

**COMMONS AND RIGHTS OF WAY COMMITTEE  
2 DECEMBER 2021**

**APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER FOR AN  
ADDITIONAL LENGTH OF PUBLIC FOOTPATH  
CRAWLEY HILL TO BATH ROAD, PARISHES OF ULEY AND NYMPFIELD**

**REPORT OF THE LEAD COMMISSIONER, COMMUNITIES & INFRASTRUCTURE**

**1. PURPOSE OF REPORT**

To consider the following application:

<b>Nature of Application:</b>	Additional Footpath
<b>Parishes:</b>	Uley and Nympsfield
<b>Name of Applicant:</b>	Mr Ian Crossland
<b>Date of Application:</b>	13 August 2018

**2. RECOMMENDATIONS**

- (1) That no order be made to add a length of public footpath to the Definitive Map and Statement between points A and B (as shown on map GCC 2);
- (2) That an order be made to add a length of restricted byway to the Definitive Map and Statement between points A and B

**3. RESOURCE IMPLICATIONS**

Cost of advertising Order in the local press, which has to be done twice, is approximately £500 per notice.

In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application.

If the application were successful, the path would become maintainable at the public expense.

**4. SUSTAINABILITY & EQUALITY IMPLICATIONS**

No sustainability or equality implications have been identified.

**5. STATUTORY AUTHORITY**

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub section (3). Any person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53(3) (b) or (c). The County Council is obliged to determine any such

application that satisfies the required submission criteria in accordance with schedule 14 of the Act.

## **6. DEPARTMENTAL CONTACT**

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## **REPORT**

### **7. DESCRIPTION OF PATH**

- 7.1 A location map at scale 1:15,000 is attached (numbered **GCC 1**) showing the position of the claimed path which crosses the Parishes of Uley & Nympsfield. The claimed path is 4.5 kilometres (2.8 miles) north-east of the town of Dursley. The area of interest is within Ordnance Survey Grid Squares ST 7999 and SO 7900.
- 7.2 A large-scale map showing the whole of the claimed route at 1: 4,000 scale is attached (numbered **GCC 2**). The way is shown running between points A and B. Reference is made to the points shown on map GCC 2 throughout the report. The route commences at its junction with Crawley Hill at Ordnance Survey Grid Reference (OSGR) ST 7919 / 9993 and shown as point A. It runs in a generally north-easterly direction for approximately 657 metres to its junction with Bath Road at (OSGR) SO 7971/ 0034 shown as point B.
- 7.3 The route of the claimed path was inspected on 29 May 2018. The path crosses 3 fields; at the time of inspection, one of which was arable and two were pasture. No physical evidence of the path could be seen on the ground and no evidence of use by the public was identified. At point A, the claimed way starts at Crawley Hill where there is an area of hardstanding. There is a 4 metre wide gateway into an arable field but no gate. The path crosses this field diagonally clipping the corner of a second field bounded by a hedge via gaps and crosses a third field before exiting onto Bath Road via a metal field gate tied to the overgrown hedge with baler twine. There is a further area of hardstanding at this point.
- 7.4 Photographs taken during the site visit can be seen at **appendix GCC 3**.

### **8. APPLICATION**

- 8.1 An application, dated 12 January 2018, was received comprising Form 1 (Notice to Order Making Authority of DMMO Application), a plan and a report on the evidence supporting the claim.
- 8.2 Form 3 (Certificate of Notice served on affected Landowners and Tenants) was received dated 15 January 2018. This certified that notice had been served upon Mr Goldingham and Mr Woodridge. A second Form 3 was received dated 1 May

2018 certifying that notice had been served upon tenant farmer Mr Nichols and then a third Form 3 was received (dated 13 August 2018) certifying that notice had been served upon Severn Trent.

- 8.3 It was considered by the County Council, as surveying authority, that the application was fully compliant with both schedule 14(1) and 14(2) of the 1981 Wildlife and Countryside Act.

## 9. USER EVIDENCE

- 9.1 The application was supported by four user evidence forms (UEFs), completed by four individuals. The use as evidenced by the forms dates back to 1930. All four witnesses claim use of the path on foot over a period of 20 years. A summary of the evidence forms can be seen at **appendix GCC 4**.
- 9.2 Mrs Timbrell used the claimed way on foot, without seeking permission, during the period from the mid 1940s to the 1960s to get to Uley for work or for the doctors. She remembered the path being wide enough for a horse and cart and being used as such by a neighbour. She stated that “everybody from Nympsfield used it, often to get to work because there were no buses. I remember Tom Lord who lived at the top of Crawley Hill driving a horse and cart back and forth.” She also remembered Mr Goldingham (senior) placing barbed wire between the two fields and when people moved it away, replacing it more securely.
- 9.3 Mr Whitman used it 5 or 6 times per year on foot, without seeking permission, from the late 1930s until the mid 1980s, for the purpose of travelling to Uley for work and for shopping. He remembered gates at each end along with a “Public Footpath” signpost at the Nympsfield end of the path. During the mid-eighties a wall was constructed between the two middle fields. Mr Whitman stated that he worked for the owner for a period of “a week or so.” He stated “People from Nympsfield – my uncle Bill Selby for instance - used it to walk to work especially if there was snow and the buses weren’t working.”
- 9.4 Mrs Whittard used the path during the late 1930s and 1940s three to four times a year on foot, without seeking permission, for the purpose of recreation and travelling to Uley for the shops. She remembered gates at either end of the path but no signs or notices. She stated “Men including my father used it to get to Dursley (Listers) in the winter when there was snow.”
- 9.5 A fourth Public Path Evidence Form was supplied under a letter dated 16 December 2019, from the applicant, Mr Crossland. Mary Broder claimed use of the path from the early 1940s to about 1960. She used it on foot to access the doctors and work and remembered an unlocked gate at each end of the path and a third half way along the path.
- 9.6 Three of the witnesses claimed that they observed many local members of the public using this path over the years. They have not however provided any dates of reference and it is unlikely that they would have been aware of the authority under which the paths were being used. Their statements therefore with regard to

use of the path by others constitutes hearsay evidence and shouldn't be accorded much weight.

- 9.7 The applicant was unable however to provide further user evidence forms. Two of the statements, although evidencing public use over a period of 20 years, also indicate that the landowner demonstrated his lack of intention to dedicate the path by erecting a barbed wire fence and also a wall across the path to prevent access and that the barbed wire was strengthened after it was removed. These actions could for the purpose of s.31 HA 80 constitute the date that the public's right to use this path was challenged and interruptions capable of rebutting this claim. This report has not sought to establish exactly when and for how long the barbed wire fence and wall were in place across this claimed way because the user evidence supplied in support of this application is considered to be insufficient in itself to support a claim of presumed dedication, as demonstrated by *R.v.SSETR (ex p. Dorset)* 1999, where the justice accepted that, although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test.

## 10. DOCUMENTARY EVIDENCE

The documents are set out below in date order.

### 10.1 Inclosure Award

None known

Area not shown in detail. Claimed route not shown.

### 10.2 "A Plan of the Mannor of Nympsfield in the County of Gloucester belonging to Abraham Chambers Esqr, Surveyed And delineated by Thomas Warburton 1733, Contracted and redrawn by Isaac Messerder 1761" (GA D7223/1)

The map includes both a plan of the field parcels comprising the Manor of Nympsfield and a corresponding written list of the names and field parcel numbers. The list also denotes the fields for which tithe was paid and those which were tithe-free. The separate 'Explanation' notes that buildings were coloured red, hedges were denoted by a specific green line and roads were brown. Although the compass rose defines the colours green, red and brown, the only remaining colour on the map today is green. The field boundaries and the areas of hedging are still identifiable. The outline of the buildings can be seen in the vicinity of the village of Nympsfield along the sections of turnpike road excluded from adjacent fields but identifying colours of both have disappeared over time.

