

# COMMONS AND RIGHTS OF WAY COMMITTEE

**MINUTES** of a meeting of the Commons and Rights of Way Committee held on Tuesday 26 March 2024 in the Council Chamber - Shire Hall, Gloucester.

**PRESENT:**

Cllr Terry Hale	Cllr Robert Vines
Cllr Beki Hoyland (Vice-Chair)	Cllr Roger Whyborn
Cllr Graham Morgan (Chair)	Cllr Dr David Willingham
Cllr Vernon Smith	

Substitutes: Cllr Susan Williams

Apologies: Cllr Alex Hegenbarth and Cllr Mark Mackenzie-Charrington

**1. DECLARATIONS OF INTEREST**

No declarations of interest were made.

**2. MINUTES**

**Resolved**

**That the minutes of the previous meeting held on 12 December 2023 be approved as a correct record.**

**3. PUBLIC QUESTIONS ON APPLICATION(S)**

No public questions had been received on the application before the Committee.

**4. MEMBERS QUESTIONS ON APPLICATION(S)**

No questions from members had been received on the application before the Committee.

**5. APPLICATION FOR A MODIFICATION ORDER FOR THE UPGRADING OF RESTRICTED BYWAY FHE4 TO BYWAY OPEN TO ALL TRAFFIC ("BOAT") - HEWELSFIELD & BROCKWEIR PARISH, GLOUCESTERSHIRE (REF:573/11/115(1))**

- 5.1 Jaci Harris, Asset Data Officer (PROW Definitive Map), gave a detailed presentation to the Committee aided by a PowerPoint presentation, which included photographs of the restricted byway under consideration. (For information: A copy of the presentation slides has been uploaded to the Council's website.)
- 5.2 The Committee was informed that the West Glos & Dean Forest Motorcycle Club, submitted their Definitive Map Modification Order (DMMO) application on 23 November 2005. They sought to re-classify Restricted Byway FHE4 in the parish of Hewelsfield & Brockweir as a BOAT: a way that carried a public motor vehicular

right but was generally more suited for use by walkers and horse riders. On the Plan attached at Appendix JH2 to the report FHE4 was shown running between points A and E.

- 5.3 The route connected to two public highways; Brockweir Road at point A and Sandy Lane at point E. The route was already recorded on the Definitive Map, compiled under the statutory process of the National Parks and Access to the Countryside Act 1949. This constituted conclusive evidence of its status but was without prejudice to higher rights. The Committee was advised that its determination of the application, must be based on the higher test of the balance of probabilities; i.e. the Committee must consider whether it was more probable than not that the route had higher rights than a restricted byway (a probability of 51% or higher).
- 5.4 The Committee was informed that this application was one of a number received by the Council between February 2005 and March 2006 to record public motor vehicle rights in advance of a change in legislation which sought to limit such use of “mechanically propelled [motor] vehicles” in the countryside, whilst at the same time preserving routes that were considered to form part of the ordinary road network. These measures formed part of the Natural Environment and Rural Communities (NERC) Act 2006. Prior to this Act, no distinction was made between motorised and non-motorised vehicles such as horse drawn carriages. The NERC Act sought to curtail the future scope for establishing public rights of way for motor vehicles where claims were based on evidence of historic non-motorised vehicles. To achieve this it extinguished all public motor vehicular rights over ways which immediately before commencement of 2 May 2006 were shown to carry a historic public vehicular right whether motorised or not, and were either not shown on the Definitive Map and Statement at all, or were recorded footpath, bridleway or restricted byway status, unless one of the exemptions set out in the NERC Act could be applied.
- 5.5 The NERC Act also ensured that in the future a long period of use by motor vehicles could not give rise to public motor vehicular rights. Where such rights were extinguished under the NERC Act, the Act provided that the route should be recorded as a restricted byway, thus reflecting its historic origins.
- 5.6 The Asset Data Officer explained that in 2006 the Commons and Rights of Way Committee, on the basis of officers’ understanding of the new legislation at that time, approved the blanket rejection of the application, along with similar ones to re-classify existing restricted byways to the legal status of BOAT, in light of the NERC Act, due to the fact that even historical evidence of public carriage rights would most likely only result in a restricted byway. As the route’s current status was a restricted byway, no amendment to the legal record would have been necessary. The applicant was advised of this and informed of the appeal process. No appeal was made.
- 5.7 Members were informed that the application had been brought back to the Committee again, for determination, as subsequent to that determination in 2006, Defra issued a much-revised set of guidance notes concerning the NERC Act. These advised that each application must be evaluated individually to see whether

any of the exemptions to extinguishment of public motor vehicular rights set out in Section 67(2) of NERC applied.

