

Wildlife and Countryside Act 1981 s.53 (“the 1981 Act”)

Byway Open to All Traffic Winterslow 94 (WSLO94) – Back Drove

Consideration of the Width

1.0 Introduction

- 1.1 Wiltshire Council has a statutory duty under s.53(2) of the 1981 Act to keep the definitive map and statement under continual review. Upon the discovery of evidence which shows that on the balance of probability the definitive map and statement is in error the council has a duty to make a definitive map modification order to correct it.
- 1.2 Common law provides that the discovery of evidence relates to ‘new’ evidence, that is, evidence not previously considered in the recording of the right of way in the definitive map and statement. Upon the discovery of ‘new’ evidence the council is entitled to re-examine previously considered evidence.
- 1.3 WSLO94, Back Drove, was recorded in the Salisbury and Wilton Definitive Map and Statement dated 1952 as a bridleway with a recorded width of 10 feet (3.04 m). It was reclassified as a byway open to all traffic (BOAT) at the Second and Special Review in 1972 (being finally determined at Inquiry by the Planning Inspectorate in 1982). The character of the route is of a worn or surfaced track leading within a greater fenced width. Despite supporting a greater width at the Inquiry, Wiltshire Council had not specifically proposed a definitive statement change to the width at the Second and Special Review and accordingly the Inspector found against the council and other objectors on this point. The recording of the route as a byway open to all traffic had not been objected to.
- 1.4 The route is also recorded in Wiltshire Council’s highway record as a highway maintainable at public expense leading between the greater fenced width. It was handed over to Wiltshire County Council as such when rural roads were handed over by the Rural District Council in 1929/1930 as a result of the Local Government Act 1929. The Highway Record forms part of Wiltshire Council’s List of Street held under s.36 Highways Act 1980.
- 1.5 Recording has been unchanged since the Second and Special Review for the definitive map and statement date 1972 and since 1929 for the highway record, but recent planning applications within the greater fenced width caused officers of the council to consult both large scale Ordnance Survey mapping and more significantly the Inland Revenue’s Finance Act 1909/1910 records both of which support the BOAT as being a public highway extending between the greater fenced width (i.e. more than 10 feet).
- 1.6 The Finance Act 1909/1910 records were not available to officers during the 1972 Second and Special Review process (or the subsequent Inquiry in 1982) and therefore constitute ‘new’ evidence with the act of discovery being triggered by planning applications. Officers consider the first occasion that Wiltshire Council

relied upon Finance Act 1909/1910 plans for a definitive map case was in 1986, the plans being regularly consulted after that date.

- 1.7 Additional evidence relating to Sales Particulars from the early 20th century have also been recently discovered and considered to be relevant.
- 1.8 This report considers both new evidence and previously considered evidence for the purpose of deciding whether, on the balance of probability, a public right exists over a width greater than 10 feet thereby triggering a modification order to be made and duly advertised.

2.0 Current Recording of WSLO94, Back Drove

2.1 Salisbury and Wilton Rural District Council 1952 Definitive Map and Statement as modified under the provisions of the Wildlife and Countryside Act 1981

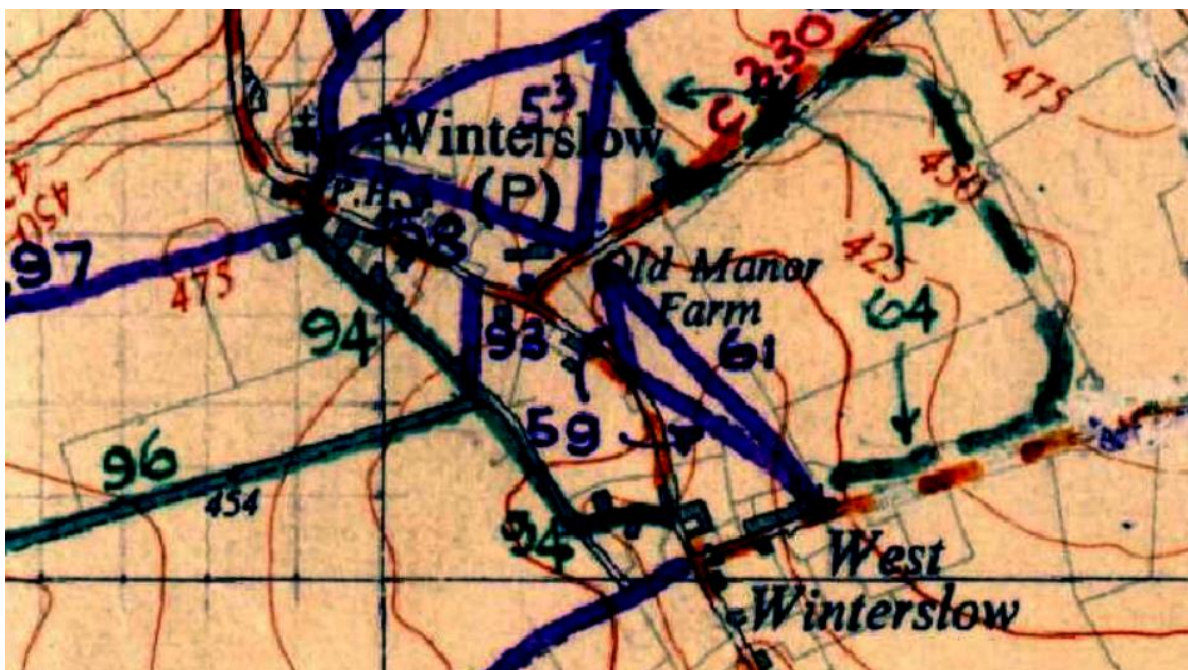
Definitive Statement:

Winterslow 94 BYWAY From the East Grimstead – Winterbourne Down road, C.289, at its junction with path No. 97, leading south-east across the junction of path Nos. 93 and 96 then east to road C.289 at West Winterslow, 37 m north of the West Winterslow – The Common road, U/C 12018.

Approximate length 585 m.

Width 3.04 m.

- 2.2 The route was recorded in the original definitive map (scale 1:25000) and statement as a bridleway as below (solid green line). It was upgraded to byway open to all traffic at the Second and Special Review 1972 (as determined at inquiry in 1982).



3.0 Photographs of WSLO94, Back Drove

3.1 Google Street View image of northern end 2011 (before garage built to rear of Horseshoe House):



3.2 Images taken by officers 09 August 2022 – from south eastern end leading north











To northern end (junction with The Street)



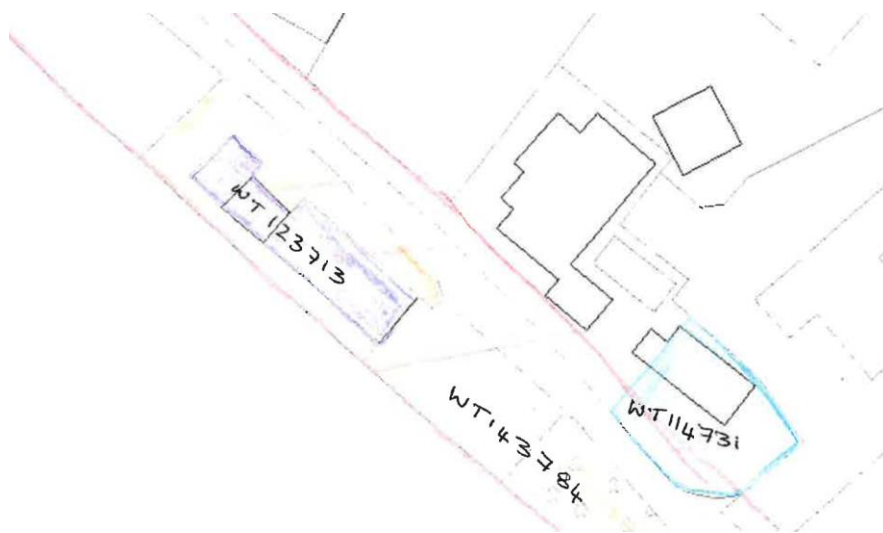
Image taken on return walk heading north to south

4.0 Land Ownership

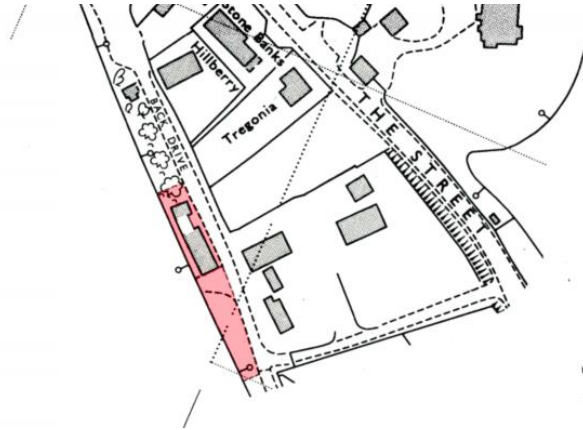
- 4.1 The majority of the land known as Back Drove (enclosed by the fenced boundaries and adjoining land) is not registered with Land Registry. The only titles registered are WT123713, WT143784 and WT114731 (small part of title in south east corner).



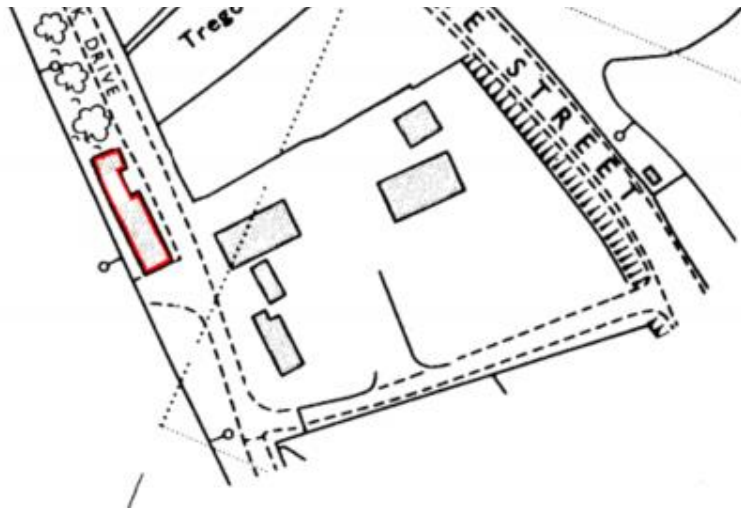
4.2 Detail of registered titles:



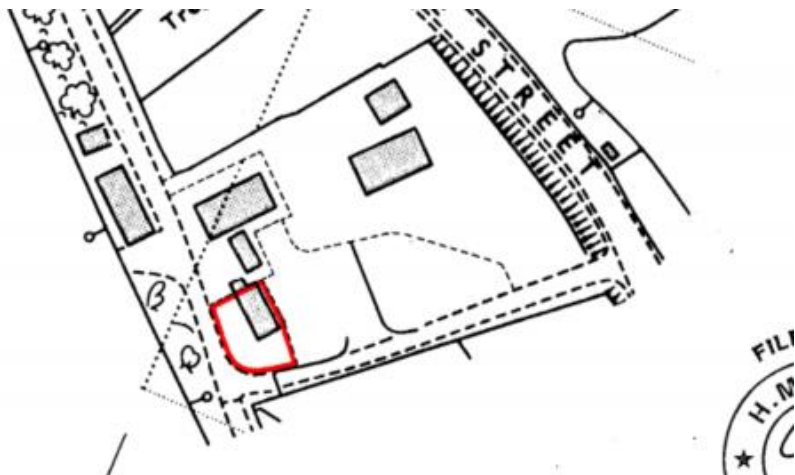
4.3 WT 143784 has a caution against the first registration of the land is lodged in favour of Nigel John Northeast, The Furniture Workshops, Back Drove. A statutory declaration accompanying the caution sets out that the cautioner is interested in the land as successor to R B J Collins and M J Collins. A copy has not been held by Land Registry. Land shown shaded red below.



4.4 WT123713 refers to the building surrounded by WT143784. Title absolute is registered to Nigel John Northeast, The Furniture Workshops, Back Drive. Land Registry do not hold copies of conveyances or transfers referred to.



4.5 WT 114731 refers to a parcel of land adjacent to Back Drive with possible overlap with the historical fenced width of Back Drive. Title absolute is registered to Nigel John Northeast, The Furniture Workshop, Back Drive. Land Registry does not hold copies of conveyances or transfers referred to.



- 4.6 Adjacent land is farmed by E A Barton and Son, Old Manor Farm, Livery Road and enquiry has been made to them of any unregistered land that they own (17 April 2023). A response sent in July states that they own the land adjoining Back Drove but that they are making further queries of the land that is enclosed by the fences that is Back Drove.
- 4.7 Application was made for registration of land at Horseshoe House by adverse possession in 2018 but was withdrawn. The extent of the land applied for covered the area where a garage has been built (but excluded the built track that forms part of Back Drove WSLO94). Wiltshire Council objected to this registration based on the Finance Act plans showing the extent of the highway extending between the fences. See para 3.1 for image of Back Drove in 2011 showing some of Back Drove before the garage was built.

5.0 Enabling Legislation

5.1 Wiltshire Council is the surveying authority for the County of Wiltshire, excluding the Borough of Swindon. A surveying authority is the body responsible for the preparation and upkeep of the definitive map of public rights of way.

5.2 The Wildlife and Countryside Act 1981 (WCA 1981)(c.69) section 53(2)(b) applies:

As regards every definitive map and statement the Surveying Authority shall-

- (a) *as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*
- (b) ***as from that 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 these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.***

5.3 The events referred to in subsection 2 above relevant to this case are:

(3)(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;

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

- 5.4 The council must consider all available evidence and this may relate to a dedication at common law or by statute law. Historical evidence may be considered under Section 32 of The Highways Act 1980 (below):

A court or tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

6.0 Consultation responses

In January 2021 Wiltshire Council circulated the following letter and 2 plans:

***“Wildlife and Countryside Act 1981 s.53(2)(b) and (3)(c)
Extent of Public Right of Way Winterslow 94 - Back Drove***

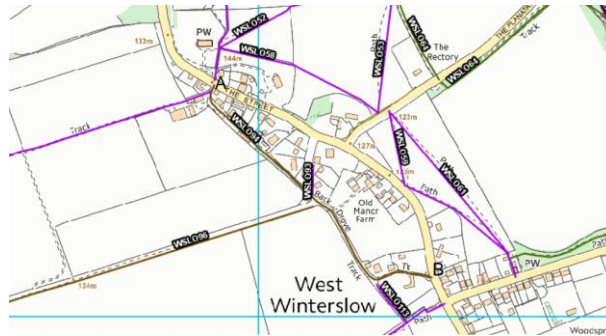
Public right of way Winterslow 94 (Back Drove) is recorded in the definitive map and statement for the area as a Byway Open to All Traffic (see extract from working copy attached). The width recorded in the definitive statement is 10 feet.

Wiltshire Council has recently discovered that historical evidence exists which supports that the extent of the public is a width in excess of 10 feet. Maps produced by the Inland Revenue pursuant to the 1909/1910 Finance Act show the width of the highway to extend to the physical parameters of the route (i.e., to the banks, fences, hedges or other physical boundaries in place in 1899 when the map was surveyed) (see extract attached).

If it is considered that, on the balance of probabilities, a public right subsists over this width, then Wiltshire Council has a duty to make a definitive map modification order to record the greater width. The principles of the legal maxim ‘once a highway, always a highway’ would apply unless the additional width had been stopped up by a legal action. Such an order, if made, would be advertised locally and notice served on all interested parties. There would then follow a period of at least 42 days during which objections to the order may be made.

As part of that duty officers will proceed with a thorough investigation of the historic evidence available and are also required to consult with Winterslow Parish Council. This procedure is evidence based (matters such as desirability, need, risk or the environment are not relevant to the recording of a public right though may be in the

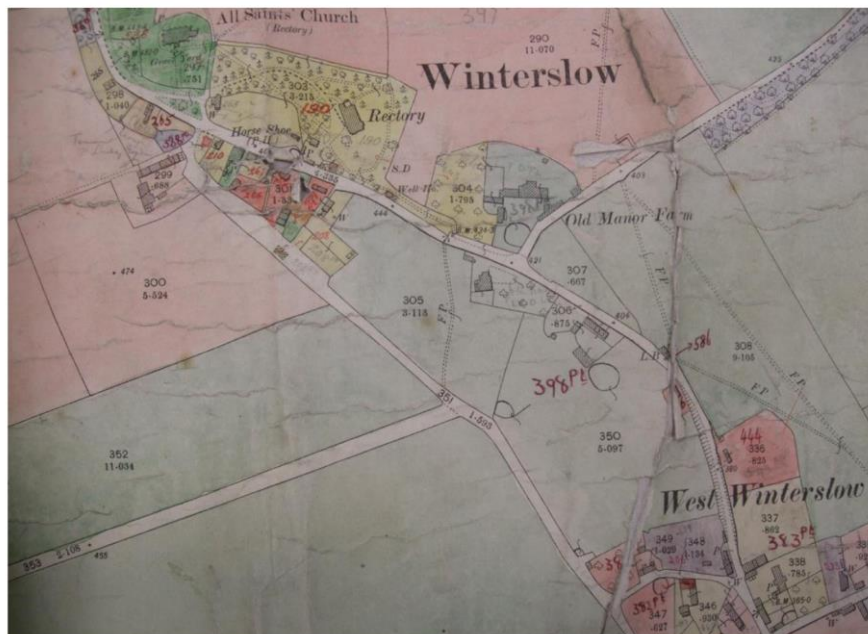
management of that right) and if you have any evidence relating to this right of way or historical knowledge of it, I would be very pleased to hear from you by 1700 on Friday 25th February 2022.”



Extract from Inland Revenue Finance Act 1909/1910 plan (not to scale)

Wiltshire and Swindon History Centre, Chippenham Cat ref. L8/10/67 sheet LXVII.7

Basemap: Ordnance Survey County Series 1:2500 plan Second Edition sheet LXVII.7



6.1 This was circulated to the following:

- The Auto Cycle Union
- Open Spaces Society
- The Ramblers (Wiltshire and National)
- British Horse Society (Wiltshire and National)
- Byways and Bridleways Trust
- Green Lane Association
- Cycling UK
- Trail Riders Fellowship
- Mr B Riley
- Wiltshire Bridleways Association
- Wiltshire Council Countryside Access Officers
- Winterslow Parish Council

Wiltshire Councillor Rich Rogers
British Driving Society
Mr N Northeast, Back Drove
The Owner, Hope Cottage, Livery Road
The Owner, Kings Farm, Livery Road
Winterslow Coachworks, Livery Road
The Owner, 2 Kings Paddocks
The Owner, 3 Kings Paddock
B J H Technical Services, 4 Kings Paddock
N Northeast, The Street
The Owner, Hillberry, The Street
The Owner, Tregonia, The Street
The Owner, Kingsdown, The Street
The Owner, Glebe Cottage, The Street
The Owner, Foinavon, The Street
The Owner, Beecham House, The Street/Back Drove
J Garbutt, Horseshoe House
Mrs G Wigmore, Old Manor Farm

6.2 Responses – originals and attachments at **Appendix A**

Wiltshire Bridleways Association 01 February 2022

“Your correspondence dated Thursday 13 January 2022 relative to the route recorded on the definitive map and statement as a Byway Open to All Traffic - Winterslow 94 - Back Lane, has been forwarded to all committee member of Wiltshire Bridleways Association.

I have also visited and driven this route.

Committee members unanimously support the continued investigation into historical evidence as additional support to that already identified on the Inland Revenue Maps of 1909/1910. WBA will continue to support an order, if made, to amend the definitive map and statement to record a width in excess of 10 feet over this Public Right of Way.

Unfortunately WBA do not appear to have any additional information relating to Winterslow 94.”

6.3 Winterslow Parish Council 08 February 2022

“Thank you for your email.

At the Winterslow Parish Council meeting on 7th February, the Council discussed the content of your email reference;

***Wildlife and Countryside Act 1981 s.53(2)(b) and (3)(c)
Extent of Public Right of Way Winterslow 94 - Back Drove***

The Council made the following observations:

'The Parish Council discussed the access width of Back Drove and the Historical use as an agricultural access track to surrounding fields. To erect any permanent structure to restrict Back Drove to 10 ft will restrict the usefulness to farm activities as many pieces of equipment will exceed that width without considerable dismantling. In comparison to a highway, it would not be permissible to build a wall directly on the edge of the road ,leaving a verge or pavement over which the Council has control.'

