

WILDLIFE AND COUNTRYSIDE ACT 1981 S.53

DECISION REPORT

Grafton 29 (part), 30 and 31, Burbage 1 (part) and Collingbourne Kingston 34

NB All documents (including user evidence forms where applicable, responses to consultations and correspondence) are available to be viewed at the Council's offices at Rights of Way and Countryside, County Hall, Bythesea Road, Trowbridge, BA14 8JN; please contact Sally Madgwick on 01225 713392.

1.0 APPLICATION

Application number: 2004/07

Date of application: 26 March 2004

Applicant: Mr B Riley
141 Bath Road
Bradford on Avon
Wiltshire
BA14 8JD

Application for: An Order modifying the definitive map and statement for the area by upgrading to a byway open to all traffic the following rights of way forming one continuous route:

Grafton right of way no 31 from the southern end of road u/c 5121 at Manor Farm, West Grafton leading south west and west north west to Grafton right of way no. 29. Estimated length 450 metres. Width ranging from 9 metres to 15 metres.

Grafton right of way no 29 (part) from Grafton right of way no. 31 leading south south west along the parish boundary to Burbage right of way no. 1. Estimated length 660 metres. Width 9 metres.

Burbage right of way no 1 (part) Southgrove Lane. From right of way Grafton no. 29 leading south south west along the parish boundary to right of way Grafton no. 30. Estimated length 1.33

kms. Width 9 metres except where awarded (40 feet 12.192 metres).

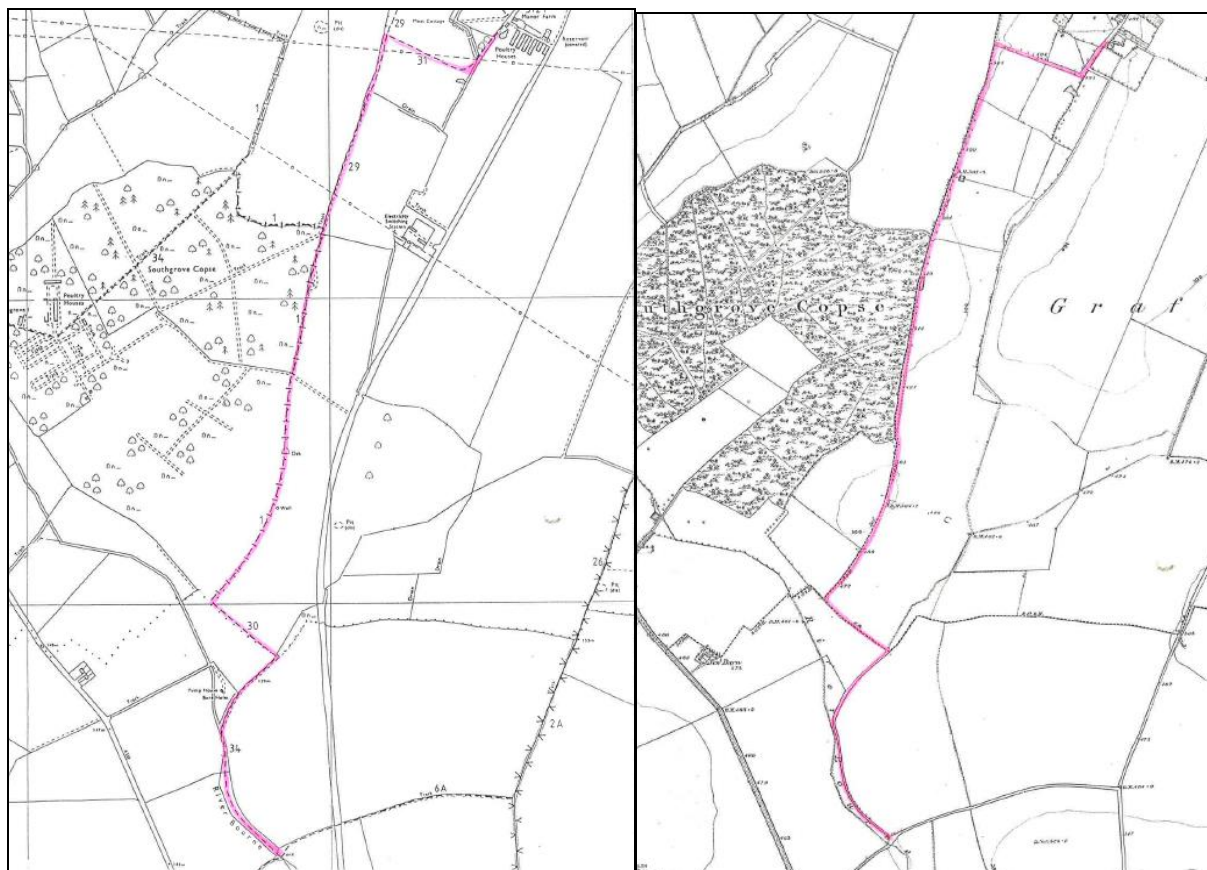
Grafton right of way no 30 From the southern end of Burbage path no. 1 leading south east along the parish boundary to right of way Collingbourne Kingston No. 34. Estimated length 274 metres. Width 40 feet (12.192 metres).

Collingbourne Kingston right of way 34 The Grafton Road. From Grafton right of way no. 30 leading south west to the River Bourne where south east on the eastern side of the river to Collingbourne Kingston right of way no. 6A. Estimated length 777 metres. Width 6 metres.

Application comprises:

- Schedule 7 Form of application for a modification order 26/03/04
- Schedule 8 Form of notice of application for a modification order sent to: (copies provided)
 - Mr G Crook, Aughton Farm, Collingbourne Kingston
 - Mr R Browning, Manor Farm, West Grafton
 - A. C. Withers, Parsonage Farm, Upper Chute
 - Mr N Hosier, Waglands Farm, Brunton, Collingbourne Kingston
 - R Crook and Sons, Parsonage Farm, Collingbourne Kingston
 - Mr T Curnick, Southgrove Farm, Burbage
 - Mr Koenig, Manor Farm, West Grafton
- Schedule 9 Form of Certificate of notice of application 26/03/04
- Maps to the scale of 1:10560 and 1:10000 showing the claimed route highlighted in pink
- Summary of Historical Evidence

Application maps



Reduced from 1:10000

Reduced from 1:10560

2.0 Enabling Legislation

2.1 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.

