claimed Route at the time of the survey.

**14 Ordnance Survey Old Series, 1833 (A-E)**

- 14.1 The entire Route is present in a similar alignment to the claimed Route,. It is depicted by double solid lines except for the portion of the Route within Dean Grove, which is shown by double pecked lines. This provides evidence that there was a route open on the ground at the time of the survey, but does not show public rights.

**15 Charlbury Tithe Award 1847 (D-E)**

- 15.1 The map is dated 1848 and titled '*Map of the Township of Charlbury in the County of Oxford*'. It is signed by two commissioners. A road is shown on the map along the same route as that shown in the Plan of the Charlbury and Walcott Estates. The descriptions for parcel 135 and 136

(see table below) describe the bridge over Coldron brook as 'Masebridge' which is very similar to 'Mare Bridge' labelled on the Oriol College map of 1742 and therefore could be referring to the same feature.

15.2 The route is shaded light orange/brown, as are the main public carriageways marked on the plan and some, but not all, of the footpaths in the vicinity.

15.3 The following table shows the details of the land crossed by the Route.

Parcel Number	Name and Description of Land and Premises	State of Cultivation
135	Gibbs Closes and Masebridge	Meadow
136	Masebridge close and Coldron Hill	Meadow
137	Coates Oaks and Lane	Meadow
145	Lane	Pasture
146	Church Slade	Meadow
147	In Church Slade	Meadow
148	In Church Slade	Meadow
149	Church Close	Meadow
150	No record found	-

## 16 Ordnance Survey County Series First Edition (Surveyed 1880) (A-D)

16.1 Grove Lane is marked on the map to Coldron brook, between two solid boundaries. It appears to continue south along the west side of the brook to the field boundary. There is no sign of a track over the southern section of the Route (south of Coldron brook), although the field boundaries follow a similar alignment to the claimed Route.

## 17 Ordnance Survey County Series Second Edition (1898 Revision) (A-D)

17.1 The northern section of the claimed Route - Grove Lane, is clearly shown on the map and continues through Dean Grove to Coldron Brook. No track is visible on the east side of Coldron brook where the southern section of the claimed Route is located. As with the first edition, there is a

field boundary that approximately follows the alignment of the claimed Route, although the boundary starts further south along the brook.

## **18 Kelly's Map of Oxfordshire 1900 (A-E)**

- 18.1 The map shows a track in almost exactly the same alignment as the claimed Route and is depicted between two solid lines. This suggests there was a route open on the ground at the time of the survey.

## **19 Ordnance Survey County Series Third edition (1919 Revision) (A-D)**

- 19.1 Grove Lane is shown on the map running southwards through Dean Grove to Coldron Brook, between solid boundaries. As with the second edition, no track is shown to the south of Coldron brook, although again there are field boundaries marked along a similar alignment. Water Lane is present in its current location.

## **20 Finance Act Documents 1910 (A-E)**

- 20.1 The working copy and record plan maps show the northern end of the Route where it meets the Chadlington to Spelsbury road. The Route is uncoloured and un-numbered, and labelled as Grove Lane on the Ordnance Survey base map (Second Edition County Series, 1899). The uncoloured section continues southwards in the same location as the application Route, enclosed between the boundaries of separate hereditaments, which may be good evidence that the landowners considered it to be public. It remains un-coloured and un-numbered throughout Dean Grove, where it meets Coldron Brook, before heading south for a short distance still uncoloured as shown by the final record plan. This short section appears coloured as part of hereditament 135 on the working copy version, but there is a pencil annotation stating that the road should specifically be uncoloured. The field books for Parcel 135 make a deduction of £10 for a footpath only. However the valuation book makes no deductions for Parcel 135. At the top of the entry for Parcel 135 in the field book, 'Including no. 136' has been written. However parcel 136 could not be found on the Finance Act map in the surrounding area.



