

WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53, SCHEDULE 14
APPLICATION TO:

‘ADD A RESTRICTED BYWAY, FROM BRIDLE FARM TO THE B3081’
IN THE PARISH OF CHARLTON MUSGROVE, WINCANTON

Application: 644M
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Date: October 2019

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1. Introduction

- 1.1. On the 26th November 2009, Stephanie Wheeler, on behalf of South Somerset Bridleways Association, made an application under Schedule 14 and Section 53(5) of the Wildlife & Countryside Act 1981, for an Order to amend the Definitive Map and Statement by adding a restricted byway.
- 1.2. A restricted byway is a right of way which can be used by any member of the public; on foot, horseback, bicycle or any other non-mechanically propelled vehicles such as a horse and cart.
- 1.3. The purpose of the investigation is to establish whether or not these public rights already exist. There is currently no recorded public right of way on the Definitive Map along the claimed route.
- 1.4. Private rights may exist, but have no place in this investigation and do not form part of the decision making process.

2. The Application

- 2.1. The application is based on documentary evidence and includes extracts of the following documents:
 - *Current Map*
 - *Land registry Report*
 - *Photos of each end of the route*
 - *1811-1817, 1st OS (Timeline / Cassini)*
 - *1822, Greenwoods Map*
 - *1840, Wincanton Tithe Map*
 - *1899, OS reprint (Timeline / Cassini)*
 - *1910, Finance Act Map*
 - *1919, OS reprint (Timeline / Cassini)*
- 2.2. No user evidence was submitted with the application.

3. Description of Route

- 3.1. The 'application route' is shown by blue dashes with crosses in the intervals on Appendix 1.
- 3.2. The route is a total length of approximately 423 metres. When visited on 18th June 2018 a ditch with a hedge/tree line could be found on either side of the route which separated it from the fields. The boundary features appeared to be of some antiquity and, while the width between them varied, it averaged approximately 9.9 metres (measured from the centre-point of the ditches on either side).
- 3.3. The route (as of the 18th June 2018) was overgrown. The plants and trees on the edges of the route had grown in towards the centre, greatly reducing the access along the route, but it was still passible on foot.
- 3.4. The surface of the route varied. Mostly, it was similar to a forest floor; with randomly placed uneven areas, random levels of vegetation (and some vegetation free areas), along with varying degrees of soft and firm surface areas.
- 3.5. At the Eastern end of the route (point B on the map), the route has a metalled surface for about 50 metres into the route. This 50 metres section looks like it would easily be suitable for an average road car.
- 3.6. Photographs of the claimed route, taken on 18th June 2018, are located in Appendix 2.
- 3.7. A Land Registry search was carried out on 30th May 2018 which identified that there were no registered owners for the claimed route. The Common Law presumption is that, in the absence of any evidence to the contrary, adjoining landowners own up to the centre point of a highway. The landownership is shown at Appendix 3.
- 3.8. The case file, including the application, accompanying evidence and consultation responses can be viewed by Members by appointment.

4. Relevant Legislation

4.1. The Wildlife and Countryside Act 1981 specifies in Section 53(2)(b), that the County Council must keep the Definitive Map and Statement under continuous review and must make such modifications as appear to them to be requisite in the light of certain specified events. In this case 53(3)(c)(i) is of particular relevance.

4.2. Section 53(3)(C)(i) states that the Map and Statement should be modified where the County Council discover evidence which, when considered with all the other available evidence, shows:

“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”.

4.3. The purpose of Section 53 of the Wildlife and Countryside Act 1981 is to record or delete rights rather than create or extinguish rights. Practical considerations such as suitability, the security and wishes of adjacent landowners cannot be considered under the legislation.

4.4. Section 32 of the Highways Act 1980 states that:

“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 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”.

4.5. The Natural England and Rural Communities (NERC) Act 2006, Section 66 and 67, extinguished rights for mechanically propelled vehicles (MPV's) over any routes that were recorded on the Definitive Map as footpath, bridleway or restricted byway and over any routes that were not recorded on the Definitive Map or the list of highways maintained at public expense. There are a few exceptions to the general rule outlined above, none of which appear to apply in this case. There is therefore no question of rights for MPV's existing over the claimed route.

4.6. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence). The decision is a quasi-judicial one in which the decision maker must make an objective assessment of the available evidence and then conclude whether or not the relevant tests set out above have been met.

5. Documentary Evidence

5.1. The tables below list the sources of the documentary evidence examined as part of this investigation. In some cases it has not been possible to view the original copy of a document and it has instead been necessary to rely entirely on an extract supplied by the applicant. Where this is the case the words ‘extract only’ follow the title of the document. If it has been necessary to give those documents less weight on account of them only being viewed in part this has been made clear in the description and interpretation of the evidence.

5.2. Throughout discussion of the evidence, comparison might be made to the way in which other routes within the immediate vicinity of the application route have been recorded. Where other rights of way, roads or physical features have been referred to; their location has been identified on the plans at Appendix 4.

5.3.	Inclosure Records:
	Explanation of the type of evidence
5.3.1.	Inclosure Awards are legal documents that can still be valid today. They usually consist of a written description of an area with a map attached. Awards resulted from a need by the landowners to gather together their lands and fence in their common lands. A local Act of Parliament was often needed to authorise the procedure and an Inclosure Commissioner was appointed as a result to oversee the compilation of the award and map. Land was divided into individual plots and fields and redistributed amongst the existing owners. Inclosure Awards provide statutory evidence of the existence of certain types of highway. They enabled public rights of way to be created, confirmed and endorsed and sometimes stopped up as necessary. Inclosure Commissioners surveyed land that was to be inclosed and had the power to ‘set out and appoint public and private roads and paths’ that were often situated over existing ancient ways.
	Documents

5.3.2. Names: - An Act for Inclosing Lands within the several Parishes of Kilmington, Charlton Musgrave, Wincanton, and Penselwood, in the County of Somerset 1814.
- Kilmington, Charlton, Musgrave, Wincanton and Penselwood. Inclosure General Award 1821.

Dates: 1814 + 1821
Reference: Q/RDE/127
Source: South West Heritage Centre
Appendix: 4

Description and interpretation of evidence

5.3.3. This Inclosure Award is made under the provisions of the above mentioned local act which, in turn, incorporates provisions from the Inclosure Consolidation Act of 1801 (as referenced on page 3 of the 1814 Act).

5.3.4. Amongst other matters, the 1801 Act, states that the Commissioner had the power to set out private and public roads, bridleways and footways.

5.3.5. The Award contains four maps, labelled A, B, C and D. These correspond with the four parishes the Award relates to. The map which includes the relevant area, inclusive of the application route, is 'Ball Common' on map C.

5.3.6. The application route on map C of the Award is labelled 'B 30 feet wide'.

5.3.7. Within the text of the Award the application route is described under the title 'Private Roads in Ball Common' and is set out as a 'private carriage road'. By contrast the Award sets out the 'Shaftesbury and Bruton Road' (i.e. the road which the application route meets at its eastern end) as a 'Public Road'.

5.3.8. An indication as to what the Commissioners might have meant by the term 'private carriage road' is found later in the text.

All of such public Carriage roads and Highways and private roads on the said Commons' called Wincanton Common and Ball Common being in our judgment necessary and set out by us in such directions as upon the whole appear to us most commodious to the public and which said public carriage Roads and Highways respectively have been formed made and put in complete Repair by us the said Commissioners and certified to have been done by his Majestys Justices of the peace for the said County of Somerset who Certificate is to this Award annexed. And we the said commissioners so hereby order and direct that the said several private Roads shall be and remain of

the respective Breaths herein mentioned for the use of the owners and occupiers for the time being of the several allotments and old inclosed lands adjoining to such roads or to which the same receptively lead and that the said private Roads shall henceforth be repaired and kept in Repair by the Owners and Occupiers of Allotments within the said parish of Wincanton in the shares and proportions particularly set forth in a schedule hereunto annexed entitled "Schedule for the Repairs of Private Roads" [my emphasis].

- 5.3.9. The first piece of highlighted text above refers to the public carriage roads, highways and private roads being, upon the whole, commodious to the public. This could be interpreted as meaning that all three classifications, including private roads, were considered to be for public use. However, use of the words 'upon the whole' leaves an alternative explanation open. The Commissioners were not necessarily stating that each and every route set out was commodious to the public but, instead, that the network as a whole was commodious to the public. In other words not every element of the network needed to be commodious in itself; the private roads could be limited to a specific section of society with the network as a whole remaining commodious to the public.
- 5.3.10. This alternative interpretation is supported by the second piece of highlighted text in paragraph 5.3.8 above, which explicitly limits those entitled to use the private roads to 'the owners and occupiers...of the several allotments and old inclosed lands adjoining to such roads or to which the same respectively lead'.
- 5.3.11. In order for a route to be a highway the public at large must have the right to pass and repass over it. The Commissioners restricted the right to use 'private roads' to a specified section of society. Therefore, the right to use those private roads did not extend to the wider public and so no public rights were created over them by the Award.
- 5.3.12. The Award differentiates between 'public' and 'private' roads and the application route falls into the private category. Private roads were explicitly set out for use by the adjacent landowners and therefore, this could not have amounted to a public right for the benefit of the population as a whole. This conclusion is consistent with the judgement in the *Dunlop case*¹. In that case, it was held the term 'private carriage road' within the Award (which, like the present case, incorporated provisions from the Inclosure Consolidation Act 1801) was used 'to distinguish the particular road according to the extent of the particular rights over it from the public carriage roads on which all subjects enjoyed [a] right'².

¹ *Dunlop v SSE and Cambridgeshire County Council* [1995] 70 P & CR307, 94 LGR 427

² Planning Inspectorate Definitive Map Orders (Consistency Guidelines), Section 7.33.

5.3.13. In addition, the Inclosure Award states that the previous land owner should receive compensation ‘in lieu of their Rights of Soil’. In such circumstances ownership of the roads set out by the award would ordinarily vest with the adjoining landowners³.

5.3.14. In light of the above, the Award must be attributed a significant degree of evidential value. It provides very strong evidence that the application route was a private road carrying no public rights in 1821. That is not to say that additional public rights could not have been dedicated since 1821. Such post-inclosure dedication would explain why some, but by no means all, of the routes set out as private roads in the Award are now public highways. However, evidence of such a post-inclosure dedication would be necessary before it could be concluded that public rights exist over the application route. That evidence would collectively need to positively indicate public rights rather than simply being consistent with those rights known to exist as a result of inclosure.

5.4. Tithe Records:

Explanation of the type of evidence

5.4.1. Tithe maps and the written document which accompanied them, (the apportionment) were produced between 1837 and the early 1850’s in response to the Tithe Commutation Act 1836, to show which landowner owned which pieces of land and as a result how much they owed in monetary terms. The tax replaced the previous ‘payment in kind’ system where one tenth of the produce of the land was given over to the Church.

5.4.2. A map was produced by the Tithe Commissioners which showed parcels of land with unique reference numbers, and these were referred to in the apportionment document, which contained details of the land including its ownership, occupation and use.

5.4.3. Public roads which generated no titheable produce and were not given a tithe number. Some private roads, due to use could be equally not liable to a tithe. However, public and private roads could be subject to a tithe, if for instance, they produced a crop – grazing or hay cut from the verges.

5.4.4. The Map and Apportionment must be considered together. Roads are often listed at the end of the apportionment; there is also sometimes a separate list for private roads.

³ Sauvain, S (2009). Highway Law Fourth Edition. London: Sweet and Maxwell. Paragraph 3-20.

5.4.5. Tithe maps provide good topographical evidence that a route physically existed and can be used to interpret other contemporary documents but were not prepared for the purpose of distinguishing between public and private rights and so tend to be of limited weight.

Document(s)

5.4.6. Name: Tithe Map and Apportionment 1841, Parish of Wincanton
Reference: D/D/RT/M/233 & D/D/RT/A/223
Source: South West Heritage Centre
Appendix: 5

Description and interpretation of evidence

5.4.7. The application route is clearly marked on the Tithe Map indicating it physically existed at the time that these documents were drafted.

