

**HERTFORDSHIRE COUNTY COUNCIL
Countryside & Rights of Way Team**

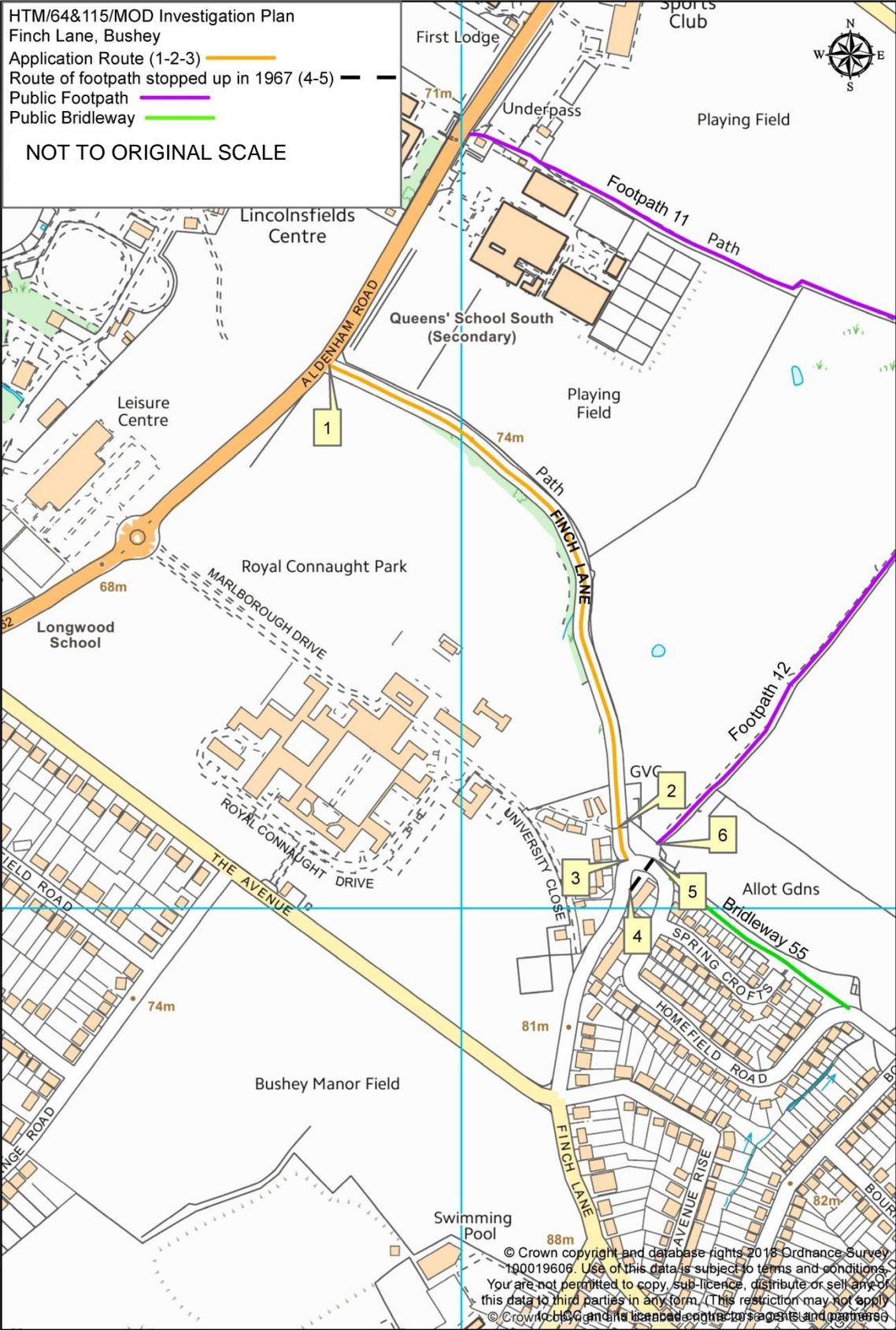


**Modification Order Application
Reasons for the Decision**

Finch Lane, Bushey

Author: Angela Simpkins

Date: 31 August 2018



Application Details

Two applications have been made to record on the Definitive Map, as a Byway Open to All Traffic, Finch Lane in Bushey. An extract of the 2015 Definitive Map is attached. It shows where the Application Route is and it is labelled Point 1 to Point 3.

The applications were made by Dr P D Wadey on 27th April 1995 and by Mr C Beney on 9th August 1995. Dr Wadey's application was supported by copies of:

- The Bushey (Finch Lane) (Prohibition of Driving) Order 1973 and
- a statement of use by non-vehicular traffic.

Mr Beney's application was supported by copies of:

- The Bushey (Finch Lane) (Prohibition of Driving) Order 1973 and
- 2 user evidence forms demonstrating use of the Application Route as a public path.

Both applications were submitted in the prescribed form. On 22nd October 1995 the applicants certified that they had each served notice of the applications on the owners of the land crossed by the Application Route.

On 4th November 2017, Mr Beney applied to the Secretary of State for Environment, Food and Rural Affairs, under Schedule 14 to the Wildlife and Countryside Act 1981, asking the Secretary of State to direct HCC to determine his application. A direction decision was issued to HCC on 19th February 2018 directing HCC to determine the application.