The sections of turnpike road running across field parcels such as No 16 are unclear. This field is noted in the reference list as an arable field for which tithe was paid. Field No 15, over which the turnpike road also ran, however does show the route and annotates it "To Bath" which indicates that it was a public highway. The proposed northern route of the turnpike (Bath) road created in 1780 bypassing the village of Nympsfield is shown by later pencil markings and is annotated "To Bath". It is not known when these markings were made but they could have been made in preparation of the new Bath Road c.1780, particularly as the proposed turnpike is annotated. The claimed route does not appear to be shown on the original 1733 map, but is marked by two pecked lines in pencil in a later addition.

### **10.3 Isaac Taylor's Map of Gloucestershire, 1777 (National Archives ref: WO78/5733) (GCC 5)**

'A Map of the County of Gloucester' was an original survey undertaken by Isaac Taylor in 1777 which was purchased and published by William Faden in August 1786. This map was produced to be sold to members of the public which means that it is likely the routes shown were both public and publicly maintainable. The map contains an "explanation" (key) which includes 'villages and close roads' and 'open roads' but does not appear to show routes which, at the time, were thought to be footpaths or bridleways. Although not included in the explanation, the map shows and annotates the turnpike road passing through Nympsfield by means of bold continuous lines to each side.

Taylor's map shows that the northern end of Bath Road south of Nympsfield, the length of road connecting Crawley Hill to the end of Buckholt Wood and the length of road connecting Crawley Hill with Frocester Hill as they are known today, did not exist at this time. This is confirmed by Dr Christopher Cox, PhD, in his thesis; *Development & Decline of the Turnpike System in the Stroudwater area of Gloucestershire* (1987). "In the eighteenth century, travellers from Dudbridge to Uley would have had to turn left at the old Frocester Hill toll-gate, and then right at Nympsfield: the present stretch of road from the tollgate site past the Frocester quarry to near Hetty Pegler's Tump (a Neolithic long-barrow on the rim of the scarp) did not then exist".

The claimed path is depicted on Taylor's map as a Village and Close Road and shown as the only road between Uley and Nympsfield. Dr Cox's statement noting that a traveller turning right at Nympsfield to get to Uley must have used the claimed path because at this time it was the only road available. It follows therefore that the claimed path at this time formed part of the local public road network connecting Dursley & Uley via Crawley Hill with the Frocester/ Nympsfield turnpike road and Nailsworth via Tinkley Lane.

### **10.4 John Cary's New Maps of England and Wales (1794) sheet 23 (GCC 6B)**

John Cary was an Ordnance Survey cartographer until c.1808 and also a leading map publisher in the late 18<sup>th</sup> and early 19<sup>th</sup> century. He maintained a high standard of maps, using trigonometric surveys and other up to date source materials including parliamentary documents, which was reflected by his commission in 1794 by the Postmaster General to survey the 9,000 miles of turnpike roads.

Full title is 'Cary's New Map of England and Wales, With Part of Scotland'. *On Which Are Carefully Laid Down All the Direct and Principal Cross Roads, the Course of the Rivers And Navigable Canals ... Delineated from Actual Surveys: and materially assisted From Authentic Documents Liberally supplied by the Right Honourable the Post Masters General. London: Published June 11th 1794 by J. Cary, Engraver & Map-seller*". This is a book of sectioned maps in atlas form. The 81 plates are drawn at a scale of 1:360,000 and are hand painted. The maps show the Direct (turnpikes) coloured and also principal cross roads but do not show routes which, at the time, were thought to be footpaths or bridleways. The claimed path is shown as a cross road.

In *Fortune v Wiltshire Council Court of Appeal (2012)* [para. 54], it was noted that at that time “the expression “cross road” did not have its modern meaning of a point at which two roads cross. Rather in “old maps and documents, a ‘cross road’ included a highway running between, and joining other, regional centres”. Indeed that is the first meaning given to the expression in the *Oxford English Dictionary* (“A road crossing another, or running across between two main roads; a by-road”).”

The Planning Inspectorate’s Advice Note No.4 (Advice on the Definition of Cross Road) states that on old maps and documents the term cross road would mean “a highway running between, and joining, other highways, a byway and a road that joined regional centres”. In the case of *Hollins v Oldham* (October 1995) quoted in Advice Note 4, Judge Howarth concluded that the category known as “cross road”... “must mean a public road in respect of which no toll is payable. This map was probably produced for the benefit of wealthy people who wished to travel either on horseback or by means of horse and carriage. The cost of such plans when they were produced would have been so expensive that no other kind of purchaser could be envisaged. There is no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use”.

The appeal court decision of *Fortune & Others v Wiltshire County Council*, March 2012 stated that “the judge concluded that Greenwood’s map supported the emerging picture of an established thoroughfare. In our judgement the label “cross road” added further support.”

The claimed route is shown as a principal cross road from Uley connecting to the turnpike road through Nympsfield and is drawn in a similar manner to other cross roads in the area such as Crawley Hill and Tinkley Lane. The northerly extensions of Crawley Hill to the end of Buckholt Wood and Frocester Hill and the northerly section of Bath Road, by-passing Nympsfield, are not shown.

#### **10.5 New Map of the County of Gloucester, Divided into Hundreds, printed for C. Smith in 1804. (GA SR86/1804GS) (GCC 7)**

The ‘New English Atlas’ comprised a set of 46 county maps, divided into hundreds on which were delineated all the direct and cross roads, cities, towns & most considerable villages, parks, gentlemen's seats, rivers & navigable canals. These started appearing in 1801, and in 1804 were bound as the New English Atlas; the maps continued to be published, with the addition of railways and changes to place names, until the 1860s.

Smith’s map divides the county into its hundreds; the claimed path falling into the Hundred of Berkeley (No.17). It has an explanation which includes turnpike and cross roads but does not appear to show routes which, at the time, were thought to be footpaths or bridleways. The turnpike from Frocester to Nympsfield is shown coloured brown with one its boundaries emphasised with a thicker black line and the claimed route is shown as a cross road. The claimed path is shown as the only road linking Uley with the Frocester - Nympsfield turnpike road and Tinkley Lane and connecting freely with the existing highway network of the time. It is shown running between solid boundaries in a similar manner to other routes known today as highways. The northerly extensions of Crawley Hill to the end of

Buckholt Wood and Frocester Hill and the northern section of Bath Road by-passing Nympsfield, are not shown.

#### **10.6 A New Map of the County of Gloucestershire Divided into Hundreds – Thomas Dix, 1816 (GA SR86/1816DixGS\*J3.112GS) (GCC 8)**

Thomas Dix, a surveyor & cartographer, initiated his atlas project 'A complete atlas of the English Counties' c.1816, but after his death it was carried on to completion by the publisher William Darton. Although the Atlas was published in 1822, individual county maps from the first edition bear various dates between 1816 and 1821. The explanation on this original colour wash map states that the map includes Turnpike, Mail and Cross Roads. The Frocester – Nympsfield turnpike road is coloured brown and edged on one side by a thick black line. The claimed route is shown as a cross road extending from Crawley Hill as the only road between Uley and Nympsfield, and connecting freely with the turnpike and Tinkley Lane. It is shown in exactly the same manner as Crawley Hill and Tinkley Lane. The northerly extensions of Crawley Hill to the end of Buckholt Wood and Frocester Hill and the northern section of Bath Road by-passing Nympsfield, are not shown.

