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Public Rights of Way Management & Consultancy Services

Investigation into the Status of Monmouthshire Lanes Community of: Devauden Route: 53-16

Client: Monmouthshire County Council

1.0 Introduction

1.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), a Member of the Institute of Sports, Parks and Leisure (ISPAL) and a Registered Expert Witness and I hold a Certificate in Leisure Management.

1.2 My experience is based, most generally, on an expertise that has been developed over a twenty-four year period as a Public Rights of Way practitioner.

2.0 Instructions

2.1 I am instructed by Paul Keeble Traffic and Network Manager, of Monmouthshire County Council, Highways, County Operations, County Hall, The Rhadyr, Usk NP15 1GA.

2.2 My instructions are to:

- a) investigate the status of the lane highlighted on Plan 1 attached to this report (this plan is also included in Appendix 1 of the document bundle attached to this report);
 - b) carry out such consultations and site visits/meeting as deemed necessary in connection with the above;
 - c) produce an advisory report for the County Council in order to assist them in making a decision whether or not the route in question should be added to the Definitive Map and statement of Public rights of Way (hereafter referred to collectively as “the Definitive Map”); and
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- d) if the route is determined to be a highway whether or not it is maintainable at public expense

Site Visit and Documents Consulted

- 2.3 As part of my investigation and in accordance with my instructions I have conducted a site inspection. This was undertaken on Tuesday 16th December 2014 and I was accompanied by my wife and the land owners.
- 2.4 A substantial proportion of the route clearly has not been passable for some considerable time, it being substantially overgrown. It would however appear to be a route of some antiquity with a number of sections of the route having the physical form of a sunken lane or Holloway.
- 2.5 I have had sight of a range of documents obtained from a number of different sources. A list of documents I have consulted in the compilation of my report is attached as Appendix 2. It should be noted that not all of these documents were found to be relevant to my investigation and only those which are relevant have been included in the document bundle accompanying this report.
- 2.6 I have also been instructed to investigate the status of two other routes (Route53-11/53-18 and Route 53-19) in the immediate vicinity of the route that is the subject of this report (Route 53-16). This arises, in part, from a request made by the owners of the land crossed by Route 53-16, as well as being a time/cost effective working practice. The bundle attached to this report is therefore also relevant to my reports into the status of these other two routes.

Matters which are not relevant to my Investigation

- 2.7 As set out above my instructions are to undertake the necessary investigations etc and to produce an advisory report to assist the County Council to determine whether or not to add the route under investigation to the Definitive Map. If the route is to be added this would be achieved by making a legal order known as a Definitive Map Modification Order.
- 2.8 Definitive Map Modification Orders do not extinguish, create or divert public rights of way, they only modify the legal record (the Definitive Map) to reflect the existing situation. It therefore follows that if Route 53-16 was to be added to the Definitive Map the corresponding Definitive

Map Modification Order would not create any new rights, it would only seek to record those that, as a matter of evidence, have been demonstrated to already exist.

2.9 In view of the above, and whilst they may be matters of genuine concern, issues such a desirability, suitability, need, future maintenance, privacy, security and even public safety are not matters that can be lawfully taken into consideration.

2.10 On a number of occasions during my investigations issues and concerns have been raised regarding various procedural matters and the conduct of the County Council etc in this matter have been raised. These are not matters that relate to the status of the route under investigation, and as such they will not be taken into consideration as part of my findings.

2.11 I am also aware that there have been a number of previous reports, opinions, decisions and submissions made by both the County Council and other parties in respect of this matter. Whilst not obliged to do so, but in keeping with my role as an expert witness, I have prepared this report in keeping with the principles of the Civil Procedure Rules. As such the opinions I have expressed represent my true and complete professional opinions on the matters to which they refer, and I have not been influenced by the opinions of the third parties.

3.0 Understanding of the Background to the Case

3.1 For the purposes of the Highways Act 1980 Monmouthshire County Council are the Highway Authority for their area. They are also the Surveying Authority in respect of maintaining the Definitive Map and Statement of Public Rights of Way for their area.

3.2 In 2003 a resident of Devauden made enquiries with the County Council regarding the status of Route 53-16. Officers of the County Council subsequently sought to determine the status of the route and then in June 2008 the Council were served notice under Section 56 of the Highways Act 1980 requiring them respond on the matters of whether a) the route was a highway maintainable at public expense and b) whether it was out of repair. At this time the route was not recorded on either the List of Streets Maintainable at Public Expense (the List of Streets) or the Definitive Map.

- 3.3 It would appear that this resulted in proposals that the route be added to the Highway Authority's List of Streets Maintainable at Public Expense, however the issue seems to have continued to be considered and discussed with various parties resulting in a report being produced by Council Officers in November 2010. From this report the Authority confirmed its position that it believed that Route 53-16 was a highway maintainable at public expense.
- 3.4 Whilst the matter of the status of Route 53-16 appears to have been determined the issue of its state of repair still remained outstanding and as a result of this in October 2011 a further Notice under the provisions of Section 56 of the Highways Act 1980 was served on the County Council. The Council were advised that if the road was not repaired then application would be made to the Magistrate's Court seeking an order/direction that the required works be carried out within a specified period. The Council were subsequently required to attend Court in March 2012, however an agreement/compromise was reached resulting in the case not having to be heard.
- 3.5 Route 53-16 is currently recorded on the List of Streets with reference to its status being a Restricted Byway. The owners of the land crossed by Route 53-16 have had a level of involvement in parts of these proceedings, but the addition of a route to the List of Streets is not regulated by any process which allows for challenge (other than Judicial Review). Feeling aggrieved by this they made a complaint to the Ombudsman in February 2014. The Ombudsman sought clarification on a number of matters from the County Council on their behalf and closed the file on the matter at the end of March 2014 being satisfied that the County Council were prepared to reconsider the issue via the Definitive Map Modification Order process.
- 3.6 The decision to make a Definitive Map Modification Order is quasi-judicial in nature and therefore must be made based upon matters of evidence rather than a simple commitment to do so made to the Ombudsman. In view of the dissatisfaction expressed by the land owners over the decision making processes employed so far in this case the Council decided to commission an independent investigation and assessment of the evidence to assist in their decision making process.

3.7 Robin Carr of Robin Carr Associates Public Rights of Way Management & Consultancy Services was asked to tender for this work, and was subsequently awarded the contract to undertake the commission.

4.0 Legislative Context

4.1 Within the scope of my instructions I have been asked to provide guidance to assist the Authority in making their decision whether or not they should promote a Definitive Map Modification Order in respect of the route under investigation.

4.2 In order to address this matter it is necessary to consider issues surrounding how highways come into being. I have therefore set out within this section of the report my understanding of the general principles that apply to these matters.

Public Rights of Way - General

4.3 Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are public highways. A highway is a way over which the public have a right to pass and re-pass. Not all highways are maintainable at public expense, nor is there any need for a way to have been “adopted” before it is either a highway or a highway maintainable at public expense.

4.4 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.

4.5 Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of “Once Highway, Always a Highway”¹ applies. Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of local authority administrative order or a Court Order.

