

WILTSHIRE COUNCIL

**WESTERN AREA PLANNING COMMITTEE
10 MARCH 2010**

**THE WILTSHIRE COUNTY COUNCIL SHEET ST95NW PARISH OF KEEVIL – KEEVIL 23
AND WILTSHIRE COUNTY COUNCIL SHEET ST96SW PARISH OF SEEND – SEEND 57
RIGHTS OF WAY MODIFICATION ORDER 21 2008**

Purpose of Report

1. To:
 - (i) Consider and comment on evidence investigated, representations made and one objection lodged relevant to the above Definitive Map Modification Order.
 - (ii) Recommend that the Order be forwarded to the Secretary of State with the recommendation that the Order be confirmed with one minor modification.

Background

2. An application to upgrade the public footpath Keevil 23 was received by Wiltshire County Council on the 2 May 2006. The application was made by The Wiltshire Bridleways Association and sought to bring evidence to the Council's attention that public rights higher than footpath rights existed along the route of footpath 23 in Keevil Parish and that an Order should be made to record a bridleway.
3. The application relied on historical documents. Officers have investigated the copies of the documents included with the application and a considerable number of other documents, the majority of which are held at the Wiltshire and Swindon History Centre at Chippenham.
4. A non-statutory consultation was carried out initially between 17 April 2008 and 2 June 2008, though additional evidence has been forthcoming since the Order was made on 2 July 2008. The last piece of evidence was received in September 2009.
5. The landowner's agent responded to the consultation in May 2008 and pointed out that the route features a locked gate and that the pre-registration deed (early title deed) specifically refers to the route being a footpath. No other evidence was adduced that challenged the historical evidence and requests for further information were not answered.
6. It was considered that, on the balance of probability, higher rights than footpath existed along the route and an Order was made on 2 July 2008 to record the length of path Keevil 23 and a short stretch of highway u/c6076 as restricted byway (see **Appendix A**). The short stretch of highway u/c 6076 is included in this order as the definitive map provides conclusively the existence of public rights.
7. The Order was advertised on 10 July 2008. A statutory 42 day period, in which objections or representations could be received, followed.

8. Two representations and one objection were received in response to the advertisement of the order. The representations were made by user group representatives and the objection was made by the landowner.
9. The objection has not been withdrawn and hence this Order must now be determined by the Secretary of State. This Committee must decide whether the confirmation of the Order is supported, supported with modification or unsupported by Wiltshire Council.

Description of the Route

10. Keevil 23 is a wide hedged track leading from the A361 due north to the Semington Brook. It passes across the Semington Brook, the centre of which is the Seend/Keevil Parish boundary, and proceeds into Seend Parish as the u/c6076 (an unclassified road). The u/c6076 passes Seend Head Mill, crosses the mill leat and goes on towards Seend.
11. The route has been gated at the southern end (A361) throughout living memory and has been recently (summer 2009) gated at the northern end.
12. Keevil 23, to the middle of the Semington Brook, historically lay within the area administered by Westbury and Whorwellsdown Rural District Council. The u/c6076, north of the middle of the Semington Brook, lay within the Melksham Rural District Council Area.
13. The land appears to have been part of the Duke of Somerset's estate between at least 1747 and 1922 when it passed into the hands of a branch of the Noad family. It was sold in 1978 but is currently in the ownership of three members of the Noad family trading as J S Noad and Sons.
14. The terrible state of England's major roads in the 18th century, and the inability of parishes to maintain them, led to routes becoming Turnpikes. People on horseback, drovers and drivers of carts and carriages were charged a fee to use these roads. The roads were generally in better condition than local roads but travellers had to weigh this benefit against paying a fee. Fees were collected at toll gates or bars and side gates were set up to prevent travellers slipping off the Turnpike without paying a fee. Fees collected were used to maintain the road. The southern end of Keevil 23 joins the A361 which was a Turnpike administered by a Turnpike Trust, responsible for its repair through the levying of tolls. This commenced with an Act of Parliament 24 Geo II (1750-1751) and renewed in 1770/1771, again in 1796/1797 and again in 1820. The Act was finally repealed in 1870.
15. The northern end of the Order route leads through the Semington Brook (currently there is a bridge in place), effectively crossing the parish boundary in the middle of the brook joining the southern end of u/c6076 (an unclassified road maintainable at public expense) south of Seend Head Mill.

