

North Somerset Council

REPORT TO THE PUBLIC RIGHTS OF WAY SUB COMMITTEE

DATE OF MEETING: 27 SEPTEMBER 2017

SUBJECT OF REPORT: UPGRADING CARDITCH DROVE TO A BOAT.

TOWN OR PARISH: CONGRESBURY

OFFICER/MEMBER PRESENTING: ELAINE BOWMAN

KEY DECISION: NO

RECOMMENDATIONS

It is recommended that

- (i) The Public Rights of Way Sub Committee do not authorise the making of a Definitive Map Modification Order for the route A-B on the grounds that there is insufficient evidence to show that Byway Open to all Traffic rights have been established.
- (ii) the Public Rights of Way Sub Committee authorise the relevant Officer to make a Definitive Map Modification Order for the route A-B on the grounds that there is sufficient evidence that Bridleway rights have been established.

1. SUMMARY OF REPORT

The report considers an application for a Definitive Map Modification Order under Section 53(5) of the Wildlife and Countryside Act 1981, requesting that an unrecorded route and small part of Footpath AX 16/20, in the Parish of Congresbury and Puxton should be recorded as a Byway Open to all Traffic. The effect of this request, should an Order be made and confirmed, would be to amend the Definitive Map and Statement for the area. The application is based on historical documentary evidence. A Location Plan, EB/MOD30c showing the route claimed is attached.

In order that members may consider the evidence relating to this application, further details about the claim itself, the basis of the application, and an analysis of the evidence are included in the Appendices to this report, listed below. Also listed below are the Documents that are attached to this report. Members are also welcome to inspect the files containing the information relating to this application, by arrangement with the Public Rights of Way Section.

Location Plan EB/Mod30c

- Appendix 1** – The Legal basis for deciding the claim
- Appendix 2** – History and Description of the Claim
- Appendix 3** – Applicants Evidence
- Appendix 4** – Additional Documentary Evidence

Appendix 5 – Consultation and Landowners Responses

Appendix 6 – Summary of Evidence and Conclusion

Document 1 – Applicants Application

Document 2a & 2b – Congresbury, Wick St Lawrence & Puxton Enclosure Award 1814

Document 3 – Congresbury Tithe Map 1840

Document 4a, 4b & 4c – Somerset and Dorset Railway Records (Cheddar Valley & Yatton) 1864

Document 5 – Handover Map 1930

Document 6 – Definitive Map 1956

2. POLICY

The maintenance of the Definitive Map should be considered as part of the management of the public rights of way network and so contributes to corporate plan “Health and Wellbeing” and “Quality Places”.

3. DETAILS

Background

i) The Legal Situation

North Somerset Council, as Surveying Authority, is under a duty imposed by the Wildlife and Countryside Act 1981, Section 53(2) to keep the Definitive Map and Statement under continuous review. This includes determining duly made applications for Definitive Map Modification Orders.

The statutory provisions are quoted in **Appendix 1**.

ii) The Role of the Committee

The Committee is required to determine whether or not a Definitive Map Modification Order should be made. **This is a quasi-judicial decision and it is therefore essential that members are fully familiar with all the available evidence. Applications must be decided on the facts of the case, there being no provision within the legislation for factors such as desirability or suitability to be taken into account.** It is also important to recognise that in many cases the evidence is not fully conclusive, so that it is often necessary to make a judgement based on the balance of probabilities.

The Committee should be aware that its decision is not the final stage of the procedure. Where it is decided that an Order should be made, the Order must be advertised. If objections are received, the Order must be referred, with the objections and any representations, to the Planning Inspectorate who act for the Secretary of State for Food and Rural Affairs for determination. Where the Committee decides that an order should not be made, the applicant may appeal to the Planning Inspectorate.

