

## Protocol for Requests to Investigate Highway Status and amend the 'list of streets'

### Introduction

1. This protocol has been prepared for Oxfordshire County Council as highway authority and is sponsored by the Highway Records section of the County Council. They are located at County Hall, New Road Oxford OX1 1ND and can also be contacted on 01865 815082 or [highway.records@oxfordshire.gov.uk](mailto:highway.records@oxfordshire.gov.uk)

### County Council's Responsibilities

2. The Highway Records Team are responsible for complying with the highway authority's statutory duty to make and keep corrected an up to date a list of streets within its area which are highways maintainable at the public expense.<sup>1</sup> This list is maintained by reference to maps which is common practice in rural counties where there are numerous unnamed roads. They are commonly called '*Highway Record Maps*' and these maps focus on vehicular highways.

The Countryside Records team of Oxfordshire County Council maintain the Definitive Map and Statement which records public rights of way which are footpaths, bridleways, restricted byways and byways open to all traffic. Any enquiries as to the Definitive Map and Statement including proposed variations should be directed to Countryside Records, County Hall, New Road, Oxford, OX1 1ND Telephone 01865 810808 or email [countrysiderecords@oxfordshire.gov.uk](mailto:countrysiderecords@oxfordshire.gov.uk).

This protocol relates exclusively to highways which do not qualify for recording on the Definitive Map and Statement, that is highways for mechanically propelled vehicles ("vehicular highways") and which are not byways open to all traffic.<sup>2</sup>

The *Highway Record Maps* relate to highways maintainable at the public expense. They do not cover highways, where the County Council is not responsible for their maintenance.

### The Highway Records Team Objective

3. Their objective is: to ensure that the *Highway Record Maps* are correct and they keep them under constant review. These maps show the general boundaries of highways maintainable at the public expense. They do not determine the exact line of the highway boundaries. The precise delineation of highway boundaries, in particular the width and especially

---

<sup>1</sup> Section 36 (6) Highways Act 1980 which is in turn derived from Section 38 (6) Highways Act 1959

<sup>2</sup> Byways open to all traffic means a highway over which the public have a right of way for vehicular and all other kinds of traffic but which are used by the public mainly for the purposes for which footpaths and bridleways are so used – Section 66 (1) Wildlife and Countryside Act 1981.

the width of older highways, may well be open to interpretation (from both historic records and on site).

The County Council's statutory duty is limited to producing 'a list of streets' which are highway maintainable at the public expense.

### **Land Ownership**

4. The *Highway Record Maps* do not record ownership. A piece of land (road) may be in private ownership but nonetheless constitute public highway. This concept may be difficult to grasp but it is a correct statement of the law. The effect is that registration of ownership of a road at the Land Registry does not mean that the road is **not** public highway.

### **Compilation of the Highway Record Maps**

5. The *Highway Record Maps* are Ordnance Survey based and the highways maintainable at the public expense (other than those recorded on the Definitive Map and Statement) are denoted by various colours which relate to their classification: these colours are explained by reference to a key which is available at all offices where the record maps can be viewed and which is attached to any extract of the *Highway Record Maps* which may be supplied to an enquirer.

The maps are at varying scales e.g. 1:1250 or 1:2500 for towns and larger villages and 1:10560 or 1:100000 for rural areas. Some of the maps date from the early 1950's and other documents from the 1930's.

It is especially relevant that the *Highway Record Maps* were drawn up by the County Council as part of its statutory function as highway authority. Self evidently this was undertaken by County officers as part of their professional duties in the knowledge that these records would be open to the public and of considerable importance to the public. Their sole objective was to produce accurate records as to the extent of the highway. They had no other cause or reason to record land as highway or to exclude it from the highway. Thus the County Council's position is that significant evidential weight should be attributed to the *Highway Record Maps*.

Further information on the compilation of the Highway Record Maps is set out at Annex 1

### **Application for Variations**

6. There is no statutory regime for seeking variations to *Highway Records Maps*<sup>3</sup> so the County Council has drawn up this protocol. Anyone who believes the information recorded on the *Highway Records Maps* is incorrect and who wishes to have it changed should complete an application form (attached) and this must include all relevant information (both that in public domain and that held privately) which the enquirer holds or has access to. No relevant information may be withheld, this

---

<sup>3</sup> There is for Rights of Way

means information which is relevant but which does not support the applicant's case must be included.