6.4 Kevin Horner 24 February 2022

"We have received a letter from yourself reference WSL094 SM . On Winterslow 94 Consultation Map our workshop is the second property on the right from entrance point B. At the point where the track meets the road there is a very old cottage, probably in excess of 200 years old. On the other side of the track entrance is a well cap that has a significant concrete cover on for safety. This was, I am told, one of a series of wells that supplied the village with water hundreds of years ago. At that point the track is approximately 12-15 feet wide and in my memory (64 years of age) the bottom part of Back Drove has always been narrow. This is highlighted by Kings Farm which is end on to the track and I think is in the process of being listed and dates of 1400's have been mentioned.

The track passes our workshop (first building on the right on '94 map and 1909 map) and at the point where footpath WSL0113 branches off the track was for my childhood only a single-track footpath, it has been recently opened up for limited farm use.

The top end of Back Drove from the point where WSL093 intersects has always been wider and "The Drain" as its locally known (WSL096) was and still is a very wide track. As a child the top end was always referred to as 'Common Land' and many parts of it were overgrown. The single building on the left of this common land was erected by Ronnie Deare possibly around the early 1900's, the rest of the widened area was un-used.

Hopefully this information will be helpful."

6.5 Trail Riders Fellowship 20 January 2023

"I am surprised to learn that the width of Winterslow 94 has been recorded in the definitive statement as ten feet. This is clearly an error, given that the public have enjoyed unquestioned and unobstructed use of a much greater width for decades.

The earliest known motorcycle use of the byway that I am aware of was made by a gentleman named Michael May in the late 1950s. Therefore Wiltshire TRF strongly support correcting this mistake via the proposed order in order to conserve subsistent public rights, and thank you for your diligence in ensuring their accuracy."

6.6 Mr J Garbutt 09 February 2023

Extent of Public Right of Way Winterslow 94 – Back Drove

I am writing to set the documents I have to substantiate my ownership of land at the rear of my house.

- 1) Statutory declaration 1st July 1959 land rear of Horseshoe House
- 2) Statutory declaration 27th October 1993 land rear of Horseshoe House.
- 3) Statutory declaration 31 August 2017 land rear of Horseshoe House.
- 4) Salisbury approved planning permission 72FY567500 dated 4 October 1977 building at rear of Horseshoe House.
- 5) Salisbury planning permission 18.02.1992 pair of Garages land at rear of Horseshoe House.
- 6) Salisbury approved planning permission 17/02999/FUL was granted in 2017 after the Council asked for evidence of my ownership as this had been questioned by some local residents as they were not sure if it was common land. On presentation of the documents in this letter the application was approved. I then built the timber framed carport/garage at a cost in the order of £25,000.
- 7) Epitome of the Title Deed plan attached dated 1st July 1959.

- 8) Epitome of the Title Deed date 1993.
- 9) Photograph of Back Drove showing my land and newly constructed carport/garage.

It is my understanding that the land was fenced and used many, many years ago, in the late 1800's onwards, as an area where the local farmers, would leave their livestock securely, while they had refreshment at the public house, as Horseshoe House was, until 9th July 1959, when it was converted to a residential property. Hence the historic name Back Drove as this was where farm animals were driven to market.

It would seem any extension of the 10ft width of the Drove behind my house would impact on the land I own and the recently built carport/garage, that was approved by the Council after investigating my ownership during their planning permission process.

6.7 Nigel Northeast 14 February 2022

“With regards to the letter, extract of the Finance Map and the other highlighted map to the definitive map status of Path 94.

The alleged “new evidence” of the Finance Map of 1909/10 is a modification of the Ordnance Survey Map of 1901(attached). This can be clearly seen on the top of the full finance map (attached) which states it is the Ordnance Survey Map. The full map supplied from Jane Hughes appears to be different from the extract which was supplied by yourselves, so must come from different sources? Both state that they are the second edition of the OS Map which was 1901 not 1899 as previously stated in your letter.

The OS map was divided, numbered and coloured to show what taxes had to be paid. The section of the map uncoloured is the only part of the map under current discussion, this does not make it “new evidence”. The Finance map legally cannot prove or disprove the status of Path 94. The Map on its own is not evidence that it is a highway across all of the uncoloured width, it is just one possible reading of it.

The Special Enquiry of 1982 has the OS map on the list of documents which was taken into account at that time. This makes the Finance map, only regarding Back Drove, as not new evidence.

The Special Review also had the Ordnance Survey sheet used as a "take over" map in the document list which has exactly the same information shown as the Finance Map (attached).

At the Special Review in 1982, the evidence from Robert Fry of Horseshoe House formed part of the decision where there were Statutory Declarations from the Brewers (previously a public house) going back many years to the use of the land on the opposite side of Back Drove. This, with planning permission, is now a garage and car port.

Winterslow Parish Council claimed Path 94 in 1950, stating it at 10 feet (see attached). At the meeting on Monday 7th February attended by myself the committee had no new evidence to add in response to your letter.

The inspector had all the evidence in 1982 and this was ratified in 1985 by the Department of the Environment.

The only area under discussion according to the map sent, where it is highlighted the area under consultation, is the uncoloured section of the Finance map which is the identical to the originally taken into account on the OS map of 1901.

I purchased the land and workshops in 1985, Reg Collins and Ron Dear before that, have statutory declarations to say this land has been undisputed for at least 111 years.

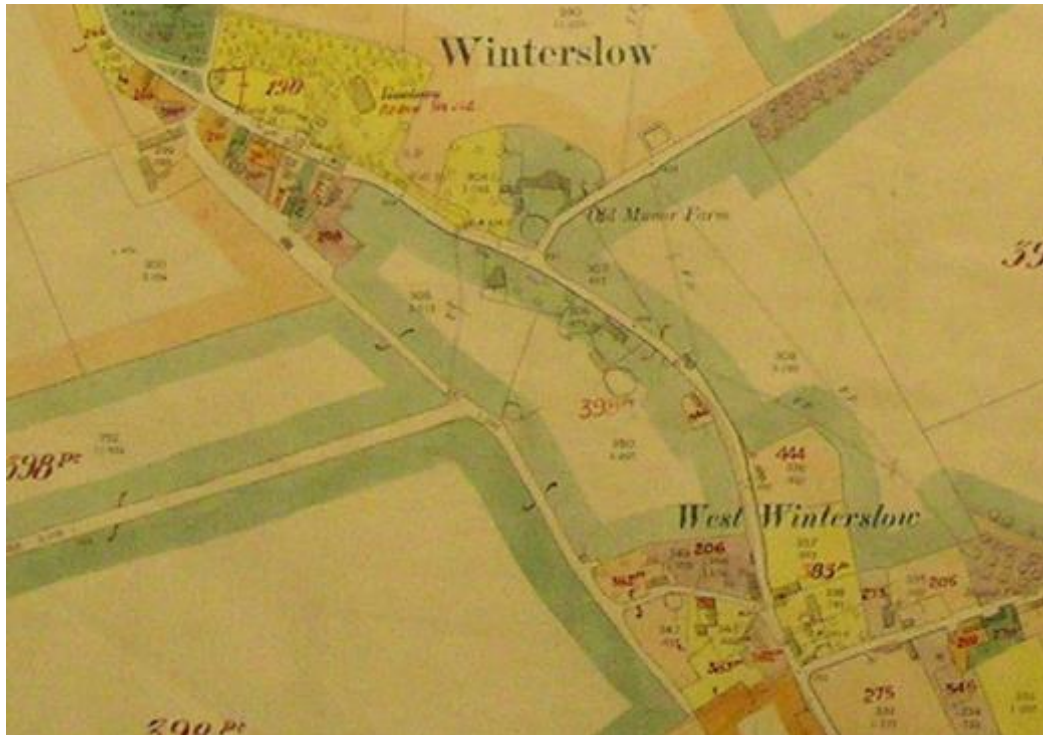
The North access to Back Drove down to the workshops has been maintained in its 10ft width by myself and my predecessors.

The workshop on the uncoloured area of the map was the Estate Workshop for Winterslow House which burnt down in 1775 and pre-dates Back Drove, as seen of the Andrews and Dury's map of Winterslow of 1773.

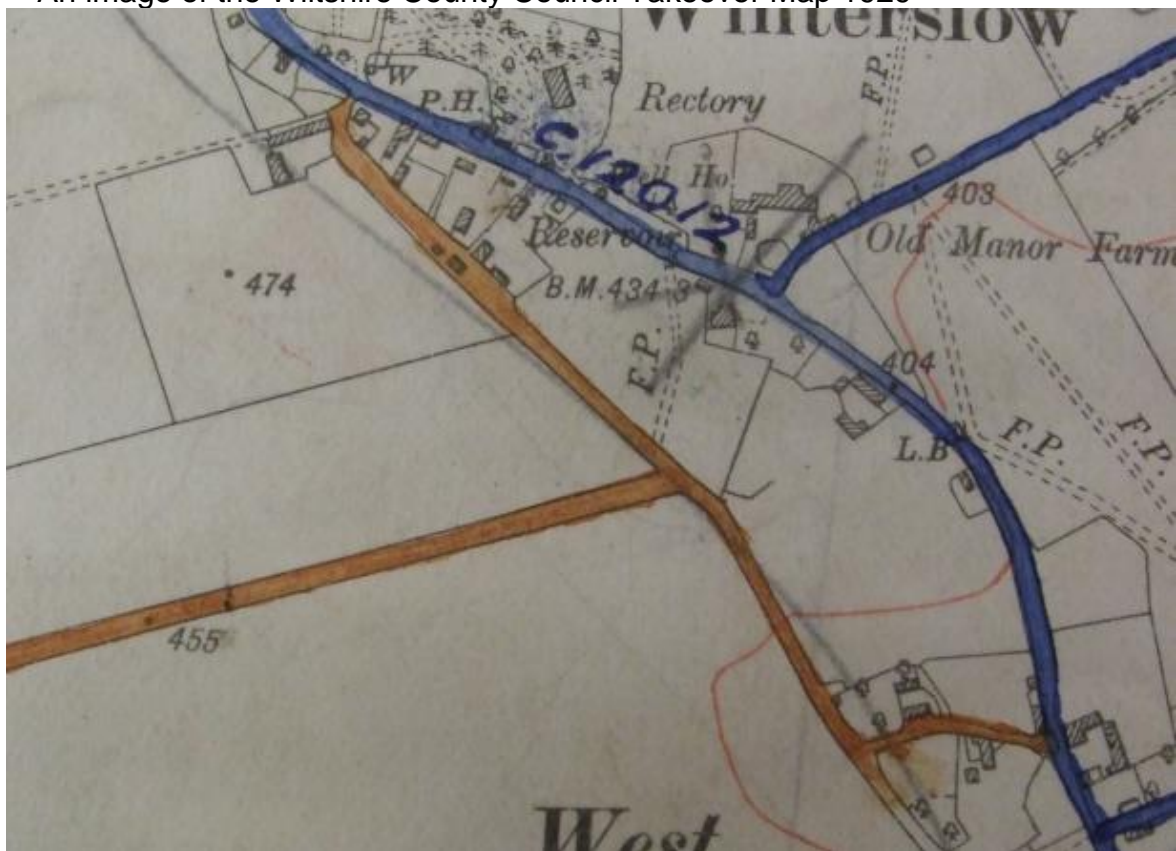
My conclusion is that I dispute that the Finance map is "new evidence". The definitive map statement of 1950, confirmed at the Special review of 1982 should stay at 10ft as it does not show any difference from that which was taken into account at the 1982 enquiry - so the original findings should stand and a Modification Order should not be made in this instance.

It may also be that because of legal technicalities the additional width, if it were to be recorded, could only be recorded as a restricted byway and not a full byway as per the piece of land down the middle. Restricted byways have no rights for public motorised vehicular traffic to use them and so would not be deemed a highway in this case."

Included an image of the Finance Act 1909/1910 map sheet:



An image of the Wiltshire County Council Takeover Map 1929



An image of the Parish Claim card submitted by the PC in 1950:

NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT, 1949.

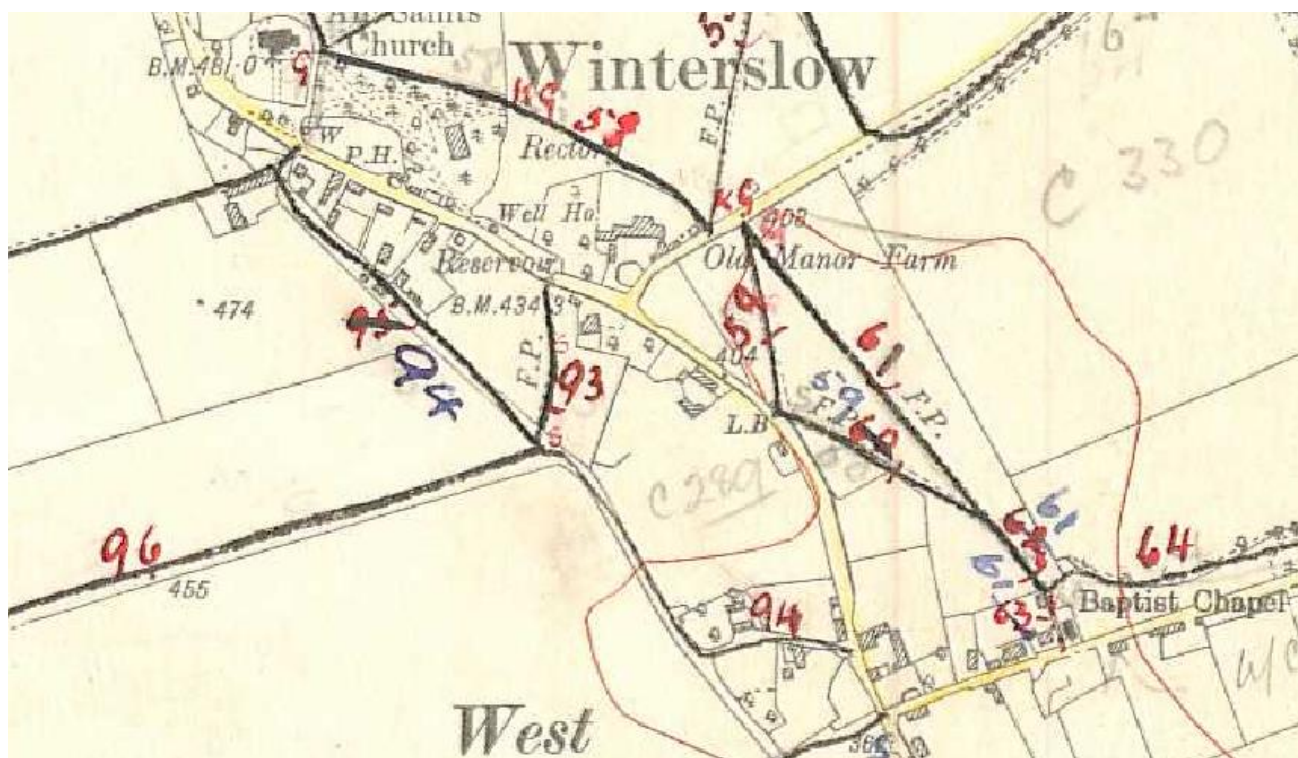
PUBLIC RIGHT OF WAY.

PATH No. 25
(to correspond with No. on map)

PARISH OF Winterslow.

| | |
|---|--|
| <p>NAME OR SITUATION AND DESCRIPTION (FOOTWAY, BRIDLEWAY, ETC.)</p> <p><u>From junction 93, 94 & 96 Fittor Drain out to Glebe Farm to Roadway 97.</u></p> <p>B.P.</p> <p>NATURE OF SURFACE</p> <p><u>Part grass part metal.</u></p> <p>STILES, GATES, FOOTBRIDGES, STEPPING STONES</p> <p><u>None</u></p> <p>WHETHER DIRECTION POSTS ON WAY (GIVE PARTICULARS)</p> <p><u>None</u></p> <p>OBSERVATIONS:</p> <p><u>From junction 94 & 93 along grass track to wood yard, straight through until next junction 97 is reached.</u></p> <p><i>REVIEWED BY PARISH COUNCIL 22.2.51</i></p> | <p>LENGTH <u>330</u> yards WIDTH <u>10'</u></p> <p>WHETHER FENCED OR OPEN <u>Open</u></p> <p>APPROXIMATE PERIOD OF UNINTERRUPTED USER:— <u>50</u> YEARS FROM</p> <p>WHETHER REPAIRED BY PARISH, DISTRICT, BOROUGH OR COUNTY COUNCIL:— <u>No repairs</u></p> <p>DATE OF REPAIR</p> <p>WHETHER SUBJECT TO PLOUGHING <u>No</u></p> <p>DATE OF SURVEY <u>December, 1950.</u></p> <p>WHETHER SHOWN ON UNDERMENTIONED MAPS:— ORDNANCE 6" SHEET. REF. <u>LXVII N.5.</u></p> <p>INCLOSURE AWARD</p> <p>LANDOWNER'S MAP (DEPOSITED UNDER SECTION 1 (4) OF THE RIGHTS OF WAY ACT, 1932.)</p> <p>OTHER MAPS:—</p> |
|---|--|

An image of the accompanying parish claim map:



And 4 images of OS maps sheet LXVII which would not download and open. However, these maps will be considered in section 7.0 below.

7.0 Historical Records

- 7.1 Although it can be helpful to present these in chronological order to show the consistency of recording of a way over time it does not allow for the need to apply evidential weight to documents. For example, although a way may appear on ten commercial maps it does not necessarily carry as much evidential weight as if the way is shown in perhaps two publicly consulted documents or created, say, as the result of an Act of Parliament.
- 7.2 The value of relatively low evidential weight documents should not be underestimated though where it is considered that they add synergy to the evidence as a whole. The Planning Inspectorate's *Definitive Map Modification Orders: Consistency Guidelines* state:

“There is a distinct and important difference between the ‘cumulative’ and ‘synergistic’ approach to the weighing of evidence. Under the cumulative approach a number of relatively lightweight pieces of evidence (e.g., three commercial maps by different cartographers all produced within the same decade or so) could be regarded as mere repetition. Thus their cumulative weight may not be significantly more than that accorded to a single map. If, however, there is synergy between relatively lightweight pieces of highway status evidence (e.g., an OS map, a commercial map and a Tithe map), then this synergy (co-ordination as distinct from repetition) would significantly increase the collective impact of those documents.”

- 7.3 The court of appeal gave guidance on how evidence should be considered in ‘the Fortune’ case (*Fortune & Ors v Wiltshire Council & Anr* [2012] EWCA Civ 334). Lewison LJ at paragraphs 22 and 23:

22. *“In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in R v Exall (1866) 4 F & F 922:*

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fail. It is more like the case of a rope composed of several cords. One strand of the cord may be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”

23. *In addition section 32 of the 1980 Act provides:*

“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 a dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose form which it was made or compiled, and the custody in which it has been kept and from which it is produced.” “

7.4 That said, in evaluating historical evidence it is necessary to recognise that differing weight must be given to different evidence. The following categorisation has been used;

Category A carries the highest weight and category F the lowest. This system of categorisation has been devised by officers with regard to The Planning Inspectorate’s Consistency Guidelines:

<http://www.planningportal.gov.uk/planning/countryside/rightsofway/guidance> (as revised to date of report) and Chapter 6 of the book ‘Rights of Way A Guide to Law and Practice – Fourth Edition’ by John Riddall and John Trevelyan.

Abbreviations: Wiltshire and Swindon History Centre, Chippenham (WSHC), The National Archive, Kew (TNA), House of Lords Record Office (HoL)

The evidence investigated in this report will be presented in order of weight (i.e. Category A being the most significant). Although officers have endeavoured to view original documents where it has not been possible to view originals (e.g., those held at The National Archive at Kew) officers have relied upon the copies published elsewhere.

| Category | May provide evidence for | Examples |
|-----------------|--|---|
| A | Legal creation of a highway Reputation of a way as a highway Physical existence of a way Conclusive evidence of public rights | Inclosure Acts, awards and plans Orders creating, diverting or extinguishing highways Railway and canal acts and plans Definitive map and statement |
| B | Reputation of a way as a highway Physical existence of a way | Documents, maps plans drawn up as a result of legislation, consulted upon, but whose primary purpose was not to record public rights. i.e., Tithe Commission, Inland Revenue Finance Act |

| | | |
|---|---|--|
| C | Reputation of a way as a highway Physical existence of a way | Includes local government records (highway board, county council, parish council) |
| D | Reputation of a way as a highway Physical existence of way | Other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans, conveyances |
| E | Reputation of a way as a highway Physical existence of a way | Commercial maps, some Ordnance Survey records |
| F | Reputation of a way as a highway Physical evidence of a way | Local repute, consultation responses |

8.0 CATEGORY A EVIDENCE

8.1 Evidence within this category is potentially of the highest weight and includes conclusive evidence (i.e., the definitive map and statement), inclosure acts, awards and plans, legal orders or events and deposited plans for public undertakings (i.e. arising from an Act of Parliament which specifically required the identification and verification of public rights of way).

