

Wildlife and Countryside Act 1981

The Definitive Map and Statement of Public Rights of Way in Hertfordshire

To: Hertfordshire County Council
Of County Hall
HERTFORD
SG13 8DN

I, Dr Philip David Wadey of 12 Home Close, Corsham, Wiltshire SN13 0BE hereby apply for an order under section 53(2) of the Wildlife and Countryside Act 1981 modifying the definitive map and statement for the area by:

Adding the restricted byway from Old Fishery Lane just north of the gate across the route, on the northern side of the railway, (Point A), generally SSW to a junction with London Road opposite Box Lane
and shown on the map accompanying this application.

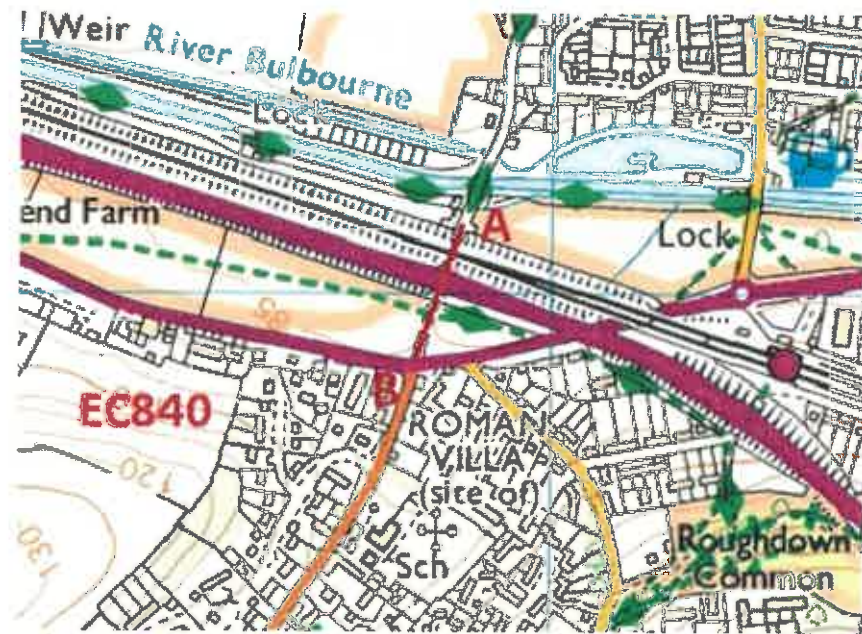
I attach copies of the following documentary evidence (including statements of witnesses) in support of this application:

- Ordnance Survey 1st edition 25" extract from map Hertfordshire 33 - 11.
- Ordnance Survey Book of Reference for Parish of Bovington.
- Ordnance Survey Book of Reference for Parish of Hemel Hempstead.
- Bartholomew's Half Inch Maps of England and Wales, Sheet 25.
- IR126/8/115 Inland Revenue Valuation plan, The National Archives.
- Hertfordshire County Council Land Charges map, circa 1980.
- The A41 London-Birmingham Trunk Road (Berkhamstead Bypass Side Roads) Order 1990.
- Hertfordshire County Council Gazetteer (2013 and 2017 versions).
- Applicant's statement.

Dated: 11 Dec 17

Signature: 

Applicant's Reference: EC840



Ordnance Survey 1:25000 scale map extract showing application route

Wildlife and Countryside Act 1981

Definitive Map Modification Order Application

For a route known as Old Fishery Lane from just N of the railway to London Road in the Parish of Hemel Hempstead to be shown as a Byway

Applicant's Reference: EC840

11 Dec 17

Quick reference path facts to assist the Surveying Authority in its investigation