2.2 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.

2.3 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.

2.4 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 by virtue of 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.

2.5 Section 53(5) WCA 1981 allows for any person to apply for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

2.6 Schedule 14 to this Act states:

Form of applications

1. An application shall be made in the prescribed form and shall be accompanied by –

(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and

(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

Notice of applications

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*

(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description "owner" or "occupier" of the land (describing it) and by affixing it to some conspicuous object or objects on the land.

(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

(4) Every notice or certificate under this paragraph shall be in the prescribed form.

- 2.7 A surveying authority has discretionary power to waive strict compliance to Schedule 14 when determining an application or may consider the application to be improperly made whereby the surveying authority may use the evidence brought to its attention as a trigger to make its own decision under Section 53(2) of the 1981 Act.
- 2.8 This application is considered to fail the test of strict compliance (no actual copies of evidence were adduced, only a list and extracts were provided) to Schedule 14 but to otherwise be compliant.
- 2.9 Although it is clear that it is possible to proceed with most applications that are not strictly compliant with Schedule 14, legislation enacted in May 2006 (Natural Environment and Rural Communities Act 2006 (NERC Act 2006 see Para 20) means it is necessary for the Council to consider strict compliance where an exemption from the extinguishment of public rights for mechanically propelled vehicles (MPVs) under s.67(3) may apply.
- 2.10 An exemption under s.67(3) may only apply where an application was received before the 20th January 2005. In this instance the application was made on the 26th March 2004 and therefore may be subject to a saving under s.67(3).
- 2.11 The application, when received in 2004, in line with Defra advice and practice, appeared compliant with Schedule 14. Subsequent investigations by officers revealed that it is possible that the applicant had failed to serve notice on all of the landowners. Land Registry records show that the majority of the affected land forms

parts of Southgrove Farm and Aughton Farm. Notice was served on these owners at the time of application. In addition the neighbouring farms of Manor Farm, West Grafton, Parsonage Farm, Upper Chute and Waglands Farm Brunton all had notice served on them at that time. In 2012 notice of the application was also given to Kinwardstone Farm, Burbage (adjoining land) and Morgan and Denny of Newbury who farm that land .

- 2.12 Approximately 300 metres of the route appears unregistered. This is a very narrow piece of land lying within land owned by T W Curnick of Southgrove Farm and land owned by G Crook of Aughton Farm and T W Curnick of Southgrove Farm. It does not connect to any highways other than the one which leads over it. The adjoining landowners had notice served upon them but no notice was posted on this length (see section 3). It is unlikely that any prejudice has been caused to any party as the most likely owners are the adjoining landowners. In the event that an Order is made, permission to post notices on this short stretch will be sought from the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA). Based on a principle established in the second ground of the Winchester case ([2008] EWCA Civ 431) it is considered that no prejudice to date has been caused to any party and accordingly the matter is not fatal to the application or the Council's duty to examine the evidence brought to its attention.
- 2.13 The same case law (known as the Winchester Case and discussed in detail later) changed the way in which officers must look at Schedule 14 compliance where a case turns upon the application of s.67(3) of the Natural Environment and Rural Communities Act 2006 (NERCA 2006). This is regardless of any compliance issues regarding the service of notice.
- 2.14 Following the Winchester Case the Lord J Ward, Dyson and Thomas found that **if** the outcome of an application turned on the application of Section 67(3) of the Natural Environment and Rural Communities Act 2006 (NERC Act 2006) then strict compliance with Schedule 14 would be required in respect of the presentation of "copies of any documentary evidence ...which the applicant wishes to adduce in support of the application". This is required in Section 67(6) for Section 67(3) to apply.

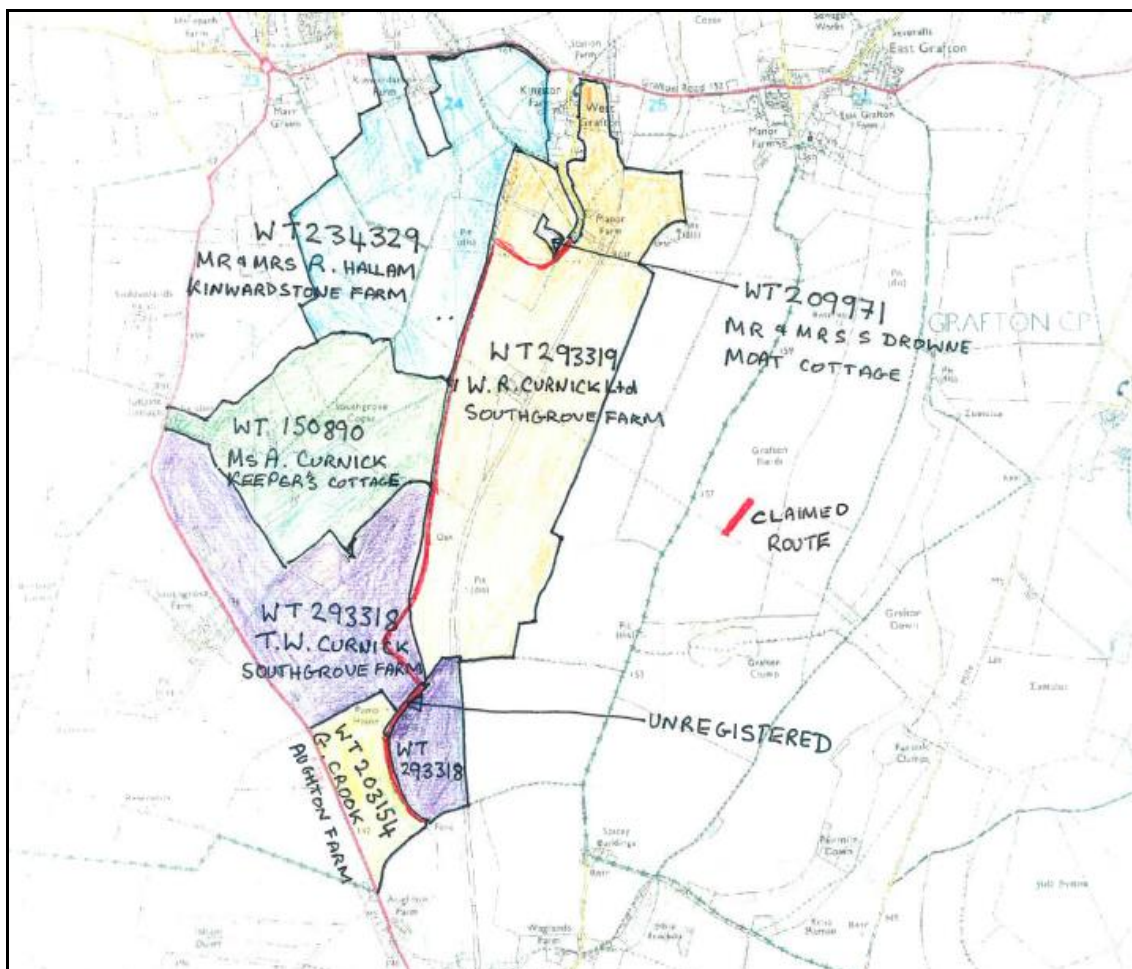
However Dyson J, in paragraph 55 of his decision went on to say:

"I wish to emphasise that I am not saying that, in a case which does not turn on the application of section 67(6) it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the "trigger" for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3)"

- 2.15 As a result it is now considered that this application does not satisfy the requirements of Schedule 14 with regard to the evidence adduced. Schedule 14 states that copies of evidence may be adduced by the applicant but in this case Mr Riley has not included copies of any evidence, just a list of documents and some transcripts. The application is therefore not fully compliant with Schedule 14. The effect of this is that any right that the public had to use the route with a mechanically propelled vehicle is not protected by the making of the application (section 67(3) NERC Act 2006).
- 2.16 The NERC Act 2006 permits further exemptions to the extinguishment of public vehicular rights under s.67(2), however, in all cases it is necessary to establish whether, on the balance of probabilities, the route carried a right for the public to use a mechanically propelled vehicle before the 2nd May 2006. Only if, on the balance of probabilities, it was a public road before that date is it appropriate to consider whether any savings apply. As a result NERC Act 2006 will be covered later in this report (see sections 19 and 20 of this report).

3.0 Land Ownership

- 3.1 See plan below (red line shows claimed route):



Landowners and occupiers/tenants as 16 August 2019

Affected titles

WT293319 W R Curnick Limited, Southgrove Farm, Burbage, SN8 3RX (owned and farmed)

WT293318 T W Curnick, Southgrove Farm, Burbage, Marlborough, SN7 3RX
Farmed by W R Curnick Limited

Unregistered land

WT203154 G I Crook, Aughton Farm, Collingbourne Kingston, Marlborough, SN8 3RY (owned and farmed)

Adjoining

WT234329 Mr and Mrs R Hallam, Kinwardstone Farm, Grafton Road, Burbage, SN8 3BU
Farmed by Morgan and Denny, East Woodhay, Newbury, RG20 0AH

WT150890 Ms A Curnick, Keepers Cottage, Southgrove Copse, Burbage, SN8 3RX
Farmed by W R Curnick Limited

WT209971 Mr and Mrs S Drowne, Moat Cottage, West Grafton, Marlborough, SN8 3BY

Manor Farm, West Grafton, Marlborough, SN8 3BY

4.0 Current Records

4.1 The definitive statements for the route are as follows:

Burbage 1 Bridleway From the Salisbury – Hungerford road, A.338 at Pall Mall, north of Marr Green, leading south-east, south-west and east then south along the Grafton Parish boundary and the eastern side of Southgrove Copse to the Grafton and Collingbourne Kingston Parish boundaries, north east of New Barn.

Width 9 metres (30 feet) Approximate length 2.011 km

Grafton 29 Footpath From the junction of paths Nos. 28 and 17 at West Grafton, south-east of Kinwardstone, leading south-south-west along the Parish boundary to Burbage path No. 1 at the north-east corner of Southgrove Copse. Approximate length 1124 metres