¹ Harvey v Truro Rural District Council (1903) 2 Ch 638 & Dawes v Hawkins (1860) 8 CB (NS) 848, 141 ER 1399

Types of Highway

4.6 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. who may use it) is dependent upon the specific type of highway status attributed to a route.

Common Law

4.7 Under the common law there were, and indeed still are, only three types of highway. These are:

- Footpaths,
- Bridleways; and,
- Carriageways

4.8 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).

4.9 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including people leading horses) and possibly the right to drive cattle.

4.10 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including people leading horses), non-mechanically propelled and mechanically propelled vehicles.

Statute

4.11 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance under the provisions of the Countryside Act 1968 cyclists are granted a right to use bridleways. Other legislation provides for Public Carriageways to be subdivide into various categories which include, motorways, cycle tracks, restricted byways and byways open to all traffic.

4.12 When determining the status of a specific route one must first consider the common law situation and then apply any necessary restrictions to status imposed by statute in respect of restricted byways and byways open to all traffic (e.g. the effects of the Natural Environment and Rural Communities Act 2006 (discussed below)). Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case.

Establishment of Highways

Dedication and Acceptance

- 4.13 Subject to a small number of exceptions, before any highway over land can come into being there must be an act of dedication by the landowner followed by the acceptance of the strip of land as a highway by the public, usually (but not always) demonstrated by the public using the way. It is important to note that a highway is a specific linear corridor of land and that there is no general right to wander at will over land (excepting that provided by the Countryside and Rights of Way Act 2000, which does not apply in this instance).
- 4.14 The act of dedication may be express, or implied depending upon the actions or inactions of the land owner. Acceptance is usually demonstrated by public user, however acceptance of a way as a highway by the Highway Authority may also suffice. The principles of how rights can come into being are further discussed in more detail below:

Statute

- 4.15 It is possible for highways to be created as a result of statutory processes such as enclosure awards, or in more modern times various types of statutory creation order or agreement. Such processes invariably result in the production of a range of documents confirming their effect as well as the grounds upon which they have been made.
- 4.16 The Highways Act 1980, Section 31 has also, to a certain extent, codified the common law (discussed below) by identifying a specific set of circumstance whereby a presumption of dedication may arise. One of these circumstance is the requirement that the way in question must be used for a full period of twenty years, with such use being further qualified as having to be “as of right” and “without interruption”. There is no suggestion in this case that rights have come into being as a result of modern user therefore I do not propose to discuss the detail of Section 31 of the Highways Act 1980 in further detail.

Common Law

- 4.17 The establishment of highway rights under the common law is not bound by the “20 year rule” discussed above, and it is understood that the Courts have clarified² that rights can be established in a very short period of time. It may therefore be helpful to look at this area in more detail.
- 4.18 Halsbury³ states – *“Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.*
- 4.19 It is my understanding that the inference of dedication may arise in three ways:
- i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example⁴ where a new bridge which was constructed by a railway company, and the bridge was subsequently used by the public freely from the time it was completed, it was concluded that the way had been dedicated as a carriageway at a point when the bridge had been in use for only 18 months.
 - ii) Second, the inference has been drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced.

² North London Railway Co v Vestry of St Mary, Islington (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18 month period

³ Halsbury’s Laws of England (Volume 55 ‘Highways’)

⁴ North London Railway Co v Vestry of St Mary, Islington (1872) 27 L.T. 672

In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred⁵.

- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact⁶.

4.20 It is the second of these options that will most likely apply in this case.

Natural Environment & Rural Communities Act 2006

4.21 Section 67(1) of the Natural Environment & Rural Communities Act 2006 extinguished, on commencement, public motor vehicular rights over every highway that is not already shown on the definitive map and statement, or is there shown as a footpath, bridleway, or restricted byway. In effect this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the definitive map and statement as a byway open to all traffic.

4.22 In the absence of further qualification this provision would extinguish public rights of way for mechanically propelled vehicles over virtually the whole of the existing highway network. But subsection 67(2) introduces a series of exceptions to protect certain highways from such extinguishment under subsection 67(1). Any way that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished.

4.23 Because clause 67(1) explicitly extinguishes public motor vehicular rights over every highway that was not shown on 2nd May 2006 [in England] on the definitive map and statement as a byway open to all traffic, there is a clear presumption that this will be the case unless it can be shown that one (or more) of the five exceptions in subsections 67(2) or the transitional arrangements in subsection 67(3) apply.

⁵ See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA)

⁶ See e.g. *Parker J in Webb v Baldwin and others* (1911) 75 JP 564 at p565

A summary of the five exceptions

4.24 The five exceptions may be summarised as follows:

- *Subsection 67(2)(a)* excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the 'ordinary roads network'.
- *Subsection 67(2)(b)* excepts ways that are both recorded on the "list of streets" as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the 'ordinary roads network'.
- *Subsection 67(2)(c)* excepts ways that have been expressly created or constructed for motor vehicles.
- *Subsection 67(2)(d)* excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
- *Subsection 67(2)(e)* excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive 'off-road'.

4.25 Section 67(4) of the 2006 Act provides that where a public vehicular right existed, but has now been extinguished by virtue of the provisions of the Act, a private right of way is retained, whether previously used or not.

Modifying the Definitive Map – Section 53 of the Wildlife and Countryside Act 1981

4.26 For the purposes of Section 53 of the Wildlife and Countryside Act 1981, Monmouthshire County Council are the Surveying Authority and have a duty to ensure that the Definitive Map and Statement are properly maintained by way of a process of continuous review. This means that when they discover evidence that suggests the legal record needs to be amended/updated they should promote a Definitive Map Modification Order to effect the required change.

4.27 In particular Section 53 (3)(c) requires that an Order made upon 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 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; or
- (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

Section 32 of the Highways Act 1980

4.28 Section 32 of the Highway Act 1980 which 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 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.

Standard of Proof

4.29 With regard to the standard of proof, it should be noted that an Order must be made under Section 53(3)(c)(i) if there is a reasonable allegation in favour of the existence of public rights. Such an Order can however, only be confirmed if, on the balance of probability, the alleged

rights can be shown to subsist. The test for making an Order therefore differs from the test for confirmation⁷.

4.30 For an Order to be made under Section 53(3)(c)(ii) (iii) the standard of proof for both making and confirmation is on the balance of probability

4.31 If the above tests appear to be satisfied, yet there is a conflict of credible evidence, which cannot be reconciled, the Authority is also obliged to make an Order⁸.

5.0 Consultations

5.1 As part of the investigation into the status of Route 53-16 a range of user representative groups, the Community Council, land owners and adjoining landowners have been consulted and offered the opportunity to submit relevant evidence for consideration. Notices were also posted at convenient points on the route to advise of the consultation exercise and investigation. Information was also placed on the Community Council website and I attended a Community Council meeting on 26th January 2015.

5.2 Copies of consultation responses and associated correspondence are included in the bundle attached to this report under Appendix 26. Any relevant evidence that was submitted is discussed later within the report and included in separate appendices.