8.2 Inclosure

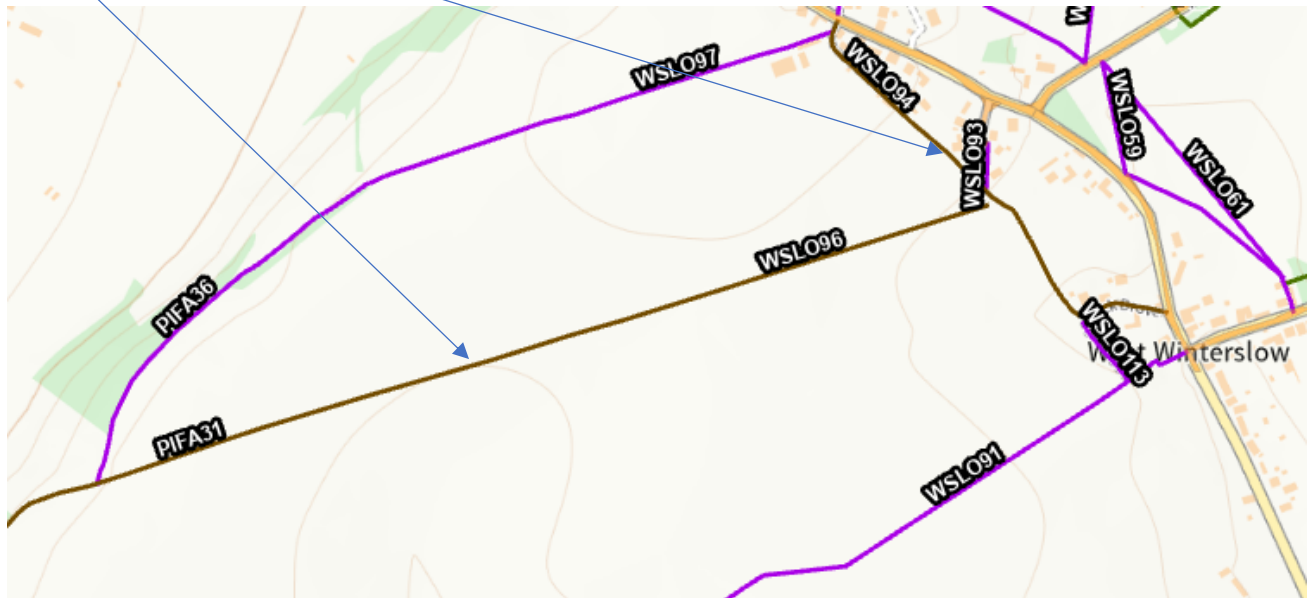
Between 1545 and 1880 the old system of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners sought to improve the productivity of their land. The process of inclosure began by agreement between the parties concerned, although locally powerful landowners may have had significant influence on the outcome. By the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The process was further refined at the beginning of the nineteenth century with the passing of two main general acts, bringing together the most commonly used clauses and applying these to each local act unless otherwise stated.

8.3 Not all parishes were affected by parliamentary inclosure and Winterslow is one of these. Accordingly no records relating to the parliamentary inclosure of lands in the parish have been found at the Wiltshire and Swindon History Centre and no records of any agreements have been found either. However, it is clear that land has been enclosed and the land exhibits a pattern of enclosures similar to adjoining parishes.

8.4 The Byway Open to All Traffic (BOAT) Pitton and Farley 31 (PIFA31) enters Winterslow parish where it becomes labelled as Winterslow 96 (WSLO96) which

meets Back Drove (WSLO94) before connecting to the local road network. PIFA31 is therefore an important route to also investigate as its status of a through route and not a dead end is reliant upon its connection with WSLO94. It is therefore more likely than not that both routes were considered highways of an equal status.

PIFA31 connects to Back Drove:



8.5 The route that came to be recorded as PIFA31 was created by Parliamentary Inclosure in 1820 following the line of an earlier track. It is a very wide route known locally as “The Drain”.

8.6 **Pitton and Farley Inclosure Award EA108 (WSHC) 1820**
Pitton and Farley Inclosure Act 1810 A1/215/61 (WSHC)

The chapelries of Pitton and Farley laid within the ecclesiastical parish of Alderbury and 1500 acres of lands were enclosed under An Act for Inclosing Lands in the Parish of Pitton and Farley in the County of Wilts which gained Royal Assent 2nd June 1810 (50 Geo III). This local Act was applied together with the provisions of the ‘general inclosure Act 1801’ entitled “An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure and for facilitating the mode of proving the several Facts usually required on the passing of such Acts”.

8.7 The local Act appointed Richard Webb and William Jennings to act as Commissioners and the subsequent Award viewed (EA108) is signed by both of these parties. The Award is dated 03 December 1819 and enrolled on 04 February 1820.

8.8 It was the practice of the Commissioners to first set out the roads and other highways before the allotments of land and in the chapelry of Pitton the following were laid out and awarded:

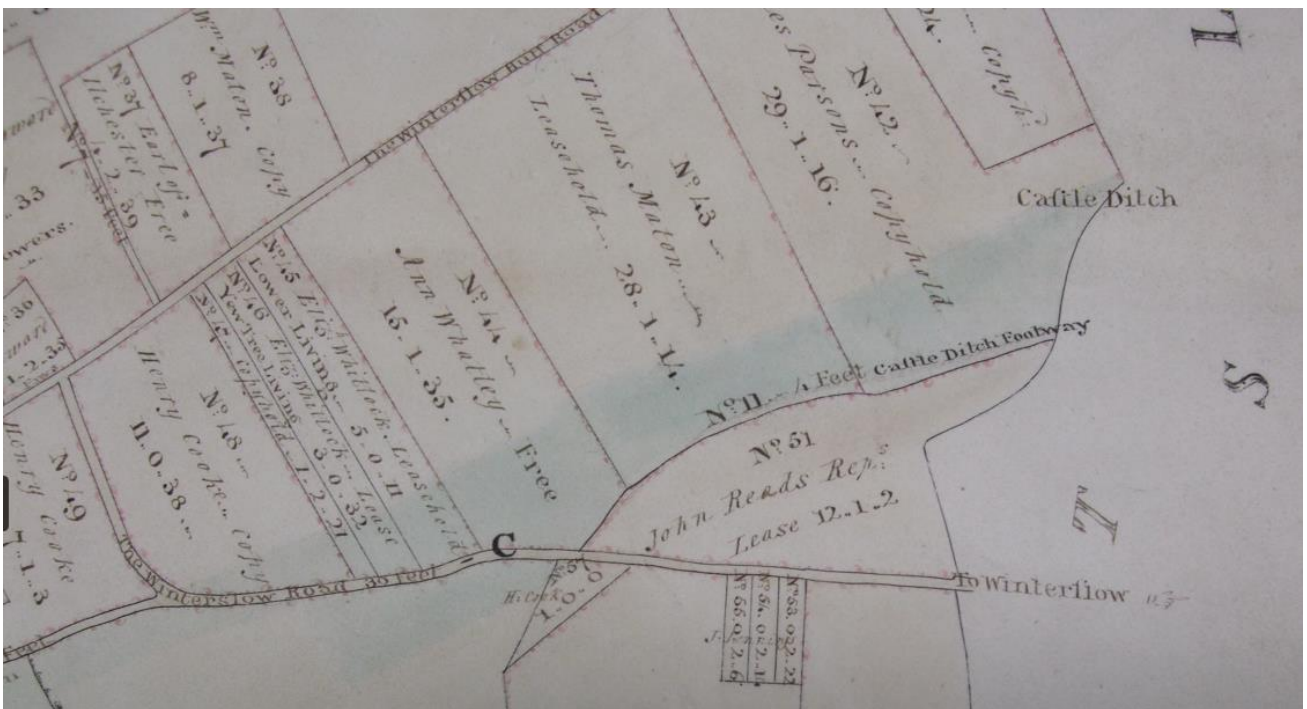
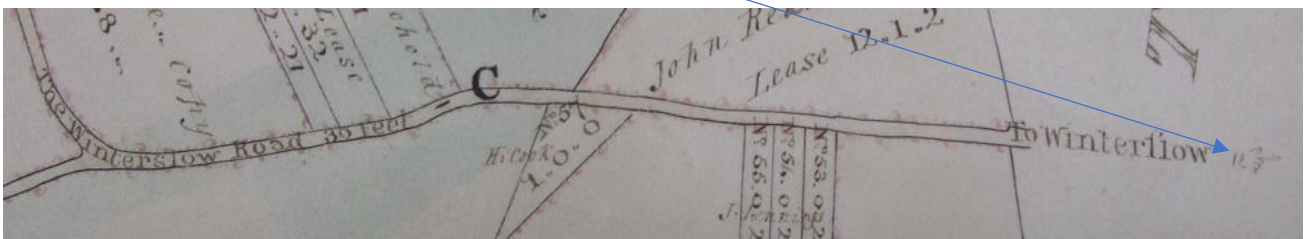
- 4 x Public Roads
- 5 x Public Footpaths
- 7 x Private Roads

The rate for the repair of the private roads being levied on the neighbouring allottees.

8.9 The highway now recorded as BOAT PIFA31 was awarded as a **Public Carriage Road**, the Winterslow Road. Public roads were “to be an remain 30 feet wide at the least” –

“Road C Winterslow Road – One other public carriage road and highway of the breadth of thirty feet called the Winterslow Road and marked C on the said map branching out of the Winterslow Hut Road between allotments to Mary Cooke and extending south-east and eastward in its present track over the middle and east field to its usual entrance into Winterslow Drove leading towards Winterslow.”

8.10 The map referred to is annexed to the Award and is a detailed colour map of the scale 8 chains to one inch. Road C (PIFA31) is labelled “The Winterslow Road 30 feet” and where it leads out of the chapelry of Pitton it is annotated “To Winterslow” with a hand and finger pointing east.



8.11 The route referred to as Winterslow Drove is today called Back Drove (WSLO94). It is noted that PIFA31/WSLO96 has the appearance of a wide drove and was clearly fenced as such. It joins Back Drove (WSLO94) but to head south to join Livery Road it would have met the narrow part of WSLO94, constrained by properties pre-dating 1820. Hence the continuation into Winterslow along a similarly wide drove would logically have followed the route of WSLO94 north to its junction with The Street and nearer to the parish church - All Saints church. The formalisation of PIFA31 as a wide drove road "Winterslow Road" makes little sense unless it connected to a similarly wide road in Winterslow. The reasonable assumption then is that by 1820 WSLO94 was a wide drove road known as Winterslow Drove and carrying an equal public right to PIFA31 "Winterslow Road".

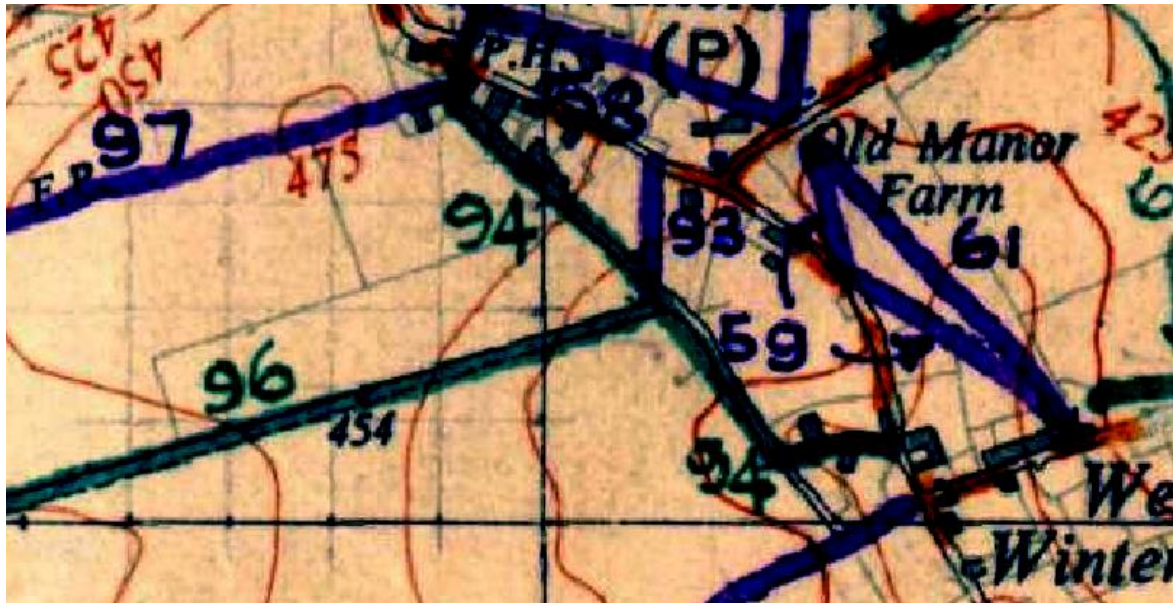
8.12 **National Parks and Access to the Countryside Act 1949 – Original definitive map and statement 1952**

WSLO94 was recorded in the original parish survey of rights of way to be recorded in the draft definitive map and statement as a Carriage Road Footpath (CRF) (or Road Used as a Public Path – RUPP)) in common with other highways recorded in the Council's highway record as 'brown tracks'. Brown tracks being the lowest maintenance category of roads handed over to Wiltshire County Council as a result of the Local Government Act 1929 (an Act, amongst other things, requiring rural district councils to hand over maintenance liability for rural roads to county councils).

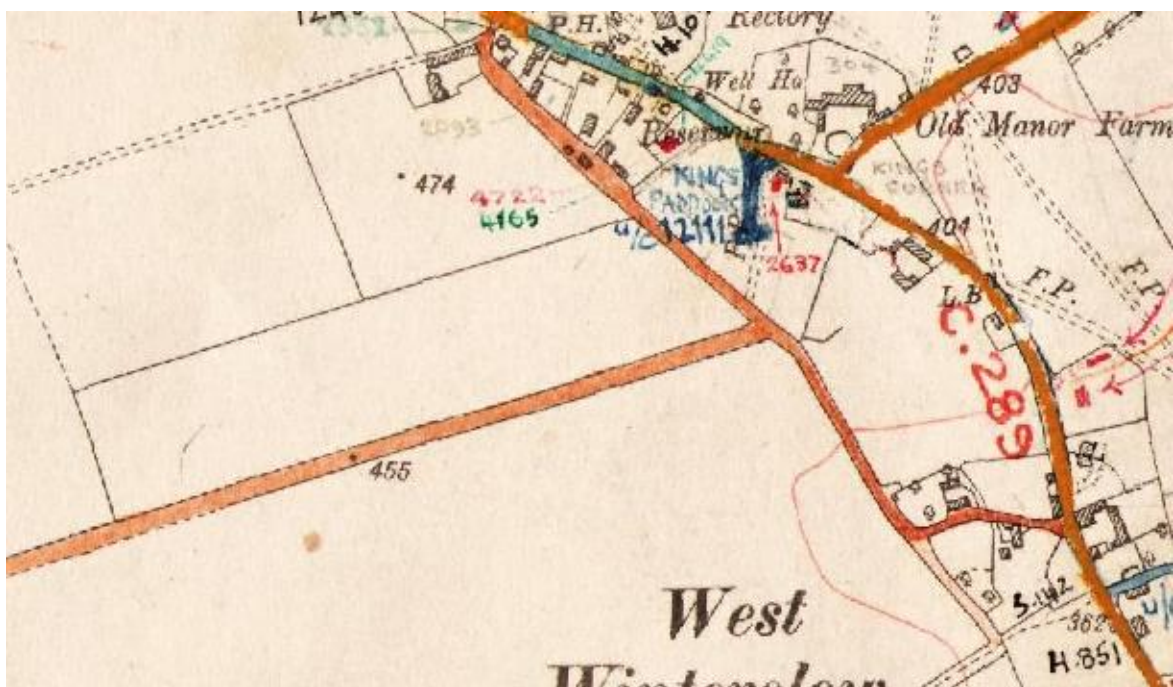
8.13 In Winterslow other brown tracks were WSL01A, 1B,2, 38 and 108. Although these were subsequently recorded as RUPPs, WSLO94 was altered to be recorded in the draft definitive map and statement as a bridleway before it was published. It is not known why this changed. It attracted no objections and was recorded as a bridleway with a width of 10 feet until WCC's Second and Special Review dated 1972 when it was proposed to upgrade the route to a byway open to all traffic (BOAT).

8.14 The classification of the route as a BOAT did not attract any objections but the retention of the width at 10 feet did and the matter was considered at a public inquiry held in 1982. Although WCC supported the route being recorded as wider than 10 feet at inquiry, the Inspector found this was contradicted by there not being a change to the width promoted by WCC at the 1972 review stage. The review only considering rights and not widths. The Inspector did not amend the definitive statement to effect a change to the recorded width which remains at 10 feet. A copy of the Inspector's report is appended at APPENDIX A.

8.15 The definitive map line fills the entire width of Back Drove (as does the highway record) and it is not possible to tell within the boundaries where the 10 feet is though the used route follows a meandering track or carriageway between these boundaries.



Extract from Salisbury and Wilton Rural District Council Definitive map 1952 (base map 1:25000)



Extract from WCC Highway Record (base map 1:10560)

- 8.16 The Second and Special Review process and subsequent recording of WSLO94 as a BOAT gives certainty to the representation of the brown track on the highway record carrying a vehicular right. It is an important point for the consideration of the retention of a public right of way for mechanically propelled vehicles over those areas which (by virtue of being outside the recorded 10 feet) are not recorded in the definitive map but are recorded in the council's highway record and List of Streets. Please see section of Natural Environment and Rural Communities Act 2006 later in this report at Section 15.

8.17 It is further noted that without a public right existing across the whole physical width of Back Drove, the awarded public road now recorded as WSLO96 and PIFA31 could not reasonably join WSLO94 as the used 10 feet follows the opposite hedgeline..

9.0 CATEGORY B EVIDENCE

9.1 Category B evidence may be documents or plans drawn up as a result of legislation and consulted upon but where the primary purpose was not to record public rights. Examples of this includes records from the Tithe Commissioners and the Inland Revenue.

9.2 **The Tithe Commutation Act of 1836** A system of taxation existed in Britain whereby farmers and people who worked the land were bound to pay tithes to the church. These payments were in kind and generally represented one tenth of production. The system was both unpopular, cumbersome and increasingly unjust as the industrial revolution gathered pace. The Tithe Commutation Act of 1836 sought to commute these tithe payments in kind to annual rent-charges. Parliament appointed a three man commission to direct a staff of assistant commissioners, valuers and surveyors who mapped, valued and apportioned rent charges among thousands of separate parcels of the tithable land in different states of cultivation.

9.3 Tithe surveys required careful mapping and examination of the landscape and land use and the maps and apportionments documents that resulted can offer valuable evidence of how the parish was at that time.

9.4 The Tithe Commissioners seconded Robert K Dawson from the Royal Engineers to organise and superintend the land surveys. Dawson had a background in surveying and produced a paper, the details of which it was considered all tithe maps should be drawn to. This paper (British Parliamentary Paper XLIV 405 1837) only ever served in an advisory capacity as the Tithe Act itself contained contradictory clauses on the nature of maps (*Tithe Surveys for Historians by Roger J P Kain and Hugh C. Prince*) and was amended in 1837 allowing commissioners to accept maps of a variety of scales and dates.

9.5 Roger J P Kain and Richard Oliver in *The Tithe Maps of England and Wales* at page 23 note that the portrayal of features on tithe maps is very variable across parishes and that advice to the privately commissioned surveyors was itself imprecise and that although the official instructions required that surveyors should include such detail on their maps as it is usual to find on estate maps, there was no statutory requirement to do this.