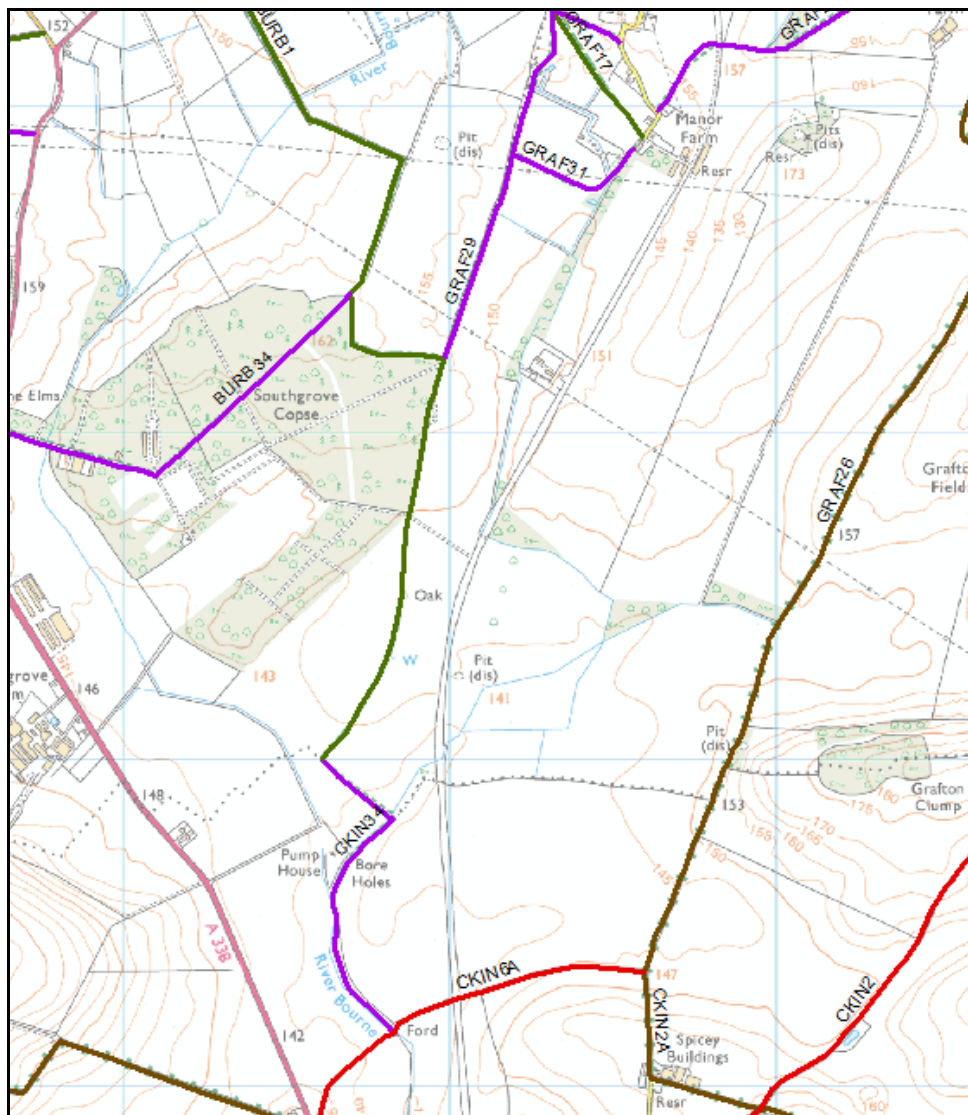
Grafton 30 Footpath From the southern end of Burbage path No. 1, south of Southgrove Copse and east of the River Bourne, leading south-east along the Collingbourne Kingston Parish boundary until it turns south-west into that Parish west of the railway. Approximate length 274m.

Grafton 31 Footpath From the southern end of road u/c 5121 at West Grafton Farm leading south-west and west-north-west to path No. 29. Approximate length 457 metres

Collingbourne Kingston 34 Footpath From Grafton path No. 30, west of the Railway, leading south-west to the River Bourne then south and south-east on the eastern side of the river to path No. 6A.

Approximate length 777 metres

4.2 Working copy of definitive map



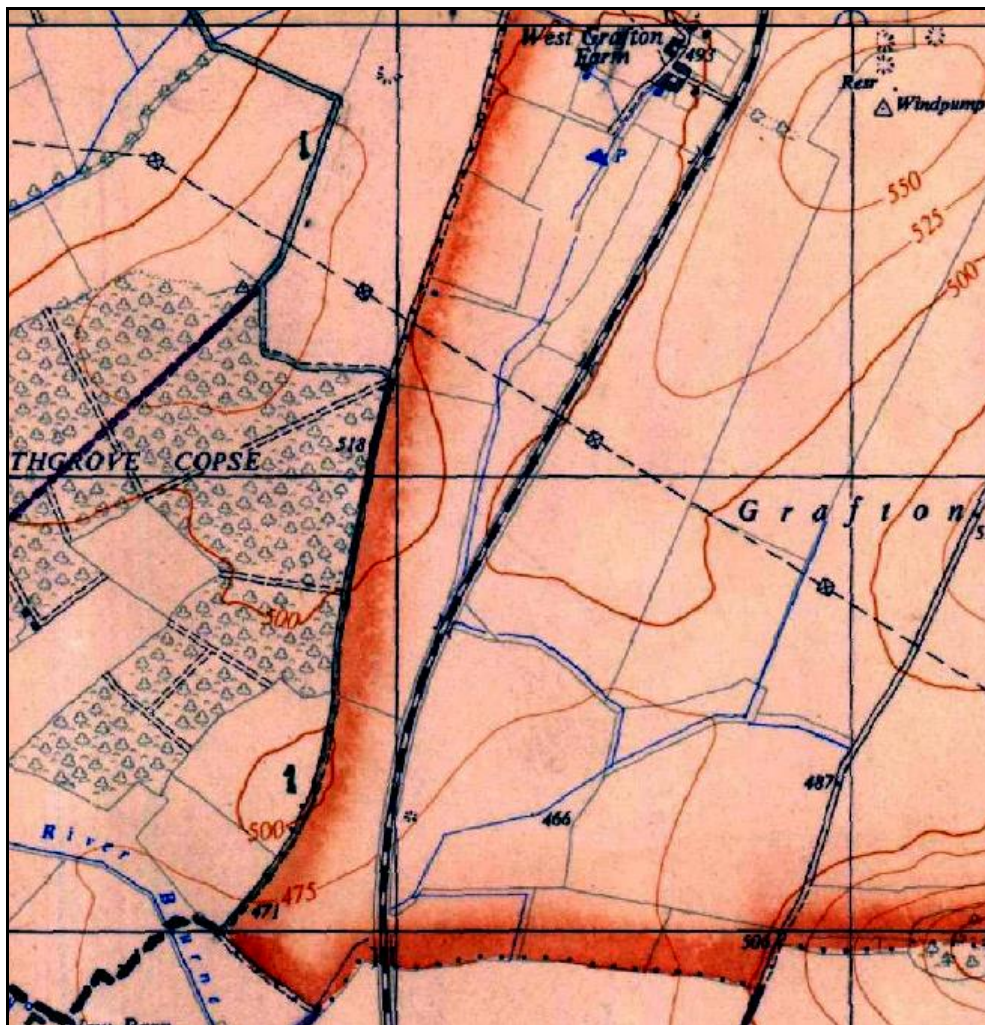
- 4.3 Burbage no. 1 and Collingbourne Kingston no. 34 are both recorded in the Pewsey Rural District Council definitive map and statement dated 1952 and have not been altered since their addition.
- 4.4 Grafton paths nos. 29, 30 and 31 are recorded in the Marlborough and Ramsbury Rural District Council area definitive map and statement dated 1952 and have not been altered since their addition.
- 4.5 The route was claimed at the draft definitive map publication stage by the Ramblers who objected to the route's omission as follows:

“Although a step stile at one point indicates that these tracks are now used by pedestrians, old maps show all these tracks as old roads. The middle section of (b) is claimed by Burbage Parish”.