OS County series map	Hertfordshire 33 – 11
Modern Definitive Map sheet(s)	65

1. My name is Phil Wadey. I am the applicant for the order. My rights of way experience stems from having been a volunteer access and bridleways officer for the British Horse Society since 1992, including 14 years as the Society's regional access officer for the East of England, and from my being a trustee of the Open Spaces Society.
2. This application is made because, on the cut off day,
 - a. The effect of s.53(1) and (2) Countryside and Rights of Way Act 2000 on a public path that existed prior to 1949, still exists on the cut-off date, and hasn't been a highway of a different description in between, and is not shown in the definitive map and statement at all is to extinguish all rights on that route. (This applies if the route is determined to be a footpath or bridleway.)
 - b. The effect of s.54A Wildlife and Countryside Act 1981 (as inserted by Sch 5 para 4 of the Countryside and Rights of Way Act 2000) on a route that carries public mechanically-propelled-vehicular rights and is not already on the definitive map as a highway of any description, is to prevent it from being recorded. (This applies if the route is shown to be a highway other than a footpath, bridleway or restricted byway.)
3. I believe this application will pass the planned Preliminary Assessment Test required by para 2 Sch 13A Wildlife and Countryside Act 1981 because:
 - a. This application statement includes explanations as to how the evidence applies to the application route, and
 - b. The application contains one or more of the following forms of supporting evidence:
 - (1) Legal document(s) relating specifically to the right of way that is the subject of the application (such as Railway Act, Inclosure Act and Award, Finance Act, Court Order or Main Roads Order evidence).
 - (2) Evidence of reputation in legal document(s), even though not written specifically about the right of way that is the subject of the application (such as Tithe Awards and Maps).
 - (3) Documentary evidence of expenditure that would be unlawful unless the way was a public highway, for example Highway Board records. Here it is the improvement caused by the 1990 Order.
 - (4) Maps and other documents which, over a period of time, and taken together, provide evidence of reputation that the order route is part of the public road network.

THE APPLICATION ROUTE

4. The application route is shown on the plan below:
 - a. Point A is the junction with Old Fishery Lane (public vehicular highway).
 - b. Point B is the junction with London Road (A4251) opposite Box Lane (B4505).
5. The application route is not currently shown on the definitive map of rights of way for Hertfordshire:

6. The application route is currently shown on the online Gazetteer as:
 - a. Point A to Point B is shown as route 2F946/10 (but was part of 2U880/10 in 2013)
7. The route's width is as shown uncoloured on the Inland Revenue Valuation Plan.



Ordnance Survey 1:25000 scale map extract showing application route

DOCUMENTARY EVIDENCE OF HIGHWAY STATUS

8. In order to be able to modify the definitive map and statement, the Surveying Authority needs to have a discovery of evidence which shows, on the balance of probabilities, that highway rights exist. The use of the 'balance of probabilities' test rather than 'beyond reasonable doubt' was confirmed by the High Court in *Todd, Bradley v SOS for EFRA* [2004] 4 All ER 497.
9. The courts have given guidance on how evidence of highway status is to be considered. In *Fortune and Others v Wiltshire Council and Another* [2012] EWCA Civ 334, Lewison LJ said, at paragraph 22,