9.6 There are however general conventions that are observed and at page 24 Kain and Oliver observe that:

“Roads are usually shown on tithe maps as they normally bounded individual tithe areas. Only very rarely is their status as public or private indicated with any

certainty, though the general convention of colour filling public roads in sienna is often followed.”

“Foot and Bridleways ...are sometimes explicitly annotated as such, but more usually they are indicated by single or double pecked lines.”

9.7 Tithe surveys for both Winterslow and Pitton & Farley have been viewed.

9.8 **Tithe Survey Winterslow T/A Winterslow WSHC 1841**

The map has been drawn at the scale of 8 chains to one inch and is dated 1841. The surveyor was J R Peniston of Salisbury. It also carries the Tithe Commissioners stamp of 1841 and has been signed by Robert Page, Assistant Tithe Commissioner and endorsed as a copy of the map and plan referred to in the apportionment.

9.9 The map shows roads coloured sienna with only the main roads (today the A30 and A345) having destinations (“from Salisbury” “to Andover” and “to Stockbridge”). Only one sienna coloured road is numbered (no 183 Apple Lye Wood, a road across the common) and all other roads must therefore be included in the apportionment calculations under “Roads and Waste”.

9.10 WSLO94 (Back Drove) is shown as a wide unnumbered sienna coloured road, enclosed largely as it is today. It is continuous with the local highway network and forms a wide alternative north south route to the much more narrow and restrictive The Street and Livery Road.





9.11 Cottages and gardens to the east side of part of WSLO94 are shown with Plot no 70 described in the apportionment as “garden only”. No building consistent with the workshop built within the drove is recorded.

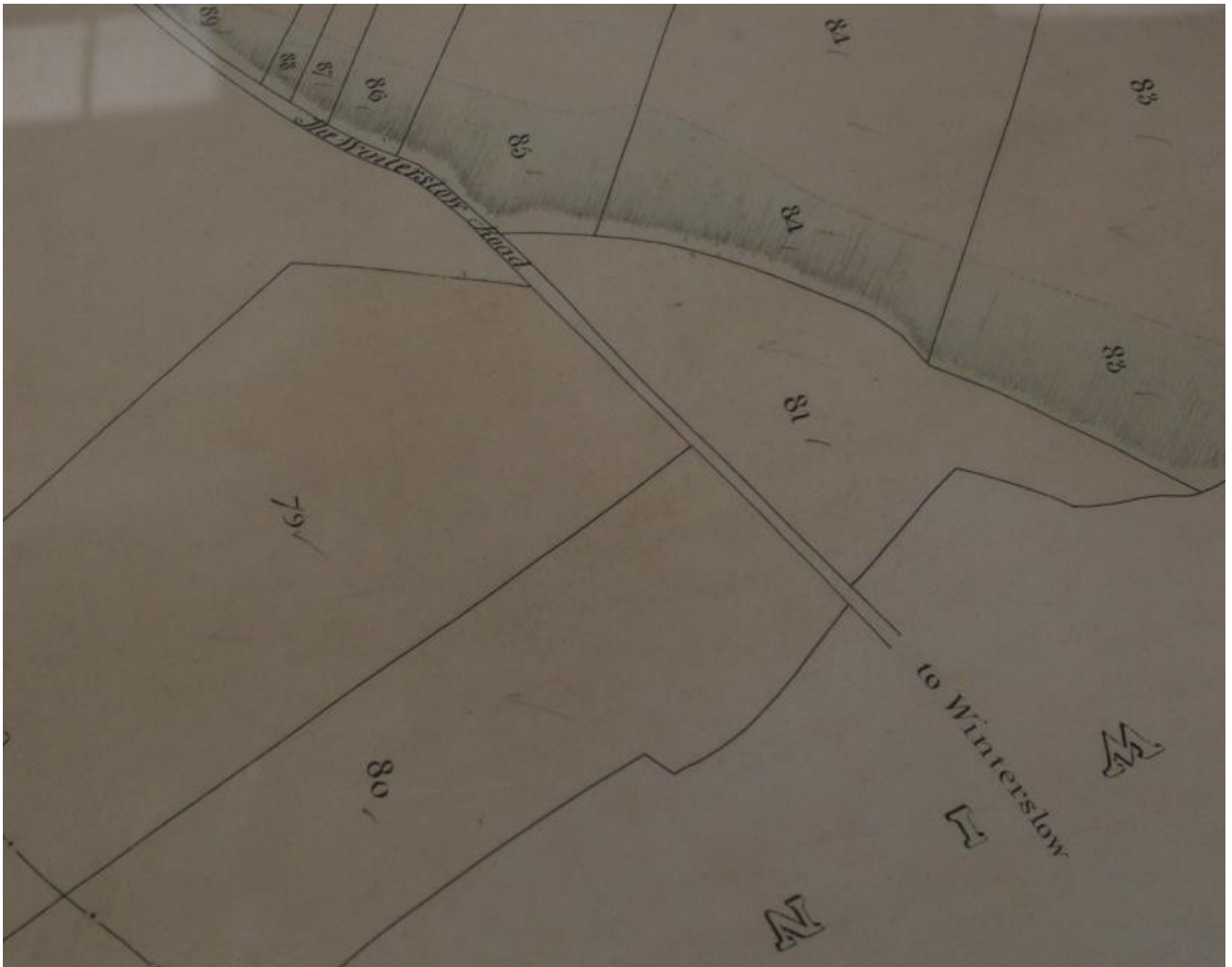
It is considered to have been exempt from tithes on account of it being a road.

9.12 Tithe Award Pitton and Farley T/A Pitton & Farley WSHC 1842

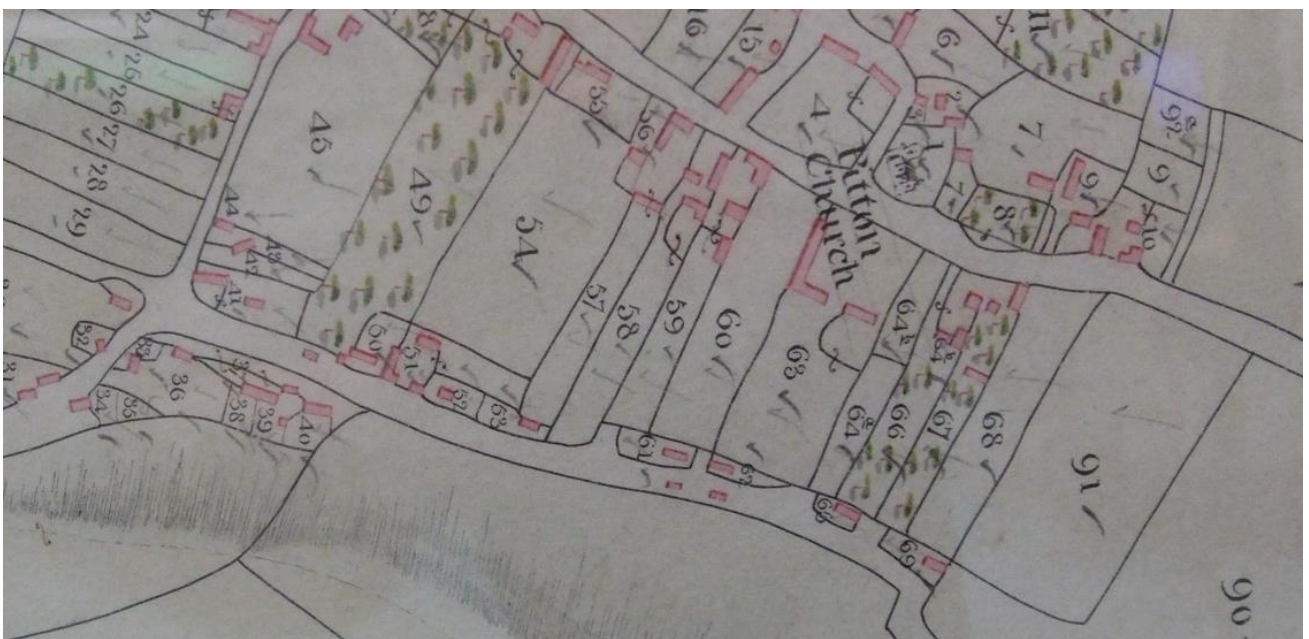
The map is drawn at the scale of 6 chains to one inch and is dated 03.03.42. It is signed by John Martin Valuer and carries a Tithe Commissioners stamp March 02 1842 and the signature of Robert Page Assistant Tithe Commissioner.

9.13 Roads are drawn uncoloured and surrounding lands and buildings are coloured. The map reflects the Inclosure Award and shows PIFA31 as “The Winterslow Road” “To Winterslow”. The map does not extend into the neighbouring parish.





9.14 It is noted that some small buildings are shown in the middle of highways suggesting a local practice for wide routes:



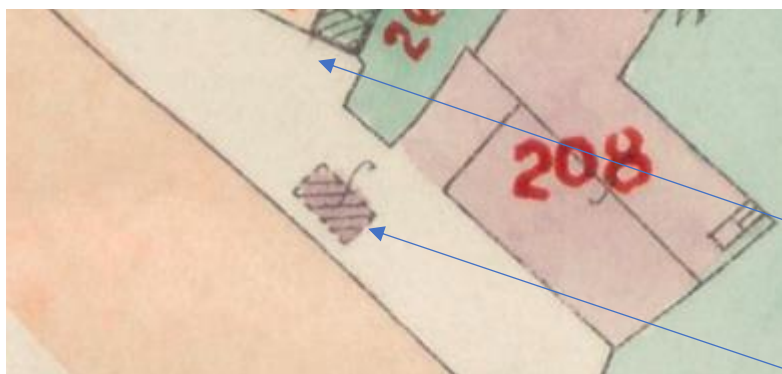
9.15 INLAND REVENUE FINANCE ACT 1909/1910 RECORDS

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 usually 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 generally identified and included in the documentation.

- 9.16 The working copy of the Finance Act plans held at Wiltshire and Swindon History centre (WSHC) have been viewed along with the Record Copy held at The National Archive at Kew. The base maps for these records were the Second Edition of the Ordnance Survey's County Series maps at a scale of 1:2500. The map viewed had been revised in 1900 by the OS and provides the most accurate record of the landscape that we have for this area at that time.
- 9.17 Land that was valued for taxation purposes was shown coloured and given a hereditament number. This number allows reference to a valuation book where deductions are listed. Deductions were permitted where the value of a property was diminished, for example if a public right of way, an easement or a right of common existed. It was common practice for valuers to exclude public roads by leaving them uncoloured and in some instances by re-enforcing their separation from the surrounding hereditaments by drawing on 'broken braces'. Braces were a symbol used by the OS to link or join features and by breaking them the surveyor could show that something was un-connected with an adjoining feature.
- 9.18 The Finance Act is not specific about the exclusion of roads though they may be excluded under s.25 or 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*". Section 25 states that "*the total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and...[other exclusions]*". Details relating to s.25 reductions are found in the Valuation Books, records of any exclusions resulting from s.35 can be seen on the plans where the routes are shown excluded from hereditaments.
- 9.19 Inland Revenue Finance Act 1909/1910 L8/10/67 and L8/1/169 WSHC (working copy) and IR/125/7/332 Record Copy from the National Archive, Kew**

The valuer for the survey in Winterslow was John King of West Winterslow and he signed the valuation book on September 30th 1910. John King established and maintained Winterslow Land Court, was 50 years a church warden, 40 years an assistant overseer and clerk to the parish council and had various other local involvements and titles. For some of his life he ran Old Manor Farm as the family

- 9.21 Hereditament 208 is recorded as belonging to Agnes Bligh of 4 Hill Street, Berkeley Square and occupied by Charles Dear. There are no deductions or easements for the property.
- 9.22 The road now recorded as BOAT WSLO96 is also represented in the same manner as is the local highway network.
- 9.23 **Record Copy IR/125/LXVII.7** The exclusion of the Drove from the surrounding hereditaments is confirmed by the broken red braces in 3 places along the Drove. The area coloured red and green in the extract from the working copy above has been amended slightly and the area previously coloured is now uncoloured and part of the Drove. This indicates a degree of revision or further enquiry following the production of the working copy plan. The process was believed to rigorous and with criminal sanctions for incorrect claims it is not surprising that corrections of this nature were made before plans were made final. Compare with image at 9.20.



building in Drove and altered area

10 CATEGORY C EVIDENCE

Evidence in this category includes local government records (i.e., parish council, rural district council, highway board and county council), that is records whose purpose is connected with the administration of public assets, has legal responsibility for the protection of public rights and assets and is subject to public scrutiny. Includes bodies whose function is the highway authority. These can be important records as they relate to maintenance liability and can be a clear indication of public acceptance of same.

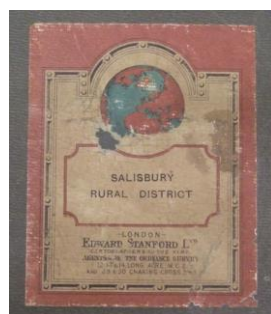
10.1 Records in this category can be difficult to identify as they are often contained within minute books or written records rather than depicted on maps or plans.

10.2 **Wiltshire County Council Highway Records and List of Streets**

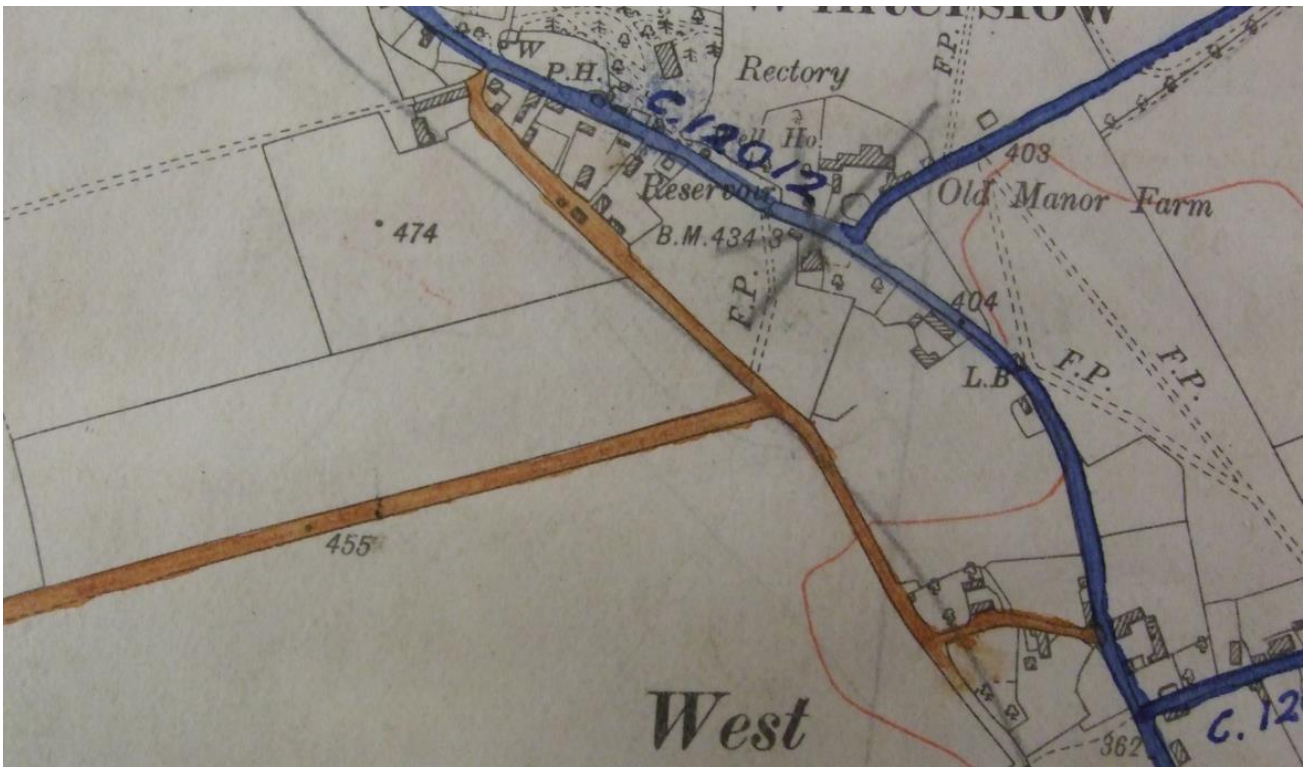
Wiltshire County Council (WCC) has been the highway authority for rural roads in this area since 1929. The Local Government Act 1929 required the then highway authority (Salisbury Rural District Council (RDC)) to hand over maintenance liability for all rural roads to the county council (WCC). It is known that surveyors from the RDCs came into the offices of WCC and coloured on 1:10560 Ordnance Survey maps bought specifically for the purpose of showing the highways that were being handed over. No other single record formalises the handover of RDC highway authority duties arising from the Local Government Act 1929. These maps are known as the Takeover Maps and formed WCC's record of highways maintainable by them until c. 1936 when a new set of 1:10560 Ordnance Survey maps were bought and coloured. These maps have been continually updated since that time and are known as the Highway Record, remaining the council's record of the extent of highways maintainable at public expense (in addition to the definitive map and statement).

10.3 Both the Takeover Map and the Highway Record record the full width of Back Drove coloured brown as a highway maintainable at the public expense. Brown coloured highways are known as 'brown tracks' and represent the lowest maintenance category of highways, often with no grant allocated and in a small number of cases have been found to also have been liable to private repair. They are frequently 'down tracks' or highways requiring little maintenance.

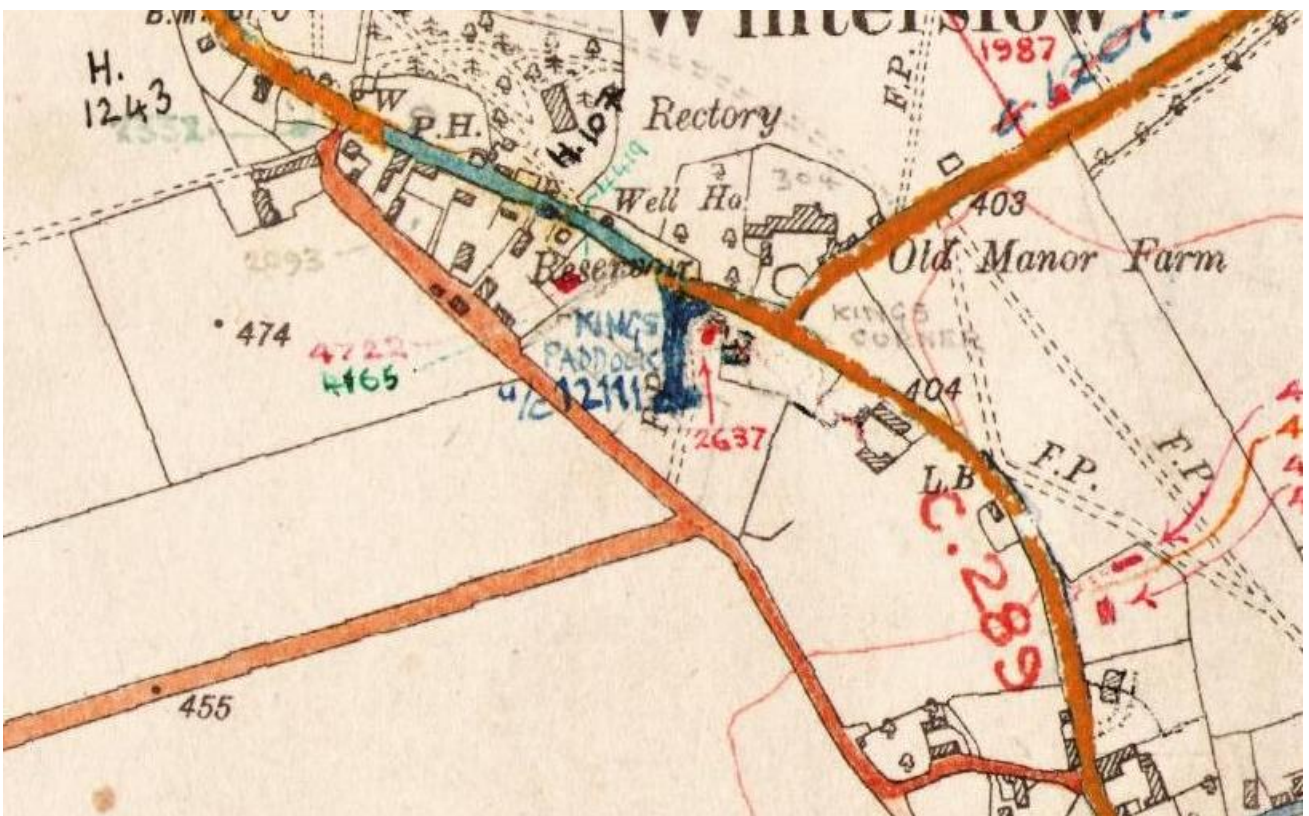
10.4 Takeover Map extract



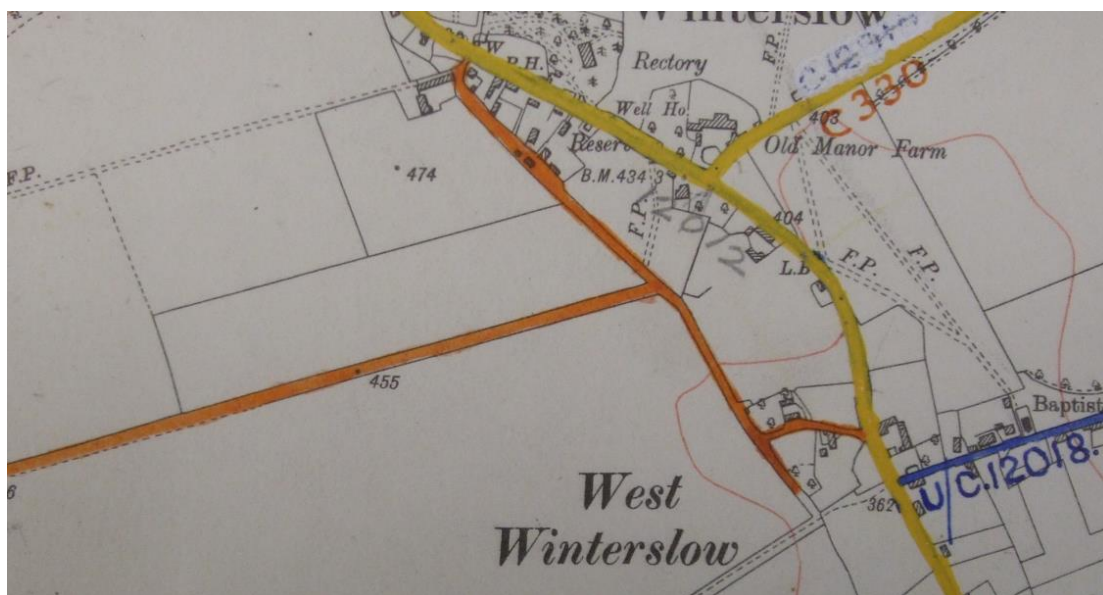
10.5 The underlying base map records two buildings within Back Drove but these have been coloured as part of the highway.



