

WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53, SCHEDULE 14

APPLICATION TO:

ADD A BRIDLEWAY AT COLD HARBOUR LANE
IN THE PARISH OF HARDINGTON MANDEVILLE

Application: 587M
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Date: October 2019

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1. Introduction

- 1.1. On the 16th June 2009, Stephanie Wheeler, on behalf of South Somerset Bridleways Association, made an application under Schedule 14 and Section 53(5) of the Wildlife & Countryside Act 1981, for an Order to amend the Definitive Map and Statement by adding a bridleway over the route known as Cold Harbour Lane, Hardington Mandeville. The route in question is shown on drawing number H077-2018 (Appendix 1).
- 1.2. A public bridleway is a right of way which can be used by any member of the public on foot, leading or riding a horse, or on a bicycle. In some instances there is also a right to drive livestock.
- 1.3. The purpose of this report is to establish what public rights, if any, already exist. There is currently no recorded public right of way along the claimed route on the Definitive Map.

2. The Application

- 2.1. The application is based on documentary evidence and includes extracts of the following documents:
 - *Current Map*
 - *Land registry Report*
 - *Photos of each end of the route*
 - *1822, Greenwoods Map*
 - *1841, Hardington Mandeville Tithe Map*
 - *1862 Crewkerne Highway District*
 - *1901, OS Object Name Book*
 - *1910, Finance Act Map*
 - *1927, Bartholomew's Map*
- 2.2. No user evidence was submitted with the application.

3. Description of Route

- 3.1. The 'application route' covers the majority of the length of Cold Harbour Lane, excluding a 70m section at the north eastern end. This 70m excluded section is already classified as a public road. The application route is shown coloured blue and annotated with A to E, in Appendix 1.
- 3.2. The application route is a total length of approximately 720 metres. In addition the route varies in width with two spurs, as referenced 'C' and 'D' in appendix 1. It also has two connecting public footpaths which are; 'Y10/38' and 'Y10/37'.
- 3.3. Photographs of the claimed route taken on 12th April 2019, are located in Appendix 2.
- 3.4. A land registry search was carried out on the 15th March 2019 which identified that there were no registered owners for the claimed route. The Common Law presumption is that, in the absence of any evidence to the contrary, adjoining landowners own up to the centre point of a highway. The landownership is shown at Appendix 3.
- 3.5. The case file, including the application, accompanying evidence and consultation responses can be viewed by Members by appointment.

4. Relevant Legislation

4.1. The Wildlife and Countryside Act 1981 specifies in Section 53(2)(b), that the County Council must keep the Definitive Map and Statement under continuous review and must make such modifications as appear to them to be requisite in the light of certain specified events. In this case 53(3)(c)(i) is of particular relevance.

4.2. Section 53(3)(c)(i) states that the Map and Statement should be modified where the County Council discover evidence which, when considered with all the other available evidence, shows:

“that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic”.

4.3. Later in the same Act section 53(5) enables any person to apply to the Authority (Somerset County Council) for an Order to be made modifying the Definitive Map and Statement in respect of a number of ‘events’ including those specified in Section 53(c)(i) as quoted above. On receipt of such an application the County Council is under a duty to investigate the status of the route. It was under these provisions that the South Somerset Bridleways Association made their application.

4.4. The purpose of Section 53 of the Wildlife and Countryside Act 1981 is to record or delete rights rather than create or extinguish rights. Practical considerations such as suitability, the security and wishes of adjacent landowners cannot be considered under the legislation.

4.5. Section 32 of the Highways Act 1980 states that:

“a Court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give weight thereto as the Court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled and the custody in which it has been kept and from which it is produced”.

- 4.6. The Natural England and Rural Communities (NERC) Act 2006, Section 66 and 67, extinguished rights for mechanically propelled vehicles (MPV's) over any routes that were recorded on the Definitive Map as footpath, bridleway or restricted byway and over any routes that were not recorded on the Definitive Map or the list of highways maintained at public expense. There are a few exceptions to the general rule outlined above, none of which appear to apply in this case. There is therefore no question of rights for MPV's existing over the claimed route.
- 4.7. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence). The decision is a quasi-judicial one in which the decision maker must make an objective assessment of the available evidence and then conclude whether or not the relevant tests set out above have been met.

5. Documentary Evidence

- 5.1. Listed below is the documentary evidence sources examined as part of this investigation. In some cases it has not been possible to view the original copy of a document and it has instead been necessary to rely entirely on an extract supplied by the applicant. Where this is the case the words 'extract only' follow the title of the document. If it has been necessary to give those documents less weight on account of them only being viewed in part this has been made clear in the description and interpretation of the evidence.
- 5.2. Throughout discussion of the evidence comparison is frequently made to the way in which other routes in the immediate vicinity of Cold Harbour Lane have been recorded. Where other rights of way, roads or physical features have been referred to their location has been identified on the plans in Appendix 4.

5.3. Tithe Records

Explanation of the type of evidence

- 5.3.1. Tithe maps and the written document which accompanied them, (the apportionment) were produced between 1837 and the early 1850's in response to the Tithe Commutation Act 1836 to show which landowner owned which pieces of land and as a result how much they owed in monetary terms. The tax replaced the previous 'payment in kind' system where one tenth of the produce of the land was given over to the Church.
- 5.3.2. A map was produced by the Tithe Commissioners which showed parcels of land with unique reference numbers, and these were referred to in the apportionment document, which contained details of the land including its ownership, occupation and use.
- 5.3.3. Public roads which generated no titheable produce were not generally given a tithe number. For the same reason some private roads were also not liable to a tithe. However, both public and private roads could be subject to a tithe, if for instance, they produced a crop e.g. for grazing or hay cut from the verges
- 5.3.4. The Map and Apportionment must be considered together. Roads are sometimes listed at the end of the apportionment; there is also sometimes a separate list for private roads.
- 5.3.5. Tithe maps provide good topographical evidence that a route physically existed and can be used to interpret other contemporary documents but were not prepared for the purpose of distinguishing between public and private rights and so tend to be of limited weight.

