

Delegated Powers:	Commons and Rights of Way Committee;- Report of the Lead Commissioner Communities & Infrastructure
Date:	26 March 2024
Chair:	Cllr Graham Morgan
Presenting Officer:	Jaci Harris
Item Type:	For decision
Purpose of Report:	<p>To supply evidence to enable the determination of the following Definitive Map Modification Order application:</p> <p>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))</p>
Recommendations of the Presenting Officer:	<ul style="list-style-type: none"> • That public motor vehicular rights have been preserved over the section of application route: A-B, by virtue of section 67(2)(a) of the 2006 Natural Environment and Rural Communities Act. Having the character of the ordinary road network, the List of Streets should be amended to reflect these rights. • That public motor vehicular rights have not been preserved over section B-E of the application route, by virtue of sections 67(2)&(3) of the 2006 Natural Environment and Rural Communities Act.
Background Documents:	Consultation responses (sub-section 7)
Forthcoming Decisions:	To flag those items that get referred on to Council for determination.
Appendices:	As listed under sub-heading 11: ‘ <i>Appendices</i> ’ in the report.
Contact Information (For information on the report)	<p>Jaci Harris, Asset Data Officer (Definitive Map), Highway Records & DMMO Team Telephone: 01452 328981 Email: jaci.harris@gloucestershire.gov.uk (quoting file reference)</p>

1. RESOURCE IMPLICATIONS:

Average staff cost in taking an application to the Committee- £5,000. Cost of advertising Order in the local press, which must 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 route would be maintainable at the public expense.

2. SUSTAINABILITY & EQUALITY IMPLICATIONS:

No sustainability implications have been identified.

3. LEGAL CONSTRAINTS;-

Section 53 of the Wildlife and Countryside Act 1981 ("the Act") 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.

Section 53(3)(c)(ii) of the Act relates to the discovery by the authority of evidence that shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.

Section 66(1) of the Act defines a byway open to all traffic as a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used. In *Masters v the Secretary of State for the Environment, Transport and the Regions (2001)*, the Court of Appeal clarified that the test for a BOAT should include consideration of its concept and character in order to assess whether it is more suitable for use by walkers and horse riders than vehicles. Further, an authority should also have regard to current use when deciding whether a highway is being used by the public within the meaning of the s66 WCA81 definition.

Section 48(4) of the Countryside and Rights of Way Act 2000 defines a restricted byway as a right of way on foot, on horseback or leading a horse and for non-mechanically propelled vehicles, with or without a right to drive animals of any description along the highway.

Section 67(1) of the Natural Environment and Rural Communities Act 2006 ("NERC") extinguishes an existing public right of way for mechanically propelled vehicles over ways that, immediately before commencement of the NERC Act on 2nd May 2006, were either not shown in a definitive map and statement or were recorded only to foot route, bridleway or restricted byway status.

Subsection 67(2)&(3) of NERC contains several exemptions to the above extinguishment provisions.

STATUTORY DEDICATION: S31 Highways Act 1980: Dedication of a way as highway presumed after public use of 20 years.

- a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

PRESUMED DEDICATION AT COMMON LAW

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

4. ISSUES TO BE DECIDED

- 4.1** This application deals with a route recorded on the Definitive Map, compiled under the statutory process of the National Parks and Access to the Countryside Act 1949. This constitutes conclusive evidence of its status but is without prejudice to higher rights. Unlike the test applied to applications to add unrecorded routes to the Definitive Map which requires evidence that a way either 'subsists' or is 'reasonably alleged to subsist', a higher test is applied to applications, such as the one subject to this report, for the re-classification under s53(3)(c)(ii) WCA81 of an existing highway. The test to be considered is whether, on the balance of probabilities, there is sufficient evidence to show that the claimed public rights subsist or put another way, it is more probable than not that the route has higher rights than a restricted byway, i.e., a probability of 51% or higher.
- 4.2** Where a Definitive Map Modification Order ("DMMO") is made, the process allows for objections to the order to be submitted. Further evidence could potentially be put forward for examination along with an objection. In these circumstances, the County Council cannot confirm the order, and the matter would need to be referred to the Secretary of State.
- 4.3** Where an order has been made and no objections are received, the Order Making Authority ("OMA") can confirm it.
- 4.4** In the event of an application under Section 53 being refused, the applicant has the right to appeal against the decision to the Secretary of State, who may direct the OMA to make the order that is sought.

REPORT

5. APPLICATION HISTORY

- 5.1** A map at scale 1:10,000 is attached (**JH1**) showing the location of the application route in Hewelsfield & Brockweir Parish. The parish is located on the eastern bank of the River Wye within Ordnance Survey Grid Squares SO55/02 & SO55/03. A larger scale map (1:4500), showing the claimed route; A-E, is attached (**JH2**).
- 5.2** The West Glos & Dean Forest Motorcycle Club, submitted their application on 23 November 2005. They sought to re-classify Restricted Byway FHE4 ("FHE4") in the parish of Hewelsfield & Brockworth as a Byway Open to All Traffic ("BOAT": a way that carries a public motor vehicular right but is generally more suited for use by walkers and horse riders). The applicant referred to the following documents that they considered provided evidence that FHE4 carried historic public vehicular rights: Parish Map of Hewelsfield (P175SD 2/1), Hewelsfield Map surveyed by Rev A.W.Hands 1901/2 (D1015), 1st Edition Ordnance Survey Map 1881, Greenwood & Bryant Maps 1824, Finance Act 1910 (sheet XLXI.7) & user evidence submitted by 23 individuals.

- 5.3 FHE4 was originally recorded on the Definitive Map and Statement as a Road Used as a Public Path (“RUPP”) until 2 May 2006, when section 47 of the Countryside and Rights of Way (“CROW”) Act 2000, reclassified all RUPPs as restricted byways (*A Restricted Byway carries a public right to walk, ride a horse, drive a horse-drawn vehicle or ride a bicycle; it does not carry a public right to use a motor vehicle; any private vehicular rights would be unaffected.*). Section AB of the claimed route is separately recorded on the List of Streets (record of publicly maintainable highways) as the 43024 highway.
- 5.4 The application included Form 1 and an accompanying map at 1:25000 on which the application route was highlighted yellow. The land over which the application route crosses, is unregistered, so the principle of “*ad medium filum*” has been applied, which although rebuttable, is the legal presumption that any property fronting onto a road, would own the portion of road up to its centre line. Form 3 certifies that notice was served upon the following adjacent landowners: Mr Waycott, Mr Watson, Mr Richardson & Mr Christian. As a result of the notifications, the following responses were received:
- 5.5 Mr Watson (6 December 2005) objected to the claim on the basis that “*Motorcyclists are using this RUPP at present, and I would like to say that this path is totally unsuitable for motorbikes and represents an extreme hazard to people who walk with their families. I indeed have my main gate adjoining this path and at present motorcyclists sometimes fly past our concealed gate at speeds of 40mph. Indeed, further down the path towards Hillcrest, due to the twists and turns of the lane, it is impossible to see around the next corner and I have been involved in a very near miss while walking with my grandchildren*”.
- 5.6 Mr Richardson (4 December 2005) objected to the claim on the basis that “*I own and manage the Hartlands Equestrian Centre at Hartland’s, Hewelsfield. The stables and outdoor arena adjoining RUPP FSB4. My objection is because of the safety problems caused by motorcycles travelling down this path which cause and have caused horses being ridden in the arena or handled in the stables to panic and take flight, thereby endangering the people riding or handling them*”.
- 5.7 **For ease of reference, this report will refer to the application route, Restricted Byway FHE4, as FHE4.**
- 5.8 On 27 June 2006, the Commons and Rights of Way Committee approved the recommendation that applications received after 20 January 2005 (relevant date – NERC Act) to re-classify existing RuPPs to BOATs would be determined as Restricted Byways. The applicant was advised of this by letter on 18 August 2006.
- 5.9 This application, was one of a number received between February 2005 and March 2006 to record public motor rights in advance of a change in legislation which sought to limit such use of “*mechanically propelled [motor] vehicles*” in the countryside. These measures formed part of the Natural Environment and Rural Communities (NERC) Act 2006. It achieved this by automatically extinguishing such rights except where those rights were saved by one of a number of exemptions and by ensuring that in the future a long period of use by MPVs cannot give rise to public MPV rights.
- 5.10 At the same committee, members approved the blanket rejection of this 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 only result in a restricted byway. On 18 August 2006, the applicant was advised of this and informed of the appeal process. No appeal was made.
- 5.11 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