5.3 A further consultation exercise was undertaken following the completion of my investigations in order to allow a further opportunity for the submission of relevant documents/evidence. Copies of responses received are included in the document bundle at Appendix 27.

⁷ Todd & Bradley v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 1450 (Admin)

⁸ R v Secretary of State for Wales Ex p Emery [1998] 4 All E.R. 367

6.0 Summary Description of Available Evidence

6.1 In this section of my report I have sought to objectively set out what each document, as a matter of fact, shows. Matters of interpretation are dealt with in the follows sections of the report.

Eighteenth and Nineteenth Century Commercial Maps (Appendix 3)

6.2 Cary's map (1805), Teesdale's map (1829) and Moule's map (1848) do not show the route.

6.3 Price's map (1823) and the David and Charles map (1830) show the route as a continuous road through to Trelleck Grange.

6.4 Greenwood's map (1830) shows the southern section of the route as far north as the junction with the track to Panta Farm. It also shows a continuation to Trelleck Grange but the middle section between the junction with the track to Panta Farm (to the south) and Parish Boundary (to the north) is not shown.

6.5 Hall's map (1831) and the Gray & Son map (1840) shows the route running through to Trelleck Grange but the southern section to the south of routes 53-18/53-11 is not shown

Tithe Map 1839 (Appendix 4)

6.6 Two copies of the Tithe Map for the area have been consulted. The first is located at the Gwent records Office, the second at the National Archives in Kew. Digital images of both documents have been consulted and both show the route under investigation. Neither show the route shaded in any colour.

Ordnance Survey Maps (Appendix 5)

6.7 The 1833 first Edition 1 inch Ordnance Survey Map shows the route as a continuous road running north to Trelleck Grange.

6.8 The 1881, 1901 and 1920/1 Ordnance Survey 25 inch County Series maps show the route as a road or lane with boundaries each side running northwards past Panta Barn, and then as an unbounded path or track. The 1886 Ordnance Survey 6 inch County Series Map shows the same.

1910 Finance Act Records (Appendix 6)

- 6.9 The 1910 Finance Act maps show the section of the route running south from its junction with routes 53-18 and 53-11 as being excluded from valuation. The route running north to Trelleck Grange is included within Hereditament Nos 225 and 324. Deductions of £20 and £5 respectively are claimed in respect of public rights of way across the land.

Highway Authority Maps/Records (Appendices 7 – 14)

- 6.10 The 1949 Highway Record Map (Appendix 7) shows the route in purple with the reference number 53-16. A small section at the southern end appears not to be shown. The purple line has been crossed out with the word “out” next to it.
- 6.11 The 1952 Highway Record Map (Reproduced and Updated 1987) (Appendix 8) is a composite map showing both publically maintainable roads and public rights of way. The route has not been marked onto the Ordnance Survey base map as being a highway of any description.
- 6.12 The 1955 Highway Record Map (Appendix 9) shows the route by a solid black line with the reference number 53-16. A small section at the southern end appears not to be shown. The black line has been crossed out in respect of the section running northwards from route 53-18 and 53-11. There is evidence of post 1955 amendments to this record set by reference to route 53-19 in 1960 and the restoration of route 53-11 to the record in 1993.
- 6.13 An undated hand written schedule of highways (Appendix 10) refers to route 53-16 calling it “*Great Panta Road*” stating that it is “*not maintained at all*” and refers the reader to “*See ‘Schedule of Amendments’ Div. 2*”. This schedule does not contain a complete list of all highways.
- 6.14 An undated extract of a list of highways in Division 2 (Appendix 11) appears to have included route 53-16 but it has been scored/crossed out.
- 6.15 A list of unclassified roads which appears to be from a file of highway returns to Central Government and believed to originate circa 1970 (Appendix 12) includes the road but it has been crossed out.

- 6.16 A set of undated highway maps using a 1921 Ordnance Survey 25 inch County Series base map, but believed by the Highway Authority to have been compiled circa 1974 (Appendix 13) shows the route shaded brown and annotated 53-16. The route has then been crossed out and annotated “out” and “See schedule of amendments”
- 6.17 A further set of undated highway maps, using metric series Ordnance Survey base maps, and believed by the Highway Authority to have been compiled circa 2008 (Appendix 14) show the route shaded pink and annotated C53-16. These maps are understood to be an interpretation of the 2008 List of Streets discussed below.

List of Streets (Appendix 15)

- 6.18 The 1988 version of the Highway Authority’s List of Streets Maintainable at Public Expense does not include route 53-16. A version of the List of Streets dated 2008 does include the route, but the entry detail is incomplete. A supplementary sheet appended to the current List of Streets includes route 53-16 showing a last date of amendment to that specific record as 16 May 2012.

Definitive Map and Associated Documents (Appendix 16)

- 6.19 The route is not recorded on either the Draft or Definitive Maps for the area, however a number of public footpaths were claimed and are subsequently recorded as terminating on, or running immediately adjacent to the route. The Statements that accompany the Draft and Definitive Maps which relate to these footpaths refer to route 53-16 as a County Road.
- 6.20 The “Additions and Deletions Map” shows that no amendments were made that affect the route between the Draft and Provisional Stages of productions of the Definitive Map. The Provisional Map appears to have been relabelled as the Definitive Map during the process.

The 1972 Special Review of the Definitive Map (Appendix 17 & 18)

- 6.21 General correspondence relating to Special Review of the Definitive Map (Appendix 17) shows that in addition to matters relating the general review and the reclassification of Roads Used as Public Paths, the County Council were also considering the status of various unclassified road and green lanes that were on their highway records.

- 6.22 The Draft Map of the Special Review (appendix 18) records route 53-16 as a public footpath. Associated correspondence suggests that it was being added at this time because when the original Definitive Map was produced it was thought to have been a County Road.

1920 Sales Particulars for the Trelleck Grange Estate (Appendix 19)

- 6.23 A number of extracts from some sales particulars which are understood to relate to the sale of the Trelleck Grange Estate circa 1920 have been provided by the land owners. The extracts relate to the sale of a number of land holdings, some of which refer to roadside frontages etc.
- 6.24 The preamble to the sale particulars under “Remarks and Stipulations: 1. Situation” remarks that the estate “.....is intersected by many good parish roads”. At point 3 the farms are described as having “....good frontages to parish roads”. The specific entry for “the Panta Farm” does not however refer to any roadside frontage.
- 6.25 A description of the land parcels (referenced to the 1920 OS Map – Appendix 5) lists parcels 24, 142 and 145 which correspond with Route 53-16 as a Road. Parcels 280 and 281 which correspond with the track running from Route 53-16 past Little Panta are listed as a Lane and Parcel 273 which is the road/lane running east from Little Panta is described as a Road.

Documents relating to the purchase of Panta Farm in 1977 (Appendix 20)

- 6.26 A map showing the boundary of Panta Farm edged in red and which I understand is connected to the purchase of Panta Farm in 1977 has been provided by the land owners. The route under investigation is included within the land holding. Route 53-18/53-11 is not included within the land holding.
- 6.27 Various property deeds have also been submitted which clearly show that Route 53-16 is part of the land holding and was sold with the surrounding land. The schedules included in the deeds refer to Route 53-16 as a Track and the access road to Little Panta as a Driveway. There also appears to be a private right of way/easement over parts of Route 53-16 for forestry purposes.