#### **10.7 Turnpike Acts**

*“Until the late 19th century, Britain had no national framework for maintaining its highways. For much of the 17th and 18th centuries, roads were repairable by the population at large, with every able-bodied man being subject to six days a year of unpaid statute labour repairing the roads. The inefficiency of the statute labour system left most roads poorly repaired and maintained.*

*Turnpikes were an alternative method of road administration and were first used in 1663. A turnpike was a toll-gate set up across a road, with travellers along that road being able to pass through the gate only upon payment of a toll. The revenue collected from tolls would be used to repair and maintain the road. After 1711, Parliament began establishing ad hoc turnpike trusts responsible for collecting tolls and maintaining specified stretches of road. These Acts were generally expressed to continue for, or expire after, a fixed period, usually 21 years. The relevant periods were frequently extended by an Act specific to a particular turnpike trust.” ‘A Consultation Paper on the Repeal of Turnpike Laws’, commissioned by the Law Commission 2010.*

As demand for road improvements increased, so did the numbers of roads being made subject to new or extended Turnpike Acts. Several Turnpike Acts were sanctioned during the 18<sup>th</sup> and 19<sup>th</sup> centuries in the vicinity of the claimed path to improve existing roads for travellers and create new sections of roads where previously there were none.

The position of the various turnpike roads are shown marked on a modern Ordnance Survey map (**appendix GCC 11**). The original route up to the top of Frocester Hill, indicated by a continuous blue line, annotated 1726, was turnpiked under the following act; *Glos.Roads Act; 12 Geo.i,c.24 (1726)*; “...the road from Framilode Passage over the River Severn, to the top of Froster Hill”).

A later authority; *Glos Roads Act; 31 Geo 2. c.65 (1758)* relates to the section of road also shown by a blue continuous line (annotated 1758) from the turnpike gate at the top of Frocester Hill through the village of Nympsfield as corroborated by the older maps referred to in this report. This combined route (1726 & 1758) was realigned under later authority; *Glos Roads Act; 20 Geo.3.c.70 (1780)* whereby Frocester Hill was re-aligned along a more commodious route (shown by the continuous black line with cross bars at intervals) and the section of turnpike road originally running through the village of Nympsfield was re-aligned by the creation of a new turnpike which bypassed it.

These improvements are noted in the *Victoria County History of the County of Gloucester'*: Volume 10, Westbury and Whitstone Hundreds by Kathleen Morgan and Brian S Smith, under Frocester; Introduction p.170-171

It states: *"The Frocester Road was turnpiked in 1726 by means of the Glos. Roads Act; 12 Geo.I,c.24. As a result Frocester became the first coaching stage on the journey from Gloucester to Bath; there were toll-booths south of Frocester Court and at the top of Frocester Hill. The turnpike road climbed Frocester Hill on the line of the surviving track through Buckholt Wood until 1783 when, at the instigation of the vicar George Hayward, it was diverted up a gentler incline to the south."*

A newspaper article posted by the licensed victualler, Christopher Coleman of the George Inn, Frocester in 1784, corroborates the above statements. An advert posted in the *British Chronicle (Pugh's Hereford Journal)*, newspaper, as set out below and a copy of which is held **(GCC12)** declared;

#### **THE NEW ROAD through FROCESTER and PETTY-FRANCE to BATH**

*CHRISTOPHER COLEMAN, at the GEORGE INN, FROCESTER, ever grateful for the many and repeated favours which he has received from the NOBILITY, GENTRY and PUBLICK, with singular satisfaction, acquaints them that FROCESTER HILL, which heretofore occasioned inconveniencies and delay to travellers on account of its steepness, is now, by a new and judicious cut, which avoids the village of Nympsfield, rendered quite easy and pleasant.*

*From this NEW ROAD the traveller is entertained with one of the most extensive and delightful prospects in the kingdom; the eye commanding at one view, a most beautiful and highly cultivated vale, with the River Severn, the Malvern hills, the romantic Mountains of South Wales and many other pleasing and picturesque scenes.*

*Being determined to exert every means in his power to render the accommodation of his House perfectly agreeable, C.COLEMAN humbly hopes for the future encouragement of the PUBLICK, and begs leave to assure them that upon all occasions, he will most gratefully acknowledge their favours. **The British Chronicle; February 26, 1784. (GCC13)***

Dr Christopher Cox in his Thesis 1987; "Development and Decline of the Turnpike System in the Stroudwater Area of Gloucestershire", noted with regard to the claimed path. *"The new Frocester Hill road emerges onto the top, out of the former direct line through Nympsfield Village, and the present road runs along the top*

*past a row of houses called Cockadilly before re-joining the existing Bath Road. In the eighteenth century, travellers from Dudbridge to Uley would have had to turn left at the old Frocester Hill toll-gate, and then turn right again at Nympsfield; The present stretch of road from the toll-gate site past the Frocester quarry to near Hetty Peglar's Tump ....did not then exist.....”* This shows the importance of the claimed route at this time.

Three further Turnpike Acts of the early 1800s which may have affected the use of the claimed path are highlighted on the attached extract of 1:25,000 scale Explorer Map (168) Stroud, Tetbury & Malmesbury (**GCC 13**). The claimed path is marked by a red broken line. The ways created or improved by the three Turnpike Acts are highlighted as follows;

**i. 1&2 Geo.4 c. lxxxii (1821) (Gloucester to Bristol Road and Branches Act)**

*Highlighted blue.*

By this time, the Crawley Hill connection with Frocester Hill was in existence. This Act was passed to authorise the repair and maintenance of “the Great Road from Gloucester to Bristol and certain Roads through and near the Towns of Berkeley, Dursley, Wotton- under- Edge and Stroud, and other Roads therein mentioned, in the Counties of Gloucester and Wilts”. The 1821 Act superseded and repealed earlier enactments. It authorised works to roads, including;

- *“The Claypitts, and leading through Alkerton and Frocester to a Place called The Freezes, where the Direction Post stands at the top of Frocester Hill in the parish of Nympsfield”*
- *“the turnpike road from Nubbis Ash through Dursley and Uley to the Freezes” (top of Frocester Hill).*

The ‘Berkeley, Dursley, Wotton under Edge, Frocester & Cainscross Turnpike Trust’ was set up in 1821 to oversee the works relating to this Act and four divisions were created to make it more manageable. Documents pertaining to the setting up of this trust, including 2 hand drawn maps of the road network of the time were found at Gloucestershire Archives, ref; D9125/1/1536 & 1591. One of the maps records the great road from Claypitts to Stone and turnpike roads in the Cam, Dursley, Uley area, including Crawley Hill and the spur roads off them including;

- Fiery Lane (41489) annotated ‘to Owlpen’
- Lampern Hill (3/283) annotated ‘to Tetbury & Wotton’
- Drake Lane (3/264) annotated ‘to Cam & Coaley’
- Kingshill Lane (3/263) annotated ‘to Upper Cam’
- Claimed path, annotated ‘to Nympsfield’.

The annotation of a road ‘from’ or ‘to’ a named settlement is suggestive of public rights.

The 1822 Act, which amended the general laws for the regulation of turnpikes, made specific provision allowing Trustees to stop up and dispose of land constituting a former turnpike road that in their judgement had become superfluous by reason of the realignment of the turnpike. Under this Act provision was made for old roads to be stopped up or sold. Page 2536 noted “*Lands constituting any former Road or Roads which may therefore become useless or unnecessary shall*

*or may be stopped up or discontinued, unless leading over some Moor, Common, uncultivated Land or Waste Ground, or to some Village, Town or Place to which such new Road or Roads doth not or do not lead*. No evidence has been found to show that the claimed path between Uley & Nympsfield was stopped up.

ii. **1&2 Geo.4 c.lxxxiii (1821) (Road from Tetbury, Frocester Hill and from Latterwood Act)** *Highlighted yellow.*

This Act was passed to authorise the repair and maintenance of the Gloucestershire Roads from Tetbury to Symondshall, from Frocester Hill to Dunkirk and from the Latterwood to Nailsworth. The Act superseded and repealed earlier enactments (so far as they relate to these roads). It authorised work to roads including;

- “road from the top of Frocester Hill, through the Latterwood to Ashell Barn near Coldharbour”.

iii. **3 Geo. 4 c. lxi (1822) (Gloucestershire Roads Act)** *Highlighted green.*

This Act was passed “...for the Purpose of amending, making, altering, widening and maintaining in Repair the present Turnpike Roads leading from ....Dudbridge to the End of Buckholt Wood in the parish of kings Stanley, **and also the intended new Piece of Road to branch and continue from thence to join the Turnpike Road leading from Frocester to Petty France at or near a place called The Freezes at the top of Frocester Hill in the Parish of Nympsfield....**”.