s.67(2) of NERC applied. As a result, the application subject to this report has been considered more closely.

5.12 This report will consider whether:

- (a) Restricted Byway FHE4 carried an historic public vehicular right on 2 May 2006 (commencement of NERC). In the event that it does but none of the NERC exemptions apply, then no order will be made because it currently enjoys the highest classification of status without motor vehicle rights.
- (b) Any of the exemptions to extinguishment of unrecorded public motor vehicular rights have been preserved under section 67(2) or 67(3) of the NERC Act.
- (c) In the event that an exemption is deemed to apply, consideration will be given to whether an order should be made to upgrade Restricted Byway FHE4 to a BOAT on the Definitive Map and Statement or added to the List of Streets, a record of highways maintainable at public expense under s.36(6) of the 1980 Highways Act.

6 DESCRIPTION OF FHE4 (“APPLICATION ROUTE”)

6.1 FHE4 was inspected on 29 November 2023 at which time photographs were taken. These are held **(JH3A-G)**.

6.2 Referencing appendix **JH2**, FHE4 has an overall length of approximately 1.1km. The route is enclosed by hedges and trees along its length, is free of gates or stiles, and connects freely to the public highway network at either end. It commences at a point marked A on the said plan at Ordnance Survey Grid Reference (OSGR) SO5564/ 0215 at its junction with Brockweir Road (3/6 publicly maintainable highway)) where it has road markings but no signs. The first 35m, between the said point A & B at OSGR SO5565/ 0219 is dual classified, being designated on the Definitive Map (record of public rights of way) as Restricted Byway FHE4 and separately recorded on the List of Streets (record of publicly maintainable highways) as the 43024 publicly maintainable highway. The 43024 highway diverges at point B from FHE4 and continues as a well maintained surfaced highway serving a further 7 properties before rejoining Brockweir Road. Restricted Byway FHE4 continues from point B (where there is a sign saying, ‘Restricted Byway’), to Sandy Lane, to a point marked E at OSGR 5518/ 0311 where there is a further ‘Restricted Byway’ sign.

6.3 For a length of approximately 134m, from the said point A to a point marked C on the plan at OSGR 5570/ 0227, FHE4 is surfaced, with a width of approximately 3m, and serves properties, Blackberry Hill, Hillcrest & Hartlands. Internal Officer’s files indicate that the householder at Hartlands paid for section B-C to be surfaced in February 2003. The next approximately 600m from Hartlands (point C) to the track leading off FHE4 to the reservoir at point D, is unsurfaced, uneven and in places very overgrown with a much reduced available width. There was some evidence of vehicle tracks at the time of inspection but during a further site visit of 23 February 2024, it was explained that contractors working on behalf of Gigaclear, recently drove along it trying to establish whether cables could be laid along it. The 113m section of FHE4 between point D and the furthest boundary of Common House, continues as a 3m wide stone track with a central grass strip. The last approximately 312m from Common House to Sandy Lane at the said point E, also has a width of approximately 3m but the surface is completely stone along which there are a few potholes.

7. CONSULTATION:

7.1 On 30 November 2023, a consultation was carried out of adjacent landowners, County Councillor McFarling, Hewelsfield Parish Council, Forest of Dean District Council, The Byways & Bridleways Trust, The Trail Riders Fellowship, The Cotswold Carriage Driving Society, The British Horse Society, Cycling UK, The Open Spaces Society, and The Ramblers’ Association.

7.2 The following responses were received;

- 7.3 6 Dec 2023: The Forest of Dean District Council responded:** *“Thank you for consulting the FODDC on this modification Order application. The FODDC Local Plan Team have no evidence relevant to the application”.*
- 7.4 11 Dec 2023: Mrs Sinclair responded:** *“I have lived in the St Briavels Common area for over 20 years and pre 2006 the only 'traffic' I encountered on this byway was dog walkers, rambles and horse riders”.*
- 7.5 11 Dec 2023: Mrs Beard & Father Bryan Beard responded:** *“We have been made aware that there is applications in to change the restricted byway that leads past our property and farm. There has been no motor vehicles using the track past the farm except for access to the main reservoir by Severn Trent. The main uses up and down are for ourselves, neighbour and Severn Trent and then for people walking riding horses and cycling.....”.*
- 7.6 10 Jan 2024: Mrs Beard further commented:** *“.....I am aware that the evidence wanted/ needed is for before 2006 but I feel it is very important to stress a dangerous situation that my father has experienced a couple years ago. He was hedge trimming on the inside of the field siding up the hedge that runs parallel to the restricted Byway when he had an off roader motor bikes (illegally) come over and into the hedge and his bike falling on top of him. Where he landed his head came about a couple of foot at most from the working hedge trimmer as he could not get up as was trapped by the motorbike. To say the least this shook my father up and could not hedge trim for a couple of days but had to help by going back up the farm to get a strap and lift the motorbike of him with a strap on the loader of the tractor as his leg was stuck and it was too heavy to move and down over in the hedge. If that was not frightening enough it does not bare thinking about what could happen...”.*
- 7.7 17 Jan 2024: Mrs Beard clarified the location of the incident described above.** She stated, *“Yes I can confirm that the hedge my farther was cutting is adjacent to the byway. But like I said before my father was on our side on our field cutting the inside, siding the hedge up before the motor bike came up the byway fast and illegally and came through the hedge having a close call with the hedge trimmer....”.*
- 7.8 13 Dec 2023: Mrs Nissel responded:** *“I have personally ridden and walked the application route regularly (at least once a week) since I moved to the area in 1990. Between 1990-2006, I met many walkers/ riders/ cyclists who were clearly the main public users of this route. I never encountered a motorised vehicle or saw any evidence of such usage (tyre marks/damage) etc”.*
- 7.9 14 Dec 2023: Mrs Addams-Williams responded:** *“I wish to object to DMMO application Reference Number 573/11/115(1). I have used the route regularly since 2005. Prior to 2006 I encountered many walkers/ riders/ cyclists who were the main public users of this route. But I rarely/ never encountered a motorised vehicle”.*
- 7.10 15 Dec 2023: Severn Trent responded:** *“We have received the application in the post for the reclassification of the track as per the reference above. As the letter states ‘Any existing Private motor rights are unaffected by this application) STW have no further comment or objection to provide as there is no impact on rights in agreement to access STW owned land to the rear of Common House”.*
- 7.11 17 Dec 2023: Mrs Smith responded:** *“I am writing to submit my objection to the DMMO application to upgrade the Restricted Byway to a BOAT. I have been visiting and living in the area since 1995 and I have used this route regularly to walk dogs and horse ride. When walking these paths, I have frequently encountered other walkers, cyclists, and horse riders. The path is one of the main paths used by walkers and horse riders to access the area of Hewelsfield Common and The Hudnall's.*

