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# Order Decision

Inquiry held on 27 November 2012

**by Martin Elliott BSc FIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 3 January 2013

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## Order Ref: FPS/M1900/7/70

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Offley 54 and Pirton 28) Modification Order 2011.
- The Order is dated 28 October 2011 and proposes to modify the Definitive Map and Statement for the area by adding a bridleway as shown in the Order plan and described in the Order Schedule.
- There were 30 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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## Procedural Matters

1. I held a public local inquiry in the Main Hall, Christ Church, Hitchin on 27 November 2012. I carried out an unaccompanied site inspection of the Order route and the surrounding area on the afternoon of 26 November. I did not carry out a further site inspection following the close of the inquiry as there were no issues requiring me to do so.
2. There were 30 outstanding objections at the commencement of the inquiry. The basis of these objections is that the route should be recorded as a byway open to all traffic. In addition to those objections two representations have been made in support of the confirmation of the Order as made. Following the 'Notice of Order' a number of representations were received (accepted as statements of case). I have had regard to all representations in reaching my decision.
3. At the Inquiry Mr Westley represented the East Herts Footpath Society (EHFS) and the original applicant for the order<sup>1</sup>. Mr Westley was not a statutory objector but took an opposing view from the Council insofar as he considered that the Order should be modified to record a byway open to all traffic.
4. Mr Tilbury representing the Trail Riders Fellowship (TRF) did not give evidence to the inquiry but made legal submissions on behalf of the TRF. These submissions were circulated at the start of the inquiry and the Council had an opportunity to consider them. The Council gave a response in closing. Mr Tilbury also submitted to the inquiry a number of maps. Their submission did not accord with the timetable set out in the 'Notice of Order' however the

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<sup>1</sup> The Order arises from an application under section 53 of the Wildlife and Countryside Act 1981 made by a Mr K Payne (deceased) to record the Order route as a byway open to all traffic.

parties were given the opportunity to consider the maps and there is no evidence of prejudice.

5. The Council submitted a number of letters in support of the Order as made. The correspondence did not raise any issues which I am able to take into account in reaching my decision.
6. The submissions from the TRF refer to the 1972/3 statutory return of the Council in relation to categories of public highways and mileage thereof. Copies of the return were not provided and the TRF asked for the paragraph relating to the returns to be struck out.

### **The Main Issues**

7. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in Section 53(3)(c)(i). The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way, namely a bridleway, which is not shown in the map and statement subsists over land in the area to which the map relates. The issue arising from the objections is that the Order route is a carriageway such that it should be recorded as a byway open to all traffic.
8. The test to be applied to the evidence is on the balance of probabilities.
9. On 2 May 2006, section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) came into effect. This provides that an existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement of the Act was not shown in the definitive map and statement, or was shown as either a footpath, bridleway or restricted byway. However, sub-sections 67 (2) and (3) of the 2006 Act provide certain exceptions to the statutory extinguishment of rights for mechanically propelled vehicles.
10. Should I conclude that the Order route is a carriageway then it will be necessary to consider whether rights for mechanically propelled vehicles have been saved by any of the exceptions provided by NERC. If rights for mechanically propelled vehicles have been saved then it would be appropriate to record the route as a byway open to all traffic. In the event that rights have not been saved then the route should be recorded as a restricted byway.

### **Reasons**

#### ***Background Issues***

##### *Evidence of use*

11. As noted above, the 30 outstanding objections to the Order oppose the confirmation of the Order as a bridleway but contend that the route should be recorded as a byway open to all traffic. A number of the objectors provided evidence of use forms attesting to the use of the way by mechanically propelled vehicles. None of the parties at the inquiry argued that the way has been dedicated as a vehicular carriageway in accordance with any statutory dedication under section 31 of the Highways Act 1980 or dedication at common law as a consequence of use.