Evidence

5.3.6. **1843 Hardington Mandeville Tithe Map**

Source: Somerset Heritage Centre

Reference: D/D/RT/M/408

Appendix number: 5

5.3.6.1. The tithe map for Hardington Mandeville includes a clear depiction of the application route. It is not shown to have a tithe number nor is it coloured. While there are a number of reasons why this may have been the case, the most plausible is that the land did not generate any titheable produce.

5.3.6.2. The application route is depicted with its width varying along its route. Two additional spurs ('spur 1' and 'spur 2' as shown on appendix 1) are shown to the south of the route. The application route also connects to two much thinner routes which lead in a north-westerly and northerly direction from point D and point B respectively. Both of those routes are now recorded as public footpaths.

5.3.7. **Hardington Mandeville Tithe Apportionment**

Source: Somerset Heritage Centre

Reference: D/P/hard.m/3/2/1

Appendix number: *not included*

5.3.7.1. The Tithe Apportionment lists the plot numbers, as shown on the map, with details of the registered keeper of the plot (the landowner and the occupier – who is working the land).

5.3.7.2. The application route is shown (on the tithe map) next to 55 different plots which are registered under 43 different occupiers.

Description and interpretation of evidence

5.3.8. The application route is clearly marked on the Tithe Map indicating it physically existed at the time these documents were drafted. It also shows what are now recorded as footpaths Y10/37 and Y10/38 joining the route.

5.3.9. The application route provided access to land for 43 different people, the tithe documents do not state whether this would have been via a public right or by a private right. However, as the apportionment indicates that the 40+ fields connected to the application route are arable, it is likely the application route was needed to take horse and cart traffic and therefore been physically capable of doing so.

- 5.3.10. On the map, the route itself is shown between solid lines and is not numbered or specifically referred to within the apportionment. This indicates the land was not considered to generate any titheable produce. However, both public and private roads might be unproductive and/or produce no crop, and would therefore not need to be numbered, valued or recorded in the apportionment.
- 5.3.11. Furthermore, while it is true that routes which were almost certainly highways are shown in the same way as the application route, so are other ways which are unlikely to have carried public rights (e.g. the cul-de-sac to the north of point B, which continues on from the road called 'Hill End' off of the western end of footpath Y10/37).
- 5.3.12. The tithe documents provide excellent evidence as to the existence of the route in 1843 and also that it would have been capable of carrying vehicles. However, they were not intended as a record of public rights and as such are less helpful in determining the status of the given route. In this case, even when read together, the map and apportionment give little indication as to why the claimed route was considered unproductive; i.e. did it carry public or just private rights?
- 5.3.13. For all of the above reasons these documents suggest that Cold Harbour Lane was used for vehicular access but give little indication as to whether or not that access was by way of a public or a series of private rights.

5.4. **Ordnance Survey Maps**

Explanation of the type of evidence

- 5.4.1. The Ordnance Survey (OS) are generally accepted as producing an accurate map depiction of what was on the ground at the time of a survey.
- 5.4.2. OS Maps cannot generally be regarded as evidence of status; however, they indicate the physical existence of a route at the date of survey.

Evidence

- 5.4.3. **1887 OS County Series 1st Edition Map**
Sheet No: LXXXIX.11
Survey Date: 1886
Scale: 1:2500
Appendix: 6.1

- 5.4.3.1. The map depicts the application route as white, between solid parallel lines. Some of the other routes shown on the same map are coloured sienna.
- 5.4.3.2. The map also shows a variation along the width of the application route, with a few trees or vegetation on either side at various points. In addition to this, the map depicts spurs 1 and 2 coming off of the application route as cul-de-sacs, which extend in a southerly direction for a short distance. There is also a section, depicted with a series of dashes near point D, which could mean an embankment.
- 5.4.3.3. At point A the application route is traversed by a pecked line. This is most likely to indicate a feature which would not have been an obstruction to pedestrians¹.
- 5.4.3.4. Three sets of parallel pecked lines meet the application route. These are likely to indicate the presence of paths or unfenced tracks. These tracks connect to the application route, one connects to the south of the route approximately half way between points A and B, the other two are from a more northerly direction, one at point B and another near point E.
- 5.4.3.5. The parallel pecked lines near point A are annotated F.P. suggesting the route was not traversable by horses or wheeled traffic². The annotation is indicative of the physical character of a route rather than its status. As such it would be unsafe to conclude that the parallel pecked lines indicate a public footpath simply because they are marked F.P.
- 5.4.3.6. The parallel pecked lines leading north and northwest from points B and E broadly correspond with routes currently recorded on the Definitive Map as footpaths (Y10/37 and Y 10/38). The significance of this is dealt with later in the report.
- 5.4.3.7. Near point E on the map, there is a circle of blue, likely to depict a pond. It is located at the far eastern end of the application route, where it meets a public vehicular highway. It is situated within the solid parallel lines but leaves enough space to easily allow all types of traffic past it.

5.4.4. **1898 OS Revised New Series**
 Sheet No: 312
 Survey Date: 1884-86; Revised: 1896
 Scale: 1:63360
 Appendix: 6.2

¹ Oliver, R [2005]. Ordnance Survey maps: a concise guide for historians, 2nd ed. London: Charles Close Society. Page 97.

² The Planning Inspectorate Definitive Map Orders (DMO Consistency Guidelines), 6th revision May 2015, Section 12, page 7, 12.20.

5.4.4.1. Although based on the same survey and published at a smaller scale than the first edition county series map, the revised new series map does include more detail regarding the character of the ways shown on it.

5.4.4.2. The application route is shown on the map by narrowly spaced parallel lines. The OS used this symbol to record both public and private roads.

5.4.5. **1903 OS County Series 2nd Edition**

Sheet No: LXXXIX.11

Survey Date: 1886; Revised: 1901

Scale: 1:2500

Appendix: 6.3

5.4.5.1. The application route is depicted on the second edition county series map in much the same way as it is on the first edition map. However, there are some important differences.

5.4.5.2. Unlike the earlier first edition, the second edition is not in colour. However, the application route continues to be depicted with a varying width and with spur 1 and 2 heading off of the route for a short distance.

5.4.5.3. The route which had been shown by a set of parallel pecked lines running south from the application route between points A and B is not shown on the second edition. Instead a similar set of pecked lines annotated with 'F.P.' join the application route off of the southern end of spur 1.