Description of Route

Finch Lane is located on the north side of Bushey, in the district of Hertsmere - south west Hertfordshire between Watford (to the west) and the M1 motorway (to the east).

The Application Route is approximately 650 metres long (615 metres between points 1-2 and 35 metres between points 2-3) and runs generally south east from Aldenham Road (point 1) to the section of Finch Lane which is all-purpose vehicular highway (point 3, at its junction with Homefield Road), between land at the Royal Connought Park and Queen's School South:

The width of the Application Route is restricted at point 1 by a combination of wooden fencing, a gas governor station and a metal post. There are gaps on either side of the metal post (over one metre wide) suitable for horse, cycle and pedestrian access. There are two signs at point 1 – one indicating a segregated pedal cycle and pedestrian route and a metal flag pointing south east along the Lane which reads "Finch Lane Public Way on Foot Horse & Bicycle Homefield Road ½".

The Application Route is fenced throughout and is partly banked and tree lined (on the eastern side of the Lane). The Lane is metalled along its full length. The metalled width varies between approximately 3 and 5 metres with vegetation either side along parts of the Lane, between fences. There are street lights (one of which was lit on the afternoon of the site visit) along the eastern side of the Lane, between the trees and the eastern fence line. It appears that there had been a surfaced footway on the eastern side of the Lane which was separated from the wider surfaced way and which had benefitted from street lighting. Part of the footway is still apparent (and in use as an unofficial route onto the school playing field) and lies on slightly higher ground on the tree lined bank.

At point 2 the width of the Lane is again restricted by post and rail fencing and locked metal gates. As at point 1, there is a gap to the side of the fence which is over 1 metre wide. The gap gives access to and from the Lane via a surfaced footway.

At point 3 there is a sign prohibiting the use of motor vehicles. However the Application Route between points 2 and 3 is surfaced similarly to the adjoining road way and provides access to buildings to the west of point 2.

Footpath 12 terminates at (point 6) Homefield Road on the wide grass verge immediately east of points 2-3 on the plan. The fingerpost can be seen from the footway. The extent of footpath 12 is discussed at section 3 below.

Documentary Evidence

For each investigation, we check at least 10 primary sources of information for any historic evidence relating to the application route. You can view the documents listed below at Hertfordshire Archives and Local Studies (HALS) or at the Rights of Way Service (CROW) and the National Archives. The documents are listed below with a reference number (if it has one) and where you can find it.

Where the document shows information relevant to the area of the application route, it is listed with the following information:

- the document's name, date and where it can be found (location and reference);
- why we consider the document important when making our decision;
- what is shown by the document in the area of the application route;
- investigating officer's comments.

For further information contact:

Hertfordshire Archives and Local Studies (HALS) - <https://www.hertfordshire.gov.uk/hals>
Rights of Way Service (CRoW) - www.hertfordshire.gov.uk/row or 01992 555279 to make an appointment.

The National Archives (TNA) - <http://www.nationalarchives.gov.uk/>

If you would like more information about documents and how they are important in investigating public rights of way, please go to the Government's Information website and view the Planning Inspectorate's Guidance Booklet for Definitive Map Orders: Consistency Guidelines at

<https://www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines>

The following historical documents have not been consulted:

- **Inclosure records**
- **Dury and Andrews Map**
- **Bryant's Map**
- **Tithe Map and Tithe Apportionment**
- **Railway and Canal Plans**

1. Ordnance Survey (OS) maps

Date: 1872

Ref: ROW

1.1 Why we consider these documents important

The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1897/8 in Hertfordshire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

1.2 What is shown by these documents in the area of the application route?

The 1872 1st edition OS map has been included in this report as it shows some of the physical features, in relation to the Application Route, which are referred to in the 1899 Main Roads Order which declared Finch Lane to be a main road (see below).

The OS map shows Aldenham Road, labelled, running north-east south-west generally between Aldenham and Watford. Finch Lane joins Aldenham Road, also labelled, at point 1 on the plan. A large property, labelled 'The Hall' (now the Bushey Hall complex) is situated on the north west side of Aldenham Road opposite point 1 on the plan. Approximately half way along the Application Route, a building labelled 'Lodge' is shown on the eastern side of Finch Lane, at the south west end of a route leading to Bushey Grange. The Application Route is shown, depicted by solid parallel lines, running between points 1 and 3. At point 3 Finch Lane continues running generally south toward the centre of Bushey. There is a fork in the road some distance south of point 3 - the western fork runs south south west on the eastern boundary of the Manor House (labelled on the OS map). The eastern fork runs south east past a junction with Bournehall Lane (labelled) and continues generally south east. The Primitive Methodist Chapel is labelled, off Melbourne Road. Immediately south of point 3 a path on the approximate course of footpath 12 joins Finch Lane.

1.3 Decision on OS mapping

HCC decided that the OS map provides evidence of the physical existence of the application route in 1872. OS maps alone do not generally provide evidence of public highway status.

2. Inland Revenue Documents

Date: c. 1910

Ref: TNA IR126/10/40
HALS IR1/480

Extract submitted by Dr Wadey during the public consultation

2.1 Why we consider these documents important

The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. In order to ascertain the value of all land as at 30th April 1909, a survey was carried out assessing each piece of land. The OS 2nd Edition Plans (usually from 1898) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or 'hereditament' number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist, but are unlikely to be good evidence that rights of way do not exist.