As to the relevant information see Annex II

### **Consideration of Application**

7. The Highway Records Team will then consider the application together with any records held at County Hall or the Records Management Unit of the County Council (that is the section of the County Council which deals with modern records of the County Council). - see Annex III.

Since significant evidential weight is attributed to the *Highway Record Maps* - very great weight for maps which were produced more than [50] years after and which have not previously been queried – a good case must be made out that the land in question is either highway or as applicable that it is not highway and it is for the applicant to produce sufficient evidence to effect the change. Indeed in cases where it is suggested that land recorded as highway should be removed from the *Highway Record Maps* it is especially appropriate that the County Council should adopt a robust approach in the light of the duty on highway authorities under Section 130 Highways Act 1980 and that the maxim, 'once a highway is always a highway' is good law.

If a case proves to be particularly complex then in order to progress it may be considered appropriate to obtain a report from a reputable highways record expert. In such a case the applicant will be asked whether or not he wishes his application to be pursued and if he does the expert's costs must be borne by the applicant.

Evidence maybe adduced both for and against varying the *Highway Record Maps*; in short a request for variation may be finely balanced in particular where a query has been raised as to the precise boundaries of a highway. In those cases where the evidence is not conclusive in the County Council's opinion the *Highway Records Maps* will not be altered.

### **Application to remove land from the Highway Record Maps**

8. There may be an application that land which is recorded as public highway does not constitute public highway. This application may relate either to the width of the highway (see 7 above) or an entire stretch of road. See 7 above as to the County Council's position although occasionally this may be a straightforward matter if there has been an obvious clerical error. Some public consultation may also be appropriate.

### **Application to add land to the Highway Record Maps**

9. There may be an application that a road which is not registered as highway should be recorded as highway. This may relate either to the width of the highway (see point 7 above) or an entire stretch of road. See 7 above as to the County Council's position and the following applies:

9.1. The *Highway Record Maps* do not relate to all public highways but only public highway which is maintainable at the public expense and highway which has been dedicated through long user does not automatically constitute highway maintainable at the public expense.

9.2. A very substantial change in the law took effect in May 2006.<sup>4</sup> This provided that public highway rights for mechanically propelled vehicles overall then existing public highways, excepting those recorded on the *Highway Records Maps* at that time, were extinguished<sup>5</sup> unless one of the following exemptions applied: - main lawful use by the public during the five year period pre 2 May 2006 was use for mechanically propelled vehicles.<sup>6</sup>

- the highway was created by an enactment or instrument or otherwise on terms that expressly provided for it to be a right of way for mechanically propelled vehicles.
- the highway was created by the construction, in exercise of powers conferred by virtue of an enactment, of a road intended to be used by mechanically propelled vehicles; or
- the highway was created by virtue of use by mechanically propelled vehicles during a period ending before 1 December 1930.

In short, in order for it to be established that at 2 May 2006 a road was then (and remains) vehicular highway maintainable at public expense one of these exemptions must be established as well as establishing that:

- there were public vehicular rights at 2 May 2006; and
- the vehicular highway is maintainable at the public expense.

9.3. A vehicular highway can only be created after 2 May 2006 by one of the following two ways that is:

- by an enactment or instrument or otherwise on terms that expressly provide for it to be a right of way for mechanically propelled vehicles; or
- the highway was created by the construction, in exercise of powers conferred by virtue of an enactment, of a road intended to be used by mechanically propelled vehicles.

---

<sup>4</sup> Part 6 Natural Environment and Rural Communities 2006

<sup>5</sup> Or recorded on the Definitive Map and Statement as a BOAT

<sup>6</sup> It is recognised that establishing this exemption is problematical and that in practice at best 'conclusions' will be drawn from indirect evidence and the probabilities of the situation – so conclusions will not be definitive.

In short creation of a vehicular highway after 2 May 2006 cannot be based on long user.

- 9.4. Probably it will be appropriate to undertake consultation with those likely to be effected by any change of the status of the road.

