



Wildlife and Countryside Act 1981 section 53

Application for Definitive Map Modification Order to add a route between the B4477, Brize Norton northwards to Bridleway No 8 Minster Lovell as a Restricted Byway to the Definitive Map and Statement for Oxfordshire

Parish of Brize Norton

Draft Determination Report

A. PURPOSE OF REPORT

1. The purpose of this report is to determine an application submitted by the British Horse Society in accordance with the Wildlife and Countryside Act 1981 section 53(5) to record a Restricted Byway between the B4477, Brize Norton and Bridleway No 8, Minster Lovell.

B DRAFT RECOMMENDATION

- **There is sufficient evidence to support the application. However;**
- **The section of the claimed route crossed by the A40 Witney Bypass was stopped up in consequence of the London Fishguard Trunk Road (Witney Bypass Side Roads) Order 1973 and that section cannot be recorded on the Definitive Map and Statement of Public Rights of Way;**
- **Rights for mechanically propelled vehicles are saved on the remainder of the route by virtue of the Natural Environment and Rural Communities Act 2006 section 67(2)(b); and**
- **That a Definitive Map Modification Order should be made pursuant to the provisions of Section 53(2)(a) of the Wildlife and Countryside Act 1981 to record a Byway Open to All Traffic between the B4477 at Brize Norton, northwards to the fence line at the southern boundary of the A40, and from the fence line at the northern boundary of the A40 northwards to its junction with Restricted Byway No 10 in the parish of Minster Lovell.**

C DETAILS OF THE APPLICATION

2. On 14 June 2013 the British Horse Society submitted an application requesting that an Order be made under Section 53(2) of the Wildlife and Countryside Act 1981 to modify the Council's Definitive Map and Statement by recording the existence of a restricted byway between the B4477 at Brize Norton and Bridleway No 8, Minster Lovell. A copy of the full application is at **Appendix 1**.
3. Although the applicant refers to the northernmost junction as being with Bridleway No 8, the junction is actually with Restricted Byway No 10, Minster Lovell.
4. A Restricted Byway is in every day parlance defined as "a highway over which the public have a right of way on foot, on horseback, or leading a horse, allowing cycling and any vehicles other than mechanically propelled vehicles".
5. The application was supported by the following evidence: -
 - (i) The Brize Norton Inclosure Award 1776;
 - (ii) The Asthall Inclosure Award 16 December 1814;
 - (iii) Davis' Map of Oxfordshire;
 - (iv) Ordnance Survey 1st Edition 1-inch Map published in 1833;
 - (v) An extract from "the Book of Reference for Cheltenham, Oxford and London and Birmingham Union Railway 1836";
 - (vi) An extract from "the Book of Reference for Oxford, Witney, Cheltenham and Gloucester Independent Railway 1845";
 - (vii) An extract from "the Book of Reference for Cheltenham and Oxford Railway 1846";

- (viii) An extract from “the Book of Reference for London, Oxford and Cheltenham Railway Branches 1846”;
 - (ix) An extract from “the Book of Reference for the Cheltenham and Oxford Union Railway from the Midland Railway near Cheltenham to the Oxford Worcester and Wolverhampton Railway with Junction Railways at Cheltenham 1852”;
 - (x) An extract from “the Book of Reference for the Northleach and Witney Railway – Plans and Sections – Session 1859 to 1860”;
 - (xi) An extract from “the Book of Reference for the Gloucester, Cheltenham and Oxford Direct Railway – Plans and Sections – Session 1863-4”;
 - (xii) An extract from “the Book of Reference for the Witney, Burford and Andoversford Light Railway – Plan – Sheet No. 1”, said to be dated 1899; and
 - (xiii) Extracts from “A History of Oxfordshire – Volume XV”.
6. On 10 August 2018 the applicant applied to the Secretary of State seeking direction to determine the application. In accordance with the provisions of Wildlife and Countryside Act 1981 schedule 14, should a surveying authority (the council) fail to determine an application for a Modification Order within 12 months of receipt, the applicant has the right to apply to the Secretary of State who may issue a direction to the council to determine the application within a stated time.
7. On 14 January 2019 the Planning Inspectorate wrote to the council with a direction that the matter be determined within 6 months (by 14 July 2019). A copy of the direction is at **Appendix 2**.

D LEGAL BACKGROUND

8. The relevant statutory provisions which apply to adding a path to the Definitive Map and Statement are contained in the **Wildlife and Countryside Act 1981 section 53(3)(c)(i)** which requires the council, as the Surveying Authority, to modify the Definitive Map and Statement following: -

“the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;”

9. Because of the nature of the evidence relating to this route, it must also be considered in light of the provisions of the **Natural Environment and Rural Communities Act 2006**. This is addressed later in the report.

E DESCRIPTION OF THE ROUTE

10. The claimed route referred to is shown on the plan at **Appendix 3** between the points A – B – C – D.
11. A report of a site inspection undertaken on 26 July 2013 contains a description and photographs of the claimed route, **Appendix 4**.
12. This is an ancient route which long pre-dates the construction of the A40 Witney Bypass dual carriageway. The route was effectively severed by the construction of the new road and the effects of this are considered later.

