

RIGHTS OF WAY REVIEW COMMITTEE PRACTICE GUIDANCE NOTES

PRACTICE GUIDANCE NOTE 5 INVESTIGATING THE EXISTENCE AND STATUS OF PUBLIC RIGHTS OF WAY

Second edition, December 2007

FOREWORD

The Rights of Way Review Committee is a non-statutory committee which reviews matters relating to public rights of way in England and Wales with the aim of agreeing, by consensus, proposals for action. It brings together a wide range of organisations. The Chairman is John Grogan MP. The Countryside Council for Wales and Natural England provide Vice-Chairmen.

The following bodies are represented on the Rights of Way Review Committee : Association of National Park Authorities, British Driving Society, British Horse Society, Byways and Bridleways Trust, Central Council of Physical Recreation, County Surveyors' Society, Country Land and Business Association, Countryside Council for Wales, Cyclists Touring Club, Disabled Ramblers, Institute of Public Rights of Way Management, Land Access and Recreation Association, Local Government Association, National Association of Local Councils, National Farmers Union, National Federation of Bridleway Associations, Natural England, Open Spaces Society, Ramblers' Association, Riding for the Disabled Association, Welsh Local Government Association. Observer status : Department for Culture, Media and Sport, Department for Environment, Food and Rural Affairs, National Assembly for Wales, Department for Transport.

The purpose of these Practice Guidance Notes is to offer practical advice on aspects of rights of way legislation and to recommend working practices that will enhance the overall protection and good management of the rights of way network. They are advisory, derived from extensive discussions between the principal interest groups, and represent a consensus that has been endorsed by the Rights of Way Review Committee. We hope that they will be welcomed by everyone concerned with the practical management of rights of way and be a valuable aid in that important work.

Notes in the series are :

- PGN1 : Consultation on changes to public rights of way and definitive maps*
- PGN2 : Deemed dedication of public rights of way : section 31(6) of the Highways Act 1980*
- PGN3 : Minimising representations and objections to definitive map modification orders*
- PGN4 : Securing agreement to public path orders*
- PGN5 : Investigating the existence and status of public rights of way*
- PGN6 : Planning and public rights of way*

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INVESTIGATING THE EXISTENCE AND STATUS OF PUBLIC RIGHTS OF WAY

1. Introduction

- 1.1 This note is intended to help those who are seeking information on rights of way beyond that provided by the definitive map. Local authorities are recommended to provide information according to the principles set out below to assist those undertaking research into rights of way. The definitive map is the first port of call for anyone to see what rights are recorded but further research may be needed where the status of a way is in dispute. The principle *once a highway, always a highway* is important - public rights of way cannot be lost because they are not recorded or through disuse.
- 1.2 Local authorities are not obliged to offer information beyond that recorded on the definitive map. If landowners, users or anyone else with an interest wishes to discover whether evidence exists of public rights of way beyond that recorded on the definitive map they must ask what information local authorities have or carry out their own research. (Note that local authorities may not be able to respond rapidly to such enquiries and may charge for doing so.) It should also be noted that authorities may not commit themselves on the value of evidence which has not been tested through the definitive map modification order-making process and that local authorities may not have all the relevant evidence.
- 1.3 Assembling as much information as possible minimises uncertainty over the existence and status of public rights of way. Authorities might like to consider gathering together for each parish or community the main documentary evidence that they have. They might also consider finding out whether any research has already been carried out (by user groups, local historians or others) so that work is not duplicated and historic documents (which may be fragile) are not handled more than is necessary. Natural England's Discovering Lost Ways project aims to gather information about ways not yet recorded on the definitive map (see www.naturalengland.org.uk). There is no similar project in Wales.

2 Getting started

2.1 The starting point for any research is to ask your local authority to let you see

- a. the definitive map and statement;
- b. the register of applications for definitive map modification orders.

The local authority should also be able to supply information about

- c. modification orders applied for and refused;
- d. modification orders directed to be made by the Secretary of State but not yet made;
- e. applications that have been determined but for which orders have not yet been made;
- f. modification orders made but not yet confirmed.