The Evidence

16. Officers have examined a large number of historical records relevant to assessing the status of the right of way. These have all been reviewed, taking into account the objector's comments. The evidence and comments are set out within **Appendix B**.

17. Before going into more detail, describing the most important documentary evidence, it may be helpful to Members to outline three tests that are to be applied to ensure that any information contained within the documents is relevant. The tests are as follows:
- (i) Why were the documents compiled?
 - Did the recording of the highway have any legal significance?
 - (ii) How were the documents compiled?
 - The compilation process
 - Public participation
 - Accuracy (for instance was the map accurately surveyed?)
 - (iii) Who compiled them?
 - What were the consequences for the compiler's duties/rights of including or not including a public right of way?
 - What were the consequences for the rights/duties of others?
 - Were there any declarations against the compiler's interest?
 - Were there any sanctions for falsifying evidence?
18. The 'how, why and by whom the evidence was compiled' will attach evidential weight to the data. This case will be determined by whether, on the balance of probabilities, the way ought to be shown in the definitive map and statement as a restricted byway.
19. The Council does not have to decide whether it is beyond reasonable doubt that public rights exist that are higher than already shown in the definitive map and statement. Instead, it must decide whether, on the balance of probabilities, those rights exist. In other words, whether it is more likely than not.
20. The evidence for this case is by no means 'one way', i.e. there is evidence both for and against the existence of higher rights than footpath, and careful consideration must be given to the weight of the evidence, both in quality and quantity.
21. The apparent anomaly of there being a footpath recorded from the A361 to the centre of the Semington Brook in Keevil and an unclassified road recorded north from the centre of the Semington Brook in Seend has dictated that evidence viewed has included a number of documents relating to Seend and the u/c6076 road, as well as records relating to Keevil Parish.
22. The fact that either side of the Semington Brook has traditionally been administered by different highway authorities (whether parish or rural district council) has also added to the amount of evidence that has been viewed.
23. **Appendix B** highlights in grey, evidence that is considered '**primary evidence**'. This covers documents produced as a result of an Act of Parliament. Whilst the representation of rights of way may not have been the purpose of the legislation, these records are considered to hold the higher evidential weight.