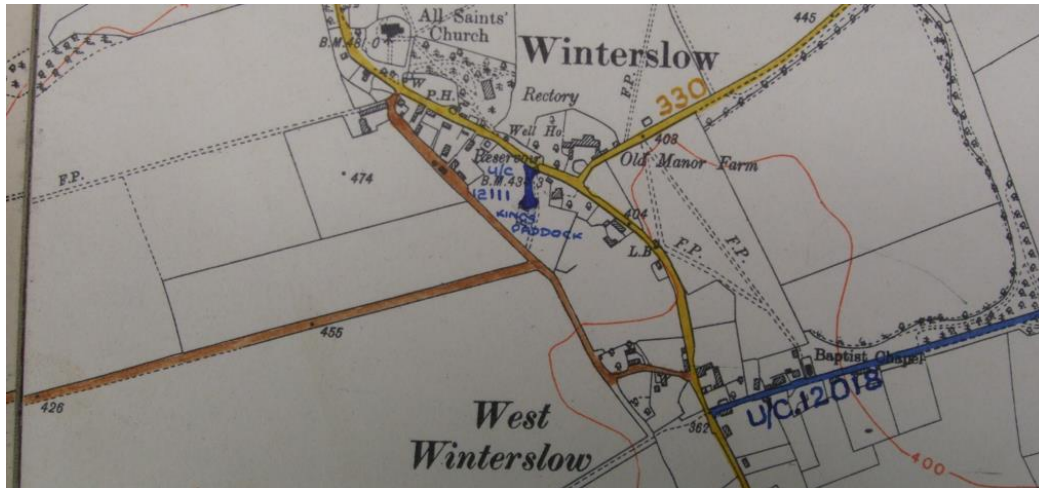
10.6 Highway Record extract:



- 10.7 The Highway Record shown above, subject to continual updating, was retained and managed by the Clerk and Solicitor's Department (now Legal) at WCC until the 1980s but a separate copy of the highway record was produced in 1939 and 1947 by the County Surveyor's Department (now Highways). These copies were produced on 1:10560 Ordnance Survey sheets and bound in leather backed books for the three highway areas (northern, central and southern). They are held at the Wiltshire and Swindon History Centre under catalogue references F4/904/1,2 &3 (1939) and F4/905/1,2 &3 (1949). The maps have been variously kept up to date and annotated, for instance Kings Paddock has been added to the 1947 edition below. The purpose of these records when they were produced was for maintenance liability purposes for the County Sureyor's department, however, later additions suggest a slightly wider use (i.e. bridge team or highways development control).
- 10.8 The representation of Back Drove as a brown coloured highway coloured across its entire width is the same on the 1939 edition and the 1949 edition. The basemap records two small buildings in the centre of the highway, both coloured with the highway.
- 10.9 1939 Edition



- 10.10 1947 edition – note addition of Kings Paddock and slight shortening of southern end Back Drove in this edition. This is indicative of a review of the record in this area and a change in view of the maintenance liability for this short spur. WSLO94 Back Drove is unchanged.



11 CATEGORY D EVIDENCE

Evidence in this category includes other maps, plans or documents which show highways additional to or as a part of their purpose but which were not produced as a result of legislation or subject to consultation. Examples are parish maps, estate plans, conveyances or sales particulars.

11.1 Parish Map – landownership 1641/91 (WSHC) map dated 1841 catalogued as arising 1873 (suggests later use of earlier map)

This map is entitled “Map of the Parish of Winterslow in the County of Wilts 1841” and is drawn at the scale of 8 chains to one inch. It is catalogued by WSHC as an undated copy of the tithe map but it is clearly dated and represents land and roads in a different manner. The map has a key identifying the lands of:

“Reference

Thomas Fracer Grove Esq. Yellow

Saint Johns College Oxford – Blue

Francis Thomas Egerton Esq. Green”

WSLO94 and PIFA31 are uncoloured on this map unlike the road network which is coloured sienna. It is possible that the lack of colouring indicates an unmetalled highway (as they are both droves). If the map really does have a link to the tithe survey (as suggested by the catalogue) then the subsequent colouring of Back Drove in the same manner as the adjoining highway network suggests a deliberate act in the recording of the route, presumably as part of the local road network with no tithe attributable.

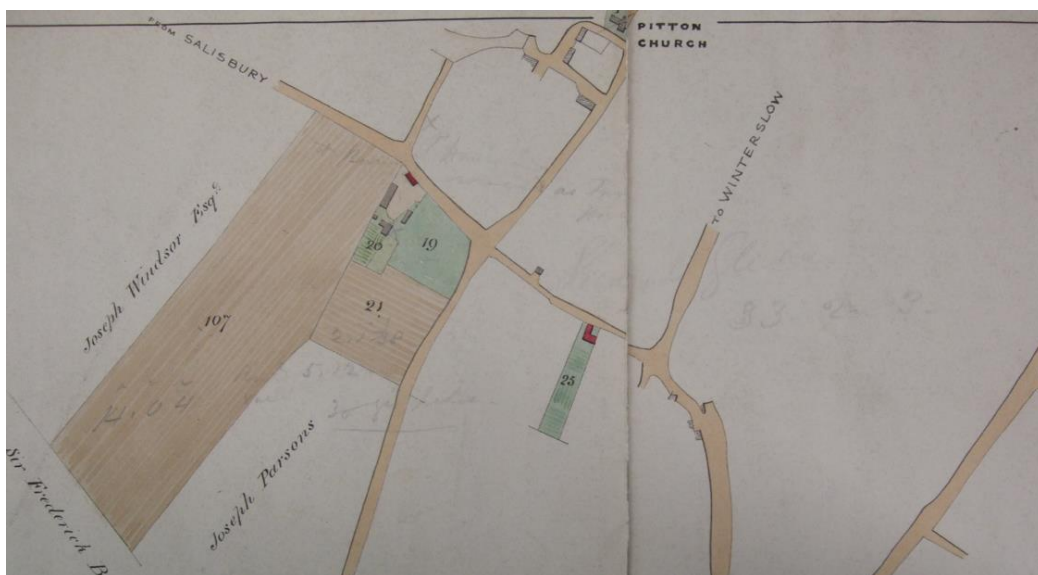
11.2 Although the purpose of this map is unknown (beyond identifying the lands of the 3 owners above) it is clear that there was no building in the middle of the drove as shown on later and current OS maps and that the land was not held by those listed in the key.



11.3 Glebe Plan Pitton and Farley 1845 CC Maps 14 WSHC

This map is entitled “Plan of the Rectorial and Vicarial Glebe Lands in the Chapelries of Pitton and Farley in the Parish of Alderbury, Wilts” and is drawn at the scale of 6 chains to 1 inch by Robert and John Clutton. It is dated Nov. 1845 and has a key showing plot numbers, descriptions, states of cultivation and quantity for the purpose of recording rectorial glebe and vicarial glebe lands.

- 11.4 The plan shows the Pitton end of PIFA31 coloured sienna in the same way as the local road network extending towards Winterslow parish marked “To Winterslow”. The plan acts as further evidence that the road between Pitton and Winterslow used what is now PIFA31, WSLO96 and WSLO94.



11.5 Sales Particulars New Manor Farm 1908 - 3382/111 WSHC

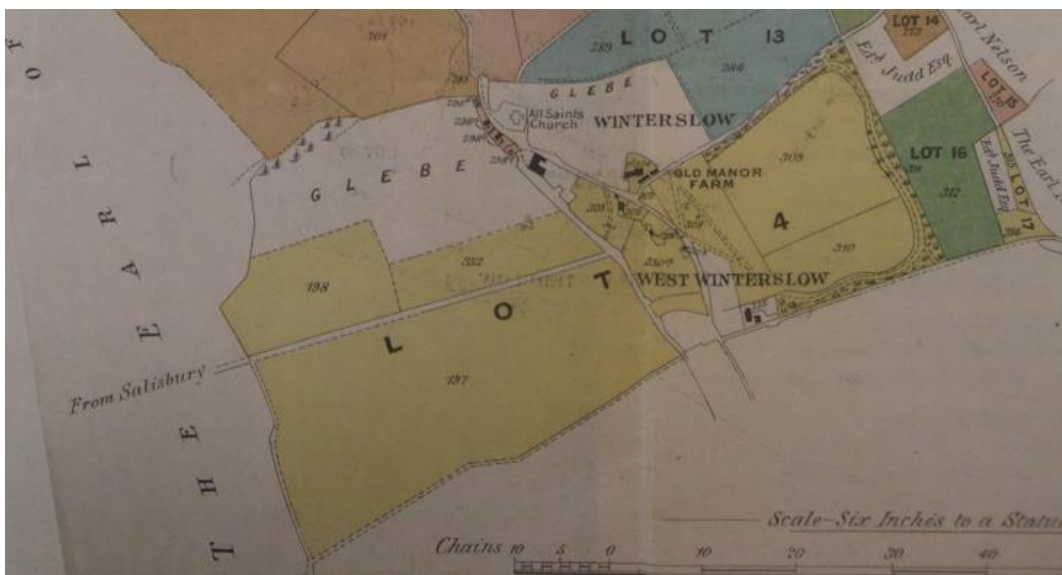
The New Manor Farm was advertised for sale in 1908. It was originally part of The Winterslow Estate but was being offered for sale as a separate entity. The sales particulars have been viewed and confirm that land associated with New Manor Farm do not extend as far south as Back Drove, although the northern end is shown on the sales plan:



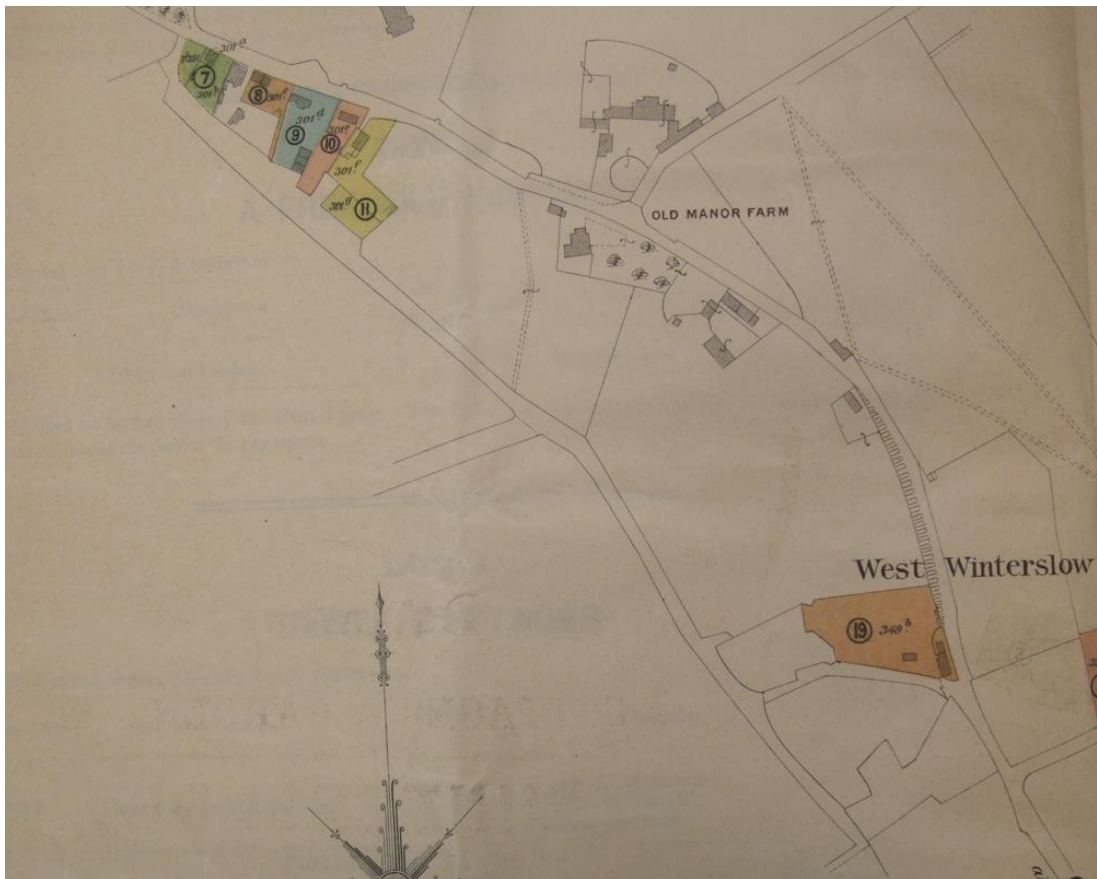
11.6 Sales Particulars The Winterslow Estate 1902 - 1641/87/2 & 3 WSHC

These particulars detail the extensive sale of 22 lots of the Winterslow Estate comprising over 1000 acres. The lots include New Manor Farm (see above) and Old Manor Farm along with 20 cottages and gardens and various enclosures. The lands and dwellings being sold variously adjoin Back Drove throughout its length and no part of Back Drove is included in any of the properties, or the sale.

11.7 Lot 4 is Old Manor Farm and details the sale of land now largely part of Manor Farm. Back Drove is excluded from the sale (in same manner PIFA31 and other local highways are).



11.8 Additional lots for smaller parcels and cottages are shown on other plans. Properties adjoining Back Drove are shown for sale but Back Drove is excluded.



- 11.9 It is noted that although properties adjoining Back Drove were consulted for this investigation officers have not been made aware of any specific grants or easements relating to Back Drove granted at the time of this sale.
- 11.10 It is further noted that the extent of properties 9 and 10 being sold are as per the Record copy of the Inland Revenue Finance Act Record plan but that the extent of property 11 does not include the building in the Drove. It is not explained how in 1902 (the time of this sale) the building in the Drove was not part of Lot 11 but by 1909/1910 it was declared to the Inland Revenue as being so. This may be explained by the building simply not being recorded on the sales plan above.

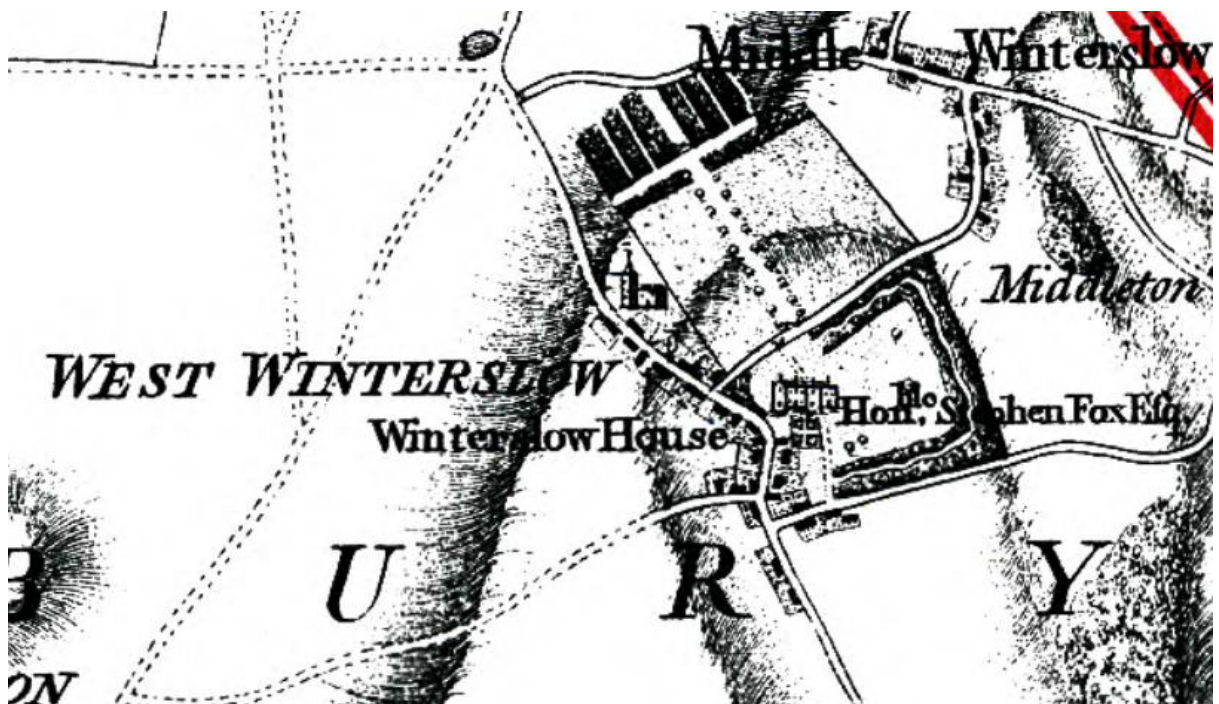
12 CATEGORY E EVIDENCE

Evidence in this category includes commercial maps and Ordnance Survey maps, plans and documents. It is usual for there to be some evidence in this category and it is important to bear in mind the originality and purpose of the documents. The value of this group of evidence lies in the continuity of records over a long period of time and any differing origin. It must be borne in mind that this group of documents would have had the largest public circulation outside of the parish.

- 12.1 Not all commercial maps are derived from the same surveys and although there is some duplication of Ordnance Survey derived material, a number of surveyors of early maps produced independent surveys. Hence it is useful to compare the early county maps produced by Andrews and Dury, John Cary and C & I Greenwood and also those of the Ordnance Survey as all were independent surveyors.
- 12.2 It must also be considered that even when surveys produced by the Ordnance Survey were used by other map makers there was considerable scope for revision and updating specific to the individual purpose. For example, maps produced by Bartholomew were continually revised and early versions were verified by the Cyclists Touring Club and Popular Series maps produced by the Ordnance Survey were revised with reference to highway surveyors.