- 5.8 The Asset Data Officer presented a series of photographs of the claimed route and described its character. She reported that the section of the route between points A and B was surfaced, had road markings and was recorded not only as a restricted byway on the Definitive Map and Statement but it was also recorded as the 43024 publicly maintainable highway on the List of Streets. The section of the route between B and C had a hard top surface but was not currently in a good condition. This section of the route was surfaced by Gloucestershire County Council in February 2003, paid for by the householder at Hartlands, for their private use. She explained that from point C-D the route was unsurfaced, uneven, muddy, and in places very overgrown with a much-reduced available width. The route from point D was a stone track which formed the driveway to the reservoir. There was some evidence of vehicle tracks at the time of inspection; however, she had been informed by a local walker that contractors from a utility company had recently driven along the track. At point E the route was unsurfaced; this section served two properties and there was evidence of motor vehicle use.
- 5.9 The Committee's attention was drawn to the documentary evidence set out in Section 8 of the report. It was reported that documentary evidence dating back to 1830, pointed towards the historic reputation of FHE4 as a public carriage road whereby the actual evidence of dedication was lost in the mists of time. The physical representation of FHE4 was shown on the Finance Act valuation map as an uncoloured, enclosed through route, excluded from adjacent numbered hereditaments (even though they were in the same ownership) and therefore exempt from tax, suggesting that the landowner considered the route to be outside his ownership. The Asset Data Officer advised that as private roads were assigned a number and assessed for tax, and deductions for public footpaths or bridleways across hereditaments could be made, it would be reasonable to infer that FHE4 was considered to be a public vehicular road.
- 5.10 It was also reported that during the statutory process of drawing up the Definitive Map, FHE4 was identified as a "carriage road used mainly as a footpath" resulting in its designation on the Definitive Map as a Road Used as a Public Path, which in turn was subsequently re-classified by statute to a restricted byway. This document reinforced the notion that FHE4 was considered to be a public vehicular road, which had declined in importance and was being used mainly by walkers. No evidence had been found of a stopping up or extinguishment order extinguishing these historic vehicular rights and therefore, following the legal maxim, "once a highway always a highway", these vehicular rights did not cease to exist, even if they were no longer exercised.
- 5.11 The Asset Data Officer advised that if the Committee accepted that restricted byway FHE4 carried historic public vehicular rights at the commencement of the NERC Act, then it would be necessary to determine whether any of the exemptions listed under Section 67(2) or (3) of the NERC Act preserved modern day motor vehicle rights, following the blanket extinguishment of such rights under Section 67(1) of the Act.

- 5.12 Members were advised that none of the three exemptions under Section 67(3) of the NERC Act were deemed to apply to the application, and as a result none of the exemptions preserved public motor vehicular rights along the route. Members were also advised that none of the exemptions (b)-(e) under Section 67(2) of the NERC Act were deemed to apply to the application, and therefore none of the exemptions preserved public motor vehicular rights.
- 5.13 In response to a question, the Asset Data Officer explained that in order for exemption (e) of Section 67(2) of the NERC Act to apply there had to be sufficient evidence to show that it could be inferred that public motor vehicular rights had come into being prior to 1930. The properties were shown on the Ordnance Survey Map of 1921; however, there was no evidence to determine whether they were using motorised vehicles.
- 5.14 The Asset Data Officer explained that under exemption (a) of Section 67(2) of the NERC Act, it had to be shown that there was more public motor vehicle use over the period 2001-2006, than there was by other users, e.g. walkers, cyclists, horse riders and horse drawn vehicles. It was reported that the applicant provided 23 Public Path Evidence Forms (PPEFs) completed by 23 members of the public in support of the application; members' attention was drawn to the analysis of the user evidence at paragraphs 9.7 to 9.9 of the report. The use was deemed to be as of right, as there was no evidence of force, secrecy or permission of the landowner. The Committee was informed that the use would meet the test of presumed dedication.
- 5.15 The Asset Data Officer informed the Committee that the user evidence indicated that motor vehicle use of FHE4 over the 2001-2006 NERC Act timeframe was infrequent. She explained that in regard to the motor vehicle use associated with the six properties that were situated adjacent to the application route, until the commencement of the NERC Act, no distinction was made between mechanically propelled vehicles and non-mechanically propelled vehicles. The evidence of historic public motor vehicular use as outlined in her report, suggested that the householders were exercising a lawful public motor vehicle right to access their properties until the commencement of the NERC Act.
- 5.16 The Asset Data Officer referred to the consultation responses from Mr Richardson & Mr Watson, to the initial 2005 notification of the application which provided evidence of public motor vehicle use along FHE4, together with responses from 43 individuals and organisations to the 2023 consultation. Both Mr Richardson & Mr Watson and 17 of the people who responded to the 2023 consultation, acknowledged some historic public motor vehicular use along FHE4. The frequency of this use as described in the consultation responses appeared to corroborate the infrequent use claimed in the 23 PPEFs.
- 5.17 The Committee was informed that conversely, 41 of the 43 individuals and organisations who responded to the 2023 consultation, (22 of whom had used FHE4 for 20 years or more), considered that the main use along FHE4 was by horse riders and dog walkers with occasional cyclists. Their use was described as

being regular or frequent and whilst using the route often saw or passed other walkers or horse riders.