Investigating the existence and status of public rights of way

Local authorities also hold other information which may reveal unrecorded rights of way :

- g. claims arising from past reviews of definitive maps that were not determined because of local government re-organization. The local authority should re-examine these, but if it does not propose to do so, the evidence can form the basis of an application for a definitive map modification order;
- h. Roads used as public paths reclassified before 1982 that were recorded as bridleways or footpaths on the grounds of suitability. There may be grounds for seeking a modification order to record these as restricted byways, or in some cases, byways open to all traffic;
- i. The list of streets and other registers (see section 3).

It is also worth asking about likely changes to the network arising from :

- j. Rights of Way Improvement Plans;
- k. other proposals to create, extinguish or divert rights of way, whether by public path orders or by other statutory proceedings.

The definitive map

2.2 The definitive map or revised definitive map prepared under Part IV of the National Parks and Access to the Countryside Act 1949 or Part III of the Wildlife and Countryside Act 1981 will provide conclusive evidence of the existence and status of public rights of way at the relevant date of the map. There will be supporting information in the definitive statement. This information can be accepted at face value. However, it may not accurately reflect all existing rights and it may be necessary to carry out further research to reveal other ways, or inaccuracies in the definitive map. Reasons for inaccuracy and incompleteness in the definitive map include :

- a. the right of way may have been wrongly designated when the original definitive map (or a subsequent revision) was published and the error has not been corrected;
- b. routes shown on the definitive map and statement may carry higher rights than those recorded. Higher rights may have been deemed to have been dedicated through use by the public for a period of 20 years under section 31 of the Highways Act 1980 or after a lesser period under common law, or may be proved by reference to historical documents;
- c. a right of way may not be recorded on the definitive map. Nevertheless its existence may be proved under section 31 of the Highways Act 1980 or under common law, or by means of historical documents;
- d. the definitive map may not have been modified to show the effect of changes brought about by public path orders (e.g. to create, divert or extinguish rights of way) or other statutory proceedings;
- e. until 1983 certain authorities (e.g. the former county boroughs) were not required to prepare definitive maps. Although only the inner London boroughs are now excluded from compulsory map preparation, some of the previously excluded areas are still not mapped.

Registers of applications for modification orders

- 2.3 Local authorities are required to keep registers of applications to modify the definitive map and statement. The registers are available for public inspection and should be on each authority's website. However, the register may not reveal the totality of outstanding applications and orders, so it is worth asking local authorities for information on :
- a. modification orders applied for but refused (because an authority has refused to make an order does not mean that it will not do so in the future. New evidence may be discovered or the weight attached to existing evidence may change);
 - b. modification orders directed to be made by the Secretary of State but not yet made;
 - c. applications that have been determined but for which orders have not yet been made;
 - d. modification orders made but not yet confirmed.

Previous definitive map reviews

- 2.4 The National Parks and Access to the Countryside Act 1949 which required definitive maps and statements to be drawn up also required authorities to undertake periodic reviews to bring those maps and statements up to date. This system never operated satisfactorily. To improve matters, the Wildlife and Countryside Act 1981 introduced the concept of continuous review. Because of the change, some periodic reviews that had been started but not completed were abandoned, either totally or in part. Such reviews unearthed considerable evidence that further ways should be shown on the definitive map and that ways already recorded should be shown with a different status. Where a review was abandoned, the local authority should still have details of the claims and supporting evidence. The authority should indicate what further action it proposes to take and when.

Evidence on the ground

- 2.5 It is often helpful to examine the physical features of ways which are visible on the ground. Aerial photographs can be useful in identifying tracks that may not be visible throughout the year (e.g. through grassland). Other evidence of the existence of old, unrecorded ways includes historical features such as causeways, the remains of old stiles or gates and parallel lines of fences or hedgerows of "lane" width. Modern Ordnance Survey maps can be checked for evidence of tracks that are not recorded on the definitive map. Local people may have relevant information about, for example, ways that have been used as short-cuts. If this use has taken place over a long time there could be grounds for a claim that the track is a public right of way.

Documentary evidence

- 2.6 Documentary evidence may provide the answers where there is uncertainty about the existence and status of ways that are not shown on the definitive map. Section 3 describes various documentary sources. None of these will necessarily provide outright evidence of the existence or non-existence of a public right of way and it will often be necessary to consult more than one source. Even where there is good evidence of the existence or otherwise of public rights of way, definitive map modification orders will still need to be made so that the strength of the evidence can be tested. Cases are determined on the balance of probability given all the evidence available. In relatively few cases will one or two documents be considered to amount to proof in their own right.