Where a route is shown uncoloured on the plans and excluded from the taxable land this provides very strong evidence of it being public highway. Usually this will be of vehicular status unless there is other contemporary evidence to indicate otherwise. Where footpaths and bridleways cross privately owned land these may be recorded as a reduction to the tax. However, where routes cross large hereditaments it can be difficult to establish which route is considered to be the right of way without additional details.

2.2 What is shown by these documents in the area of the application route?

The Inland Revenue documents were not initially consulted by HCC.

The Inland Revenue documents held at the National Archives are the final copies prepared by the Inland Revenue surveyors, an extract of which was submitted by Dr Wadey during the public consultation.

HALS does not have the map sheet which covers the south eastern most extent of the Application Route from just north of point 2 on the plan, south.

The significance of the Application Route being shown uncoloured is generally accepted to mean that it was considered to be a public road at the time the map was drawn up. It is uncoloured because it was not considered to be within private ownership and therefore there was no responsibility for a private landowner to pay tax on it. The application route is also shown in the same manner as Aldenham Road which is a known public highway.

Dr Wadey notes that the Application Route is shown as a 'white road'.

2.3 Decision on Inland Revenue documents

HCC decided that the Inland Revenue map provides strong evidence of the Application Route's status as a public road.

3. Highways Maintenance Records

The Hertfordshire Highways (Main Roads) No. 4 Order

Date: 24th October 1898 and 23rd January 1899

Ref: HCC

Hertfordshire Map of Main and County Roads

Date: circa 1927

Ref: HALS Off Acc 732

Hertfordshire Map of traffic accidents on Trunk and County Roads

Date: circa 1950

Ref: ROW

List of Streets

Date: 1967

Ref: HCC

Agreement made under section 40 Highways Act 1959 – relating to the adoption of Homefield Road and surrounds.

Date: 26th September 1967

Ref: HCC

The Bushey (Finch Lane) (Prohibition of Driving) Order

Date: 1973

Ref: *copy submitted with application*

HCC correspondence

Date: 1995

Ref: RoW

List of Streets

Date: May 2006

Ref: HCC

Extent of highway

Date: 2018

Ref: HCC

3.1 Why we consider these documents important

Maintenance of a route by the public is strong evidence that it is a highway, although it should be noted that not all highways are automatically maintainable at public expense. However it is important not to confuse 'maintainable' (i.e. duty to maintain) with maintained (i.e. works done). It should also be noted that lack of maintenance of a route does not necessarily mean a route is not highway.

The Highways Act of 1555 provided that parishes and their inhabitants had the responsibility for maintaining all existing public highways. The physical work was to be done by the inhabitants and each parish had to provide an unpaid parish surveyor who was obliged to keep a detailed account of public monies expended. This situation remained largely unchanged until the 1835 Highways Act, which allowed parishes to combine into larger groups for maintenance purposes. Under the Highways Act 1835 pre-existing highways continued to be maintained at public expense. Any highways established after that date needed to be 'adopted' to show they were liable for repair at public expense. The

Highways Act of 1862 allowed parishes to combine into Highway Districts under Highway Boards. In 1868 highway administration in Hertfordshire was entirely parochial, except for the turnpike roads, corporations and the Local Boards of Heath. The Justices of the Peace decided to divide Hertfordshire into 8 Highway Districts; 7 of these were established but Hemel Hempstead was not. These Highway Boards were dissolved between 1880-1899. The Highways and Locomotive (Amendment) Act 1878 allowed highway authorities to apply to the county authority (Quarter Sessions) for an order to declare highways as Main Roads, which would then have half the maintenance expenses paid for by the county authority, unlike the 'ordinary' or local roads which were still the responsibility of the highway authority. The Local Government Act of 1888 introduced elected County Councils, which took over "main" roads, while after the Local Government Act 1894 new Urban and Rural District Councils took over all other roads. Responsibility for maintenance of these roads was handed over to the County Councils in 1929. Records from the minutes of the vestry council or Highway Boards accounts from this period can provide evidence of a route being maintained and is therefore strong indication of public highway. Most routes referred to in this manner are now part of the county's road network.

The Public Health Act 1925 required every urban authority to prepare a list of the streets within their district which were maintainable by the inhabitants at large. The Highways Act 1959 required the council of every borough and urban district to keep up to date a list of the streets within their area which were highways maintainable at public expense. Under the Highways Act 1980, the County Council is required to keep up to date a list of the streets within Hertfordshire which are highways maintainable at public expense. There are no rules or regulations about what information is required, or how it is to be presented or amended. The County Council holds this information as part of the Hertfordshire Roads Gazetteer, which is itself part of the Hertfordshire Roads Management Database. It is a record of what is maintainable, not necessarily what is maintained. It should be noted that whilst the information is referred to as the "List" of Streets, it is not held as a paper list but kept electronically.

If there is evidence that the application route was a vehicular highway, consideration of whether or not a route was recorded on HCC's List of Streets has to be given due to the effect of the Natural Environment and Rural Communities Act 2006 ('NERC'). NERC introduced legislation which automatically extinguishes all public mechanically propelled vehicle ('MPV') rights, unless they were exempted by one of the exceptions provided. One of these exceptions applies to routes that were recorded on HCC's List of Streets immediately before 2nd May 2006. Where there is evidence that a route was a vehicular highway, then under NERC the continued existence of any MPV rights will depend on whether this or any one of the other exceptions provided is met.