24. In medieval times, responsibility for maintenance of the King's Highway was placed on the Manor. The public has 'the right of good passage', not only on the beaten track and deviation was permitted if necessary. By the 14th and 15th centuries there was an increase in travelling in the country but with the breakdown of manorial institutions in the 15th and 16th centuries highways became badly neglected. This led to the passage of an Act in 1555 which, until the Highways Act of 1835, formed the basis of the organisation of road maintenance.
25. **Wiltshire Quarter Sessions records** reveal that a route in Seend described as "the Kings Highway" at "a certain place called Seend Head Mill" was in 1675 sufficiently repaired and mended "for horses, carts and carriages" and a certificate confirming this was signed and sealed by the court. This repair resulted from a presentment in 1674 for Seend Parish relating to a highway being out of repair, the parish then repairing the route before a surveyor inspected it and a certificate could be issued.
26. At the time of the presentment, the parish was the highway authority responsible for maintaining the highway and the Quarter Sessions Court was the body responsible for ensuring the parish carried out this duty. The Court found the route to be a vehicular highway and the route was repaired as such. It is noted that this record refers to the route in Seend Parish alone, as it was only Seend that was indicted for repair. This route is considered to be the u/c6076 road.
27. The Victoria County History records that by the mid 15th century Keevil Parish does not appear to have done suit to (appeared at) any of the hundred courts and hence no presentments were made from this date. However, a **Parish record**, dating from 1787, has been found and investigated. It relates to a rate made by surveyors in the parish of Keevil "to pay surveyors what they have laid out for materials in the repairing of highways". This relates to the responsibility of the parish to repair highways.
28. A payment was made to the surveyor for the "Duke of Somerset's" for materials to repair the highway. The document is a list of landowners or locations, for example field names where a road leads past. The Duke of Somerset only owned the land adjoining Keevil 23 and the Turnpike in Keevil Parish. As the Turnpike was maintained by the Turnpike Trust this payment has to be for the laying out for materials by surveyors along Keevil 23.
29. Although the objector argues that this evidence is conjectural, an alternative explanation has not been found, or offered.
30. Primary evidence relating to highway records has high evidential weight but other primary evidence compiled by bodies, such as the Inland Revenue, and either compiled after public consultation or derived as a result of consultation with landowners, is also valuable, even though the purpose of the document may not have been to record public rights.
31. The payments of tithes to the church (a percentage of production to be paid in kind) was a feature of medieval England. As wealth and production moved away from agriculture it was clear that the payment of tithes based on agricultural production only was not a fair scheme of taxation. From the 1700s to the passing of the Tithe Commutation Act in 1836 parishes moved away from the payment of tithes by commuting them to corn rents during the process of enclosure.

32. The tithes in the parish of Keevil were commuted to corn rents by the **Enclosure Act and Award of 1795**. The enclosure of land led to alterations in public access and the accompanying Act of Parliament allowed for the awarding of highway. The Keevil Award lists 2 public roads, 13 private roads and 2 footways, none of which is Keevil 23. The land surrounding the route of Keevil 23 was already enclosed by 1795 and the route of Keevil 23 is shown as a fenced and gated route leading to a narrow bridge and possible ford across the Semington Brook. Its physical existence as a road on its current course is substantiated by an estate map, dated 1749, which will be discussed later in this report.
33. In the Enclosure Award the route of Keevil 23 is not numbered or listed. The fields on either side are numbered and named. Although most currently recorded public roads are shown in this award, not all are. For example, the current “byway open to all traffic” Keevil 7 and the public road past Seend Road Farm are unnamed and unnumbered on the award. Hence, officers consider it impossible to attach any evidential weight to this document.
34. The tithes in the parish of Seend were commuted to a money charge (rent charge) in 1838 by virtue of the **Tithe Commutation Act 1836**. The process involved a survey of the parish and the production of a large scale map. The process was one of consultation and advertisement with eventual sealing of the documents by a tithe commissioner (or assistant commissioner). See **Appendix C**.
35. The Seend tithe map and apportionment (its purpose to identify productive land and identify owners for taxation purposes) excludes roads, canals, water courses and buildings, but numbers and details productive land and private roads. For example, 813b is described as “lane to the house”. It is therefore considered reasonable to suggest that roads shown coloured ochre and excluded from the apportionment were considered public roads at that time.
36. The map covers the whole parish and shows a total of 9 roads leaving the parish, the u/c6076, which becomes Keevil 23, is one of these and is shown leading over the Semington Brook in the direction it now heads. None of the roads leaving the parish have destinations written on them or arrows. It is noted that the exit from the parish over the claimed route is shown in exactly the same way as the parish exit at Baldham Bridge on the turnpike (now the A361). Other parish exits are all currently recorded as bridleways (x 4), C class roads (x 2) or A class roads (x 2). The modern maps showing public rights record 15 other paths leaving the parish (footpaths and bridleways) but none of these were recorded by the tithe commissioners as routes leaving the parish. It is considered likely that this is because these were minor routes.
37. The Seend tithe map and apportionment held at the Wiltshire and Swindon History Centre is the working copy of the document. The original, the Record Copy, is held at The National Archives at Kew, London. Officers have viewed this document and found it to be the same in its representation of routes.
38. The tithes in the parish of Keevil were commuted to a corn rent by the Enclosure Award of 1795 (see 32 above). The corn rents were converted to a rent charge in 1864 by virtue of the 1860 Tithe Amendment Act. A map and apportionment were produced in 1863 and signed by the Tithe Commissioners in 1864 (see **Appendix D**).
39. The map shows the route of Keevil 23 and the u/c6076 as a sienna coloured road, possibly gated at the southern end and numbered 11a. In the book of reference 11a is described as a “Private Carriage Road to Seend Head Mill” being in the ownership of “Somerset His Grace Duke of”.