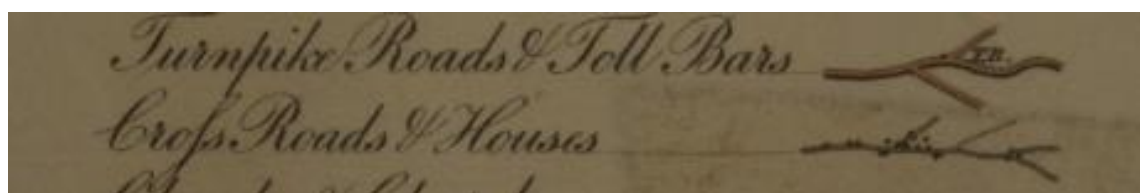
12.3 Andrews and Dury's Map of Wiltshire 1773

This map was produced at the scale of 2 miles to one inch and does not have a key. However, it is generally considered that owing to the scale of the map it only recorded vehicular routes with a convention for solid lines for routes bounded by hedges or fences. The pre-enclosure (182) route of PIFA31 is shown as a route connecting Pitton with Winterslow but there is no feature corresponding to the northern part of Back Drove shown. The map is not sufficiently detailed to add very much in the way of evidential weight though does show the location of Winterslow House (the Fox family having bought the Manor in 1765) before it was destroyed by fire in 1774.

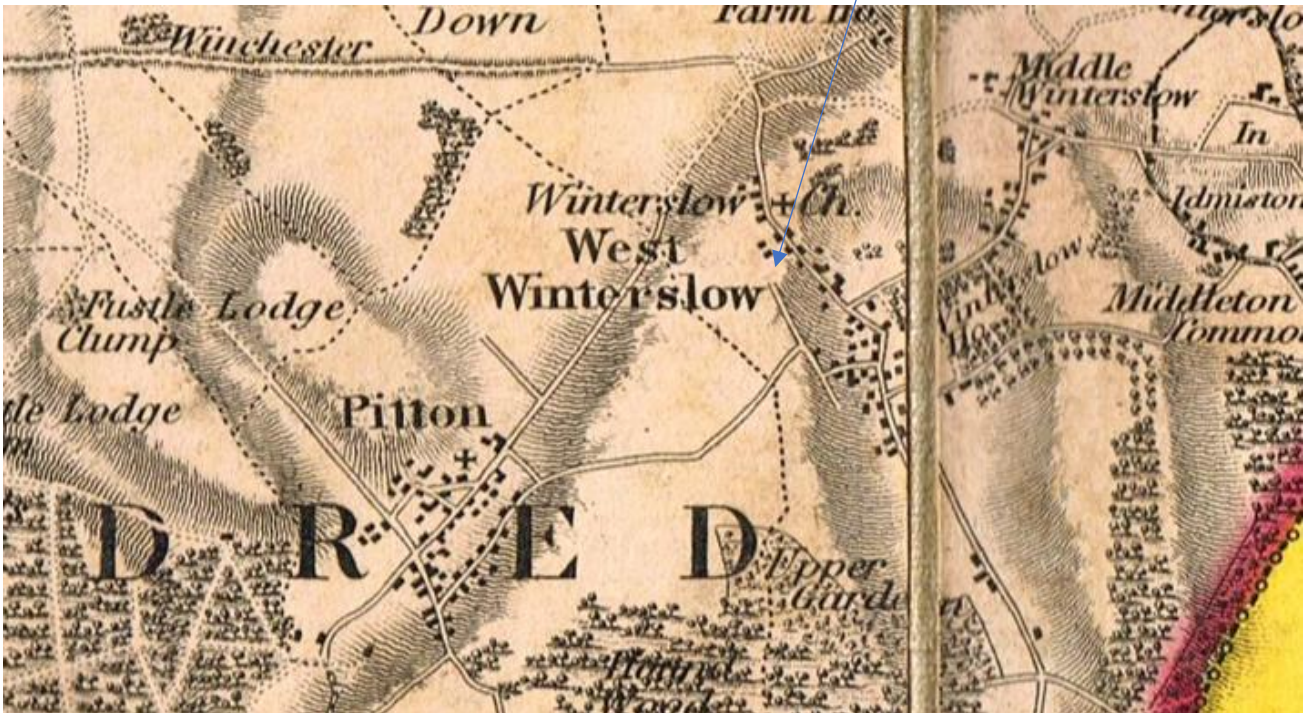


12.4 C and I Greenwood 1820

This county map, again from an independent survey was produced at the scale of one inch to the mile in 1820 and then produced in 1829 as a revised and reduced version. The map has a scale and shows, amongst other things, Turnpike Roads and Cross Roads, Rivers and Brooks. The map does not show footpaths and brideways.



12.5 PIFA31, now enclosed, is clearly shown leading into a north Cross Road that is likely to be Back Drove, also now enclosed. The northern end of the route is not shown suggestive of either only partial enclosure or partial surveying of minor routes. Taken at face value a comparison of the 1773 map of Andrews and Dury and the 1820 map of Greenwood suggests inclosure of this area of Winterslow may have occurred in the period 1773 – 1820. Significantly from a maintenance liability perspective this would pre-date the 1835 Highways Act. It is certainly clear from more detailed parish maps that by 1842 a wide fenced drove was established.



12.6 The term 'cross road' is a historic term used to describe routes that were not primary or turnpike roads. Susan Taylor in her book entitled "What is a Cross Road?" ISBN 0 9530573 0 5 records:

"The earliest mention of a 'cross road' so far discovered is found in John Ogilby's famous road book Britannia, published in 1675. Ogilby chose this term to distinguish secondary roads, which ran across country from one provincial settlement to another, from primary roads (which he called 'direct roads') which began in London and led to a provincial town or city..."

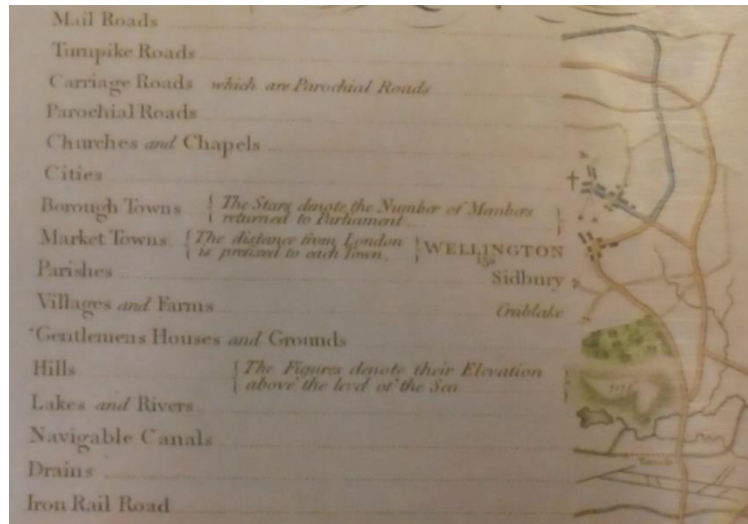
12.7 The Planning Inspectorate's Consistency Guidelines records at section 12:

"Hollins v Oldham 1995 C94/0206, unreported. Judicial view on cross roads: 'Burdett's map of 1777 identifies two types of roads on its key: firstly turnpike roads, that is to say roads which could only be used on payment of a toll and, secondly, other types of roads which are called cross roads... This latter category, it seems to me, must mean a public road in respect of which no toll was payable.'"

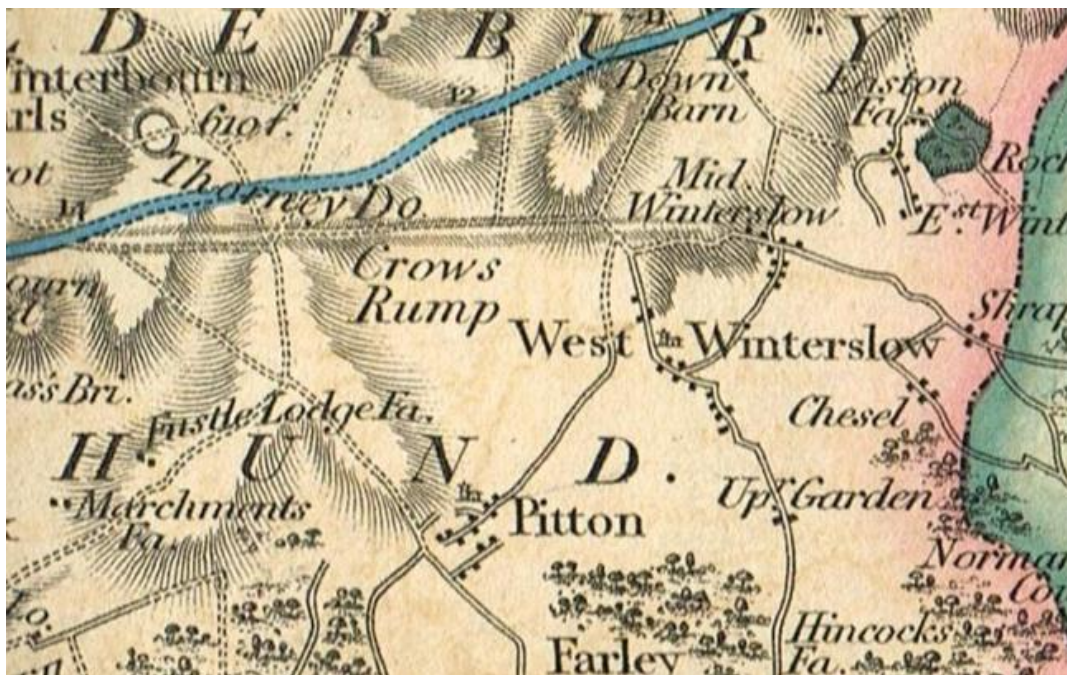
12.8 Greenwoods Map of Wiltshire has an extensive key featuring 19 items. Like Burdett's map described in the case of Hollins v Oldham, there are 2 categories of road: "Turnpike Roads" and "Cross Roads".

12.9 **John Cary's Half Inch Map 1832 (WSHC Ref. no 3.4)**

Cary's half inch map has a key which differentiates Mail Roads, Turnpike Roads, Carriage Roads which are Parochial Roads and Parochial Roads.



12.10 Cary's map fails to record PIFA31, WSLO96 or Back Drove. This is at odds to other evidence, not least the Inclosure Award for Pitton and Farley, and is suggestive of either poor surveying in this area or perhaps a slightly different purpose for this survey. The survey may have relied heavily on Cary's earlier surveys (pre-dating enclosure) for smaller scale county maps.



12.11 **ORDNANCE SURVEY 'Old Series' one inch to one mile map 1817 and OS drawing 76 (The British Library) 1807 - 1808**

In preparation for the production of the first countrywide 1 inch to 1 mile maps (now known as 'the old series') the Ordnance Survey surveyed the country at the scale of 2 inches to 1 mile. The route of PIFA31 is shown leading into the southern part of Back Drove but the northern section is not shown:



12.12 The survey drawing was used to produce the 1" to one mile map. West Winterslow is shown on Sheet 14 published 14th August 1817 by Colonel Mudge, Tower. The route of PIFA31 is shown leading into Back Drove but the northern continuation of Back Drove is not shown.



12.13 Ordnance Survey Mapping – The County Series 1:2500 1874 – 1925 Sheet LXVII.7

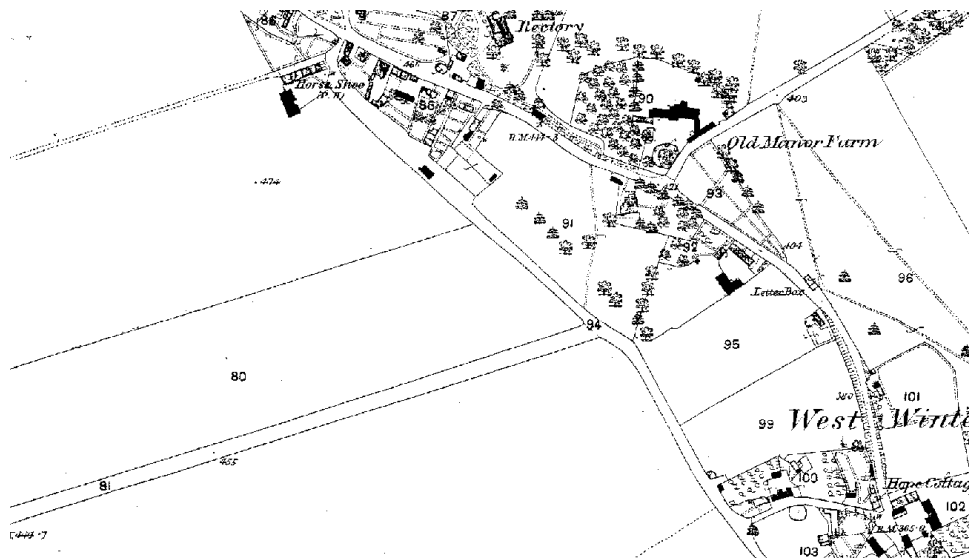
The 1:2500 scale was introduced in 1853-4 and by 1896 it covered the whole of what were considered the cultivated parts of Britain. Sheet LXVII.7 (67.7) covers the claimed route. J B Harley, historian of the Ordnance Survey, records that “the maps delineate the landscape with great detail and accuracy. In fact, practically all the significant man made features to be found on the ground are depicted. Many phenomena make their debut on the printed map and as a topographical record the series transcends all previous maps. Every road...., field...., stream and building are shown; non-agricultural land is distinguished...quarries, sand, gravel and clay pits are depicted separately; all administrative boundaries...are shown;...hundreds of minor place names...appear on the map for the first time. Where appropriate, all topographical features are shown to scale. The series is thus a standard topographical authority”.

- 12.14 Richard Oliver in his book “Ordnance Survey Maps a complete guide for historians” recognises that surveying errors (and paper distortion during printing) cannot be ruled out, particularly where detail is sparse, but in practice such errors are likely to be very hard to demonstrate, because of a general paucity of suitable sources rivalling or bettering the OS in planimetric accuracy and completeness of depiction.”
- 12.15 Ordnance Survey maps from 1888, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.
- 12.16 It was the practice of the OS to allocate parcel numbers to distinct pieces of land and measure them. These are numbered and recorded on the map as acreages. Where applicable parcels were ‘braced’ with adjoining parcels – for example a pond in a field may be braced with the adjoining land or a track across a field may be braced in with the surrounding land and measured with that. However, some features “*are always separately numbered and measured irrespective of their size. They include railways in rural areas (in built up areas they may form part of ‘Town area’), all public roads, whether fenced or unfenced and foreshore and tidal water....*” (From Ordnance Survey Maps a descriptive manual by J B Harley published by the Ordnance Survey 1975). For the earlier (to 1879) First Edition maps the OS produced a Book of Reference (or Acreage Book) in which parcel numbers were listed against acreages and land use. The book was not produced for the Second Edition maps (1900/1901) and for these (and subsequent editions) the parcel number and acreage was printed on the sheet. Land use information was dropped.
- 12.17 It is noted that the WCC Takeover Map and Highway Record are both based on OS 1:10560 maps. These maps are a digital reduction of the 1:2500 maps and it is considered reasonable to consider the greater detail portrayed at the larger scale in interpreting the smaller scale maps. The smaller scale (1:10560) maps are not

included here but are the base maps for the Takeover maps and the highway record maps.

12.18 First Edition 1874 1:2500 original

Back Drove is shown as a wide route separately numbered 94 (PIFA31/WSLO96 is separately measured and numbered 81 in the same way). PIFA31/WSLO96 is shown joining the boundary of Back Drove (not crossing it to join a track) and no track of carriageway is drawn within the boundaries of the route. A building is shown within the route corresponding with part of the workshop that is there today and is likely to be the same one depicted in the 1909/1910 Finance Act plan.

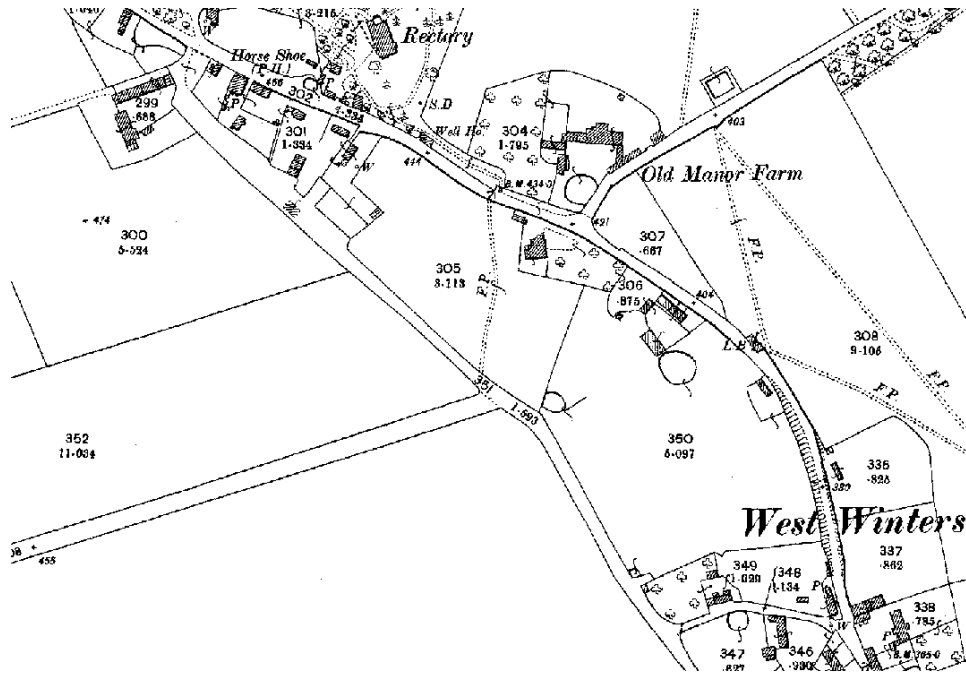


12.19 Below is an overlay of the modern OS map (thin lines) with the First Edition County Series above. It can be seen that there is substantial overlap of the building with additional structures added in the intervening years:



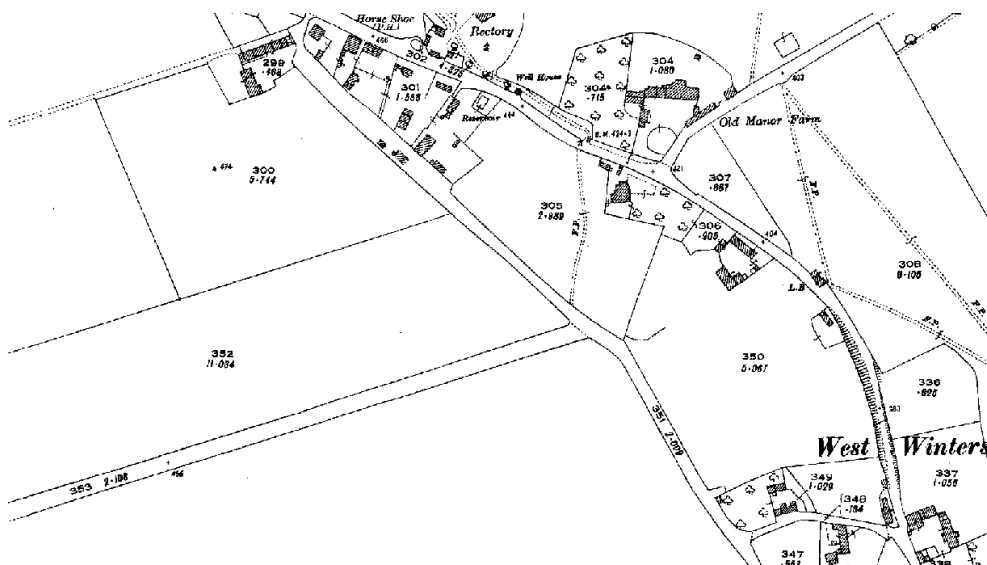
12.20 Second Edition 1901 1:2500 original (Survey 1874 Revised 1900)

The route has clearly been revised with small alterations to the boundaries of some of the properties. The footprint of the building in the middle of the Drove remains unaltered and has been braced with the Drove for parcel measurement purposes. No track or carriageway has been recorded within the Drove.



