COMMONS AND RIGHTS OF WAY COMMITTEE

MINUTES of a meeting of the Commons and Rights of Way Committee held on Monday 17 March 2025 at the Committee Room - Shire Hall, Gloucester.

PRESENT:

Cllr Paul Baker	Cllr Graham Morgan (Vice-Chair)
Cllr Terry Hale	Cllr Robert Vines
Cllr Beki Hoyland (Chair)	Cllr Dr David Willingham
Cllr Mark Mackenzie-Charrington	

Apologies: Cllr Alex Hegenbarth and Cllr Vernon Smith

1. MINUTES

That the minutes of the previous meeting held on 10 December 2025 be approved as a correct record.

2. DECLARATIONS OF INTEREST

2.1 No declarations of interest were made.

2.2 At this juncture Cllr Dr David Willingham reported that he had undertaken an independent informal site visit to the application routes on Saturday 15 March 2025.

3. PUBLIC QUESTIONS ON APPLICATION(S)

No public questions had been received on the applications before the Committee.

4. MEMBER QUESTIONS ON APPLICATION(S)

No questions from members had been received on the applications before the Committee.

5. APPLICATIONS FOR MODIFICATION ORDERS FOR THE UPGRADING OF RESTRICTED BYWAYS FHE27 & FHE24 TO BYWAYS OPEN TO ALL TRAFFIC, HEWELSFIELD & BROCKWEIR PARISH, GLOUCESTERSHIRE (REF:573/11/115(2&3))

5.1 Jaci Harris, Asset Data Officer, gave a detailed presentation to the Committee aided by a PowerPoint presentation, which included photographs of the routes under consideration. (For information: A copy of the presentation slides have been uploaded to the Council's website.)

5.2 The Committee considered applications for Definitive Map Modification Orders (DMMO) for the upgrading of restricted byways FHE27 and FHE24 to byways open to all traffic (BOAT) in Hewelsfield & Brockweir Parish, Gloucestershire.

5.3 The Asset Data Officer reported that the two applications were submitted by the West Glos & Dean Forest Motorcycle Club on 23 November 2005. She explained that the Group sought to upgrade Restricted Byways FHE24 and 27 in Hewelsfield and Brockweir Parish to Byways Open to all Traffic (BOAT). A restricted byway was the highest classification of a way without public motor vehicle rights whereas a BOAT, as defined in Section 66 of the Wildlife and Countryside Act 1981, was "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". The applications therefore were to add public motor vehicle rights to the two existing routes.

5.4 The Asset Data Officer pointed out that on slide 3 the claimed route FHE24 was highlighted blue and connected two public highways: Bailey Lane and the Lane past Clifden Cottage. Claimed route FHE27 was highlighted pink and connected Bailey Lane and Mill Hill.

5.5 The Asset Data Officer explained that this application was for the upgrading of existing public rights of way. As such, their inclusion on the Definitive Map was conclusive evidence of their existence but was without prejudice to other rights. The Committee was advised therefore that its determination must be based upon the "balance of probability" test, i.e., it was considered more probable than not that the routes had higher rights than that of a restricted byway.

5.6 The Committee was informed that the applications were part of a number received over 2005 and 2006 to record public motor vehicle rights in advance of legislation which would seek to limit such use in the countryside whilst preserving routes that were considered to form part of the ordinary road network. These measures formed part of the Natural Environment and Rural Communities (NERC) Act 2006. Prior to this Act, no distinction was made between motorised and non-motorised vehicles such as horse drawn carriages. The NERC Act sought to curtail the future scope for establishing public rights of way for modern day motor vehicles where claims were based upon evidence of historic non-motorised vehicles. To achieve this, it extinguished all public motor vehicle rights over ways that, immediately before commencement (2 May 2006) were shown to carry a historic public vehicular right and were either not shown on a Definitive Map and Statement at all or were recorded to footpath, bridleway, or restricted byway status, unless they were saved by one of a number of exemptions. The NERC Act also ensured that in the future, a long period of use by motor vehicles would not give rise to public motor vehicle rights.