*During this period, I have not encountered *any motor vehicles and on occasions motor bikes* (asterisks are case officer's denoting the comment subject to clarification of 16 Jan 2024 below).*

I also had family members who lived in the area, close to the path since 1964 until a few years ago when they died. Prior to the period of 2006 they regularly used the path for walking and family members rode horses on the path. Their experience was that it was a path used only by walkers and horse riders with occasional motor bikes. I appreciate this is 3rd hand evidence, but it illustrates that from our family experience, that prior to 2006 the path was predominately used by walkers, cyclists and horse riders."

7.12 16 Jan 2024: Mrs Smith clarified her comment: *"It is the latter - "I have not encountered any motor vehicles but occasionally encountered motor bikes".*

7.13 18 Dec 2023: Mrs Cockfield responded: *"Please register my strong evidence of usage of the Byways referred to in this application, as follows. From the 1960s I lived at on Brockweir Common (shown on the map detailing the Byways) which you will see is central to the network of these routes in question, and our garden was adjacent to the route leading down to Brockweir. During my childhood I would use all of these Byways regularly, often daily, to walk the dogs, or to Brockweir to visit friends; and as a teenager to walk to work in Tintern, plus I used it as the quickest route to get to the bus stop at Brockweir Bridge - to get to Chepstow or Monmouth.*

I now live on St. Briavels Common, just above my old family home and these routes - where I have been since 1989 - and have maintained my consistent regular use of these byways to walk by myself, or with family and friends, but most frequently, sometimes daily - to walk to Brockweir to exercise my dogs. The close familiarity I have of these routes, that can only come from such prolonged usage, means that I even know where to step to avoid muddy springs, what rocks to use as steps through steeper sections, and the slipperier sections in the Autumn caused by a blanket of wet leaves..... In fact, the only occasion I have ever encountered in all of these years to date anything other than walkers, dogs, horse riders, the very occasional cyclist and deer, was on such a narrow steep section above orchard Cottage when I was walking with my young nephew and dogs down to Brockweir.

I remember this single incident very well as I was so taken aback to hear motorbikes coming towards us, although we could not see them. We were then suddenly confronted by 3 men on scrambler motorbikes who could not get past us, and they were waving their arms and shouting at us to get out of the way. I said it was impossible and explained that they were on a restricted Byway. They then just drove at us doing a 'wheelie' with their right legs outstretched to boot us out of the way, so we were forced to scramble up the bank to cling to some barbed wire of a field fence whilst the dogs ran down into the steep woodland. This incident was the only time I have ever witnessed the use of motor vehicle of any kind on these routes, and I am prepared to commit this to a sworn statement should it be required...."

7.14 18 Dec 2023: Mr Curtis responded: *"I wish to object to DMMO application reference number 573/11/115(1) to convert the restricted byway FHE4 to a byway open to all traffic. I have lived on Hewelsfield Common very close to this path for over 40 years and I have walked this footpath very frequently. Before 2006 when I had a dog we walked it almost every day. During all the time before 2006 I often met other walkers, and horse riders, very occasionally cyclists but never a motorcycle. I did once meet a small car which was reversing having failed to get through. The top section near Common farm has always been used by farm vehicles, but not all the way through to Hartlands and Blackberry Hill".*

7.15 18 Dec 2023: Mr Humphreys responded: *"I wish to object to the DMMO 573/11/115(1). I have lived at, adjoining FHE4, for almost ten years. During this time the byway has been regularly used by a large number of walkers, both individuals/with dogs and in groups, as well as occasional horse riders and cyclists. In addition, the neighbouring farmer uses the track for moving sheep, and*

the livery stable for moving horses. At no time have any motorized vehicles used the byway apart from occasional illegal use by trail bikes”.

- 7.16 18 Dec 2023: Mr Sinclair responded:** *“I would like to object to the DMMO Application :- FHE4 - I have lived here and been used this route for many years since 2005. I have encountered many walkers and cyclists over this time. I’ve never encountered a motorised vehicle”.*
- 7.17 19 Dec 2023: Mr Richardson responded:** *“I wish to object to DMMO application, reference number 573/11/115(1). I have lived and worked in this area since 1978. My livery yard was established in 1982 and is adjacent to FHE4. My house is also adjacent. I have used the byway throughout for exercising horses. Prior to 2006 I used to meet many walkers and horse riders and the occasional cyclist. These were the predominant users of this byway. I rarely encountered a motorised vehicle of any description. If motorbikes were allowed to use the route they would present me with a serious safety issue as horses and motor bikes do not mix”.*
- 7.18 19 Dec 2023: Mrs Secrett responded:** *“I have lived aton Sandy Lane since 1985 and have very frequently walked this path particularly in the years before 2006 when my dog needed a lot of exercise. I also walked the path to visit friends at what is now called Blackberry Hill. The other users of the path were dog walkers and ramblers or single walkers. I never met any motor vehicles. I will add that this has always been a popular route for walkers, particularly with their dogs”.*
- 7.19 20 Dec 2023: Mrs Phillips responded:** *“This is an organisational response from the Forest of Dean Bridleways and Access Association (FODBA). We wish to object to the above application....As a committee, we are very familiar with the routes in our area. This is a route that, even when it was a RUPP, was mainly used by riders, walkers and cyclists and not by motor vehicles. This has been confirmed by one of our committee members who lives close to the route which she has ridden and/or walked weekly since 1990. She said that in all that time she never encountered any form of motor vehicle.”*
- 7.20 27 Dec 2023: Mrs Lyons stated:** *“I wish to object to DMMO application Reference Number 573/11/115(1). I have lived next to this lane since May 20 and have used the route DAILY to walk my dog. When I walk I regularly see other dog walkers and horses from Hartland’s livery. I also see lots of other walkers, both locals and others who have travelled from further afield to enjoy the wonderful scenery. I have occasionally seen a few cyclists, but I have never seen a motorised vehicle”.*
- 7.21 1 Jan 2024: Ms Powell stated:** *“I wish to object to DMMO application Reference Number 573/11/115(1). I have kept horses at the livery yard adjoining the route and have used the route regularly since 1995. Prior to 2006 I encountered many walkers, horse riders and occasionally cyclists who were the main public users of this route, but I rarely encountered a motorised vehicle”.*
- 7.22 5 Jan 2024: Mr Lyons stated:** *“Please accept this email as an objection to DMMO application Reference Number 573/11/115(1) that refers to reclassification of the right of way that runs close to my property. I bought the property in May 20 and have lived here full time since Jan 21. I use this route multiple times a week as part of my daily dog walk. During this time, I have regularly come across other dog walkers and also ramblers from further afield. I have frequently seen horses being exercised on this route, usually as singletons but occasionally a couple at a time. Cyclists are less common but not unusual; it is only suitable for ‘mountain bikes’ and the most I have seen at one time is three. I have never seen nor heard a motorised vehicle of any kind on the route”.*
- 7.23 8 Jan 2024: Mr & Mrs Wedel stated:** *“I have lived at, Sandy Lane for over 26 years with my family....Our property is very close to the above Restricted Byway which has been used predominately by locals and visitors to the area for dog walking, and general walks around the village plus horse riders. In all the 26 years plus of living in this area to the best of my knowledge we have*