5.4.8. The route itself is shown between solid lines and is not numbered or specifically referred to within the apportionment. This indicates that the land was not considered to generate any titheable produce.

5.4.9. Both public and private roads might be unproductive and/or produce no crop, and would therefore not need to be numbered, valued or recorded in the apportionment. This point is supported by the fact that, while some routes shown on the Tithe Map in the same way as the application route were almost certainly public vehicular roads, others are more likely to have been private. For example, the route running north from point A is a cul-de-sac which appears to lead to a field of no apparent interest to the general public. The same route currently has no recorded status, nor is it recorded as a highway maintainable at public expense on either the 1929 handover map or the 1930s or 1950s road records (see paragraph 5.4.10 below). While this is by no means conclusive of it having been private, it is indicative of that status.

5.4.10. The tithe documents provide excellent evidence as to the existence of the route in 1840. However, they were not intended as a record of public rights and as such are less helpful in determining the status of the application route. In this case, even when read together, the map and apportionment give little indication as to why the claimed route was considered unproductive; i.e. did it carry public or just private rights?

5.4.11. For all of the above reasons these documents are not considered to provide evidence of the existence of a right of way in this case.

5.5.	Ordnance Survey Records:
Explanation of the type of evidence	
5.5.1.	The Ordnance Survey (OS) Maps are generally accepted as producing an accurate depiction of what was on the ground at the time of a survey.
5.5.2.	OS Maps cannot generally be regarded as evidence of status; however they do indicate the physical existence of a route at the date of survey.
1806-1815 OS ‘Surveyor drawing’ map Original scale: 1:63,360/one inch to the mile Source: South West Heritage Centre Appendix 6.1	
5.5.3.	This Map indicates a route running north-easterly, which directly connects the area of (the now called) Bridle Farm and the route between Southmarsh and Leigh Common (the now B3018). The route indicated from Bridle Farm to the B3018 has no bend and is on a different alignment to the application route. Therefore, while routes in the Ball Common area are depicted, the application route itself is not.
5.5.4.	It is therefore likely that it either; did not physically exist at the time of the survey or it was considered to have been of insufficient importance to depict on the map.
1811-1817 OS ‘old series’ map Original scale: 1:63,360/one inch to the mile Source: Cassini Timeline reprint (extract only) Appendix 6.2	
5.5.5.	Although not the original version of the OS’s ‘old series’ maps, the Cassini Timeline reprints are reliable copies, re-projected and enlarged to match modern 1:50,000 mapping.
5.5.6.	Like the surveyor’s drawing this map shows a route between Bridle Farm and Southmarsh/B3018. As discussed above, this does not correspond with the application route. The Old Series Map also shows a route leading east from Bridle Farm. While it may well begin at point A it appears to travel south of the application route and certainly does not have the distinctive dog leg of the application route.

1886 OS County Series 1st Edition Map

Sheet No: LXVI:66

Survey Date: 1885

Published: 1888

Scale: 1:2,500

Source: South West Heritage Centre

Appendix 6.3

- 5.5.7. The map shows the application route as white, between solid parallel lines, with trees/vegetation on either side.
- 5.5.8. At point B the application route is traversed by a solid line. In Richard Oliver's Book 'Ordnance Survey Maps'⁴, it states 'A solid line across a thoroughfare may reasonably be interpreted as a gate, though the writer is not aware of any specific instruction which confirms this'. Therefore, given this understanding, a gate across the route is likely to have been present at the time the map was surveyed.
- 5.5.9. It is noted that this map shows a set of parallel pecked lines (indicating a path of some sort) meeting the application route from the south. Those pecked lines are annotated F.P. If it could be concluded that this path was considered a public footpath then it might well be considered evidence of the application route also carrying public rights (if that were not the case then the footpath would have been a cul-de-sac leading to a place which does not appear to be of any public interest). However, the fact that the path is marked 'F.P.' does not necessarily mean that it was considered to be a public footpath. Surveyors were instructed to annotate routes F.P. to indicate roads which were not traversable by horses or wheeled traffic'. This was supported by guidance from the Planning Inspectorates Consistency Guidelines which states that:
- 'The inclusion [in OS maps] of "F.P." gave rise in 1885 to letters being written to *The Times* complaining that the public were likely to view such annotations as indicating the existence of a public footpath. On behalf of the OS, Col. Pilkington-White responded that it was the practice to show paths on the ground, irrespective of whether they were public or private. From 1888, Ordnance Survey maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way.'⁵
- 5.5.10. Therefore, F.P. is indicative of the physical character of a route rather than its status. As such it would be unsafe to conclude that the pecked lines leading to the application route indicate a public footpath simply because they are marked F.P.

⁴ Oliver, R [2005]. Ordnance Survey maps: a concise guide for historians, 2nd ed. London: Charles Close Society. Page 102.

⁵ Consistency Guidelines, Section 12.20.

1898 OS Revised New Series Map
Sheet No: 297
Survey Date: 1884-85
Revised 1897
Published 1898
Scale: 1:63,360 (one inch to the mile)
Source: South West Heritage Centre
Appendix 6.4

- 5.5.11. Although based on the same survey and published at a smaller scale than the first edition county series map, the revised new series map does include more detail regarding the character of the ways shown on it.
- 5.5.12. The application route is shown on the map as a 'Metalled, Third Class, Fenced Road'. The OS used this labelling to include; 'public roads, occupation roads and old metalled roads not kept in repair or roughly metalled or not metalled'⁶. This would suggest that the symbol was used to depict private as well as public roads.
- 5.5.13. There is a solid line across the end of the application route at point B, which, as explained above, is likely to portray a gate at the end of the road. The map and key gives no direct indication as to whether the route is public or private.

1903 OS County Series 2nd Edition Map
Sheet No: 66:9
Survey Date: 1885
Revised: 1901/02
Scale: 1:2,500
Source: South West Heritage Centre
Appendix 6.5

- 5.5.14. The application route is largely shown in the same way as on the first edition, with the line at point B of the application route, potentially showing a gate across the route.

1919 OS popular edition Map
Sheet No: 183
Scale: 1:63,360
Source: Cassini Timeline reprint (extract only)
Appendix 6.6

- 5.5.15. The 'popular edition' was based on the survey of 1885 and so does not add much in terms of topographic evidence to those maps described above. It was produced for sale to the public and graded roads and tracks. The result is much the same as the previously referred to Revised New Edition.

⁶ Hodson, Y. [1999] Popular Maps: The Ordnance Survey Popular Edition One-Inch Map of England and Wales 1919-1926. 1st ed. London: Charles Close Society for the Study of Ordnance Survey Maps. Page 132.

<p>5.5.16. The Map shows the application route as white with a solid black line either side. The key identifies this as depicting a road under 14' wide in bad condition, but the map and key give no indication as to whether the route is public or private. In fact, according to the key which would have accompanied this map, the symbol used to depict the application route could be used for private, as well as public, roads.</p>
<p>1946 OS 'new popular edition' Map Frome - 166 Original scale: 1:63,360 (one inch to the mile) Source: South West Heritage Centre Appendix 6.7</p> <p>5.5.17. The route is shown as a Road with under 14ft of metalling and in bad condition, albeit part of the route is covered up by the labelling of Ball Common on the map.</p>
<p>1959 OS 7th Edition New Popular Edition Frome - 166 Original scale: 1:63,360 (one inch to the mile) Source: South West Heritage Centre Appendix 6.8</p> <p>5.5.18. The route is not shown on this map.</p>
<p>1970 OS Map (extract only) Original scale: 1:5000 Source: Digimap Appendix 6.9</p> <p>5.5.19. The specific details of this map, provided by Landowner E, have not been found, however it is clearly an OS map and depicts the application route.</p> <p>5.5.20. The route is shown on the map with pecked lines at point A, pecked lines are also shown on the eastern end of the route, with a solid line across the application route at point B. The remainder of the route is shown with trees or vegetation.</p>
<p>Description and interpretation of OS evidence</p> <p>5.5.21. OS maps dating from the early 1800s do not show the application route suggesting that it either did not exist at the time or was not considered a significant enough feature to depict.</p> <p>5.5.22. The poor quality Surveyor's Drawing Map and the 1811-1817 Old Series Map do not show the application route. Shown instead is a more northerly route which existed pre-Inclosure.</p>

- 5.5.23. The application route is however clearly shown on most OS maps produced since 1885. This is strong evidence that it has physically existed since that time. The way in which the route has been depicted suggests that, while not in good condition, it would have been physically capable of taking the vehicular traffic of the day.
- 5.5.24. The consistent depiction of a solid line at point B is suggestive that a gate was present at the point of survey (1885) and possibly for many years after that. While maybe more common on private roads, it should be noted that the presence of a gate does not preclude existence of public vehicular rights. Public roads could (and still can) be gated.
- 5.5.25. Based on the OS maps listed above, it is concluded the application route has physically existed since at least 1885. While the route may have been in poor condition, it would appear that the route was capable of taking vehicular traffic.
- 5.5.26. However, since 1888 all OS maps have carried a disclaimer to the effect that they should not be used as evidence of a public right of way. Furthermore, case law⁷ has shown OS maps are only indicative of the physical qualities of a way and should not be treated as direct evidence of status. In the circumstances, it is concluded that, while these documents seem to suggest that the application route could be used by vehicles, they offer little assistance in terms of determining its status.

5.6. 1910 Finance Act

Explanation of the type of evidence

- 5.6.1. The Finance Act of 1910 provided, among other things, for the levy and collection of a duty on the incremental value of all land in the United Kingdom.
- 5.6.2. Land was broken into ownership units known as hereditaments and given a number. Land could be excluded from payment of taxes on the grounds that it was a public highway and reductions in value were sometimes made if land was crossed by a public right of way. Finance Act records consist of two sets of documents which are:-
- Working Plans and Valuation Books. Surviving copies of both records may be held at the Local Records Office. Working maps may vary in details of annotation and shading. The Valuation Books generally show records at a preparatory stage of the survey.

⁷ Moser v Ambleside Urban District Council [1925] 89 JP 118 at 119.

	<ul style="list-style-type: none"> The record plans and Field Books (small bound books) are the final record of assessment and contain more detail than the working records. The Record Plans and Field Books are deposited at The National Archives, Kew. <p>5.6.3. While the Valuation and Field Books were generally kept untouched after 1920, many of the working and record maps remained in use by the Valuation Offices and sometimes information was added after the initial Valuation process.</p> <p>5.6.4. The 1910 Finance Act material did not become widely available until the mid1980's. It cannot therefore have been considered during the Definitive map making process and can be considered "new evidence". This is of particular importance for meeting the requirements of section 53(3) of the Wildlife and Countryside Act 1981 which requires the 'discovery' of new evidence (i.e. evidence not considered when the Definitive Map was originally drawn up or last reviewed) before an order to amend the definitive map can be made.</p>
5.6.5.	<p>Names: Finance Act Working Plan 66-9 References: DD/IR/66/ 9 to 14 Source: South West Heritage Centre Appendix: 7.1</p>
5.6.6.	<p>Document Names: Finance Act Record Plan References: IR 128/9/792, sheet 66-9 Source: National Archives Appendix: 7.2</p>
5.6.7.	<p>Document Names: Finance Act Valuer's Field Book References: R58/5359 Source: National Archives Appendix: 7.3</p>
Description and interpretation of evidence	
5.6.8.	<p>The route itself was clearly marked on the OS base map used for the valuation.</p>
5.6.9.	<p>In appendix 7.1, the working plan shows the application route excluded from the adjacent hereditaments. Towards the Eastern end of the route, nearer to point B, an S shaped bracing mark connects the land on either side of the route. That land all falls within Hereditament 123 which indicates that it was owned by the same person.</p>

- 5.6.10. On the Record plan, as shown as appendix 7.2, the majority of the route is excluded from the surrounding hereditaments. However, towards the eastern end it does fall within hereditament 'Pt 123'. The line passing over the application route indicating the border of hereditament 123 is broken as it crosses the route.
- 5.6.11. Case law⁸ has shown that the exclusion of a route from the 1910 valuation raises the strong possibility that the road was recognised as a highway. Ordinarily, one would expect highways recorded in this way to carry vehicular rights, as routes with lower rights (i.e. footpaths and bridleways) were typically dealt with by deductions recorded in the field books⁹.
- 5.6.12. However, while exclusion may well raise a strong possibility of the existence of public rights, there are other possible reasons for a route to be depicted in this way. As stated in the Planning Inspectorate's The Consistency Guidelines: 'It has been noted, for example, that there are some cases of a private road set out in an inclosure award for the use of a number of people but without its ownership being assigned to any individual, being shown excluded from hereditaments'¹⁰. Therefore, in this case, the setting out of the application route as a private road in the Inclosure Award offers a very plausible alternative explanation for its exclusion.
- 5.6.13. As mentioned above, although most of the application route is excluded from the valuation, there is a short section which falls within Hereditament 123. Cross referencing the Record Plan with the Valuer's Field Book shows no deductions for public rights had been made for this hereditament. As such it is not supportive of public rights.
- 5.6.14. While Finance Act records can, in some cases, be very strong evidence of the existence of public rights, they need to be considered along with all of the other relevant documents. The fact that the application route was set out as a private road during Inclosure offers a very plausible explanation for its partial exclusion from the adjacent hereditaments. Furthermore, where the route does run through a hereditament, no deduction for rights of way was made. In conclusion, whilst exclusion is consistent with the route carrying public rights, they are equally consistent with the route being a private road.