- 20.2 The Route is not shown on the map south of the brook. The Route would pass over and next to the parcels coloured and numbered 395, 259, 137 and 255. The valuation book record for parcel 395 shows no deductions for public rights of way or user.
- 20.3 A short section of the Route does appear to be present (adjacent to parcel 259) and is un-coloured and un-numbered. The field book entry for parcel 259 is as follows under **fixed charges, easements, common rights and restrictions**: *1 cartroad and 1 footpath* with a deduction of £5 under **public rights of way or user**. A footpath can be seen crossing parcel 259 on the base map, and the 'cartroad' may refer to route referred to as 'The Mill Way' on the 1761 Charlbury & Walcott Estates Plan, but not shown on this plan.
- 20.4 Although no track can be seen to pass through parcel 137, the field book does however have the following description for this parcel:  
**Particulars, description, and notes made on inspection:**  
*Two Enclosures of pasture land situated at the Common Charlbury*
- Charges, Easements, and Restrictions affecting market value of Fee Simple:**  
*Cartroad from Charlbury to Chadlington crosses this property.*
- As the cart road that is described in the field book is not evident on the Finance Act 1910 map, one can not be sure that it is following the claimed Route. Again it is perhaps more likely to refer to 'The Mill Way' as shown on the 1761 Charlbury and Walcott Plan. The record for parcel 137 shows a deduction of £2.
- 20.5 The record for parcel 255 shows a £20 deduction for public rights of way or user, and two footpaths can be seen on the map running through this parcel. One travels through the parcel just south of Water Lane, and the

other (again present in the Charlbury and Walcott Plan of 1761) can be seen crossing this parcel near parcels 257 and 256.

20.6 The Form 37 for hereditament 137 (*see photo: Charlbury form 37a*) describes the property as 'Land. The Common. Spelsbury Road'. A £2 deduction is present in the box for Public Rights of Way or User. Hereditament 255 (*see photo: Charlbury form 37b*) has a deduction of £20 for Public Rights of Way or User. As previously mentioned, routes do cross this parcel, but not on the alignment of the claimed Route. Hereditament 395 (*see photo Charlbury form 37c*) has no deductions made under Public Rights of Way or User.

20.7 The Finance Act documents are of considerable value and carry considerable weight. It was in the landowners' interests to declare a path across their land and making a false claim was a serious criminal offence. The Finance Act documents provide some evidence that public rights may exist between points A and D, but do not provide evidence of the existence of public rights between D and E.

## **21 Traffic and Works Sub-Committee letter, 1980 (See appendix 1)**

21.1 The 1980's correspondence between Mr Pomfret and the County Surveyor/Engineer originally highlighted the issue about the true definition of the road which at the time was an unclassified metalled road.

21.2 **Appendix 4** shows the relevant classifications of Grove Lane (unclassified & unclassified unmetalled from point A to D) according to Land and Highway Records.

## **22 Parish Claim Map and Statement**

22.1 There is no public right of way over the claimed Route in either Spelsbury or Charlbury.

## **23 Definitive Maps and Statements and List of Highways Maintainable at the Public Expense**

- 23.1 None of the definitive maps and statements for the area show a public right of way over the claimed Route.
- 23.2 The List of Highways Maintainable at the Public Expense held by Oxfordshire County Council and required by section 36(6) of the Highways Act 1980 ("List of Highways") lists sections A to D of the claimed Route. Section A to B is listed as an unclassified road and section B to D is listed as an unclassified unmetalled road.
- 23.3 The highways required to be listed by section 36(6) are the "streets which are highways maintainable at the public expense". "Street" is defined in the Highways Act only as "any highway, and any road, lane, footpath, square, court, alley, or passage" and as a result the List of Highways does not serve to describe the status of any highway, only whether it is maintainable at the public expense. Since all rights of way include at least a right of way on foot, inclusion on the List of Highways proves no more than that a right of way on foot exists. Therefore evidence from other sources is needed to establish the existence of higher rights.