not been aware of motor bikes using the track. The claim by the Motor Cycling Association that between the years 2001 to 2006 it was primarily used by motor bikes is clearly incorrect”.

7.24 8 Jan 2024: Ms Trefgarne stated: “As a long-time resident (48 years)of Brockweir & Hewelsfield, living directly on FSB 69 I have daily insight into who uses these paths and tracks....I know that prior to the reclassification to a **Restricted by way** the vast **majority of users of the lanes were horse riders, walkers**, both locals getting from A-B, dog walkers and recreational walking as part of long distance Offa’s Dyke walkers.... Numerous horse riders and people on foot would pass several times a day.....Regarding motorbikes - they have generally been infrequent users, but with a few of them becoming quite a nuisance on weekends / bank holidays because of their behaviour. There was a group of older bike riders on what looked to be classic bikes. They would ride up fairly slowly obviously in an organised rally following one after another. They would stop if they saw you riding or leading horses / dogs and also say “good morning/ afternoon” and were pretty civilised. We saw these people maybe 3 or 4 times a year.

But then there are other bikers who come in a pack - maybe in two groups on trials bikes. Younger riders who seemed to use any steep or muddy section of a track as an opportunity to go as fast as possible and spray mud/ water for fun. They would sometimes come up and down several times on the same day for the fun of it! Their activities hacking up the lane surfaces. You would hear these bikers from a distance coming through the woods ‘off track’ using any opportunity to venture into tracks into woodland to race about. If you try to slow them down or stop them by stopping yourself they seemed to have the attitude that potentially they would mow you down. Often these bikes had no visible number plate and didn’t seem to be licensed for road use.

There also used to be an annual ‘ classic car’ rally and old small tractor rally using the lanes. They would post notices of their route throughout the village and make their sedate trail. This involved generally no more than 20 vehicles once in a summer. We quite miss seeing this! Since the reclassification to **Restricted by way** life has been much calmer - far less vehicles, few motorbikes other **than rogue ones**, far more families walking with dogs & children, groups of DofE teenagers with backpacks and many horse riders, the vast majority of whom ride slowly and carefully”.

7.25 11 Jan 2024: Ms Trefgarne further stated:I now write to emphasise that in my experience as a horse rider, parent of pony rider, wife of regular runner and a daily dog walker I have weekly used FHE4 over the years since moving here in 1976. During the earlier years I occasionally saw a motorbike on this footpath when it was a RUPP. The bikes were by no stretch of the imagination the main users of this track. Mostly it’s horses and riders - lots of the due to livery yard at Hartlands - and second dog walkers and locals walking from A to B by most direct route without using roads”.

7.26 9 Jan 2024: Mr & Mrs Clewett stated: “We are writing in response to the Council’s consultation about the possible reclassification of Restricted Byway FHE4 (Sandy Lane to Blackberry Hill) to a ‘Byway Open to All Traffic’. We write to refute any suggestion that motor-vehicles were ever the main users of this path. We have lived in the Wye Valley, very close to this path, for almost ten years. We have frequently (i.e., three or four times every week) walked our dogs on this path throughout this time. We can meet other dog walkers, and the occasional jogger or walking group. We have met horses possibly from the nearby Livery yard. But we have never met a motorbike, and only occasionally met a vehicle on the short section from Sandy Lane to Common House”.

7.27 9 Jan 2024: Mr Harvey stated: “I wish to object DMMO application Reference number is 573/11/115(1). I have lived on Sandy lane since 2007 and used the route on a regular basis for exercise and have never seen any motorised vehicle only pedestrians and cyclists and horse riders”.

7.28 9 Jan 2024: Mrs Harvey stated: “I have lived on Sandy Lane since 2007 and use the route regularly since then 2007 on my own or with my husband, grandchildren, and dogs. I meet many friends,

walkers, riders, cyclists and people exercising dogs who were the main users of this route, but I never encounter motorised vehicles”.

- 7.29 9 Jan 2024: Ms Sinfield stated:** *“I can categorically confirm I have used the above byways from 1984 to the present day. I had horses until 8 years ago and walk my dogs , children previously and grandchildren now on all footpaths around the parish. Motorbikes do not let me, a local resident, feel safe and they do damage to an already damaged surface As a local, I would dispute that motorbikes were primary users”.*
- 7.30 9 Jan 2024: Miss Lyons stated:** *“I lived next to this lane at my parent's house from May 2020 until March 2023. When living at the property, I used this lane several times a week to walk the family dog. Although I no longer live next to the lane, I visit my parent's house multiple times a month and when there, use the lane daily with my parents to walk the dog. When I walk I regularly see other dog walkers and horses from the Hartlands livery. I also see lots of other walkers, both locals and others who have travelled from further afield (like myself from Bristol and my sisters from Bournemouth and Oxfordshire) to enjoy the wonderful scenery. I have never seen a motorised vehicle”.*
- 7.31 10 Jan 2024: Mrs Orchard stated:** *“My family & I have been landowners & resident here for the past 38yrs. I walked & rode these tracks everyday at least 5 or 6 times a day having owned up to 12 horses & have done so since we've lived here & although it was a rare occurrence that we encounter motorcycles it was mostly an aggressive situation on the motorcyclist part.... Over the past 20yrs since these tracks were changed to RBW's, I have seen motorcyclists use them illegally on a couple of occasions and on those occasions they have been very aggressive to the point I was forced to report them to the police for aggressive threatening behaviour towards me!”*
- 7.32 10 Jan 2024: Mr Shewell stated:** *“Born to a local farming family in Tintern in 1960 I have remained a keen walker in the area ever since and subsequently bought a property in Brockweir 8 years ago. I am familiar with the restricted byways FHE64, FHE27, FHE4 and FHE24, having walked them over several decades. There use has been virtually exclusively for foot traffic, occasional horse riders and on rare occasions vehicles accessing properties/fields along them”.*
- 7.33 10 Jan 2024: Mr Harrison stated:** *“My family (Harrison) lived at Hillcrest for over 40 years which is next to the livery yard at the entrance of the footpath. In that time the majority of the users were walkers and horse-riders. Occasionally you would see a farm vehicle”.*
- 7.34 10 Jan 2024: Ms Webb stated:** *“Having resided in the St Briavels/Brockweir area for 26 years & having been a regular visitor since 1998 I have walked the paths extensively & thus have first-hand knowledge relevant re the proposed modification to FHE4. This particular path is part of my regular personal circuit, being a 5 minute stroll from my house & my preferred route when visiting friends in Brockweir or using the shop & have never encountered a motorcycle/ trail bike on the paths. The only motorised vehicle I have ever encountered has been the local farmer cutting his hedges. I do recall seeing evidence of motorcycles once in the distant past as the surface had been churned up where wheels have struggled over rough ground & tyre marks left imprint, but luckily this experience has not been repeated.....A few times a year I do see a large group of riders pass my house heading towards Brockweir, but to my knowledge using the lanes. What has been noticeable is the amount of walkers, individuals, families & walking groups from outside the area using this & other pathways over the year's I've lived here. I regularly meet other neighbours, dog walkers, horse riders & a wide variety of organised walking groups, both young & old, from near & far parts of the country; it is more irregular for me to walk this circuit & not meet anyone else”.*
- 7.35 10 Jan 2024: Ms Taylor stated:** *“I have been walking those lanes since the early 80s and have never encountered any motorised traffic of any description”.*