5.7 Members were informed that in 2006, the Council's Common and Rights of Way Committee, on the basis of officers' understanding of this new legislation at that time, approved the blanket rejection of the applications being considered today along with similar ones to re-classify existing restricted byways to byways open to all traffic due to the fact that under the NERC Act historical evidence of vehicular use, i.e., public carriage rights, would most likely only result in a restricted byway. As the current status was that of restricted byways, this would mean that no amendment to the legal record was necessary.

5.8 The Asset Data Officer explained that subsequent to the 2006 Common and Rights of Way Committee's determination, Defra issued a much-revised set of guidance notes concerning the NERC Act. These advised that each application must be evaluated individually giving consideration to each of the exemptions to extinguishment as set out under the NERC Act. This was the reason as to why these applications were before the Committee today.

5.9 The Asset Data Officer presented a series of photos of the claimed routes. The following points were raised:

5.9.1 There were no road markings or road signs on Section A-B-C (FHE27). This section had a stone/ mud surface (provided by local landowners and residents). It ran for 1.1km, and had an enclosed width of 3/4m, and served six residential properties. The physical characteristics of this application route changed however beyond the property Springvale at point B where it became unsurfaced, uneven and muddy with a reduced available width of approximately 1.5m, (although the enclosed track had an overall width between boundaries of approximately 4m).

5.9.2 The Section D-E (FHE24) was a natural continuation of FHE27 and had an overall length of approximately 275m and there were no road signs or markings. For the first 84m, FHE24 had a 3m wide tarmac surface facilitating the motor vehicle use by the adjacent property owners of Wells Farm and Hopewell Barn. The character of the route then changed, becoming narrow, uneven, and muddy.

5.10 The Asset Data Officer explained that firstly, consideration had to be given to whether there was sufficient evidence to show that Restricted Byways FHE24 and 27 carried historic public vehicular rights at the commencement of the NERC Act.

5.11 The Asset Data Officer drew members' attention to the documentary evidence detailed at section 9 of the report which dated back to 1830, and she explained that it pointed towards the historic reputation of the application routes as public carriage roads. Members were informed that there were two statutory processes to evidence this. The first being under the Finance Act 1910 process. Private land (hereditaments) and private roads were assigned a number so that they could be assessed for tax. However, deductions in tax could be claimed for public footpaths or bridleways crossing hereditaments. On slides 13 & 14 the application routes were shown uncoloured, unnumbered and excluded from adjacent numbered hereditaments and thus it could be inferred that they were considered to be public carriage roads. The second was that during the statutory process of drawing up the Definitive Map (on slides 15 and 16) the application routes were identified as "carriage roads used mainly as a footpath" (CRF), resulting in their designation on the Definitive Map as Roads Used as Public Paths (RuPPs). This was a status beyond that of footpath or bridleway, for which the intention under the National Parks and Access to the Countryside Act 1949, was to reflect unmetalled tracks which may or may not carry vehicular rights but were in practice suitable for, and mainly used by, walkers and horse riders. This definition proved to be unsatisfactory however because of the Act's failure to make it clear whether RuPPs were subject to public vehicular rights. Consequently, they were all subsequently

re-classified under Section 47 of the Countryside and Rights of Way Act 2000, to restricted byway.

5.12 The Committee was advised that those documents reinforced the notion that FHE24 and 27 were considered to be public vehicular highways, which had declined in importance to the point that they were used mainly on foot. No evidence had been found of stopping up or extinguishment orders affecting the historic vehicular rights and therefore, following the legal maxim, “once a highway always a highway”, the vehicular rights did not cease to exist, even if they were no longer being exercised.

5.13 The Asset Data Officer explained that if it was accepted that Restricted Byways FHE24 and 27 carried historic public vehicular rights (whether motorised or not) at the commencement of the NERC Act, it would be necessary to consider whether any of the exemptions found under Section 67(2) or 67(3) of the NERC Act preserved modern day public motor vehicle rights following the blanket extinguishment of such rights under Section 67(1). The Asset Data Officer detailed the 3 possible exceptions under Section 67(3) and explained that none of the conditions were deemed to apply and as a result, did not preserve public motor vehicle rights.