3.2 What is shown by these documents in the area of the application route?

Hertfordshire Highways (Main Roads) No.4 Order 1898

On 24th October 1898, HCC made an Order recording various highways as main roads. The Order is made pursuant to The Highways and Locomotives (Amendment) Act 1878 and The Local Government Act 1888. On 23rd January 1899 the Order was confirmed and a declaration was made that the roads contained in the Order were in the proper repair and condition to the satisfaction of HCC.

The Order refers to the legislation under which the Order is made. This includes section 15 of the 1878 Act which states that "where it appears to any Highway Authority that any

Highway within their District ought to become a Main Road... such Highway Authority may apply to the County Authority for an Order declaring such road... to be a Main Road; and the County... shall cause the road to be inspected, and if satisfied that it ought to be a Main Road shall make an Order accordingly...”

Article 1 of the Order declares that “Each of the Roads specified in the fourth column of the Schedule to this Order... and the same is hereby declared to be... a Main Road within the meaning of “The Highways and Locomotive (Amendment) Act, 1878”.”

Information regarding entry 25 in the Schedule is provided in four columns. The description in column four clearly includes the Application Route as it refers to the road opposite ‘The Hall’ and ‘passing by Bushey Grange Lodge’ (see the description of the OS map at 1.2 above). However entry 25 relates to a much longer route than just the Application Route. Entry 25 relates to Finch Lane, Falconer Road, Herkomer Road and Melbourne Road:

“...commencing at its junction with the road from Aldenham to Watford, opposite The Hall [Bushey Hall complex], passing by Bushey Grange Lodge to the southern end of Finch Lane, where the road forks, the Western branch [Falconer Road] passing along the East side of the Manor House [The Bushey Academy], and terminating at its junction with the Main Road from Watford to London [High Street], near the Girls School, Bushey; the Eastern branch continuing along Back Lane [Herkomer Road] and Melbourne Road, and terminating at its junction with the London Main Road [High Street], near the Primitive Methodist chapel, Bushey [“The Venue” converted church].”

The length of road given in column three of the Schedule is 1 mile and 4 furlongs which is approximately 2.4 km. The length of Finch Lane & Falconer Road and Herkomer Road & Melbourne Road measured on current mapping is approximately 2.4 km.

Hertfordshire Map of Main and County Roads (c.1927)

The Map was created to index routes which had been taken over by HCC as Main Roads under the Highways and Locomotives (Amendment) Act 1898. The Map depicts the Application Route coloured red and numbered 315. The High Street is shown differently – coloured brown. Route 315 appears to include not just Finch Lane but Falconer Road, Herkomer Road and Melbourne Road – the same as in the Main Roads Order described above.

Route 315 is marked in the same style as other publically maintainable roads today including Aldenham Road (numbered 162) and Little Bushey Lane (numbered 250).

Hertfordshire Map of traffic accidents on Trunk and County Roads (c.1950)

The Hertfordshire Map of traffic accidents depicts a survey of the entire county road network, around 1950. The map categorises all roads into Trunk Roads, Class I, II or III County Roads and Unclassified County Roads.

The base map shows Aldenham Road approaching point 1 and Avenue Rise and The Avenue south of point 3. The mapping does not show development of Spring Crofts or Homefield Road south east of point 3. The ‘Royal Masonic Schools’ is labelled on the site of Bushey Manor (now The Bushey Academy).

The map is damaged but the majority of the Application Route can be seen and is coloured yellow. It is shown in the same way as other publically maintainable roads including Falconer Road, Herkomer Road and Coldharbour Lane. The key to the map defines yellow routes as 'County Roads – Unclassified'. The A41, to the north east of the Application Route, is shown as a Trunk Road. Aldenham road is shown as a class II County Road and the High Street is shown as a class I County Road.

The 1967 List of Streets includes an entry for Finch Lane in Bushey Urban District. Finch Lane is given the road number F.55 and the OS grid reference is (E) 512 (N) 196 which corresponds to the general area of land crossed by the Application Route.

1967 agreement made under section 40 Highways Act 1959

This agreement was made between the Urban District Council of Bushey [statutory predecessor to Hertsmere Borough Council] and George Wimpey & Co. Limited. The agreement set out the terms under which land at Homefield Road (and surrounds) was to be constructed, and dedicated, as highway maintainable at public expense by agreement with the Urban District Council.

Paragraph 1 of the agreement states that “the developers agree to dedicate as hereinafter provided rights of way as highways to the use of the public for all purposes over the land described in the First Schedule hereto and within the limits shown and defined in the plan annexed hereto”.

The First Schedule states that “All that piece of land forming part of the site of the Finch Lane Estate Bushey in the County of Hertford as is more particularly delineated on the plan annexed hereto (Drg. No. ED 550/1 Rev. J) and is thereon coloured green”.

Plan ED 550/1 Rev. J includes, coloured green, the wide grass verge on the east side of points 2-3 on the plan which joins the southern end of footpath 12 at point 6 on the plan.

Both applications are supported by The Bushey (Finch Lane) (Prohibition of Driving) Order 1973. The Order was made on 9th October 1973 by the Urban District Council of Bushey under sections 1(1), (2) & (3) and 84D of the Road Traffic Regulation Act 1967 as amended by Part IX of the Transport Act 1968. [The Road Traffic Regulation Act 1967 was repealed by the Statute Law (Repeals) Act 2004 and is replaced by the Road Traffic Regulation Act 1984].