- 4.6 Marlborough and Ramsbury Rural District Council area definitive map:



4.7 Pewsey Rural District Council area definitive map:

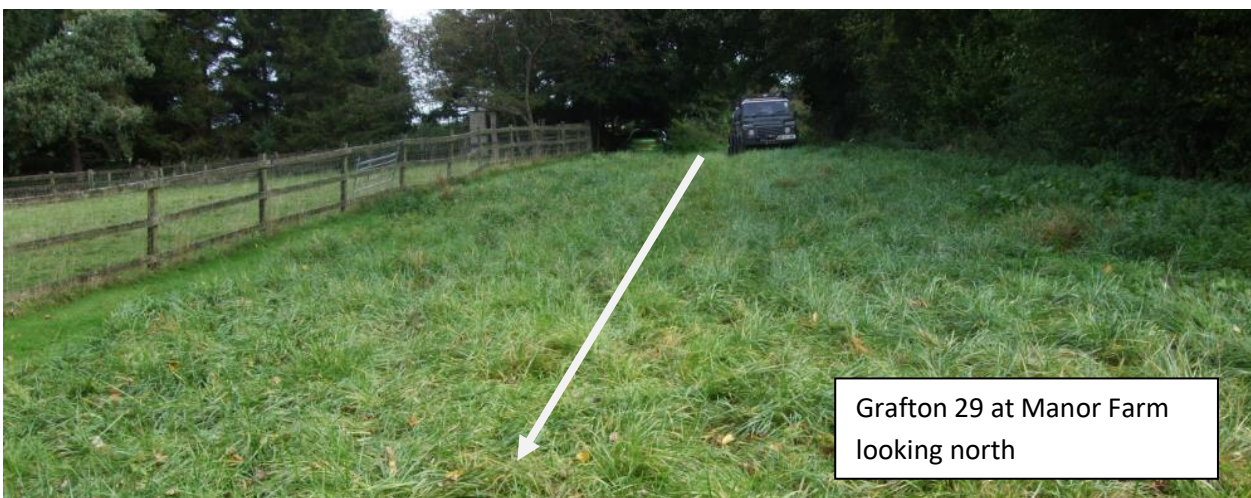


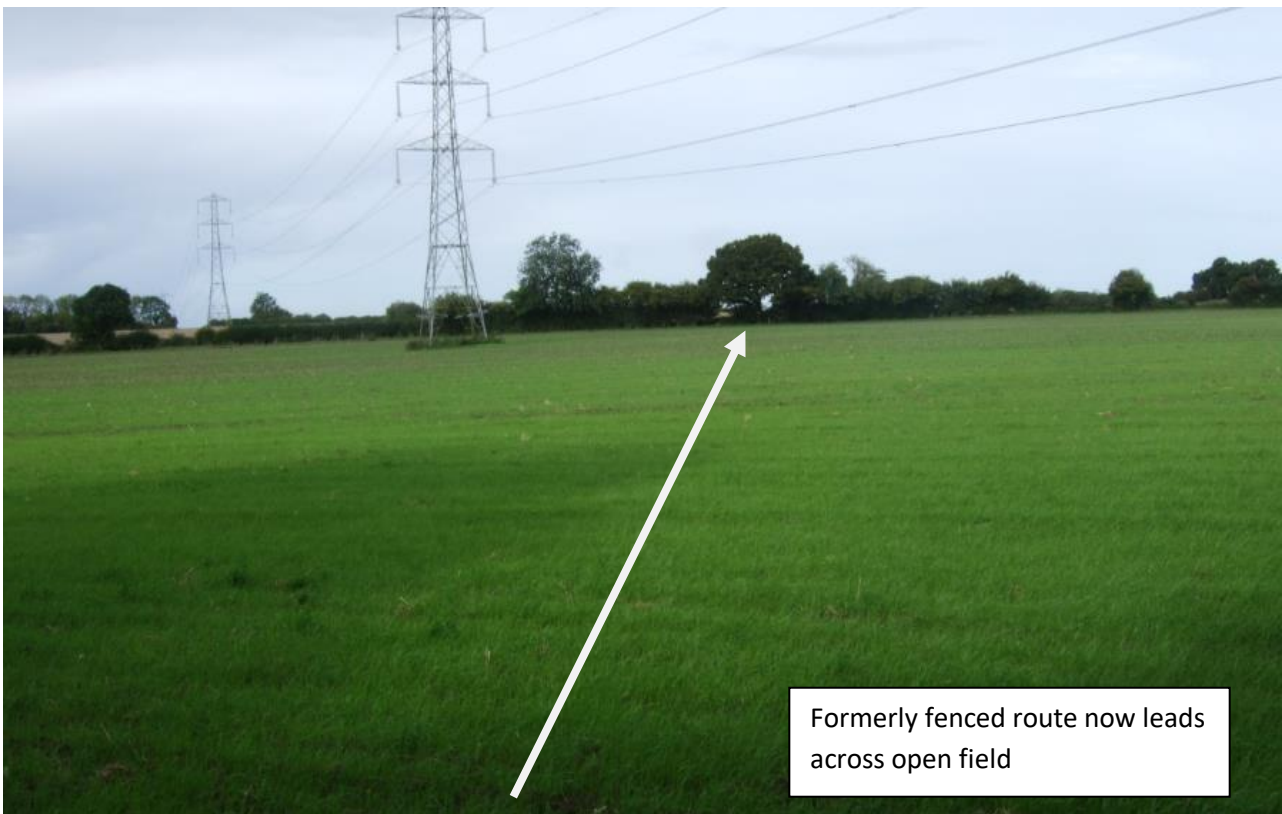
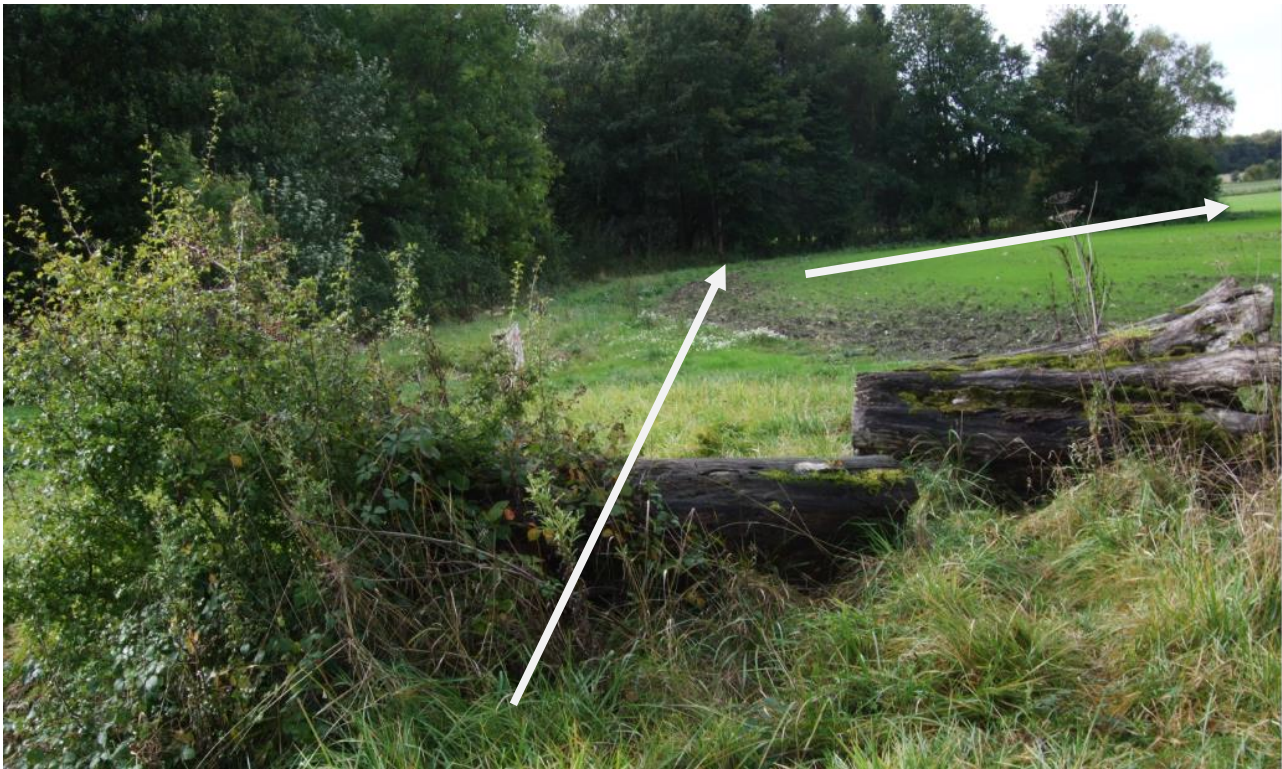
6.0 Photographs of the Route

- 6.1 Aerial photography demonstrates that the claimed route forms a north south link leading from West Grafton to Collingbourne Kingston. Lengths of the route now pass over arable land though historic documents show that this arises from the removal of road or lane boundaries (likely in this area to have been hedgerows) and the ploughing of the land. Part of the route follows a surviving section of lane past Southgrove Copse recorded as a Southgrove Lane.
- 6.2 The northern end of the claimed route is the cul-de-sac end of a road recorded in the Council's highway record as a road maintainable at public expense (the u/c5121). The recorded section of this road ends south of West Grafton or Manor Farm.
- 6.3 The claimed route is shown coloured orange in the following photograph.