## **24 Discussion**

- 24.1 The evidence needs to first be examined to establish whether a public right of way for mechanically propelled vehicles existed immediately before commencement of section 67 of the Natural Environment and Rural Communities Act on 2 May 2006. The evidence for this varies considerably depending on which section of the Route is being considered. If it can be ascertained that rights of this nature exist upon sections of the Route, it should then be established whether or not that right has been extinguished. Where no rights for mechanically propelled vehicles can be shown to have existed, or where these rights are extinguished, the evidence needs to be examined to conclude what nature of public right, if any, exists on this Route.

## **25 Section A-B**

- 25.1 The Inclosure Award sets out this section of the Route as a public road. It describes the Route as '*extending in its present direction.*' This section is continuously shown as a feature on many of the maps providing evidence of a continuous physical existence on the ground. There is no evidence of the road being stopped up. The Route appears on later mapping confirming that the inclosure route was set out and available on the ground after the award.
- 25.2 This section of the Route is shown on the List of Highways maintainable at public expense as an unclassified road, and was shown on it immediately before commencement. It is therefore exempt under s.67(2)(b) from extinguishment.
- 25.3 A byway open to all traffic is defined at section 66 of the Wildlife and Countryside Act 1981 as

*'a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are so used'.*

According to *Masters v Secretary of State for the Environment and Somerset CC (CA) (2000)* (see **Appendix 5**) it is necessary to consider whether the character of the Route is such that it is more suitable for use by walkers and horse riders rather than vehicles. This section does not appear to have the character of a Route that is predominately used as a footpath or bridleway, but rather appears to be more suitable for use by vehicles. It has a metalled surface and appears to be used by vehicles to access the recycling centre.

- 25.4 Therefore when all the available evidence is considered it appears that although there is evidence that the public have a right to use this section for vehicles and all other kinds of traffic, this section does not satisfy the requirement that a byway open to all traffic is used mainly for the

purposes for which footpaths and bridleways are so used. Therefore it can be concluded that byway rights do not exist over Section A-B.

## **26 Section B-C**

- 26.1 The Inclosure Award sets out this section of the Route as a public road '*extending in its present direction.*' The section is shown as a feature on many of the maps providing evidence of a continuous physical existence on the ground. There is no evidence of the road being stopped up. The Route appears on later mapping confirming that the inclosure route was set out and available on the ground after the award.
- 26.2 This section of the Route is shown on the List of Highways and was shown on it immediately before commencement; it is therefore exempt under s.67(2)(b) from extinguishment.
- 26.3 This section is recorded on the List of Highways as an unclassified unmetalled highway and on the ground is a gravelled track that then becomes a muddy track that looks as though it is a farm track. It satisfies the test in *Masters v Secretary of State for the Environment and Somerset CC.* as this section of the Route has the character of a Route that is mainly used as a footpath or bridleway.
- 26.4 Therefore it can be concluded that there is sufficient evidence to suggest that a byway open to all traffic subsists or is reasonably alleged to subsist over this section, and that the character of the section is such that it meets the definition of a byway open to all traffic.

## **27 Section C-D**

- 27.1 It has not been possible to find any supporting inclosure or tithe mapping for this section of the Route. The available mapping for the section from C-D does show the Route as a feature on the ground up to Coldron Brook; however this mapping is evidence only that there was a route on the ground, and not of public rights.