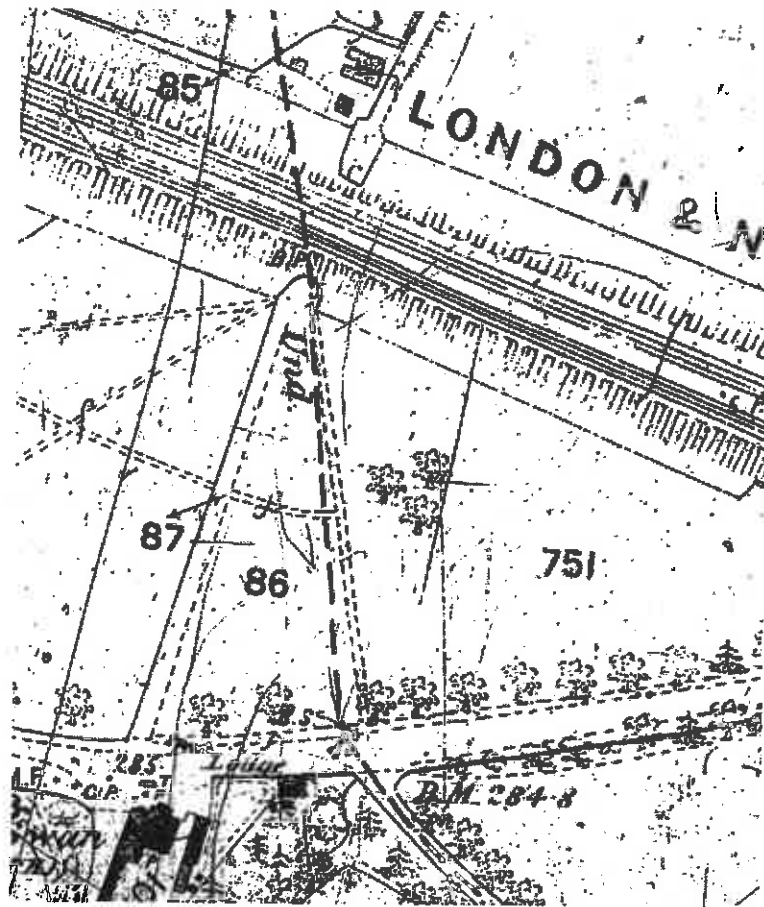
'In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

10. While no single piece of evidence is conclusive, the applicant believes that taken as a whole the pieces of evidence demonstrate highway reputation over many years, indicating that the route does indeed have highway status, and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights.

11. Ordnance Survey First Edition 25 inch.

- a. Date. OS sheet Hertfordshire 33 – 11 was produced in 1876. The Area Book for Bovingdon was published in 1876. The Area Book for Hemel Hempstead was published in 1878.
- b. Relevance. The early first edition county series (25 inch) OS maps contain valuable extra information when cross referenced to the Books of Reference, often called simply the ‘Area Books’, that were published to go with them. These are indexed by parish.
- c. Archive. Copies of the first edition Ordnance Survey 25” maps are held by the British Library. As well as originals, they have created microfiche copies, which can be inspected by the public. Copies can also be viewed at <http://www.old-maps.co.uk> and some sheets are available from the National Library of Scotland at <http://maps.nls.uk/os/25inch-england-and-wales/index.html>. The map and books of reference extracts below were obtained from the British Library.
- d. Meaning.
 - (1) The application route is shown on the OS map as land parcel number 87 in Bovingdon and land parcel 738 in Hemel Hempstead. At the time of the mapping, the parish boundary cut the route in two.
 - (2) In the entry for the Area Book for Bovingdon there is a description for land parcel 87. The description reads, “Road”.
 - (3) In the entry for the Area Book for Hemel Hempstead there is a description for land parcel 738. The description reads, “Road”.
- e. Assessment. The application route has been identified by the Ordnance Survey surveyor, a public official, as a ‘road’. The showing of the route on the map and the description in the Area Book are evidence of reputation and appearance at the time the documents were compiled.



Extract from the Ordnance Survey first edition 25" map of the area, sheet Hertfordshire 33 - 11.

85	·046	Garden, &c.	181	·786	ground, &c.
86	·786	Pasture.	182	9·494	Pasture.
87	·145	Road.	188	·200	Road.
88	·600	Wood.	184	2·728	Pasture.
89	1·178	Houses, gardens, &c.	185	1·694	Dead
an	4·776	Ornamental ground			

Extract from the Book of Reference to the Plan of the Parish of Bovington

685	·998	Houses, garden, &c.	736	·718	Water.
686	1·288	Orchard.	736	·266	Houses, gardens, &c.
687	·294	Houses, garden, &c.	737	·865	House, garden, &c.
688	·155	Houses and yard.	738	·872	Road.
689	2·255	Pasture, &c.	739	6·486	Pasture.
690	·143	Road.	740	4·919	Pasture.
691	6·667	Ornamental ground,	741	·440	Houses, gardens, &c.