Conclusion

As this application relates to a route which includes part of the Footpath AX16/20 currently recorded on the Definitive Map, it is necessary for the Committee to consider whether, given the evidence available, that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description and that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over the 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 or, subject to section 54A, a byway open to all traffic. If the Committee is of the opinion that this test has been adequately met, it should determine that a Definitive Map Modification Order should be made. If not, the determination should be that no order should be made. See **Appendix 1**.

4. CONSULTATION

Although North Somerset Council is not required to carry out consultations at this stage notices have been placed on site and affected landowners have been contacted. In addition to this Congresbury and Puxton Parish Council have been consulted as well as Local members, interested parties and relevant user groups have also been included. Detail of the correspondence that has been received following these consultations is detailed in **Appendix 5**.

5. FINANCIAL IMPLICATIONS

At present the council is required to assess the information available to it to determine whether there is sufficient evidence to support the application. There will be no financial implications during this process. Once that investigation has been undertaken, if authority is given for an Order to be made then the Council will incur financial expenditure in line with the advertisement of the Order. Further cost will be incurred if this matter needs to be determined by a Public Inquiry. These financial considerations **must** not form part of the Committee's decision.

6. RISK MANAGEMENT

The Wildlife and Countryside Act 1981 requires that applications which are submitted for changes to the Definitive Map and Statement are determined by the authority as soon as is reasonably possible. Due to the number of outstanding applications awaiting determination Officers of North Somerset Council, in conjunction with the Public Rights of Way Sub Committee have agreed a three tier approach when determining the directed applications. A report was presented to the Committee in November 2016 which outlined a more streamlined approach. This could result in challenges being made against the Council for not considering all evidence.

The applicant has the right to appeal to the Secretary of State who may change the decision of the Council (if the Council decided not to make an Order) and issue a direction that an Order should be made. Alternatively if an Order is made objections can lead to a Public Inquiry.

7. EQUALITY IMPLICATIONS

Public rights of way are available for the population as a whole to use and enjoy irrespective of gender, ethnic background or ability and are free at point of use.

8. CORPORATE IMPLICATIONS

Any changes to the network will be reflected on the GIS system which forms the basis of the relevant corporate records.

9. OPTIONS CONSIDERED

The options that need to be considered are:

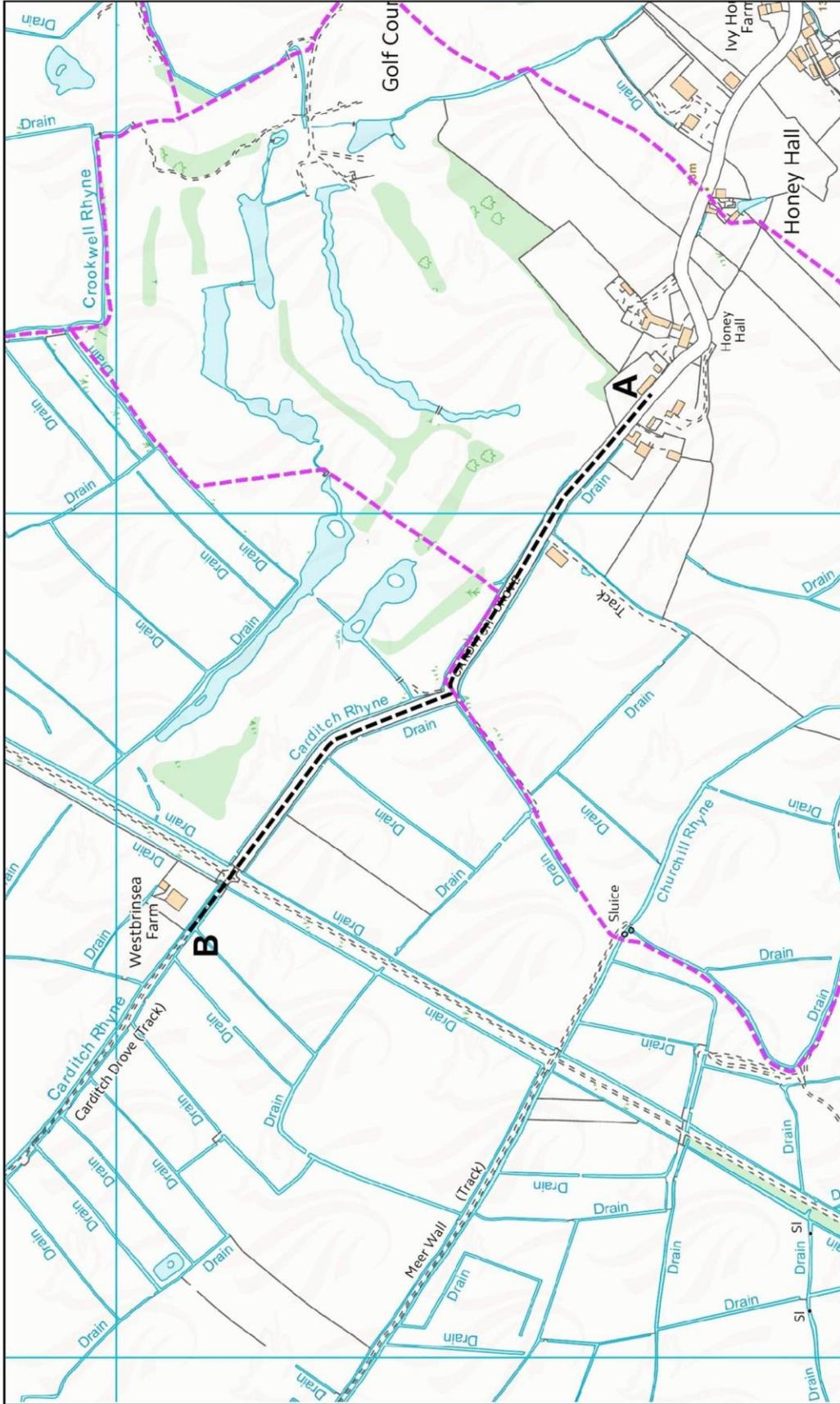
1. Whether the evidence supports the making of a Definitive Map Modification Order for the route A-B.
2. Whether the application should be denied as there is insufficient evidence to support the making of an Order for the route A-B.

AUTHOR

Elaine Bowman
Senior Access Officer Modifications
Access Team
Natural Environment
Telephone 01934 888802

BACKGROUND PAPERS

Public Rights of Way File Mod 30c



North Somerset COUNCIL

MDO 30c -Carditch Drive, Congressbury
 Claimed BOAT (Grid Ref: ST4261)

Public Rights of Way
 Castlewood, Tickenham
 Road, Clevedon, BS21
 6FW

Scale: 1:6000
 Drawn by: Lucy Roca
 Date: 02 August 2017
 Time: 09:04:28

N

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The Legal Basis for Deciding the Claim

1. The application has been made under Section 53 of the Wildlife and Countryside Act 1981, which requires the Council as Surveying Authority to bring and then keep the Definitive Map and Statement up to date, then making by Order such modifications to them as appear to be required as a result of the occurrence of certain specified events.
2. Section 53(3)(b) describes one event as, "the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway". See paragraph 4.

Subsection 53(3) (c) describes another event as, "the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- (i) "that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over the 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"
- (ii) "that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description"

The inclusion of Section 53(3) (c) (ii) is relevant in this case as part of the claimed route is currently recorded on the Definitive Maps as Footpath AX16/20.

The basis of the application in respect of the Byways Open to all Traffic is that the requirement of Section 53(3) (c) (ii) has been fulfilled.

3. Section 32 of the Highways Act 1980 relating to evidence of dedication of way as highway states " 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 such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered documents, 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. Section 31 (1) of the Highways Act 1980 provides that, "Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it".

Section 31 (2) states, "the period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by a notice or otherwise".