3. What is “documentary evidence”?

- 3.1 Documentary evidence can take many forms. Some types of evidence will be relevant to only certain parts of the country. In other cases, information may be incomplete or missing from the publicly available records.

Manorial records

- 3.2 Before 1555 the manor was the administrative unit for highways. Manors courts continued to exist until the 20th century. The records contain papers, court books, court rolls, minute books, etc. Much early inclosure took place under the aegis of the manorial courts and awards were entered into manorial records. Because of this public aspect, they carry more weight than private estate records (see below) although the types of records often overlap.

Inclosure Awards and Maps

- 3.3 Inclosure (or "enclosure") awards were the means by which many thousands of hectares of mediaeval "open fields" and "waste of the manor" were enclosed and distributed among those who could prove that they possessed rights on the old open fields, common or waste, from the early 17th century until 1850. The process was essentially a local one until legislation was passed in 1801 to provide a framework for local awards. The process affected about one-seventh of the total area of England, and parts of Wales. Inclosure awards do not exist for every parish, nor do they necessarily cover the entire parish.
- 3.4 As Inclosure Commissioners were empowered to stop-up or divert existing highways and to set out new public carriageways and (depending on the powers granted by the Private Act) other lesser highways, inclosure awards often include schedules of new, diverted or extinguished roads and paths. Descriptions of parish and plot boundaries may also be useful. It is important to read other sections of the text. And Inclosure Awards should always be read in conjunction with their enabling Acts, unless they were made by agreement, in which case there is no enabling Act. Awards quite often contain a provision that private roads were to include the status of a public bridleway or footpath (Willmore 1990, 1993; Sugden 1992). The interpretation of "private" in the context of inclosures is diverse and needs careful consideration.

Tithe Awards and Maps

- 3.5 Around the early 1840s the majority of parishes was surveyed by the tithe commissioners. These were appointed by statute to commute tithes in kind to money rents. They produced detailed maps according to a colour coding system set out by Parliament and accompanying schedules ("tithe awards"). These were concerned solely with identifying tithable lands and not with roads or their status, so cannot necessarily be used as definitive evidence about public roads but the maps mark roads quite accurately and, with the schedules, can provide supporting evidence (Padley 1991). As crops and grass could not grow on metalled roads, these were often shown in special colouring on the plans and listed explicitly in schedules. Where the line of the path or way was capable of being cropped, however, tithes could be and were often imposed on the whole area crossed by the way. Shading conventions vary from map to map and conclusions cannot be drawn from shading alone. The colouring of tithe maps was intended to indicate their construction rather than their legal status. The use of colour to indicate metalling was a convention that was also applied to early large scale OS maps.

Glebe Terriers

- 3.6 These are lists of the glebe – land farmed or leased by a parish priest – in a parish. They are most easily used in conjunction with tithe maps and apportionments to identify or locate glebe land. Where roads pass through or alongside glebe land the terrier may contain references to public status.

Incremental Value Duty Records

- 3.7 The Finance Act 1910 provided for a tax to be levied upon the incremental value of land every time it was sold. The tax was based on the value of a site itself, irrespective of any value attached to buildings or crops on it. As the presence of a right of way would reduce site value, owners were able to claim relief from tax where rights of way crossed their land. Therein lies the relevance of the records compiled for the purposes of collecting the tax between 1910 and 1920, when the Act was repealed (Bowles 1990). It should be noted, however, that in some instances landowners may well have considered it preferable to forgo tax relief rather than admit the existence of a right of way across their land.
- 3.8 There are four basic sets of records: working plans and Valuation Books ("Domesday Books") which may be available from county record offices; and record plans and Field Books, which are held in the National Archives at Kew. The Valuation Books are helpful in identifying specific plots of land and providing a key to the corresponding working plans, record plans and Field Books. Field Books sometimes provide more useful information on the existence and status of rights of way. Record plans can be obtained by e-mail from the National Archives.

Quarter Session Highway Orders

- 3.9 Until 1949 the diversion or extinguishment of public roads and paths could be carried out only by special Act of Parliament or by application to the justices of the peace. Both diversion and extinguishment orders often refer, either in the text or on the plans, to connecting public roads or paths. It is not unusual to discover that the order affects a path starting on a "green lane" and thereby provides evidence that the lane itself was a public highway. Indictment records are also a good source of information, identifying both publicly maintainable and RT highways that were out or repair. Orders made after 1949 may be held by the highway authority rather than the local record office.