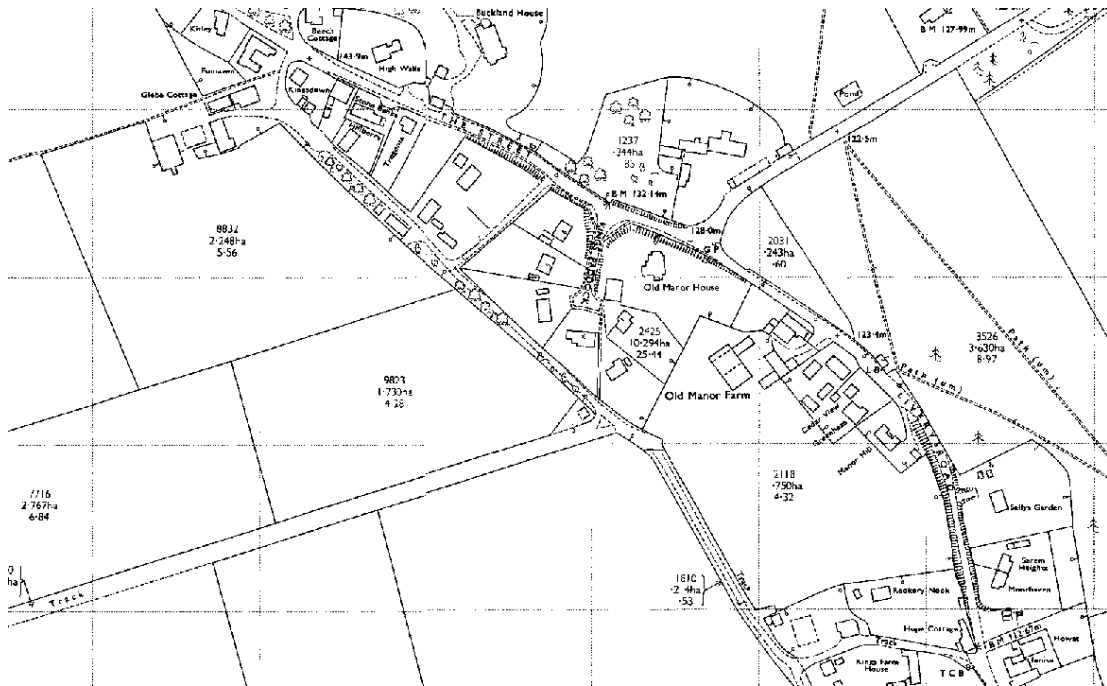
12.21 Edition of 1925 1:2500 original (Survey 1874 Revised 1924)

Further small changes to boundaries of the measured area have occurred at the northern end of the Drove and an additional building is recorded north west of the existing building in the middle of the Drove. No track or carriageway is recorded within the Drove.

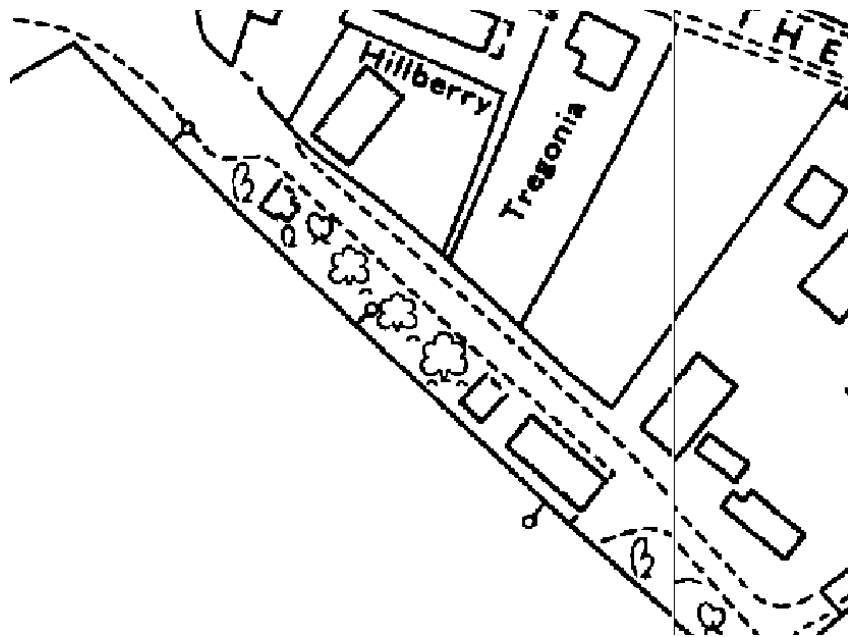


12.22 National Grid Series 1:2500 original survey 1952 onwards

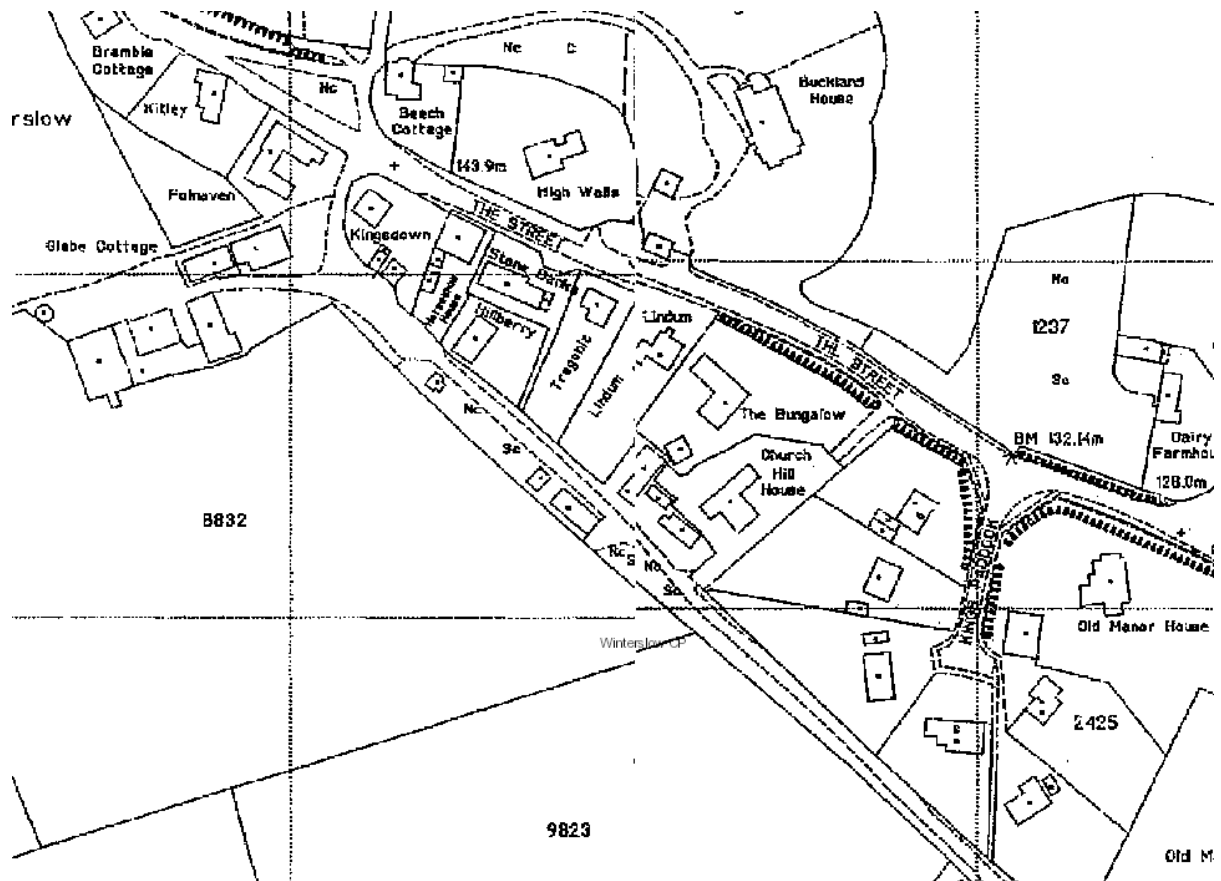
The survey date of this map is not currently known, it being recorded in the source data on the Council's GIS system as 1952 to 1992. However, it is considered likely to be c. 1960/1970. The map shows a track along the Drove and the buildings are consistent with those recorded in the 1925 County Series map. At this time the junction with PIFA31/WSLO96 is wide and well established.



12.23 By this time another small building has appeared in the Drove opposite Hillberry and vegetation is recorded west of the track though the land within the Drove remains unenclosed.



12.24 **National Grid Series 1:2500 'super plan'** surveyed at a later date to the above shows little change to the buildings in the Drove but shows the addition of Church Hill House and Lindum putting the date of this map as later than the above, possibly 1980s/early 1990s. The Drove remains wide in the area behind Horseshoe House and unenclosed.



13.0 CATEGORY F EVIDENCE – Evidence of repute or other evidence

13.1 **Evidence of Mr K Horner.** Mr Horner telephoned the Council and subsequently wrote describing his own recollections of the route from being a lifetime resident and from playing there as a child in the 1960s. He recalls the following:

“On Winterslow 94 Consultation Map our workshop is the second property on the right from entrance point B. At the point where the track meets the road there is a very old cottage, probably in excess of 200 years old. On the other side of the track entrance is a well cap that has a significant concrete cover on for safety. This was, I am told, one of a series of wells that supplied the village with water hundreds of years ago. At that point the track is approximately 12-15 feet wide and in my memory (64 years of age) the bottom part of Back Drove has always been narrow. This is highlighted by Kings Farm which is end on to the track and I think is in the process of being listed and dates of 1400's have been mentioned.

The track passes our workshop (first building on the right on '94 map and 1909 map) and at the point where footpath WSL0113 branches off the track was for my childhood only a single-track footpath, it has been recently opened up for limited farm use.

The top end of Back Drove from the point where WSL093 intersects has always been wider and "The Drain" as its locally known (WSL096) was and still is a very wide track. As a child the top end was always referred to as 'Common Land' and many parts of it were overgrown. The single building on the left of this common land was erected by Ronnie Deare possibly around the early 1900's, the rest of the widened area was un-used."

13.2 Mr Horner's comments are helpful, confirming the map evidence that the northern Drove has until recent times been wide ('known as Common Land'), though overgrown during the 1960s. He also points out that the route was historically narrow at the southern end being limited by very old buildings. Officers agree with this point. His recollection of the building being erected by Mr Deare is not disputed though the date appears earlier (a building is shown in the 1874 OS survey, though not the 1841 Tithe survey), however, that is not to say that Mr Deare's building was not a re-build of an earlier small building.

13.3 **Evidence of Mr J Garbutt** of Horseshoe House. Horseshoe House backs onto Back Drove. Mr Garbutt has absolute freehold title for the dwelling house and lands adjoining (WT129235) but the land over which a garage has recently been built (2017/2018) is not registered with Land Registry. Mr Garbutt relies statutory Declarations from 1959, 1993 and 2017 stating free and undisturbed possession of the Drove beyond the track behind Horseshoe House. In his possession he has, and does rely upon, the following documents:

- 1) Statutory declaration 1st July 1959 land rear of Horseshoe House
- 2) Statutory declaration 27th October 1993 land rear of Horseshoe House
- 3) Statutory declaration 31st August 2017 land rear of Horseshoe House
- 4) Approved planning permission 72FY567500 dated 04 October 1977 building at rear of Horseshoe House
- 5) Planning permission 18.02.1992 pair of garages land at rear of Horseshoe House
- 6) Approved planning permission 17/02999/FUL Documents referred to above presented to planning authority prior to approval. Carport/garage built
- 7) Epitome of the Title Deed plan attached dated 1st July 1959
- 8) Epitome of the Title Deed date 1993
- 9) Photograph of Back Drove showing my land and newly constructed carport/garage

13.4 Mr Garbutt also writes:

"It is my understanding that the land was fenced and used many, many years ago, in the late 1800s onwards, as an area where the local farmers would leave their livestock securely, while they had refreshment at the public house, as Horseshoe House was, until 9th July 1959, when it was converted to a residential property. Hence the historic name Back Drove as this was where farm animals were driven to market.

It would seem any extension of the 10 ft width of the Drove behind my house would impact on the land I own and the recently built carport/garage, that was approved by the Council after investigating my ownership during their planning permission process."



- 13.5 Mr and Mrs Garbutt purchased Horseshoe House in 1993 from Mrs M E Fry. The plan attached to the Transfer shows the house and curtilage edged in red and this now forms WT129235. A parcel of land edged in blue showing a brown area corresponding to the track and an area beyond (where the garage has been built) forms part of the transfer and relates to land conveyed by Strong and Co to Mr R E Fry of The Old Manor House in 1959. The land edged blue remains unregistered. An application to register it was made and withdrawn in 2017.

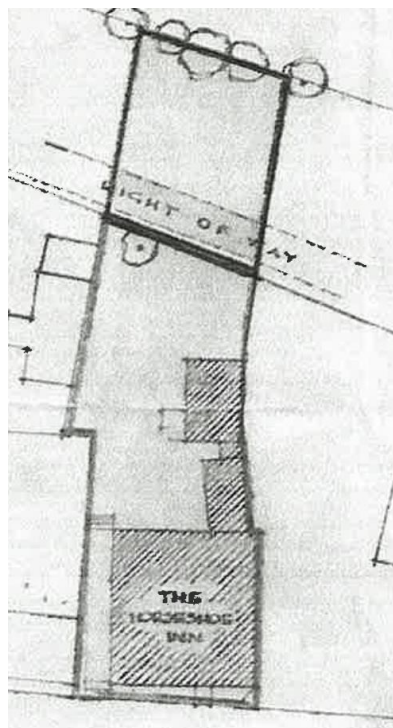


- 13.6 The conveyance of 1959 between Strong and Co and Mr Fry contains a declaration from the Director of Strong and Co who was a member of staff for 31 years and was well acquainted with The Horseshoe Inn during the period 1928 and 1959. He relies on a coloured plan and states:

“During the whole of the time I have been a member of the Staff or a Director of Strong and Co of Romsey Limited that Company has been occupant or in

possession of the whole of the said property shown coloured Pink and Brown on the said plan and I verily believe in the full free and undisturbed possession and enjoyment of the rents and profits thereof without any adverse claim save such rights of way as now exist over such part of the property as is shown coloured Brown on the said plan.”

Black and white copy supplied:



- 13.7 A declaration from Mrs M Fry accompanying the 1993 transfer confirms full free and undisturbed possession and enjoyment of the property since her husband's death in 1991.
- 13.8 The property history supplied by Mr Garbutt is helpful in understanding the history of the property since 1928 insofar as the view that the land to the rear of Horseshoe House, subject to a highway right over part of it, forms part of that property. There is however a lack of evidence from the Ordnance Survey that the land was enclosed during that period.
- 13.9 In 1902, when the Winterslow Estate was broken up and sold, Horseshoe House (between Lots 7 and 8) was not included in the sale suggesting that, at that time, it did not form part of the Winterslow Estate. Strong and Co owned Horseshoe House in 1910 (Finance Act evidence) but not the land behind it. No part of the Drove was offered for sale in the 1902 sale but no evidence has been found as to the conveyance of the additional land to Strong and Co. If ownership was based on possession, it is not possible in law to adversely possess highway land even if as a matter of fact, you do occupy it..



13.10 In 1910, as part of the Inland Revenue's Finance Act valuation no part of the Drove was recorded as part of Horseshoe House (Record copy Hereditament 191):

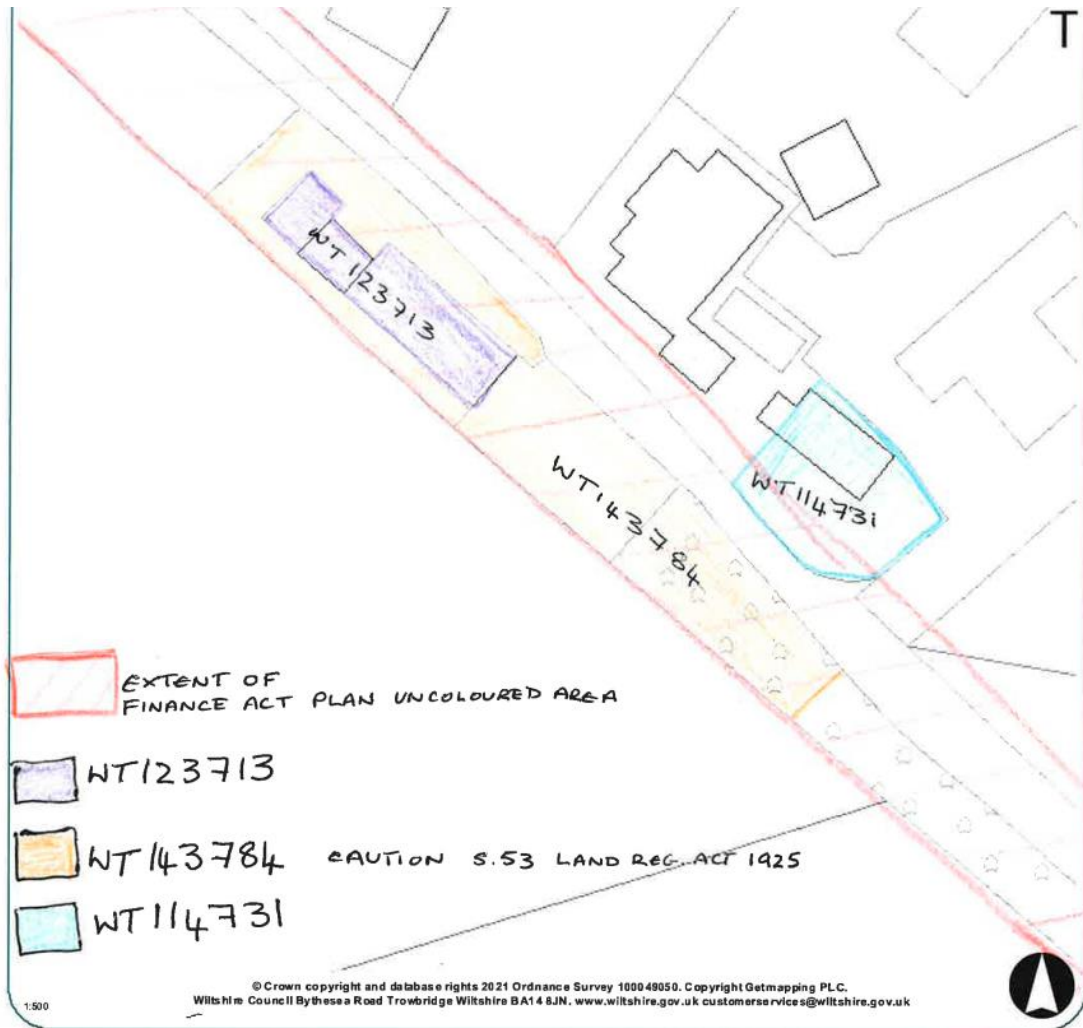


- 13.11 The working copy numbers Horseshoe House as no. 195 (though records the colouration in the same way) and the valuation book lists it as “Horseshoe” owned by Strong and Co, Romsey. There are no deductions claimed for public rights of user or easements.
- 13.12 Hence it appears that while it is not disputed that owners of the Horseshoe House, and previously The Horseshoe Inn have enjoyed free access and use of the land to the rear of the property (notwithstanding highway rights were believed by them to only be along a defined track) since 1928, there is nothing prior to 1928 to support ownership of the freehold to that land. This is consistent with a highway right subsisting over the surface of the Drove and vested in the local authority (as shown in the Finance Act 1909/1910 plan and the Council’s Takeover Map of 1929).
- 13.13 Ownership of the subsoil of the Drove is not a matter for this enquiry or report, though, if a highway right is found to subsist over the whole width, any structure at Horseshoe House would be an encroachment onto it. In instances where this occurs a pragmatic approach may be taken and applications to extinguish that right over a selected area can be successful.

13.14 **Other Land Ownership Matters**

The majority of the length of Back Drove is not registered with Land Registry and enquiry has been made of the owner of neighbouring farmland, E A Barton and Son, Old Manor Farm. It has been confirmed by Georgina Wigmore (10 July 2023) that they own the farmland adjacent to Back Drove but has reverted to her solicitor who holds the deeds to the farm and who can confirm the boundaries. No response to their further enquiry has yet been received. It is certainly apparent that when their land was sold as Lot 4 in the 1902 Winterslow Estate sale, no part of the Drove was offered for sale with it.