Section 31 (3) states, "Where the owner of the land over which any such way as aforesaid passes-

- (a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and
- (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

For a public highway to become established at common law there must have been dedication by the landowner and acceptance by the public. It is necessary to show either that the landowner accepted the use that was being made of the route or for the use to be so great that the landowners must have known and taken no action. A deemed dedication may be inferred from a landowners' inaction. In prescribing the nature of the use required for an inference of dedication to be drawn, the same principles were applied as in the case of a claim that a private right of way had been dedicated; namely the use had been without force, without secrecy and without permission.

The Committee is reminded that in assessing whether the paths can be shown to be public rights of way, it is acting in a quasi-judicial role. It must look only at the relevant evidence and apply the relevant legal test.

5. Modification orders are not concerned with the suitability for use of the alleged rights. If there is a question of whether a path or way is suitable for its legal status or that a particular way is desirable for any reason, then other procedures exist to create, extinguish, divert or regulate use, but such procedures are under different powers and should be considered separately.

History and Description of the Claim

1. An application for a modification to the Definitive Map and Statement was originally received dated 11 February 1994 from Woodspring Bridleways Association (“The Association”). The basis of this application was that a route should be recorded as a Byway Open to All Traffic. Submitted with the application was a list of documentary evidence that the applicant considered to be relevant.

Listed below is the documentary evidence that the Association referred to:

1814 Congresbury, Puxton, Wick St Lawrence Inclosure Award

1840 Congresbury Tithe Map

All of the above documents will be reported on in **Appendix 3**.

This matter is currently recorded on the Definitive Map Register as Mod 30c.

It should be noted that the Council has undertaken additional research into records that are held within the Council as well as those obtained from external sources. These are detailed in **Appendix 4** of this report.

2. The 1994 application claims that a Byway open to all Traffic should be recorded over a route that includes a section of Footpath AX16/20, the rest of which is unrecorded. The claimed route affects the Parish of Congresbury.
3. The route being claimed commences at Point A from the western end of Honeyhall Lane and proceeds in a north-westerly direction along a route known as Carditch Drove. 300 metres along the track the claimed route then joins onto Footpath AX16/20 for a further 121 metres, Footpath AX16/20 then continues in a south-westerly direction. The claimed route then continues north-west for 328 metres along Carditch Drove to its junction with the Strawberry Line. The claimed route then continues across the line for a further 95 metres to Point B, which is adjacent to Westbrinsea Farm. Therefore making the route a total of 844 metres.
4. This claimed Byway open to all Traffic is illustrated as bold dashed black line on the attached Location Plan EB/Mod30c (scale 1:6000).

Applicants Evidence

The claim is based on documentary evidence submitted by the applicant, a copy of which is attached to this report as **Document 1**. The route is illustrated on the Location plan attached EB/Mod30c.

Congresbury, Wick St Lawrence & Puxton Inclosure Award (1814) North Somerset Council

The applicant has referred to the Congresbury, Week St Lawrence & Puxton Enclosure Award which illustrates the claimed route on Plan B of the Award.

It is their opinion that Carditch Drove is a continuation of Honey Hall Road. The Enclosure Award refers to Honey Hall Road as '**One other Private Carriage Road or Drove of the breadth of twenty four feet extending from a certain place called The Four Elms towards Honey Hall called Honey Hall Road and numbered XI on the said Plan B**'.

However unlike other private or public carriage ways depicted on the plan, this particular route is not illustrated or described within the award, providing no status or ownership of the route. This would seem to suggest that this route could be a pre enclosure route.

A few metres past point A on the plan, there is a solid black line cutting across the track possibly indicating an obstruction, which would suggest that access was prevented beyond this point.

This Plan can be located in **Document 2a and 2b**.

Congresbury Tithe Map (1840) North Somerset Council

This document covers the area of Congresbury which illustrates the claimed route A-B as an enclosed track for its full length with adjoining plots of land at either side. However similar to the previous document, there isn't any evidence of ownership or status therefore difficult to prove its use. However as there are a number of houses and plots of land it would be considered that this route would have been used as private access.

This map is located in **Document 3**.