F LAND OWNERSHIP AND NOTICES

13. Copies of the Land Registry Map Search are at **Appendix 5**.
14. The freehold of the whole of the land crossed by the claimed route between Brize Norton and the A40 is registered to The Dean and Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry the Eighth of Oxford OX1 1DP (Mr James Lawrie, Christ Church, Oxford, OX1 1DP). Their Agents are Savills of Wytham Court, 11 West Way, Oxford, OX2 0QL.
15. The Title No is ON147964. The title and plan are at **Appendix 6**.
16. This land is also registered on a leasehold basis by virtue of a lease of 20 July 2015 to Brian Barnett and Robert Barnett of Astrop Farm, Brize Norton, Carterton, OX18 3NQ.
17. The Leasehold Title No is ON325664. The title and plan are at **Appendix 7**.
18. To the north of the A40, the land is unregistered. Adjoining land to the east of this section of the route is owned by The Dean and Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry the Eighth of Oxford. The Title No is ON302696. The title and plan are at **Appendix 8**. The registered proprietor claims that this land has the benefit of a right of way with or without vehicles over the section of the claimed route north of the A40. This does not form part of the registration and is supported by a statutory declaration made on the 16th August 2012 by Gordon Brian Barnett and statutory declaration made on the 14th June 2013 by James Cameron Fitzgerald Seymour Lawrie.
19. The land adjoining to the west of this section of the route is owned by Tony Smith of Yewhurst, Burford Road, Minster Lovell, Witney, Oxon, OX8 5RZ. The Title No is ON144756. The title and plan are at **Appendix 9**.
20. On 14 June 2013 the applicant served the Dean and Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry the Eighth of Oxford (and on Messrs Savills) with a notice confirming the submission of the application. The Certificate of Service of the notice forms part of the attachment at **Appendix 1**.
21. On the same date the applicant applied for consent to fix a notice relating to the submission of the application on the land affected by the claimed route. The applicant did so as it was not possible to determine the identity of the landowner / tenant for the route in question. A copy of this application forms part of the attachment at **Appendix 1**.
22. Whilst there was no response at the time, on 22 January 2019 a letter was sent by the county council to Brian Barnett and Robert Barnett, being the registered leaseholders of the land crossed by the route to the south of the A40, to confirm the submission of the application. A copy of the letter is at **Appendix 10**.

G DOCUMENTARY EVIDENCE

23. Section 32 of the Highways Act 1980 sets out how any court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances,

including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was compiled, and the custody in which it has been kept and from which it is produced.

Inclosure Awards

24. Inclosure awards are legal documents that recorded the ownership and distribution of land. They often detail roads and rights of way. They can be extremely important documents and, in many cases, if an inclosure award has created a right of way, and there is evidence that the correct legal procedures were carried out, this can be conclusive legal evidence of the existence of a right of way.

Brize Norton Inclosure Award 1776

25. The Applicant submitted photographs of pages from the Brize Norton Inclosure Award, dated 1776 in support of the application. The Award was examined at the Oxford History Centre and a copy of the relevant page is at **Appendix 11**. The relevant section from the page is shown edged in red and states the following: -

“One other public road or highway called or known by the name of Millway beginning at the end of the [?] in the village of Brize Norton near the public house called or known by the name of the Crown and extending from there northward in or near its usual course or direction into and through or over the sixth allotment to Charles Greenwood Esquire the first allotment to Lord Viscount Woosum[?] taken in exchange by the Dean and Chapter of Christ Church and George Wood Esquire and the fourth allotment to the said Dean and Chapter and George Wood part of the [?] first allotment to the said Dean and Chapter and [?] Brown and allotment to the said Charles Greenwood the said Dean and Chapter and George Wood and the Lord Viscount Woosum[?] respectively taken in exchange by the said Dean and Chapter and [?] Brown and other part of the said first allotment to the said Dean and Chapter till it meets or adjoins the usual entrance or continuation of the same road in the common fields of Astal at a place called or known by the name of Woosum[?] Gap”.

26. The Brize Norton Award has no map, which is not helpful and investigations into the locations of the Crown Public House and Woosum Gap have not been successful. The name 'Woosum' (if, indeed, that is the correct spelling) presumably relates to what is now known as Worsham.
27. The description does, however, include details that correspond with the claimed route in that: -
- The claimed route begins 'in the village of Brize Norton.....and then extends northward in the direction of Asthal'; and
 - It is referred to as 'Millway'. In other evidential sources considered below, the route is referred to as Mill Way and as being the route leading to Worsham Mill. The Mill was located at Worsham on the River Windrush which would have been reached in a direct northward continuation of this route.

Asthall Inclosure Award 16 December 1814

28. The applicant submitted photographs of pages from the Asthall Inclosure Award of 1814. This has been examined at the Oxford History Centre and, unlike the Brize Norton Award, includes a map. The relevant section of the Award Map is at **Appendix 12**.
29. The applicant identified the route circled red on the Map which is labelled as “Mill Road to Brize Norton No. 18”, as the one that corresponds with the claimed route.
30. However, this is not the same route identified by the applicant as Mill Way in both the Brize Norton Award and other documents. The route identified on the Asthall Award map passes to the immediate west of the topographic feature known as ‘the Asthall Barrow’. This is some distance to the west of the claimed route. This is shown on current Ordnance Survey mapping, **Appendix 13**.
31. Shown circled in blue is the route some distance to the east which is actually the route now recorded as Restricted Byway No 10 Minster Lovell which, when it continues south into Brize Norton parish, becomes the claimed route.

Finance Act 1910

32. The 1910 Finance Act provided for the levying of a tax upon the incremental value of land. The tax was to be paid when the land changed hands. Every piece of land was recorded and given a holding number. Information regarding ownership and occupation was also recorded.
33. The survey was carried out under statutory authority by District Valuers of the Valuation Department of the Inland Revenue, giving little argument about the authenticity or legal validity of the resulting plans and records. Tax relief was given to land containing public rights of way with a deduction made for the amount by which the gross value would be diminished if sold subject to any public rights of way.
34. Public roads, usually those with vehicular rights, were generally not included within the parcels of private land and were therefore untaxed. If a lane or track was excluded from the taxable land holding, it was probably considered as a public road at that time. Other private tracks and footpaths are not shown in this way and are, instead, shown within the respective land parcels.
35. Extracts from the Finance Act map for the parish of Brize Norton is at **Appendix 14**. This shows the whole of the claimed route was excluded from the surrounding coloured heraditaments just as the other public roads are.