Road Books

- 3.10 Road Books (as distinct from atlases and map books) come in two formats, one as columns of text listing the places that passed through with mileages and other text details along with cross-reference tables and indexes, and the other as strip maps showing the routes in question and some detail of the surrounding landscape. Many of the routes shown have become major or minor roads still in use by everyday traffic, but even the earliest example quoted here includes some roads which have escaped the march of progress. In addition to the roads shown and listed, these books can also be helpful in explaining the terminology used in the past. References abound to High Wayes, Post Stages, Grand and Principal Cross Roads, and Great Roads both Direct and Cross.
- 3.11 The first really comprehensive Road Book in the UK was produced by Ogilvy in 1675 with the title *Britannia*, later reissued as *Britannia Depicta*. Many reprints of these strip maps, some reduced from the folio of the original, have appeared in recent years (and example pages can be found on many pub walls). Many later books were copies of Ogilvy's work, sometimes up-dated and sometimes in the form of listings. Other notable authors who produced original works include Cary (Post Master General), Jefferys, Kitchin, Mogg, Owen, Paterson and Senex.

Ordnance Survey maps and other material

- 3.12 The aim of Ordnance Survey maps is to show the features that exist on the ground, whether man-made or natural, as precisely and accurately as possible given the limitations of scale.
- 3.13 Old Ordnance Survey maps at scales other than 1:2,500, such as early editions of the maps at 1 inch to the mile, provide information on the existence and status of historic ways. Ordnance Survey surveyors' manuscript maps, including the hill sketches, c1789 – 1840 are the drawings on which the earliest Ordnance Survey maps were based, and pre-date the published maps which were derived from them. They often have far more detail than the published maps. These are in the Map Library of the British Library.
- 3.14 Ordnance Survey collections of Object Name Books (Class OS35 at the Public Record Office) contain information about named roads and lanes, very frequently identifying them as public or otherwise. Ordnance Survey Boundary Remarks Books contain maps and comments about the resolution of boundary disputes and – where roads follow parish boundaries – sometimes include details about, for example, which parish had maintained the road in the past.
- 3.15 In certain areas the first edition of the Ordnance Survey 1:2,500 map was accompanied by a published "Book of Reference" for each parish. Where the first edition was published before 1880 (about a quarter of England and Wales), this book gives the land use of each numbered parcel on the map. One category is "Public Road" (or "Road" in some of the later books). This is not definitive evidence of the status but could well be useful supporting evidence (Harley 1979). The maps and Books of Reference are available in the British Library.
- 3.16 Modern Ordnance Survey maps are published at two scales : 1:25,000 Explorer maps and 1:50,000 Landranger maps. Both series show footpaths, bridleways, restricted byways (or roads used as public paths where the map has not been revised to reflect the change in status) and byways open to all traffic, national trails, European long-distance routes, other long-distance routes, selected recreational routes, the national and regional cycle network and other routes with public access. (These *other routes* are ways which local authorities recognise as maintainable at public expense and which therefore carry at least public rights on foot.)

Road Maps, Atlases and Guides

- 3.17 Walkers' maps and guides published before the introduction of definitive maps are a valuable source of evidence of reputation of highways. Since the late 19th century, the London newspapers, railway companies and others had Rambling Correspondents and examples of their work can be found in local archives. Some guides (eg those of London Transport) went through many editions, so the continued description of a path over the years is evidence both that the readers were happy to use that route and that the landowner did not prevail on LT to withdraw it.
- 3.18 Road maps made for sale to the public normally use some convention to differentiate roads that are recommended for use from those that are not, either because they are unsuitable for modern traffic or are private roads not open to the public. Even if the map offers no warranty that recommended roads are public, it is evidence that the map-maker thought that the public would meet no opposition. Bartholomew's maps in particular had a high reputation in the early 20th century (Riley, Byway and Bridleway, 1993).

Highway district highway maintenance records

- 3.19 In some parts of the country highway districts were set up under the Highways Act 1862. (In some counties the Act was ignored because the parishes refused to give up their responsibilities to the new authorities.) In West Suffolk for example, five highway boards were set up to run the county's roads but in East Suffolk, nothing of the kind seems to have occurred. One of the most valuable documents to have survived is a detailed survey of the complete network of roads in the 55 parishes of a West Suffolk highway district.