7.0 General Comments and Interpretation of Documents

- 7.1 In this section of the report I have sought to set out matters relating to the interpretation of individual documents and document types. I have also commented on the evidential value of

documents. A discussion on specific issues which may be of assistance in determining this matter is included in the report at Section 8 below

Planning Inspectorate Definitive Map Orders: Consistency Guidelines

- 7.2 The Planning Inspectorate have produced a document entitled: “Definitive Map Orders: Consistency Guidelines”. This is available for download on the Planning Inspectorate’s website. Extracts of the document that may be of assistance in this particular case are included in the bundle attached to this report under Appendices 21 – 24.

Other Published Articles

- 7.3 Two further articles published in the Institute of Public Rights of Way and Access Management’s journal “Waymark” are included in the bundle at Appendix 26. The first of these provides a concise overview of the history of highway authority records, the second provides an insight into the problems associated with the management of highway authority records. Both articles may be considered to be of assistance and relevant in determining issues relating to this particular case.

Eighteenth and Nineteenth Century Commercial Maps (Appendix 3)

- 7.4 An extract from the Consistency Guidelines relating to these documents is included in the bundle at Appendix 21.
- 7.5 Maps of this nature were generally produced as a commercial enterprise and therefore aimed at the sort of people who would be likely to make use of them. This would, quite often be reasonably well heeled members of society with the means to purchase the maps and also then to use them for the purposes of travelling throughout the county to which they relate. It therefore follows that the ways shown upon them may generally be considered to have been available for their use, in other words they were public highways. As a result the showing of a road on such maps is generally considered to be supportive of the existence of highway rights and the more maps a way is shown on, the greater the evidential value of the document set.
- 7.6 In this particular case, a number of commercial maps show the route, and/or parts of the route, and are indicative that historically it formed part of a through route running to Trelleck Grange.

Overall in my opinion this document set is supportive of the proposition that the route is a public highway.

Tithe Map 1839 (Appendix 4)

- 7.7 An extract from the Consistency Guidelines relating to these documents is included in the bundle at Appendix 23
- 7.8 Tithe maps and apportionments were produced as part of the process of transferring the payment of tithe duties from material goods to a monetary payment. They were not particularly interested in defining public highways unless they were likely to adversely affect the final valuation of the land. As such it is possible to find reference to the existence and status of public highways (of any description) in the documentation. Some areas of land, such as roads and tracks, may be found to be colour washed in a shade of brown. Such colour washing indicates that the land in question was not subject to tithe, or in other words it was not productive land, it is not, as is sometimes suggested, necessarily indicative of a route being a public highway. It was also possible for highways to be included within tithable land holdings by virtue of the fact that the highway verges could be harvested for its herbage.
- 7.9 Notwithstanding the above, tithe maps do provide what is probably the most accurate large scale mapping of its time, and as such it is of value in determining the existence of physical features, which in turn may be of assistance in determining whether or not public highway rights may exist. In this case the Tithe Map confirms the physical existence of the route but is generally silent on the matter of status.

Ordnance Survey Maps (Appendix 5)

- 7.10 An extract from the Consistency Guidelines relating to these documents is included in the bundle at Appendix 21.
- 7.11 It should be emphasised that the depiction of a way on an Ordnance Survey map is not, of itself, evidence of a highway. Whilst it is understood that the courts have treated Ordnance Survey maps as not being evidence of the status of a way, they are evidence as to what physically existed at the time of survey.

- 7.12 In this particular case the earliest edition of the Ordnance Survey, the 1833 first Edition 1 inch map, shows the route as a continuous road running north to Trelleck Grange. This is consistent with some of the earlier commercial maps discussed above, and would suggest that in the early to mid-Nineteenth Century there was a though route of equal status throughout. This may certainly dispel any suggestions that it was originally a cul-de-sac route.
- 7.13 The later Nineteenth Century and early Twentieth Century editions may suggest that the northern section of the route had fallen into decline and was less of a prominent physical feature in the landscape, being shown as a path or track, and later recorded on the Definitive Map (Appendix 16) as a public footpath. The section of the route under investigation (Route 53-16) however remained a more prominent feature in the landscape and was shown as lane with fixed boundaries. It does not, of course, automatically follow that its physical presence is indicative of it enjoying some level of public highway status.

1910 Finance Act Records (Appendix 6)

- 7.14 An extract from the Consistency Guidelines relating to these documents is included in the bundle at Appendix 24.
- 7.15 The 1910 Finance Act provided for the levying of tax ('Increment Value Duty') on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or other transfer. The valuation process allowed for deductions for, among other things, the amount by which the value would be reduced if the land were subject to any public rights of way.
- 7.16 Evidence of the possible existence of a public right of way in Finance Act documentation usually arises in one of two ways-
- reference to it in one or more of the various documents forming part of the valuation process, (i.e. a deduction was claimed); or
 - the exclusion of a route from the assessable parcels of land shown on the map record.
- 7.17 Land under the control of a Rating Authority (which would include a Highway Authority) was excluded from valuation, therefore the exclusion of a path track or way from valuation may be considered very good evidence in support of the existence of public highway rights, but not necessarily carriageway rights. There are certainly instances of footpaths and bridleway being

excluded from valuation, however in such instances the class of user is often determined by the physical characteristics of the route (e.g. flights of steps etc making the route only available to pedestrians). In this case the section of the route running south from its junction with routes 53-18 and 53-11 was excluded from valuation. This may be considered to be good evidence in support of the existence of highway (and most probably public carriageway) rights.

7.18 The section of the route running northward towards Trelleck Grange is not excluded from the valuation but is included in the surrounding land holdings (Hereditaments) with deductions of £20 and £5 being claimed in respect of public rights of way. Other public rights of way are known to exist within these land holdings (See Definitive Map – Appendix 16) therefore it is impossible to determine which routes the deductions were claimed for. As a result it is difficult to attribute this record set any great evidential value in respect of this section of Route 53-16.

7.19 The fact that one section of the route was excluded and the other was not may also have some bearing in the interpretation and evidential value of these documents. It would certainly suggest that the section of Route 53-16 that runs northwards from its junction with routes 53-18 and 53-11 was considered to be of a different status to the section running south from this junction. It may be that the different sections of the route enjoyed different statuses, or it may be that they are of the same status but that the northern section had generally fallen into disuse by this time and was no longer considered to enjoy such status. It is not possible to ascertain this from this document set.

Highway Authority Maps/Records (Appendices 7 – 14)

7.20 An extract from the Consistency Guidelines relating to these documents is included in the bundle at Appendix 24.

7.21 The “List of Streets” article included Appendix 25 of the bundle sets out a helpful summary of the history of the “List of Streets” and associated documents. When interpreting these documents it is important to ensure that they are afforded the appropriate level of evidential value and their history and background is paramount to determining this.