Additional Documentary Evidence

The Somerset and Dorset Railway 1864 (Cheddar Valley and Yatton) Somerset Record Office

The Cheddar Valley line was originally a Somerset & Dorset project promoted in 1863 for a line to Bristol via Wells and Yatton for which an Act was authorised on 14 July 1864. During this process plans were drawn up which illustrated the route of the railway line and an extent of deviation. Due to the use that was to be made of these plans they are a detailed record of the land over which the railway was to run. The book of reference associated with this plan tells us that the route A-B was dissected by the railway line and that Carditch Drove was listed as number 7 and described as an Occupation Road. The Owner or reputed Owners were the Trustees of the Bristol Municipal Charities (previously Queen Elizabeth Hospital), The Trustees of Sarah Collings, and Francis Henry Dickinson. It should be noted that a distinction was drawn between this route and the one numbered 79 which is recorded as Parish Road, this is the A370. The recorded information confirmed that the Highway Board for the District were the Owners. Furthermore this route was shown to be occupied by Henry Masey and John Say.

This plan illustrates that a route was in existence at this location and that it was capable of being used but it should be noted that it was called an occupation road which implies that it was for the use of the landowners. In addition, it would be reasonable to suggest that at this location unmanned gates would have been erected which were capable of being opened by anyone but would have stopped any straying animals from gaining access to the railway. An extract of the plan is attached as **Document 4a, 4b & 4c**.

Finance Act (1910) North Somerset Council

Unfortunately there was not a copy of the Finance Act Plan available that related to the claimed route A-B.

Handover Map (1930) North Somerset Council

The purpose of these plans was to illustrate routes which were considered to be public highways maintained by the local authority. Routes are coloured according to their differing category, Red being main routes, blue being secondary routes and yellow minor highways.

As we can see from the plan Carditch drove, the claimed route A-B, is not coloured in any way. However, from Point A running in an easterly direction there is a route coloured yellow (Minor highway) which is known as Honeyhall Lane.

An extract of this map is attached as **Document 5**.

Definitive Map (1956) North Somerset Council

The definitive map process was carried out over many years going through various processes which involved the area being surveyed by local people and advertisements being placed detailing that maps were being held on deposit for public viewing. This process was carried out through a Draft, Draft Modifications and Provisional stage before the Definitive Map was published. Any objections about routes that were included or routes

that had been omitted were considered by Somerset County Council and amended if considered relevant.

This map illustrates the route A-B as Carditch Drove, it is enclosed at either side for its full length with a Rhyne running alongside it (labelled on the map as Carditch Rhyne). In comparison to the Location Plan (EB/Mod30c) for the claimed route, this map has the Public Footpath AX16/20 commencing from north-west to south-east, whereas today it is depicted the other way. Footpath AX16/20 has been diverted at some point in the past.

This Map is located in **Document 6**.

Consultation and Landowner Responses

Consultation Responses

As part of North Somerset County Council's process letters of consultation were sent out to Statutory Undertakers, Landowners, User Groups and interested parties on the 4 July 2017.

The following parties responded to this consultation, the content of their response also being recorded