Parish highway maintenance records

- 3.20 Not many of these records have survived and it is rare to find maps among them. The most useful records are the account books of the parish highway surveyors who were responsible for the upkeep of the roads until late in the nineteenth century. These detail the payments made to labourers for their work in "mending" the roads and some specify the names of the roads upon which they worked. These names may not be those still in use. They are particularly useful for roads built after 1836 as the Highways Act 1835 provided that only public roads were repairable at public expense.

County and district council records

- 3.21 These consist of minute books and files of county and district councils and their committees, particularly highway committee minutes and surveyors records from 1888 onwards. Useful information can be obtained from these papers, for example, the adoption of privately maintained highways in the 1890s-1920s, and various forms of maintenance liability. In addition, both county and metropolitan councils hold records covering the preparation of the definitive map and revised definitive map. These include parish survey forms, draft and provisional maps, objections and records of hearings

Parish and local board records

- 3.22 Many documents have survived, though they may prove difficult to locate if they are not in a county record office. Minute books and other miscellaneous papers may contain references to dealings over public rights of way. There may be records of boundary disputes between parishes and landowners which include references to rights of way. Descriptions of land bounded by the public road or bridle-road may be of some significance.

Other local authority sources

- 3.23 Take-over (or Hand-over) maps of highways made under the Local Government Act 1929 and maps and schedules compiled under the Rights of Way Act 1932 may also provide useful information. So too may Quarter Sessions enrolled indictments for non-repair of highways.

Lists of streets which are maintainable at public expense and the street works register

- 3.24 Evidence about whether a way is a public right of way can be obtained by consulting the list of streets. Highway authorities are required to compile and keep up to date this list of highways that are maintainable at public expense under section 36 of the Highways Act 1980. The list may include publicly maintainable footpaths, bridleways, restricted byways and byways open to all traffic. If a way is shown in the list of streets you can assume that it is a public way but the list may not specify its status. A way not recorded in the list of streets is not necessarily a private highway. The authority may have failed to include it in the list of streets or it may be a highway which the authority is not liable to maintain.
- 3.25 A further record that may be useful is the street works register. Authorities are required to compile this register under section 53 of the New Roads and Street Works Act 1991

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and the Street Works (Registers, Notices, Directions and Designations) Regulations 1992 (SI 1992) No 2985. It must contain details of all streets that are highways regardless of who is responsible for their maintenance. Both this register and the list of streets are open to public inspection free of charge at all reasonable hours.

Estate records

- 3.26 These are collections of documents from solicitors, land agents, etc., deposited in local record offices and local studies libraries. They include conveyances, deeds, estate plans, extracts from inclosure maps and awards, and plans of undertakings (e.g. waterworks, railway, turnpike road) affecting properties. These may include specific references to or show public roads and paths; they often specify the exact position of pieces of land, for example, a piece of land “abutting upon” the King’s Highway or common way.
- 3.27 County record offices will probably include in their holdings maps of private estates or of portions of estates. These may range from rough pencil sketches to large-scale plans. Such maps can provide valuable evidence on roads (Hodson 1991). Many of them are however on deposit from private owners. Access to them for research may require the owner's agreement.

Rights of Way Act 1932, section 31(6) of the Highways Act 1980

- 3.28 Section 31(6) of the Highways Act 1980 (and its predecessor, the Rights of Way Act 1932) enables landowners to deposit maps showing those ways on their land that they admit to being public rights of way. These provide very strong evidence of the existence and status of ways. They are particularly useful where they pre-date definitive maps. These are described in Practice Guidance Note 2.

Aerial photographs

- 3.29 Aerial photographs can provide topographical information on the existence and line of tracks. They can also provide information on tracks used in the past that may no longer be visible at ground level (e.g. paths may show up through differences in crop growth). Maps of the available coverage for any particular area can be obtained from the national collections. Prints may also be borrowed.

Evidence Forms

- 3.30 Over the years many hundreds of evidence forms have been completed and forwarded to highway authorities, particularly in the years after 1949 when definitive maps were first drawn up. However, it may be difficult to discover the whereabouts of forms sent to a county council in the early 1950s. Parish minutes may give an idea of when these were collected.