5.14 There were five exemptions to consider under Section 67(2). Members were informed that exemptions (b)-(e) were all deemed not to apply. The only exemption which could be considered was under (a), where ways had been lawfully used more by motor vehicles than by other users, e.g., walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement of the NERC Act (2001-2006). The DEFRA guidance notes explained that the intention of this exemption was to except highways that were part of the “ordinary roads network”.

5.15 The Committee was informed of the following sources of evidence, which would be considered as part of the determination of whether public motor vehicle use over this period, could be ascertained to be the main use of the application routes:

5.15.1 19 similar Public Path Evidence Forms were submitted by 19 individuals in support of the applications. The claimed use, dating back to 1972, was considered to be by members of the public and their use was “as of right”, without force, secrecy or permission. A total of 9 individuals claimed at least 20 years use of FHE27 and 10 individuals claimed at least 20 years use of FHE24 prior to the date of the DMMO application, (as permitted under Section 69 of the NERC Act, where there was no direct challenge to public use) and therefore this use was deemed to meet the statutory test of presumed dedication. When considering the stated exemption timeframe: 2001-2006, only 15 individuals claimed use of between 1-12 times per year and 4 individuals claimed use of 20+ times per year; this suggested infrequent use.

5.15.2 The comments of two adjacent landowners, Mrs Murphy and Ms Withers, to the initial 2005 notification of the application and 10 of the 21 respondents (including the parish council) to the 2024 consultation acknowledged some historic public motor vehicles use along FHE24 and 27. Their responses corroborated the

infrequency of use using the following terms; “very rare users”, “occasionally encountered”, “rare occurrence”, “light use” and “very limited traffic”. The Asset Data Officer outlined the comments made by Ms Withers of Wells Farm in 2005.

5.15.3 The motor vehicle use associated with the 6 properties adjacent to FHE27 and 2 properties adjacent to FHE24 over the 2001-2006 timeframe could be taken into account. Until the commencement of the NERC Act, as far as public rights of way classifications were concerned, no distinction existed between mechanically and non-mechanically propelled vehicles. The evidence of historic public vehicular use suggested that householders using motor vehicles to access their properties were exercising a lawful public right until the commencement of the NERC Act. This however was impossible to quantify.

5.15.4 The responses of all 23 individuals (2005 notification & 2024 consultation), of whom 16 claimed firsthand knowledge of the application routes over the 2001-2006 timeframe, suggested that the main use was by horse riders and dog walkers with occasional cyclists. This use was described as regular or frequent and whilst using the route they often saw or passed other walkers or horse riders. The Asset Data Officer explained that the essence of the responses to the 2024 consultation could be summed up in Mr Wilson’s email (paragraph 8.16 of the report) of 20 January 2024.

5.15.5 The evidence found within the internal Public Rights of Way Officer’s files contained a letter from the owners of Springvale, dated 4 April 2004 to Diana Organ MP, requesting assistance with the surfacing of FHE27 due to increased motor vehicle traffic.

5.16 The Asset Data Officer advised the Committee that the infrequent claimed and observed use by motor vehicles along FHE24 and 27, which became markedly more pronounced over the period 2004-2006, and then tailed off, did not provide sufficient evidence to outweigh the claimed regular and frequent use by walkers, horse riders and cyclists over the time period 2001-2006.

5.17 The Committee was informed that the “main user” test under Section 67(2)(a) was highly subjective and related to an elapsed period, meaning that it had become increasingly difficult to ascertain what the main use during 2001-2006 may have been over a period that was now between 18 and 23 years ago. The DEFRA Guidance Notes stated, “that the intention of the subsection was to except highways that are part of the “ordinary roads network” and suggested that the physical character (surfacing, signage, street furniture) of the application routes should be considered also. This was clarified by the Masters Court of Appeal judgement 2000 which directed that consideration should be given to the concept and character of a way. The judgement also concluded that current use was relevant as to whether a way should be recorded as a BOAT, although the balance of user was not wholly conclusive.