Ordnance Survey Mapping

Ordnance Survey 1st Series 1833

36. This map, **Appendix 15**, shows that the claimed route physically existed on the ground and enclosed on each side at the time the map was produced.

Ordnance Survey County Series First Edition 1880

37. This map, **Appendix 16**, shows that the claimed route physically existed on the ground and enclosed on the eastern side and unenclosed on the western side at the time the map was produced.

Ordnance Survey County Series Second Edition 1899

38. Extracts of this map, **Appendix 17**, show that the route physically existed on the ground and enclosed on each side at the time the map was produced.

Ordnance Survey County Series Third Edition 1921

39. This map, **Appendix 18**, shows that the route physically existed on the ground and enclosed on each side at the time the map was produced.

Other Documents – Commercial Mapping

40. In the 18th and 19th centuries map makers started to produce county maps. Individual surveyors saw an opportunity to produce small-scale maps of counties which could be purchased by individuals and were, effectively, the road atlases of their day. A surveyor was generally concerned to show on these maps only those routes which the traveller could use. These showed features such as turnpike roads, cross roads and lanes and bridleways. They can be useful supporting evidence in rights of way claims.

Jeffreys' Map of Oxfordshire 1766 – 67

41. Thomas Jeffreys, Geographer to King George III, was the leading map publisher of his day. He produced large scale maps of several English counties, including Oxfordshire. He expected high standards of his surveyors but relied on the patronage of the major landowners and therefore more prominence was given to their properties. Nevertheless, the Oxfordshire Map was produced in response to a competition, instigated by the Royal Society of Arts 1759 to produce the best 1 inch to a mile county survey. It shows towns, parishes, farms, cottages, hills, commons and parks and roads.
42. An extract of his map and the map legend are at **Appendix 19**. It shows the claimed route as an 'open road' in the manner of many other local roads in the area.

Richard Davis' Map of Oxfordshire 1797

43. Richard Davis earned a premium of 50 Guineas from the Royal Society of Arts, producing the first ever large scale (2" to 1 mile) survey of Oxfordshire. He took full advantage of the larger scale to depict almost every house and farm in villages and rural areas and even the blocked layout of towns is correct. The road system is extensively shown, including minor routes, bridleways and milestones.
44. An extract of his map is at **Appendix 20**. It shows the claimed route in the same manner as other, recognisable, public roads bounded by solid lines indicating it as being an enclosed route.

Bryant's Map of Oxfordshire, 1823-24

45. Bryant's Map is to the larger scale of 1½ inches to the mile and includes a key. He produced well-made maps based on actual surveys carried out as opposed to copying or plagiarising other maps. The Planning Inspectorate's Consistency Guidelines refer to Bryant's use of surveyors and a triangulation system. The map depicts county, hundred and parish boundaries and, at the time, was ahead of Ordnance Survey in providing that level of detail. The road system is carefully depicted to distinguish between turnpike, main, cross and driving roads, lanes and bridleways. Bryant was among the last generation of private county surveyors, his business later declining with the growth of the Ordnance Survey.
46. Bryant's map and map legend are at **Appendix 21**. These show the claimed route as a 'lane' and, whilst this may not define the use of the route, the legend indicates that the category of 'lane' is separate from another category of 'bridle road', the next lower category in the legend.

Railway Deposited Plans and Books of Reference

47. During the eighteenth and nineteenth centuries there was a great expansion in the canal and the railway networks. The canal and railway companies had to obtain Private Acts of Parliament to acquire land for these. As part of this process, books of reference were produced containing detailed plans of the proposed canal or railway. Generally, canal plans only showed roads affected by the proposed scheme, whereas railway plans would also show footpaths and bridleways.
48. Books of Reference are mainly concerned with the ownership of land affected by the route of the proposed railway and so their evidential value for establishing public rights of way should be considered alongside other evidence. Their use is explained in an article for the Rights of Way Law Review by Bill Riley in 1990 (Section 9.3 of the Rights of Way Law Review is at **Appendix 22**). This provides detail as to why deposited plans made under the provisions of private Acts of Parliamentary for the purpose of constructing railways are admitted in courts as evidence of public rights of way. He states that the legal process developed to identify public highways on railway plans were at least as thorough as any other system in use to record highways at the time.
49. Most significantly, Mr Riley indicates that it would not be in the interests of a private rail company to show the existence of a public highway on its plans if that were not the case. Legislative requirements at the time meant that a much more expensive structure would be needed to carry the rail line over a public highway than that provided to accommodate a private track.
50. The Oxford History Centre and the House of Lords Records Office hold copies of Books of Reference and plans for those railway projects that concerned land in Oxfordshire.
51. This application was supported by extracts and plans from several Books of Reference, including those listed below.