- 27.2 The Finance Act mapping excludes the Route from the relevant parcels and leaves the Route uncoloured. The Field Book refers to a deduction as a footpath only. However, other footpaths cross the parcel and it would have been possible to travel from point C to Charlbury using other footpaths in the vicinity. The Finance Act Maps provide evidence of no more than footpath rights.
- 27.3 There appears not to be sufficient evidence to suggest that it can be reasonably alleged that a public right of way for mechanically propelled vehicles exists on this section of the Route. Had there been, these rights would have been exempt from extinguishment under s.67(2)(b), since this section of the Route was shown on the List of Highways immediately before commencement.
- 27.4 This section is shown on the List of Highways as an unclassified unmetalled road through Dean Grove to Coldron Brook and the junction with footpath 19. Research was carried out into how Grove Lane came to be added onto the List of Highways. When Grove Lane's status was first queried in the 1970s, there seemed to have been some confusion as to why it had come to be on the List of Highways. It had been added beyond staff memory and no-one could remember carrying out any maintenance work on the road. There seemed to be no conclusive evidence supporting the fact that it is maintainable highway.<sup>1</sup> However it was later concluded that it had been added by virtue of the Dean Enclosure Award.<sup>2</sup>
- 27.5 The most that can be gleaned from the inclusion of the Route on the List of Highways is that the Route is maintainable at the public expense and that at least a right of way on foot exists. As Riddall and Trevelyan write in *Rights of Way: A Guide to Law and Practice*, 'inclusion of a way on the list gives no guidance as to the nature of the rights that exist over it

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<sup>1</sup> In a memorandum from Mr. L. R. Revell acting for the County Surveyor and Engineer, to the County Secretary, 19<sup>th</sup> August 1977

<sup>2</sup> In a letter from the County Secretary to Messrs. Cole and Cole, 8<sup>th</sup> January 1979

(other than that inclusion on the list does prove that at least a right of way on foot exists)'.<sup>3</sup>

## **28 Section D-E**

- 28.1 This section of Route does not appear on the List of Highways and none of the other exemptions listed in s.67(2) apply. It is therefore necessary to check whether any of the exemptions listed in s.67(3) apply. This application was made before the relevant date of 20<sup>th</sup> January 2005 and therefore it would appear at first sight that the exemption in s.67(3)(a) should apply.
- 28.2 However, in the case of R (on the application of Warden & Fellows of Winchester College and another) v Hampshire County Council ([2008] EWCA Civ 431) it was ruled that for any of the three exceptions in section 67(3) to apply, a section 53(5) application must have been made in accordance with *all* the requirements of paragraph 1 of Schedule 14 of the wildlife and Countryside Act 1981. That is to say, it must have been (i) made in the prescribed form; and (ii) accompanied by a map drawn to the prescribed scale and showing the way(s) to which the application related; and (iii) accompanied by copies of any documentary evidence (including statements of witnesses) which the applicant wished to adduce in support of the application.
- 28.3 However, none of the documents listed as evidence which the applicant wished to adduce in support of the application were submitted with the application except for the Works Committee Report. Therefore, the requirements of paragraph 1 of Schedule 14 have not been fulfilled. Thus the exemption under section 67(3) cannot be applied to this application. No other exemptions apply and any existing public right of way which might exist for mechanically propelled vehicles are extinguished.

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<sup>3</sup> p. 158, Riddall, John and Trevelyan, John, *Rights of Way: A Guide to Law and Practice*, Fourth Edition, The Ramblers' Association and Open Spaces Society, 2007.

- 28.4 DEFRA guidance advises that authorities should process all definitive map modification order applications for byways open to all traffic to a full determination, even though the outcome may be that a public right of way for mechanically propelled vehicles existed before 2 May 2006, but has since been extinguished by the Act. Therefore a consideration of the merits of the claim for byway rights over section D-E follows:
- 28.5 The southern section of the Route is present on some maps such as the Plan of Charlbury and Walcott Estates (1761), Davis map (1797) and the Ordnance Survey Old Series (1833). However, these maps do not provide evidence as to whether public rights exist over the Route or not.
- 28.6 The precise alignment of the Route is difficult to gauge with the Davis (1797) and the Ordnance Survey Old series (1833) maps because there are no distinguishing features on the Route. However, the Charlbury and Walcott Estate maps set out a relatively similar route across the land to the one being claimed. This Route is also clearly seen on the Tithe map, which shows the route and the field boundaries that it passes through. The majority of the evidence for the existence of the southern section of the Route existed before 1848, except for Kelly's map later in 1900 which shows a general route over the section.
- 28.7 It is a convention that main highways are shown in brown, yellow or cream on Tithe maps. Where a road is not subject to tithe rent and is shown in every respect in an identical fashion to other roads on the same map which were indisputably part of the public highway network, then this may be a positive indication that it shared that same status.
- 28.8 However, land may be exempt from tithes where it is unproductive and has never been cultivated. It was possible for private access or occupation roads to be exempted for the same reason. The route is shown on the plan of the Charlbury and Walcott estates and because that is a plan of a private estate all in the same ownership it is likely that



this Route was a private or occupation road to various parcels farmed by various tenants, and not necessarily a public road.