⁸ Fortune v Wiltshire County Council [2012] EWCA Civ 334

⁹ Consistency Guidelines', section 11.7.

¹⁰ Ibid.

5.7.	Highway Road Records held by the County Council
Explanation of the type of evidence	
5.7.1.	Over time responsibility for maintenance of highways has passed between various different authorities. On each occasion a map was typically produced showing those highways which were considered publicly maintainable.
1929 Handover Map and Schedule Source: Somerset County Council Appendix 8.1	
5.7.2.	Responsibility for maintaining many classifications of highway was transferred from Rural District Councils to County Councils by the Local Government Act 1929. In order to assist in the transfer of responsibilities maps were prepared showing all roads that were maintained at public expense at that time. These maps were drafted as a record of those highways which were considered maintainable in the view of the Rural District Council. In theory this would include publicly maintainable footpaths and bridleways as well as carriageways. However, it is clear from the maps themselves that footpaths and bridleways were not typically shown. Instead, most of the coloured routes are public carriageways
5.7.3.	Although difficult to make out, it would appear as though the western end of the application route has been shaded yellow on the 1929 Handover Map for Wincanton Rural District Council (the poor quality of shading is consistent throughout the map). The key for this map indicates yellow shading as ‘a road of little importance’.
5.7.4.	Most other routes which are shaded yellow are today recorded as either restricted byways or unclassified public roads.
5.7.5.	This is evidence the Rural District Council believed at least the western part of the application route to be a highway maintainable at public expense and, in light of the other routes depicted the same way, probably a vehicular one. However, as mentioned above only the western end of the route is shaded. There would appear to be no logical reason why the Rural District Council would have considered any rights to stop part way along the route.
5.7.6.	The black circle situated at point B on the route seems to have been a mistake. Commonly within the map the circles denote a bridge where water or a railway crosses the various routes. There were no such features at point B. Furthermore, unlike similar circles the one at point B is without a number. On the other hand there is an arrow to the right hand side of it which points north towards Southmarsh Farm. All of this suggests that the circle was misplaced and therefore is unlikely to have any relevance to the investigation.

1930 Road Records
Source: Somerset County Council
Appendix 8.2

- 5.7.7. This map was drafted as a record of those roads which were publicly maintainable in the view of the County Council.
- 5.7.8. The application route is shown on the Map and coloured in yellow. This colouration indicates it was considered a highway maintainable at public expense. The yellow colouring also continues in a southerly direction from point A to Riding Gate (along Ball Lane).
- 5.7.9. The application route, but not the road heading south from point A, has zig-zag pencil lines over the top of it and looks like it has been crossed off in a deliberate fashion. There is no indication on the map as to when the pencil annotation was added.

1950 Road Records
Source: Somerset County Council
Appendix 8.3

- 5.7.10. The route is shown on the base map but is not coloured and so was not recorded by the highway authority as being maintainable at public expense at the time of this map.
- 5.7.11. The route leading in a southerly direction from point A (called Ball Lane) is coloured in orange. The B3081, which passes the easterly side of the application route, is coloured green.

Modern Road Records (current record)
Source: Somerset County Council – ROAM
Appendix 8.4

- 5.7.12. The application route depiction on modern road records is much the same as it was on those from the 1950s; i.e. it is not shown coloured.

Wincanton Rural District Council Highway Committee Minutes
D/R/winc/3/2/1
Source: Somerset Heritage Centre
Appendix 8.5

- 5.7.13. Although they do not refer to the application route itself, the Committee Minutes of March 1932, do discuss a footpath heading West from Ball Farm. The Committee were concerned that a bridge on that section of footpath was unpassable and dangerous.
- 5.7.14. These documents only provide clarification the footpath (WN8/10) ends at Ball Farm; it given no weight for or against rights of way along the application route.

Description and interpretation of evidence

- 5.7.15. According to the Planning Inspectorate's consistency guidelines 'The evidential strength of handover maps is they are conclusive evidence of the highway authority's acceptance of maintenance responsibility, a commitment which would not normally have been undertaken lightly'¹¹. However, they were not public documents, therefore they cannot be regarded as conclusive (for the status of a road) and there is a possibility, mistakes might have been made¹². Furthermore, the fact that a route does not appear does not necessarily suggest that it was not a highway. It may simply have been that the route was not maintainable at public expense or that the highway authority was unaware of its liability towards to the road.
- 5.7.16. Furthermore, this type of document did not typically record public bridleways or footpaths. Thus, the omission of a route does not in any way indicate that it was not regarded as a public path.
- 5.7.17. The application route is partly coloured on the 1929 Map. As mentioned above this suggests that the highway authority at the time took responsibility for its maintenance. Ordinarily this would be good evidence in favour of public rights existing over the application route.
- 5.7.18. However, the weight given to this set of documents needs to be tempered by the fact that:
- i) for reasons unknown, the application route only appears to be partially coloured on the 1929 Map
 - ii) the route, although coloured, has been crossed through in pencil on the 1930s map suggesting that it was no longer considered publicly maintainable; and
 - iii) it is not shown on the 1950 Map
- 5.7.19. The pencil marks crossing through the full length of the application route on the 1930s Map appear to have been a deliberate action. The person who marked this map with pencil and the time he/she did so is unknown, as is the definitive reason of said action. Having said this it seems likely that the pencil mark was intended to show that the route was no longer a highway maintainable at public expense. This may have been because it was considered to have never been publicly maintainable or because it was stopped up/downgraded. No legal order to stop up or downgrade the route has been found.

¹¹ Consistency Guidelines, Section 6.9.

¹² Sugden, J. [1995]. 'Highway Authority Records' in Right of Way Law Review. Charlcutt: Rights of Way Law Review Ltd. Section 9.1, Page 6.

5.7.20. The suggestion that the pencil marks were intended to show that the route was not highway maintainable at public expense, is backed up by the 1950's Map failing to show the route coloured in full or even in part.

5.7.21. To summarise, the 1929 Handover Map is good evidence that the application route was considered to be a highway maintainable at public expense and probably a vehicular highway. It is of course possible that the subsequent crossing out on the 1930s map and the fact that it was not coloured on the 1950s map was in some way in error. However, it seems more likely that they were deliberate actions based either in the belief that the application route had never been a highway maintainable at public expense or knowledge of an order stopping up/downgrading the rights over it. Taken at face value this would seem to significantly weaken the weight that can be given to these documents in terms of the existence of public rights. That said, it is of course important to view the highway records in light of all the other evidence which may shed more light on the apparent inconsistencies.

5.8. Definitive Map and Statement preparation records

Explanation of the type of evidence

5.8.1. The Definitive Map and Statement were produced after the National Parks and Access to the Countryside Act 1949 placed a duty on County Councils to survey and map all public rights of way in their area. The process was undertaken in a number of stages:

- *Walking survey cards and maps - Parish Councils were required to survey the paths they thought were public paths at that time and mark them on a map. The route was described on a survey card, on the reverse were details of who walked the route and when. Queries for the whole parish are often noted on a separate card.*
- *Draft Map – Somerset County Council produced the Draft Map from the details shown on the survey map. These maps were agreed by the County Works Committee and the date of this Committee became the 'relevant date' for the area. The map was then published for public consultation; amongst other things this included parish and district councils being contacted directly and notices appearing in local newspapers. Any objections received were recorded in a Summary of Objections found in the District file.*

- *Draft Modification Map – This stage in the process was non statutory. SCC produced a map to show any proposed changes as a result of objections to the Draft Map. Any objections received were recorded in a summary of Counter Objections to the Draft Modification map, found in the District file.*
- *Provisional Map – This map incorporates the information from the Draft Maps and the successful results of objections to the Modification Maps. These were put on deposited in the Parishes and District Council offices at this point only the tenant, occupier or landowner could object.*
- *Definitive Map and Statement – Any path shown is conclusive evidence of the existence and status of a public right of way until proved otherwise. The Definitive Map is without prejudice to other or higher rights.*

Definitive Map documents

Survey Map and Card

Appendix 9.1

- 5.8.2. The Survey Map produced by Charlton Musgrove Parish Council shows the application route shaded brown with a purple line running along it. From point A the purple line continues west and is labelled '10'.
- 5.8.3. With the exception of two minor anomalies, there is a strong correlation between those routes shaded brown on the Survey Map and those shown on the 1950s road records.
- 5.8.4. The Survey Card describes route 10 as a footpath. The original text describes a route leading from what is now WN28/6 in the south to Parsonage Lane to the north. The description broadly matches the route as shown on the survey map. However, at the end of the card reference is made to 'a spur path' which 'runs east at Ball Farm to Ball Common'. This entry is in a different colour to the remainder of the description and it also seems to be in a different style of handwriting.

Draft Map – October 1956

Appendix 9.2

- 5.8.5. The application route is clearly shown on the base map. However, Footpath WN8/10 ends at point A and does not extend over the application route. No public rights are shown to exist over the application route. This is a change from the Survey Map.

	<p>Draft Modification Map – October 1968 Appendix 9.3</p> <p>5.8.6. The application route is not highlighted on this map suggesting that no objection(s) were made to the route’s exclusion on the draft map.</p>
	<p>Provisional Map – June 1970 Appendix 9.4</p> <p>5.8.7. The footpath WN8/10 ends at point A of the application route. No public rights are shown to exist over the application route.</p>
	<p>Definitive Map Appendix 9.5</p> <p>5.8.8. The Definitive Map was required to show; Footpaths as a purple line, Bridleways as a green line and RUPPs as a dashed green line (Road used as a Public Path).</p> <p>5.8.9. The Definitive Map does not show the application route in any of these ways. Therefore, the application route is not shown as a public right of way.</p> <p>5.8.10. Footpath WN8/10 is shown to stop at point A of the application route and does not progress along said route.</p> <p>5.8.11. The purpose of the Definitive Map was to conclusively depict public rights of way using the line styles described in paragraph 5.8.8 above. However, for this particular area the Map also shows a large number of routes shaded brown (i.e. in a style not prescribed by the law). These typically correspond with those routes which are coloured on the 1950 road records suggesting that the draftsman was intending to show public roads. This is supported by the fact that routes which one might expect to be private (i.e. driveways etc) are not shaded. The application route has not been coloured brown, which suggests whoever was responsible for the brown shading was not aware of it being a public vehicular road or believed it not to be.</p> <p>5.8.12. The Definitive Map is only definitive in relation to the information it contains relating to public rights of way. The brown shading is therefore not definitive of the existence of public vehicular rights. Furthermore, while the routes shaded brown appear to correspond with public roads, it is difficult to be sure what the draftsman intended. This shading therefore needs to be treated with some caution. Nevertheless, the Definitive Map does imply that the County Council believed the shaded routes to carry some status, but not that of a public rights of way.</p>

Definitive Map Statement

- 5.8.13. As the application route is not recorded as a public right of way, there is no Definitive Statement covering the application route.
- 5.8.14. The Statement for WN8/10 refers to it as a footpath. As with the parish survey card, the statement describes a spur leading up to Ball Common.