5.4.5.4. Parallel pecked lines connected to the application route continue to be shown running north from point B and north west from point E. Unlike on the first edition map, the route running north from point B is now also annotated F.P.

5.4.6. **1929 OS County Series 3rd Edition**

Sheet No: LXXXIX.11

Survey Date: 1886; Revised: 1928

Scale: 1:2500

Appendix: 6.4

5.4.6.1. Similar to OS Maps already viewed, the application route is depicted with a varying width along its route. Also shown are spur 1 and 2 as well as 3 paths shown by parallel pecked lines connecting to the route.

5.4.7. **1946 New Popular Edition – Taunton and Lyme Regis**

Sheet No: 177

Revised: 1930

Scale: 1:63360 (one inch to a mile)

Appendix 6.9

- 5.4.7.1. The application route is depicted as a 'Minor Road in towns. Drives and Unmetalled Roads'.

Description and interpretation of evidence

- 5.4.8. The application route is clearly shown on all of the OS maps considered by this report. This is strong evidence that it has physically existed since at least 1886.

- 5.4.9. The application route has consistently been depicted as a minor road or drive. While the route may not have been in good condition, OS mapping suggests that it was physically capable of taking the vehicular traffic of the day. However, this depiction was used for both public and private roads.

- 5.4.10. While the larger scale maps do show various topographical features on the route (e.g. a pond, embankment and change of surface) none of these would have necessarily restricted vehicular use of the route either in a public or private capacity.

- 5.4.11. Based on the above, the application route appears to have been capable of supporting vehicular traffic from at least 1886 onwards. However, in themselves, these OS Maps do not provide evidence for or against public rights along the application route. Since 1888 all OS maps have carried a disclaimer to the effect that they should not be used as evidence of a public right of way. Furthermore, case law³ has shown OS maps are only indicative of the physical qualities of a way and should not be treated as direct evidence of status. In the circumstances, it is concluded that, while these documents seem to suggest that the application route could be used by vehicles, they are silent in terms of determining its status.

³ Moser v Ambleside Urban District Council [1925] 89 JP 118 at 119.

5.5. **OS Object Name Book**

Explanation of the type of evidence

5.5.1. In preparing the second edition County Series map, the Ordnance Survey produced an 'object name book' the primary purpose of which was to ensure that the various names recorded on the maps (e.g. names of farms, roads, places etc.) were accurate and correctly spelt. To this end each book contained a list of those names and a description of the feature to which they related. Each of the names in those books was later corroborated by a prominent member of the local community (e.g. a landowner or clergyman).

5.5.2. **1901 OS Object Name Book**

Source: National Archives (extract only)

Reference number: TNA OS 35 1913

Appendix number: 7

Description and interpretation of evidence

5.5.3. Cold Harbour Lane is specifically listed in the OS Object Name Book as 'A public roadway extending from Prospect Farm to road 18 chains NE of Dwelly Bridge'. The entry was corroborated by the agent of a local landowner.

5.5.4. The main purpose of the document would have been to ensure the features were named and spelt correctly. The status of the application route would have been of less importance to the author. Nevertheless, the term 'public' has been intentionally chosen to describe the application route. While it is possible that the term 'roadway' could be referring to a 'bridle road', looked at in isolation, it is more likely that the surveyor believed the route to carry vehicular rights. Therefore, while there are weaknesses to the object name book, it does provide good evidence that Cold Harbour Lane had the reputation of a public vehicular road in 1901.

5.6. **1910 Finance Act**

Explanation of the type of evidence

5.6.1. The Finance Act of 1910 provided, among other things, for the levy and collection of a duty on the incremental value of all land in the United Kingdom.

- 5.6.2. Land was broken into ownership units known as hereditaments and given a number. Land could be excluded from payment of taxes on the grounds that it was a public highway and reductions in value were sometimes made if land was crossed by a public right of way. Finance Act records consist of two sets of documents which are;
- i) Working Plans and Valuation Books. Surviving copies of both records may be held at the Local Records Office. Working maps may vary in details of annotation and shading. The Valuation Books generally show records at a preparatory stage of the survey.
 - ii) The record plans and Field Books (small bound books) are the final record of assessment and contain more detail than the working records. The Record Plans and Field Books are deposited at The National Archives, Kew.
- 5.6.3. While the Valuation and Field Books were generally kept untouched after 1920, many of the working and record maps remained in use by the Valuation Offices and sometimes information was added after the initial Valuation process.
- 5.6.4. The 1910 Finance Act material did not become widely available until the mid 1980's. Therefore, it could not have been considered during the Definitive Map making process and can be considered "new evidence". This is of particular importance for meeting the requirements of section 53(3) of the Wildlife and Countryside Act 1981 which requires the 'discovery' of new evidence (i.e. evidence not considered when the Definitive Map was originally drawn up or last reviewed) before an order to amend the definitive map can be made.

Evidence

- 5.6.5. **Finance Act Record Plan**
Source: National Archives (extract only)
Reference: sheet 89-11
Appendix number: 8

Description and interpretation of evidence

- 5.6.6. The record plan shows the application route unnumbered and excluded from the adjacent hereditaments.
- 5.6.7. It is noted that the application route is separated from the two connecting public footpath of today (i.e. Y10/37 and Y10/28) both of which fall within hereditaments. On the other hand the two spurs are excluded along with Cold Harbour Lane.

- 5.6.8. Case law⁴ has shown that the exclusion of a route from the 1910 valuation raises the strong possibility that the route was recognised as a highway. Ordinarily, one would expect highways excluded in this way to carry public vehicular rights, as routes with lower rights (i.e. footpaths and bridleways) were typically dealt with by deductions recorded in the field books⁵. However, there are other reasons why land might have been excluded from the adjacent hereditaments (e.g. where they were set out as private roads in an inclosure award).
- 5.6.9. The valuation documents can therefore often be good evidence in support of public vehicular rights. However, in attributing weight to these documents it is important to view them in the context of the evidence as a whole.
-

5.7. **Highway Road Records held by the County Council**

Explanation of the type of evidence

- 5.7.1. Over time responsibility for maintenance of highways has passed between various different authorities. On each occasion a map was typically produced showing those highways which were considered publicly maintainable.
- 5.7.2. Footpaths and bridleways were often not shown on historic road records.