28.9 Parcel 145 is the only section of the Route that is numbered on the Tithe Map and subject to tithe payments. It is labelled as "Lane" and state of cultivation 'pasture'. It was not unusual to impose a tithe on a road which is grassy and suitable for grazing, treating it as an oddly shaped meadow. However, this is not evidence that this section of the Route road has public rights over it. Neither is it evidence that the rest of the Route is a public road.

28.10 Some sections of the Route are braced with neighbouring allotments (136, 137, 146, 147, 148, 149 and 150), indicating that the Route formed part of each parcel. The Route is bounded by a pecked line, sometimes double pecked, through these allotments. It is sometimes the case that when a road is not clearly differentiated from an inclosure of tithable land through which it passes, this is evidence that it carried no public rights of way. This links back to the Plan of Charlbury and Walcott Estates on which the Route is not shown with pecked lines on both sides of the Route and seems simply to make use of the irregular gaps which have been left between the fields. It would have been in the landowner's interest to declare a route, public or private, which ran across their land and which was not cultivated to reduce the tithe burden.

28.11 Some routes on the map (shaded in the same manner as the Route in question) are annotated with the name of their destination. However there is no annotation of the Route in question. On tithe maps the addition of a destination may be indicative that it connects with a through public route and therefore it could be surmised that the Route is a public route. In other cases the purpose may simply have been to assist with orientation of the map. However, there are already enough landmarks on the plan (such as the rivers and town of Charlbury) to enable easy orientation. Where the destination "From Burford" is marked this does not help much with orientation. Therefore it appears to be the case that the

destinations are marked only on public roads. This also links to the Plan of the Charlbury and Walcott Estates which shows the continuation of some routes but not of the Route in question.

28.12 Therefore any assumption that a shaded route is a public road should be treated with caution. There is no key to the colouring, nor a list of public and private roads. Further, there is no annotation of this Route or any of the roads as public roads or otherwise, as appears in some tithe maps. In some cases shading on tithe maps seemed simply to indicate that the surface had some kind of metalling. Therefore the fact that it is shaded is useful supporting evidence but needs to be backed up by other evidence.

28.13 Therefore there appears to be insufficient evidence to suggest that byway rights or any other public rights can be reasonably alleged to subsist over this section D to E.

## RECOMMENDATION

There is strong documentary evidence to allege the existence of a byway open to all traffic from A to B, but the nature of the route on the ground is such that it is not possible to conclude that it is mainly used for the purposes that footpaths and bridleways are used.

**It is therefore recommended that a Definitive Map Modification Order, under section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, to add a byway open to all traffic from A to B (as shown on the plan at Appendix 1) be NOT made..**

There is strong documentary evidence to allege the existence of a byway open to all traffic from B to C and the character of the route is such that it can be considered to be a byway. The public vehicular rights are exempt from automatic extinguishment further to Section 67(2)(b) of the NERC Act 2006.

**It is therefore recommended that a Definitive Map Modification Order, under section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, to add a byway open to all traffic from B to C be made..**

There is sufficient documentary evidence to reasonably allege the existence of a public footpath from C to D but not of a byway open to all traffic.

**It is therefore recommended that a Definitive Map Modification Order, under section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, to add a public footpath from C to D be made.**

Although there is documentary evidence of the existence of a path from D to E, the evidence of public rights over the path is weak and it is concluded that there

is insufficient evidence to reasonably allege that there is a right of way as a byway open to all traffic under the Wildlife and Countryside Act 1981 Section 5. Even if public vehicular rights could have been established, they would have been automatically extinguished under s.67(1) of the NERC Act because the failure to provide documentary evidence together with the application means that this application does not qualify as an exemption under s.67(3)(a).