Extract from the Book of Reference to the Plan of the Parish of Hemel Hempstead

12. Bartholomew's Half-Inch Maps of England and Wales

- a. Date. This map was published in 1903.

- b. Relevance. The map was made for sale to the public, particularly for tourists and cyclists, and so is unlikely to show routes that the public could not use. It has a key in which different types of route are distinguished.
- c. Archive. An original of Sheet 25 (Bedfordshire and Hertfordshire) is held by the National Library of Scotland (NLS) and can be viewed via http://maps.nls.uk/series/bart_half_england.html.
- d. Meaning. The application route is shown as an 'inferior' road. That is, according to the key, a road which 'is not to be recommended to cyclists'. The solid black dashes are the county boundary running along the route.
- e. Assessment.

(1) Although the map carries the standard disclaimer that the representation of a road or footpath is no evidence of a right of way, it remains the case that this map was produced for sale to the travelling and cycling public, and the roads were revised by the Cyclists' Touring Club. It seems likely that the disclaimer is to avoid the publishers from finding themselves in the midst of legal action, and that their true beliefs come from the fact that the CTC assessed the roads as suitable or 'inferior'. In addition, the application route was shown as this 'inferior' road rather than as a footpath or bridleway, and cyclists at the time of publication (1903) had no right to use bridleways, having been declared to be carriageways by s.85 Local Government Act 1888, so it is appropriate that at least a little weight be given to this document as evidence of vehicular status.

(2) The PINS Consistency Guidelines suggest that little weight can be given to this source, However, in *Commission for New Towns and Another v J. J. Gallagher Ltd* [2002] EWHC 2668 (Ch), the judge stated at para 108:

"Bartholomew's Map of England, 1901 and 1911 editions, has three categories of coloured roads. They are "first class roads", "secondary roads (good)", and "indifferent roads (passable)". There are two other categories, namely uncoloured roads and "footpaths & bridlepaths". Beoley Lane is marked in each of the two editions as uncoloured road. The legend to each of the Bartholomew maps states that "the uncoloured roads are inferior and not to be recommended to cyclists". The implication of the demarcation of Beoley Lane on these maps appears to me to be that they are public carriageways. First, each of the other four categories is a public highway. Secondly, in a somewhat paradoxical way, the indication in the description of the uncoloured road is that they can lawfully be used by cyclists, which, as at 1901 and 1911, would have meant that they were public carriageways. However, it is important to mention that there is a note to the effect that "the representation of a road or footpath is not evidence of the existence of a right of way". **I do not consider that that means that one can cast aside what one could otherwise glean from Bartholomew as being of assistance**, but the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps, or indeed on any map which does not have the positive function of identifying public carriageways."

(3) The conclusion is that at least some weight must be given to this source even if small.



Extract from Bartholomew's Map showing the application route as an 'inferior' road

<p>First Class Roads </p> <p>Secondary (Good) </p> <p>Indifferent (Passable) </p> <p>Footpaths & Bridlepaths </p>	<p>On all roads the sign indicates dangerous hills and where caution is required.</p> <p>The uncoloured roads are inferior and not to be recommended to cyclists.</p> <p><i>N.B. The representation of a road or footpath is no evidence of the existence of a right of way.</i></p>
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Extract from Bartholomew's Map showing the Key

13. Inland Revenue Valuation.

- a. Date. The valuation records were produced in the few years after 1910.
- b. Relevance. The Finance (1909–10) Act 1910 caused every property in England and Wales to be valued. The purpose was to charge a tax on any increase in value when the property was later sold or inherited. The valuation involved complicated calculations which are not relevant for highway purposes. However, two features do affect highways: public vehicular roads were usually excluded from adjoining landholdings and shown as 'white roads', and discounts could be requested for land crossed by footpaths or bridleways. This is known because s.35 of the 1910 Act provided,

“No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.”

We note that a highway authority was a rating authority. There was no obligation for a land owner to claim any of the other discounts available (applying for discounts was an entirely voluntary act), but Section 25 authorised the discount for footpaths and bridleways if they were claimed:

“The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and ... [other exclusions.]”

