

Decision maker:	Assistant Director Environment and Place
Decision date:	31 July 2017
Title of report:	Wildlife and Countryside Act 1981 Modification Order to add a Byway Open To All Traffic in the Parish of Peterstow, a Restricted Byway in the Parishes of Peterstow and Hentland and a Restricted Byway in the Parish of Peterstow
Report by:	Parks and Leisure Commissioning Manager

Classification

Open

Key Decision

This is not a key decision.

Wards Affected

Pontrilas, Llangarron

Purpose

To seek a decision to make a Definitive Map Modification Order to add a section of Byway Open To All Traffic (BOAT) in the Parish of Peterstow, and two sections of Restricted Byway in the Parishes of Peterstow and Hentland in consequence of the duty set out in section 53(2)(b) of the Wildlife and Countryside Act 1981 to keep the council's Definitive Map and Statement under continuous review.

THAT:

An order be made under the provisions of section 53(2)(b) of the Wildlife and Countryside Act 1981, in consequence of events under sections 53(3)(c)(i) of that Act to add to the Definitive Map and Statement: -

- **a Byway Open to all Traffic with a width of four metres in the Parish of Peterstow, as shown between points A and B on drawing number M274/275 at Appendix 1 to this report;**

- a Restricted Byway with a width of four metres in the Parishes of Peterstow and Hentland, as shown between points B and G on drawing number M274/275 at Appendix 1 to this report and
- a Restricted Byway with a width of four metres in the Parish of Peterstow as shown between points H and I on drawing number M274/275 at Appendix 1 to this report

and THAT:

That part of the original application for a Byway Open to all Traffic in the Parish of Peterstow between the unclassified road U71015 and Point A on the plan at Appendix 1 to this report be rejected.

Alternative Options

- 1 This decision is to determine whether, on the balance of probabilities, public rights subsist (or are reasonably alleged to subsist) along the routes shown A – B, B – G and H – I) on the plan at Appendix 1 (and also between Point A and the unclassified road U71015). In determining this matter, the council is carrying out a quasi-judicial function in accordance with the provisions of section 53 of the 1981 Act. The only alternative options would be to do nothing, whereby public rights will be omitted from the Definitive Map and Statement, or to amend any part of the decision based on the evidence of the rights that are alleged or reasonably alleged to subsist. The Council is duty bound to investigate such matters.

Reasons for Recommendations

- 2 The Definitive Map and Statement are conclusive legal records of the status, position and width of public rights of way and Herefordshire Council has a legal duty under section 53 of the 1981 Act to keep them under continuous review. The Council must make Orders to modify the Map and Statement - in accordance with s53(3)(c)(i) in this case - where evidence is discovered which, in conjunction with other available evidence shows,

“that a right of way that is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54a, a byway open to all traffic”

- 3 Following a detailed investigation into this application documentary evidence indicates that public rights subsist or can reasonably be alleged to subsist over the claimed routes, as fully set out in the Research Report at Appendix 2.
- 4 The recommended outcomes in this matter are not the same as those applied for.

Key Considerations

- 5 On 17 June 2004 Mr D O Morgan, on behalf of the Open Spaces Society, made two applications in accordance with Section 53(5) and Schedule 14 of the Wildlife and Countryside Act 1981 to add these routes to the Council's Definitive Map and

Further information on the subject of this report is available from
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Statement as, respectively, a BOAT in the parishes of Hentland and Peterstow and a bridleway in the parish of Peterstow. These included certificates of service of notice on the landowners. The routes applied for are shown A – G on the plan at Figure 1 in Appendix 2 and X – Y on the plan at Figure 2 in Appendix 2. As outlined above and in Schedule 14 of the Wildlife and Countryside Act 1981, the Council has a duty to investigate and determine such applications to decide whether an order should be made.