Description and interpretation of evidence

- 5.8.15. When producing the definitive map, purple lines were to be used for footpaths, green for bridleways and dashed green for roads used as public paths. Although not required to do so, it would appear that Charlton Musgrove Parish Council adopted this convention when undertaking their survey. Under normal circumstances it would be reasonable to conclude that the purple line running along the application route indicates that the Parish Council believed it to be a public footpath at the time the map was produced.
- 5.8.16. However, in this case the fact that the route is also shaded brown, makes interpreting the map a little harder. Brown shading on this map was clearly not being used to identify public rights of way as these are shown in purple and green (see above). The most likely explanation is that brown was being used to show routes that the Parish Council felt were roads and, given the correlation with the 1950s road record, most likely public roads. While the Parish Council had not been asked to identify such roads (as to do so was of little assistance to the County Council in preparing the Definitive Map) that does not mean that they could not have chosen to do so.
- 5.8.17. It would be unusual for the route to be considered to be both a footpath and a public road given that the public would have the right to walk over a public road by virtue of it being a highway. This would suggest the Parish Council recorded either the brown colouring or the purple line in error. Some indication as to the most likely explanation is contained within the survey card.
- 5.8.18. The main text on the survey card is in blue ink and describes the route of footpath 10 in some detail. The application route is not included in that description. An additional note appears to have been added to the card after the initial survey. This is written in pencil and describes a 'spur' leading 'to Ball Common'. Significantly, it does not refer to the spur as passing 'over' or 'past' Ball Common (or similar). This would suggest that the footpath spur only extends to the western edge of Ball Common and therefore not over the application route. If this is correct, it would indicate that the purple line on the survey map was extended over the application route in error and that the Parish Council did not intend to show it as part of the footpath. This assumption is supported by the fact that the Definitive Statement also

refers to the spur as leading 'to Ball Common' and this point is depicted on the Definitive Map as terminating at point A.

- 5.8.19. Based on the above it is felt to be more likely that the Parish Council drew a purple line over the application route in error and they instead meant to leave it coloured brown. It seems likely that, even though they were not being asked to show non-rights of way information, the Parish Council chose to show routes that they believed to be public roads in this way.
- 5.8.20. However, this evidence should be taken with some caution for a number of reasons. Firstly, the evidence of the parish survey is confused and open to a number of different interpretations. While the above is considered to be the most likely, it is by no means the only plausible one. Secondly, it should be taken as no more than the opinion of the Parish Council as to status. Finally, whatever the opinion of the Parish Council, it needs to be interpreted in light of how the County Council subsequently used the survey.
- 5.8.21. The application route is not recorded as a public right of way on the draft, draft modification, provisional or definitive maps. This would suggest that, having given consideration to the information in the Parish Survey, the County Council took the view that the application route was incapable of being depicted on the definitive map. There are two possible reasons why this may have been the case. Either there was insufficient evidence of the public having any rights over the route in question or it was considered to be a public vehicular road.
- 5.8.22. As mentioned above, while not definitive, the County Council appear to have indicated their belief that a route carried public vehicular rights by shading it brown. The application route is not shown shaded brown on the Definitive map, nor is it coloured on the 1950s road records which were contemporaneous to the drafting of the Definitive Map. In the circumstances, it is likely the County Council did not concur with the Parish Council's view that the application route was a public road (or at least not one which was maintainable at public expense). In light of this the application route was presumably left off the Definitive Map because the evidence before them was insufficient to demonstrate the existence of public rights.
- 5.8.23. In conclusion, while the evidence of the parish survey needs to be treated with some caution, the Parish Council appears to have considered the application route to be a public road. The survey, by itself, therefore weighs slightly in favour of the application route having the local reputation of a public vehicular rights.
- 5.8.24. Neither the DMS nor the preparatory documents produced by the County Council show the application route as a public right of way. However, it should be noted that, while the DMS is definitive of what it shows in terms of public rights of way, it is not definitive of what it omits. Therefore, while the fact that the application route is not shown

as a public right of way does not provide evidence of the existence of public rights, this does not necessarily mean that they did not exist.

5.8.25. The DMS is also not conclusive evidence of matters which do not relate to rights of way. The brown shading shown on this particular sheet of the Definitive Map is therefore not conclusive. Nevertheless, it is indicative of those routes which the County Council considered to be publicly maintainable roads at the time. The fact that the application route is not shaded brown suggests that the County Council did not necessarily share the Parish Council's view that it was a public road. As with the highway road records discussed above, the fact that the County Council do not appear to have considered the application route to be a public road, does not in itself mean that public rights did not exist, but it certainly cannot be seen as being in favour of their existence.

5.9. Deposited Plans

Explanation of the type of evidence

5.9.1. Railways, canals and turnpike roads all required an Act of Parliament to authorise construction. Detailed plans had to be submitted which showed the effect on the land, highways and private accesses crossed by the proposed routes. Plans were accompanied by a Book of Reference, which itemised properties (fields, houses, roads etc) on the line of the utility and identified owners and occupiers. Where there is a reference to a highway or right of way these documents can generally be regarded as good supporting evidence of its status at that date.

5.9.2. **Document Names:** 1814, Intended Public road. Leading From The Turnpike Road in Leigh Common Through Ball, South Marsh and Chalton Common To Shaford Lane
References: DD/WY/9/2/41
Source: South West Heritage Trust
Appendix: 10

Description and interpretation of evidence

5.9.3. The turnpike map includes a north arrow. However, comparing it to other maps suggests that it was orientated incorrectly. For the purposes of this report an additional arrow has been added to Appendix 10 in red. This is intended to show a more accurate representation of North.

- 5.9.4. The turnpike map shows the layout of Ball Common prior to the Inclosure Award. Like other pre-Inclosure Maps (i.e. those produced by the Ordnance Survey) it does show a route across the Common, but this does not appear to correspond to the application route. While the route shown on the map begins in the vicinity of point A it doesn't travel in the same direction nor does it have the distinctive dog leg of the application route.
- 5.9.5. The reasons for the application route being excluded from the map are either; it did not exist at the time or it was not of significant importance to be depicted in these plans. In either case, as the application route is not shown it can be given no weight in favour of the existence of public rights.

5.10. **Other Sources**

Parish Files (held by Somerset County Council (SCC) and relating to PROW issues)

Appendix: 11.1 + 11.2

- 5.10.1. The County Council's files contain two documents relating to the path in question.
- 5.10.2. The first document is a letter dated 22/06/1973. It asks a number of questions in relation to rights of way in Charlton Musgrove. Of particular relevance to this case is reference to footpath WN8/10 being obstructed by wood piles followed by the comment: 'the road leading to the B3081 is covered in grass. Please will you look into this.'. Given that this comment follows mention of footpath WN8/10, it appears to relate to the application route.
- 5.10.3. With such little detail it is difficult to reach any conclusion as to exactly what the correspondent was asking the County Council to 'look into'. While they were clearly under the impression that the application route was a 'road', no indication is given as to whether they chose to use this word to indicate public rights, private rights or simply the physical character of the route. The fact that they were referring the matter to the County Council is maybe some indication that they believed the route to be public. However, the vagueness of the statement means that it is difficult to be sure what the author was referring to. In any case, even if they did believe the route to be public, this is no more than the view of one person rather than evidence of a wider level of use.

5.10.4. The second document is a record of a telephone conversation between a member of the public and the County Council. The call was made on the 25/09/1995. The caller was a horse rider enquiring about the status of the application route. This document carries no weight as it neither confirms or refutes the public status of the application route.

Day and Masters 1782
Appendix: 11.3

5.10.5. Published in 1782, this commercial map included very little detail, typically only depicting settlements, major roads (particularly those in and between settlements), and rivers. It is therefore unsurprising that the application route is not shown and the map neither confirms nor removes the possibility that it existed in the late 18th century.

5.10.6. This map carries no weight either way in relation to rights of way as it does not show the route.

Greenwoods 1822 Appendix 11.4

- 5.10.7. Despite some criticism relating to the positional accuracy of Greenwood's maps they can provide good evidence of a route's physical existence at the time of the survey and also that the surveyor considered it to be of some importance. As the map was produced for use by members of the public it is likely that the surveyor would have focused on those roads which he believed to be publicly accessible or that were useful for the public in some other way.
- 5.10.8. The map shows the application route as a 'cross road'. Although not specifically defined on the map, this term was being used to refer to more than just the point at which two roads cross. In one prominent case the courts defined a cross road as 'a **public** road in respect of which no toll is payable'¹³ (my emphasis). However, in that case the judge was considering a map produced 55 years earlier than Greenwood's and by a different cartographer. Therefore, while consideration should be given to this legal precedent, it is important to consider the term 'cross road' in the context of any individual map before drawing any inferences¹⁴.
- 5.10.9. While the majority of cross roads shown on Greenwood's map are now recognised as public vehicular roads, there are many which are not. Many of those which are not now public vehicular roads are shown on Greenwoods Map as cul-de-sacs (e.g. route to Kingwell Farm off of Old Hill, the route to Thorney Copse Farm and the route from Overdene Farm to Roundhill Grange, as highlighted in appendix 12.4). These were unlikely to have carried public vehicular rights. A similar picture emerges when analysing other extracts of the same map. In the circumstances it seems as though Greenwood either did not consider all 'cross roads' to be public vehicular routes, or that he did not make very careful checks about the public status of the routes recorded.
- 5.10.10. This conclusion is supported by the fact that this map was produced only one year after the application route was explicitly set out in the Inclosure Award as a private road. It seems highly unlikely that its status would have changed in that time.
- 5.10.11. Furthermore the court case referred to in 5.10.7 above needs to be viewed in light of *Merstham Manor Ltd v Coulsdon UDC 1936* in which the judge, considering Greenwood's Map, concluded that 'there is nothing in the map(s) to show whether or not the topographer-author was intending to represent the road on his map as a public highway'.

¹³ Hollins v Oldham [1995] C94/0206.

¹⁴ Consistency Guidelines. Section 2.26.

5.10.12. The fact the application route appears as a through route and cross road on Greenwoods map may in some circumstances be slightly in favour of public rights, possibly vehicular. However, the weight given to this document is significantly reduced by the fact that Greenwood's definition of 'cross road' does not appear to have been limited to public highways and the case of 1936. In any case, the map would have undergone little or no consultation and therefore represents no more than the opinion of the surveyor.

**Leir Estate Sale 1920
Somerset Heritage Centre (Extract only)
DD/BT/18-12 C/1531
Appendix: 11.5**

5.10.13. The Ordnance Survey base map used shows the application route. The route is unshaded and is not included as part of the sale.

5.10.14. The extract provided does not catalogue the status of the application route (or of the nearby road, which also divides some of the plots). The map clearly shows access is available via an alternative route.

5.10.15. While no comprehensive document setting out the full conditions of this particular sale has been located, experience shows that such documents were common. The alternative is that all the information pertaining to the proposed sales of each plot of land is included within the few lines included in the Lot 6 sale sheet. Given the detail that any prospective purchaser would require this seems implausible.

5.10.16. It is noted that in this case the extract provided includes no reference to any covenants, land charges or easements in relation to any of the plots of land. With no reason to believe that an easement would have been recorded in this document had it existed, the lack of a recorded easement should not be taken as evidence a private right did not exist. On the contrary it is known that at least some private rights were created by inclosure.

5.10.17. Therefore, this document provides no evidence for or against the public status of the application route.

**Ministry of Food National Farm Survey 1941-42
National Archives (Extract only) MAF 73/36/66
Appendix: 11.6**

5.10.18. The National Farm Survey was commissioned to assist the work of the County War Agricultural Executive Committees by assessing Britain's ability to feed itself in wartime. A hurried survey of land quality took place in 1940 and despite having to operate under wartime conditions, the 1941 National Farm Survey gathered information on all farms in England and Wales over 5 acres. 320,000 farms in total were surveyed. This data was gathered on a map and four forms. It included

information on the location of the Farm in relation to (public) roads and the condition of the farm roads.