7.22 There has been some suggestion that some of these documents represent nothing more than the informal opinion of an unknown officer of the authority. I cannot agree with this

interpretation. They are a highway authority record, albeit a non-statutory one, and as such they must be afforded a fair degree of evidential weight as they still represent the Highway Authority's views at that time.

- 7.23 The issue of why the route was removed from these records is of key importance to the determination of this matter and the subject of discussion later within this report. In this section of the report I have concentrated on more general matters of interpretation.
- 7.24 Prior to local government reorganisation in 1974 the parish/community of Devauden fell within the former Chepstow Rural District Council area. Therefore when the 1949 (Appendix 7), 1952 (Appendix 8) and 1955 (Appendix 9) Highway Records were produced there was no statutory requirement for the Highway Authority (the rural district council) to maintain a list of streets, or for any such records that were produced to be available for public inspection. This will have an effect on their overall evidential value.
- 7.25 Some caution must be exercised when interpreting the 1952 Highway Record (Appendix 8) as it appears to be a composite map produced in 1987 based upon the 1952 record. As a result it is quite likely that any changes to the network between 1952 and 1987 have been incorporated into the plan. It is not therefore possible, taking this document in isolation to identify whether the exclusion of Route 53-16 is as a result of it being removed from the Record prior to the production of the original record in 1952, or as a result of its removal at some time prior to the compilation of the copy document in 1987. When the document is considered alongside the 1955 Highway Record (Appendix 9) which shows route 53-16 albeit crossed out, this would suggest the latter is most probable. This issue is discussed further later in the report.
- 7.26 In order to attribute them appropriate evidential value the two undated schedules (Appendix 10 and 11) need to be considered in terms of their likely date of production. The schedule at Appendix 10 appears to be a schedule or proposed amendments which suggests that it was produced before route 53-16 was removed from the highway records. It may therefore be considered to be evidence that the route was included in the highway record at that the time of this documents production. The schedule at Appendix 11 appears to have been originally produced prior to the removal of the route from the highway records because route 53-16 is listed and then subsequently crossed out. Due it not being possible to attribute it a specific date it must be treated with caution.

- 7.27 The 1970 Highway Record (Appendix 12) appears to be part of a return made to Central Government (for financial purposes) with respect to the length of highways within the County Council's area. It will have been based upon the County Council's highway records at that time and may be considered to be of good evidential value.
- 7.28 It is understood by the Highway Authority that the map contained within Appendix 13 was compiled circa 1974 although it is undated and uses a 1921 base map. The lack of clear dating evidence means that this must be treated with some caution, but if it has been dated correctly it was produced at a time when the County Council was the Highway Authority and it would constitute being an interpretation of the "List of Streets" at that time.
- 7.29 Notwithstanding the above I do have some doubts as to whether this document was compiled in 1974. My reason for doubting this date is that the route was crossed out in the 1970 highway schedule/returns (Appendix 12) therefore there would be no reason to show the route and then subsequently remove it. It would simply have not been shown at all. I therefore consider that this map was produced prior to 1970, although it is unclear as to at what date. In the absence of clear dating evidence they must be treated with some caution.
- 7.30 With regard to the 2008 Highways Maps (Appendix 14) these correspond to the route being added to the current "List of Streets" in 2008 (Appendix 15). This addition of the route to the record was as a direct result of the current ongoing dispute. Whilst it represents the Highway Authority's current view on the matter I consider that it would be inappropriate to afford it any great evidential value when determining this matter.

List of Streets (Appendix 15)

- 7.31 An extract from the Consistency Guidelines relating to these documents is included in the bundle at Appendix 24.
- 7.32 Highway Authorities are obliged⁹ to maintain a list of all streets within their area that are maintainable at public expense. The definition of "street" includes any highway. The omission

⁹ Highways Act 1980, Section 36

of a publically maintainable highway from the list would represent a failure in the Authority's legal obligations. Furthermore the inclusion of a way that is not maintainable at public expense may result in unlawful expenditure on the part of the Highway Authority. A degree of care must therefore be exercised by the Highway Authority in compiling and maintaining its records. In view of the above the inclusion of a street in this list may be considered to be prima facie evidence that the way in question is highway maintainable at public expense.

- 7.33 It should however be noted that not every public highway is maintainable at public expense. As a result any highway that is maintainable by a third party (i.e. other than the Highway Authority), or any highway to which no maintenance liability is attached, should not be included in this set of records. This would not diminish the status of such a way as a highway.
- 7.34 Notwithstanding the above, in my experience these documents are often misunderstood and misinterpreted, even by those with responsibility for their management. Furthermore as they are not governed by the same sort of administrative procedures employed in the management of Definitive Maps and Statements of Public Rights of Way it can be difficult to identify any documentary audit trail in relation to the recording of specific routes. Such problems usually however relate to the under recording of routes rather than over recording (See article at Appendix 26).
- 7.35 Route 53-16 was not included in the 1988 List of Streets which would indicate that at that time the Highway Authority did not consider it to be a highway maintainable at public expense. This is, of course, a commentary on maintenance liability rather than actual status. It is also wholly consistent with the references in earlier highway records to the route being removed from the record.
- 7.36 With regard to the 2008 and 2014 List of Streets extracts, these correspond to addition of the route to the records as a direct result of the current ongoing dispute. Whilst it represents the Highway Authority's current view on the matter I consider that it would be inappropriate to afford it any great evidential value when determining this matter.

Definitive Map and Associated Documents (Appendix 16)

- 7.37 The Definitive Map and Statement provide conclusive evidence¹⁰ (as of their Relevant Date) as to the existence, status and alignment of the highways described within them, generally without prejudice to the possible existence of additional or higher rights.
- 7.38 The “without prejudice” caveat contained within the conclusive evidence provisions means that whilst these documents provide conclusive evidence as to the existence of the rights recorded within them, they do not provide evidence of the non-existence of any rights that are not shown. It is not therefore possible to infer that highway rights do not exist over a piece of land by virtue of the fact that they are omitted from the Definitive Map and Statement.
- 7.39 Route 53-16 was not claimed in accordance with Part IV of the National Parks and Access to the Countryside Act 1949 and subsequently was not recorded on the Definitive Map for the area. This was not because the route was not considered to be a public right of way, but because highway authority records at that time (see Appendix 7) showed it as an unclassified county road.
- 7.40 A number of footpaths are recorded on the Definitive Map as commencing on or running adjacent to Route 53-16. Some of the Statements for these paths refer to Route 53-16 as being a County Road. Whilst the Definitive Map and Statement do provide conclusive evidence the particulars contained within them, this conclusive status does not apply to the status of Route 53-16.
- 7.41 When considering the evidential value of these documents it must be remembered that the original claims for routes were made by parish/community councils and such bodies were required to hold a public meeting on the subject. The maps and statements were then subject to a number of public consultation exercises where there was opportunity to make objections and representations. The fact that Route 53-16 was considered to be a County Road during that time would have been in the public domain and open to a degree of scrutiny. It would certainly be reasonable to conclude that had anyone wished to challenge the status of the Route at that

¹⁰ Wildlife and Countryside Act 1981, Section 56

time they would have had the opportunity to do so, even if not directly as part of the Definitive Map process.