- 7.36 15 Jan 2024: Mr Weeks stated:** *“.....I have lived in the parish of Hewelsfield and Brockweir for 26 years and before that in the adjacent Parish of St. Briavels for 18 years. I do not own any land or have any interest in land through which this path runs. Over the years I have lived in the area and particularly, for the avoidance of doubt, over the period 2000 to 2006, I have walked and/or run along this path most days with my dog, sometimes on my own and at other times with my family. I often meet other walkers and occasionally a horse as this path is walked frequently by local people and visitors. I can categorically say that in all my years walking this path I have never come across a motorised vehicle. In fact, I have assumed that this path is a bridal way as this was the only traffic I have seen”.*
- 7.37 15 Jan 2024: Mr Stickland stated:** *“....I moved to my current address on July 2001. Since that date I have regularly walked public rights of way in the local parishes, with frequent walks of up to 8 miles starting and finishing at my address.... FHE4 forms part of one sicu circular walk, from FHE35 west of Hart Hill Court Farm, either turning down FHE4 to Belmont Road or north past Common House to Sandy Lane. I have normally walked it in most months of the year, sometimes at least once a week, so around 15-25 times per year since 2001. I have never seen any mechanically propelled vehicles on the section leading to Blackberry Hill and Belmont Road, occasionally meeting cars and tractors en route to Over Common Cottage and Common House, but never southeast of Common House. Use by people on foot is common, I frequently meet at least one runner or dog walker”.*
- 7.38 16 Jan 2024: Mr Stephens stated:** *“..... I have lived at Belmont, Belmont rd G1156UZ continually from 1998/9 to the present. We have actively walked the local RUPPs since residency. In my experience the primary users are and always have been Hikers/ walkers/ dog walkers/ horse riders. The occasional farm vehicle can also be seen where access permits. I have no recollection of motor bikes or indeed ‘Green laners’. While this refers to FHE4 between 2001-6 I would mention that there has been a deterioration of the paths over recent years and any increased use would be detrimental, they are just fit for purpose now and could not cope with motorised vehicles without considerable damage”.*
- 7.39 16 Jan 2024: Mr Orchard stated:** *“.....I and my family have resided on St Briavels Common since 1986 and walk the lanes and tracks daily. During this time FHE 4 has been used by hikers, dog walkers and horse riders virtually exclusively. During the period before pre - 2006 we have very, very rarely encountered or have seen motorcyclists on FHE 4.....”*
- 7.40 16 Jan 2024: Mrs Thomas stated:** *“.... I have lived in woodland cottage Brockweir since 1995 and have walked all the lanes and pathways around my cottage since that date. I have seen other walkers on the pathways including the one above but never seen it used at any point by cyclists or motor cyclists”.*
- 7.41 22 Jan 2024: Mr Whitmarsh stated** *“... My property is called Blackberry Hill and has a 200 yard boundary with FHE4. Although I was not living here in 2006 I can say that I have only seen, and heard, motorbikes four times in as many years i.e. one a year, usually on a Sunday morning. Furthermore, these were scramble type bikes which were therefore breaking the law twice over as they were not road legal with number plates etc. It appeared to be the same group of three riders each time....”*
- 7.42 20 Jan 2024: Mr Wilson stated** *“....I am a former resident of ‘The Croft, Hewelsfield, GL15 6US’ and lived there from June 1997 until June 2017. Thus, I lived there during the period being inspected. I owned a dog from late 1998 and as a result of a heart condition took him for two long walks every day. I became so familiar with all the footpaths, bridleways and RUPPs that I became the unofficial Parish Footpath Warden. I recorded the state of every footpath on an Excel spreadsheet which became invaluable many years later when ‘the Ramblers Group’ wanted the state of each path determined. In May 2003 I was elected onto the Parish Council and remained The Footpath Warden. I can assert that all of the footpaths were exclusively used only by walkers and that most of the*

RUPPs used by walkers, often with dogs, and horse and riders. Prior to the 2006 act there was some very light use of RUPPs (FHE 4, FHE 24 and FHE 27) by motorized vehicles. They would pass me about once a month at weekends, in twos and threes. Once or twice a year, an event was held with considerable traffic for about an hour. This very limited traffic effectively became zero after 2006....”.

7.43 23 Jan 2024: Hewelsfield & Brockweir Parish Council: *“.....Other than those vehicles that are legally entitled to use these paths for access to their properties, the footpaths have mainly been used by pedestrians, horse riders and dog walkers. On very rare occasions in the last 30 years, use of vehicles i.e. motorcycles, has been noted by parishioners...”.*

7.44 25 Jan 2024: Mr Brown stated: *“I became a resident of Hewelsfield in September 1984 and have regularly walked the PROWs on Hewelsfield and St Briavels Commons ever since....In the ‘evidence period’ between 2001 and 2005 when FHE4 was classed as a RUPP I would have walked it many times. I recall a couple of occasions when I encountered motorcyclists, though I cannot be sure whether it was on FHE4 or another PROW in the vicinity. I do not recall any discourtesy by the motorcyclists, but the consequences of any reckless action on much of FHE4 (and other Restricted Byways in the area) would potentially be very serious because a motorcycle in motion could not safely pass a pedestrian – they would have to stop for the pedestrian to go by. My recollection as from 1984 is that the use of FHE4 was almost wholly by pedestrians (other than for the property access sections).....”*

8. DOCUMENTARY EVIDENCE

8.1 Under 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.

8.2 The following sources have been examined by the County Archivist at Gloucestershire Archives to see whether this route is marked in any way and to establish its status. The sources have then been checked by the Asset Data Officer. The full report is held as a background paper to this report.