*“...and as soon as the new Piece of Road from the South-west End of Buckholt Wood to the Top of Frocester Hill shall be made and completed, the old Roads in lieu whereof such new Piece of Road shall be made, and which will thereupon become useless or unnecessary; leading to Nympsfield, shall be stopped up and discontinued, and shall be vested in Lord Ducie, in lieu of and in exchange for the Land taken from the said Lord Ducie for making the said new Piece of Road”*

Earlier maps show the claimed path as a ‘secondary’ cross road or croft road which for many years was the only road between Uley and Nympsfield. No evidence has been found to show that the claimed path was itself subject to a turnpike act, but the new roads created or existing roads improved under the various Turnpike Acts from 1725 onwards would have resulted in a lessening of the importance of the claimed route.

## **10.8 Greenwood’s Map of Gloucestershire 1824 – Gloucestershire Archives Library (GCC 14)**

The Greenwood Map of 1824 was drawn from an original survey. Its depiction is much more accurate (like an Ordnance Survey Map). This may be due to survey equipment (theodolites) becoming commercially available in the 1790s. Like Taylors’ map of 1777, Greenwood’s map was sold to members of the public. The commercial nature of the map means that the routes shown are usually public and publicly maintainable unless there is strong contemporary evidence which shows the route is private. Greenwood identifies two types of road in the key: turnpike roads; roads which could only be used upon payment of a toll, and cross roads. According to the key, the claimed path is shown as a cross road (see para 9.5 of this report) connecting freely to the wider road network.

This map also shows the effect of the re-aligned length of Frocester Hill & the section of new turnpiked road which bypassed the village of Nympsfield as detailed previously in this report.

#### **10.9 Ordnance Survey Surveyor's Drawing, 2" to 1 mile, 1825-28 Stroud (British Library online OSD 171) surveyor E. Crocker (GCC 15)**

2 inch to 1 mile pen and ink drawing, survey for Ordnance Survey 1" to 1 mile maps. Being significantly larger in scale, the preliminary drawings show much more detail than the printed maps. The British Library possesses 351 of the original preliminary drawings made by the surveyors between the 1780s and 1840, one of which is the 1825 drawing by Edmund Crocker (OSD171) which covered Stroud.

The turnpike (Bath) Road, the extension of Crawley Hill and the claimed route are shown coloured. The claimed route however is depicted as an unenclosed path, by double pecked lines with unimpeded access to Crawley Hill but with a boundary feature at its junction with Bath Road. Other paths similarly depicted in the area are the tracks across Woodchester Park, which today are recorded as private and the route extending from the bend on Crawley Hill to Ticks Hill, which today is designated as a Restricted Byway.

#### **10.10 Ordnance Survey 1" to 1 mile, first edition 1830 (GCC16)**

This map was engraved in the Ordnance Map Office under the direction of Thomas Colby from the pen and ink drawings as detailed above. The map shows the Crawley Hill & Bath turnpike roads and the claimed path. The claimed path at this time is part enclosed and part unenclosed. No barriers are shown at either end of the path and it freely connects with Bath Road (turnpike) to the north and Crawley Hill to the south. The physical representation of the claimed path is similar to Nympsfield Lane and the old turnpike which passed through Nympsfield.

#### **10.11 Tithe Maps**

Although not produced to record public rights of way, Tithe maps provide important evidence as to the physical existence of such paths. The maps were drawn up under statutory authority by the Tithe Commissioners under the provisions contained in the Tithe Commutation Act of 1836 to show all cultivated land, arable and pasture, as tithe was payable on land producing crops. It is unlikely that a tithe map will show public footpaths and bridleways as untithable as their effect on the tithe payable was likely to be insignificant. They were required to show wasteland and roads, because tithe was not payable on these, although this is not necessarily an indication that any road was public.

An 1837 amendment to the Act provided for the maps to be either first or second class. First class maps, being signed and sealed by the commissioners, are considered to be a true record of matters relating to the purposes for which the map was designed. Second class maps, signed but not sealed, which failed in some, often minor way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view. Both first and second class maps have been accepted by the courts as evidence. At this time the application route ran through three parishes; Nympsfield, Owlpen and Uley. This report therefore considers the tithe maps for all three parishes.

#### **10.12 Owlpen Tithe Map (1839) and Apportionment (1838) (GA GDR/T1/136) (GCC 18)**

The Owlpen Tithe Map is a second class map being signed but not sealed by the commissioners. At the time this map was drawn, Owlpen Parish had a number of detached parcels of land and it is across one of these that the claimed path runs. This particular area in Owlpen was later incorporated into Nymphsfield Parish in 1883. The detached section is shown in more detail in the inset map provided at the top of the main map. The claimed way is shown by means of two dashed lines across the neighbouring parish of Uley with the annotation 'Bridle Road to Nymphsfield' along it and extending into Nymphsfield Parish. The map shows the Owlpen parish boundary edged in orange following the route of the claimed path for a short distance. The claimed way is shown unnumbered running between two arable fields; Nos.161 & 162 for which the Owlpen Apportionment states are both in the ownership of Lord Ducie and tenanted by James Townsend. There is no brace symbol to indicate that the claimed path was measured together with the adjacent numbered tithable land.

#### **10.13 Nymphsfield Tithe Map (n.d.) and Apportionment (1838) (GA GDR/T1/133) (GCC 19)**

The Nymphsfield Tithe Map is a second class map being signed but not sealed by the commissioners. The length of the claimed path runs for the length of one field across field parcel no.126 which the Nymphsfield Apportionment states was owned and farmed by Lord Ducie. It is shown starting at its connection with Owlpen Parish Boundary and ends at Bath Road. The status of the track is undefined, but is shown in a manner consistent with other known roads in the area, such as Bath Road and the Continuation of Crawley Hill, both of which were turnpikes at this time without barriers at either end preventing access to the existing highway network.

#### **10.14 Uley Tithe Map (1842) and Apportionment (1842) (GA GDR/T1/187) (GCC 20)**

The Uley Tithe Map is a first class map – signed and sealed by commissioners and therefore considered a true record of the evidence shown. Although not necessarily constituting evidence of public vehicular rights, it is noted that the claimed route is unnumbered, coloured and depicted in exactly the same way as the turnpike road, Crawley Hill. Crawley Hill is annotated; 'to Stroud' and the claimed path is similarly annotated 'to Nymphsfield'. The annotation of a road 'from' or 'to' a named settlement is suggestive of public rights. A further similarity between the turnpike road and the claimed way is their width. The claimed path ran between two arable fields numbered 250 and 249 which the apportionment shows were both owned by Thomas Kingscote and tenanted by John Norris but there is no brace symbol to indicate that the claimed path was measured together with the adjacent numbered tithable land. The map shows the parish boundary that existed at the time between Uley and Owlpen (before this small detached area of land in Owlpen parish was transferred to Nymphsfield Parish in 1883) following the route of the claimed path for a short distance.