All land had to be valued unless it was exempted by the Act. There were harsh penalties for making false declarations, and Section 94 provided:

“If any person for the purpose of obtaining any allowance, reduction, rebate, or repayment in respect of any duty under this Act, either for himself or for any other person, or in any return made with reference to any duty under this Act, knowingly makes any false statement or false representation, he shall be liable on summary conviction to imprisonment for a term not exceeding six months with hard labour.”

As it appears to be a highway from other evidence, and no duty was assessed in the Inland Revenue Valuation, and the Inland Revenue were under a duty to collect all taxes applying, and hence value the land unless certain that an exemption applied, it is surely for anyone who argues that a different reason for the non-valuation of this white road to show which other exemption could have applied.

c. Archive. The extract below is from the records that were passed from the IR Valuation Offices to The National Archives at Kew. The National Archives document reference is IR 126/8/115.

d. Meaning. The extract below clearly shows the application route as a white road, separate from the adjoining hereditaments.

e. Assessment.

(1) As this land is unvalued, this suggests it belonged to a rating authority. As it is not held by a local authority or government department for any other known reason, this suggests that it belonged to a highway authority. Had it only been a bridleway, the Inland Revenue would have valued the land and allowed a deduction instead, since this would have resulted in a greater tax levy. Had it been held by a rating authority for another purpose there would be some evidence of that holding, yet none has been found.

(2) The legislation is sufficiently clear that anyone arguing that white road status means something other than the route is a public vehicular highway must show which other exception from valuation the route falls under.



Extract from the Inland Revenue Valuation Map

14. County Council Land Charges Map.

- a. Date. Photographs of these County Council records were taken by Steve Vaughn in the early 1980s.

- b. Relevance. 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.
- c. Archive. The originals of these records should still be available from the appropriate part of the County Council. At the time the photographs were taken, they were housed at The Old Court House, St Albans Road East, Hatfield AL10 0ES.
- d. Meaning. The application route is shown as an unclassified road that is in an area where the district council was undertaking the maintenance. As such, it is unnumbered.
- e. Assessment. 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.



Extract from the County Council's Land Charges Maps circa 1980

15. The A41 London-Birmingham Trunk Road (Berkhamsted Bypass Side Roads) Order 1990.
- a. Date. The order was signed by the authority of the Secretary of State in 1990.
- b. Relevance. The opening paragraph of the order says that the Secretary of State for Transport made the order in exercise of powers conferred by sections 12, 14, and 125 of the

Highways Act 1980 and other enabling powers. It is therefore an order that was able to make changes to highways in the vicinity of the trunk road being constructed or improved.

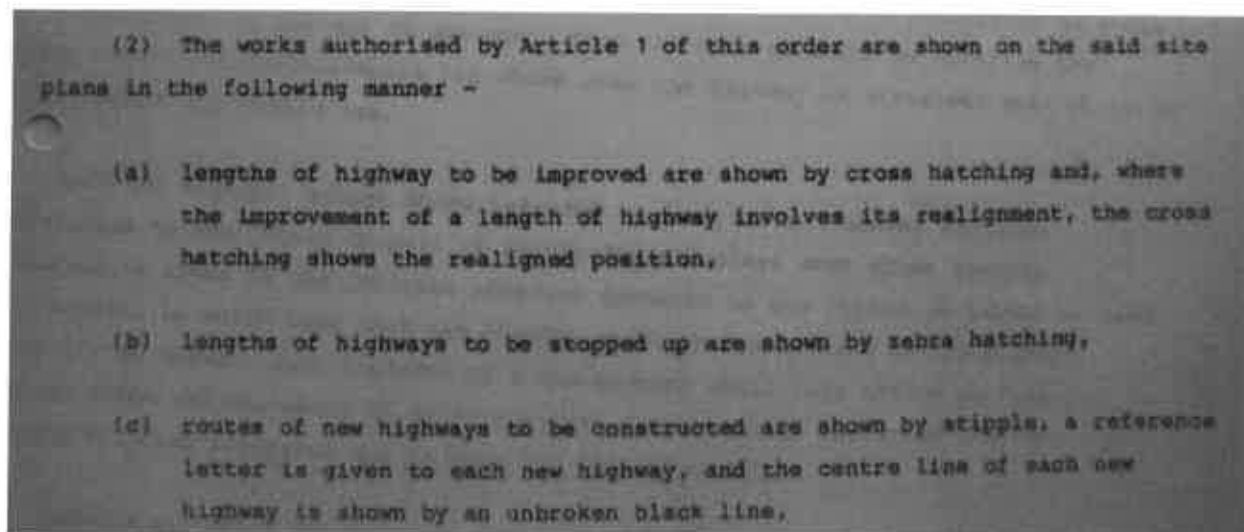
c. Archive. A copy of the order is held at The National Archives under reference OS78/590.