- 7.42 The fact that the Definitive Map process was conducted at a time contemporaneous with the production of the 1949 Highway Records may increase the overall value of the Highway Records in question.

The 1972 Special Review of the Definitive Map (Appendix 17 & 18)

- 7.43 The Special Review was conducted as a result of the provisions of the Countryside Act 1968, but was never completed and subsequently abandoned as a result of procedural problems with the way in which the County Council had undertaken the work.
- 7.44 Part of the requirements of the Special Review was to reclassify routes that had been recorded on the Definitive Map as Roads Used and Public Paths (RUPPs). This reclassification process included (albeit the Courts later ruled that it was incorrect) a suitability test when determining the revised status of these routes.
- 7.45 In addition to this work it would appear that Monmouthshire County Council also decided to consider the status of various unclassified county roads with a view to adding them to the Definitive Map. Strictly speaking this was not part of the Special review process, but there was no reason why such work could not be undertaken. It is unclear whether a suitability test similar that that to be used for RUPPS was being employed in respect of these routes.
- 7.46 The Special Review Map shows that it was proposed that Route 53-16 be added to the Definitive Map as a Public Footpath. Documentation associated with the review suggest that the reason for it not being originally claimed was because it was thought (possibly mistakenly) to have been a County Road at that time. This may suggest that by the time the Special Review commenced the route had already been removed from the highway records.
- 7.47 Had the Special Review been completed and taken effect there is little doubt that Route 53-16 would now be recorded, in conclusive form, on the Definitive Map as a footpath. However, the process was not completed and therefore this document set cannot be afforded such a level of evidential value that it might have been. Nonetheless it does give a clear indication of what the

status of the route was considered to be in the early 1970's although this must be treated with some caution as consideration may have been given (incorrectly) to matter of suitability and by this time the lane is understood to have been substantially overgrown and subject to only minimal use.

1920 Sales Particulars for the Trelleck Grange Estate (Appendix 19)

- 7.48 A number of extracts from some sales particulars which are understood to relate to the sale of the Trelleck Grange Estate circa 1920 have been provided by the land owners. The extracts are limited and the map referred to has not been provided. A full copy has been requested but has not been forthcoming. This will inevitably have an effect on the evidential value of the document sources.
- 7.49 If the entry for "The Panta Farm" is cross reference with the 1910 Finance Act field book entry for "Great Panta" (as shown on the 1920 OS) the acreages appear to match suggesting that they are one and same.
- 7.50 Some of the properties listed in the sales particulars refer to roadside frontages etc. but Route 53-16 does not appear to be referred to. This would certainly suggest that it was not considered to be a public road at that time, but in the absence of the complete document set this must be treated with caution.
- 7.51 The reference in the schedules to Route 53-16 being a "Road" must also be treated with caution as it does not specify whether the road is public or private. It does however suggest that it may have been in a substantially better condition than it is today.

Documents relating to the purchase of Panta Farm in 1977 (Appendix 20)

- 7.52 It is unclear what the precise status of the map referred to is. It may be a plan used for a land charge search when the property was purchased, or it may have formed part of the deeds. It clearly shows that Routes 53-11 and 53-18 are not included in the land holding edged in red whereas Route 53-16 is included. This may be indicative that Route 53-11 and 53-18 are of a different status to Route 53-16. It is however important to understand that ownership of the land is not actually relevant to the existence or otherwise of public highway rights, as the subsoil

of most highways belongs to the adjoining land owners, and the highway right is the right of the public to pass and re-pass over (usually) private land.

7.53 Various deeds confirm that Route 53-16 was included in the land holding, but as already stated above, this does not necessarily mean that highway rights do not exist. It would certainly suggest that there may be some difference in status between Route 53-11/53-18 which was excluded from the land holding and 53-16 which is not. It is also notable that 53-16 is referred to as a Track whereas the access road to Little Panta is defined as a Driveway, thus clearly differentiating between the two. The lack of any qualification between public and private again means these references should be treated with caution.

7.54 Perhaps of greater significance is the fact that a right of way for forestry purposes appears to have been granted over a section of Route 53-16. If the route had been a public carriageway such a right would not be necessary and this may be indicative that Route 53-16 did not enjoy public carriageway rights. It may have been a highway of lower status, or indeed not had any public rights over it at all. However the first reference to such a right in the extracts provided, is in the deeds dated 1959. If highway rights are shown to have existed prior to this date, and had not been stopped up (by due legal process), the private rights would be irrelevant. This is a matter to be determined by consideration of all of the available and relevant evidence.

8.0 Discussion

8.1 Having considered what evidence is available and commented upon matters such as the interpretation and evidential value of specific document types there are a number of issues which I consider need to be addressed in order to assist the Authority in determining whether or not to promote a Definitive Map Modification Order.

8.2 It is a matter of documented fact that Route 53-16 has previously been included in the Highway Authority's records and that it was attributed the status of an "unclassified county road". In order to afford these document appropriate evidential value, and also to assist in bring the current dispute to a resolution I consider that it may be expedient to address the following issues:

- a) When was Route 53-16 removed from the Highway Records?
- b) Why was Route 53-16 removed from the Highway Records?

- c) If it was correctly shown on the Highway Records what rights can be inferred from its classification as an unclassified county road?

When was Route 53-16 removed from the Highway Records?

- 8.3 Route 53-16 was shown on the 1949 (Appendix 7) and 1955 (Appendix 9) Highway Maps. In my opinion this suggests that at the time of their production the route was considered by the Highway Authority to be a highway maintainable at public expense at the status of unclassified county road. There would certainly no logic, and I consider it highly improbable, that the Highway Authority would show a road on a newly produced document only to immediately cross it out. The crossing out on earlier (superseded) documents suggests that they were still in use and being updated.
- 8.4 I have already questioned the 1952 Highway Map (Appendix 8) by virtue of the fact that it is a version of the 1952 record reproduced (with additional public rights of way information added etc) in 1987. In my opinion it is highly probable that such a document, if it were to be of any use, would show any changes (creations, extinguishments and diversion etc) that had taken place between the production of the original (1952) and the making of the copy (1987). If this were not the case it may lead to incorrect information being provided, especially when a) the route is still shown on the 1955 Highway Record (Appendix 9); and b) that by 1987 the Authority had clear duties with regard to maintaining a list of streets and making such records publically available. I do not therefore think that the 1952 Highway Record (Appendix 8) can be relied upon for the purposes of identifying when Route 53-16 was removed.
- 8.5 From this information I consider it reasonable to conclude that Route 53-16 was still included in the Highway Records in 1955 and that its removal occurred sometime after that date.
- 8.6 As stated previously I consider that the 1970 Highway Record (Appendix 12) may be part of a return made to Central Government (for financial purposes) with respect to the length of highways within the County Council's area. This is speculative but if I am correct then it amounts to a snap-shot in time with regard to what routes were considered highway at that time. In other words it is correct as of 1st April 1970 and will not show any changes made after that date.