Name	Objection or Supporter	Comment
Bristol Water	No Objection	We confirm that we have no objection to the proposed stopping up modification order at Carditch Drove, Puxton Moor.
Atkins Global	No Objection	We confirm that we have no objections
Openreach	No Objection	Openreach does not appear to have plant in the area of your proposals. Openreach will not object to this order, however, we will insist on maintaining our rights under the appropriate legislation. If plant has to be resisted then charges will be raised to recover these costs.
Clerk to Congresbury Parish Council	Objection	The Parish Council has no objection to the byways being open to all traffic apart from the 'mechanically propelled vehicle' element of the designation as it was considered to be inappropriate to the nature of the byways as old unmade farm tracks and narrow footpaths. In addition these tracks lead directly onto the Strawberry line; designation must not include mechanically propelled vehicles apart from authorised farm vehicles as this would it is believed encourage access onto the Strawberry Line which is for recreational cycling and walking only. Any authorised vehicle access would be both a safety concern for those using the Strawberry Line and damage the surface of the track.
North Somerset Levels Internal Drainage Board	No Objection	Although the Board has no objection to the proposals, the fact that large machinery will be using these Lanes and Drove under their statutory powers of entry, on a bi-annual basis and in an emergency, and this may cause conflict with other byway users. Any fencing or gates that are to be provided should be wide enough to allow the passage of IDB's machinery. The board would also recommend that any proposals for such works be discussed with the IDB prior to installation.
AL (Landowner)	Objection	We understand that the section of Carditch Drove adjacent to land at Cider Cottage, Honeyhall Lane belongs to us, and is not a public right of way. We are aware that the Drove is used by cyclists and horse riders from time to time, and we have not objected to such occasional use. We did however, object to the use of the Drove for solar farm construction traffic. We would in the same way strongly oppose the application for Byway open to all traffic. This could result in mechanically propelled vehicles passing within one foot of the foundations of our house, and over our foul drainage system which is under the surface of the drove, with likelihood of damage as a

consequence. Some vehicles would also damage the surface of the drove, which is currently maintained by residents of Honeyhall Lane as a safe route to the village for our children and bicycles via the Strawberry Line. Designation as a BOAT might well also encourage unauthorised vehicular use of the Strawberry Line itself, because there is nowhere else for vehicles to go at the end of the Drove.

EB & HW
(Landowner)

Objection

We Write to oppose strongly the request by Woodspring Bridleways Association dated February 1994 that Carditch Drove to be considered a Byway Open to All Traffic. There are several clear reasons for our opposition. The drove is a narrow, low level, single track which joins the Strawberry Line by the local council and, therefore, there would be no point in attempting to provide such access.

The Drove is un-metalled with a rutted and deeply pot-holed surface. Local residents and members of the regional Drainage Board will confirm that it is prone to severe flooding. Attempts to improve this surface over the years have simply resulted in material subsequently sinking into the mud and filling the immediately adjacent rhynes.

At the lower end of Honey Hall Lane, Just before its continuation as Carditch Drove, there is a tight bend bounded by Grade 2 listed wall around Honey Hall itself. Just after this, the drainage from Cider Cottage, also shared with Honey Hall and Honey Hall Cottage, is only a short depth beneath the surface of the road. An increase in heavy traffic over this area would potentially damage the drains from these properties. The drove is totally unsuitable to be considered a traffic byway and we would strongly urge that this twenty three year old application is refused.

M & D G
(Landowner)

Objection

With reference to the application EB/MOD30c, we do not grant permission for the adoption of Carditch Drove for use a byway open to all traffic, including pedestrians, horseriders, cyclists and mechanically propelled vehicles. The current granted access along Carditch Drove is adequate for the purposes of agriculture and agricultural access to the land adjoining Carditch Drove.

M & J A
(Landowner)

Objection

We are emailing in regard to the above Application. We oppose the application on the following basis: A solar installation had to use the Strawberry Line last year because Carditch Drove is not suitable for "all traffic". Increased use by traffic on Honey Hall Lane is dangerous for pedestrians and current residents as there are no passing points. All of this was highlighted and agreed with during the solar panel application last year. This application is 23 years out-of-date and by no means should be resurrected. All of the residents of Honey hall Lane are in agreement and I hope you have been hearing their views in separate correspondence, as they have all sent them to you.

Strawberry Line
Society

Objection

The Strawberry Line Society is strongly against the Drove becoming a BOAT, but unfortunately we have been unable to obtain all the information we require to provide you with a fully documented objection, from North Somerset Council. For example the documents showing the rights to use an Accommodation Crossing by West Brinsea Farm. This is but one part of the missing information we require, so we request that the Application date be put back by 1

month, by which time we should have obtained all the relevant information we require.