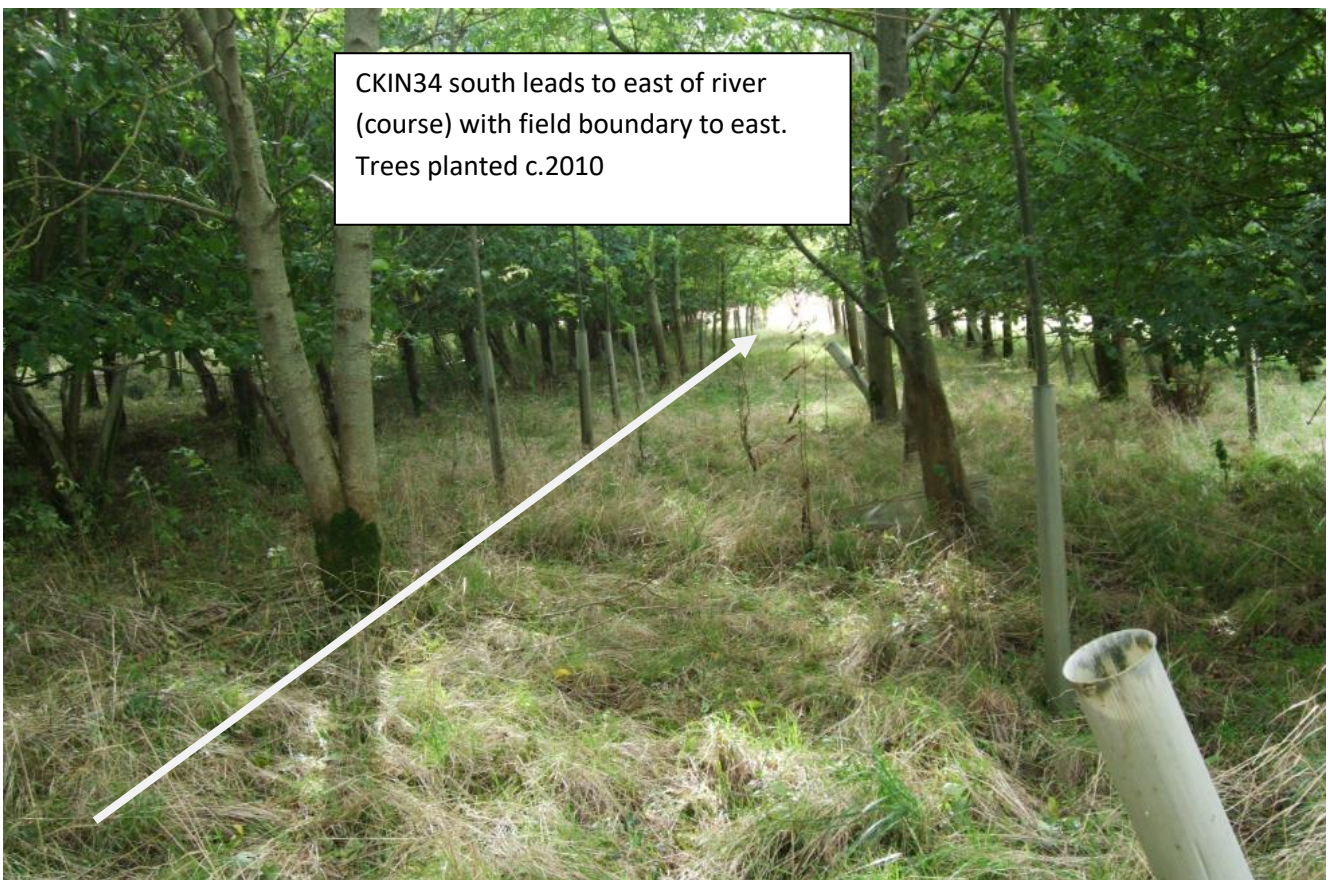
6.4 A site visit was made on 09 October 2019. The route was walked from West Grafton towards CKIN6A.











This route then joins CKIN6A.

7.0 Consultation

A consultation was conducted in January and February 2012 alongside another application for a DMMO affecting the adjoining route of Collingbourne Kingston 6A (CKIN6A). The letter stated:

“Application to upgrade Collingbourne Kingston Footpaths 6A and 34, Grafton footpaths 29 (part), 30 & 31 and Burbage Bridleway 1 to the status of Byways Open to All Traffic.

Wiltshire County Council (now Wiltshire Council) received two applications under the Wildlife and Countryside Act 1981 s. 53 from Mr Bill Riley to amend the Definitive Map and Statement by upgrading to the status of Byway Open to All Traffic the above mentioned paths between West Grafton and Aughton. The application to upgrade Collingbourne Kingston 6A was received in January 2003 and the application for the other paths in March 2004. Both applications are supported by a substantial list of historical documents. The paths are shown on the enclosed map which is not to scale.

The 2006 Natural Environment and Rural Communities Act 2006 removed the right to record any more Byways Open to All Traffic onto the Definitive Map and Statement unless they fitted certain exemptions within s.67 of the said act. It is believed, after an initial examination of the submitted evidence, that none of the exemptions apply in this case and therefore the highest status that may be recorded is that of Restricted Byway. A Restricted Byway allows a right of way on foot, on horseback or leading a horse, riding a bicycle or using any other vehicle that is not mechanically propelled.

Wiltshire Council has a duty to consider all available evidence, so if you have any evidence you wish to bring to the Council’s attention, or comment to make, I would be pleased to receive it by Friday 17 February 2012.”

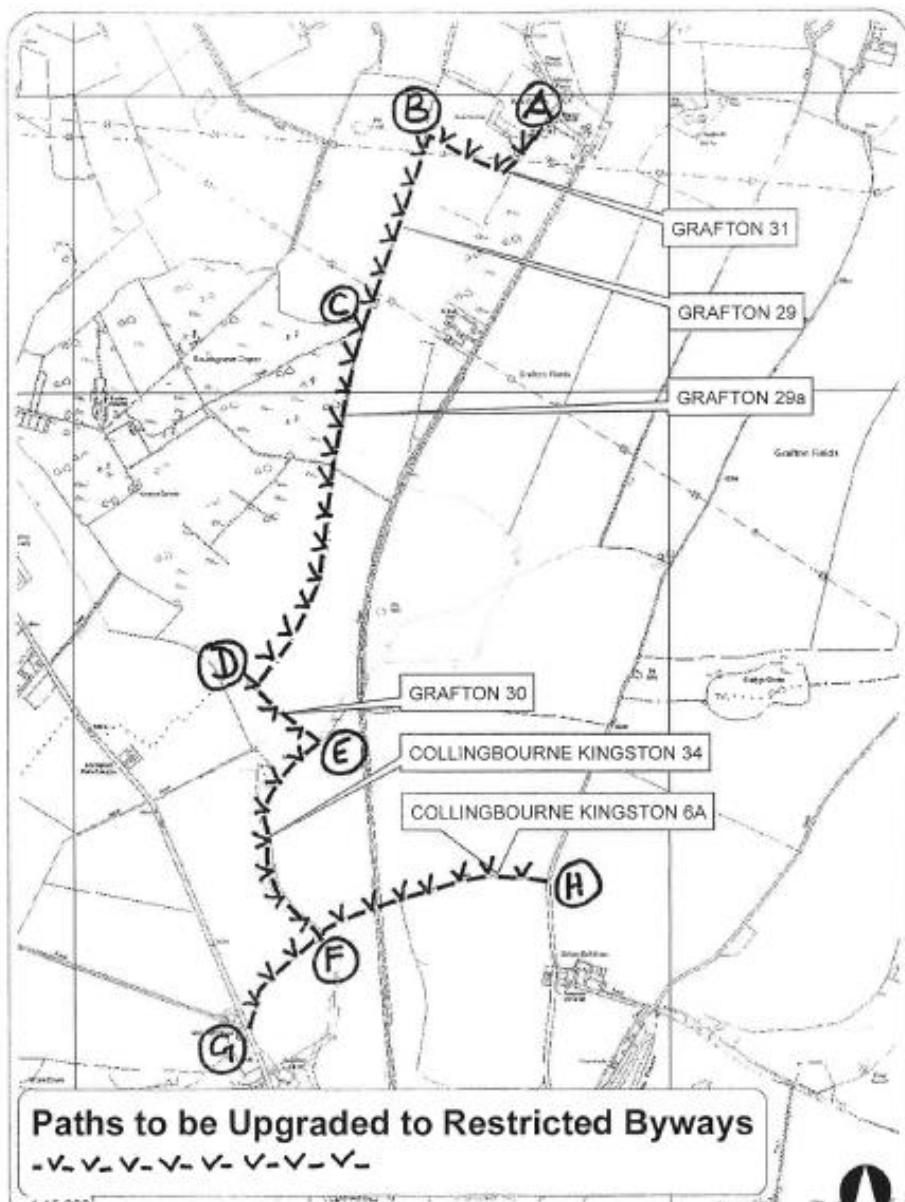
NB Owing to omissions in the circulation the letter was also sent on the 23rd January 2012 and the consultation date extended to March 2012.