It is therefore recommended that a Definitive Map Modification Order, under section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, to add a public footpath from D to E be NOT made.

  
\_\_\_\_\_  
On behalf of Countryside Services

Date 10/8/2010

Legal Services has reviewed this report and approved the legal analysis contained in it.

  
\_\_\_\_\_  
On behalf of Legal Services

Date 4/8/2010



The Planning  
Inspectorate

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## Appeal Decision

by **Michael R Lowe** BSc (Hons)

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: **15 JUL 2011**

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### Appeal Ref: **FPS/U3100/14A/1**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Oxfordshire County Council (the Council) not to make an Order under section 53(2) of that Act.
- The Application dated 28 October 1991 was refused by Oxfordshire County Council on 20 August 2010.
- The Appellant claims that the appeal route, between Coldron Brook and Restricted Byway 1 in the Parish of Charlbury, should be added to the definitive map and statement for the area as a restricted byway.

### Summary of Decision: **The appeal is allowed**

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#### Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. The appeal has been decided on the basis of the papers submitted.
3. The application was made for a byway open to all traffic and for a longer route, between Dean and Charlbury, shown referenced A-B-C-D-E on the application plan (the application route). The Council has accepted that the section A-B is a public highway shown on the list of streets prepared under section 36(6) of the Highways Act 1980. On that basis the Council declined to make a modification order for that section and the appellant has accepted that decision. The Council has resolved to make a Modification Orders for the sections B-C and C-D. The appeal therefore only concerns the section D-E (the appeal route).
4. It has been accepted by the Council and the appellant that the provisions of section 67(1) of the Natural Environment and Rural Communities Act 2006 extinguished any public rights of way for mechanically propelled vehicles that existed along the appeal route before the commencement date of 2 May 2006. I agree with that conclusion. The exception of section 67(3) does not apply in this case, as the application was not made strictly in accordance with paragraph 1 of Schedule 14 to the 1981 Act (the application did not include all the documents required). I have therefore considered the appeal on the basis that the appellant is seeking 'restricted byway' status for the appeal route.

#### Main issues

5. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act and court judgements.

6. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw, and clarified in the case of R v Secretary of State for Wales ex parte Emery.

Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.

For the purposes of this appeal, I need only be satisfied that the evidence meets test B.

### **Dedication at Common Law**

7. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point conclusively to an intention to dedicate. The evidence would need to be cogent to discharge the burden of proof that rests upon those seeking to establish the rights. The evidence would need to be sufficient, on the balance of probability, to demonstrate that the claimed route had been dedicated and accepted by the public in the past. Long uninterrupted user of a way by the public gives rise to a strong presumption of dedication without the need to inquire into the actual intention of the owner of the land. However, the presumption is not to be drawn if the circumstances indicate that the user was likely to have been permissive.

### **Reasons**

#### *The Spelsbury (Dean Hamlet) Inclosure Award 1779 and 18C maps*

8. Amongst other things, the Award reads as follows: *One public Road of the breadth of forty feet branching out of the last described road near the east side of clay sands and extending in its present direction to the north end of a lane at the north west corner of a piece of land called Walkers little sands leading into Dean Grove the same being part of the public road from Chadlington and Dean aforesaid to Charlbury in the said County of Oxford.*
9. There does not appear to be a map with the Award but it is possible to identify *Walker little sands* and *Dean Grove (Dean Wood)* on a map of the land belonging to Oriel College from 1743. From this map it is apparent that the Award is referring to the application route between points A and C and the presence on this map of a track predating the Award and the reference in the Award to *extending in its present direction* indicates that the Award was, in effect, confirming the existence and establishing a width to a pre-existing road across unenclosed land. The significance of the Award to the appeal route is the reference to *the same being part of the public road from Chadlington and Dean aforesaid to Charlbury in the said County of Oxford*. This provides good evidence of the continuity of a public road to Charlbury, but does not indicate

Yes but is it setting it out? If not, it's stopped up / see map (2-11)

the route. However, this evidence together with the evidence of three earlier maps indicates to me that the appeal route is the most likely route indicated by the Award.