- 5.10.19. The OS base map used for the Survey shows the application route. The National Farm Survey Forms were not provided as evidence in this case.
- 5.10.20. The Westerly end of the application route is shown included as part of parcel number 4/398/14. This parcel also incorporates Ball Farm. However, the Easterly end of the application route is excluded and separates the land of owner 4/419/6.
- 5.10.21. The purpose of this survey was to survey farms and not to record the status of roads. Therefore, while exclusion from the surrounding plots of land may be indicative of vehicular routes, the map provides no evidence as to the status of the roads passing through or adjacent to the landholdings. This is all the more true given that the map is available only in isolation and without the supporting forms. This conclusion is supported by paragraph 11.14 of the Planning Inspectorate's Consistency Guidelines which state that 'It is possible that information regarding rights of way might arise from the Survey, although...it seems unlikely'.

Aerial photograph 1946
Appendix: 11.7

- 5.10.22. The aerial photograph shows the application route as defined on the ground, although less clearly at some points where the route is obscured by vegetation.
- 5.10.23. The shape of the route is consistent with the Maps already viewed in this report. Due to the vegetation covering the route the surface type is not clear in this photograph.
- 5.10.24. The aerial photograph is excellent evidence for the physical state of the route in 1946. However, it does not provide evidence for or against public rights.

- 5.11. Other sources of Primary Documentary Evidence which didn't cover the relevant area or didn't show the claimed route or did not assist in determining the status.

Heritage Centre Documents

- Q/RUP/12: Plan of the Proposed Dorset and Somerset Canal. 30 Sep 1795
- Q/RUP/14: Bristol and Western Canal. 12 Jan 1796
- Q/RUP/214: Wiltshire, Somerset and Weymouth Railway, Amendment 1. 30 Nov 1846
- Q/RUP/111: Plan of existing roads, new roads and deviations in the Bruton Turnpike Trust. 30 Nov 1830
- Q/REL/28/5: Tithing of Penselwood. 1766-1832
- DD/SAS/C212/MAP/35: Map of Charlton Musgrove, c/1821 (C-D). c. 1821
- D/P/PEN/21/1: Enclosure map and award of Leigh common in Penselwood with copy of Act. 1821
- Q/SR/640/37-41: Stopping up order. Aug 1860
- D/R/WINC/34/1/1-3: Minutes. 1863-1896

6. Discussion of the documentary evidence

6.1. As discussed in paragraph 4.1 above, the County Council is under a duty to modify the Definitive Map where evidence comes to light that it is in error. The standard of proof to be applied in cases such as this (i.e. where the route of a claimed right of way is not already shown on the Definitive Map and Statement) consists of two limbs. An order should be made to modify the Definitive Map if the evidence shows that a right of way;

- a) subsists; or
- b) is reasonable to allege to subsist.

6.2. Importantly, the above paragraph describes the test for making an order. Such an order can only be confirmed (and therefore the Definitive Map can only be modified) if the evidence meets the higher 'balance of probabilities' test.

6.3. The full length of the application route does not appear on any of the pre-Inclosure documents (i.e. the Day and Masters 1782 Map, the 1814 Turnpike Road map, the Ordnance Survey surveyors drawings and the 1811-1817 OS Old series map) and as such there is no evidence that public rights existed prior to 1821.

6.4. The 'Kilmington, Charlton Musgrave, Wincanton and Penselwood, Inclosure General Award of 1821', as already discussed (under 'Inclosure Records', see 5.3), labels the application route as a 'Private Road' and sets out the section of society permitted to use the application route.

6.5. In relation to the interpretation of Inclosure Awards the Planning Inspectorate Consistency Guidelines state that: 'every case must be examined individually in the context of all the local circumstances and the prescribed details of the process, all of which may vary'¹⁵. In this case, there are two key paragraphs within the Award which are of particular assistance in determining the meaning that was being given to the term 'private road'. These are;

- (i) 'All of such public Carriage roads and Highways and private roads on the said Commons' called Wincanton Common and Ball Common being in our judgment necessary and set out by us in such directions as upon the whole appear to us most commodious to the public'
- (ii) 'Private Roads shall be and remain of the respective Breaths herein mentioned for the use of the owners occupiers for the time being of the several allotments and old inclosed lands adjoining to such roads or to which the same respectively lead'

6.6. With reference to (i), it states that the road network 'on the whole' is 'commodious to the public' (i.e. convenient for the public). This

¹⁵ Consistency Guidelines, Section 7.40.

statement could be read as being evidence of all 'public Carriage roads and Highways and private roads' being public. However, it is important to consider the meaning in the context of the rest of the Award and in particular the text quoted at (ii) above. That text clearly limits the right to use the private roads to the owners and occupiers of adjacent land rather than the public at large. In this context it is suggested that the quote at (i) was intended to mean that the Award created a network of public routes which, on the whole, was considered convenient to the public. However, this is not to say that all routes were public, only that those which were public provided a convenient network. There remains scope for the Award to set out private roads in addition to that network.

- 6.7. In light of this it is concluded that the term 'private' in the inclosure Award was used to define the limited group of individuals who had the right to use the ways in question. As such no public rights were awarded at inclosure.
- 6.8. All post-inclosure documents need to be viewed in light of the above conclusion. This does not prevent public rights being obtained after 1821. However, there would need to be evidence of such a dedication before an order to modify the Definitive Map could be made. That evidence would collectively need to indicate public rights, rather than simply being consistent with those private rights known to exist as a result of the Inclosure Award.
- 6.9. Greenwoods Map shows the application route did come into physical existence following the making of the Inclosure Award. Notwithstanding the fact that it appears to show routes which were unlikely to have been public, this document might in some instances be given some weight in favour of public rights. However, in this case, the map was produced only one year after the Inclosure Award and it is very unlikely the status would have changed in that short space of time. It is therefore considered that Greenwoods Maps is entirely consistent with those private rights set out at inclosure.
- 6.10. The application route is also clearly depicted on post-inclosure Ordnance Survey Maps and the Tithe Map. Collectively this evidence shows the physical characteristics of the route and demonstrates that it was capable of carrying people on foot, on horse and by cart (although it appears to have fallen into disrepair by the early 20th Century). As discussed previously in this report, these maps do not provide direct evidence as to the status of the route and, given that the route is repeatedly depicted in a way which is consistent with the private rights set out at inclosure, do not weigh in favour of the existence of public rights. A similar argument can be made in relation to the Leir Estate sale documents.
- 6.11. The same conclusion is reached in relation to the Finance Act. While exclusion from the valuation is normally good evidence of public status, there are other reasons for a route to be shown in this way.

Notably where, as in this case, a route was set out as a private road for a number of people in an Inclosure Award. The exclusion of the western end of the application route is therefore entirely consistent with the way that it was set out at inclosure. It is noted that part of the eastern end of the route is included within Hereditament 123. The Valuer's Field Book, shows no deductions for public rights over hereditament 123 and therefore provides no evidence of public rights.

- 6.12. Whilst some of the evidence collected for this investigation is inconclusive and provides no weight for or against the existence of public rights over the application route, there are three documents which could be read as being in favour of the application route having carried public vehicular rights. Those documents are the 1929 Handover Map, the Parish Council's survey in preparation for the Definitive Map and the letter to Somerset County Council in 1973. Each of these is discussed in turn below but none of them carry much weight.
- 6.13. The 1929 Handover Map shows the route in yellow. As discussed from 5.7.3, this is evidence that the Rural District Council believed at least part of the route to be a highway maintainable at public expense.
- 6.14. Ordinarily this would be good evidence in favour of public vehicular rights. However, the weight to be given to the 1929 map in this case is reduced. In part this is because the colouration only affects part of the application route suggesting a lack of care or some uncertainty on the part of the draftsman.
- 6.15. More importantly, in terms of evidential weight, the 1929 Handover Map needs to be seen in light of the later road records. While the application route is coloured yellow on the 1930s Road Records it has subsequently been crossed through in pencil and does not appear coloured on the 1950 road records at all.
- 6.16. It would be reasonable to assume that, unless there is evidence to the contrary, routes would only have been added to or removed from these documents on the basis of sound evidence.
- 6.17. Based on this assumption one might reasonably conclude that:
 - i) In 1929 the Rural District Council were of the view that the application route was a highway maintainable at public expense;
 - ii) Somerset County Council initially copied that information on to the 1930 record; and
 - iii) Somerset County Council subsequently discovered evidence to show that the route was not a highway maintainable at public expense and crossed the route off of the 1930s records and did not include it in the 1950s.
- 6.18. It is of course possible that the pencil lines on the 1930s map and the lack of colour on the 1950s map were both in error. However, at the

very least this paints a confused picture as to whether or not the application route was considered to be a highway maintainable at public expense. Furthermore, the act of crossing through the route with pencil lines on the 1930s records suggest a deliberate act to remove the route as opposed to it being an oversight. In the circumstances it seems that the most likely explanation for the variation in depiction is that sometime after the 1930 Road Records were produced it was either discovered that the application route had been incorrectly recorded as a highway maintainable at public expense or that it was extinguished (although it is acknowledged that no evidence of an extinguishment order has been found).

- 6.19. In light of the above, when taken in isolation the 1929 Handover Map remains supportive of public vehicular rights. However, viewed in the context of the other road record documents it can, at best, only be given minimal weight.
- 6.20. The Parish Council's survey in preparation for the production of the Definitive Map is also supportive of public vehicular rights. While it appears to show the application route as both a road and a public footpath, it would be unusual for the Parish Council to have considered the route to have dual status.
- 6.21. As the application route appears not to have been described on the survey card, it seems more likely that the depiction of the footpath was an error and the Parish Council were under the impression that the route was a public road. While the purpose of the Definitive Map is not to show public vehicular roads, this remains evidence that the route had the reputation of being used by vehicles. However, the weight to be attributed to that evidence is reduced by its confused nature (i.e. the route being coloured both brown and purple). Furthermore, irrespective of the views of the Parish Council, it would appear that the County Council were not persuaded of public rights as the route was neither recorded as a RUPP nor on the almost contemporaneous 1950s road records.
- 6.22. It is possible that the evidence of reputation is supported by the views expressed in the 1973 letter as contained on the County Council's Parish Files. However, while the route is referred to as a road, little more detail is given. It is therefore difficult to be sure in what sense the author was using the word.
- 6.23. The 1973 letter is also of significance in that it would not have been available when the Definitive Map was being drafted. An order to modify the Definitive Map can only be made where there has been a discovery of evidence which, when considered with all other available evidence, justifies the modification. The 'discovered' evidence does not have to be new in the sense that it did not exist when the Definitive Map was being drafted, but it must have been unknown to those who were drafting it. Furthermore, it is necessary for some reliance to be

placed on the discovered evidence in reaching the conclusion that an order should be made¹⁶.

- 6.24. In many cases, Finance Act documents are sufficient to satisfy the 'discovery of evidence' criteria. Although they were produced in the early part of the 20th century they did not become widely available until the 1980s. However, in this case, the Finance Act is entirely consistent with the private rights set out at inclosure. In the circumstances it would be difficult to see how any order to modify the Definitive Map would be relying upon it.
- 6.25. Therefore, there is strong evidence in favour of the route having been a private road at the point of inclosure. Much of the subsequent evidence is consistent with the existence of those rights. While it is true that there are three documents which could arguably provide positive evidence of public rights having been acquired since the inclosure award they are weak. Taken as a whole the documentary evidence is insufficient to reasonably allege the existence of public rights. However, this does not mean that rights cannot be presumed to have been dedicated as a result of more recent public use.