**The Cheltenham, Oxford, London and the Birmingham Union Railway
Book of Reference and Plan 1836**

52. Extracts from the Book of Reference are at **Appendix 23**, showing the front cover and date and the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 24a, which is described as 'Road' with the owner listed as 'Robert Hall, Surveyor' (the Surveyor of Highways, who would be somebody appointed by the parish to maintain the road network in the parish).
53. Extracts from the accompanying plan are at **Appendix 24**. These show the route of the proposed railway as a black line and bisecting the claimed route. Grove Farm can be seen on the plan which lies a short distance to the east of the claimed route. For reference, a section of the 1899 OS map is included within **Appendix 24**, identifying the location of Grove Farm.
54. The claimed route is shown bounded by solid lines in the manner of a road with a description at each end, stating 'From Worsham Mill' at its northern end and 'To Norton Brize' at its southern end. The road is numbered 24a as described above in the Book of Reference, clearly understanding that the route to be crossed by the proposed rail line was a highway in the 'ownership' of the Surveyor of Highways.

**The Oxford, Witney, Cheltenham and Gloucester Independent Railway
Book of Reference 1845**

55. Extracts from the Book of Reference are at **Appendix 25**, showing the front cover and date and the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 15, which is described as 'Parish road from Brize Norton to Worsham Mills' with the owner listed as 'The Surveyor of Highways for the parish of Brize Norton viz., George Gillett'.
56. Extracts from the accompanying plan are at **Appendix 26** and show the route of the proposed railway as a black line and bisecting the claimed route which is identified on the plan and numbered 15.

The Cheltenham and Oxford Railway Book of Reference and Plan 1846

57. Extracts from the Book of Reference are at **Appendix 27**, showing the front cover and date and the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 23, which is described as 'Parish Road' with the owner listed as 'William Morley, Surveyor' (the Surveyor of Highways).
58. Extracts from the accompanying plan are at **Appendix 28**. These show the route of the proposed railway as a red line and bisecting the claimed route which is clearly identified on the plan and numbered 23.

**The London, Oxford and Cheltenham Railway
Book of Reference and Plan 1846**

59. Extracts from the Book of Reference are at **Appendix 29**, showing the front cover and date and the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 26, which is described as 'Public Highway' with the owner listed as 'Surveyor of Highways'.
60. An extract from the accompanying plan is at **Appendix 30**. This shows the route of the proposed railway as a black line and bisecting the claimed route which is clearly identified on the plan and numbered 26.

**The Cheltenham and Oxford Union Railway from the Midland Railway near Cheltenham to the Oxford, Worcester and Wolverhampton Railway with Junction Railways at Cheltenham
Book of Reference and Plan 1852**

61. Extracts from the Book of Reference are at **Appendix 31**, showing the front cover and date and the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 19, which is described as 'Public Highway' with the owner listed as 'Surveyor of Highways'.
62. Extracts from the accompanying plan are at **Appendix 32** and show the route of the proposed railway as a red line and bisecting the claimed route which is clearly identified on the plan and numbered 19.

The Northleach and Witney Railway – Plans and Sections 1859-1860

63. An extract from the Book of Reference is at **Appendix 33**, showing the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 34, which is described as 'public carriage or driftway'.
64. Extracts from the accompanying plan are at **Appendix 34**. These show the route of the proposed railway as a black line and bisecting the claimed route and numbered 34.

**The Gloucester, Cheltenham and Oxford Direct Railway
Plans and Sections 1863-4**

65. An extract from the Book of Reference is at **Appendix 35**, showing the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 34, which is described as 'public highway' and lists the owners of the land as 'The Dean and Chapter of Christchurch College Oxford and The Surveyor of Highways'.
66. Extracts from the accompanying plan are at **Appendix 36**, showing the route of the proposed railway as a red line and bisecting the claimed route. There are also plans in section indicating how the proposed rail would cross the claimed route which is numbered 34 on the plan.

The Witney, Burford and Andoversford Light Railway 1899

67. Extracts from the Book of Reference are at **Appendix 37**, showing the particular entry relating to the claimed route. The schedule relates to plot numbers on the accompanying plan, with descriptions of property owners. This route is numbered 7, which is described as 'public highway' and lists the owners of the land as 'The Rural District Council of Witney and Brize Norton Parish Council'.
68. Extracts from the accompanying plan are at **Appendix 38**, showing the route of the proposed railway as a red line and bisecting the claimed route. There are also plans in section indicating how the proposed rail would cross the claimed route which is numbered 34 on the plan.

'A History of the County of Oxford: Volume 15, Bampton Hundred' – Published by Victoria County History, London, 2006

69. The applicant made reference to this, which is detailed on the British History Online website (<https://www.british-history.ac.uk/vch/oxon/vol15/>). Founded in 1899, originally as a private enterprise, it was produced by 'historians working in counties across England', and forms part of an 'encyclopaedic record of England's places and peoples from earliest times to the present day'.
70. Extracts from pages 205-218, **Appendix 39**, are set out below. The same document also has a map at page 228 which is dated 1870. The extracts state: -

'Early Roads. Five other routeways probably date from the Anglo-Saxon period. A route in the north-west of the parish, which connected the 7th-century Asthall barrow and Sir Edward's Way, was recorded from the 15th to 18th centuries as Salter's Way, and in the late Anglo-Saxon and post-Conquest periods it was presumably part of a saltway between Droitwich (Worcs.) and Bampton'.

71. This provides some clarity about the route referred to in the Asthall Inclosure Award which was referred to as Mill Road. The route can be seen on the 1770 map at **Appendix 39** marked as Salters Way and following the route from Asthall Barrow.
72. This extract continues: -

'A second route ran from the north end of Brize Norton village to Worsham mill in Asthall parish), which probably existed by 1086; it was recorded as Worsham Mill Way in 1685, Miller's Way in 1737, and Mill Way in 1776, and possibly also served as part of a droveway between Bampton and Stockley, north of Asthall parish, where woodland was associated with Bampton in the 11th century'.