5.18 The Asset Data Officer explained that the photos suggested that the application routes’ character was that of a BOAT, whose use would more likely be by walkers and horse riders than motor vehicles using the ordinary road network. However,

the main use of FHE24 and 27 by the public with motor vehicles was not considered to outweigh that of other user groups such as walkers and horse riders and therefore mechanically propelled vehicular (MPV) rights were not deemed to have been preserved by virtue of Section 67(2)(a).

5.19 In concluding her presentation, the Asset Data Officer explained that it was considered that FHE24 and 27 were deemed to have carried historic public carriage road rights at the commencement of the NERC Act. By virtue of Section 67(1) of the NERC Act, public MPV rights had been extinguished. The available user evidence suggested that none of the Section 67(2) or (3) exemptions had preserved public MPV rights. If this assessment was accepted, then Restricted Byways FHE24 and 27, currently enjoyed the highest classification possible without motor vehicle rights and this reflected their historic vehicular use. Where existing unrecorded use of ways by MPV were extinguished under Section 67(1) NERC Act, a private right was retained under Section 67(5) on the basis that use was reasonably necessary to enable a person with an interest in the land to obtain access to it. This meant that people relying on a restricted byway for access to premises would retain a private right of vehicular access. Therefore, the recommendation was that no order be made to re-classify Restricted Byways FHE27 or FHE24 to BOAT on the Definitive Map and Statement of Public Rights of Way.

5.20 One member questioned whether the private right of vehicular access which enabled a person with an interest in the land to obtain access to it, could in effect, create a situation whereby public motor vehicles were permitted to use the route. In response, the Asset Data Officer explained that this was not possible, as the NERC Act had ensured that in the future, a long period of use by motor vehicles would not give rise to public motor vehicle rights.

5.21 Cllr Dr David Willingham explained that on his site visit he had parked at point C and walked from point C to B to A. He had also walked from point D to E. He reported that he had observed differences in the physical characteristics of the routes, as some parts appeared not to be wide enough or suitable for a car. He felt that it would be dangerous for people using the routes on foot or on horseback if motor vehicles were using the routes too. He commented that having considered the evidence and by applying the probability test, he would support the officer's recommendation.

5.22 In response to Cllr Dr Willingham's comments, the Asset Data Officer explained that whilst she acknowledged the concerns around safety for walkers, riders and horses, using the routes alongside any motor vehicles, these issues could not be taken into account as part of the Committee's determination of the applications.

5.23 In response to a question, the Asset Data Officer clarified that the claimed routes were not on the List of Streets as publicly maintainable highways. The section between points A-B-C had been surfaced and maintained by the owners of the adjacent properties.

5.24 Members of the Committee considered all the evidence, it was proposed, seconded and

Resolved
That no order be made to re-classify Restricted Byways FHE27 and FHE24 to byways open to all traffic on the Definitive Map and Statement of Public Rights of Way.

6. APPLICATION FOR A MODIFICATION ORDER FOR THE UPGRADING OF RESTRICTED BYWAY FSB65A TO A BYWAY OPEN TO ALL TRAFFIC, ST BRIAVELS PARISH, GLOUCESTERSHIRE, REF:573/11/209(14)

6.1 Julie Haworth, Asset Data Officer gave a detailed presentation to the Committee aided by a PowerPoint presentation, which included photographs of the route under consideration. (For information: A copy of the presentation slides have been uploaded to the Council's website.)

6.2 The Committee considered an application for a Definitive Map Modification Order (DMMO) for the upgrading of Restricted Byway FSB65A to a byway open to all traffic (BOAT) in the St Briavels Parish, of Gloucestershire. On the plan at Appendix JAH2 the claimed route was shown running from points A-B by a solid blue line which showed it connecting from publicly maintainable highway 40017 at point A descending towards point B where FSB65A ended and met FSB51. The claimed route was dual classified, being designated on the Definitive Map as Restricted Byway FSB65A and separately recorded on the List of Streets as the publicly maintainable highway 43031.