#### **10.15 Plan of Nymphsfield for Sale Particulars, Ducie Estate 1846 GA D1011/P6 (GCC 17)**

The plan attached to the Particulars of Sale on behalf of Lord Ducie. It is a hand drawn plan showing land in the ownership of the Ducie Estate. Surveyed by Charles Hyde, Surveyor and Valuer, Horsley on June 12<sup>th</sup> 1846. It notes that 'This plan was taken from the Tithe Commutation Map'. Scale 11.4 inches to 1 mile. It further notes that 'This parish now consists of three sets of .....numbers, each set differing from each other; viz one for the Tithe Map, one for the Survey Book and one for the Printed Particulars'. The claimed route is shown running between solid boundaries and is excluded from the adjacent fields which are numbered. The path connects freely without any physical barriers to Bath Road and the extension of Crawley Hill (both turnpikes roads) and is shown in a similar manner to those turnpikes.

**10.16 Ordnance Survey Boundary Remark Book, (National Archives ref. OS 26 Gloucester 6841, 1879, p.33 (GCC 21)**

The Ordnance Survey Act 1841 laid on the Ordnance Survey the duty of ascertaining and recording all public boundaries in Great Britain and effectively required the Ordnance Survey to create a permanent archive of the public boundaries of Great Britain. The position of a boundary on the ground was to be determined in relation to surveyed natural or man-made features and incorporated in new editions of published Ordnance Survey maps.

This series, held at the National Archives, consists of small books containing hand drawn strip maps prepared by the Ordnance Survey to record original information on public boundaries under the provisions of the Ordnance Survey Act 1841 over the period 1850- 1892. The maps shown boundary and related ground features and carry the signatures and marks of the meresmen for the parishes on each side of the boundary.

The surveyor depicted the physical representation of the claimed way by two pecked lines. Two braces are shown across the width of the path which further evidences its physical existence on the ground but also indicates that it was considered to be part of the parcel of land being surveyed. The status of the way is otherwise undefined. The surveyor noted that part of the parish of Owlpen was amalgamated with Nympsfield in March 1883 and crossed out the old boundary which is shown to be annotated 'Und' or undefined – (no feature to attribute a boundary to). A short section of this old parish boundary is shown following the route of the claimed way for a short distance and is annotated S.Rd which is a boundary mereing abbreviation for 'Side of Road'.

**10.17 Ordnance Survey 25" to 1 mile 1884 coloured edition. Sheet Glos 49.13 (GCC 22)**

The Ordnance Survey 25" to one mile, 1884 coloured edition contains a disclaimer with regard to paths shown on maps to the effect that "the representation on this map of any other road, track or path is no evidence of the existence of a right of way". However, it does provide reliable and accurate evidence of the physical existence and extent of the claimed route which is depicted by double pecked lines denoting that the path was unfenced from the land over which it crossed. There is a boundary feature across the track at the northern and southern end of the path preventing free access to the existing highway network. The roads Crawley Hill and Bath Road are coloured burnt sienna, as are other known roads in the area at

the time, but the claimed route is uncoloured. Two braces are shown across the path indicating that it was included within the parcel of land which it crossed for measuring area. The status is otherwise undefined. As with the Boundary Reference Book referred to previously, the former Owlpen-Nymphsfield parish boundary is marked 'und' or undefined (no feature to attribute a boundary to). For a distance of 27 metres, part of the parish boundary runs parallel to the claimed path. This section of path is marked S.R. which is a boundary mereing for 'Side of Road'.

**10.18 Ordnance Survey 25" to 1 mile, Glos 49.13 1902 (second) and 1921 (third) editions. (GCC 22 A & B)**

Neither map shows the claimed path.

**10.19 Inland Revenue, maps compiled under the Finance Act, 1910 based on Ordnance Survey 25" to 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files (D2428) (GCC 23)**

The claimed route is not shown on the valuation plan.

**10.20 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 (GCC 24) and Parish Council Minutes**

Section 27(1) of the National Parks & Access to the Countryside Act 1949 ("NPACA 49"), required County Councils to "*carry out a survey of all lands in their area over which a right of way...is alleged to subsist*" and then "*prepare a Draft Map of their area, showing thereon... 'footpaths', 'bridleways' and 'roads used as public paths (a highway, other than a public path, used by the public mainly for the purposes for which footpaths and bridleways are so used)'*". There was no requirement to record public vehicular highways. The process consisted of the following stages; the initial survey carried out by parish councils, referred to as the Original Submission, the Draft Map, Provisional Map leading to the Definitive Map and Statement (Gloucestershire's relevant date was 1953) which is conclusive evidence of what it shows, but is without prejudice to what is not shown.

Gloucestershire County Council initially provided parish councils with Ordnance Survey 6":1 mile, 1924 edition maps to enable them to survey and record their local public path networks. As noted previously, the returned documents are referred to as 'Original Submissions'. Sometimes additional surveys were carried out by the Ramblers Association. The surveys once completed were sent to the Divisional Surveyor's Office at the County Council who would examine the returned maps, making queries and seeking clarification where necessary before publishing the Draft Map.

The small section of land which was originally part of Owlpen Parish had by this time been amalgamated into Nymphsfield (NPC).

The Nymphsfield Parish Council minutes record at a Meeting of the Parish Council and Parochial Committee was held on May 26 1950, at which time there was a discussion, recorded under the sub- heading, 'Survey of footpaths'; "*Meeting of Parish Council arranged for June 9<sup>th</sup> 8pm, to make arrangements for the actual survey*". The minutes record an entry for a Special Meeting held on June 9<sup>th</sup> 1950.

*“A start was made on the survey of footpaths, and some paths marked on the survey map. It was decided to ask; Mr Goodrich, Mr Fisher & Mr Walkley to attend the next meeting if they could & the councillors were left to get any other information possible”.*

Minutes from the Nympsfield Parish Council Annual Parish Meeting dated 29<sup>th</sup> September 1950 state *“the business then began for which the meeting had been convened, namely, the consideration of the Draft Map of all footpaths in the Parish. The Chairman pointed out all the footpaths which had been put on the draft map”.* [Case officer’s note; this minute refers to the Original Submission as the Draft Map was not placed on deposit for public inspection in Gloucestershire until September 1953.] The Original Submission included the claimed path subject to this report and showed it extending into the neighbouring parish of Uley. It was claimed as a public footpath. Its route was identified by means of a blue marker. No.4 and the words ‘see PC’ were annotated in pencil against the path. The section of path across Uley Parish was scribbled out with pencil and the words, which are difficult to read, appear to say ‘no significance’ written on it. The divisional surveyor re-numbered the paths and No.4 was assigned to the path from the Rose & Crown in Nympsfield which connected with No.6. The Written Statement drawn up by the divisional surveyor at this time does not provide an entry for the claimed path.

The Uley Parish Council minutes for the 27 October 1950 record *“The maps required from the County Council and marked by the Parish Council showing all rights of way were submitted to the meeting for their inspection in accordance with the provision of the National Parks and Access to the Countryside Act 1949. Following due consideration and inspection it was agreed that within the knowledge of the Parish Meeting assembled, the maps so deposited were an accurate statement of those rights of way known to all present. The clerk was duly instructed to forward the maps to the clerk of the County Council”.* The Original Submission map shows a faint red line along the route of the claimed path which was all but rubbed out. Further maps of the same time do not show the path at all. The Written Statement drawn up by the divisional surveyor at this time does not provide an entry for the claimed path.

The Nympsfield Parish Council minutes of May 28<sup>th</sup> 1953 state under the sub-heading ‘Footpaths’; *“Mr Pitcher gave the council an ...? of meeting with Ass. County Surveyor with other members of the Council, when the Draft Map was discussed in its first stage”.* Further minutes dated September 25<sup>th</sup> 1953, under the same sub-heading; *“Decided to write to County Surveyor regarding omission of any footpath on Draft Map from Bath Road to Old Quarry (Uley).”*

The Nympsfield Parish Council minutes record on 30<sup>th</sup> October 1953: *“Regarding the footpath from Bath Road to Old Quarry (location of the start of the claimed path at the electricity booster station), the Council wished to know the exact position of footpath as proposed by Uley Parish Council. It was also proposed by Mr J Whitman and seconded by Mr J Walkley (namely) that the parish council should insist on the footpath as known to run through the two fields. & any other footpath to be deleted”.* Please note the full stop after the word ‘fields’. When the sentence is read with the full stop, it suggests that the parish wanted the claimed

path to be added to the legal record. The words after the full stop appear to be an afterthought.