7. User Evidence

- 7.1. Though no user data was received at the start of this investigation, during the consultation of the initial draft report user evidence in relation to the application route was received.
- 7.2. Under section 31 of the Highways Act 1980, the dedication of a route as a public highway is presumed after public use, 'as of right' and without interruption for 20 years. As of right is defined as without force, without secrecy and without permission.
- 7.3. The presumption raised under section 31 can be rebutted where there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period must run back from the date that use of the route was brought into question (i.e. the date of challenge).
- 7.4. User evidence forms and user statements have been received collectively from 15 different users, for reference they have been labelled UEFs 1 to 15. Of these 15 users, 10¹⁷ of them were interviewed in order to clarify their evidence and gather more specific data.
- 7.5. Use of the application route has been claimed from 2019 back to 1947. Although the likely use of the route was low prior 1994 it gradually increased peaking between 2002 and 2004 before gradually reducing again.

¹⁶ Burrows v Secretary of State for Environment Food and Rural Affairs [2004] EWHC 132. Paragraph 26, link; <http://www.bailii.org/ew/cases/EWHC/Admin/2004/132.html>

¹⁷ Users interviewed; 1, 3, 4, 5, 6, 8, 11, 12, 14, 15. (Those not interviewed: 2, 7, 9, 10, 13)

- 7.6. Users of the application route have been recorded using a variety of methods.
- 7.6.1. 6 UEF's¹⁸ have recorded use on foot – sometimes with the addition of walking with a dog(s) or leading a horse. Collectively that use occurred between 1947 and 2019. The overall frequency of use ranges from zero walking users from 1993 to 1991, up to an approximately 773 collective uses per year between 2005 and 2001.
- 7.6.2. 14 UEF's¹⁹ have recorded riding the application route on horseback. Collectively that use occurred between 1947 and 2019. The overall frequency of use varies. Again, the lowest period of use is approximately 114.5 times per year in 1991. The highest recorded use is in 2006, with an estimated 883 recorded uses within the year.
- 7.6.3. 1 UEF²⁰ used a horse and cart to traverse the application route, this was from 1978 to 2004. During that time they used it an estimated 4 times per year.
- 7.6.4. 2 UEF's²¹ have cycled along the application route. This use occurred from 1976 to 2009. Collectively their use never amounted to more than 18 times a year.
- 7.6.5. 2 UEF's²² state they had driven a vehicle along the application route. This use was recorded as sporadic and one was linked with working at Ball Farm.
- 7.7. Irrespective of other matters such as whether or not the use has been as of right or the length of time it has been occurring for, vehicular use (i.e. that on bicycle, horse and cart or in a car) has been by too few people and too infrequent to amount to 'use by the public'. For this reason the use is insufficient to lead to the presumption that the route is a restricted byway or byway open to all traffic. As such vehicular use is not considered in any great detail in the rest of this report.
- 7.8. Only one user mentions any limitations on the route referring to an old gate which was in place about 30-40 years ago but which was never locked.

8. Landowner and Adjoining Landowner Evidence

- 8.1. This section of the report includes information provided by landowners and adjacent landowners. Factual first hand evidence carries more weight than personal opinion, heresay or third party evidence.

¹⁸ Users on foot: 1,3,6,11,12,15.

¹⁹ Users on horseback: 1,2,3,4,5,6,7,8,10,11,12,13,14,15.

²⁰ User on horse and cart: 1.

²¹ Users on a push bike: 5,6.

²² Users in a vehicle: 9,15.

8.2. Landowner A supplied a letter confirming ownership of land adjoining the application route and raised the following salient points:

- They had only owned the land in question since 2017
- They had been informed by others that the track has been allowed to fall into disuse and has become overgrown in order to deter vehicular use.
- Concerned it would be a security issue if made public without taking appropriate counter measures to restrict access.

8.3. Landowner B's evidence was received via a telephone call, (no letter received), during which they raised the following salient points:

- Claims ownership of up to half of the width of the application route where it adjoins Landowner B's land.
- Referred to the application route as 'green lane' and stated; 'in the past the green lane was used by walkers and riders', this use was stopped, in part, by allowing it to become overgrown.

8.4. Landowner E supplied written correspondence and also discussed on the telephone. They raised the following salient points:

- Referred to the application route as a 'green lane'. When they purchased land adjoining the application route in 2017 it was impassable and extremely overgrown.
- Shortly after they purchased adjoining land, User 15 used a digger in an attempt to clear that application route. This was despite User 15 having been previously informed that the route was private by Landowner F. Landowner E managed to stop the digger.
- Although they are unable to watch the lane all of the time, they have told everyone that they have seen not to use it, as it is private. Some locals have walked up towards the lane, probably with the intention of using it, but turned around when they have been seen by Landowner E.
- Furthermore, the condition of the lane in the winter makes it impassable. A friend of this landowner had permission to use the lane and during her use the horse got stuck in mud over its knees (bottomed out the horse), she said she would not risk taking the horse along the route again.
- Landowner E understands that the application route has been in private ownership and management since the 1840's.
- None of the OS maps show markings of a byway, a bridleway or a footpath along the route.
- They have been informed that one of the previous owners of Ball Farm gave permission to users 3, 5 and 12 to use the route. However, that previous owner did not allow user 15 to use the route.

- There has been attempted use of the green lane in the past by the Bridleway Society, which was stopped as soon as it was known, along with some other attempts to create access.
- They are also concerned it would be a security issue if the application route was made public.

8.5. Landowner F supplied written correspondence and also discussed the case on the telephone. They raised the following salient points:

- They are also concerned it would be a security issue if the application route was made public. Landowner F states that the application route is privately owned and has no public rights over it. They claim to have jointly owned Bridle Farm with their sister between 1982 and 2017. Although ownership of the application route is not registered by the Land Registry, Landowner F is of the view that they purchased it in 1982 and, despite selling some parcels of adjacent land, continue to own it today.
- The route was in the previous owner of Bridle Farm's family for 80 years before Landowner F purchased it. They informed Landowner F that the application route was a private entrance to Bridle Farm which fell into disuse when the road running south from point A began to be used as an alternative. Prior to Landowner F's ownership cattle had been grazed on the route and it had been regularly fenced at each end.
- The application route was overgrown and impassable when landowner F bought the farm in 1982 and it has remained so since.
- Landowner F states that during that time they have managed the route as a natural habitat. This was done in order to deter use.
- The lane has not been passable by car and use by a horse would have resulted in an issue for the rider as getting through the route would have been difficult due to low branches and the limited walking area. On foot the route could be walked but not easily. Landowner F had only used the route once themselves. This was on foot. They found it difficult going due to the mud. Despite keeping horses Landowner F had never ridden the route.
- The lane is often founderous particularly in the winter. 6 inches of mud is possible after it has rained making it impassable for horses.
- Landowner F has not erected gates or notices on the route during the time that he claims to have owned it. They asked the Council in the mid 1980's about the status of the route and was told it was a private lane only with no public rights of way over it.
- On occasion permission was given to certain unspecified individuals. Particular mention is made of Landowner F's sibling (who co-owned the farm) not objecting to horse riders using the route. Permission was given to a neighbouring family

who have not completed UEFs as well as users 3, 5, and 12. Those same users would have been aware that the route was private, and not a public right of way, on account of a previous attempt to purchase land adjacent to the route.

- However, the permission given to users 3, 5 and 12 would not have extended to everyone. In fact a number of users were stopped from using, or told not to use, the route.
- It has also been suggested that User 15 reportedly sought and received permission to walk the route prior to 1982.
- Users 1, 10, 11 and 15 were not permitted to use the route. They would have been stopped had they been seen using the route and they knew that it was not a public right of way. Landowner F recalls a specific instance when User 15 laid scalpings on the application route with a view to using it as a vehicular access to their land. User 15 was confronted by Landowner F and informed that the lane was not public and that they had no right to use it. Following this incident Landowner F checked 'the council records in Taunton' and was informed that there were no public rights over it.
- Also, a local hunt group were told that they were not permitted to hunt on Landowner F's land following which they did not come back. Others were also stopped from using the route, including anyone who was considered to have damaged the route. One such person was trying to clear the route with a machete. Landowner F stopped him and explained that the route was private and that he could not make his own route through private land. Landowner F was of the view that the man with the machete had been sent by User 15.
- Landowner F had told a man who wished to drive a horse and cart along the application route that it was for private use only. He did not use the route as to do so would have damaged his cart.
- Landowner F did not actively supervise the route but dealt with issues as they encountered them. However, the lane was always quiet and any noise made would be easily heard. They did not hear anyone using the route. No-one would have wanted to on account of it only leading to a main road with fast moving traffic. On the rare occasion Landowner F did see someone attempting to use the lane, they were stopped in person.

8.6. Landowners C and D have not replied.

9. Discussion of User and Landowners evidence

9.1. Quality of Evidence

- 9.1.1. The Planning Inspectorate’s consistency guidelines state that “Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)”
- 9.1.2. It is hardly surprising if, after some years or even decades, those submitting non-documentary evidence are not able to accurately recall dates or events which they did not know at the time would be important or they would be questioned about later. This does not in any way imply a lack of honesty by those submitting evidence, but the possibility that their recollections may not be completely accurate or complete does need to be considered when interpreting the evidence and placing weight on it. This is true of all recollection based evidence, whether submitted by users, witnesses, landowners or others.
- 9.1.3. It might be expected that those supporting the application and those against it will have a different perspective on the same event. In this case, there has been conflicting evidence supplied on several points. Whilst some can be reconciled (for example, differing accounts of where the boggy areas or muddy areas are and the potential depth of said mud), others are less easy to resolve (for example the specific details of relevant conversations held).

9.2. Calling into question

- 9.2.1. An action deemed to be a ‘calling in to question’ of the public’s right to use a route is needed to define the last chronological date of the 20 years period of use. There are many examples of events which might constitute a calling into question including (but not limited to); an application to modify the definitive map, the locking of a gate across a route or an appropriately worded sign at an entrance to the route.
- 9.2.2. In this case there are two events which could be considered a calling into question.
- 9.2.3. The earliest calling into question is the submission of the SSBA’s application to modify the definitive map and statement in 2009. The relevant 20 year period in respect of this calling into question would therefore be 1989 to 2009.
- 9.2.4. The second calling into question is the ‘Private Property Keep Out’ notice. There is a consensus this was erected in the summer of 2017. Therefore, if the evidence does not show that rights were acquired in the earliest 20 year period (1989-2009) then it will be necessary to consider whether use between 1997 and 2017 has been sufficient to demonstrate that rights have been dedicated.

9.3. As of right use

- 9.3.1. Having established the two potential 20 year periods, it is necessary to consider whether the use within these periods has been 'as of right'.
- 9.3.2. In order to qualify for the purposes of section 31, use of the claimed route is required to meet the 'as of right' criteria. The DMO Consistency Guidelines state 'Use 'as of right' must be without force, secrecy or permission'²³. Each of these elements is dealt with in turn below. There is no requirement within these criteria for users to believe the route is public.

9.4. Permission

- 9.4.1. Permission can be either express permission (direct/verbal) or implied from the owners actions. However, encouragement to use a way might not equate to 'with permission', the correct inference to be drawn depends on any evidence of the overt and contemporaneous acts which are presented in each case.
- 9.4.2. Landowner F's evidence is that his late sibling gave permission both to a neighbouring family and users 3, 5 and 12. Little detail of the circumstances and nature of any communication between these parties and Landowner F's sibling is now available. Furthermore, the suggestion that permission was given is directly contradicted by the first hand accounts of users 3, 5 and 12. All three were interviewed and gave no indication of having been given permission (although they also took the view that neither Landowner F nor his sibling owned the application route).
- 9.4.3. Landowner F goes on to state that, in addition to giving permission to the individuals referred to above, they had, on occasion, given permission to other unspecified people. Exactly to whom or when this permission was given is uncertain but it does not appear to have come to the attention of users more generally as none of the UEFs or interview statements refer to the Landowner ever giving permission to use the route.
- 9.4.4. Finally, Landowner F states that their sibling 'would not have objected to horse riders using the route'. Even if effectively communicated to the users this would seem to amount to acquiescence rather than permission and therefore would not, in itself, make any subsequent use not as of right.