- 8.7 Of course by 1st April 1970 as can be seen from the record of that date (Appendix 12) the route had been struck of the list of highways. Due to the logistics of the process and copying technology of the time, in my view, lists of this nature were far more likely to be duplicated and then updated/amended by the Authority each year, for the purposes of submitting the returns than the maps.
- 8.8 By reference to this document I consider it reasonable to conclude that Route 53-16 had been removed from the highway records at some point before 1st April 1970.
- 8.9 I do not consider that the Highway Maps which are said to have been compiled in 1974 (Appendix 13) were produced at that time (they have been referred to as the 1974 maps for convenience). My reasons for this are that route 53-16 had already been struck off the 1970 list of unclassified road (Appendix 12) and the documentation relating to the Special Review (appendix 17 & 18) when the route was proposed to be shown on the Definitive Map as a footpath and is referred to being previously considered to be a public road also appears to pre-date 1974. Again I consider it highly improbable, that the Highway Authority would show a road on a newly produced document only to immediately cross it out.
- 8.9 If my assessment and interpretation of the 1970 Highway Record (Appendix 12) is incorrect then the above dates may have to be reconsidered
- 8.10 In the absence of further information/evidence it is unlikely that it will be possible to identify a specific date for the removal of Route 53-16 from the Highway Authority's records, but taking into account the above information I consider that Route 53-16 was struck off the records at some point between 1955 and 1970.

Why was Route 53-16 removed from the Highway Records?

- 8.11 The inclusion of Route 53-16 in the Highway Authority's records and more particularly its subsequent removal from those records are, in my opinion, key issues to the determination of this case. It is a matter of well documented, and in my view indisputable, fact that Route 53-16 was included in the Highway Authority's records and attributed the status of an unclassified county road. It is also a matter of well documented, and in my view indisputable, fact that Route 53-16 was struck off the Highway Authority's records at some point (probably between

1955 and 1970). If it is possible to reach a sustainable conclusion as to why the route was removed from the Highway Records, it will then be possible to also reach a conclusion as to whether any public highway rights still exist today, and indeed whether a Definitive Map Modification Order should be made to record such rights on the Definitive Map.

- 8.12 In my opinion there are a number of reasons why Route 53-16 may have been struck off the Highway Records. These are that:
- i. it was shown on the record in error (i.e. it was never a public highway of any status)
 - ii. that highway rights did exist but they were stopped up using due legal process
 - iii. that they were removed for other reasons, such as an incorrect process administrative process or a lack of understanding of highway law (this would not result in the extinguishment of any rights); or
 - iv. they were removed (albeit incorrectly) as a result of the Special Review of the Definitive Map

Was Route 53-16 shown on the Highway Records in error?

- 8.13 If Route 53-16 was shown on the Highway Records in error, strictly speaking this would mean that it was not a highway maintainable at public expense, but would not preclude the possible existence of a privately maintainable public highway, or a highway for which no maintenance liability is attached. Notwithstanding this, for clarity I propose to deal with the issue of whether or not Route 53-16 is a highway of some status. I will address the issue of maintenance liability later within my report.
- 8.14 In order to answer this point it is necessary to consider all of the available and relevant evidence that pre-dates the 1949 Highway Records. If the evidence shows that Route 53-16 was a public highway prior to 1949, in the absence of evidence of a legal stopping up procedure pre-dating its inclusion on that Highway Record, it would be reasonable to conclude that those rights were still in existence as of 1949, and therefore that the records of that date were correct. The legal principle of “Once a Highway, Always a Highway”¹¹ would apply.

^{11 11} Harvey v Truro Rural District Council (1903) 2 Ch 638 & Dawes v Hawkins (1860) 8 CB (NS) 848, 141 ER 1399

- 8.15 The depiction of Route 53-16 on some of the early Commercial Maps (Appendix 3) as a through route to Trelleck Grange and parts of the route on other maps clearly indicates that it has physically existed for nearly 200 years, and when one looks at the reasons why such maps were produced (to assist travellers etc) these documents can be said to be indicative, if not prima facie evidence, of the route being a public highway, and if so, probably a public carriageway.
- 8.16 The Tithe Map (Appendix 4) further confirms the physical existence of the route and when considered in conjunction with the Commercial Maps (Appendix 3) may be said to be further supportive of the proposition that the route is a public highway. It certainly does not detract from such proposition. The same would apply to the Ordnance Survey Maps (Appendix 5).
- 8.17 The records relating to the 1910 Finance Act (appendix 6) show that the section of Route 53-16 which runs southwards from its junction with Route 53-11 and 53-18 was excluded from the valuation. Such exclusion can be taken as strong evidence in support of that section of the route enjoying public highway status, and probably public carriageway status.
- 8.18 The section of the route running to the north of the above mentioned junction however was not excluded from valuation, but included in the adjoining land holdings. Deductions of £20 and £5 were claimed in respect of public rights of way across the parcels of land within which the route was included. Whilst this acknowledges the existence of public rights somewhere across the land holding it is not possible to attribute the deduction directly to Route 53-16 especially as other public rights of way are known to exist within the land holding.
- 8.19 The fact that the section of Route 53-16 to the north of its junction with Routes 53-11 and 53-18 was not excluded from valuation is by no means evidence that highway rights did not exist, but it does raise the issue of why one section of the route was excluded, and one was not. It may have been because the section north of the junction was of a lower status than that running to the south; or it may have been because the section to the north of the junction did not have any public rights over it at all.
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- 8.20 The estate sales particulars and deeds (Appendices 19 and 20) identify Route 53-16 as a Road but are silent as to whether it is public or private, the exception being the right of way/easement for forestry purposes. This would suggest that the route is not a public carriageway, but does not negate the possibility of it being a public rights of way of a lower status (e.g. a footpath or bridleway).
- 8.21 Taking the available pre-1949 evidence as a whole it is finely balanced. The one thing that we do not have available to us, that was available when the 1949 Highway Record was produced is local knowledge and living memory dating back to the late Nineteenth Century. Had such knowledge still been available it may have been possible to shed further light on the matter.
- 8.22 Taking the above matters into account, and the fact that there is no evidence which categorically shows that Route 53-16 was included in the 1949 Highway Records in error (although I do accept there is some evidence to support such a proposition) I am of the opinion that Route 53-16 was probably not shown in error, the case for the section of Route 53-16 which runs southwards from its junction with Route 53-11 and 53-18 being strongest because of the 1910 Finance Act evidence.

If highway rights did exist were stopped up as a result of due legal process?

- 8.23 If Route 53-16 is a highway maintainable at public expense its removal from the Highway Records some time during the period 1955 – 1970 would not in itself result in the extinguishment of the highway rights or the maintenance liability. This could only be achieved by way of some form of legal order, probably via a Magistrates Court. The decision to apply for such an Order would not (certainly in the period 1955 – 1970) usually be delegated to Officers of a Highway Authority but would be a decision for a committee of elected members. The process also usually requires the agreement of the Parish/Community Council who generally have a right of veto in such matters.
- 8.24 I am advised that the Monmouthshire County Council Roads and Bridges Committee minutes and the Devauden Community Council minutes for the period 1929 – 1974 have been checked by Officers of the County Council and no evidence of any formal legal closure procedures etc has been discovered in respect of the route in question. Similarly Officers of the County Council have checked Quarter Sessions Court records for the area and again no evidence of formal

closure proceedings have been discovered. For the purposes of fulfilling my brief I have not repeated this exercise and am satisfied that these records have been properly checked.