6.3 The Committee was informed that the application was submitted by the West Glos and Dean Forest Motorcycle Club on 23 November 2005.

6.4 The Asset Data Officer presented a series of photographs of the claimed route (following an inspection of the area on 11 April 2023), which detailed the character of the path.

6.5 The Asset Data Officer explained that to ascertain whether the application route provided evidence of a historic public carriage road rights at the commencement date of 2nd May 2006 of the NERC Act, consideration would need to be given to documentary evidence. She explained that three documents pointed towards the historic reputation of the application route as a public carriage road.

6.5.1 On the Inland Revenue map under the Finance Act of 1910 the claimed route was shown uncoloured, un-numbered and excluded from adjacent land parcels and therefore exempt from tax. There was an annotation at point B but it was unclear as to what it was displaying, i.e. structure or change of surface etc. As FSB65A was excluded from adjacent land, it suggested that the surveyor considered it to be a public road.

6.5.2 On the 1st edition Ordnance Survey map of 1830, FSB65A, was shown by means of two solid lines (neither highlighted). No barriers were shown at either end of the

claimed route, and it was shown in a similar manner and connecting freely with the road network of the day.

6.5.3 The statutory process of drawing up the Definitive Map, identified the claimed route as a "CRF" "carriage road used mainly as a footroute". The route was shown by an orange line, numbered 65a, indicating that the route was a RuPP. The accompanying Draft Statement described FSB65A as a CRF.

6.6 The Asset Data Officer explained that in conclusion, documentary evidence dating back to 1830, pointed towards the historic reputation of FSB65A as a public carriage road whereby the actual evidence of dedication was lost in the mists of time. The physical representation of FSB65A within the documentary evidence reinforced the notion that FSB65A was considered to be a public vehicular highway, which had declined in importance and was being used mainly by walkers.

6.7 It was reported that no evidence had been found of a stopping up or extinguishment order extinguishing the historic vehicular rights and therefore, following the legal maxim, "once a highway always a highway", the vehicular rights did not cease to exist, even if they were no longer exercised.

6.8 The Committee was informed that the claimed route was extinguished under Section 67(1) of the NERC Act and none of the exemptions under Section 67(3) of the NERC Act were deemed to apply. Exemptions under Section 67(2)(b)(c)(d) and (e) were similarly deemed not to apply.

6.9 The Asset Data Officer explained that in considering exception (67)(2)(a) the main lawful use meant that the way had to first carry a public vehicular right at the commencement of NERC (2 May 2006). There was no evidence the right was stopped up, FSB65A was deemed to satisfy this condition of main lawful use. Secondly, the main use of FSB65A between 2001 and 2006 had to be by motor vehicles (as opposed to other categories of user such as walkers, cyclists, horse riders and horse-drawn vehicles). Motor vehicular use in itself did not preserve the right as such use must be greater than the other uses.

6.10 The Committee was informed that the applicant provided 11 Public Path Evidence Forms completed by 11 members of the public in support of this application. The claimed public motor vehicle use dated back to 1972 and 10 individuals claimed use exceeding 20 years prior to the date of the DMMO application. The claimed use of all 11 individuals was deemed to be "as of right" (without force, secrecy, or permission) and without interruption. As such it was considered that this use would constitute a claim of presumed dedication under Section 31 of the Highways Act 1980.

6.11 The public evidence forms suggested that motor vehicle use of FSB65A over the 2001-2006 NERC timeframe was infrequent: There were 9 individuals claiming between 1-20 times use per year, 1 individual 21-50 times per year (on average weekly) and 1 individual did not supply information of frequency.

6.12 The Asset Data Officer drew members' attention to the consultation responses at paragraph 10.11 of the report specifically Councillor McFarling's and St Briavels Parish Council's.