The claimed route was not shown on the Draft Map, dated 24<sup>th</sup> September 1953.

The Nympsfield Parish Council meeting minutes of the 27<sup>th</sup> November 1953 record; “*The Chairman reported that the Uley Parish Council had agreed to the footpath from Bath Road to Old Quarry to be recorded on the Draft Map*”. Despite this assurance, the claimed path was not shown at any subsequent stage in the process. An inspection of Uley Parish Council’s minute book between the years 1950-57, although recording that the draft map would be framed and exhibited in the church hall, does not minute any discussions with regard to the claimed path or any other path for that matter.

Although both Nympsfield and Uley Parish Councils agreed that the claimed path should be added to the Draft Map as a public footpath, it could be inferred that the decision was taken not to include it due to documentary evidence indicating that it may carry public carriage rights, which were not required to be shown on the legal record of public paths under this process.

Following the determination of any appeals with regard to the Draft Map, authorities then prepared a Provisional Map and Statement; this was the Draft map plus any amendments and was only open to representation by landowners, occupiers and lessees. Dursley Rural District’s is dated 25 February 1966. Although the claimed path was not included on the Draft Map, a letter, received 14 March 1966 by Gloucestershire County Council, from Mr Pitcher, Clerk to Nympsfield Parish Council, titled ‘Provisional Maps. Public Rights of Way’. states “*I am directed by my council to write you ref the possibility of two footpaths in the parish of Nympsfield omitted from the above map. I enclose tracing of the said footpaths location, trusting you will be able to define same, and will let me have your observations in due course. One, or both of these link up with Uley Parish and at the time of preparing the draft map, I was in contact with the then Uley Parish Chairman, W. Bilbruck ref footpath (symbol drawn against path). I could not say if Uley Parish Draft Map linked up with Nympsfield or whether it was omitted*”. A plan accompanied this letter, referring to the 2 paths which were omitted from the Draft Map. One of the paths referred to is the claimed path; this is referenced by the notation of the symbol as marked in the letter. The other path was similarly drawn on the Original Submission and annotated No.9 but also did not make it onto the Draft Map. This letter suggests on-going communication because it was headed by the clerk - Your ref; ‘TD WM/NM’.

No further correspondence was found, but it may be inferred that the parish was informed that this matter would be considered under the Five Year review of the legal record of public rights of way. This is indicated by Nympsfield Parish Council’s minutes which show that the parish continued to press for the inclusion of the claimed route from 1969 and through the 1970s. They include the following entries;

*“The Clerk to investigate footpaths question re five years review, the footpath concerned being from Bath Road to Monie Quarry, part in Uley Parish (25 July 1969)”*

*“The matter of footpaths left over for five yearly review from Glos. County Council (29 August 1969)”*

*”The footpath from Bath Road to junction ay Uley Parish Boundary to be investigated with Glos. County Council at the next review of footpaths (Annual General Meeting 24 March 1970)”.*

*“Further information to be obtained reference omission of footpath from Bath Road to the quarry, Uley Road on Draft Map of Footpaths (27 September 1973)”*

*“The clerk reported further information was required ref footpath, Bath Rd to Uley Rd. This has been forwarded to Glos, County Council (29 November 1973)”*

*“The matter of the public right of way from Bath Rd to Money Quarries be put on the agenda for the Annual Parish Meeting (27 February 1974)”*

Annual Parish Meeting - *“It was decided the parish council pursue the question of alleged footpath from the Bath Rd to the Money Quarries as a public right of way under the Countryside Act 1949 (Annual parish Meeting 28 March 1974)”*

Annual Parish Meeting - *“Parish Council to pursue the matter of the alleged footpath, Bath Rd to Dursley, Stroud Road with Glos. County Council (26 March 1975)”.*

The Five Year review of the County as a whole as required under the Countryside Act 1968 could not start until the original process of drawing up all of Gloucestershire’s Definitive Map was concluded. This did not happen until 1981. By this time, the Wildlife & Countryside Act 1981 had overtaken the Countryside Act 1968 and allowed individual applications to modify the Definitive Map and thus no further action was taken with regard to the claimed path until receipt of this application.

We can infer from the Nympsfield Parish Council minutes that they considered the claimed way to be a public footpath, and they were still raising the issue of its recording on the Definitive Map with the County Council until as late as 1975. However, there does not seem to have been the same interest in recording the path with Uley Parish Council, despite initially agreeing with Nympsfield that it should be legally shown.

#### **11.15 Footpath or highway diversion orders deposited with Clerk of the Peace (Q/SRh)**

##### **Uley Q/SRh**

Uley: 1775D; 1786D/3; 1802B; 1805A/4; 1818D/3,4; 1832D/3; 1835B/2; 1876B & C; 1879C

**1775D**

Uley and Owlpen highways and footpaths diversions. Ink plan on paper of roads to be diverted

**1786D**

Highways and footpath diversions. Plan of road between Uley and Lampern Farm to be diverted and of new road through ground of Rev William Lloyd Baker.

**1802B**

Highway and footpath diversions- road to be diverted from Uley Street.

**1805A**

Road between Uley and Bowcott adjoining closes at the Croft, Jakes Acre and the Lynches, to be widened.

**1818D**

Diversion of footway

**1832D**

Private driftway and public footpaths to be diverted and stopped up at Angeston Grange

**1835B**

Diversion of the road between road from Wresdon Farm and the road from Cam, ending at a place called Yorkshire Stile

**1876B/C**

No details

**1879C**

No details given in index

**Q/SR**

**1819A**

Certificate of completion of diversion of footpath

Certificate of completion of maintenance of highway, following indictment, and other papers including accounts

**1835C**

Certificate of completion of diversion of highway

**1876D**

Certificate of completion of diversion of footpath

**1879C**

Notice of withdrawal of application to divert footpath

**Nympsfield**

Q/SRh

None

**Owlpen**

Q/SRh

1773 D

All searched, nothing relevant

**11 LANDOWNER'S EVIDENCE**

The 4 landowners affected by this application; Messrs Goldingham, Nichols, Wooldridge & Severn Trent were consulted on 11 June 2018. Letters of reminder were sent by recorded delivery to Messrs Goldingham, Wooldridge & Severn Trent on 26 July 2018.