d. Meaning.

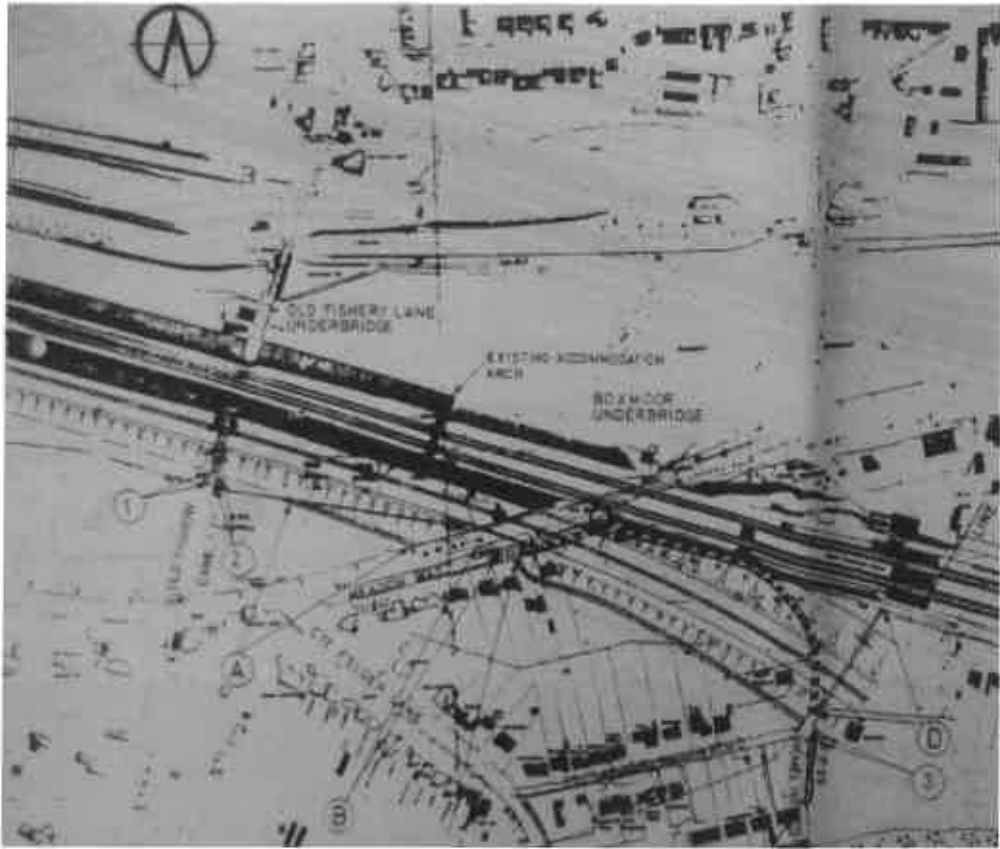
(1) The part of the application route that is affected by the A41 trunk road construction or improvement is shown cross hatched.

(2) Article 2 of the order provides that lengths of highway to be improved as shown by cross hatching, lengths to be stopped up are shown by zebra hatching and routes of new highway are shown by stipple.