73. This correlates with the claimed route and suggests it has been in existence since the 11th century. It is shown on the 1770 map at **Appendix 39** as Mill Way leading out of Brize Norton and running to Worsham Mill, effectively as part of the general road network in the area.
74. The extract continues: -

'Post-Inclosure Roads. In 1776 the inclosure commissioners confirmed the roads from Brize Norton to Burford, Worsham mill, Minster Lovell, Witney (via Curbridge),

Bampton, Black Bourton, Kencot, and Shilton (Lower Way) as 60-ft wide public highways. The former Salter's Way was reduced to a 10ft-wide bridleway reserved for the occupiers of Asthall mill'.

H EVIDENCE PROVIDED LOCALLY BY MR LES GOBLE

75. Mr Goble lives locally and emailed with evidence of his own. He states that Ting Tang Lane is recorded as a routeway, probably from the Anglo-Saxon period (4th to 11th century) which ran from the north end of Brize Norton village to Worsham Mill (in Asthal parish), which probably existed in 1086. It was recorded as Worsham Mill Way in 1685, Miller's Way in 1737 and Mill Way in 1776. It possibly also served as part of a drove way between Bampton and Stockley, north of Asthal parish (as stated in 'A History of the County of Oxford').
76. He states that it would appear that Ting Tang Lane is an extension of a recorded public right of way (No 302/10) in Asthal parish although this stops at the old boundary between Asthal and Brize Norton parishes. He notes that the Brize Norton parish boundary has, more recently, moved further south to align with the A40.
77. He goes on to state that the Witney by-pass was opened on 19 April 1977 and that it is clear that the county council recognised that Ting Tang Lane was a public right of way which ran between Brize Norton and Asthal as it installed a break in the central barrier to allow pedestrian access across the A40, albeit it is extremely dangerous as there is no central refuge area.
78. Mr Goble referred to a book 'Old Brize Norton Through the eyes of two young girls', by Kathleen Timms and Clare Hicks. (ISBN 1-870519-68-X). The girls' memories date back as far as 1924. He provided this extract: -

'Ting Tang Lane, also known as Green Lane, at the top of the village was rather out of bounds for both Kathy and Clare when they were small children. On a school nature study walk they were taken by 'Boss' Jones (the headmaster) who explained it was an old Roman Road proven by the fact that if searched for, there were stones laid side by side upright, to make the base of the road. The lane led to the small hamlet of Worsham, where there were just a few remains of a Roman Villa, mainly small tiles and pieces of decorated pavement. On either side of Ting Tang Lane were stone walls, beautifully created by real tradesmen and not a trace of cement or anything else to hold the stones in place. The book goes on to say Ting Tang Lane joined up with another lane known locally as Abingdon Track. Along these lanes, which together became a drovers' road, were driven sheep gathered from the farms and hillsides to be sold at Abingdon Market'.

79. He relayed the following excerpt from Brize Norton Parish Council News Sheet No. 17 dated October 1972 regarding the proposed Witney By-Pass: -

'Objections have been made in respect of the closure of Worsham Lane (Ting Tang) as a carriageway. Although this lane is no longer used as a road, the council consider that it should be preserved as such for the use of agriculture and for use a bridleway to connect with the Freeboard and other rights of way. The public footpaths will not be closed as stiles will be provided to continue across the new road'.

80. The following is an excerpt from Brize Norton Parish Council News Sheet No. 19 dated September 1973: -

'The overgrown condition of Ting Tang Lane has been notified to the county council who have promised to clear the lane as and when they can. This is a favoured 'doggy walk' enjoyed by master and dog alike'.

81. Excerpt from Brize Norton Parish News No. 72 dated December 1995: -

'Ting Tang Lane has now been cleared. (I hope it didn't take 22 years for OCC to carry out the previous request!)

82. Mr Goble describes Ting Tang Lane as 8m wide, is still regularly used by ramblers and dog walkers albeit the first 420m can become very muddy due to agricultural vehicles gaining access to the fields eastwards. Once past this, the path is full of the wonders of nature with spectacular views westwards across the rising hills that form the start of the Cotswolds all of which creates an environment which is beneficial for the wellbeing of our community. The Cotswold Stone walls still exist each side of the lane although the first 420m on the east side has virtually disappeared. However, the base is still visible.
83. Referring to the naming of Ting Tang Lane, he considers two local theories; the first is that it came from the sound of the bells around the necks of sheep that were being taken to Abingdon market, and the second, and far more likely, is that it was the 'ting tang' sound made by the single bell mounted in the centre of St Britius's Church roof ridge which was used to call the community to communion. This bell, once cast, was carried by boat up the river to Worsham and then overland by track to the church. This track became known as 'Ting Tang Lane'.

I HIGHWAY RECORDS

The List of Streets

84. The council is under a duty to hold and maintain on the public record a 'List of Streets' in accordance with the provisions of The Highways Act 1980 section 36(6). This can be a list but many highway authorities, Oxfordshire included, maintain the information in the form of maps. The purpose is to keep an up to date public record of the highways that the council is liable to maintain (at the public expense) and this public register is the source of information for Con29 enquiries (one of the standard searches and enquiries undertaken on conveyancing transactions).
85. Early lists, or road registers, gave routes road numbers, described or mapped them and usually indicated lengths that were both metalled and unmetalled. Footpaths and bridleways were rarely so recorded or referred to, and neither were routes that we widely recognise today on the Definitive Map described. These are the routes regarded by the highway authority as being the general road network and as having full public vehicular rights unless otherwise identified.
86. The List of Streets is not intended to be definitive as to classification but is evidential of the classification / status where it is recorded. It is required to set out what the highway authority has concluded to be highways maintainable by the highway authority. The addition of classifications is a tool for establishing the level of maintenance appropriate to the highway in question - so classification was undertaken as an adjunct to the role of

the List of Streets coupled with the highway authority's statutory maintenance responsibilities, and it would not have been sensible for the county council, as the highway authority, to identify a route as maintainable for a certain level of vehicular use if no vehicular use was lawful.