- 6 Extensive research into the application has been carried out involving investigation into the evidence provided by the applicant and as might be available to the council from its own records and these are listed and discussed in the attached report.
- 7 The documentary evidence indicates that both routes have existed in some form since at least the early 1800s as, almost certainly, old roads. No evidence has been forthcoming that suggests a different conclusion should be considered.
- 8 There are a number of legal considerations that have had to be assessed in arriving at the conclusions and recommendations in this report.
- 9 As stated above, the original application by Mr Morgan was that the whole route shown in Figure 1 of Appendix 2 should be recorded as BOAT and that the whole of the route shown in Figure 2 of Appendix 2 should be recorded as bridleway. Following investigation, a number of matters impact on this.
- 10 Firstly, it is unclear why Mr Morgan's application was for a bridleway on the second route as the evidence for both routes is almost identical.
- 11 Secondly, the section of the route (E – F – G) shown in Figure 1 of Appendix 2 is already all purpose public highway maintained at public expense and should be excluded from the decision to include it on the Definitive Map and Statement.
- 12 Thirdly, the provisions of the Natural Environment and Rural Communities Act 2006 (and the subsequent *Winchester* judgement) impact on both routes. The reasons for this are fully detailed in the report at Appendix 2 but the effects are that rights for mechanically propelled vehicles that, otherwise, would have been shown to exist, were extinguished by virtue of not meeting the various 'savings' requirements of the legislation.
- 13 This leaves both routes as having rights for all other users and that restricted byway is the appropriate status for both routes, save for a very short section (between D – E shown in Figure 1 of Appendix 2), where rights for mechanically propelled vehicles are saved by virtue of the recording of that section on the Council's 2005 List of Streets.

Community Impact

- 14 Whilst there is considered to be no adverse community impact in respect of this decision, it cannot be a relevant consideration under section 53 of the 1981 Act.

Equality Duty

- 15 Whilst there are considered to be no equality implications, this is not a relevant consideration under section 53 of the 1981 Act.

Financial Implications

- 16 This is not a relevant consideration under section 53 of the 1981 Act. The council cannot take financial considerations into account in determining whether or not to make Definitive Map Orders. Following the making of the Order it will be advertised as required by Schedule 15, paragraph 3 of the 1981 Act. Should the route on the Definitive Map be added in due course it would be publicly maintainable. Any future management, maintenance and improvements will be prioritised in accordance with the criteria set out in the Public Realm Annual Plan and the Council's Rights of Way Improvement Plan. In practice there is little that needs to be done to re-establish the route or needed by way of annual maintenance.

Legal Implications

- 17 There are some complex legal issues surrounding the recommendation contained in this report. There are the usual requirements of the Wildlife and Countryside Act 1981 section 53 to keep the Definitive Map and Statement up to date and to make Orders to modify the Map and Statement if evidence is discovered that requires the Council to do so. In this case there are also the impacts of the Natural Environment and Rural Communities Act 2006 (NERCA) and the interpretation of that legislation as determined in the case of *R (on the application of Warden and Fellows of Winchester College and Humphrey Feeds Ltd) v Hampshire County Council 2008 (The Winchester Case)*.
- 18 Section 67 of NERCA introduced a cut-off date of 20th January 2005, on which date any mechanically propelled vehicular rights which had not already been recorded on the Definitive Map and Statement were extinguished. The Act, however, contained exceptions to this. One of these was in respect of duly made applications for BOATs which had been submitted to the Council under the provisions of the Wildlife and Countryside Act 1981 before the cut-off date. Any applications for BOATs made after that date could only be treated as applications for restricted byways, which are available to users of horse-drawn vehicles, cyclists, horse-riders and walkers, but not for motorised vehicles.
- 19 Mr Morgan's application meets this exception by virtue of being submitted before the cut-off date and, as a consequence, any rights for mechanically propelled vehicles that are shown to exist are, on the face of it, saved by this action.
- 20 This principle was tested in the courts and *Winchester* determined that when considering an application for a BOAT that was made before the NERCA cut-off date it must be fully compliant as a duly made application in order to meet the NERCA exception. A 'duly made' application is one that fully complies with the requirements of the Wildlife and Countryside Act 1981 Schedule 14, paragraph 1. This states: -
- An application shall be made in the prescribed form and shall be accompanied by:*
- *a map drawn to the prescribed scale and showing the way or ways to which the application relates; and*
 - *copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.*
- 21 Failing to meet the strict requirements for exception to NERCA means that mechanically propelled vehicular rights are extinguished and the routes could only be considered as restricted byways.