- 11.3 Mr Nichols responded by telephone on 24 July 2018 to state that he had share-farmed one of the fields affected for only 5 years but in that time he had never seen any evidence on the ground that anyone had used the path and he was not aware of any signs prohibiting use of it.
- 11.4 Mr Wooldridge responded by letter on 31 July 2018: *“At this stage I would only bring your attention to facts. Firstly, there is no record of the route applied for on the 1910 Finance Act Map. One would expect to find such a record if the owner of the field at that time considered that a road (precursor to the claimed Restricted Byway) had been dedicated to the public across his or her field at some times in the past. Secondly even making allowance for the very poor surfaces of many roads at that time, one would expect to find some evidence of a hard-stoned track underlying the field. No such evidence has ever been found although the field has often been ploughed. It is difficult to see how the “only road linking Uley to Nympsfield for many years” has left no trace of its prior existence on the ground.”*
- 11.5 Jaci Harris of Highway Records responded to Mr Wooldridge on 1 August 2018: *“The earliest map I have found which shows the ‘claimed’ path across your land dates back to 1777. Until 1823, the claimed path is shown as the only road between Uley and Nympsfield. At this time all roads were nothing more than dirt tracks. The road network was improved by means of Turnpike Acts & Trusts which resulted in people being charged tolls for travelling along them. Routes such as Frocester – Nympsfield – Horsley and Dursley – Uley – Dudbridge were improved as a result of Turnpike Acts in the early 1900s.*
- The claimed path across your land was never subject to a Turnpike Act and as the two routes noted above were created and improved, this one obviously lessened in use in favour of the improved paths. The claimed path however is shown consistently on maps until 1884 in addition to the parallel turnpike road along Crawley Hill. By the 1910 Finance Act, it is clear that the path was not used to any great extent although local people claim to have continued to use it to get to Listers in Dursley when the weather was bad.*
- The reason I wrote to you as one of the landowners is simply this; if highway rights existed, even a hundred years ago, and they were not legally extinguished, then they still exist today, which is why this application could succeed and potentially result in an Order being made for a Restricted Byway, open to horse & carts. As a landowner you have the opportunity to provide information perhaps from private deeds or sales of land that could result in the claim being defeated”.*
- 11.6 Mr Wooldridge in turn responded on 5 August 2018 to say *“I do not consider that there is, at present, sufficient evidence available to your County for it to make an order under Section 53. As stated in my previous letter, if your County does, however, decided to make an Order, I shall review the evidence and object to the order if appropriate”.*
- 11.7 As noted at the start of this report, there is little evidence that the claimed path is used today and it does not easily link with any other public rights of way. The considered historical documentation however suggests not only the existence of

the claimed path but indicates a higher status than footpath. Messrs Goldingham & Wooldridge, therefore, as the main landowners, were contacted on 5 April 2019 to ask them to consider, in the light of anticipated regulations to be added to the Wildlife & Countryside Act 1981 (not yet in place), whether they could agree to a Modification Consent Order, which unlike DMMOs, and in the interests of reducing the burden on landowners, would allow the alteration of the route of claimed route across their land, before determination. A further benefit being that there is no right to object.

11.8 The only response was again received from Mr Wooldridge on 11 April 2019. He rejected the idea of a Modification Consent Order in favour of determination by councillors.

11.9 Ben Davies of Severn Trent contacted Gloucestershire County Council on 24 August 2018 to say "*I am still Waiting for a reply from the Service Delivery Manager in relation to the proposed public footpath before I can reply*". No further comment was received.

## **12. CONSULTATIONS**

The following organisations and councils were also consulted by email on the 26 July 2018 regarding the application: The Trail Riders Fellowship, British Horse Society, The Open Spaces Society, The Ramblers Association, Cycling UK, Cotswold Carriage Driving, Uley and Nympsfield Parish Councils, County Councillor Lorraine Patrick, Stroud District Council and District Councillor Jim Dewey.

## **13. LEGAL COMMENTS AND CONCLUSIONS**

13.1 Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

13.2 Section 31(1) of the Highways Act 1980 states that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

13.3 Section 31(2) states that the period of 20 years in sub-section (1) is to be calculated retrospectively from the date when the right of the public is brought into question whether by a notice or otherwise. The twenty years usage must furthermore be "without interruption".

13.4 Section 31(9) of the Highways Act 1980 says that nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years. If there is no presumption of dedication under

Section 31 of the 1980 Act, then we will also consider whether the evidence is such as to establish, again on a balance of probabilities, dedication at Common Law.

- 13.5 The provisions of section 31 of the 1980 Highways Act do not supersede the principles of implied dedication that existed at common law before 1932, these principles being preserved by Section 31(9) of the 1980 Act which says that nothing in this Section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years. Paragraph 12 of Annex B of the Department of Environment Circular 2/93 states that before making an order the surveying authority must be satisfied that the evidence shows on the balance of probability that a right of way of a particular description exists. We may thus consider a claim at common law, under which the inference drawn will depend on the facts of the case. *“Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication”*. (Dyson J, *Nicholson v Secretary of State for the Environment* (1996).
- 13.6 In considering whether there has been a full 20 years use by the public of the claimed route, we have to ascertain whether there has been an overt act on the part of the landowner to bring it home to users that their right is being challenged. The 20 years use, for the purposes of Section 31, is to be dated retrospectively from this date of challenge (s.31(2)).
- 13.7 There is no fixed method by which the public’s right is brought into question, though one (the erection of a notice) is expressly referred to in Section 31(3). The House of Lords in *R (on the application of Godmanchester and Drain) v SSEFRA [2007]* is the most recent case addressing the meaning of s.31(2) as to what act or acts constitute “bringing into question”. *Godmanchester* endorses earlier judgments in this regard.
- 13.8 There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by ‘the public’ and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)
- 13.9 It was held in *Mann v Brodie* 1885 that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. Lord Watson said: “If twenty witnesses had merely repeated the statements made by the six old men who gave evidence that would not have strengthened the respondents’ case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence.
- 13.10 Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. *R. v. SSETR (ex p. Dorset)* [1999]

accepted that, although the evidence within five user evidence forms was truthful, it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.

- 13.11 The application was supported by four user evidence forms which all describe use since the 1930s and 1940s and state that there were gates at each end of the path and in the middle, which were either open or closed but unlocked, and that use was blocked by the landowner through the use of barbed wire, which was replaced when it was removed by walkers. Another witness describes a gap in a wall being closed. Use was on foot, but Mrs Timbrell recalls the claimed route being used by a horse and cart. The evidence of use is insufficient in itself to infer dedication, but is of value in supporting the documentary evidence and in its indication that the way was in use until at least 1960, after which time use was challenged through the deliberate obstruction of the path with barbed wire with a view to preventing public use.
- 13.12 Section 32 of the Highways Act 1980, when 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 in the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.
- 13.13 Following the principle "*Once a highway, always a highway*", if the way is shown to have been public at any time in the past, the public's rights will still exist today (in the absence of a stopping-up or diversion order). Simple disuse of a right of way does not mean that the right no longer exists, just that the right is not being exercised.
- 13.14 The claimed way is shown on the maps produced by Isaac Taylor (1777), Carey (1794) Smith (1804), Dix (1816) and Greenwood (1824) in a manner consistent with other known highways, and it is identified in the key to the 1794, 1804, 1816 and 1824 maps as a cross road. The significance of this term has been considered earlier in this report, but it is indicative that the way at that time carried public carriageway rights. Prior to the construction of the turnpike roads the claimed way formed the only link between the villages of Nympsfield and Uley. It is shown in a manner consistent with other known highways on the Ordnance Survey Surveyor's Plan of 1825-28 and the first edition one inch to the mile map of 1830.
- 13.15 The way was not created or constructed as a turnpike road, but its usefulness as a through route is linked to the roads which came into being around it in 1758 and 1821. Prior to the construction of the turnpike from the top of Frocester Hill to Uley c.1822 it formed the only direct road link between the two villages of Nympsfield and Uley. With the construction of the turnpike road bypassing Nympsfield village and that from Frocester Hill to the Freezes and then to Uley, it was of less importance. There is no evidence that it was legally stopped up as part of the

turnpike process, and it is shown on a later statutory record (tithe) as a public highway.