87. The 1929 Local Government Act, whereupon highway authority functions passed from former rural district councils to county councils and partially from former urban district councils to county councils defines a road (in section 134) as 'a highway repairable by the inhabitants at large' and were known as 'county roads'.
88. Early lists of streets will have been derived from 'handover' maps in 1929 when responsibility passed to the county council but some of these no longer survive in Oxfordshire.
89. In this case the map that covers the claimed route, **Appendix 40**, shows the whole of the claimed route, excluding its crossing of the A40, shaded in yellow denoting that it is categorised as an 'unclassified unmetalled' road. The same notation appears on an edition dating from the 1950s. This classification does not have a corresponding legal definition, but the inference is that by virtue of being recorded in this manner on Oxfordshire's highway records the public has the right to use the route with vehicles. Public rights of way are not so coloured or indicated on the highway records maps. As stated above, few public rights of way are recorded on these maps and those which are have a different colouring.
90. The A40 itself is coloured red to its full extent indicating that it is an A road.
91. The appearance of the claimed route on the List of Streets is evidence that it is highway and it is referred to as an unmetalled 'road' giving the inference that the way has public rights with vehicles. As mentioned earlier, other rights (footpaths, bridleways, etc) were rarely recorded on the council's List of Streets and those which were given a different classification.
92. Nevertheless, Government Guidance issued following the introduction of the Natural Environment and Rural Communities Act (NERCA) 2006 provides some additional advice on this point, in that inclusion of a route on the List of Streets is not conclusive evidence of what rights it carries and there can be no presumption that any highway shown on the list of streets carries vehicular rights. Each case should be considered on its own merits and in this regard Oxfordshire's practice dating from the 1950s of identifying by colour coding different classes of highway maintainable at the public expense is of particular relevance.

The A40 Dual Carriageway

The Side Roads Order

93. In the mid-1970s a bypass for Witney was constructed as a dual carriageway road that, effectively, severed the claimed route. As is normal when such major road construction is undertaken, an Order is made setting out how all 'side roads' are to be dealt with where they are impacted by the new road.
94. The London Fishguard Trunk Road (Witney Bypass Side Roads) Order 1973 is at **Appendix 41**, with its plan at **Appendix 42**. The Order and plan refer to the claimed route as 'Worsham Lane' and, at Schedule 1, it is detailed as 'highway to be stopped up' and

the area shaded on the plan indicative of the claimed route being stopped up as highway within the extent of the line of the new A40.

95. This stopped up this section of the way without creating alternative provision and the area required for the A40 was transferred to the Secretary of State for Transport by a conveyance of 3 May 1978 from Christchurch College.
96. Part of the detail for the design of the new road included for the erection of gates on either side of the A40 across the claimed route. The A40 was a trunk road at the time of its construction, and the works undertaken and the responsibility for maintenance rested with the former Department of Transport, now the Highways Agency. This detail is set out in a drawing dated November 1974, at **Appendix 43**. This was produced by the Eastern Road Construction Unit, which was based in Aylesbury and undertook detailed planning, design and construction work on behalf of the Department of Transport for its road schemes.
97. The road is now de-trunked, since 2003, becoming the responsibility of Oxfordshire County Council as highway authority, including the maintenance of the gates, since that time.
98. The legal basis of the gates stems from the Stopping Up Order which terminated the original highway rights at points B and C on the plan at Appendix 3. The functional basis for the positioning of these gates may be because it was recognised there would be some continued use of the claimed route and so the gates were installed as a safety feature. No doubt, the Department would not have wanted any traffic using the dual carriageway to be encouraged to turn off and utilise the claimed route or, indeed, for any vehicles to attempt to manoeuvre on to the A40 from the claimed route, whether for legitimate reasons or any other. Furthermore, they could have been required as accommodation works for the landowner to make good the severance.
99. From time to time, highways officers at the council have been called upon to take action where the gates have been interfered with in some way, presumably deterring access. Examples of this are at **Appendices 44 and 45** which are internal notes of reports that the gates had been 'wired up'.
100. **Appendix 44** relates to a reported problem in February to May 1989. It seems there is some doubt as to whether this refers to the gate above and, more likely, it relates to another gate along the way which may or may not be lawful. As it is, the gates were being maintained by the council as it was under pressure not to encourage vehicle access, as well as to deter incidences of fly-tipping.
101. **Appendix 45** relates to a similar issue.
102. Neither gate is presently in place.
103. Clearly, two further matters are of note in relation to the A40.
104. Firstly, it would seem that, whilst the Side Roads Order referred to the stopping up of a section of Worsham Lane, some provision was made for crossing the A40 dual carriageway, by retaining a gap in the safety barrier in the central reservation. This can be seen in Photograph 10 at **Appendix 4**. At some stage, plastic bollards (which can be seen in the photograph) have been positioned to deter any potentially dangerous vehicle movements.

105. Secondly, on the A40 150 metres either side of the crossing are signs to warn motorists of 'Horses Crossing'. These are standard triangular warning signs with separate supplementary plates stating '150 metres'. It is not known why these are in place but, presumably have come about because horse riders were making the crossing and it was considered appropriate to warn motorists of that.