40. At the end of the apportionment there is a list of “Public Roads” and one of “Private Roads etc”. The Private Carriage Road referred to above is not included in either list.
41. This map records that a pecked line (a common representation for a path) meets Keevil 23 at a point along it and then leaves it again heading west nearer to the bridge. The only access to this path would be along Keevil 23 and it is noted that the pecked line is not shown leading over or along Keevil 23.
42. In addition to this 1864 Tithe Map and Apportionment, the Wiltshire and Swindon History Centre also holds a detailed map of the parish of Keevil dated 1841. This map relates to a separate book of reference. It is noted that the map carries one stamp of the Tithe Commissioner and is neither signed nor further annotated by the Commissioner. Hence neither record is an official Inland Revenue document. This map represents the route of Keevil 23 and the u/c6076 as it is in the 1864 Tithe Map and apportionment – that is as a “Private Carriage road to Seend Head Mill” in the ownership of Edward Adolphus Duke of Somerset.
43. This map records that the pecked line joining Keevil 23 and leaving it again further north nearer the bridge is a “Public Footpath”. To use this footpath the user would have to use part of Keevil 23 that is labelled ‘private road’. The book of reference does not aid clarity here, as it fails to record the route of Keevil 23 as either a Private Road to fields or a public road through the parish. It is also noted that footroads are listed under Public Roads through the parish, but again, Keevil 23 is not recorded here either.
44. It is reasonable to assume that there is a relationship between the 1841 map and the 1864 map. This is perhaps best explained by Roger Kain and Richard Oliver in the Tithe Maps of England and Wales – a Cartographic analysis and county by county catalogue (Cambridge University Press 1995). This book states that before 1836 some tithes had been commuted in the course of parliamentary enclosure (this is the case for Keevil). The book continues to say that although some corn rents anticipated the method used for tithe commutation after 1836, they lacked the mechanism for automatic annual review of the tithe rent charge which was a central tenet of the 1836 Act.
45. It would appear that Keevil's corn rents could not be commuted by the Tithe Act of 1836 though the 1841 map was possibly prepared for this purpose. It is suggested that this is why it has one stamp from the Tithe Commissioner but no other official mark or signature. It is as if it was produced for this purpose, but was rejected. The Tithe Amendment Act of 1860 enabled pre-1836 corn rents to be converted into tithe rent charges on application. Although only 39 conversions were effected between 1862 and 1929, Keevil was one of these. Kain and Oliver also note that in a number of cases, schedules are direct transcripts from enclosure awards.
46. Officers consider that whilst the 1841 map and the 1864 Tithe Map show the claimed route as a private carriage road to Seend Head Mill, it is not clear why the route is not listed under the headings for private roads, nor why it should have a staggered crossing of a ‘public footpath’ if it was a wholly private road. The meaning of the term ‘private carriage road’ is by no means clear – if the road was simply a private road then it would have been less ambiguous to describe it as such.
47. On the subject of tithe maps, The Planning Inspectorate Guidelines state that it is “dangerous to assume the maps to be absolute proof of something that it was not the business of the Commissioners to ascertain. However, they can provide useful accumulative evidence of the history of a route and how it was viewed at that time”. This should be borne in mind when considering the evidence of either the Seend tithe map or the Keevil maps.