²³ The Planning Inspectorate (February 2016) *DMO: Consistency Guidelines 9th revision*, paragraph 5.21.

9.5. Force

- 9.5.1. Amongst other things, passing over, through or around an intentional blockage, such as a locked gate, constitutes use 'with force' and therefore that type of use is not 'as of right'²⁴.
- 9.5.2. Landowner F states the application route was left to overgrowth to deter use of the said route. Landowners A and E also state the route had become overgrown and impassable. User 9 supports this by stating that in the past 15 years the route has been not been maintained and has become impassable. User 9 went on to say overgrowth, a felled tree and an old gate were placed across the route.
- 9.5.3. Other users have also encountered the route being blocked by overgrowth and fallen branches but they did not feel these were placed there to prevent use and could make their way past said objects.
- 9.5.4. Users 6,7,8,11,12 and 15 have all indicated the route can be overgrown at times. Users 15, 12 and 3 report they removed these natural obstructions to help maintain a passable route for horses along the application route. Users 6 and 8 state they would either jump over (when not on horseback) or just push their way through overgrowth.
- 9.5.5. It is therefore clear that the route was at times overgrown or even partially obstructed by fallen branches/trees. However, this does not appear to have typically prevented use. On most occasions users seem to have viewed these as natural obstacles which they were content to climb over or push these out of the way. There is nothing to suggest that this use was out of contentious or with force.
- 9.5.6. However, there are several events which stand out as being materially different to the removal of natural obstructions by hand. Firstly, user 15 used a mini-digger to clear the route. Secondly, user 12 (and quite possibly user 3) used a chain saw to remove a larger tree(s) which had fallen across the route. It is quite possible that this use would have been with force and, if it was, subsequent use by users 3,12 and 15 might also have been with force.

²⁴ The Planning Inspectorate (February 2016) *DMO: Consistency Guidelines 9th revision*, paragraph 5.22.

9.6. Secrecy

- 9.6.1. In order for dedication of a right of way to be presumed the use of a route must be open and used in the same manner as a person who is rightfully entitled to use it would, i.e. without any secrecy. This allows the landowner the opportunity to challenge use, if the landowner wishes to.
- 9.6.2. There is no suggestion any of the users were attempting not to be seen whilst using the route, therefore actions do not amount to use with secrecy.

9.7. Interruption and Deviation

- 9.7.1. In addition to the requirement for use to have been as of right, it must collectively span the full 20 year period without interruption and must have been over the same route.
- 9.7.2. An interruption must be a physical and actual stopping of the enjoyment of the public's use of the way, created by the landowner or someone acting on his or her behalf and with the intent of preventing public use of the way. Acts which were not carried out to prevent public use (for example, fencing to contain livestock) will not act as an interruption to defeat a claim²⁵. While the sufficiency of the 'as of right' use of the route has been questioned, there is no suggestion that there has been an interruption in that use.
- 9.7.3. Similarly, the course of the route has always remained the same. The route on the ground today broadly corresponds to that set out by the Inclosure Award of 1821. All the users who have submitted evidence claim that this was the route which they have used.

9.8. Sufficiency

- 9.8.1. According to the Planning Inspectorate Consistency Guidelines²⁶, there is no statutory minimum number of users required in order to raise a presumption that rights have been dedicated under section 31 of the Highways Act 1980. The number of users must instead be as might be reasonably expected if the way had been a public highway. The necessary level of use is related to the nature of the locality of the route and what could therefore be reasonably expected. However, it is clear this use must be of a sufficient level for the landowner to have been made aware of the use and therefore have or had the opportunity to resist said use if the landowner chooses. Use of a way by different people, may suffice if, taken together, they total a continuous period of 20 years or more. There is no need for each

²⁵ Riddall, J and Trevelyan, J.(2007), *Rights of Way. A Guide to Law and Practice. Fourth Edition*, Ramblers' Association and Open Spaces Society, 46).

²⁶ DMO Consistency Guidelines, 9th rev. Feb 16, Section 5, page 6, 'Sufficiency' 5.15-5.20

individual to have used it for the entire period as long as the cumulative public use extends over the relevant 20 years. Use by the landowners and their visitors (including trades-people) does not constitute public use and therefore does not contribute to the acquisition of public rights.

- 9.8.2. A total of 15 individuals have claimed use of the application route.
- 9.8.3. 55% of the interviewed users have meet others whilst using the application route, 45% of users have never met anyone else during use. Taken at face value this might suggest a much greater level of use than demonstrated by the UEFs alone.
- 9.8.4. However, little information about the other people seen using the route is available. It may be that the people met on the route also completed a user evidence form or their use of the route was with permission or indeed they could have been a landowner. Therefore, while the fact many of the users have seen others using the route should be given some weight, the evidence must be treated with some caution due to the lack of available detail concerning their use of the route.
- 9.8.5. Arguably, users 3, 12 and 15 used the route with force. Therefore, their use has been discounted for the purposes of this report (see section 9.5).
- 9.8.6. Users 1, 10, 11 and 15 owned land adjoining the application route from 1982 to 2000. By virtue of the conditions laid out in the Inclosure Award, they all had a private right to use the entire route during the period of their ownership. Therefore, between these dates their use does not qualify for the purposes of section 31 of the Highways Act 1980. However, use outside of the years 1982-2000, when they did not own adjacent land, they would continue to qualify.
- 9.8.7. Landowner F states that his sister gave users 3, 5 and 12 and others permission to use the route. However, the user evidence forms, including those of Users 3, 5 and 12, all state that use was without permission. There is therefore a conflict in the evidence on this point. However:
- There is no incontrovertible evidence to show that permission was given;
 - Landowner F's evidence is typically of a third parties actions rather than their own and so Landowner F was not aware of the details of any discussion;
 - The first hand evidence of the users is that permission was not sought or given; and
 - The test for making an order to modify the definitive map in this case is whether or not a right subsists or can reasonably be alleged to subsist

In the circumstances it is reasonable to conclude that, no permission was given by the landowner and the use of user 3²⁷ and others qualifies for the purpose of acquiring rights.

9.8.8. User 9 only used the route on a horse and cart, a tractor and an off-road vehicle. Two other users, 5 and 6, state that they used the route by cycle (as well as horse). There is no further evidence of vehicular use. Irrespective of which of the 20 year periods referred to above is used the number of vehicular users is small and their frequency of use low. For example, between 1990 and 1999 there were only two vehicular users of the route and their estimated use amounted to no more than a total of 16 time per year. This is insufficient to demonstrate use by the public and therefore vehicular rights have not been acquired. Having reached this conclusion, it is possible to discount user 9's use of the route for the rest of this report on account of it only being vehicular (users 5 and 6 also used the route on horseback and foot).

9.8.9. Therefore, in summary, use by the following users is not considered to be as of right:

- Users 3, 12, and 15 (between years);
- 1, 10, 11 and 15 (between 1982 and 2000)
- User 9.

9.8.10. The first 20 year period to consider, as stated above (see 9.2.3) is 1989 to 2009. Within that 20 year period the lowest level of use is between 1989 and 1991 in which there were four users; 1, 6, 9, and 15.

9.8.10.1. As mentioned above, user 1 had a private right to use the route during those three years and so their use does not qualify for this period of time.

9.8.10.2. Of the remaining users, user 9 used the route very infrequently (4 times per year) by horse and cart. This does not contribute to the acquisition of footpath or bridleway. There was no evidence of other vehicular use during this time.

9.8.10.3. As such, for the first three years of the earliest relevant period (i.e. between 1989 and 1991) there was only one person using the route in each mode (i.e. on foot, horse and horse and cart).

9.8.11. It is difficult to see how this low level of use by one person can be described as public. It is less than one might expect of a right of way in this area and is unlikely to have come to the landowner's attention. Without sufficient use in those first three years it cannot be said that there has been 20 years as of right use by the public between 1989

²⁷ Use by User 3 and 12 is already discounted due to the use of force

and 2009. As such no right of way can be presumed to have been dedicated under section 31 of the Highways Act 1980.

- 9.8.12. However, the fact that there is insufficient evidence of use in the earliest possible 20 year period, does not mean that a later period of use cannot be relied upon.
- 9.8.13. In this case there is a second calling into question to consider. This runs from 1997 to 2017 (see 9.2.4). As one would expect, use has varied during this time.
- 9.8.14. The lowest use in this period of 20 years is from 1997 to 1998. During this time it was used, as of right, by 4 users²⁸. All of these used it on horseback while 1²⁹ also claim to have used it on foot. Collectively their use amounted to approximately 266 users a year on horseback and 365 on foot.
- 9.8.15. The estimated frequency of as of right use steadily increased after 1998 peaking in 2006 when it was being used by 5³⁰ individuals. As in 1997, all used it on horseback while 2³¹ also used it on foot. The estimated level of collective equestrian use in that year amounts to 729 journeys a year on horseback and 377 on foot.
- 9.8.16. The number of users then continues to increase, peaking at 10 equestrian users between 2011-2015. However, their estimated frequency of use falls to between 422 equestrian journeys per year.
- 9.8.17. The accuracy of this evidence has been questioned by some. In particular it has been suggested that use could not have occurred (or at least not to any great extent) because:
- the route was too founderous;
 - the route was obstructed by overgrowth;
 - the route was grazed by cattle;
 - no use was observed on the route.

Each of these matters is dealt with in turn below.

- 9.8.18. There is a general consensus that, during prolonged spells of wet weather, the route could become very boggy. Examples are given of shoes being lost and horses getting stuck due to the depth of the mud. For this reason many of the users used the route less, if at all, during the winter months. There may even have been times when the route was so wet as to make it entirely impassable.

²⁸ UEF 4, 5, 6 and 8.

²⁹ UEF 6.

³⁰ UEF 2, 4, 5, 6 and 8.

³¹ UEF 1 and 6.

- 9.8.19. However, while use seems to have been less in the winter months there is evidence of it having continued during all but the wettest periods. To some extent fluctuations in use throughout the year are to be expected even on acknowledged rights of way. The fact that, in this case, use of the route was concentrated in the drier months does not in itself prevent a presumption of dedication from arising.
- 9.8.20. As with the state of the surface of the route, there is a great deal of agreement in relation to the level of overgrowth. Landowners A, B and F all refer to the route having been overgrown and therefore unusable. Landowner F suggests that it had been overgrown since they purchased land in 1982. Landowner E confirms that it was overgrown when they moved to the area in 2017. The UEFs paint a similar picture in terms of the route becoming overgrown at times³². Two UEF's³³ even classified the overgrowth as an obstruction on their user evidence forms.
- 9.8.21. However, others suggest that the overgrowth was rarely enough to prevent use and, when it was, it quickly got cleared. This was the case for annual growth as well as fallen trees etc. Use was therefore only restricted for very short period of time before the route became available again. There is no incontrovertible evidence to suggest that this was not the case.
- 9.8.22. Landowners E and F both refer to the application route being grazed by cattle in the past. Landowner F refers to that grazing (and associated fencing) having taken place prior to their ownership. As they became owner in 1982 this falls outside of the relevant 20 year period. In any case, the presence of cattle would not necessarily have prevented public use of the route.
- 9.8.23. Finally, Landowner F has said that only on rare occasions did they see or hear any use of the route. However, this would not necessarily be inconsistent with the UEF evidence. Given the proximity of the route from the farm buildings, it is entirely plausible that Landowner F was rarely in the immediate area when people were riding.
- 9.8.24. Although the number of equestrian users did not amount to more than 10 in any given year the overall frequency of use is quite high particularly for such a rural area. Furthermore, it is likely to have come to the attention of a landowner particularly as it was largely condensed into about nine months of the year (in order to avoid the boggy ground in the winter months). While there is some suggestion that this level of use might be an exaggeration there is not incontrovertible evidence of this. In the circumstances it can be reasonably alleged that the route was used on horseback, as of right and without interruption between 1997 and 2017. As such there the presumption arises that the route has been dedicated as a bridleway.

³² Users 6, 7, 8, 11, 12 and 15 all refer to the route being overgrown.

³³ Users 7 and 9.