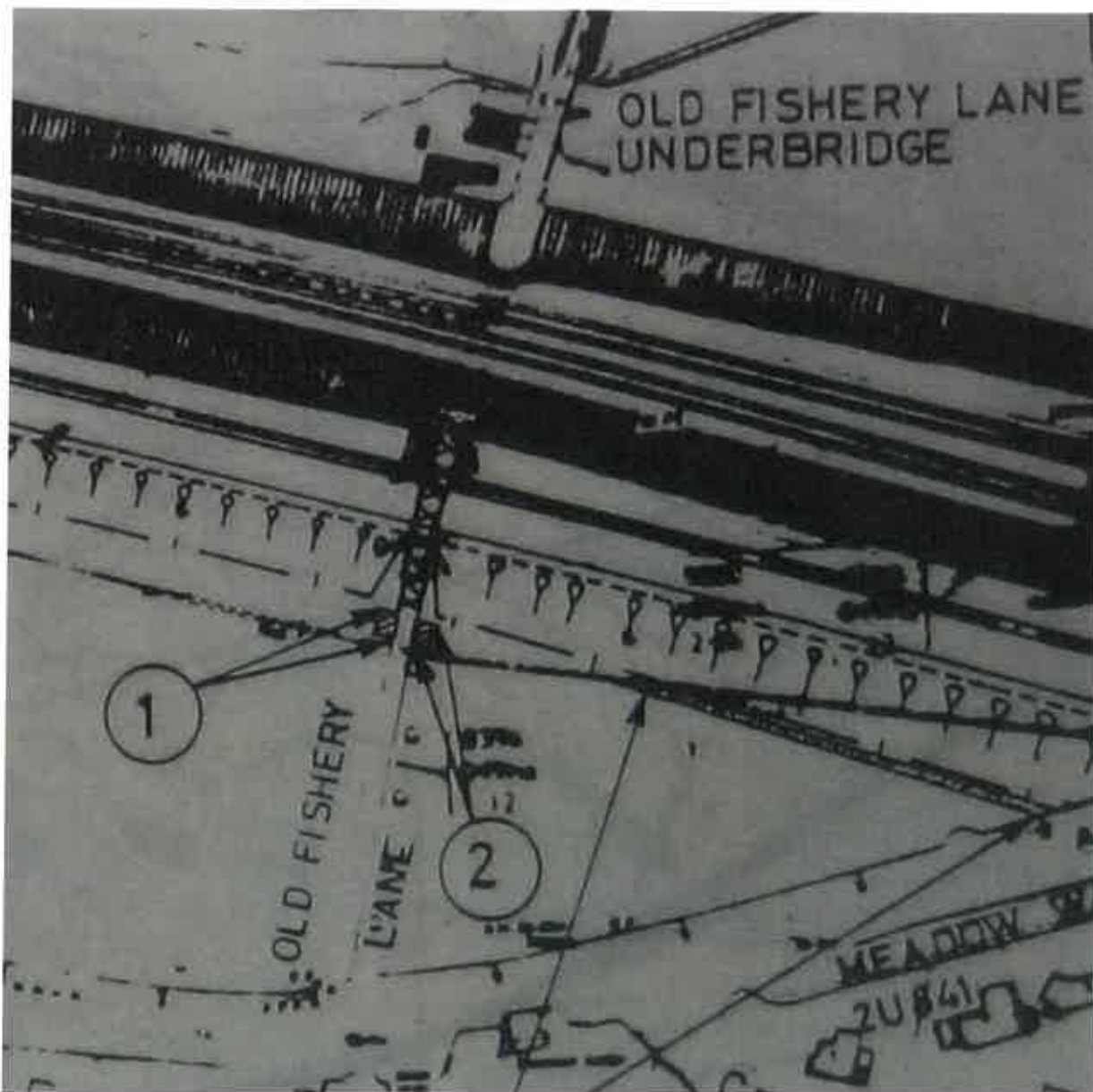
e. Assessment. The cross hatching of the route where it is close to the A41 indicates that this section at least was a public vehicular road. As there is nothing to indicate any change of status, it is likely that the whole route is also a public vehicular road.