Section 1(1) of the 1967 Act enabled an authority to make a “traffic regulation order” in respect of any road outside Greater London, where expedient to do so, and provides a list of reasons for which it would be expedient for an order to be made – including:

a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising.

The 1995 correspondence, summarised below, suggests that the 1973 Order was imposed on the Application Route to prevent Finch Lane being used as a rat-run and to overcome a dangerous junction with Aldenham Road (point 1 on the plan) and that, therefore, s.1(1)(a) was being relied upon to make the 1973 Order.

Section 104 of the 1967 Act defines 'road' as any highway and other road to which the public has access (and includes bridges over which a road passes).

The 1973 Order came into operation on 14th November 1973.

Article 1 of the Order states:

'No person shall cause any motor vehicle to proceed in that length of road, known as Finch Lane in the Urban District of Bushey, which extends from its junction with Aldenham Road (B.462) in a south-easterly direction for a distance of approximately 718 yards.'

The distance between points 1 and 3 on the plan is approximately 718 yards.

Article 2 of the Order states that nothing in article 1 applies to vehicles used for the purpose of agriculture in connection with land adjacent to the road, people requiring access to land adjacent to the road, emergency services, the local authority or to anything done with police permission.

HCC correspondence, 1995

After the applications of a modification order had been received by HCC, the Hertfordshire Highways Development Manager wrote to the Definitive Map Officer to query the effect of a successful BOAT application on the 1973 Traffic Regulation Order ('TRO').

In a letter dated 13th November 1995 the Highways Development Engineer wrote to the Definitive Map Officer referring to the 1973 TRO and informing that each end of the route subject to the Order was protected with posts and mounds to exclude vehicles but permit pedestrian and equestrian traffic. The Development Engineer assumed that a successful application to record a BOAT along Finch Lane would negate the TRO- which was imposed to prevent the route being used as a rat-run and to overcome a dangerous junction with Aldenham Road.

The reply dated 30th November 1995 from the Definitive Map Officer clarified that recording Finch Lane on the Definitive Map as a BOAT would not negate the TRO and added that the route would be included in the legal record of public rights of way [the List of Streets being an administrative record only].

The List of Streets immediately before 2nd May 2006 records the Application Route as follows:

Points 3-2 on the plan: Finch Lane, Homefield road junction to gate (opposite no. 6), [road ID] 4U65/20, [Owner] Hertfordshire, [Agent] south west – Hertsmere District, Local Access, [road class] Unclassified.

Points 2-1 on the plan: Finch Lane, Gate to B462 Aldenham Road, [road ID] 4F403/10, [Owner] Hertfordshire, [Agent] south west – Hertsmere District.

Extent of Highway 2018

HCC's Highway Boundaries & Land Charges team provided a record of the extent of the publicly maintainable highway on the Application Route. The record also provided information about the adjoining sections of Aldenham Road (point 1 on the plan) and Homefield Road (point 5 to 6 on the plan).

Adjacent is an illustrative plan showing coloured blue the highway maintainable at public expense. The information provided shows that the grass area between points 5 and 6 on the plan is publicly maintainable highway, albeit not part of the Homefield Road roadway.

3.3 Decision on highways maintenance records

In respect of the 1973 Prohibition of Driving Order, HCC decided that because the relevant provisions of the Road Traffic Regulation Act 1967 apply to both public and private roads, the Order is not evidence of the public highway status of the Application Route. HCC decided, however, that taken as a whole the Highways records held by HCC provide evidence that from 1898 to the present day the application route between points 1 and 3 on the plan has been recorded as a publically maintainable vehicular highway, notwithstanding that the 1973 TRO continues to prohibit the use of motor vehicles on the Application Route.

HCC decided that Footpath 12, between points 5 and 6 on the plan, was subsumed into the all-purpose highway following the dedication in the 1967 agreement made under section 40 Highways Act 1959. Pedestrian access to the footpath, at point 6, continues unencumbered across the grass verge on the northern side of the carriage way at Homefield Road. The 2018 extent of the highway information confirms that footpath 12 does join the public highway at point 6 on the plan.

4. Highway Diversion, Creation and Extinguishment Records

The Stopping Up of Highways (County of Hertford) (No. 11) Order 1967.

Date: 1967

*Ref: copy submitted by
applicant in 1997*

4.1 Why we consider these documents important

Most orders diverting or extinguishing rights of way were made under the Highways Acts. The orders could be made by certain courts, which up until the mid-part of the 20th century were the Quarter Sessions courts and were held 4 times a year. The Quarter Sessions courts were superseded by the magistrates' court in 1972. Certain orders can now also be made by other authorities, such as a governmental department or local highway authority. Orders relating to highways can also be made under other Acts of Parliament, such as the New Towns Acts, the Housing Acts, the Town and Country Planning Acts or the Defence Acts. Side roads orders are made under the Highways Acts to deal with changes to the local highway network following the construction/improvement of a road. These can be made by the government minister in respect of trunk roads, or by the highway authority in respect of all other highways.

In all cases, these legal orders affect the public highway rights by creating, diverting and extinguishing them. As these are legal documents they provide conclusive evidence of those matters actually decided, but are not conclusive in relation to other matters.