- 13.15 Land ownership in the region of Mr Northeast’s workshop is however more complicated and is covered by 3 titles:



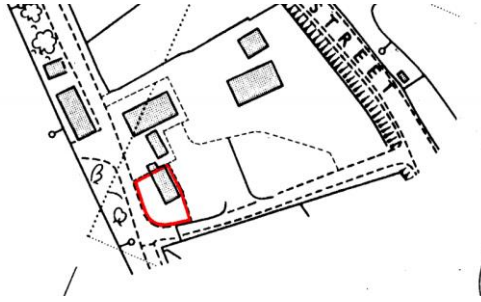
13.16 WT114731 Land at Back Drove Registered 1992 Title Absolute

The land was purchased by Mr Northeast in 1992 from Mr and Mrs Collins. Mr and Mrs Collins purchased the land in 1984 from Mrs P M Dear. Mrs Dear conveyed the property with the following right:

TOGETHER WITH (so far as the Vendor is able to convey the same) the right for the Purchasers and their successors in title owners or occupiers for the time being of the said property and their agents and employees and licensees at all times and for all purposes connected with the said property with or without vehicles machinery or livestock to pass and re-pass along the road or way delineated on the plan annexed hereto and thereon coloured green leading from the said property to the public carriageway.

NOTE: The road or way coloured green referred to is that adjoining the South Western boundary of the land in this title.

13.17 No copy of the plan referred to has been viewed and the Title plan appears thus:



The South west boundary would be that boundary adjoining Back Drive. The derivation of this right is not apparent from the title papers.

13.18 WT123713 land and buildings at Back Drive (sic), The Street Registered 1993
Title Absolute

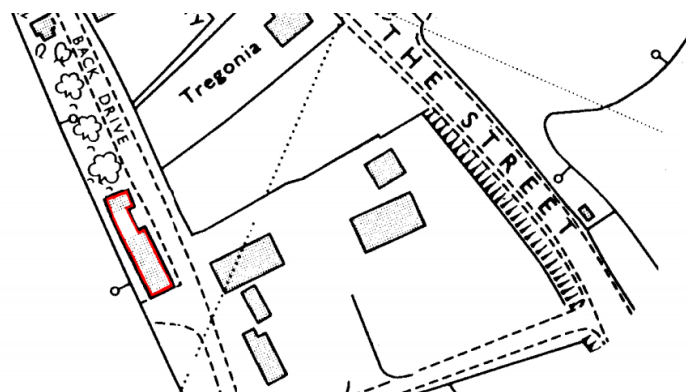
The land was registered in 1995 by Mr N Northeast. It was originally registered in 1993 and has the benefit of rights granted by conveyance in 1984 between Mrs P M Dear and Mr and Mrs Collins.

"TOGETHER WITH the right to retain and use the existing electricity and telephone cables crossing the property retained by the Vendor situated immediately to the north-east of the property hereinbefore described with the right to enter thereon for the purpose of maintaining and repairing the same."

And:

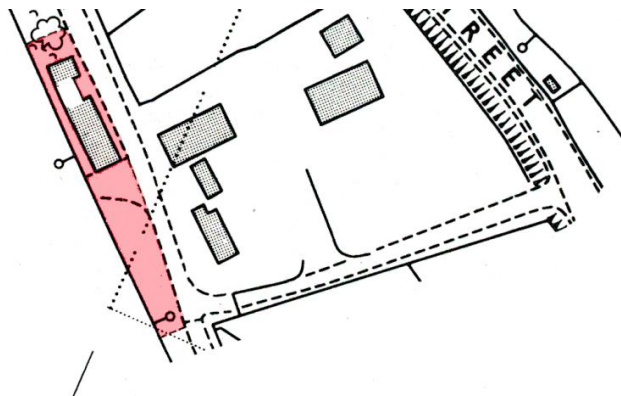
"TOGETHER WITH (so far as the Vendor is able to convey the same) the right for the Purchasers and their successors in title owners or occupiers for the time being of the said property and their agents and employees and licensees at all times and for all purposes connected with the said property with or without vehicles machinery or livestock to pass and re-pass along the road or way delineated on the plan annexed hereto and thereon coloured green leading from the said property to the public carriageway."

NOTE: The road coloured green referred to is Back Street.



- 13.19 It is this property that is, in part, coincident with the building in the Drove first recorded by the Ordnance Survey in 1874.
- 13.20 Titles WT123713 and WT114731 both contain a right granted by Mrs P M Dear to access the property along WSLO94. It is not known whether Mrs P M Dear claimed to own any part of The Drove (referred to in this document as Back Drive and Back Street) and hence an ability to grant a right (regardless of necessity) or whether she was passing on a right previously recorded and granted or conveyed to her during an earlier conveyance.
- 13.21 **WT143784 Caution Lodged under section 53 Land Registration Act 1925. Lodged 1995**

This caution was lodged in 1995 by Mr N Northeast is covers the land surrounding WT123713 as shown below:



- 13.22 The Statutory Declaration accompanying the caution sets out that the cautioner is interested in the land as successor in title to Reginal Bryan Collins and Marian Jane Collins to the land.
- 13.23 This is an 'old style' caution registered under the Land Registration Act 1925 and is an entry in the register in respect of a claim to an interest in the land and is preserved under the Land Registration Act 2002. A newer type caution is against first registration. Mr Northeast's interest in the land is not specified but it is reasonable to assume he wishes to protect various rights or benefits he has over the land, not least as successor in title, and related to WT123713 which is registered to him. Despite requesting a copy of the statutory declaration made by Mr Northeast, Land Registry have been unable to provide one. It is understood from conversation with Mr Northeast that he has copies and of the statutory declaration and the document conveying the land to him from Mr (or Mrs) Dear. The reason for the caution being made against Mr and Mrs Collins is not clear to officers but is considered largely irrelevant to the determination of public highway rights.

14.0 Summary and discussion of the evidence for a wider highway right

There are two questions for this report: Is, on the balance of probabilities the extent of the public highway WSLO94 (Back Drove) wider than 10 feet, and, if it is, what public rights exist over the additional width. The evidence assessed is historic and, in the absence of any legal events stopping up highway rights, relies on the legal maxim 'once a highway, always a highway'.

14.1 Width

The representation of WSLO94 as a byway open to all traffic in the definitive map and statement is conclusive in law that a public right for mechanically propelled vehicle and all other classes of user exists over a width of 10 feet. The definitive map is not specific about where within the greater fenced width that 10 feet is (the line on the definitive map fills the entirety of the enclosed route), though it seems likely that the used track is the most reasonable interpretation, albeit this is wider than 10 feet.

- 14.2 Back Drove is fenced away from neighbouring properties for its entire length and is of varying width. It is joined along its length by BOAT WSLO96, a continuation of PIFA31, a 30 foot wide Public Carriage Road awarded by Act of Parliament in 1820 in the neighbouring parish of Pitton and Farley. It was awarded as a road to Winterslow and the inclosure award records that it follows its usual track. Accordingly this route pre-dates 1820 and as a route to Winterslow ("The Winterslow Road" has to use some or all of Back Drove, WSLO94.
- 14.3 Small scale commercial maps of the period suggest only partial enclosure of Back Drove though there are significant questions relating to the scale of these maps and accordingly the levels of accuracy that can be attributed to them. Greenwood's map of 1820 records parts of Back Drove both north and south from WSLO96/PIFA31 as a Cross Road and the more detailed, larger scale survey for the Tithe Commissioners in 1841 record a fully enclosed road linking WSLO96/PIFA31 with Back Drove extending north to the church and also south on the routes the Drove follows today.
- 14.4 It is therefore clear that by 1841 there was definitely a wide fenced route and that it was depicted in the same manner as the local road network. As a through route to Pitton parts or all of it existed much earlier than this. The creation of PIFA31 as a wide Public Carriage Road in 1820 may have precipitated the creation of the fenced wide drove we see today (Back Drove) as it would have made little sense to connect the wide Winterslow Road (PIFA31/WSLO96) with only the narrow section of WSLO94 that connects with Livery Road. The fences of Back Drove were either laid out with respect to an existing route (PIFA31 as The Winterslow Road) pre-dates 1820) or laid out with the intention of dedicating the land as public highway. In either scenario the likelihood is that it happened before 1835 and was accepted by the public as evidenced by either the Tithe survey of 1841, the Finance Act 1910 or the

RDC highway takeover map of 1929. The evidence supports the whole width being highway maintainable at the public expense.

- 14.5 Back Drove has been consistently recorded as a wide drove in the same way as the local road network since the cadastral survey of 1841 and was also excluded from the Inland Revenue's Finance Act survey in 1910. In the latter survey it was excluded in the same way as the local highway network by being uncoloured, un-numbered and deliberately braced apart from adjoining hereditaments by broken red braces. The Record copy held by the National Archive shows some revision in small places of the Drove suggesting close scrutiny of the record between the production of the working and the record copies. The valuer was a John King, a man of good local repute and closely associated with both the land in this area and local government affairs.
- 14.6 The exclusion is likely to be based on s.35(1) of the Act: *No duty under this part of the Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.* The practice could also be compatible with s.25(3) which states *that the total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject...any public rights of way* but less likely where the land was not included in a hereditament.
- 14.7 This interpretation is consistent with the recording of the whole width of the drove as a highway maintainable at public expense as handed over by the Rural District Council just 19 years later in 1929, i.e. a rating authority.
- 14.8 The Planning Inspectorate's Consistency Guidelines point out at 11.2.7 that exclusion can also apply to private roads laid out at inclosure for the use of a number of people but without ownership being assigned to any individual. No evidence of such an award has been found and no adjoining property claims to have been granted such a right ('a private right'). Given the relationship of WSLO94 with PIFA31/WSLO96 it seems highly unlikely that such an exclusion would apply.
- 14.9 The only landowner to claim to own any part of the Drove at that time (1910) was Mr Charles Dear who claimed to own the building in the Drove now registered as WT123713, now registered to Mr N Northeast. Mr Northeast is of the view that the building was originally an estate workshop for the Winterslow estate. He did not know a date but we know it wasn't there in 1841 (Tithe survey) and was there in 1874 (Ordnance Survey). It may be that the building Mr Dear built (and referred to by Mr Horner) post dates the original building. However, whichever building is considered it is likely that on the balance of probabilities they were built in the highway as the tithe survey is likely to have recorded a building if one had existed in the drove in 1841. Notably other buildings in the middle of wide highways have been found in neighbouring Pitton (Tithe survey 1842) and the convention was to show outbuildings (non dwellings) in red.

- 14.10 No deeds have been adduced to support Mr Dear's ownership or purchase from the estate and no part of the Drove was offered for sale by the Winterslow Estate in 1902. It is also noted that despite Mr Dear's subsequent sale of land surrounding the building (WT 143784) to Mr Northeast, Mr Northeast does not rely on a Deed for the land but a statutory declaration from Mr Dear. Land Registry have only registered a caution on this land and no title.
- 14.11 Similarly, the land to the rear of Horseshoe House was considered, by the late 1950s, to be owned by Strong and Co who owned the pub, but they did not claim it to be so to the Inland Revenue in 1910 and again rely on a statutory declaration and not a deed for the sale of the land to Mr Fry in 1959.
- 14.12 It is further noted that the formation of the track in the Drove that later became the accepted and used line of the byway WSLO94 was not formed until at least the late 1920s (it not being recorded in the OS County Series maps as a vegetation feature – a usual practice for showing hard tracks in grass bounded by pecked lines). Had it been so recorded when the Takeover Map and Highway Record were formed it could be the practice of WCC to only record maintenance liability over a section of the enclosed highway (the track) as per the below example in Urchfont:



However, in the absence of a defined track the whole width was recorded as maintainable highway. This view is supported by the clear fenced width of the Drove, being either fenced with respect to an ancient highway across unenclosed land or with the intention of dedicating that way as a highway. Without a built or used path, there is no reason why the public would not have used the whole of the width of the highway and no reason why it would not all have been highway maintainable at public expense. The formation of the track likely coincided with increases in use of mechanically propelled vehicles and possibly with increased use of the workshop and development of properties along it.

- 14.13 In relying on the records of the following (numbers 3, 4 and 5 are new evidence for the purposes of the Definitive Map and Statement):

- 1) The Pitton and Farley Inclosure Award 1810
- 2) The Winterslow Tithe Award of 1841
- 3) Parish map showing land ownership 1841
- 4) Sales Particulars from the sale of the Winterslow Estate 1902/1903
- 5) The Inland Revenue's Finance Act 1909/1910 records
- 6) Salisbury Rural District Council/Wiltshire County Council Highway Takeover Map 1929
- 7) Wiltshire County Council Highway Record map c.1936 onwards

It is considered that it is both reasonably alleged that, and on the balance of probability, a historic public highway subsists over the whole of the enclosed width of Back Drove and should be recorded in the definitive map and statement.

- 14.14 Before a change in the law in 2006 (Natural Environment and Rural Communities Act 2006) this additional width would have been recorded as a byway open to all traffic, carrying a public right for all categories of user. However, the 2006 Act created a new category of user, a mechanically propelled vehicle (MPV) and it is necessary to consider whether that public right was extinguished by the 2006 Act or not.
- 14.15 If the public MPV right were to be found to be extinguished the public right recorded over the additional width would be that of a restricted byway leaving part of the width as a byway open to all traffic.

15 Natural Environment and Rural Communities Act 2006 s.67

It is appropriate to consider each exemption in turn:

- 15.1 **(2)(a)** *it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles.*

No evidence has been adduced for the use of the wider route with MPVs in the period 2001 to 2006. It is possible some of the greater width was used for ancillary highway uses such as parking and passing, activities that have been recently observed.

I conclude that the requirements of Section (2)(a) NERCA 2006 are not met and public vehicular rights are not preserved by this section.

- 15.2 **(2)(b)** *immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66)(list of highways maintainable at public expense).*

The wider drove is not shown in a definitive map and statement (only 10 feet of the whole width is recorded as a byway open to all traffic) but is shown in Council's highway record which forms the List of Streets kept for the purposes of s.36(6) Highways Act 1980. The wider drove is shown coloured brown as a highway maintainable at public expense. Although the recording of a brown track does not

infer a public vehicular right without further research, in this case the existence of a public vehicular right over part of the brown track was determined at the Second and Special Review dated 1972 and determined in 1982. Hence it is reasonable to say that the brown track known as Back Drove is recorded as a public vehicular highway in The Council's List of Streets.

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| I conclude that the public vehicular right across the width of the drove is preserved by s.67(2)(b) NERCA 2006. |
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- 15.3 **(2)(c)** *it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles.*

There is no evidence before the council that this saving applies. The wide drove was created by 1841, an early date for mechanically propelled vehicles and hence it was unlikely that the route was created for their use.

I conclude that the requirements of Section (2)(c) NERC Act 2006 are not met.

- 15.4 **(2)(d)** *it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.*

Public MPV rights have not been preserved by this section.

- 15.5 **(2)(e)** *it was created by virtue of use by such vehicles during a period ending before 1930*

No evidence of this has been adduced and accordingly Public MPV rights have not been preserved by this section.

- 15.6 **(3)(a)** *(3) Subsection (1) does not apply to an existing public right of way over a way if –*

(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c.69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic.

There is no application either pre-dating or post dating the relevant date.

16.0 Legal and Financial Considerations

- 16.1 The determination of Definitive Map Modification Orders (DMMOs) and the continual review of the definitive map are statutory processes for which financial provision has been made. In keeping the definitive map under continual review the Council is acting in pursuit of its statutory duty and cannot be challenged in so doing (subject to due process being followed).

- 16.2 If an order is made and advertised and no objections are forthcoming the Council will not incur any further costs beyond advertising the confirmation of the order. If the order attracts objections that are not withdrawn it must be forwarded to the Secretary

of State for determination. It may be determined by written representations (no additional cost to the Council), a local hearing (additional costs to the Council in the region of £300) or a public inquiry (additional costs to the Council in the region of £4000).

- 16.3 If the route is recorded as a byway open to all traffic between the fences demarking the Back Drove the highway authority is not placed under a specific duty to produce a suitable surface for MPVs. However, the authority is placed under a duty to ensure that the route is safe for use by the general public traffic of the area and has a duty to maintain the surface of the highway to that extent.
- 16.4 It is clear that if the full width of the drove is recorded as a public highway that there are some obstructions on it. The most significant of these would be the consented development at Mr Northeast's workshops (three dwellings and parking to be built) and accordingly Mr Northeast is proposing to apply for an order under s.247 of the Town and Country Planning Act to stop up that extent of highway affected by the development, leaving a 5 metre byway open to all traffic (carriageway and verges). There is no cost to the council for this. There is also a garage at Horseshoe House which could be treated in a similar way, utilising s.116 Highways Act 1980. The garage leaves room for vehicular and pedestrian traffic (see image below) but would not be sufficient for horses to pass a vehicle. However, ample width before and after the garage would provide for a 'give way' arrangement provided no further linear development occurred:



The image confirms the existing vehicular uses that the drove is put to.

17.0 Risk Assessment

- 17.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety

- 17.2 The Council is the surveying authority for the County of Wiltshire (excluding the Borough of Swindon) and has a duty to keep the definitive map and statement under continual review (s.53(2)(b) WCA 81). There is therefore no risk associated with the Council pursuing this duty correctly.
- 17.3 If the Council fails to pursue this duty in this case it is liable to complaints being submitted through the Council's internal procedure leading to the Ombudsman. Ultimately a request for judicial review could be made.
- 17.4 Officers are of the opinion that the matter of the extent of public rights at Back Drove has been a continual consideration since the discovery of the Finance Act 1909/1910 evidence some years ago. Owing to the development of the drove and applications to register land at the drove it has become increasingly apparent that resolution of the width question would be advantageous to all interested parties as well as the general public.

18.0 Environmental Impact of the Recommendation

- 18.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to the environment.

19.0 Equality Impact

- 19.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to equality.

20.0 Safeguarding Considerations

- 20.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to safeguarding.
- 20.2 It is however noted that there are no considerations arising.

21.0 Public Health Considerations

- 21.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to public health.

22.0 Relationship to the Council's Business Plan

- 22.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981 which is a duty for the council. However, Wiltshire Council is committed to working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

23.0 Options to Consider

- 23.1 i) Make a definitive map modification order under s.53(3)(c)(i) & (iii) WCA81 to

record the width of Back Drove, WSLO94, as shown in the 1874 First Edition Ordnance Survey County Series 1:2500 map between fence and hedge boundaries as a byway open to all traffic.

- ii) To not make a definitive map modification order under WCA81.

24.0 Reason for Recommendation

This report presents and considers new evidence discovered since the last review of the definitive map and statement. This has allowed officers to reconsider evidence considered at that time. It is clear that at least part of Back Drove existed before 1820 (PIFA31 being awarded as following its usual track to Winterslow). No early inclosure, estate or parish maps have been found before the Tithe Survey of 1841 and small scale commercial maps are conflicting. C and I Greenwood did show at least part of the route as enclosed in 1820, and being shown as a Cross Road, it is likely that it linked to another highway, albeit over an unenclosed route. Sales of adjoining lands in 1902 and 1903 confirm that no part of the Drove was sold by the Winterslow estate at that time and this is in agreement with the Finance Act plan of 1910 when no owner of the drove was identified and it was excluded from the valuation. Less than 20 years later the highway authority recorded the whole width as a highway maintainable at public expense. No evidence has been found that a public right has been stopped up or extinguished and it is considered that the legal maxim 'once a highway, always a highway' must apply.

- 24.1 As a result of the decision that, on the balance of probability, a wider public right exists it has been necessary to consider the effect of s.67 of the Natural Environment and Rural Communities Act 2006 on those rights. Owing to the recording of the whole width of the Drove in the List of Streets, saving s.67(2)(b) NERCA 2006 is considered to apply and the route should be recorded as a byway open to all traffic.
- 24.2 Where sections of the applicant route are currently unrecorded in the definitive map and statement the council is required only to consider whether the application forms a reasonable allegation of the rights claimed to make an order (s.53(3)(c)(i)) however, where an order is made under s.53(3)(c)(iii), it must be shown on the balance of probability.

25.0 Recommendation

That a definitive map modification order is made under s.53(3)(c)(iii) of the Wildlife and Countryside Act 1981 to record the full enclosed width of Back Drove as WSLO94, a byway open to all traffic and to confirm the order if no objections or representations to it are duly made.

Sally Madgwick
Definitive Map and Highway Records Manager
11 August 2023