- 5.18 The Asset Data Officer reported that the essence of the responses to the 2023 consultation could be summed up in Mr Wilson's email of 20 January 2024 (paragraph 7.42 of the report). He had provided a useful account of public use along FHE4.
- 5.19 Members were made aware that the internal Public Rights of Way Officer's files, also recorded extensive damage to the surface of FHE4 allegedly caused by water and bad drainage. Inspections in November 2000, and October 2001 showed that the surface was becoming increasingly scoured, and deep gullies 2-2.5ft deep had formed leading to the closure of the route in October 2001 to facilitate remedial works by Gloucestershire County Council early in 2002. It was therefore reasonable to suggest that there was little motor vehicle use of FHE4 at this point.
- 5.20 The Asset Data Officer advised the Committee that the infrequent claimed and observed use by motor vehicles and the extensive erosion of FHE4 did not provide compelling evidence sufficient to outweigh the claimed regular and frequent use of by walkers horse riders and cyclists over the period 2001 to 2006. She added that the main user test was highly subjective and related to an elapsed period, meaning that it had become increasingly difficult to ascertain what the main use may have been over a period that was now between eighteen and twenty-three years ago. The Defra Guidance note stated that the intention of the sub section was to accept highways that were part of the ordinary road network, and local authorities were directed to consider the physical character of the route, as well as the user and documentary evidence.
- 5.21 Members were advised that section A-B was considered to meet the character of today's ordinary road network and therefore public motor vehicular rights were deemed to have been preserved over the length of application route by virtue of Section 67(2)(a) of NERC Act.
- 5.22 Section B-C was not considered to have met the character of the ordinary road network over the period 2001-2006, or today. Further the main use of this section by motor vehicles was not considered to outweigh that of other user groups. Therefore exemption Section 67(2)(a) of NERC Act was not deemed to apply.
- 5.23 Section D-E, for a length of approximately 417m, FHE4 was a 3m wide unsurfaced track with signs of motor vehicle use by Severn Trent (access to the reservoir) and two properties. There was no sign of this use continuing beyond point D where, FHE4 became narrow, uneven, and muddy and there was no subsequent claimed public use other than householders gaining vehicular access to their properties. As such, public motor vehicle use was not considered to outweigh that of other user groups and therefore exemption 67(2)(a) was not deemed to apply.
- 5.24 The Asset Data Officer concluded her presentation by advising the Committee that FHE4 was deemed to have carried historic public carriage road rights. By virtue of Section 67(1) NERC Act, public motor vehicular rights had been extinguished. The

available user evidence suggested that public motor vehicular rights were deemed to have been preserved over Section A-B, due to it meeting the character of the ordinary road network. However, none of the Section 67(2) or (3) exemptions were considered to apply to section B-E. If the Committee accepted this assessment, then restricted byway FHE4, between sections B-E, currently enjoyed the highest classification possible without motor vehicle rights and reflected its historic vehicular use. Where existing unrecorded use of ways by mechanically propelled vehicles were extinguished in this way, a private right of way was maintained under Section 67(5) of the NERC Act, on the basis that use was necessary to enable a person with an interest in the land to obtain access to it. This meant that anyone relying on the restricted byway for access to their properties along the route would retain a private right of vehicular access.

- 5.25 In response to a question, the Asset Data Officer clarified that if the Committee resolved to approve the recommendation, the residents of the properties along the route, and contractors accessing the reservoir, would still retain their private right of motorised vehicular access despite public motor vehicle rights being extinguished.
- 5.26 Members of the Committee considered all the evidence, it was proposed, seconded and

Resolved:

- That no order be made to re-classify Restricted Byway FHE4 to byway open to all traffic on the Definitive Map of Public Rights of Way between points A-E.
- That motor vehicular rights have been preserved over the length of application route A-B, by virtue of section 67(2)(a) of the 2006 Natural Environment and Rural Communities Act and the List of Streets should be amended to reflect those rights.

## **6. PUBLIC QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE**

No public questions about the matters which were within the powers and duties of the Committee had been received.

## **7. MEMBERS' QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE**

No questions from members about the matters which were within the powers and duties of the Committee had been received.

## **8. DELEGATED DECISIONS**

**Resolved**

**That the Committee noted the report.**

*Minutes subject to their acceptance as a correct record at the next meeting*

**CHAIR**

Meeting concluded at 10.55 am