4.2 What is shown by these documents in the area of the application route?

In a letter dated 26th January 1997 Dr Wadey, one of the applicants for a modification order, wrote to the Definitive Map Officer enclosing a copy of this 1967 Stopping Up Order. The letter explains that prior to the Order footpath 12 had been recorded as far south west as Finch Lane [point 4 on the plan]. The letter continues that the remaining portion of footpath

12, as shown on the First Definitive Map, should terminate at point B on the Order Plan [point 5 on the plan] and not some distance further north [point 6 on the plan].

This Order was made by the Minister of Transport on 1st September 1967 under section 153 of the Town and Country Planning Act 1962, in order to enable development to be carried out in accordance with planning permission. The Order authorised the stopping up of a length of Bushey footpath 12 off Finch Lane and made provision for new highway.

The schedule to the Order describes the highway to be stopped up with an approximate distance: "The highway to be stopped up is in the Urban District of Bushey in the County of Hertford. It is shown between the points marked A and B on the deposited plan and is a length of footpath No. 12 leading from Finch Lane to Little Bushey Lane, starting at its junction with Finch Lane and extending north-eastwards for 50 yards." This measurement (50 yards) corresponds approximately to the distance between points 4 and 5 on the plan.

The Order stopped up the south western section of footpath 12 between Finch Lane and Homefield Road as shown between points 4 to 5 on the plan. The new highway set out by the Order included footway running between Finch Lane and Homefield Road and a section of roadway at Homefield Road.

The plan shows that (between points 5 and 6) there is a gap of approximately 15 metres between the southern extent of footpath 12, as shown on the Definitive Map, and the roadway at Homefield Road. However the Definitive Statement for footpath 12 describes the footpath from a junction with Homefield Road by Finch Lane. More information about the legal record of footpath 12 is included in section 4 below.

4.3 Decision on stopping up order

HCC decided that the Order does not provide evidence in relation to the application route (points 1 to 3) however it does provide evidence that 50 yards of footpath 12 were stopped up in 1967 (between points 4 and 5) to enable the development of Homefield Road.

HCC decided that Footpath 12 meets a highway of a different status, as demonstrated in the 1967 agreement made under section 40 Highways Act 1959 (see paragraph 3.2 and 3.3 above).

5. Definitive Map Records

The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement to show and describe the public rights of way in the county. The Map is conclusive evidence of what it shows, but is without prejudice to what is not shown.

The process resulting in today's Definitive Map and Statement consists of several stages which are dealt with below:

- the Parish Survey
- the Draft Map, Provisional Map and first Map and Statement (1953)
- the Special Review (following the Countryside Act 1968)

5a. Definitive Map Records – Bushey Parish Survey

Date: 1951-54

Ref: ROW

5a.1 Why we consider these documents important

Under the National Parks and Access to the Countryside Act 1949 the county council was required to show all public paths which were defined as “footpaths”, “bridleways” and “roads used as public paths”. This last term was never properly defined and has resulted in much confusion ever since. There was no requirement to record public vehicular highways.

In Hertfordshire each parish carried out a survey of the paths which were believed to be public. Sometimes additional surveys were carried out by the Ramblers’ Association or the Youth Hostel Association; or comments were made by them on the parish’s survey. The surveys once completed were sent to the County Council for collating and publishing as the Draft Map.

5a.2 What is shown by these documents in the area of the application route?

The Application Route (points 1 to 3) was not recorded as a right of way in the Bushey parish survey documents. The survey predates the 1967 Stopping Up Order referred to at 3. above. The survey describes and shows footpath 12 running north east between Finch Lane (at point 4 on the investigation plan) and Little Bushey Lane.

The annotations on the survey map indicate the location of structures on footpath 12: Rails or Bars (R); Cartbridge (CB); Stile (S) and Finger or Direction Post (D).

5a.3 Decision on Bushey parish survey

HCC decided that the parish survey documents do not provide any evidence relating to the Application Route between points 1 and 3 on the plan. They do provide evidence of footpath 12 commencing from a junction with Finch Lane at point 4 on the plan.

5b. Definitive Map Records – Draft, Provisional and First Definitive Map

Date: 1959-62

Ref: ROW

5b.1 Why we consider these documents important

The parish surveys were collated into the Draft Map and Statement. Notices were published advertising that the Draft Map and Statement had been produced so that the public (including landowners) could object to what was included or to what was omitted. Hearings were held to consider these objections and recommendations were made based on the evidence presented.

The Draft Map and Statement was amended following the hearings to produce the Provisional Map and Statement. As before, notice of the production of the Provisional Map and Statement was advertised but this time only landowners, lessees and tenants could apply to the quarter sessions court to amend the map – the public could not. The map and statement were then amended to reflect the court’s finding.

Please note that these records vary across the county as a full sequence of Draft Map and then Provisional Map has not always been kept.

After the amendments to the Provisional Map and Statement were made, the First Definitive Map and Statement for Hertfordshire was produced. The Map and Statement together provide conclusive evidence of the existence of those public rights of way shown at the 'relevant date' of 1953; i.e. the information shown was correct at that date.

5b.2 What is shown by these documents in the area of the application route?

There were no objections to the Application Route (points 1 to 3) not being included in the Draft Definitive Map. The Application Route was not recorded as a right of way in the First Definitive Map.