Extract from the 1990 Order showing Article 2



Extract from the 1990 Order showing Site Plan 1 Hemel Hempstead



Close up of Previous Figure

16. HCC Gazetteer.

- a. Date. The first extract from the Gazetteer was taken on 10 Dec 2017 and the second extract was taken on 30 Nov 2013.
- b. Relevance. Section 36(6) Highways Act 1980 requires each highway authority to maintain a list of highways maintainable at the public expense. The Hertfordshire County Council online Gazetteer incorporates this list. It also shows some routes as 'non-maintainable' and hence is known as the Gazetteer rather than the List of Streets.
- c. Archive. The Gazetteer can be viewed at <http://www.hertfordshire.gov.uk/gazetteer>. The Gazetteer can be altered with no public involvement. The extract below is taken from a screen shot taken by the Applicant on the date stated above.

d. Meaning. The application route from A to B is shown (2017) as route 5F946/10. It is shown as having maintenance provided by the Hertfordshire County Council as Highway Authority. The route in 2013 was shown as part of route 2U880/10 and described as an ‘unclassified road’

e. Assessment. The applicant draws the conclusion that the county council currently considers the route to be a highway maintainable at the public expense. As the route is not currently in use as an ordinary road, it follows that it should be added to the definitive map and statement.



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Extract 1A from the County Council's online gazetteer showing route (2017)

Old Fishery Lane Hemel Hempstead [\[show on map\]](#)

Section description Chaulden Lane south to end by gate at by Railway Bridge adjacent Nos1 -2 Old Fishery Lane

Section ID 2U880/10 [\[show on map\]](#)

Class Unclassified Road - U

Hierarchy L2 Local Access

Length 337m

Area SW: 2-Dacorum Area

Maintenance Hertfordshire County Council as Highway Authority

Section description South of gate at Railway Bridge (adj Nos 1 - 2) to London Road (A4251)

Section ID 2F946/10 [\[show on map\]](#)

Class Not Allocated

Hierarchy No Code Allocated

Length 167m

Area SW: 2-Dacorum Area

Maintenance Hertfordshire County Council as Highway Authority

Extract 1B from the County Council's online gazetteer showing route (2017)



Extract 2A from the County Council's online gazetteer showing route (2013)

Old Fishery Lane Hemel Hempstead [\[show on map\]](#)
Section description Chaulden Lane S To Gate Just S Of Rway
Section ID 2U880/10 [\[show on map\]](#)
Class Unclassified Road - U
Hierarchy L2 Local Access
Length 398m
Area SW: 2-Dacorum Area
Maintenance Hertfordshire County Council as Highway Authority

Extract 2B from the County Council's online gazetteer showing route (2013)

CONCLUSIONS

17. Each piece of evidence presented is either evidence of reputation of vehicular highway rights, or consistent with there being vehicular highway rights, or indicates that a civil servant thought that there were vehicular highway rights.

18. While each document could possibly be explained away by another reason, there is no other reason that explains what all of the documents show. It is therefore more likely than not that the explanation for the evidence as a whole is that public vehicular highway rights existed at the times that the various documents were compiled.

19. As a result of the common law maxim 'Once a highway always a highway', in the absence of a stopping up order, it follows that vehicular highway rights existed immediately before the operation of the Natural Environment and Rural Communities Act 2006.

20. The applicant requests the surveying authority to add the route to the definitive map as a byway. The type of byway – restricted or open to all traffic – will depend on the application of the Natural Environment and Rural Communities Act 2006. In the event that motor vehicular rights have not been extinguished, the applicant notes that the route is clearly more used by the public for walking and riding than by motor vehicle, and so would meet the criterion for being recorded on the definitive map and statement.

Dr P D Wadey
Applicant