- 13.16 Tithe Maps and Apportionments show the difference between tithable and untithable land, i.e. land capable or incapable of supporting an agricultural crop. Their purpose is not to show rights of way and hence they are not conclusive evidence, but as Tithe Commutation was an impartial public process carried out under statutory authority and subject to appeal the records should be given appropriate weight and considered alongside the other evidence.
- 13.17 The claimed way at that time passed through the parishes of Uley, Owlpen and Nymphsfield so we have three separate maps and apportionments to consider as evidence. The Uley map shows the claimed route by one full and one pecked line, coloured sienna, open to the highway at its southern end and annotated “to Nymphsfield” at its northern end, where it passes into the detached section of Owlpen parish. The Owlpen map shows both the section through Uley parish and where the way crosses Owlpen parish by double pecked lines and annotates it “Bridle Road to Nymphsfield.” The Nymphsfield map shows the way by two full lines, separated from the parcel of land which it crosses and open at each end.
- 13.18 The Planning Inspectorate’s Consistency Guidelines note that both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe and that the map and apportionment is not in itself good evidence that a way is public but conclude “*the annotation of a road ‘to’ and ‘from’ a named settlement is suggestive of public rights*”. The annotation “to Nymphsfield” on the Uley map and “Bridle Road to Nymphsfield” on the Owlpen map show that it was a through route and was presumably public. It is not in the nature of private roads to be thoroughfares from one village to another; private roads existed, and exist, to give access to the lands they lead to and abut. If the three tithe maps are pieced together they show a continuous route connecting to known public carriageways at each end, distinct from the adjoining lands.
- 13.19 The Ducie Estate map of 1846, based on the Nymphsfield tithe map, shows the way as being separate from the parcels which it crosses and outside of the estate boundary.
- 13.20 The route formed an important part of the local road network up until the mid 19<sup>th</sup> century, being the most direct route between the villages of Nymphsfield and Uley. Since then the way has gradually fallen into disuse as a carriageway, as better and more convenient routes initially created as turnpike roads have come into being. There is no evidence that public rights over the route have been legally stopped up. The way is described as a bridle road on the Owlpen tithe map, and although it is shown by the Ordnance Survey map of 1884 as a physical feature, it is not shown on subsequent large scale mapping from 1902 onwards. It is interesting to note that in the Ordnance Survey Boundary Remarks book of 1879 and on the OS map of 1884 the boundary of the detached portion of Owlpen parish is annotated “S.R.”, meaning side of road, where it crosses the claimed way, which is an indication that it appeared to be a road to the meresman and the surveyors of the time. It is not shown as separate from the hereditament land it crosses on the 1910 Finance Act map.

- 13.21 The path was initially claimed by the Nymphsfield Parish Council as part of their parish submission under the 1949 National Parks and Access to the Countryside Act and is shown on their submission map. There is a note against it presumably written by the County Surveyor “visit PC” but for whatever reason the path was not added to the draft map. The path is also shown by a faint red line on the Uley submission.
- 13.22 Nymphsfield Parish Council did not accept its omission from the Draft Map and there is correspondence (all set out in paragraph 10.20 of this report) from 1953 to 1975 between the parish and the county as they sought to have it included on the map. It was reported on 27 November 1953 that the Uley Parish Council had agreed to this path being added to the Draft Map. Despite this it was not shown on the Draft Map. The Parish Council further wrote in 1966 seeking to have the path added at the Provisional stage. Subsequent correspondence indicates that the County Council stated that the path would be included in the five yearly review of the definitive map (July and August 1969). Further requests were made to add the path in March 1970, September and November 1973, February and March 1974 and March 1975.
- 13.23 The Five Year review of Gloucestershire’s Definitive Map as required under the Countryside Act 1968 never took place as the Definitive Map was not concluded until after 1981 by which time the Wildlife and Countryside Act 1981 introduced different procedures for modifying the Definitive Map. Thus no further action was taken with regard to the claimed path until receipt of this application.
- 13.24 Given the documentary evidence which is consistent in showing the way as a cross road and as part of the ordinary roads network in the late 18<sup>th</sup> century and early 19<sup>th</sup> century and the depiction of the way as a highway on all three tithe maps in 1837-40, the recommendation is that the way be shown on the Definitive Map as a restricted byway rather than a public footpath as claimed. The category of restricted byway was introduced in 2006 and allows the public to walk, lead or ride a horse or to use a non-mechanically propelled vehicle, such as a bicycle or horse and cart. They do not carry a public motor vehicular right. All unrecorded public motor vehicular rights were extinguished by the 2006 Natural Environment and Rural Communities Act, subject to a number of defined exceptions set out in sections 67(2) and 67(3) of the Act.
- 13.25 The 2006 Natural Environment and Rural Communities (NERC) Act sought to limit the use of motor vehicles in the countryside. Subsection 67(1) of NERC extinguishes unrecorded public motor vehicular rights over *all* highways except those shown on the Definitive Map as a byway open to all traffic (BOAT).
- 13.26 In the absence of any further qualification this provision would extinguish public rights for mechanically propelled vehicles over virtually the whole of the existing highway network. Therefore, subsection 67(2) introduces a series of exceptions to protect certain highways from such extinction. The exceptions in s.67(2) to extinguishment are:

- (a) ways where the main use was by motor vehicles (rather than by other users, e.g. walkers, cyclists, horse riders and horse drawn vehicles) over the period 2001-2006;
- (b) ways that are recorded on the list of highways maintainable at public expense (the List of Streets) but are *not* recorded on the Definitive Map of Public Rights of Way;
- (c) ways that have been expressly created (by legislation or by instrument) for motor vehicles [for example by a Section 38 agreement, provided that the wording was clear, or other expressed dedication];
- (d) ways that have been created by the construction of a road intended to be used by motor vehicles [for example Gloucester South West Bypass using Section 24 Highways Act 1980]; and
- (e) ways over which rights for motor vehicles were *created* through use by such vehicles prior to 1930, when it first became an offence to drive off-road. If a way already carried vehicular rights then evidence of use by motor vehicles would not meet this exemption.

13.27 The claimed route was not recorded on the list of streets as of May 2006, and has not been created for motor vehicles by legislation, instrument or by construction. Vehicular rights have not been created by use by motor vehicles prior to 1930 (as it is contended that the way was a carriageway in the early 19<sup>th</sup> century; thus the s.67(2) exceptions (b), (c), (d) and (e) do not apply. We will now examine the exception to extinguishment contained within s.67(2)(a).

13.28 Subsection 67(2)(a) is a two-part test. Main lawful use means that the way had to firstly carry a public vehicular right as of 2 May 2006 and secondly that the main use of the way between 2001 and 2006 was by motor vehicle (as opposed to other categories of user such as walkers, cyclists, horse riders and horse-drawn vehicles). Motor vehicular use in itself does not preserve the right: such use has to be greater than the other uses. As there is no evidence of *any* use between 2001 and 2006 then this exception to extinguishment of unrecorded public motor vehicular rights is not considered to be met either.

13.29 It is thus the recommendation of the officer that the application for a length of additional public footpath be refused but an order be made for a length of restricted byway to be added to the Definitive Map and Statement, between points A and B, as shown on the map at **appendix GCC 2**.

#### 14. APPENDICES

- 1) Location Map, 1:15,000 scale
- 2) Map showing claimed route, 1:4,000 scale
- 3) Photographs of claimed path, taken 29<sup>th</sup> May 2018
- 4) Summary of user evidence forms, submitted 2018 / 19
- 5) Isaac Taylor's Map of Gloucestershire, 1777
- 6) John Cary New Maps of England & Wales 1794
- 7) New Map of the County of Gloucester – Smith – 1804
- 8) A New Map of Gloucestershire – T Dix 1816
- 9) Number not used
- 10) Number not used

- 11) Map of turnpikes with dates
- 12) Turnpikes shown on modern OS Explorer Map
- 13) Greenwood's Map of Gloucestershire, 1824
- 14) Ordnance Survey Surveyor's Drawing, 2" to 1 mile, 1825-8
- 15) Ordnance Survey 1" to 1mile map, first edition 1830
- 16) Ducie Estate plan, 1846
- 17) Owlpen Tithe Map, 1839
- 18) Nympsfield Tithe Map, 1839
- 19) Uley Tithe Map, 1842
- 20) Number not used
- 21) Ordnance Survey Boundary Remark Book, 1879
- 22) Ordnance Survey 25" to 1mile, First Edition 1884
- 22A) Ordnance Survey 25" to 1mile, Second Edition, 1902
- 22B) Ordnance Survey 25" to 1 mile, Third Edition, 1921
- 23) Finance Act Map 1910
- 24) Nympsfield Parish Submission