Footpath 12 is shown running north east between Finch Lane (at point 4 on the plan) and Little Bushey Lane. The Statement for footpath 12 describes the path as starting from Finch Lane.

5b.3 Decision on First Definitive Map

HCC decided that the First Definitive Map does not provide any evidence relating to the Application Route between points 1 and 3 on the plan. It does provide evidence of footpath 12 commencing from a junction with Finch Lane at point 4 on the plan.

5c. Definitive Map Records - Special Review

Date: 1969+ Ref: ROW

5c.1 Why we consider these documents important

The Countryside Act 1968 created the new designation right of way to be recorded - a "byway open to all traffic". This was the first time that vehicular rights were recorded on the Definitive Map. It also required county councils to carry out a Special Review to reclassify all "roads used as public paths" as either "footpaths", "bridleways" or "byways open to all traffic". In Hertfordshire the Special Review was started in 1977. This was later extended to include all the amendments to the network made by diversions since the first Definitive Map. It also showed if applications had been made to add or amend details of routes. Copies of the Special Review Draft Map showing all these changes were published, inviting objections from the public. Due to the number of objections received and not resolved, the Secretary of State ordered the abandonment of the Special Review in Hertfordshire in 1984. The Definitive Map and Statement was amended to show all changes which did not have outstanding objections, and these were shown on the Definitive Map and Statement produced in 1986.

5c.2 What is shown by these documents in the area of the application route?

The Special Review did not include any objections relating to the Application Route (points 1 to 3). The Application Route was not recorded as a right of way in the Special Review.

Footpath 12 is shown on the Special Review map running from a point north east of point 5 on the plan – the same way as the footpath is currently recorded. The Statement for footpath 12 at the time of the Special Review describes the path as commencing from Homefield Road by Finch Lane. The Special Review was subsequent to the 1967 Stopping Up Order (discussed at 3. above) and the Definitive Map had been amended to reflect its provisions.

5c.3 Decision on Special Review

HCC decided that the Special Review does not provide any evidence relating to the Application Route between points 1 and 3 on the plan. The Special Review does provide evidence that the record of footpath 12 had been amended to commence from Homefield Road pursuant to the Stopping Up Order.

6.0 Land Registry information – supplied by Applicant

Date: Transfer dated 29th May 1970 Ref: Land Registry

6.1 Why we are considering these documents

Title documents, available at Land Registry, provide not only information regarding land ownership but, for example, will also detail any rights affecting the land, any personal covenants given by the current owner to the previous owner and any restrictions on the disposals of the land.

Title HD63589 relates to a strip of land on the north east side of Finch Lane. The Schedule of Personal Covenants refers to a transfer, dated 29th May 1970, between The Royal Masonic Institution for Boys and The Council of the Urban District of Bushey. The Urban District Council entered into a covenant to use statutory powers, when the land is added to the highway, to re-position gates and fences along the line of the new boundary and indemnify the School against liability in respect of the works to Finch Lane.

A copy of the transfer document is not available at Land Registry.

6.2 Applicant's Comments

Mr Beney considers that title HD63589 relates to the southern section of the footway along Finch Lane and notes that the Schedule states '...when the said land is added to the said highway...'.

7. Land Charges Map (sheet 84) – Supplied by Applicant

Date: circa 1980 Ref: HCC

7.1 Applicant's Comments

"These highways maps were held by the County Council's land charges section and were marked-up copies of the circa 1970 Ordnance survey mapping. They show the routes that the county council then regarded to be county roads. The relevance of these records is that where a route is coloured yellow and numbered, it was considered by the county council to be a vehicular highway maintainable at the public expense. This means that a formal stopping up order (or perhaps a magistrates' court order ceasing the public maintainability) is needed if the route no longer has that status. Failing the finding of such an order, the highway should be publicly recognised by inclusion on the definitive map and statement. In districts where the UDC [Urban District Council] performed the maintenance, the lines are dashed instead of solid.

Prior to 2014, Hertfordshire County Council rarely put any footpaths or bridleways on the List of Streets maintainable at the public expense, even though many footpaths or bridleways are so maintainable. Therefore, this is evidence in favour of the proposition that

the application route was considered to be a vehicular highway maintainable at the public expenses in approximately 1980.”

Dr Wadey considers that the Land Charges Map shows the Application Route as a county road maintained by the district (depicted by yellow dashes).

8. Contemporary Evidence of Use

8.1 Why we consider the evidence important

Evidence is generally provided through the completion of evidence questionnaires by users and from information provided by the owner of the land. User evidence may support historic evidence of a right of way. However, where there is no historic evidence of a route it is possible for a public right of way to come into existence if it can be shown that members of the public have used it ‘as of right’ without interruption (usually) for a period of 20 years. In order for the public’s use of a route to have been ‘as of right’ it must have been:

- without force (e.g. not breaking down a fence to access the route)
- without secrecy (e.g. not just using the route when landowners were away)
- without permission (i.e. not having the permission of the landowner).

Unless there is historic evidence of rights as well, legislation requires there to be evidence of 20 years’ use which ends with a ‘date of challenge’ (section 31 of the Highways Act 1980). The ‘date of challenge’ is the date at which the landowner challenges the use of the route e.g. by putting up a notice. Where there is no evidence that use has been challenged, section 31(7B) of the Highways Act 1980 specifies that the date of application should be used as the end of the 20 year period.