12. The Council have had regard to the evidence of use and have concluded that there is insufficient evidence to give rise to a statutory dedication or dedication at common law as a consequence of use. However, the Council considers that the user evidence is strong supporting evidence of the existence of a public highway with at least bridleway rights. Having reviewed the evidence of use I concur with the view of the council. It is recognised that there is evidence that use of the way by vehicles, in particular four wheeled vehicles, has been interrupted by gates of various descriptions in more recent years and there is evidence of challenge to vehicular users. However, if the documentary evidence supports the existence of a carriageway then the interruption of use in recent times will have no material bearing on my decision.

#### *Through route presumption*

13. The TRF state that the Icknield Way runs across the northern part of Hertfordshire, entering from Bedfordshire to the west and leaving the county into Cambridgeshire to the east. Although it is possible that the status of parts of the route have changed status it is argued that there is a common sense presumption that a long through route does not change status along its length. A road which changes status part way along is in effect a cul-de-sac for the higher right.

14. The TRF refer to *Eyre v New Forest Highway Board (1892) JP 517*. This relates to a situation where there was a short section of a route of uncertain status over a common but nevertheless supports the through route presumption. The case of *A.G. (At Relation of A H Hastie) v Godstone RDC (1912) JP 188* suggests the possibility of rural cul-de-sacs but that it is improbable that a continuous thoroughfare should be part public highway and part not. This case in my view supports the presumption of a through route where that route is continuous and where there is nothing to distinguish any part of the road except for the state of repair. Reference is made to an order decision (FPS/A4710/7/22 723) which considered the status of a through route. As accepted by the TRF this does not set any precedent and my decision must be made on the basis of the evidence before me.

15. Having regard to the submissions in this respect I take the view there may be situations where culs-de-sac in rural areas can be highways. I also accept that a route which changes status along its length could in effect be a cul-de-sac for a higher right. Before recognising a cul-de-sac it is necessary to consider whether any special circumstances exist such as the route leading to a place of public resort. Where the status of a route changes, in the absence of a reason for the change, then in certain circumstances, the through route presumption would arise.

16. The Council submits that in the current case the Pirton inclosure award sets out the Order route as a public bridleway which is not a matter of presumption. I may return to this issue further, if necessary, once I have considered the evidence.

#### ***Consideration of the evidence***

17. The Council submit that the route is a pre-Roman highway known as the Icknield Way. The route is shown on the Dury and Andrews' map of 1766 as an open road which suggests that the route was considered to be a vehicular highway at that time. The route is also shown on Carey's map of 1794, which

shows direct and principal cross roads, and Carey's map of Hertfordshire 1787. The depiction on these maps is consistent with the route being a vehicular highway at the time.

*Pirton inclosure award*

18. The Parish of Pirton was inclosed under a private act dated 1811. The act incorporated the 1801 General Inclosure Act so far as the provisions were not inconsistent with the provisions of the 1811 Act. An inclosure map and award was produced in 1818. The map shows the Order route between point A and Punch's Cross marked as The Icknield Way No. 3 which continues to the junction with Mill Way, West Mill and the Ickleford Parish boundary (point F<sup>2</sup>). The Order route is described in the award as a 'public bridle road and footway and private occupation road and driftway of the breadth of twenty four feet commencing at the north end of an lane called West Mill Lane and proceeding westwardly nearly in its ancient course across the Hitchin and Shitlington Road into the public highway leading from Hitchin to Hexton'.
19. In *R v SSE ex parte Andrews (QBD)[1993] COD 477 (Andrews)* it was held that the only powers for the creation of a new public highway were those contained in section 8 of the 1801 Act which required new highways to be over 30 feet wide. The 1801 Act did not make express provision to create public rights of way on foot. Section 10 only gave commissioners the power to set out private footpaths and bridleways.
20. In the light of *Andrews* the commissioners did not have the power to set out a public bridleway of 24 feet as there were no powers contained in section 8. The private act of 1811 did not include any additional powers for the creation of such a route. As such the setting out of the route was *ultra vires*<sup>3</sup>.
21. Bearing in mind the above, and the fact that the Order route was a highway prior to the inclosure, the main issue to consider is the effect of the inclosure act and whether those pre-existing rights would have been stopped up. If those pre-existing rights have not been stopped up then those rights remain. If those rights have been stopped up then consideration needs to be given as to whether the bridleway rights, or indeed other rights, have come into existence by other means since the 1811 Act.
22. The 1811 Act, which encompasses the general provisions of the 1801 Act, provides that the commissioners are empowered to stop up any old or accustomed road 'passing or leading between, through or over any part of the old inclosures'. Any stopping up must be with the concurrence and order of two Justices of the Peace. The EHFS contend that the Order route passes several old inclosures, particularly around Punch's Cross. These had been exchanged under the 1818 award which it is considered means that these inclosures predated the award. It is argued that, for the Order route to have been stopped up, a Justices' Order would have been necessary. In the absence of any certificate then it must be presumed that no pre-existing rights have been extinguished. The TRF also argued against the stopping up of the Order route in consequence of the 1811 Act since the route running beyond the inclosed area, in both directions, did not operate to stop up any pre-existing rights along the Icknield Way.