48. **Finance Act 1909-1910 Records.** In 1910 The Inland Revenue provided for the levying of tax (Increment Value Duty) on the increase in site value of land between its valuation on 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. The survey was carried out by Inland Revenue Inspectors working in an area of the county of which they were knowledgeable. Every individual piece of land in private ownership was recorded and mapped and, because tax was to be levied based on area, highways and common land were carefully identified and included in the documentation.
49. The process, carried out in a blaze of publicity, was not publicly consulted upon but landowners participated by providing initial survey details of properties (using 'Form 4') prior to the valuer's visit. The Act provided for the owner to give notice of objection to the Inland Revenue. There were also criminal sanctions for falsifying evidence to the Inland Revenue. The above factors give confidence in placing reliance on evidence found in these documents.
50. Keevil 23 and the u/c6076 road are shown uncoloured and excluded from any numbered hereditament on the Finance Act Map (see **Appendix E**). The surveyor has highlighted the exclusion of the route from the valuation of the surrounding property by drawing onto the map broken braces and representing the Order route as part of the normal highway network. Both the working copy of the Finance Act plan, held at the Wiltshire and Swindon History Centre, and the Record Copy, held at The National Archive at Kew, were inspected and found to show the same exclusion of the route from the properties valued.
51. In addition to this evidence, officers were able to view the Inland Revenue valuer's notebook (a 'field book') for the surrounding hereditament. The valuer records a deduction for a public right of way (almost certainly the public footpath that joins the order route and is shown crossing this hereditament) and records the hereditament in detail by reference to the OS parcel numbers. The order route has an OS parcel number of 18 and this is not described or listed at all in keeping with its exclusion on the plan.
52. Although the Finance Act is not specific about the exclusion of public roads, it does allow for land that carries public rights to be allowed a deduction, hence this land could have been represented as part of the surrounding hereditament with a deduction for the right of way or user (as clearly public rights did exist owing to the presence of at least one linking path for which deductions were allowed – without any public rights on Keevil 23 this path would have been a cul-de-sac route). This was not done. The Smyth case (Inland Revenue Commissioners v Smyth [1914]) found that a metalled or stoned road in private ownership could have a value deducted by virtue of it being a structure. However, this course was not followed either, and its deduction from the whole must be based on the provision found in Section 35(1) of the Act which says that "No duty under this part of the Act shall be charged in respect of any land or interest held by or on behalf of a rating authority".
53. The objector to the Order points out that the route was, at this time, in the ownership of the same estate as the surrounding hereditaments. It is noted that the representation in the Finance Act records is not inconsistent with that, since it is a basic premise that any highway beneath the first two spits (spade depths) is owned to the mid point by adjoining landowners. It is where the top two spits are held by or on behalf of a rating authority that there is a case for the valuation to exclude the route.
54. Officers consider this to be very strong evidence in support of the order route being regarded as part of the local road network at this time. If it were not, its exclusion from the hereditament valuation would have attracted criminal sanctions. It is also noted that the Inland Revenue's valuer went to lengths to record its exclusion in his Field book.