6.13 The Committee was informed that the main user test was highly subjective and related to an elapsed period, meaning that it had become increasingly difficult to ascertain what the main use may have been over a period that was now between 19 and 24 years ago. To preserve public motor vehicle rights along FSB65A, the applicant must show, on the balance of probabilities, that the main use of the route, over the relevant timeframe 2001-2006, was by motor vehicles. A total of 11 individuals, by their own evidence, claimed infrequent use along FSB65A with motor vehicles over this period. This appeared to be corroborated by the parish council who were under the impression that only local traffic used the claimed route in exercising a lawful public motor vehicle right to access their properties.

6.14 The Asset Data Officer explained that bearing in mind the DEFRA Guidance to the NERC Act which suggested that a pragmatic approach be taken, the County Council had taken the view that the main use between 2001 and 2006 could be inferred from its physical character (surfacing, signage, street furniture). The Masters judgement of (2000) also related to the character of the way whereby a BOAT carried a public vehicular right but what distinguished it from an ordinary road was that it had to be more suited for use by walkers or horse riders than vehicles.

6.15 The Asset Data Officer explained that the claimed route was surfaced in its entirety and was currently also recorded on the List of Streets as part of the 43031 publicly maintainable highway. It was a maintained surfaced highway, running between hedges, and serving a couple of properties before it connected to FSB51. FSB65A was considered to meet the character of today's ordinary roads network and MPV rights were therefore deemed to have been preserved over the application route by virtue of Section 67(2)(a) of the NERC Act.

6.16 She added that where existing unrecorded use of ways by mechanically propelled vehicles were extinguished under Section 67(1) of the NERC Act, a private right was retained under Section 67(5) on the basis that use was reasonably necessary to enable a person with a whole/part interest in the land to obtain access to the land.

6.17 In concluding her presentation, the Asset Data Officer explained that it was considered that FSB65A was deemed to have carried historic public carriage road rights. By virtue of Section 67(1) of the NERC Act, public MPV rights had been extinguished. The available user evidence suggested that MPV rights were deemed to have been preserved over the claimed route (A-B). If the Committee accepted this assessment, then it was recommended that no order be made to upgrade Restricted Byway FSB65A to a BOAT on the Definitive Map of Public Rights of Way between points A-B; and that that motor vehicular rights had been preserved over the length of application route A-B, by virtue of Section 67(2)(a) of the NERC Act and the List of Streets should be amended to reflect these rights.

6.18 In response to questions the Asset Data Officer explained that the West Glos & Dean Forest Motorcycle Club would have submitted the applications in order to preserve motor vehicle rights over the claimed routes. If the Committee resolved that motor vehicular rights had been preserved over the length of this application route A-B, by virtue of Section 67(2)(a) of the NERC Act then the List of Streets would be amended to reflect these rights.

6.19 Cllr Dr David Willingham reported that on his site visit he had observed that the route was metalled and had the physical characteristics of a road, with some tyre tracks along it. He commented that he would support the officer's recommendation.

6.20 Members of the Committee considered all the evidence, it was proposed, seconded and

Resolved

- That no order be made to upgrade Restricted Byway FSB65A to a Byway Open to All Traffic (BOAT) on the Definitive Map of Public Rights of Way between points A-B.

- That public motor vehicular rights have been preserved over the section of application route A-B, by virtue of Section 67(2)(a) of the Natural Environment and Rural Communities Act 2006 (NERC). By having the character of the Ordinary Road Network (ONR), the List of Streets should be amended to reflect these rights.

7. PUBLIC QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

No public questions had been received about the matters which were within the powers and duties of the Committee.

8. MEMBERS' QUESTIONS - ABOUT THE MATTERS WHICH ARE WITHIN THE POWERS AND DUTIES OF THE COMMITTEE

No questions from members about the matters which were within the powers and duties of the Committee had been received.

9. DELEGATED DECISIONS

Resolved:

That the Committee noted the reports.

CHAIR

Meeting concluded at 11.06 am