J USER EVIDENCE

106. The effect of Section 31 of the Highways Act 1980 sets out that after 20 years' use a way is deemed to have been dedicated as a highway unless there is evidence of a contrary intention.

107. Section 31 (1) states that: -

"where a way over any land, other than a way of such a 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 deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it".

108. Also, at common law, a way can be recognised as having public rights having been dedicated by the owner of the land with the capacity to dedicate, and that dedication having been accepted by the public. As with presumed dedication in accordance with Highways Act 1980 s.31, use by the public must be 'as of right'. However, with dedication at common law there is no *presumption* of dedication. The question of dedication is purely one of fact and public use is simply evidence to be considered in the light of all available evidence.

109. 4 user evidence forms were submitted in support of the application. Copies of these are at **Appendix 46**. The extent of the usage by horse riders covers a period between 1960 and 2015 (a total of 55 years) although only one of the users claims to have used the route for a full period of more than 20 years.

110. 2 users refer to there being a gate at the southern end of the claimed route in Brize Norton that they believed was erected to prevent motorised vehicles. Riders were able to ride their horses around the metal gate. One of the users refers to there being a public bridleway signpost in place at the southern end of the route and another to a sign for a bridleway or byway.

111. One user referred to the placement of the concrete block at the extreme southern end of the claimed route, likely for the purposes of preventing motorised vehicles from passing along the claimed route.

112. The evidence of use is very infrequent and has, no doubt, been impacted by the construction of the A40.

K THE IMPACT OF THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT (NERCA) 2006

113. In accordance with the provisions of the Natural Environment and Rural Communities Act 2006 (NERCA) which came into force at 2 May 2006, existing public rights for mechanically propelled vehicles have been extinguished if they are over a way which, immediately before commencement of the Act: -
- (a) Was not shown in a Definitive Map and Statement, or
 - (b) Was shown in a Definitive Map and Statement only as a footpath, bridleway or restricted byway
114. The route the subject of this report falls into the category (a) above meaning that any previously unrecorded rights for mechanically propelled vehicles were extinguished by the legislation and cannot be recorded as BOATs.
115. However, the extinguishment of such rights was subject to certain exemptions, one of which applies in this case.
116. Under Section 66 of NERCA, from 2 May 2006 no public right of way for mechanically propelled vehicles is created unless it is: -
- a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or
 - b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.
117. The legislative changes brought in by part 6 of NERCA and related statutory provisions are both intricate and complex and the Government considered it appropriate to issue detailed guidance. The current version of this guidance (version 5 May 2008) is entitled "Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways - a Guide for Local Authorities, Enforcement Agencies, Rights of Way Users and Practitioners".
118. Section 67(1) of NERCA explicitly extinguished public mechanically propelled vehicular rights over every highway that was not shown on 2nd May 2006 on the Definitive Map and Statement as a BOAT. This is the case unless it can be shown that one or more of the exemptions set out in subsections 67(2) or 67(3) applies.
119. In this case, the evidence above relates to the existence of the route as an ancient road. NERCA will have extinguished the rights for mechanically propelled vehicles if they have not already been recorded (as a BOAT). Those rights have not been recorded but have been saved by virtue of the exemption at subsection 67(2)(b) of NERCA which exempts ways that are both recorded on the council's 'List of Streets' as being maintainable at public expense and are not recorded on the Definitive Map and Statement as rights of way.
120. This exemption was to ensure that roads that do not have clear mechanically propelled vehicular rights by virtue of official classification but are generally regarded as being part of the 'ordinary roads network' do not have their rights for mechanically propelled vehicles extinguished. In this case, the route is recorded on the council's List of Streets (and was at

the relevant date in the legislation) but is not recorded on the Definitive Map of Public Rights of Way. Therefore, any rights that exist for mechanically propelled vehicles are preserved.

121. Thus, there is a two-part consideration. It is firstly necessary to consider if a public right of way for mechanically propelled vehicles existed at the commencement of section 67 on 2 May 2006 (i.e. applying the law prevailing before 2 May 2006) and, secondly, that those rights had not been extinguished because one of the exemptions in 67(2) or 67(3) applies.
122. To emphasise this point, since these will be rights of way created before commencement, they will be public rights of way for all vehicles (rather than non-mechanically propelled vehicles only), because, as far as public rights of way classifications are concerned, no distinction between mechanically propelled vehicles and non-mechanically propelled vehicles existed before then.
123. Whilst the evidence for the remainder of the route towards the Mill (northwards from Point A on the map at **Appendix 3**) is the same in the sense that it forms part of the same route of 'Mill Way' leading from Brize Norton to Worsham Mill, this section (north from Point A) is already recorded on the Definitive Map (as Restricted Byway No 10) and, therefore the exemption under NERCA does not apply and any rights for mechanically propelled vehicle have been extinguished as a consequence for that section.

L CONSULTATION

124.

125.

M CONCLUSIONS

126. The documentary evidence as set out above would seem to provide a compelling picture of this route as an ancient road linking Brize Norton and Worsham Mill.
127. The **Brize Norton Inclosure Award** states that the route is awarded as a public road or highway and, whilst there is no map with the Award, it is sufficiently detailed in its description – and supported by the manner in which it is described in other documents – to more than reasonably assert this to be the claimed route. In particular, the Award refers to the route as Millway, which is the way it is described in other documents.
128. There is **no registered ownership** of the land to the north of the A40 which may also be suggestive that the route is public highway.
129. The **Finance Act** map excludes the route from any coloured hereditaments and was not subject to taxation, giving inference that it was considered to be part of the highway network, in a similar way that all public roads as so excluded.
130. The three commercial county maps of **Jeffreys, Davis and Bryant** give a very strong indication that the route existed as a thoroughfare for travellers as far back as 1766. These were commercially produced and, as such, they were effectively the road atlases of their day.