Evidence

5.7.3. **1929 Handover Road Records – List of Roads**

Source: Somerset County Council
Reference: Yeovil RD - P1010012
Appendix number: 9

Description and interpretation of evidence

- 5.7.3.1. Responsibility for maintaining many classifications of highway was transferred from Rural District Councils to County Councils by the Local Government Act 1929. In order to assist in the transfer of responsibilities documents were prepared, listing all roads that were maintained at public expense at that time. These road lists were drafted as a record of those highways which were considered maintainable in the view of the Rural District Council.
- 5.7.3.2. Roads within the district were classified into 5 Groups; first class main roads, second class main roads, group A roads, group B roads, and

⁴ Fortune v Wiltshire County Council [2012] EWCA Civ 334

⁵ DMO Consistency Guidelines, section 11.7.

group C roads. The list appears to have focused on vehicular roads as no attempt has been made to record the full extent of the rights of way network.

- 5.7.3.3. Cold Harbour Lane (Hardington), is listed as a 'Group C' road of 0.6 miles. This length broadly corresponds to the full length of the Lane including all of the application route. This would suggest that the Rural District Council considered the full length of the application route to be a highway maintainable at public expense.

5.7.4. 1929 Handover Road Records - Map

Source: Somerset County Council

Reference: Yeovil RD - P1010002

Appendix: 9

Description and interpretation of evidence

- 5.7.4.1. These maps accompanied the lists referred to above and were also drafted as a record of those highways which were considered maintainable in the view of the Rural District Council. In theory this would include publicly maintainable footpaths and bridleways as well as carriageways. However, it is clear from the maps themselves that footpaths and bridleways were not typically shown. Instead, most of the coloured routes are public carriageways.
- 5.7.4.2. The application route has no colouration on it. This is evidence the Rural District Council did not consider it to be a publicly maintainable vehicular highway.

5.7.5. 1930 Road Records

Source: Somerset County Council

Reference: 89 SE

Appendix: 9

Description and interpretation of evidence

- 5.7.5.1. Shortly after the 1929 Handover Maps the County Council produced working records of routes which were considered to be highways maintainable at public expense.
- 5.7.5.2. The application route is not recorded as a road maintainable at public expense on the 1930s road records.

5.7.6. **1950 Road Records**

Source: Somerset County Council
Reference: 89(1)
Appendix: 9

Description and interpretation of evidence

- 5.7.6.1. The 1930 Road Records were updated and new versions were produced in the 1950s. These maps show highways considered to be maintainable at public expense.
- 5.7.6.2. The application route is not recorded as a highway maintainable at public expense on the 1950s road records. However, the far eastern end of Cold Harbour Lane (east of point E), is coloured on the Road Records, therefore, between the 1930's and 1950's, it was recognised as a public vehicular highway. No evidence has been found as to why and when this happened. This section is east of point E and not part of the application route.

5.7.7. **Modern Road Records**

Source: Somerset County Council
Appendix: 9

Description and interpretation of evidence

- 5.7.7.1. This is the current copy of Somerset County Council road records. The application route is not recorded on this map as a highway maintainable at public expense.

5.7.8. **Summary of Highway Road Record evidence**

- 5.7.8.1. According to the Planning Inspectorate's consistency guidelines the evidential strength of handover maps is that 'they are conclusive evidence of the highway authority's acceptance of maintenance responsibility, a commitment which would not normally have been undertaken lightly'⁶. However, they were not public documents and cannot be regarded as conclusive (for the status of a road) and there is also a possibility mistakes might have been made.
- 5.7.8.2. In this case, the fact that the application route is included on the 1929 list as a Group C road would normally be seen as being strongly in favour of public vehicular rights. However, the application route has not been recorded as a highway maintainable at public expense on the handover map of the same year. It is unknown why there is a discrepancy between the two documents but it is entirely plausible that a mistake was made on one of them.

⁶ Consistency Guidelines, Section 6.9.

- 5.7.8.3. Like the 1929 map, the route does not appear coloured on either the 1930s or the 1950s records. Despite these documents being good evidence of the status of routes which are positively shown on them, it would be unsafe to hold that where a road does not appear on the map it is evidence that was not a highway. The Authority may simply have been unaware of the existence of a highway rights. Alternatively, they may have considered a route to carry public rights but not be maintainable at the public expense. Furthermore, the road record documents did not typically record public bridleways or footpaths, thus the omission of a route does not indicate the route was not regarded as public.
- 5.7.8.4. To summarise, the 1929 evidence appears to be ambiguous. It may be that either the map or the list are in error but there is little indication within the documents themselves as to which one. Taken in isolation this evidence needs to be treated with some caution.
- 5.7.8.5. However, it might be possible to attribute them more weight when they are considered in light of all the other evidence. The 1930s and 1950s records do not colour the application route. This lack of colouration indicates the route was not considered, at the time, to be a public vehicular highway maintainable at public expense. As such, while not necessarily inconsistent with public rights, these documents are certainly not supportive of them.

5.8. **Definitive Map and Statement preparation records**

Explanation of the type of evidence

- 5.8.1. The Definitive Map and Statement were produced after the National Parks and Access to the Countryside Act 1949 placed a duty on County Councils to survey and map all public rights of way in their area. The process was undertaken in a number of stages:
- i) Walking Survey Cards and Maps - Parish Councils were required to survey the paths they thought were public paths at that time and mark them on a map. The route was described on a survey card, on the reverse were details of who walked the route and when. Queries for the whole parish are often noted on a separate card.

- ii) Draft Map – Somerset County Council produced the Draft Map from the details shown on the Survey Map. These Maps were agreed by the County Works Committee and the date of this Committee became the ‘relevant date’ for the area. The map was then published for public consultation; amongst other things this included parish and district councils being contacted directly and notices appearing in local newspapers. Any objections received were recorded in a Summary of Objections found in the District file.
- iii) Draft Modification Map – This stage in the process was non-statutory. SCC produced a map to show any proposed changes as a result of objections to the Draft Map. Any objections received were recorded in a summary of Counter Objections to the Draft Modification map, found in the District file.
- iv) Provisional Map – This map incorporates the information from the Draft Maps and the successful results of objections to the Modification Maps. These were put on deposit in the parish and district council offices at this point only the tenant, occupier or landowner could object.
- v) Definitive Map and Statement – Any path shown is conclusive evidence of the existence and status of a public right of way until proved otherwise. The Definitive Map is without prejudice to other or higher rights.