Deposited plans of public utilities

- 3.31 There were and still are statutory requirements that plans of undertakings such as railways, major roads and canals and drainage channels are deposited with the appropriate public authorities (Riley 1990). Where the works were authorised by Act of Parliament, the Acts, plans and books of reference can be inspected at the House of Lords Record Office. All three documents must be considered together. Surveys carried out in connection with such works, whether or not they were initiated, may also contain useful evidence. Copies had to be deposited with the Quarter Sessions, so may be indexed under Quarter Sessions records.

Records of War-time stopping up or diversion and ploughing authorisations

- 3.32 The Defence (General) Regulations 1939 empowered the temporary stopping-up or diversion of highways and the authorisation of the ploughing of others, subject to

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restoration and the provision of diversions. These orders should have been deposited with local authorities but not all have survived. The Requisitioned Land and War Works Acts 1945 and 1948 allowed orders to be made to stop-up or divert permanently highways which had been or could have been stopped-up or diverted under the Regulations. The orders made under these Acts are held by the Public Record Office. They may also be held in local record offices. These orders provided for new highways to be created and record highways that were extinguished.

Local histories

3.33 Historical accounts of journeys made or personal surveys of road networks can be useful. Local archives may also contain records of property sales, solicitors' files or old title deeds that sometimes refer to public rights of way. Sale particulars do not often give explicit information about rights of way crossing the land to be sold (and estate agents' descriptions may be vague about such features) but they would list features such as an easement or private right of way to be enjoyed with the property. If, therefore, a plot is intersected by "white roads" (ie roads not depicted as part of the land for sale) which seem necessary for access to the property and no mention is made of any private arrangements for access, this may imply that the access was considered public. Old newspapers may also provide useful evidence, especially where there was a practice of reporting regular meetings of local authorities highways committees.

4. Further sources of information

The British Library www.bl.uk

Land Registry www.landreg.gov.uk

Parliamentary Archives www.parliament.uk

National Association of Aerial Photographic Libraries www.rspsoc.org

National Monuments Record Centre www.english-heritage.org.uk

Ordnance Survey, www.OrdnanceSurvey.co.uk

The National Archives www.nationalarchives.gov.uk

The Rights of Way Law Review, dSPACE.dial.pipex.com/rwlr

Society of Archivists www.archives.org.uk

Further reading

Definitive map orders - consistency guidelines www.planning-inspectorate.gov.uk

Rights of Way Law Review Papers, published in Section 9 on Existence of Highways and Section 10 on Administrative Law :

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Hart T (1994) Inclosure Awards. *RWLR* 9.3 : 57-66.

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Padley C (1991) Tithe Records. *RWLR* 9.3 : 25-28.

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Beresford Maurice *History on the Ground* Lutterworth Press (1957)

Campbell-Kease J *A Companion to Local History Research* (1989)

Emmison F G *Archives and Local History* (1974)

Fordham Herbert George *The Road Books and Itineraries of Great Britain 1570 – 1850*
CUP (1924)

Harley J B *The Ordnance Survey and Land-use Mapping* (1979) Geo Abstracts

Hector L C , Arnold Edward *The Handwriting of English Documents* (1958)

Taylor Sue *What is a cross road?* South Pennine Packhorse Trails Trust (1997)

Jeffreys Rees *The King's Highway* Batchworth (1949)

Oliver, Richard *Ordnance Survey maps : a guide for the local historian*

Ravensdale J R *History on your Doorstep* BBC (1982)

Richardson John *The Local Historian's Encyclopedia* Historical Publications (1974, 1986)

Rights of Way: A Guide to Law and Practice, John Riddall and John Trevelyan, Open Spaces
Society and Ramblers' Association, fourth edition, 2007. £29.95 + postage and packing from
0116 254 3579

Smith *Maps and Plans for Local History*

Stevens T (1993) Road research: an introduction to rights of way evidence. (Source LARA)

Stephens W B *Sources for Local History*

West John *Village Records* Macmillan (1962)

Public Record Office (1987). Valuation Office *Records created under the Finance (1919 - 1910)*
Act (Information Sheet 68), *Tithes and Researching Rights of Way*, and other information
sheets.

Published local histories: Royal Historical Society *The Victoria County History of England*