55. The final piece of primary evidence considered is the **Definitive Map and Statement**. When this was drawn up in the 1950s neither the parish council nor the landowner brought to the Council's attention that any public rights existed along this route. The Ramblers' Association objected with the statement "the road is certainly an old public carriageway but now there is a gate across marked 'private road', but there is nothing to show that the footway has been closed". The route was added as a footpath by agreement of the resultant inquiry.
56. Officers have found no evidence that any rights were stopped up on this route, nor of any separate dedication of the route as a footway or footpath.
57. **Appendix B** records that a large amount of other evidence has been viewed. The Estate Map made in 1749 by James Sartain, Land Surveyor is amongst the most significant. It is a large scale map, extraordinarily well drawn and annotated. It is to the scale of 16 perches to one inch (1:3168) and has grid squares, which was very unusual for this time. Public roads are labelled, for example "road to Devizes and Lavington". The Order route is shown and labelled "the road to Seend Head".
58. Another significant map of this period, that was made by Andrews' and Dury in 1773 at a scale of approximately 2 inches to one mile, also records the route as a road continuous with and in the same way as the surrounding road network.
59. Another significant early map is C and I Greenwood's Map of Wiltshire from an actual survey made in 1819 and 1820. The order route is shown as a Cross Road – Cross Roads are roads linking villages and turnpikes and it is likely that they represented a public route on which no toll was payable – valuable information for a traveller or user of such a map. This is supported by the Planning Inspectorate's advice note number 4. It is also noteworthy that the owner of the land over which the route leads was the Duke of Somerset. The Duke of Somerset was a subscriber to this series of maps and is listed in the prospectus. He would have had financial input into this map and it is likely that the representation of a route over his property as a Cross Road would have been noted and amended if this had not been the true representation.
60. It is known that Christopher Greenwood relied not only on a topographical survey but also on the existence of historical records including maps, census reports and local knowledge collected by surveyors, especially relating to boundaries. The Wiltshire Record Society in "Printed Maps of Wiltshire 1787 – 1844" commends his achievement in mapping parish boundaries accurately two decades before tithe commutation maps. It is noteworthy that the Order route crosses a parish boundary, an area that would have required scrutiny.
61. Another independent surveyor of this time was John Cary. Widely regarded as one of the most important of the pre-Ordnance Survey surveyors, Cary was a Wiltshire man coming from nearby Corsley. Cary's map records that the Order route was continuous with the local road network and was a "Parochial Road". Parochial roads are local routes rather than main roads.
62. **Appendix F** contains a list of commercial maps that show this route. Officers consider it unlikely that any route that was not in use by the public would have survived being shown on maps designed for the travelling public for such a long period of time, as these maps would need to be reliable and were frequently revised.

63. The Ordnance Survey has shown the order route in the same manner as the surrounding road network since 1817. Ordnance Survey maps from the late 19th century onwards have carried a disclaimer to the effect that the representation of roads and tracks is not indicative of them having public rights over them. However, a closer examination of instructions for field surveyors and the representation of the order route throughout various surveys shows that although the Ordnance Survey could have depicted the order route as a fenced occupation road (usually considered a private road), it did not.
64. Examples of fenced occupation roads can be found in the First Edition of the 25" to the mile Ordnance Survey Map, County Series Sheet 39.2 dated 1885. Instructions to surveyors required that where fenced occupation roads and tracks were less than 10 chains in length they were to be braced to the adjacent parcel. The route of Keevil 23 is less than 10 chains in length and is not braced to the adjacent parcel. Instead, it is shown tinted sienna and shaded as a public road. It is not shaded as a metalled carriage drive, which would have been an option for surveyors.
65. Another example is found in the 25" to the mile Ordnance Survey Map, County Series, Sheet 39.2 Second edition revised 1899. Instructions to surveyors required that "metalled public roads for wheeled traffic kept in good repair by highway authority will in future be shaded". The route of Keevil 23 is shown with bold shading on the eastern side in the same manner as the surrounding road network.
66. A further example is found in the 1" to the mile Ordnance Survey Popular Series Contoured Road Map. These maps show private roads uncoloured. The Order route is shown coloured as an "other road under 14' wide". The 1" Popular series maps were a new series aimed at travellers on the roads and were undoubtedly aimed at motorists. They were the subject of frequent revision and the scheme took evidence from both the Royal Automobile Club and the Road Board. In practice, the maps went before the Rural District Council Surveyor. Whilst it is reasonable to assume that he would have been most concerned with checking the major routes, since Keevil 23 joins a major A class road (a "main road") its representation as a road joining a main road would surely have been noted and altered if it had been incorrectly represented.
67. Although the objector in this case has not given evidential weight to these small scale plans (see **Appendix F**) an expert in the field of map interpretation, Yolande Hodson in her book "Popular Maps" (ISBN 1-870598-15-6) states:

"Large-scale plans were not regarded as road maps; their primary function was to depict physical features and administrative features as accurately as the scale would allow. In contrast, the smaller scale showed a range of road classification, first by line-work, and then by line and colour. These conventions allowed the user to make an intelligent deduction of the suitability of routes for different purposes that would have been impossible at the larger scale. In this respect, the one-inch maps are an invaluable aid to the interpretation of roads on the large scale plans"

"Another demonstration of the map history rule is that the Popular Edition, rather than the 1:2500 plans, was, unquestionably, the largest scale at which road development was most faithfully portrayed, although its road classification system was unnecessarily complex as a result of inheriting principles which had been established in the days of more leisurely traffic; but most sheets had been "road-revised" at least twice at about a seven or eight year period."

68. Other evidence viewed concerned the bridge over the Semington Brook. Although this bridge is not a substantial structure today, it was once a stone arched bridge with a MDHB (Melksham District Highway Board) stone alleged to have stood at its northern bank. Melksham Rural District Council Minutes record that public money was spent on its repair in 1912. The bridge is not recorded as a publicly repairable bridge today, even though as a route carrying an unclassified road and a footpath it would be expected to be.
69. Historically, a Highway Authority was not required to provide a bridge for travellers and early bridges were usually built by private individuals for convenience. Records of 1773 show that a stone arched bridge was on this route at that time and it is suggested that the bridge was possibly built by the landowner, the Duke of Somerset.
70. In contradiction to the spending of public funds on the repair of the bridge in 1912 a record has been found that the Roads and Bridges Committee of the Melksham Rural District Council (RDC) did, in 1893, receive a letter from a Dr Green who had been challenged when trying to drive his dog cart along the u/c6076 road. The then tenant, Mr Noad, was present at the meeting and said that the way was private and he had a perfect right to stop Dr Green. The surveyor said he had always understood it to be a private road.
71. Officers find this a confusing reference insomuch as the road where Dr Green was stopped is today the u/c6076, and is recorded as publicly maintainable highway being handed over as such from the RDC in 1930. It is also the same highway that was publicly maintained in the Quarter Sessions records of 1675.

User Evidence

72. Officers have received several written statements and recollections from local people. It is clear from these recollections that the route has variously been open or gated and that private signs have been displayed at various times during the latter half of the 20th century. The evidence is listed towards the end of **Appendix B**.

Decision to make the Order

73. A considerable amount of evidence exists that shows that the route of Keevil 23 continuing as the u/c6076 has been regarded as, and recorded as, a public road. Some evidence exists that contradicts this and records the route as a private carriage road.
74. The legal test is not that higher rights should be proved beyond all reasonable doubt to exist, it is rather that on the balance of probabilities those rights must be shown to exist. In other words it must be more likely than not that the route of Keevil 23 carries public rights that are higher than footpath.
75. Although the application from The Wiltshire Bridleway Association was to upgrade the route to a public bridleway, officers considered that it was more likely that public vehicular rights existed than that they did not. However, any right to drive a mechanically propelled vehicle over this route was extinguished by Section 67 of the Natural Environment and Rural Communities Act 2006. Hence the route should be recorded as a restricted byway, that is a route that carries rights for the public to pass and re-pass on foot, on horseback or leading a horse, by cycle or by horse drawn carriage only.

76. An Order was made (**Appendix A**) on 2 July 2008 and advertised in the Wiltshire Gazette and Herald on Thursday 10 July 2008. Notices were posted on site and checked at regular intervals. Notice was served as statute requires.

Objections and Representations to the Order

77. One objection was received from the landowner, Mr R Noad.
78. Representations in support were received from Mr B Riley and Mrs M Haley.