Evidence

5.8.2. **Survey Map – Hardington Mandeville**

Source: Somerset County Council
Appendix: 10

5.8.2.1. The application route has not been annotated in any way and remains white (as it was originally on the OS base map). Several footpaths have been highlighted in the local area two of which (Y10/37 and Y10/38) connect to the application route at point B and point E. In addition some local roads have been shaded brown.

5.8.2.2. No public rights are shown to exist over the application route on this map.

5.8.3. **Survey Card – Hardington Mandeville**

5.8.3.1. Survey Cards for both footpaths Y10/37 and Y10/38 record them as leading upto or into Coldharbour Lane.

5.8.4. **Draft Map – Hardington Mandeville**
Draft Modification Map – Hardington Mandeville

5.8.4.1. The Draft Map and the Draft Modification Map have not been found for the Hardington Mandeville area.

5.8.5. **Provisional Map – Hardington Mandeville**

Source: Somerset County Council

Appendix: 10

5.8.5.1. Footpath 10/37 and footpath 10/38 are both shown to stop as they reach the application route.

5.8.5.2. No public rights are shown to exist over the application route on this map.

5.8.6. **Definitive Map – Yeovil**

Source: Somerset County Council

Reference: Y-19

Appendix: 10

5.8.6.1. The Definitive Map was required to show; footpaths as a purple line, bridleways as a green line and RUPPs as a dashed green line (Road Used as a Public Path).

5.8.6.2. The Definitive Map, does not show the application route in any of these ways. Therefore, the application route is not shown as a public right of way.

5.8.6.3. Footpaths Y10/37 and Y10/38 are shown to stop at point B and point E respectively and neither footpath progresses along the application route.

5.8.7. **Definitive Map Statement**

Source: Somerset County Council

References: Y10/37 + Y10/38

Appendix: 10

5.8.7.1. Given that the application route is not shown on the Definitive Map there is no corresponding Statement for the route.

5.8.7.2. The Definitive Statement for footpath Y10/37 refers to it beginning at a field gate opposite Townsend Farm in Cold Harbour Lane. The Statement for footpath Y10/38 refers to said footpath as running to Cold Harbour Lane. No reference is made to either footpath continuing along the application route or of any rights which the application route was considered to carry.

Description and interpretation of evidence

- 5.8.8. When producing the definitive map, purple lines were for showing footpaths, green lines for bridleways and dashed green lines for roads used as public paths. Although not required to do so, Hardington Mandeville Parish Council adopted this convention when undertaking their survey.
- 5.8.9. The Parish Council also coloured some routes in brown. This was clearly not being used to identify public rights of way as these are shown in purple and green (see above). The most likely explanation is that brown was being used to show routes that the Parish Council felt were roads and, given the correlation with the 1950s road record, most likely public roads. While the Parish Council had not been asked to identify such roads (as to do so was of little assistance to the County Council in preparing the Definitive Map) it does not mean that they could not have chosen to do so.
- 5.8.10. This style of colouration continued to the Provisional Map and the Definitive Map, which showed no changes from the Survey Map (in relation to the area directly around the application route). However, the Definitive Map is only definitive in relation to the information it contains relating to public rights of way. The brown colouring is therefore not definitive of the existence of public vehicular rights.
- 5.8.11. Neither the Definitive Map and Statement nor any of the preparation documents show the application route as a public right of way. The Parish and the County Council therefore, must have been unaware of evidence upon which it could be reasonably alleged that a public right of way existed. This does not in itself mean that public rights did not exist (as the Definitive Map is not conclusive of what it omits), but it equally cannot be seen as being in favour of their existence.
- 5.8.12. Having said this, footpaths Y10/37 and Y10/38 are both shown on the Survey, Provisional and Definitive Maps. Both of these footpaths connect to the application route. There is no apparent explanation as to why footpath Y10/38 might be cul-de-sac which indicates that there may have been an error either in the recording of this footpath or the non-recording of the application route.

5.9. Local Authority Records/Minutes

Explanation of the type of evidence

- 5.9.1. As mentioned above, over the course of the past two hundred years, responsibility for the maintenance of highways has passed between various different authorities. Furthermore, even where a local authority was not directly responsible for rights of way then, as representatives of the local people, they would have maintained an interest in the rights of way network. This could have particularly been the case for parish councils.
- 5.9.2. In light of the above, evidence as to a routes status can sometimes be found in local authority records and minute books.
- 5.9.3. **1862 Crewkerne Highway District Map and Record**
Source: Somerset Heritage Centre
Reference: DD/SB/map/3/1
Appendix number: 11

Description and interpretation of evidence

- 5.9.4. Although not titled, this map appears to have been drafted as a record of those roads which were considered maintainable by Crewkerne Highway Board when it was formed in 1862. Linear routes shown on the map appear to fall into one of three categories
- 5.9.5. Firstly, some routes (the 'coloured routes') have been allocated colours other than pink/red. An analysis of the map shows that the coloured routes in each parish are all the same colour but that each parish has been allocated a different colour. For example, all the coloured routes in South Petherton are green whereas the coloured routes in Hardington are blue. In the bottom left hand corner of the map there is a list of routes ordered by parish. Each route is identified both by a brief description and by reference to lettered or numbered points which appear on the map. There is a strong correlation between those routes listed and those shown coloured on the map. Given the purpose of the map, and the fact that the Highway Board felt it necessary to list them it seems very likely that these were considered highways maintainable at public expense at the time.
- 5.9.6. The second category of route shown on this map are those shaded red/pink. These appear to have been turnpike roads⁷.

⁷ The list in the bottom corner of the map refers to a number of routes terminating either at a turnpike road or a toll gate. In each case the turnpike road referred to, or the road on which the toll gate is located, is coloured pink.