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<sup>2</sup> For identification purposes my decision refers to the locations A to F used on the Order plans.

<sup>3</sup> Beyond the authority conferred by law.

23. The Council argue that the Order route does not pass through any old inclosures and therefore the stopping up provisions contained in section 8 of the 1801 Act do not apply. The Council submits that section 11 of the 1801 Act is applicable such that pre-existing rights may have been extinguished.
24. It is noted that the description of the Order route set out in the award makes no reference to old inclosures. In contrast the Ickleford Road (first) does make reference to old inclosures in its description. That does not suggest the Order route passing or leading between, through or over any part of the old inclosures. However, the absence of such reference does not in my view preclude this from being the case. The award provides a written description of the route and in order to identify the course of the route it may not have been necessary to refer to any old inclosures.
25. The 1811 Act at page 17 deals with the 'Power of Exchange' and indicates that the commissioners have the power to exchange land forming, amongst other things, part of the old inclosures. On the south side of the Order route between Punch's Cross and point F on the Order plan there is an allotment to George Whittingstall in exchange from a Henry Crabb. Given that the land was being exchanged this, on balance, would suggest that the land has previously inclosed and therefore is an old inclosure.
26. Since the Order route passes old inclosures, the extinguishment of what is a pre-existing route would require the consent of two Justices. The Council acknowledge that the commissioners did not use their powers to stop up or divert any existing highways. In view of this the existing rights on the Icknield Way have not been stopped up.
27. As regards section 11 of the 1801 Act, bearing in mind the above, the effect of the 1811 Act encompassing section 8 of the 1801 Act ousts the effect of section 11. As noted in *Logan v Burton (1826) 5 B&C 513* it was held that whilst section 11 provided for the stopping up of roads, ways and paths, those ways, that only applies to such roads which pass over land to be enclosed. Ways which passed partly over lands to be inclosed and over other inclosures are within the protection of section 8 and in that case the pre-existing footpath had not been stopped up.
28. The TRF have cited a number of authorities relating to the issue of stopping up and the 1801 Act. I have not been provided with copies of the cases cited but in some cases extracts have been provided. I do not propose to consider these cases on an individual basis and whilst some of the circumstances in those cases cited are not directly comparable to the Order route, where there are similarities, these offer support to my conclusion that the pre-existing rights have not been stopped up.
29. I note the assertion of the EHFS that the route was set out as a private carriageway in an attempt to circumvent the burden of repair which would have arisen if the way had been set out as a public road of 30 feet. It should be noted that the award sets out the way as a private occupation road and not a private carriageway. However, and in any event, there is no evidence to support this contention.

#### *Bryant's Map 1822*

30. The map, drawn from an original survey, depicts the Order route in a way identified in the key as 'Lanes & Bridle Ways'. The route is distinguished from

the Turnpike and Cross or Driving roads. The depiction of the route on the map suggests that the way was regarded as at least a bridleway. Its depiction does not preclude the existence of a carriageway.