9.9. Lack of intention to dedicate

- 9.9.1. Although a presumption of dedication can arise after 20 years as of right public use, that presumption will be rebutted where the landowner has demonstrated a lack of intention to dedicate during the relevant 20 year period. This means that the relevant audience, namely the users of the route, would reasonably have understood what the owner's intentions were.
- 9.9.2. In this case, there is no overt evidence of who owns the application route. Although Landowner F has claimed ownership, they have been unable to provide title deeds or any other documentation demonstrating ownership and the land is not registered with the Land Registry. Therefore, subject to evidence to the contrary, it is suggested that the *ad medium filum* principle applies and that each adjoining landowner owns up to the centre line of the route³⁴.
- 9.9.3. While Landowner E provides some evidence that they tried to deter use by erecting a sign and turning back users, this was only after the purchase of a nearby property in 2017. Their actions constitute the calling into question which defines the relevant 20 year period and therefore cannot be a lack of intention during that period.
- 9.9.4. Therefore, the only acts which might constitute a lack of intention to dedicate a bridleway during the period 1997 to 2017 were taken by Landowner F. Given the extent of their ownership any lack of intention that they may have demonstrated is likely to only relate to the northern half of that part of the route which runs in a westerly direction for 218 metres from point A. There is no suggestion that any of the other owners have expressed a lack of intention to dedicate and therefore the presumption that the rest of the route has become a bridleway is not rebutted.
- 9.9.5. Landowner F acknowledges that they did not put up notices or physical structures discouraging use but claim to have reacted to use in the following ways:
- i) Users 1, 10, 11 and 15 were not permitted to use the route and were made aware that it was private and not public. They would have been stopped had they been seen using the route.
 - ii) The local hunt was told that they were not permitted to use Landowner F's land and were stopped from using it
 - iii) Anyone who was considered to have been damaging the route was stopped from using it

³⁴ It is acknowledged that in many cases the *ad medium filum* principle does not apply to a way set out by an Inclosure Award. However, in this case the inclosure award expressly allotted land to the lord of the manor to compensate him for his rights of soil (see paragraph **). In such circumstances ownership of the land does rest with the adjoining landowners (Sauvain S. (2009) *Highway Law* 4th Ed.)

- iv) A man trying to clear the route with a machete was stopped and it was explained to them that the route was private and that he could not make his own route through private land.
- 9.9.6. There are some elements of the user evidence which support Landowners F's claims. User 1 refers to Landowner F having informed them that the route was private. Although they do not give a specific date when this occurred they do mention it being after 2012. According to User 1, Landowner F had never objected to use prior to that time. User 9 also refers to having been challenged by Landowner F in the early 2000s³⁵.
- 9.9.7. Furthermore, while not challenged themselves, user 7 refers to having been aware of others being challenged within the relevant 20 year period. While they may have been referring to the same incident described by user 1 or 9 this nevertheless demonstrates that landowner F has at least informed some members of the public that the application route is for private use only.
- 9.9.8. That said, elements of Landowner F's evidence in relation to their lack of intention to dedicate the route are contradicted by the user evidence. 13 of the 15 users claim not to have been challenged when using the route prior to 2017. Notably, this includes users 10, 11 and 15 who Landowner F recalls challenging (though it should be noted that these three users are members of the same family as user 1 who acknowledges that Landowner F said that the application route was private).
- 9.9.9. Furthermore user 15 claims to have seen a letter written by someone who jointly owned the land which Landowner F purchased in 1982. That letter reportedly stated that the then landowner had no objection to anyone using the route'. However, the letter no longer exists, was written prior to the relevant 20 year period and the author is understood to have passed away. In the circumstances it has not been possible to verify the content of the letter and recollections of its content need to be treated with some caution.
- 9.9.10. It should also be noted that Landowner F states that some years ago users 3, 5 and 12 considered purchasing land which adjoins to the south-west of the route. During this process, the users' solicitor advised them that the route was for private access only. Landowner F felt he had no reason to continually reiterate this point to them as this just seemed argumentative.
- 9.9.11. The users in question (i.e. 3, 5 and 12) have not confirmed that they sought to purchase the land in question or the advice that they may have received. However, to some extent it may not be relevant. Firstly, under section 31 of the Highways Act 1980 the presumption that rights

³⁵ Although User 9's use was vehicular, they claim that they were told that the route was not a public right of way and this therefore represents a lack of intention any type of right of way including a bridleway.

have been dedicated arises as a result of a series of instances of trespass combined with a landowner's inaction. There is no requirement for users to believe that a route is already public. Secondly, it is likely that in advising that the application route was a private access the solicitor was referring to vehicular rights. It is entirely possible for a bridleway to exist over a private road. Thirdly, if the three users in question were informed that the route was a private access, the information appears to have originated from searches undertaken by their solicitor. As such there is no suggestion that it was the landowner or anyone acting on his/her behalf who informed the users that it was private. This being the case, the advice cannot possibly be an expression of the landowner's intention.

- 9.9.12. In this case the evidence as a whole shows that some members of the public were informed by Landowner F that the application route was private and/or told not to use it. However, in order to be effective in rebutting the presumption that rights have been acquired, the actions of the landowner must have been such that a reasonable user would have understood that the owner of the land over which the route passes was intending to disabuse them of the notion that the way was a public bridleway.
- 9.9.13. Whilst it has been confirmed that Landowner F did challenge two users, these appear to have been isolated incidents many years apart. These challenges and any others that the landowner claims to have made, do not appear to have been done in such a manner that word of their actions became widely known among regular users. In order to bring home to the public that use of a path is not tolerated, action has to be taken in such an open and notorious fashion as to become known to those using the path. On the evidence available, the challenges said to have been made were insufficient to convey that message to the users in general and appears to have been confined to a few. Had a landowner been trying to demonstrate a lack of intention (be that verbally, by notice or by other means) one would have expected more of the regular users to have been aware of it.
- 9.9.14. Overall there is a certain amount of contradictory evidence in terms of whether or not a lack of intention has been demonstrated. However, reasonably taking the applicant's evidence at its highest (and in doing so applying the reasonably alleged test) it is concluded that none of the landowners have acted in such a way as to disabuse the public of the notion that the route was a right of way. It should be noted that, even if it were concluded that Landowner F had demonstrated a lack of intention, it is likely that this would only rebut the presumption that rights have been acquired over that part of the route in their ownership. There is no suggestion of the other landowners having expressed a lack of intention during the relevant 20 year period.

10. Consultation and other submissions

10.1. Consultations regarding the claimed route were sent out to all landowners and relevant local and national user group organisations in June 2018. The table below shows the organisations who were consulted and gives brief details of the replies which were received.

Name as referenced (in report)	Response
Charlton Musgrove PC	<p>No evidence of the application route having public status had been found nor were they aware of any long term residents of the village knowing it as such.</p> <p>However they did submit an application report which was sent to them, by the South Somerset Bridleways Association and which was dated 23rd Nov. 2009. All the evidence included in that report is covered elsewhere in this report.</p>
(Local) SCC Highway Manager	No documentation found of repairs or other related highway work done on the application route.

10.2. No response was received from the following organisations:

Name as referenced (in report)
Ramblers
British Horse Society
Auto Cycle Union
Cycling UK
All Wheels Drive Club
Open Space Society
Natural England

Name as referenced (in report)
British Driving Society
Byways and Bridleways Trust
Trail Riders Fellowship
South Somerset District Council
(Local) County Councillor

11. Summary and Conclusion

- 11.1. As mentioned previously, the County Council is under a duty to make an order to modify the Definitive Map and Statement on the discovery of evidence, as stated in the 'Wildlife and Countryside Act 1981;

“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”.

- 11.2. In reaching a conclusion as to whether or not the documentary evidence is sufficient to make an order, the documents need to be considered as a whole. As stated in the Consistency Guidelines with reference to the 'Hollins v Oldham' case.

“The whole of the documents have to be examined to assess their reliability. It seems to me that I have to assess each piece of documentary evidence to see how far I can rely upon it. This applies just as much to official documents such as the definitive map or ordnance survey sheets or the tithe surveys as it does to other records such as commercially produced maps. They have all been produced by human beings and are so liable to error to some extent.”³⁶

- 11.3. In this case, there is little evidence to suggest that the application route carried public rights prior to the Inclosure Award. It was clearly set out as private as part of the Award in 1821 and, at that stage, would have carried no public rights.

- 11.4. The private status created in 1821 would not have prevented public rights being acquired since. However, in order to reasonably allege that this is the case positive evidence of public rights is needed rather than simply evidence which is consistent with the private rights already known to exist.

- 11.5. The majority of post-Inclosure documents are consistent with the private rights set out in the Inclosure award. While there are some documents which might be read as being in favour of public rights existing, they are weak and collectively do not build a case to reasonably allege a public right.

³⁶ Consistency Guidelines, Section 2.29

- 11.6. Specifically, the 1929 and the 1930 Handover maps are at best confused with a significant probability of containing errors for the reasons already laid out in this report.
- 11.7. The parish survey is also confused and is no more than the view of the Parish Council. Furthermore, that view seems to have differed from that held by the County Council at the time.
- 11.8. The letter of 1973 which labels the application route as a road is inconclusive. The term could be being used to mean public or private.
- 11.9. In light of the above, although there is some evidence which can be read in favour of public rights that evidence is weak. Therefore, the documents, when looked at collectively, are not evidentially sufficient to reasonably allege a public right.
- 11.10. While the evidence may not be sufficient to show that a right of way has historically existed over the application route, that does not necessarily mean that rights could not have been dedicated in more recent times. Although there is no evidence of an express dedication by the landowner, there is evidence of use which is capable of showing that rights have been dedicated under section 31 of the Highways Act 1980.
- 11.11. The 20 year period of public use required by Section 31 must date back from a calling into question. In this case use was challenged by noticing posted in 2017. The relevant 20 year period in this case is therefore 1997 – 2017 inclusive.
- 11.12. During that period there has been very little vehicular use and so the case for a restricted byway has not been made. However, there is evidence of use by 14 equestrians. There is a suggestion that at least some of the use was with permission. However, there is little evidence to support that suggestion and it is not corroborated by the UEFs. While equestrian use fluctuated according to season it is considered to have been sufficiently frequent to have come to the attention of a reasonable landowner on the spot. In the circumstances the level of use has been sufficient to raise the presumption that a bridleway has been dedicated.

- 11.13. That presumption can be rebutted where the landowner has demonstrated to the public that they had no intention of dedicating during the relevant 20 year period. In this case, one of the landowners does claim to have challenged several users. However, this message seems to have been confined to a few individuals and was not notorious enough to have come to the attention of users in general. Furthermore, even if these actions were considered sufficient to constitute a lack of intention, it is suggested that they would only rebut the presumption of rights in relation to that part of the application route owned by Landowner F (which is now owned by Landowner E, see appendix 14). There is no suggestion that the other landowners have demonstrated a lack of intention in relation to any part of the route that they own.
- 11.14. In conclusion, there are a number of contradictions in the evidence. However, there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist

12. Recommendation

I therefore recommend that:

- i) An order be made the effect of which would be to modify the Definitive Map and Statement by adding a Bridleway over the route shown from A-B on the plan H26-2018.
- ii) If there are no objections to such an order, or if all objections are withdrawn, it be confirmed.
- iii) If objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs.

13. List of Appendices

Please note that the document reproductions in the appendices are not to scale. The report writer has added the red letters A and B present on Appendix 1 to maps to help the reader identify the sections of the route the document is depicting. Red circles have also been added to some appendices to indicate the area of the claim where lettering is not appropriate.

- 1) Plan showing claimed route
- 2) Photos of the claimed route
- 3) Land Registry Search
- 4) Inclosure Award
- 5) Tithe Records
- 6) Ordnance Survey Maps
- 7) Finance Act
- 8) Highway Road Records
- 9) Definitive Map and related documents
- 10) Deposited Plans
- 11) Other Sources (additional related documentary evidence)
- 12) OS Map used in the sale of land in 1984
- 13) Blank version of the user evidence form
- 14) Ownership of the route plan