- 5.9.7. The third, and final, category of route are those which have been left uncoloured (i.e. white roads).
- 5.9.8. The map shows Cold Harbour Lane coloured blue. It is marked with 'U' at point A and an 'f' at point E. The corresponding entry on the list in the bottom corner of the map reads 'From Marsh. Cold harbour lane'. This entry is listed under the title 'Hardington'.
- 5.9.9. This would suggest that the authority responsible for highways at the time considered that they were responsible for the maintenance of the application route. While it is acknowledged that this document is unlikely to have been subject to public consultation it would have been drafted by independent officers with a knowledge of highway law. Furthermore, as with the road records discussed in section 5.8 above, the Highway Board are unlikely to have accepted liability for a route lightly. This document is therefore strong evidence of the application route having been a public highway in 1862.
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5.10. **Somerset County Council's Rights of Way files**

Explanation of the type of evidence

- 5.10.1. Rights of way files held by Somerset County Council contain wide range of documents including correspondence sent in relation to the network.
- 5.10.2. **1992-1997 Hardington Mandeville Parish Correspondents**
Source: Somerset County Council
Appendix number: 12

Description and interpretation of evidence

- 5.10.3. In 1992 the Chairman of Hardington Mandeville Parish Council wrote to South Somerset District Council, making enquiries regarding the status of three routes within the parish. One of those routes was Cold Harbour Lane. The Chairman acknowledged that the lane was not 'designated in any way' but went on to state that 'from time to time these (routes) are obstructed and even blocked by local landowners'. He therefore sought advice on what action could be taken.
- 5.10.4. Despite the apparent recognition that the route was not recorded as a highway, the Parish Council were concerned about it being obstructed. The most likely reason that they would have had such a concern and would have expressed it to the District Council is that the obstructions were preventing public use of the route. While it remains weak evidence, this would seem to be an indication that the route had the reputation of a public right of way.

- 5.10.5. In 1996 the chairman of the Parish Council again wrote to the District Council. In that letter he stated that 'No progress has been made regarding modification to the status of our several old highways, Coker Hill Lane, Coldharbour Lane and Common Lane. Some documents were sent to me a long time ago but I have been unable to make any progress'.
- 5.10.6. The Chairman followed up his 1996 letter with one in 1997. This time he stated that he did not have the time to collect evidence but that 'there can be no doubt that Coldharbour Lane (among others) are Rights of Way and the logical category would be as Bridleways'. The paragraph goes on to mention, that the chairman understands that the Highways Authority is required to undertake the reclassification of these old lanes and that they hope the District Council can be persuaded to press forward with this as soon as possible.
- 5.10.7. The Parish Council's conclusion that Coldharbour is logically a Bridleway is presumably based in part on the documentation referred to in the 1996 letter. No record of what those documents are has been found. Furthermore, the 1997 letter has been annotated 'No!'. While it is possible that that annotation related to that part of the letter which refers to the reclassification of routes, its positioning suggests that it was intended to relate to comments that the routes in question were public rights of way.
- 5.10.8. The letters suggest that, in the 1990s, the Parish Council were of the view that Cold Harbour Lane was a public right of way. This provides some evidence of reputation. However, there is little indication as to what the Council's belief is based upon. There is some suggestion of a desire to use the route in 1992 and possibly documentary evidence in 1996, but without more detail it is difficult to give this much weight. Any weight that it might have been attributed is greatly reduced by the district council's apparent disagreement to the 1997 letter.
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5.11. **Commercial Maps**

Explanation of the type of evidence

- 5.11.1. 'Commercial maps' are those produced for sale to the public⁸. They vary widely in terms of their quality and were not all produced for the same purpose. As such the weight to be given to them also varies.
- 5.11.2. Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with evidence from other sources, they may tip the balance of probability in favour of such status.

Evidence

5.11.3. **Day and Masters 1782**

Source: Somerset County Council
Appendix number: 12

- 5.11.3.1. Published in 1782, this commercial map included very little detail, typically only depicting settlements, major roads (particularly those in and between settlements), and rivers.
- 5.11.3.2. The full length of the application route is shown on the map. This suggests that it must have been either a very prominent physical feature or a route of some importance (or both). Based on this assumption it is maybe more likely that it would have carried public rights. However, little is known about the basis upon which Day and Masters selected the features which were to be shown on their maps. Furthermore, even if they did consider it to be public, this can only be taken as the view of the individual surveyor rather than the wider public. In the circumstances this map can be given some, but not a great deal of, weight.

5.11.4. **Greenwoods 1822**

Source: Somerset County Council
Appendix number: 12

- 5.11.4.1. Despite some criticism relating to the positional accuracy of Greenwood's maps they can provide good evidence of a routes physical existence at the time of the survey and also that the surveyor considered it to be of some importance. As the map was produced for use by members of the public it is likely that the surveyor would have focused on those roads that he believed to be publicly accessible or that were useful for the public in some other way.

⁸ It is accepted that some OS maps were also made for sale to the public but these are dealt with elsewhere in this report.

5.11.4.2. In this case the map shows the application route as a 'cross road'. Although not specifically defined on the map, this term was being used to refer to more than just the point at which two roads cross. In one prominent case the courts defined a cross road as 'a **public** road in respect of which no toll is payable'⁹ (my emphasis). However, in that case the judge was considering a map produced 55 years earlier than Greenwood's and by a different cartographer. Therefore, while consideration should be given to this legal precedent, it is important to consider the term 'cross road' in the context of any individual map before drawing any inferences¹⁰.

5.11.4.3. While the majority of cross roads shown on Greenwood's map are now recognised as public vehicular roads, there are many which are not. Most of those which are not now public vehicular roads are shown on Greenwoods Map as cul-de-sacs which are unlikely to have carried public vehicular rights, for example various routes in Pendomer (shown circled blue in appendix 13).

5.11.4.4. A similar picture emerges when analysing other extracts of the same map. In fact, in some cases Greenwood shows as a cross road routes which only a few years earlier had been set out as a private road by an inclosure award.

5.11.4.5. Furthermore, any inference to be drawn from Greenwood's map needs to be viewed in light of *Merstham Manor Ltd v Coulsdon UDC*¹¹ in which the judge concluded that 'there is nothing in the map(s) to show whether or not the topographer-author was intending to represent the road on his map as a public highway'.