131. **Ordnance survey** maps, back to the earliest available, record the route. Although these are not intended to show or prove the existence of highways, they support its physical existence over time.
132. There are 8 rail schemes with relevant **Books of Reference** / mapping that provide strong contemporaneous evidence that the claimed route was a public road, covering a period of 66 years between 1836 and 1899. The schedules to these, detail ownership of the route as being the Surveyor of Highways, the local person charged – usually by parish councils – with the function of managing and repairing local highways. As stated earlier, there would be no need for private companies to provide the more expensive infrastructure that would have been needed for public highways and would, indeed, be contrary to the intentions of the companies' shareholders seeking value for their schemes.
133. These were public documents and there is no suggestion that the identity of the route as public road was ever challenged as part of the process. Moreover, the consistent reference to 'public road' (and not as a footpath or bridleway) supports its status as a public vehicular road.
134. The **History of the County of Oxford** as written by local historians, makes reference to the route as being the one between Brize Norton and Worsham Mill that had various names over the centuries and that it had existed since possibly as early as 1086.
135. Fundamentally, the whole of the claimed route is recorded on the council's **List of Streets**, documentation that the county council is obliged to hold and place on the public record detailing those highways that are maintainable at the public expense. Whilst this is not definitive proof of the particular status of the highway concerned, footpaths and bridleways are rarely recorded in this way and it has been Oxfordshire County Council's practice to categorise the various highways recorded on the List of Streets documentation (plans) and, self-evidently, the highway authority would have sought to be as accurate as possible so that appropriate level of maintenance was undertaken (further to its statutory duty to maintain such highway).
136. The route is frequently referred to as a named highway (Mill Way, Worsham Lane, etc) something that is unlikely to be the case unless this was a through route usable by travellers. It was recognised as the route that linked Brize Norton to Worsham Mill.
137. The documentary evidence, when considered in the round, is persuasive and supportive. It is reasonable to conclude that the claimed route has existed from (and probably before) 1766, that being the date of the publication of Jeffreys' County Map and the Brize Norton Award. Furthermore, the documentary evidence (particularly the District Valuation Plans, county maps, ordnance survey maps, rail documentation and the List of Streets) is all supportive and that it would be reasonable to infer that a public road for vehicular use subsists.
138. The consideration of **NERCA** then follows and, as stated above, existing rights for mechanically propelled vehicles have been 'saved' by one of the exemptions contained in the Act – that it is a route recorded on the List of Streets and not recorded on the Definitive Map. In considering the existence of rights for motor vehicles, it is necessary to evaluate the evidence of the existence of 'vehicular' rights prior to 2006 using the legislation existing prior to NERCA. NERCA, for the first time drew a distinction between motorised and non-motorised vehicular rights. This was not the case before 2006 so

historic use by horse-drawn vehicles (for example) would equate to motorised use today. A vehicle was a vehicle regardless of its method of propulsion.

139. In this case, this route would clearly seem to have been an ancient road, a named route and one that linked Brize Norton to Worsham Mill. It has been 'addressed' as a road throughout the last 200 years where circumstances considered it – setting it out at Inclosure, naming it, mapping it commercially for travellers, determining that no tax was payable in the 1910 taxation process, and clearly referencing it in various rail proposals straddling a 66-year period.
140. Therefore, an Order should be made to record the route as a Byway Open to All Traffic (BOAT) on the council's Definitive Map and Statement but excluding the section B - C which was stopped up by the Side Roads Order of 2 March 1973.

N WIDTH

141. The documentary evidence, itself, makes no reference to the width of the claimed route.
142. The applicant stated the width to be 16 feet / 3m. These widths are not the same (16 feet being approximately 4.9m).
143. The width of the claimed route was measured during the site inspection and found to be approximately 20 feet (6m) wide between its boundaries and this is the width that should be recorded in the Definitive Map Modification Order.

O OTHER CONSEQUENCES

144. In considering cases such as this and, in accordance with the provisions of the 1981 Act, no account can be taken as to whether the rights referred to are wanted, needed, or have other consequences, such as environmental or safety concerns. This must be purely a determination of establishing the rights that exist and recording them.

The NERCA Effect

145. Without repeating the workings of the Act, detailed earlier, by including this route (excluding the section between points B – C) on the Definitive Map as a BOAT, it will have rights for motorised vehicles which will then terminate when the route reaches either side of the A40, and at point A where the it will connect with a Restricted Byway with no rights for mechanically propelled vehicles.

The A40 Effect

146. As set out earlier, the Stopping Up Order, **Appendices 41 and 42**, and the construction of the A40 as a dual carriageway road, effectively severed this route. The effects of this were recognised pragmatically by the erection of gates and making no obvious junction for traffic, and so that all forms of traffic can use it and not make, potentially, inappropriate manoeuvres to do so.
147. Clearly, in this case, there is no need for all the rights that are recommended to be recorded, not least because it cannot be a through route for motorised vehicles (by virtue of connecting with a Restricted Byway at Point A) and the specific problems relating to crossing the A40. It is also more (in terms of rights) than was applied for by the

applicants). Nevertheless, it bears repeating that the Council cannot consider such matters in this specific process but can do so subsequently.

..... Date

Mike Walker
Principal Countryside Records Officer
On behalf of Countryside Records

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

..... Date

Julia Taplin, Solicitor
On behalf of Legal Services