8.3 Inclosure Map/ Award - none found.

8.4 Hewelsfield Tithe Map & Apportionment, 1841 (P175 SD 2/1) - FHE4 is not shown.

8.5 Ordnance Survey 1” : 1 mile, revised 1st edition, Sheet No. 36 - Published at the Tower of London 1830; (National Library of Australia website)

This map was engraved at the Ordnance Map Office in the Tower of London under the direction of Lieut. Colonel Colby, Director of Ordnance Survey, from the pen and ink drawings as detailed in the previous paragraph. It shows the turnpike roads by means of 2 solid lines with the easternmost line highlighted. Other roads, including FHE4, are shown by means of 2 solid lines (neither highlighted). No barriers are shown at either end of FHE4, and it is shown in a similar manner and connecting freely with Sandy Lane & Brockweir Road. A copy of this plan is held **JH4**.

8.6 Ordnance Survey 25” to 1 mile map, 1st edition, 1881, sheet Glos XLVI.7 (National library of Scotland)

This first edition map used colour to denote features. Metalled roads were identified by ochre colouring. FHE4 is shown coloured and numbered 333 in a similar manner to other known highways such as Sandy Lane and Brockweir Road. Although the status is undefined, FHE4 is shown open at each end to the road network of the day, has no boundary features across it and is not tied to adjacent fields. A copy of this plan is held **JH5**.

8.7 Ordnance Survey 25": 1 mile map, 2nd edition, 1902 & 3rd edition 1923, sheet Glos XLVI.7

FHE4 is annotated on both editions as No.55 and is shown as per the first edition, running between solid boundaries in a similar manner to other known public highways such as Sandy Lane and Brockweir Road. The route is shown open at either end to the road network of the day without boundary features across it. No indication is given as to status.

8.8 Greenwoods Map of Gloucestershire, 1824 (Coaley.net)

Christopher Greenwood's 1824 Map was drawn from an original survey and was sold to members of the public. The commercial nature of the map, as with Bryant's means that the routes shown are usually public and publicly maintainable unless there is strong contemporary evidence which shows the route is private. In *Hollins v Oldham* (1995) a comment was made regarding Burdett's Map of 1777 which identifies the same two types of road in its key as Greenwood: firstly; turnpike roads, which are roads that could be used upon payment of a toll, and secondly; crossroads. The Justice said, "*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... 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 key on Greenwood's map identifies FHE4 as part of a through route or 'crossroad' connecting publicly maintainable highways known today as Sandy Lane with Brockweir Road. In 1824 the expression "crossroad" did not have its modern meaning. The Planning Inspectorate's Advice Note No.4 states that "*In modern usage, the term "crossroad" and "crossroads" are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term "crossroad". These include "a highway running between, and joining, other highways, a byway and a road that joined regional centres"*.

It was noted in the appeal court decision of *Fortune & Others v Wiltshire County Council*, March 2012 that "*the judge concluded that Greenwood's map supported the emerging picture of an established thoroughfare. In our judgement the label "crossroad" added further support*". A copy of this map is held **JH6**.

8.9 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 (D2428/3/18/13), and reference books or files

The Finance Act 1910 provided for the levying of a tax upon the incremental value of the site itself. The tax was to be paid every time the land changed hands. A Land Valuation Officer was appointed for each income tax parish, and they were given the responsibility of plotting and recording every piece of land, assign every land holding a number and provide ownership and occupation details for valuation purposes. The initial part of the process was the completion of a 'Form 4' by the landowner. This form asked whether the relevant unit of land ownership (hereditament) was subject to any public rights of way or any public rights of user. Information from the Form 4 was copied into Field Books in the District Valuation Office before the valuers went into the field to inspect and assess the hereditaments. Deductions were awarded for public rights of way across land. All private land *including private roads* were assigned an assessment number whereas public roads, for the most part, were un-numbered, uncoloured and excluded from surrounding parcels of land. Valuers would have been extremely reluctant to show any land as a public road if it could be assessed for duty. Landowners and occupiers would be anxious to ensure that public rights of way were recorded correctly because the existence of such a way reduced the value of the land and thus their tax liability.

FHE4 is shown uncoloured, un-numbered and excluded from adjacent land parcels and thus from tax in the same way that Sandy Lane and Brockweir Road are. Valuers were instructed to brace together detached portions of land in the same ownership under one hereditament number. Map sheet 46.7, on which FHE4 is located, shows that valuers mainly used Ordnance Survey's 'single' brace (elongated 'S') to do this. Part of FHE4 crossed parcels of land which was braced together under hereditament 143. This valuation included hereditament 602. An 'open' brace was used. An

open brace is used by Ordnance Survey to denote a track excluded from a measured area of land. J B Harley-Ordnance Survey Maps; a descriptive Manual 1975, went on to describe an open brace as “*portions of a parcel that it divided by another parcel, for example when a river is crossed by a road or railway*”. As FHE4 is excluded from adjacent land, this suggests that the surveyor considered it to be a public road. This open brace was also used along part of Sandy Lane. It should be noted however that single braces were also used along Sandy Lane and Brockweir Road, so caution must be applied when inferring the valuer’s intention when using an open brace along the application route. A copy of this map is held **JH7**.

8.10 County Surveyor: papers relating to survey of footroutes under National Parks and Access to the Countryside Act, 1949 (K687) Submission map and statement (K687/1/8/4)

S27(1) of the National Parks & Access to the Countryside Act 1949 (“NPACA49”), 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 s27(5) “*prepare a Draft Map of their area, showing thereon...‘footroutes’, ‘bridleways’ and ‘roads used as public routes (a highway, other than a public route (highway being either a footroute or bridleway) , used by the public mainly for the purposes for which footroutes and bridleways are so used)’*”. 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.

Hewelsfield’s Parish Survey (Original Submission) refers to FHE4 as an ‘*open way*’ and a “CRF” ‘*carriage road used mainly as a footroute*’. At that time any public carriage road that was being used mainly by walkers and/or horse riders qualified for inclusion on the definitive map and statement as a Road Used as Public Route (RUPP). Such routes were often described either as (CRF) or ‘*carriage road used mainly as a bridleway*’ (CRB), depending on the balance of user.

Draft map

Route shown by green and white dashed line, numbered 4, indicating that the route was a Road Used as a Public Route (RUPP). The accompanying Draft Statement describes FHE4 as a CRF. An extract of this map is held **JH8**.

Objections to Draft map (K687/2/6/2)

No relevant objections

Provisional map

Features as for draft map

Definitive Map

FHE4 was ultimately recorded on the Definitive Map and Statement as a Road Used as a Public Path (RuPP) in Hewelsfield. A copy of this map and statement is held, along with the Draft Map extract, as **JH8**.

8.11 The route’s treatment as part of the process of producing the Definitive Map and Statement, which started with the National Parks and Access to the Countryside Act 1949 and continues to this day, reinforces the notion that this was a route which was considered to be a vehicular highway, which had declined in importance to the point that it was being used mainly by walkers and horse riders.

8.12 DOCUMENTARY CONCLUSIONS - Documentary evidence dating back to 1830, points towards the historic reputation of FHE4 as a public carriage road whereby the actual evidence of dedication is lost in the mists of time. The physical representation of FHE4 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 thus exempt from tax, suggests that the landowner considered the route to be outside his ownership. As private roads were assigned a number and assessed for tax, and deductions for public footpaths or bridleways could be made, it would be reasonable to infer that FHE4 was considered to be a public vehicular road. Further, during the statutory process of drawing up the Definitive Map, FHE4 was identified as a “*carriage road used mainly as a footroute*’ (CRF)” 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 Restricted Byway. These

documents reinforce the notion that FHE4 was considered to be a public vehicular highway, which had declined in importance and was being used mainly by walkers.