- 8.25 In the absence of any evidence to support the proposition that Route 53-16 has been subject to formal closure proceedings the only reasonable conclusion to be reached is that any public highway rights that did/do exist have not been legally extinguished.

Was Route 53-16 removed from the Highway Records for other reasons, such as an incorrect administrative process or a lack of understanding of highway law?

- 8.26 It is my experience that the practice of removing routes from highway records for reasons other than those discussed above has been, and possibly still continues to be widespread. This is generally not because of any deliberate attempt to falsify the records, but more of an effort to reconcile the Highway Records with what has and is habitually maintained by the Authority. This appears to arise as a result of a misunderstanding that if they are to fulfil their purpose the records whether the List of Streets or a less formal internal document need to show all highways that are “maintainable” rather than just those highways that are actually “maintained”. The “Highway Record Management” article at Appendix 25 discusses this matter and may be of interest.

- 8.27 If Route 53-16 is a highway maintainable at public expense and established that there appears to be no evidence to support the proposition it was removed from the Highway Record as a result of formal legal proceedings, it would appear logical that its removal must have been for some other purpose. The undated hand written schedule (Appendix 10) found within the highway records includes Route 53-16 and may suggest that it was removed from the records because it was “*not maintained at all*”. I am of the opinion that this is the most likely explanation for the Route being removed from the records.

Was Route 53-16 removed from the Highway Records as a result of the Special Review of the Definitive Map?

- 8.28 It has been suggested that the removal of Route 53-16 from the Highway Records may have been as a result of it being proposed for addition to the Definitive Map as a footpath as part of the Special Review (Appendix 18) . There is certainly evidence (Appendix 17) to demonstrate that the County Council were pro-actively reviewing their unclassified roads/green lanes and

were considering their inclusion on the Definitive Map so this is a possibility. However the timing of the removal of Route 53-16 from the Highway Records (by 1970) and the documentation relating to the Special Review (post 1970) suggest that this is unlikely. There are also references to the Route being added at the Special Review due to it not being originally shown on the Definitive Map due to it being thought to have been a county road. This would tend to suggest that it was removed from the Highway Records before the Special Review rather than part of it.

9.0 Conclusions Regarding Status

- 9.1 As discussed earlier within my report, my instructions are to provide guidance to the Authority with a view to assisting them to determine whether or not to make a Definitive Map Modification Order. The route under investigation (Route 53-16) is not currently shown on the Definitive Map therefore the legislative test for the purposes of making an Order, as set out in paragraph 4.27 – 4.31 above is whether public rights are “reasonably alleged to subsist”. In reaching my conclusions I will therefore apply this test.
- 9.2 In paragraph 8.13 – 8.22 above consideration was given to whether Route 53-16 had been correctly included in the Highway Records and I concluded that whilst the evidence was finely balanced it probably had. When the highway records themselves (Appendices 6 – 14), along with the Definitive Map and its associated records (Appendices 16 – 18) are thrown into the balance as well, the case in support of the proposition that Route 53-16 is a highway is further strengthened as these records refer to the route as being an unclassified county road.
- 9.3 The issue of what highway rights can be inferred from the inclusion of a route in highway records as an “Unclassified County Road” has been the subject of much discussion over the years. Government Advice issued in 1998 suggests that, with regard to status, the inclusion of a route in the List of Streets as an unclassified county road may be evidence of vehicular rights but it must be considered along with all other available evidence.
- 9.4 More recent research¹² (2013) into the matter commissioned by the Motoring Organisations’ Land Access and Recreation Association concluded that “*Unclassified County Roads are public*

¹² Unsealed Unclassified Roads. Their History, Status and the effect of the Natural Environment and Rural Communities Act 2006 – LARA 2013

vehicular highways. While doubt may be attached to individual routes in some authorities, where there is no specific evidence to the contrary, the balance of probability must be that routes recorded as UCRs are vehicular highways”

- 9.5 It is certainly my experience that the findings of the 2013 report are sustainable and that in general terms, in the absence of evidence to the contrary, a route recorded in the highway records, whether a formal List of Streets or an internal highway authority document, as an unclassified county road is a vehicular highway.
- 9.6 Having considered all of the available and relevant evidence into account and whilst acknowledging that there is some evidence by way of the property deeds and etc which may suggest to the contrary I am of the opinion that public highway rights to a level of public carriageway (i.e. public vehicular highway rights) are reasonably alleged to subsist.
- 9.7 With regard to the recording of the route on the Definitive Map, having established that, at common law, the route is reasonably alleged to enjoy public carriageway status it is necessary to consider the implications of the Natural Environment and Rural Communities Act 2006. This legislation, as discussed in paragraphs 4.21 – 4.25, essentially extinguishes public rights for mechanically propelled vehicles over all public carriageways unless certain exceptions apply. In this particular case none of the exceptions do appear to apply therefore public rights for mechanically propelled vehicles do appear to have been extinguished and therefore the appropriate status for the route would be that of Restricted Byway.
- 9.8 I should stress that the case in favour of such rights is significantly weakened in respect of the section of Route 53-16 which runs northward from its junction with Routes 53-11 and 53-18 due to it not be excluded from valuation in the 1910 Finance Act records. Whilst the County Council is duty bound, in law, to promote a Definitive Map Modification Order if there is a “reasonable allegation” over the existence of rights, such an Order may only be confirmed if the alleged rights are shown, on balance of probability, to subsist. It is therefore possible that any Order relating to this northern section may not be capable of confirmation.

11.0 Should the Route be shown on the List of Streets Maintainable at Public Expense?

11.1 It would appear that Route 53-16 was removed from the old Highway Records as a result of procedural anomaly rather than due legal process, therefore if it was maintainable at public expense at that time, it will remain so today. Furthermore its addition to the Definitive Map as a Restricted Byway would also mean that it is maintainable at public expense, albeit with no obligation for it to be maintained to a standard suitable for vehicles. Route 53-16 should therefore be included in the List of Streets Maintainable at Public Expense.

11.2 In the event of a Definitive Map Modification Order being made but it subsequently not being confirmed this situation will have to be further reviewed.

12.0 Decision Required from the Authority

12.1 The decision whether or not to make a Definitive Map Modification Order is quasi-judicial in nature which means that the decision must be made upon an objective assessment of all of the available and relevant evidence, and not the recommendations of a third party.

12.2 Whilst it is my opinion that when all of the available and relevant evidence is considered there is a reasonable allegation that Route 53-16 does enjoy Restricted Byway rights, the Authority must make its own decision based upon the evidence placed before it.

Statement of Truth

I understand that my overriding duty is to the court (in this case the County Council who are charged with making a quasi-judicial decision) and I have complied with, and continue to comply with, that duty.

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

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Robin Carr

FIPROW, MILAM (Cert)

1st June 2015

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