### **General**

10. If following investigation by the County Council the applicant wishes to pursue the matter further his next recourse is to the courts the arbiter of whether or not a road is highway maintainable at the public expense. The cost of an application to the courts must be borne by the applicant.
11. The County Council appreciates that requests for variations to the *Highways Record Maps* are of considerable importance and concern to the applicant and may be linked to differences with a neighbour which can be especially distressing. Nonetheless as indicated at point 9 the County Council will not vary the *Highway Record Maps* unless there is conclusive evidence that this should be done. In these types of cases an application to the court (see point 10) can be the most appropriate means of resolving the issue. [The County Council's resources are limited and expending them on highway cases which are linked to neighbour differences is a rarely an appropriate use of tax payers' money.]
12. The Highway Records Team work in close liaison with County Legal Services
13. All evidence presented will be put on the County Councils files and kept permanently regardless of the Councils decision or the outcome of any application to the courts.
14. Please note that this information may be revealed to third parties subject to the terms of the Data Protection Act 1998.

## **Annex I**

The information recorded on the *Highway Record Maps* is derived from a variety of sources.

The following documentary sources have been used: Ordnance Survey County Series maps dating from the late 19<sup>th</sup> century, records passed to the County Council from previous highway authorities also dating back to the late 19<sup>th</sup> century, on occasions historic records such as in-closure and tithe awards and the Finance Act Maps, records of adoption under the Highways Acts 1959 and 1980, the Housing Act 1985 and documents held by the County Council.

### Other Sources

Site surveys were undertaken in conjunction with previous highway authorities (engineers from the borough and urban district councils) when many highway responsibilities were conferred on the County Council in the 1970's. Other site surveys may have been undertaken

## **Annex II**

### **Primary usefulness and for older roads must be included**

- Enclosure Award
- Tithe Map
- Finance Act Map 1910
- OS Maps

### **Secondary usefulness (if applicable)**

- Local Maps (Davis, Thos Jefferys, Bryant, Greenwood, Kelly etc)
- Estate Maps and Drawings
- National grid Surveys
- Parish Records
- Records of Maintenance of the Road
- Railway Maps
- Acts for Railways, Waterways, Roads and Works
- Definitive Map and Statement
- Deeds of Private property

### **Of more general application**

- Local History Books
- Witness Evidence
- Historical Photographs
- Evidence regarding existence of church, mill, well, mine etc which may establish user

### **Annex III**

- i. Some County Series Ordnance maps dating from the mid-19th Century;
- ii. Records and record maps from previous highway authorities now in the County Council's possession (and not deposited in County Archives);
- iii. Records of adoption under S38 Highway Act 1980, S228 Highways Act 1980, S40 Highways Act 1959, S202 Highways Act 1959, S36(2) Highways Act 1980 (and not deposited in County Archives);]
- iv. Correspondence held in County Council files not deposited in County Archives;
- v. Documents relating to schemes and highway improvements held in County Council files (and not deposited in County Archives); and
- vi. Information relating to past and present County Council land ownership (and not deposited in County Archives)

### **FAQs**

1. **Q:** How long will it take you to deal with my application?

**A:** Obviously we would do our utmost to make a decision on your application within the shortest possible time and although we would aim to respond within one month this will depend on the complexities of the site concerned

2. **Q:** I agree that historically the land was part of the highway but it has been enclosed in my garden for many years.

**A:** The maxim once a highway always a highway is good law. Therefore the land still remains highway but there might be scope for giving you a licence for planting [*further details*]

Where land is not required by the highway authority as highway you may wish to consider securing a stopping up of the highway because if you own the subsoil then the land would revert to you. Stopping up procedures are not straightforward but in our experience the simplest procedure is by use of the Town and Country Planning Act 1990. In the first place you need to secure planning permission which permission in turn requires a stopping up for the development to be undertaken on site

3. **Q:** I think the land is highway please investigate.

**A:** See point 5 of the protocol. Generally the responsibility for establishing that land is highway rests with the person who asserts that is the case.


4. **Q:** I think the land is vehicular highway. I have provided evidence of use.

**A:** Please see point 11 of the protocol above.

5. **Q:** I have produced evidence which I think shows that the land is highway but this is not accepted by my neighbour. Is it the County Council's responsibility to resolve this dispute in its capacity as highway authority?

**A:** We can understand why you have raised this matter with the County Council; indeed the County Council may have relevant information but the County is not the statutory arbiter of the status of land as vehicular highway. Ultimately this is a matter for the courts.

Please also see point 10 and 11 of the protocol



**Owen Jenkins**  
Director Community Operations

September 2019