10. The *Map of the Residue of the Manor of Dean in the Parish of Spelsbury in the County of Oxon belonging to Oriel College in Oxford 1743* indicates that there was a bridge across Coldron Brook (point D) called Mare Bridge and that the route continued south of the bridge. The *Charlbury & Walcott Estate Plan of 1761* covers the area of the appeal route and indicates a track along the appeal route, in part indicated by pecked lines and in part solid lines for the enclosed parts. A later map of the same area, *A Plan of Charlbury and Walcott Estates belonging to His Grace the Duke of Marlborough, also the free and copyholds lying in the County of Oxford (1770)* also indicates the appeal route in a similar manner and at the crossing of Coldron Brook is marked *to Chadlington*. Davis map (1797 and surveyed 1793 & 1794) indicates a track along the whole of the application route.
11. The Council were concerned that the indication in the Award of the section A-C continuing on to Chadlington may have gone along a different route to the appeal route. However, there is no indication of any other route on the above mentioned contemporary maps. It therefore appears to me that there is cogent evidence that the route referred to in the Award as being a public road from Chadlington and Dean to Charlbury is the appeal route and that the Award is good evidence of the reputation of the appeal route as a public road. The estate plans for the land both north and south of the Coldron Brook indicate a through route between villages and this indicates to me that both estates accepted the way as a public way.

PINS  
Support  
RB of  
Whole thing

#### Later Maps and documents

12. The Ordnance Survey Surveyor's Drawing 1810, at a small scale, does not show the appeal route, although the Old Series of 1833 does show the whole of the application route, whilst Bryant's map of 1824 shows part of the appeal route.
13. The Charlbury Tithe Map 1848 shows the whole of the appeal route in some detail, with the way coloured ochre in a similar manner to other roads and paths and with a width indicative of a track. The description of the parcels by Coldron Brook includes a reference to Marebridge, as mentioned in the Inclosure Award. *incorrect. shown on Old map, not mentioned in Inclosure.*
14. The large scale Ordnance Survey maps starting from 1880, do not indicate the appeal route as a physical feature and from these maps it would appear that the route had, by the late 19C, become disused. The records from the Finance Act 1910 also indicate that, by this time, the appeal route had fallen into disuse and there are no clear indications that any reduction in value claimed with respect to public or private ways refer to the appeal route. One parcel description does refer to *carroad from Charlbury to Chadlington crosses this property*, but it is uncertain whether this refers to the appeal route.
15. Although there is very little evidence to indicate that the appeal route has been used since the mid 19C, the legal maxim *once a highway, always a highway* applies for the public cannot release their rights through lack of use and there is no evidence to suggest that the public rights have been extinguished, except under the provisions of the Natural Environment and Rural Communities Act 2006.

16. In my view the evidence indicates, on the balance of probability, that it is reasonable to allege that a restricted byway can be implied to have been dedicated at common law along the appeal route. There is a conflict of credible evidence, but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist. This conflict of evidence can be resolved by the publication of a Modification Order and the subsequent confirmation process.

**Other matters**

17. The Council has sought guidance upon the width to be indicated in any proposed modification order. In my view the width and alignment can most reliably be determined from the Tithe Map of 1848. For the part of the route that is shown to be enclosed between hedge boundaries, the width is the full distance between the hedges. For the parts that are not enclosed by hedges the map indicates the route to be consistent with a cart track and the appellants suggestion of 5 metres appears to me as a reasonable width for this purpose.

Is this correct?  
little possible on it so whole width of 5m would still have been used?

is that scaled up?