- 22 Lord Justice Dyson in his judgment in *Winchester* is very clear about the requirements of a duly made application under Schedule 14 of the Wildlife and Countryside Act 1981, and section 67(6) of NERCA. He states that “*The applicant is required to identify and provide copies of all the documentary evidence on which he relies in support of his application.*”
- 23 Mr Morgan’s application was, at first glance, accompanied by copies of all of the documents that he was relying on as evidence, thereby meeting the requirement of a duly made application under The Wildlife and Countryside Act 1981, thus affording it the protection of one of the exceptions in NERCA.
- 24 One of the documents provided was marked up and listed as ‘Roads adopted by Herefordshire CC c1929’. This would be reference to the ‘handover’ map between the district and county councils when highway maintenance liability passed from one to the other at that time. However, the map provided was a much later 1972 internal county council highways map. As the 1929 map was one of the documents that Mr Morgan sought to rely on, he was required to provide a copy of it and, whilst this may be an oversight by him or simply an error made in good faith it means that, in the strict context of *Winchester*, the application is not ‘duly made’. Only duly made applications are exempt under NERCA, and the effect of it not being duly made is that any public rights for mechanically propelled vehicles are extinguished.
- 25 This rationale only applies to the section A – B on the plan at **FIGURE 1** of **APPENDIX 2** as the remaining section of the route is recorded on the Council’s current ‘List of Streets’ (the list of highways maintainable at public expense) which would afford it a separate NERCA exemption. However, the List of Streets in existence immediately prior to the commencement of NERCA only recorded the section D – G and is, therefore, the only length afforded the protection of the List of Streets exception and where BOAT rights have been saved.
- 26 With regard to the route at **FIGURE 2** of **APPENDIX 2**, Mr Morgan only applied for this route to be added to the Definitive Map as a public bridleway and, therefore, does not constitute a duly made application for a BOAT made before 20 January 2005 and any rights for mechanically propelled vehicles has been extinguished by NERCA. Neither is this route recorded on the Council’s List of Streets.
- 27 If the council receives objections to any Order it makes, which are not subsequently withdrawn, it must submit the Order to the Secretary of State for confirmation as required by the provisions of Schedule 15(7)(1) of the 1981 Act. This may result in the holding of a public inquiry or hearing, the costs of which must be borne by the Council and would be met through the Annual Plan process.
- 28 There are then further legal complications as set out at the end of the report at Appendix 2, should an Order be made and confirmed. The documentary evidence dictates that the historic route of the ways are the ones that must be recognised by the Council. There are two issues with this. Firstly, the route between C and D on the plan at Appendix 1 is a meandering one across an open field. This is due to the route being historically enclosed by hedges and those hedges having since been removed. This may need to be something that the landowner chooses to rectify by way of a subsequent diversion order. If so, the cost of that is borne by the applicant.

29 Secondly, since the application was made, the National Grid has constructed a gas pumping station which obstructs the historic alignment of both routes. This is around Point H on the plan at Appendix 1. Officers are in discussion with National Grid about this. There are solutions but it is National Grid that will need to offer a solution and fund the cost of diverting the routes. If not, consideration would need to be given to the taking of enforcement action in order to secure the removal of the obstructions.

Risk Management

30 It is understood that the landowners involved are not minded to object and, therefore, the risk above may not materialise, although anyone can object to the order when made. Conversely, if the Council does nothing, the risk is that the applicant appeals to the Secretary of State for a direction that the Council determines the matter.

31 Making and confirming an Order has the unavoidable consequence of adding a route to the Definitive Map which will be partially obstructed as set out in paragraph 29, but this is not something that should influence the decision of whether or not a public right subsists.

Consultees

32 The local Herefordshire Councillors, Mr Summers and Mrs Swinglehurst, and the parish councils have been consulted and have raised no concerns. All landowners and adjoining landowners have been consulted and have seen a copy of the report at Appendix 2.

Appendices

Appendix 1 – Plan

Appendix 2 - Research Report to the Assistant Director Environment and Place, Reference M274 and 275

Background papers

- Public Realm Annual Plan
- Rights of Way Improvement Plan