We apologise for this action but being not only the originators and main users of the line for walkers and cyclists (latterly also a permissive trial for horses on a limited short stretch of the line) and also carrying out the maintenance with our volunteers on a weekly basis ,we do object to this Drove becoming a BOAT without us being to offer an alternative solution at this time

Date of Challenge

For public rights to have been acquired under Section 31 of the Highways Act 1980, a twenty year period must be identified prior to an event which brings those rights into question.

In regard to the claimed route A-B, this application has been submitted solely supported by historical evidence, no user evidence or detail of any challenges being made on users Therefore this application will have no further regard for Section 31 of the Highways Act 1980.

Summary of Evidence and Conclusion

Summary of Documentary Evidence

Taking all of the documents into consideration the majority of these documents illustrate the existence of the route A-B since 1814, however the fact that these are depicted does not confirm its status.

As detailed in **Appendix 3 and 4** the Enclosure Award has not set out this route despite the inclusion of Honey Hall Road.

None of the evidence has given a clear indication of the status of the route A-B. However, it is known that over time public access has been available. Indeed today, this route provides permissive Bridleway access connecting to the Strawberry Line.

During the production of the Definitive Map in 1950 only part of the claimed route was recorded on the Definitive Map as a footpath, the reason for this is unclear but nothing has been found to suggest that this classification was incorrect. These surveys were carried out by persons on foot, therefore it may be that the routes were in such a condition that they were obstructed by vegetation or too muddy to use.

Taking all of the documentary evidence into consideration although sufficient evidence has been found to support the existence of a through route between points A-B which existed prior to the Enclosure process in 1814 there is no evidence to show that these routes have established vehicular rights, only private vehicular rights for the landowners.

Therefore, based on this documentary evidence, the Officer does not feel that the evidence supports the claim that this route should be a Byway open to all Traffic.

Consultation Responses

As detailed within **Appendix 5**, from the responses received, six responses were objections, no responses of support and four confirming no objection. Those objecting have provided information relating to their personal knowledge of the area of land, including the use of this route by pedestrians, cyclists and horseriders. No further evidence has been given which would support the suggestion that this route should be Byway Open to all Traffic.

The main issue within the objections, regarded the concern of motorised vehicles using the route which would increase further damage to the road which is only used for private access to the adjoining landowners. In addition the objectors fear that this will also encourage users to access the Strawberry Line, of which motorised vehicles are forbidden to use. Concerns regarding suitability or desirability are not matters which can be taken into consideration when determining this application.

Conclusion

This application affects part of Footpath AX16/20 which is already recorded on the Definitive Map as well as an unrecorded route. To alter the status of a route on the Definitive Map, the evidence must indicate that the route which is already recorded “**ought**” to be shown as a route of a different status. This is considered a stronger test than a simple addition to the Definitive Map, where the requirement is that a right of way “is

reasonably alleged to subsist". The term "ought" involves a judgement that a case has been made and that it is felt that the evidence reviewed in the investigation supports the application on the balance of probabilities.

In this case it is thought that the documentary evidence is insufficient to challenge the current status of the route A-B. It is felt by the officer that the documentary evidence does not support the route being a Byway open to all Traffic.

It is felt that sufficient evidence has been discovered to show that it is reasonable to allege that the route A-B has been enjoyed by the public and should be recorded as a Bridleway.

The options that need to be considered are:

1. Whether the evidence supports the making of a Definitive Map Modification Order for the route A-B as a Byway Open to all Traffic
2. Whether the application described should be denied as there is insufficient evidence to support the making of an Order for the route A-B as a Byway Open to All Traffic.
3. Whether the evidence supports the making of a Definitive Map Modification Order for the route A-B as a Bridleway.
4. If the Committee accepts the recommendation of the Officer that A-B should be made a Bridleway they are asked to authorise the confirmation of the Order if no representations or objections are received.
5. That it is understood that if objections are made, the Order will be forwarded to the Secretary of State for determination. If this happens, subject to the Officers being content that there was no significant change to the balance of evidence, the Council will support the Order at any subsequent Public Inquiry.