#### *Railway plans*

31. The East and West Junction Railway plan of 1822 shows a small part of the Order route at point F and is depicted in the same way as other highways. The section of Order route is identified as plot 47 and the associated Book of Reference identifies the route as a public highway under the ownership of the surveyor of highways.
32. The proposed Towcester and Hitchin Railway followed the same route as the East and West Junction Railway and was surveyed by the same people. The railway plan dated 1871 shows the Order route in the same manner as the East and West Junction Railway plan. The book of reference also describes the route as a public highway owned by the surveyor of highways for the Parish of Pirton.
33. Railway plans were produced to a high standard and were subject to scrutiny by interested parties. The recording of part of the Order route as a public highway provides good evidence that the way was considered to be a public highway. It is noted that the schemes were not completed and that the proposals would not have passed through the whole parliamentary process. Nevertheless some weight should be given to the evidence from the railway plans arising from a professional survey. The railway records evidence needs to be considered in the context of all other available evidence.
34. I note that the nearby Hambridge Way is recorded on the railway plans as a public highway but has subsequently been recorded as a public bridleway on the definitive map and statement as a public bridleway; this was following a public inquiry. However, my decision must be based on the evidence before me. I have not considered the evidence in respect of Hambridge Way and the decision does not set any precedent.

#### *1910 Finance Act Records*

35. The initial section of the Order route leading from point A to the driveway to Highdown House is excluded from the adjacent hereditaments. The next section of the Order route is contained within hereditament 61. A deduction for public rights of way of £250 is made in relation to the 384 acre plot. This is a large sum which, as the Council say, might include a deduction for the Order route. However, the deduction may also relate to other routes across the hereditament. From point C to point F the route is excluded from the adjacent hereditaments.
36. The exclusion of a road from the adjacent hereditaments provides strong evidence that a way was a public carriageway. The view taken in *Robinson Webster (Holdings) Limited v Agombar [2001] EWHC 510 (ch)* that the exclusion of a road is strong evidence that the way was a public carriageway is reinforced in *Fortune and others v Wiltshire County Council and another [2012] EWCA Civ 334*. The Council say that although the colouring out of a road is usually indicative of vehicular status they suggest that there is evidence to the contrary contained in the inclosure award and Bryant's map which suggest that the route is a bridleway. However, given my findings as to the inclosure award the exclusion of the Order route from the adjacent hereditaments is consistent

with the way being a public carriageway. In relation to Bryant the map depicts the Order route as a lane or bridleway. However, the fact that colouring out (exclusion from adjacent hereditaments) provides a strong indication of a vehicular highway suggests that the depiction of the way on Bryant is more indicative that the way was a lane rather than a bridleway.

#### *Highway Records*

37. The Council indicate that the map and book of reference for main road adoption under section 15 of the 1878 Highways Act does not show the Order route as being formally adopted. I note the observations of the TRF that the 1878 Act does not use the term adoption and provides for disturnpiked public roads to become main roads and for other roads to be declared main roads. In any event, I do not consider that the records provide any evidence as to the status of the Order route and do not preclude the existence of a carriageway or bridleway.
38. The Order route is recorded as an unmetalled unclassified county road on the list of streets required to be kept under the Highways Act 1980. The route was added in 1992, although the EHFS contend that the route was recorded thereon at an earlier date, and the list contains a note that the maintenance was transferred to the rights of way section in October 2004. The inclusion of the route on the list of streets may confer vehicular rights but needs to be considered in the context of all other available evidence.

#### *Definitive Map Records*

39. The Order route was not included in the Parish Survey carried out under the National Parks and Access to the Countryside Act 1949 or on the first definitive map. However, the definitive statement refers to the Order route as the Icknield Way in the description of other routes recorded. Under the Special Review started in 1977 correspondence from Pirton Parish Council to the County Council refers to the omission of the Order route from the definitive map. The Parish Council took the view that the route should be recorded as a public bridleway.
40. The fact that the Order route was not recorded on the definitive map might, as the Council suggest, indicate that the route was believed to be a known ancient carriageway. The 1949 Act did not require ordinary vehicular highways to be recorded on the definitive map. Whilst reference is made to the route being a bridleway in the correspondence relating to the Special Review, there is no indication as to how this view was reached. Although the correspondence suggests that the way was considered to be a bridleway at that time, this does not preclude the existence of vehicular rights.