- 8.13** No evidence has 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. If this conclusion is accepted, it will be necessary to consider the effects of the Natural Environment & Rural Communities Act 2006.

9. NATURAL ENVIRONMENT & RURAL COMMUNITIES ACT ("NERC") 2006

- 9.1** Section 67(1) of NERC extinguishes all existing public rights for mechanically propelled vehicles ("motor vehicles") over ways that, immediately before the commencement date of the NERC Act; 2 May 2006, were not shown on a Definitive Map and Statement or were recorded to footpath, bridleway, or restricted byway status unless either one of the exemptions under s.67(2) or 67(3) of NERC are deemed to apply. Prior to this Act, no distinction was made between motorised and non-motorised vehicles such as horse drawn carriages. Even where non-motorised vehicle rights can be shown to have existed historically, such routes will only give rise to Restricted Byway status.
- 9.2** Section 67(3) notes that subsection (1) does not apply to an existing public right of way over a way if an application for a BOAT was made before the relevant date (20 January 2005), determined before commencement (2 May 2006), or a person with an interest in the land made an application immediately before commencement. None of the s67(3) conditions are deemed to apply.
- 9.3** The exemptions listed under s67(2) to the extinguishment of public motor vehicle rights, are as follows;
- (a) ways where the 'main lawful' use by the public was by motor vehicles (rather than by other users, e.g., walkers, cyclists, horse riders and horse drawn vehicles) over the period 2001-2006; *This is addressed in paragraphs 9.4-9.21 below.*
 - (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; the DEFRA Guidance Notes explain that this is to exempt roads that although not having clear motor vehicular rights by virtue of official classification, are generally regarded to be part of the 'ordinary roads network'. *This exemption is not deemed to apply because FHE4 is not recorded on the list of streets.*
 - (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]; *Exemptions C & D are not deemed to apply because FHE4 was not created for motor vehicles by legislation, instrument or by construction.*
 - (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. Although there was no distinction made between motorised and non-motorised vehicles prior to NERC, for this exemption to apply, there must be sufficient evidence to infer common law dedication of public motorised use prior to 1930. There is evidence of motorised use submitted in support of this application, but it dates to 1966 and although the 25" OS County Series Map published 1921, shows 4 properties along FHE4, there is no evidence to determine the type of vehicular use associated with them. *This exemption is not deemed to apply.*

- 9.4** Exemption s.67(2)(a) is a two-part test. Main lawful use means that the way had to first carry a public vehicular right at the commencement of NERC (2 May 2006). By virtue of FHE4's inclusion in a combination of records, particularly those of a statutory nature, as detailed in paragraphs 8.9 & 8.10 of this report, and as there is no evidence to show that this right was stopped up, FHE4 is deemed to satisfy this condition. Secondly, the main use of FHE4 between 2001 and 2006 had to be by motor vehicles (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 must be greater than the other uses.
- 9.5** The main user test was introduced to compliment a similar test which appears in section 66 of the 1981 Wildlife and Countryside Act, and which sets out the definition of a Byway Open to All Traffic (BOAT). If a highway satisfied the user test in s.67(2)(a) of NERC, it should not satisfy the BOAT test in s.66 of the 1981 Act. S.66 has been further clarified by the Masters judgement (*Masters v. SSETR [Application of the Court of Appeal judgement] [2000] 4 All ER 458*). The Masters test relates to the *character* of the way: a BOAT carries a public vehicular right but what distinguishes it from an ordinary road is that it is has to be more suited for use by walkers or horse riders than vehicles. Further, an authority should also have regard to current use when deciding whether a highway is being used by the public within the meaning of the s66 WCA81 definition.
- 9.6** The term 'main lawful use' is not defined in the Act. Version 5 of the Guidance Notes states "*it is for local highway authorities... to adopt a pragmatic approach and arrive at a judgement as to what has been the main use of the way by the public in the five years leading up to 2 May 2006....*" (para.27). Where necessary authorities should assess the evidence available on the relative volumes of walkers, horse riders, cyclists and motor vehicles and other users, to see whether it can be shown, on the balance of probabilities, that lawful use of the routes had been predominantly by motor vehicles. The Guidance Notes further state (para.28) that "*It is not incumbent on the local highway authority to undertake a detailed investigation or survey of 'main lawful use' on every way. As with all the exemptions, the onus is on anyone seeking to use a mechanically propelled vehicle on the way to prove that rights have not been extinguished where they disagree with the judgement made by the local highway authority*".
- 9.7** The applicant provided 23 Public Path Evidence Forms ("PPEFs") completed by 23 members of the public in support of this application. No maps were supplied, but the descriptions were consistent with the applicant's map & description, i.e., Harthill Common to Brockweir Road or Hillcrest to Sandy Lane. Grid references were supplied by 15 individuals identifying FHE4 and all 23 individuals referred to the application route as Road Used as Public Path FSB4.
- 9.8** The claimed public motor vehicle use dates back to 1966 and 13 individuals claimed use exceeding 20 years prior to the date of the DMMO application (section 69 of the Natural Environment and Rural Communities Act 2006 (NERC)). The claimed use of all 23 individuals was deemed to be '*as of right*' (without force, secrecy, or permission) and without interruption. As such it is considered that this use would constitute a claim of presumed dedication under s31 Highways Act 1980. Further, all 23 individuals claimed use over *most* of the prescribed NERC s.67(2)(a) exemption timeframe: 2001-2006. The stated purpose of use was for leisure and recreation in the St. Briavels/ Brockweir/ Hewelsfield area.
- 9.9** The PPEFs suggest that motor vehicle use of FHE4 over the 2001-2006 NERC timeframe was infrequent:
- 1-20 times per year: 16 individuals
 - 21-50 times per year (weekly): 5 individuals
 - 2 individuals - C Davis & G Harris did not supply any information on frequency:

- 9.10** In addition to this claimed use, there is also the motor vehicle use associated with the properties adjacent to the application route, including, Over Common Cottage, Common House Farm, Severn Trent reservoir, Hartlands, Blackberry Hill, and Hillcrest. Land Registry does not record private easements permitting vehicular access along FHE4 against these properties. However, until the commencement of NERC on 2 May 2006, as far as public rights of way classifications are concerned, no distinction between mechanically propelled vehicles and non-mechanically propelled vehicles existed. The evidence of historic public vehicular use in this report could suggest that these householders were exercising a lawful public motor vehicle right to access their properties until the commencement of NERC.
- 9.11** Some evidence of public motor vehicle use was found within the internal Public Rights of Way Officer's files. A letter from the owner of Hillcrest in 1995, complained about the surface of the application route, and included the following comment regarding use, "*There are three households using the lane on a daily basis, so driving over the crumbling edge of tarmac is causing rapid deterioration*". In March 2002, the owner of Hartlands paid GCC to surface section B-C of FHE4 to improve access to their property.
- 9.12** Lastly, evidence of public motor vehicle use along FHE4 is found in the responses of adjacent landowners, Mr Richardson & Mr Watson, to the initial 2005 notification of the application (set out in paragraphs 5.5 & 5.6 of this report), and 17 responses (including the parish council) to the 2023 consultation, (within sub-section 7), all of whom acknowledged historic motor vehicle use along FHE4. The frequency of this use was described as follows; '*rarely encountered*', '*occasionally encountered*', '*infrequent users*', '*rare occurrence*', '*recall seeing motorcycles once in the distant past*', '*light use*' and '*very limited traffic*'. This appears to corroborate the infrequent use claimed in the PPEFs.
- 9.13** Conversely, 39 responses were received to the 2023 consultation representing the views of 43 individuals and organisations. A NERC information sheet was attached to the consultation letter, and this explained each of the potential exemptions to the extinguishment of public motor vehicle rights, as set out in paragraph 9.3 of this report, including s67(2)(a) '*main use over the period 2001-2006*'.
- 9.14** The responses evidence personal knowledge and use of FHE4 dating back to the 1960s. Concerns were raised regarding the perceived and potential conflict caused by motor vehicles using FHE4 and its effect on other users such as walkers and horse riders, residents, and wildlife. Miss Beard, Mrs Cockfield (35 years use) & Ms Trefgarne (48 years use) recounted incidents where conflict had arisen. This report however can only consider evidence of use. Issues such as suitability and desirability, although understandable, cannot be taken into account.
- 9.15** The Forest of Dean District Council and Severn Trent, acknowledged the consultation but did not provide any information to assist this application. The remaining 41 individuals, 22 of whom had used FHE4 for 20 years or more, considered that its main use 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.
- 9.16** The essence of the responses to the 2023 consultation can be summed up in Mr Wilson's email of 20 Jan 2024. He provided a useful account of public use along FHE4: "*....I am a former resident of 'The Croft, Hewelsfield, GL15 6US' and lived there from June 1997 until June 2017. Thus, I lived there during the period being inspected. I owned a dog from late 1998 and as a result of a heart condition took him for two long walks every day. I became so familiar with all the footpaths, bridleways and RUPPs that I became the unofficial Parish Footpath Warden. I recorded the state of every footpath on an Excel spreadsheet which became invaluable many years later when 'the Ramblers Group' wanted the state of each path determined. In May 2003 I was elected onto the Parish Council and remained The Footpath Warden. I can assert that all of the footpaths were exclusively used only by walkers and that most of the RUPPs used by walkers, often with dogs, and*

horse and riders. Prior to the 2006 act there was some very light use of RUPPs (FHE 4, FHE 24 and FHE 27) by motorized vehicles. They would pass me about once a month at weekends, in twos and threes. Once or twice a year, an event was held with considerable traffic for about an hour. This very limited traffic effectively became zero after 2006....”.

- 9.17** The internal Public Rights of Way Officer’s files, also record extensive damage to the surface of FHE4 allegedly caused by bad drainage. An inspection in October 2000 showed that the surface was badly 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 GCC early in 2002. Photos showing the extent of the erosion on 23 October 2001 are held **JH9**. It is reasonable to suggest that there was little motor vehicle use of FHE4 at this point.
- 9.18** The main user test is highly subjective and relates to an elapsed period, meaning that it has become increasingly difficult to ascertain what the main use may have been over a period that is now between eighteen and twenty-three years ago. As stated at the start of this report, to preserve public motor vehicle rights along FHE4, the applicant must show, on the balance of probabilities, that the main use of the route, over the relevant timeframe 2001-2006, was by motor vehicles. 23 individuals, by their own evidence, claimed infrequent use along FHE4 with motor vehicles over this period. This appears to be corroborated by the email statements submitted by 43 individuals, including the parish council, who lived close to and claimed regular use of FHE4 over the same period, who reject the idea that motor vehicle use was the main use. It is further corroborated by the severe erosion of FHE4 in 2001.
- 9.19** The Guidance Notes to the NERC Act (para.21 of version 5, 28 May 2008) state *“that the intention of the subsection was to except highways that are part of the ‘ordinary roads network’* and suggest that the physical character (surfacing, signage, street furniture) of FHE4 should be considered also.
- 9.20** Section A-B, is surfaced with road markings at Brockweir Road (point A) and is currently also recorded on the List of Streets as part of the 43024 publicly maintainable highway. It diverges from FHE4 at point B and continues as a well maintained surfaced highway, running between maintained hedges, and serving at least seven properties before re-connecting approximately 440m further along with Brockweir Road. Section A-B is considered to meet the character of today’s ordinary road network and its main use is deemed to be by motor vehicles. MPV rights are therefore deemed to have been preserved over this length of application route by virtue of section 67(2)(a) of NERC Act.
- 9.21** The surfacing of section B-C was carried out by the owner of Hartlands to improve motor vehicle access to their property. Between points C-D, for approximately 603m, FHE4 is uneven, overgrown, of varying width and unsurfaced with drainage issues resulting in it being muddy for large portions of the year. This report noted that remedial work was necessary in 2001 to address surface erosion issues along FHE4. This section is not considered to meet the character of the ordinary road network. Beyond the infrequent claimed use leading up to 2005, there is no evidence of public motor vehicle use beyond point C and therefore it is not considered to outweigh use by other user groups. As such, exemption 67(2)(a) is not deemed to apply.
- 9.22** Section D-E, for a length of approximately 417m, FHE4 is a 3m wide unsurfaced track with obvious signs of motor vehicle use by Severn Trent (access to the reservoir) and the properties, Common House, and Over Common Cottage. Under section 67(1) NERC, all public motor vehicle rights were extinguished at commencement on 2 May 2006. There is no sign of this use continuing beyond point D where, as previously described, FHE4 becomes narrow, uneven, and muddy and there is no subsequent claimed public use other than householders gaining access to their properties. As such public motor vehicle use is not considered to outweigh that of other user groups and therefore exemption 67(2)(a) is not deemed to apply.
- 9.23** Where existing unrecorded use of ways by mechanically propelled vehicles are extinguished under s67(1) NERC, a private right is retained under s67(5) on the basis that use was reasonably

necessary to enable a person with a whole/ part interest in the land to obtain access to the land. This means that people relying on a restricted byway for access to premises will retain a private right of vehicular access.

- 10. CONCLUSION -** This report considers that FHE4 is deemed to have carried historic public carriage road rights. By virtue of s67(1) NERC Act, public MPV rights have been extinguished. The available user evidence suggests that MPV rights are deemed to have been preserved over section A-B. However, none of the s67(2) or (3) exemptions are considered to apply to section B-E. If this assessment is accepted, then Restricted Byway FHE4, between sections B-E, accurately reflects its historic use and enjoys the highest classification possible. If this assessment is accepted, then the following recommendations are made:

OFFICER'S RECOMMENDATION

- 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 these rights.

11. APPENDICES:

JH1	1:10,000 Location Plan
JH2	1:4,500 map of FHE4
JH3A-G	Photos
JH4	Ordnance Survey 1": 1 mile, revised 1st edition, 1830
JH5	OS 25" to 1 mile map, 1st edition, 1881
JH6	Greenwoods Map 1824
JH7	Finance Act, 1910
JH8	National Parks and Access to the Countryside Act, 1949
JH9	Photos of erosion along FHE4 in 2001