5.11.4.6. In the circumstances it seems as though Greenwood either did not consider all 'cross roads' to be public vehicular routes, or that he did not make very careful checks about the public status of the routes he recorded. This map therefore confirms the physical existence of the application route in 1822, but is of very limited weight in support of public rights over the application route.

5.11.5. **Bartholomew 1902 & 1923**

Source: National Archives (extract only)

Reference: sheet 4 England+Wales & sheet 34 Dorset

Appendix number: 12.3

5.11.5.1. The applicant has provided extracts from two different editions of Bartholomews map, published in 1902 and 1923 respectively. The application route was shown on both maps as an 'Indifferent Road (Passable)'.

⁹ Hollins v Oldham (1995)

¹⁰ Paragraph 2.26 of the Planning Inspectorate's 'Definitive Map Orders: Consistency Guidelines'.

¹¹ *Merstham Manor v Coulsdon and Purley UDC* [1937] 2 KB 77

- 5.11.5.2. The key states that ‘The uncoloured roads are inferior and not to be recommended to cyclists’ and ‘NB. The representation of a road or footpath is no evidence of the existence of a right of way’.
- 5.11.5.3. Bartholomew’s maps were considered in ‘*The Commission for New Towns and Worcestershire County Council v J.J. Gallagher Limited*’¹². After referring to the disclaimer (see above) Neuberger J. went on to say “*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.*”
- 5.11.5.4. In conclusion, inclusion of the application route on each of Bartholomew’s maps suggests that it physically existed and that it had the appearance and possibly the reputation of a public vehicular road at the time the map was drafted.
- 5.11.5.5. Following the above interpretation, Bartholomew’s maps are evidence in favour of the application routes under consideration here carrying public vehicular rights. However, the weight that can be given to these maps as evidence is minimal. Not only do both maps show other routes which are not known to carry private vehicular rights, but Bartholomew’s Maps also included a caveat explicitly stating that they were not a record of public rights.

5.12. Other Sources

- 5.12.1. **Aerial photograph 1946**
Source: Somerset County Council
Appendix number: 14

Description and interpretation of evidence

- 5.12.2. The aerial photograph shows the application route as defined on the ground, although less clearly at some points where the route is obscured by vegetation.
- 5.12.3. The shape of the route is consistent with the Maps already viewed in this report. Due to the vegetation covering the route the surface type is not clear in this photograph.
- 5.12.4. The aerial photograph is evidence for the physical existence of the route in 1946.

¹² [2002]EWHC 2668 (Ch)

5.13. **Documentary Evidence Sources not used**

- 5.13.1. Other sources of Primary Documentary Evidence which either did not cover the relevant area or did show the claimed route but do not assist in determining the status include:

Heritage Centre Documents

- D/B/yeo/3/21, Highway Committee (Yeovil) 1949-1974
- 1886 OS County Series 1st Edition – 6 inch
- 1904 OS County Series 2nd edition Map – 6 inch
- 1930 OS County Series 2nd Edition (revised) Map
- 1958 OS Map ST51
- 1960 OS Map 7th Edition New Edition
- Q/SR/657, Transfer of Hardington to Yeovil District (from Crewkerne District)

6. **Landowner Evidence**

- 6.1. All landowners and adjacent landowners were consulted on the application. No responses were received.

7. Consultation and other submissions

- 7.1. In June 2018, consultations regarding the claimed route were sent out to relevant elected representatives, local and national user groups. The table below shows the organisations who were consulted and gives brief details of the replies which were received.

Name as referenced <i>(in report)</i>	Response
Historic England	7.1.1. Modification 587 does not have any impact on any designated heritage asset.
Somerset Ramblers	7.1.2. Footpaths Y10/38 runs from Y10/37 to an apparent dead-end at Cold Harbour Lane. It seems clear that the parish would not claim a dead-end footpath and it states 'path 37 to Cold Harbour Lane'. This matter was addressed previously in the report (5.8.11).

- 7.2. No response was received from the following organisations:

Name as referenced <i>(in report)</i>
Hardington Mandeville PC
British Horse Society
Auto Cycle Union
Cycling UK
All Wheels Drive Club
Open Space Society
Natural England

Name as referenced <i>(in report)</i>
British Driving Society
Byways and Bridleways Trust
Trail Riders Fellowship
South Somerset District Council
(Local) County Councillor

8. Discussion of the evidence

- 8.1. As discussed in paragraph 4.1 above, the County Council is under a duty to modify the Definitive Map where evidence comes to light that it is in error. The standard of proof to be applied in cases such as this (i.e. where the route of a claimed right of way is not already shown on the Definitive Map and Statement) consists of two limbs. An order should be made to modify the Definitive Map if the evidence shows that a right of way;
- a) subsists; or
 - b) is reasonable to allege to subsist.
- 8.2. Importantly, the above paragraph describes the test for making an order. Such an order can only be confirmed (and therefore the Definitive Map can only be modified) if the evidence meets the higher 'balance of probabilities' test.
- 8.3. The application route has been shown consistently on the documents considered in this report. This is strong evidence the application route has physically existed from at least 1782. Due to the manner in which it has been depicted and the circumstances of each document it would be fair to conclude that, for the majority of the routes existence, it has been physically suitable for vehicular use.
- 8.4. Many of the documents considered in this report are in favour of public vehicular rights along the application route. Particularly the 1862 Crewkerne Highways documents and the 1929 Handover List.
- 8.5. The 1862 Crewkerne Highway District Map appears to have been produced by the Crewkerne Highway Board who were responsible for highway maintenance. The Map shows the application route was considered at the time to be a publically maintainable highway. This is strong evidence the application route carried public vehicular rights in 1862.
- 8.6. The 1929 Handover List also provides evidence that the application route was a publically maintainable highway and probably a vehicular one. Analysis of a sample of the routes within this list show that those listed as 'Class C' roads are typically recorded as highways maintainable at public expense on the modern day road records. While there are some exceptions, it is clear the draftsmen were not intending to systematically record all public rights of way, furthermore it seems unlikely they would have recorded private roads on a document produced for the purpose of identifying highways maintainable at public expense.
- 8.7. However, it is important to note that the 1929 Handover Map did not show the application route as publically maintainable, as such the two documents are in conflict.