#### *Ordnance Survey Maps*

41. The Ordnance Survey maps show the physical attributes of the Order route but such maps were not produced to record the status of any route shown thereon. The Ordnance Survey maps do not therefore assist in determining the status.

#### *Other records*

42. The map produced under the Hitchin Rural District Survey of 1938 shows the section of Order route C to F as a green lane; the remainder of the route is not annotated. The survey provides no definition of the term green lane but given

that the map was a general survey of all classes of highways the record indicates that the surveyor considered the route to be some form of highway and the separate identification of public footpaths, public bridleways and green lanes suggests a distinction between the classifications. The fact that the section of Order route was not identified as a footpath or bridleway provides support to the way being a carriageway. It is noted that Hambridge Way and Wood Lane, both described as green lanes, are now recorded on the definitive map as bridleways. However, this does not preclude higher rights being shown to exist at a later date. I also refer to my comments above at paragraph 34 in relation to Hambridge Way.

43. A short section of the Order route A to B is shown on the Delme Radcliffe map believed to date from the 18<sup>th</sup> century. In the absence of details as to the purpose of the map it is not possible to draw any conclusions from this map.
44. The Ministry of Food Survey (c1950) shows the section of order route east of the driveway to Highdown House to Punch's Cross as being part of the landholding of Walnut Tree and Highdown Farms. From point C to F the route is shown between landholdings. The depiction of this latter section might indicate that the section was considered to be a public highway of some description but, given the purpose of the survey, being a survey of farm holdings, it is difficult to reach any clear conclusions as to the status of the way.
45. The route is shown on Bacon's cycling road map of circa 1920. This might suggest a route which was suitable for cycling but in the absence of details as to how the information on the map was compiled it does not assist in determining the status of the route. Similarly the route is shown on an undated extract of a 3 miles to the inch road atlas, this might suggest that the way was considered to be a road. However, my observations on Bacon are equally applicable.
46. Mr Spencer-Smith made the point that Bacon's map, the road atlas and the two Carey maps (paragraph 17) all show the route of Wood Lane leading south west from Pirton. This route is currently recorded as a bridleway. Whilst the route may be currently recorded as a bridleway this does not preclude higher rights from being shown to exist at a later date. In the absence of evidence relating to the status of this route it is difficult to make comparisons with the Order route.

### ***Conclusions on the documentary evidence***

47. The Council state that the Icknield Way, the Order route, is a pre Roman highway. The route is shown on the Dury and Andrews' map of 1766 and Carey's maps of 1787 and 1794. This evidence indicates that the Order route is an ancient highway which predates the 1818 Pirton Inclosure Award. Although the way was given the status of bridleway in the award this was *ultra vires*. The ancient highway rights which predate the Inclosure were not stopped up as a consequence of the 1811 Inclosure Act. Bryant's map of 1822 depicts the route as a lane or bridleway and the railway plans record a section of the Order route as a public highway. The 1910 Finance Act records show a significant proportion of the Order route as being excluded from the adjacent hereditaments giving a strong indication that the excluded sections were considered to be public highways. Given the pre inclosure and inclosure award