Under common law a right of way can also come into existence in less than 20 years if it can be shown that there was dedication of the route by the landowner and acceptance of the route by the public.

Under Section 31, after a period of 20 years use, it is presumed that a right of way has come into existence. Where a landowner can produce evidence to show that they have taken steps to prevent the accrual of new public rights of way through use of a route by the public, no such right will be dedicated. Such steps must be overt and make the public aware of the landowner’s intentions. They can include placing and maintaining notices on site stating that the route is not public or that it is used with permission; by erecting and locking gates; or by telling people seen using the route that it is not public, etc.

In addition to placing notices on site, section 31(6) of the Highways Act 1980 (following on from the Rights of Way Act 1932) allows landowners to deposit a map and statement with the County Council showing the public rights of way across their land. Following this, declarations need to be made regularly to the effect that no additional ways have since been dedicated. It should be noted that making such deposits and declarations will not affect pre-existing rights.

Below is a summary of the evidence we have received, including a table showing the information provided in the user evidence forms.

8.2 Summary of Evidence

There are no section 31(6) HA 1980 deposits which affect the Application Route.

The application made by Dr Wadey is supported by a statement of use by non-vehicular traffic:

“I have inspected the path on six occasions in the last four years [prior to Apr 1995]. During that time, I have witnessed use of the path by walkers and joggers, and by cyclists. On one occasion, a horse-rider was using the path, heading from Aldenham Road towards Finch Lane. I have seen no use by motor vehicles. As the route is subject to vehicular rights (although many of these are suspended by the Traffic Regulation Order) but is mainly used by the public for the purposes to which footpaths and bridleways are used, it meets the definition of a byway, and should be so recorded on the definitive map and statement for the area.”

The application made by Mr Beney is supported by two user evidence forms:

User Number	no of years used	Start Yr	End yr	Type of Use	frequency	notices	permission	challenge	obstruction	width	additional comments
1	20	1975	1995	Foot & Bicycle	Weekly	No	No	No	-	-	No map attached to form. Does not refer to structures
2	13	1982	1995	Foot	Quarterly	No	No	No	-	-	No map attached to form. Does not refer to structures

In response to the public consultation, Mr Beney wrote to say that he had walked the Application Route in late July and had witnessed five others using it, including one cyclist and one jogger. Mr Beney also notes that he remembers the Application Route well as a vehicular road, having driven along it daily to Hemel Hempstead. He recalls that it was a bit narrow but he doesn't recall having to ever reverse and so it must have had surface for the width of two vehicles.

Mr Beney confirmed that the footway on the north east side of the Application Route was surfaced and lit for the safety of pedestrians in general and more particularly pupils of the two schools, now merged as Queens' School. Much of it is well trodden, but parts are overgrown. Mr Beney has some memory of a gate between the footway along the north east side of the Application Route and the school playing field near Aldenham Road, but the school fence is down in a good many places now and there is now no sign of the gate. The southern footway on Aldenham Road, from its junction with Finch Lane to the School entrance, was very narrow at one time (it is wider now thanks to the Greenways project) so direct access onto the school field was desirable not only for those coming along Finch Lane but also for those coming along Aldenham Road from the west.

8.3 Decision on user evidence

HCC decided that the user evidence in support of the applications provides evidence of use of the Application Route between 1972 and 1995 (when the evidence was collected). This

use, on foot, bicycle and on horseback reflects the terms of the 1973 Traffic Regulation Order (discussed at 3.2 above).

Conclusion

Section 66(1) of the Wildlife and Countryside Act 1981 defines a BOAT 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”. HCC has considered the judgement in the case of *Masters v. Secretary of State for the Environment, Transport and the Regions* [2001] Q.B. 151, in particular the need to interpret s.66(1) purposively and in its entirety (without reading any individual phrase in isolation, see p.163).

Analysis of the evidence has led HCC to conclude that the Application Route exists as a public vehicular highway and has the character of a part of the ordinary road network, rather than the character of a BOAT. A chief factor in this decision is that the Application Route is currently but not permanently subject to the 1973 Prohibition of Driving Order (see paragraph 3.2 above). Had the Order not been imposed in 1973, the Application Route would be used as part of the ordinary road network. Similarly, should the 1973 Order be rescinded, the Application Route would return to its former balance of user as a part of the ordinary road network. HCC therefore decided, in the light of these considerations, that the imposition of the 1973 Order does not change the underlying highway status of the Application Route.

This conclusion is supported by:

- the depiction of the Application Route on the earliest considered documents (the first edition OS map and the Inland Revenue map) in the same manner as other known roads and the fact that it is a through route linking two other public roads;
- the known actual vehicular use of the Application Route (for example, Mr Beney recalls his own vehicular use of the Application Route prior to the 1973 Order);
- the comments made by the Highways Development Engineer in 1995 regarding the dangerous junction with Aldenham Road and use of the Application Route as a rat-run; and
- the metalled carriageway, footway and street lighting along the Application Route.

HCC therefore decided that the Application Route does not fulfil the criteria of a BOAT to be recorded on the DMS and is correctly recorded on the List of Streets as public vehicular highway maintainable at public expense, pursuant to HCC's highways records from 1899 onwards.

Given this conclusion, HCC did not go on to consider the effect of section 67 Natural Environment and Rural Communities Act 2006 on the Application Route.

In the light of the above, HCC decided not to make an order.