- 8.8. It is of course possible that, when Yeovil Rural District Council produced the 1929 documents, the application route was included on the list in error and that the exclusion of the route from the map was correct. However, it is considered more likely that the Rural District Council intentionally included the route on the list and it is the map which was in error. There are two reasons for preferring this later possibility. Firstly, the application route was recorded as being a highway in 1862. No evidence has been found which would suggest that any rights were stopped up between 1862 and 1929. Secondly, all other things being equal, it seems more likely that a route would be omitted from a record in error rather than inadvertently included. This is because to include a route takes a conscious effort and, in this case, the need to decide what category of highway it is. No such effort is needed to omit something in error.
- 8.9. The 1930s and 1950s road records are updates of the 1929 Map. It is reasonable to conclude that they are therefore based in large part on the information of their predecessor. As such, in this case, they add little additional weight to that attributed 1929 Map.
- 8.10. In light of the above, while the 1929 Map (and successive road records) lessen the weight that can be given to it, the 1929 List remains evidence in favour of public rights. Furthermore, given that the List was predominantly used to record publically maintainable vehicular rights, it is likely that the application route was also considered to be vehicular.
- 8.11. This conclusion is supported by the 1901 OS Object Name Book which refers to the application route (Cold Harbour Lane) as a 'public roadway'. The most likely interpretation of this is that Cold Harbour Lane was considered to be a public vehicular highway. While status was not the primary concern of this document, it remains good evidence of the reputation of the application route in 1901. Although it carries less weight, recent correspondence from the Parish Council suggests that the route continued to have the reputation of a public right of way in the 1990s.
- 8.12. Futhermore, while the Definitive Map does not mark the application route as a right of way, it does provide some indirect evidence of status. As highlighted in paragraph 5.8.6.3, two footpaths are shown on the definitive map connecting to the application route. Footpath Y10/38, would be a cul-de-sac if the application route is not public. While cul-de-sac rights of way do exist one would normally expect them to terminate at a point of public interest. There appears to be no particular point of interest at the end of Y10/38. This being the case users of the footpath would presumably have continued their journey over the application route. While far from conclusive this is in favour of public rights.

- 8.13. In addition, while Day & Masters Map and the Bartholomew Maps only carry minimal weight in terms of providing evidence of status, they do indicate the application route was able to carry vehicular.
- 8.14. Finally, the Finance Act shows the application route excluded from the surrounding hereditaments. When viewed against the background of the evidence as a whole this also provides good evidence in favour of public vehicular rights over the application route.
- 8.15. Whilst other documents looked at within this report, such as the Tithe Map and Greenwoods Map, provide little in terms of positive evidence in support of public rights none of them are inconsistent with public road status.

9. Summary and Conclusion

- 9.1. The County Council is under a duty to make an order to modify the Definitive Map and Statement on the discovery of evidence, which when considered with all other relevant evidence available, shows;

“that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic”.

- 9.2. In reaching a conclusion as to whether or not the documentary evidence is sufficient to make an order, the documents need to be considered as a whole. As stated in the Planning Inspectorate’s Consistency Guidelines with reference to the Hollins v Oldham case¹³:

“The whole of the documents have to be examined to assess their reliability. It seems to me that I have to assess each piece of documentary evidence to see how far I can rely upon it. This applies just as much to official documents such as the definitive map or ordnance survey sheets or the tithe surveys as it does to other records such as commercially produced maps. They have all been produced by human beings and are so liable to error to some extent.”¹⁴

- 9.3. In this case, when viewed collectively the historic evidence provides strong evidence to suggest that the application route carries public rights. Of particular note is the 1862 Crewkerne Highway Board Map and the 1929 Handover List. It is accepted that the weight attributed to the later of these two is lessened by the fact that it is not shown on the 1929 handover map or subsequent road record documents. However, alongside the rest of the evidence (including the 1862 Highway Board Map), it remains evidence that the highway authority of the day considered the application route to be a highway and almost certainly a vehicular one.

- 9.4. This conclusion is supported by many of the other documents considered in this report and, in particular, the Object Name Book and the Finance Act valuation, and documents showing the existence of other rights of way terminating on the application route.

¹³ Hollins v Oldham 1995 (C94/0206, unreported)

¹⁴ Consistency Guidelines, Section 2.29

- 9.5. In light of the above, the evidence points towards the application route having been a public vehicular highway. However, section 67 of the Natural Environment and Rural Communities (NERC) Act 2006 had the effect of extinguishing all rights for mechanically propelled vehicles (MPV's) over any routes that was not shown on the Definitive Map in 2 May 2006. While there are exceptions to this provision there is no evidence to suggest that any of them apply to the application route. Therefore, the application route no longer carries rights for mechanically propelled vehicles. Rights for non-mechanically propelled vehicles (such as a horse and cart) were not extinguished by the NERC Act 2006.
- 9.6. When looked at collectively, the evidence is sufficient to reasonably allege the existence of a public right on foot, on horseback and for non-mechanically propelled vehicles over the application route.

10. Recommendation

I therefore recommend that:

- i) An order be made the effect of which would be to modify the Definitive Map and Statement by adding a restricted byway over the route shown from A-E on the plan H077-2018.
- ii) If there are no objections to such an order, or if all objections are withdrawn, it be confirmed.
- iii) If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs.

11. List of Appendices

Please note that the document reproductions in the appendices are not to scale. The report writer has added the red letters A and B present on Appendix 1 to maps to help the reader identify the sections of the route the document is depicting. Red circles have also been added to some appendices to indicate the area of the claim where lettering is not appropriate.

- 1) Plan showing claimed route
- 2) Photos of the claimed route
- 3) Land Registry Search
- 4) Additional locations referenced in the report
- 5) Tithe Records
- 6) OS Maps
- 7) OS Object Name Book
- 8) Finance Act
- 9) Highway Road Records
- 10) Definitive Map and related documents
- 11) Local Authority Documents
- 12) Commercial Maps
- 13) Other Sources