- evidence it is, on the balance of probabilities, more likely than not that the exclusion indicates a public carriageway.
48. Returning to the railway plans, although only a short section of the Order route is depicted, the 1910 Finance Act evidence indicates that the public highway continued at least to Punch's Cross. It may be the case that the railway plans were not placed under parliamentary scrutiny but the recording as a public highway is entirely consistent with the later 1910 Finance Act records. The depiction of the Order route on the 1910 Finance Act records also suggests that whilst Bryant's map depicts the Order route as a lane or bridleway the route was likely to be a lane rather than a bridleway. It is nevertheless accepted that Bryant's map follows closely after the inclosure award and its depiction may have been influenced by the awarding of the route as a bridleway.
49. The absence of the recording of the route on the definitive map might suggest that the way, at the relevant times, was not considered to be a route to be recorded on the definitive map and that the way was an ordinary vehicular carriageway. It is noted that by 1977 the Parish Council considered the route to be a bridleway but there is no evidence as to how this conclusion was reached. In any event this would not preclude the existence of higher rights.
50. The Order route is shown on the list of streets as an unmetalled unclassified county road and having regard to all the other evidence this is entirely consistent with the way being a vehicular highway.
51. When looking at the evidence as a whole it leads me to conclude, on the balance of probabilities, that the Order route is a carriageway. The TRF contend that even if the Inclosure Act and Award operated to stop up the Icknield Way, in the absence of a valid setting out of a public bridleway, the evidence since 1818 indicates that a public road has come into being. Looking at the documentary evidence since 1818 this indicates, on the balance of probabilities, that the section of Order route between point C and point F, is a carriage way. In respect of the remainder of the route (A to B) the evidence is less compelling. However, given that this section clearly forms part of a through route, there is a presumption that rights continue along the full length of the Order route. Although the issue is more finely balanced, taking all factors into account the evidence is sufficient to demonstrate the existence of a carriageway.
52. In view of my findings it is necessary to consider the effect of NERC (paragraphs 9 and 10 above). Section 67(2)(b) of NERC provides that where immediately before commencement of the Act (2 May 2006) the way was not shown on the definitive map and statement but was shown on a list required to be kept under section 36(6) of the highways Act 1980 (list of highways maintainable at public expense, list of streets) then rights for mechanically propelled vehicles will have been saved. The Council have stated that the Order route was shown on the list of streets on 2 May 2006 and the route is not recorded on the definitive map and statement. In view of this rights for mechanically propelled vehicles will have been saved by virtue of section 67(2)(b) of NERC. It is therefore appropriate to record the route as a byway open to all traffic.

## Other Matters

53. Concerns have been raised as to the adverse effects the confirmation of the Order as a byway open to all traffic would have in respect of the condition of the route. Concerns are also raised in respect of a number of safety issues and the potential misuse of the Order route. The point was also made that there was a need for routes to cater for carriage driving. Whilst I note and can appreciate these issues, matters relating to suitability desirability and need cannot be taken into account in determining the Order. I also note the observation that if the route is an ancient public highway then gates on the route would, unless authorised, constitute unlawful obstructions. This is not a matter for my consideration.

## Conclusion

54. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed subject to modifications.

## Formal Decision

55. The Order is proposed for confirmation subject to the following modifications:

- At lines 1 and 5 of Part 1 of the Schedule to the Order delete 'bridleway' and insert 'byway open to all traffic'.
- At Part II of the Schedule to the Order delete all references to 'BR' and insert 'BOAT'
- On the Order maps, both in the key and the map, delete the annotation showing the bridleway to be added (a dashed line with cross bars in the intervals) and replace with a continuous line with arrowheads shown alternatively above and below the line. From the key to the Order maps delete the word 'Bridleway' from the line stating 'Bridleway to be added' and insert 'Byway open to all traffic'. On Order map part 1, at the end of the line indicating the 'Bridleway to be added', insert 'A-B, C-D-E-F'.

56. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description I am required by virtue of Paragraph 8 (2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Martin Elliott*

Inspector

## APPEARANCES

### **For Hertfordshire County Council:**

Mrs J Briscoe	Solicitor for Hertfordshire County Council
who called	
Helen Denton	Definitive Map Officer

### **In support of the Order:**

Mr J Lauder  
Mr H Spencer-Smith  
Mrs A Peach

### **In opposition to the Order as made:**

Mr M Westley	East Hertfordshire Footpaths Society also representing the original applicant for the modification Order
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### **In opposition to the Order:**

Mr D Tilbury	Trail Riders Fellowship
Mrs Costa Sa	

## DOCUMENTS

- 1 4 No. letters of support for the Order
- 2 Extract from Bacon's Cycling Road Map of England circa 1920
- 3 Extract from J Cary's map 1794
- 4 Extract of Road Atlas
- 5 Carey's map of Hertfordshire 1787
- 6 Extract from Ordnance Survey