Comments on the Objections

79. Owing to the complexity of the evidence there has been considerable exchange of information between the objector and the case officer. Subsequent to the making of the order, Mr Noad appointed a legal representative experienced in this area of law. The objecting landowners have submitted copies of their 1922 deed of conveyance which shows that the route of Keevil 23 is owned by them (this has not been in dispute) and is recorded as public footpath in their deeds. They have also viewed the majority of the documents viewed by the case officer and have submitted full and clear interpretations of them. These interpretations explore the evidence in depth and have not been included here but are summarised within **Appendix B** together with the officer's notes and are available from the officers on request.
80. The objection is based on the premise that the route has always been a private road and has never been dedicated to the public as anything other than a footpath. No date or details are given for this dedication.
81. The objector also includes some witness evidence which states that in recent time the route has been gated and that signs have been in place. This is not disputed.
82. Officers recognise that the evidence is not all one way in this case. Given the long history of the route and long association of the Noad family with it (and their strong contention that both the Order route and the u/c6076 road north of the mill is private) it is a difficult case to assess. However, it is considered that the weight of evidence for public rights existing higher than footpath is greater than any evidence against this.

Main Considerations for the Council

83. The Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by The Wiltshire Bridleways Association. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
84. Section 53(2)(b) states:

“as regards every definitive map and statement, the surveying authority shall: “as from that date (the commencement date), keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event”.

85. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(i) and (c)(ii):

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;*
- (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.*

86. The Order is made under 53(3)(c)(i) for the northerly section in Seend (from the centre of the Semington Brook to the northern bank) and 53(3)(c)(ii) for Keevil 23. Although 53(3)(c)(i) appears to offer a less demanding legal test, case law shows that the test for confirmation of the Order is equal to that of 53(3)(c)(ii). This Order should, therefore, only be recommended for confirmation if the Council is satisfied that the way ought to be shown as a highway of a different description.

Environmental Impact of the Recommendation

87. Issues relating to the environment may not be taken into consideration when determining an Application for an Order made under the Wildlife and Countryside Act 1981.

Risk Assessment

88. Risks to users may not be taken into consideration when determining an application for an Order made under the Wildlife and Countryside Act 1981.

Financial Implications

89. Costs would be incurred associated with attending a Public Inquiry or Public Hearing for which budgetary provision has been made.

Options Considered

90. The Order must now be forwarded to the Secretary of State for determination. The Council must decide whether to recommend that the Order be confirmed, confirmed with modification or not be confirmed.
91. It is noted that a numbering error appears on the Order and that the Order will require modification if confirmed. All references to Seend 57 should be altered to Seend 59.

Reasons for Recommendation

92. Officers are satisfied that the legal test in Section 53(3)(c)(i) and (ii) of the Wildlife and Countryside Act 1981 has been satisfied in respect of the Order route and that on the balance of probabilities evidence supports that the Order should be confirmed.
93. Although it is recognised that evidence is not all one way officers consider that the weight of evidence in support of this route being a restricted byway is sufficiently high to show that the way ought to be recorded as such. Objections have been duly made and pursuant to paragraph 7 of Schedule 15 of the Wildlife and Countryside Act 1981 the Council is statutorily obliged to forward the Order to the Planning Inspectorate for determination.

Recommendation

94. That the Wiltshire County Council Sheet ST95NW Parish of Keevil – Keevil 23 and the Wiltshire County Council Sheet ST96SW Parish of Seend – Seend 57 Rights of Way Modification Order 21 2008 be submitted to the Secretary of State for Environment, Food and Rural Affairs, together with the objection and representations, with the recommendation that the Order be confirmed with the modification that all references to Seend 57 be altered to read Seend 59.

GEORGE BATTEN

Corporate Director for Transport, Environment and Leisure

Report Author

Sally Madgwick

Rights of Way Officer

The following unpublished documents have been relied on in the preparation of this Report:

Correspondence with Parish and District Councils, User Groups, other interested bodies and members of the public.