**Conclusion**

18. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

**Formal Decision**

19. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Oxfordshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a restricted byway as proposed in part of the application dated 28 October 1991 and considered here as the appeal route. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

*Michael R. Lowe*

Inspector



**Appendix 6 – Thame Sub-Division Map of Publicly Maintainable Highways**



# Appendix 7 - Consultation Responses

## **Smith, Laurence - Communities**

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**From:**  
**Sent:** 12 April 2020 09:37  
**To:** Smith, Laurence - Communities  
**Subject:** Re: Application to Upgrade Spelsbury Footpath No. 44 to a Restricted Byway at Grove Lane, Spelsbury

Dear Laurence,

Thank you for the attached letter etc.

As you are aware, this application arose because an anomaly in the Wildlife & Countryside Act 1981 resulted in my appeal against the rejection of what became Charlbury RB30 being upheld but the partial acceptance of Spelsbury 44 as only a footpath being ignored, leaving an anomaly in the form of a gap for bridleway and restricted byway users between Spelsbury BOAT 43 and Charlbury RB30. This anomaly I tried to remedy by using the Inspector's Decision as new evidence not available to OCC when making its original decision as a justification for a fresh DMMO application. It is my opinion that the Inspector's Decision constitutes a legal precedent and his opinion is also new documentary evidence which was not available to your Council at the time. If your Council is therefore not prepared to reconsider the previous evidence on the basis of the Inspector's Decision, I therefore intend to appeal against any rejection of this application.

Kind regards

NICK

## Smith, Laurence - Communities

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**From:**  
**Sent:** 04 May 2020 16:32  
**To:** Smith, Laurence - Communities  
**Subject:** Object to Proposal of Changing Footpath Dean Grove, Spelsbury.

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Laurence,

Thank you for your assistance.

I believe the Spelsbury Parish Council has commented, agreeing to your objection.

I am a member of the Council, but have not been involved with this response.

My Mother-in-Law owns the land with this proposal.

So I felt that I had to declare an interest.

I am therefore commenting on this proposal, as an individual.

I have lived in Spelsbury since 1988 and have walked this path on occasions.

Due to the current lockdown, I have had chance to walk the Grove again.

I object to the proposal of upgrading this footpath, into a bridleway.

The Grove would suffer if the path was made into a bridleway, especially if it was made up to 40 feet wide !

I have been told there is some orchids near the existing path, I was promised some photographs?

I fear making this footpath a bridleway would mean there would be a big increase in traffic thorough the wood.

Especially as it would link Chadlington to Charlbury, I fear off road vehicles using the route.

Thank you,

Graham Beacham.

## Smith, Laurence - Communities

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**From:**  
**Sent:** 04 May 2020 18:00  
**To:** Smith, Laurence - Communities  
**Subject:** Fwd: Orchids  
**Attachments:** DSCF4284.JPG; DSCF4285.JPG; DSCF4286.JPG; DSCF4287.JPG; DSCF4288.JPG;  
DSCF4289.JPG; DSCF4292.JPG; DSCF4293.JPG; DSCF4294.JPG; DSCF4295.JPG;  
DSCF4296.JPG; DSCF4297.JPG

Hi Laurence,  
Pictures of orchids.  
Thanks,  
Graham.

----- Original Message -----  
Subject: Orchids

Hi Graham ,sorry forgot

All pictures are geotagged so proving location if in doubt

Kind regards

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## Smith, Laurence - Communities

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**From:**  
**Sent:** 13 May 2020 10:56  
**To:** Smith, Laurence - Communities  
**Subject:** Spelsbury Parish Council - Re: Application to Upgrade Spelsbury Footpath No. 44 to a Restricted Byway at Grove Lane, Spelsbury

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Mr Lawrence

Spelsbury Parish Council agree with the County Council's recommendations regarding the Application to Upgrade Spelsbury Footpath No 44 to a Restricted Byway at Grove Lane, Spelsbury - that the application be rejected.

Regards,

Anne Ogilvie  
Parish Clerk  
Spelsbury Parish Council

[www.spelsbury.org](http://www.spelsbury.org)