8.1 This was circulated to the following:

The Auto Cycle Union	Commons, Open Spaces & Footpaths
Wiltshire Bridleways Association	Cycling Touring Club
British Horse Society	Grafton Parish Council
Collingbourne Kingston Parish Council	Burbage Parish Council
Cllr S Wheeler	Cllr Charles Howard
British Horse Society Wiltshire	Byways and Bridleways Trust
Rights of Way Warden Wiltshire Council	The Ramblers
Mr B Riley	British Driving Society
Wiltshire County Ecologist	Green Lane Association
Mr D Tilbury	North Wessex AONB

Mr Lemon, Manor Farm, Wilton
 Mr Hosier, Manor Farm Wexcombe
 G and D Crook, Aughton Farm
 Mr M Rowland
 Mr Powell
 All Wheel Drive Club
 Shire Land Rover Club
 Morgan and Denny
 Mr Koenig, Manor Farm, West Grafton
 Mr R Hallam, Kinwardstone Farm, Burbage

Mr Hosier, Waglands Farm
 Mr Taylor, Manor Farm Marten
 W R Curnick Ltd, Southgrove Farm
 Mr S Gunning
 Southern Counties Off Road Club
 Devizes Motor Club
 Solent and District Rover Club
 Mr A Withers, Parsonage Farm, Chute
 Mr Browning, Manor Farm, West Grafton



9.0 Consultation responses

9.1 Burbage Parish Council 07.02.12

"I am now in a position to comment on the request to upgrade Footpaths 29 (part), 30 & 31 and Burbage Bridleway 1 to the status of Byways Open to All Traffic.

I have one general comment and then will mainly limit my observations to the section of Bridleway within the Parish of Burbage.

Firstly are you correct in assuming that the Natural Environment and Rural Communities Act 2006 will apply in this case. Since the application was submitted in 2003/4 I would have assumed the request would have to be considered based on the legislation that applied at that time. This is relevant since while Burbage Parish would not object to an up rating to Restricted Byway status it would have serious objections to the route being converted in to an Unrestricted Byway.

As far as the bridleway section is concerned the physical evidence suggests that it was originally part of the drove road network in that 1. There is no evidence that it ever had a hard surface 2. It is securely hedged on both sides as was the case with many drove roads

3. It is wider than would be necessary in the case of a track

This is certainly the case for the section up to Southgrove Copse, thereafter any physical evidence has been lost due to the creation of new fields

I have consulted a local resident who has researched the drove roads and green lanes in the area and she says while she can provide no documentary evidence of its past usage it would fit logically into the known network of drove roads around Burbage.

I would comment as a walker on the section CKIN34. This section notionally follows the River Bourne from where it leaves CKIN6A. In reality the first section is so overgrown that it is impossible to follow and there is certainly no evidence that a track ever existed. Further north it does become a track running between mature hedges again suggesting it might have been a drove road

Burbage Parish Council's position therefore is that it would not oppose an up rating to Restricted Byway but would wish to oppose its conversion to a Byway"

9.2 Wiltshire Bridleways Association 16.02.2012

"With reference to your letter of 06 January, regarding the above applications for upgrade, I write to state that the Wiltshire Bridleways Association fully supports all the upgrades to a status of Restricted Byway and has therefore no objections."

9.3 The Ramblers – Mid Wilts 25.01.12

“I personally do not know this area at all and as a group we do not really walk here. However, as a general rule of thumb, I personally am not in favour of upgrades as I do not want 4 x 4 s etc ploughing up paths and making them difficult to negotiate for walkers.

I appreciate that the Council legally has to deal with these applications, but as far as the RA is concerned, footpaths are for pedestrians.”

9.4 Robin Hallam - Kinwardstone Farm 09.02.12

“I have no legal evidence as to the status of the proposed paths but so far as concerns the Grafton footpath 29 where it borders Kinwardstone Farm, I can confirm that I have only ever seen pedestrians and horses on that footpath. I believe that Footpath 29 crosses land belonging to Mr and Mrs Curnick. I believe they have for a number of years placed signs on those footpaths stating that they are “permissive bridleways”. Members of the public regularly remove those signs and throw them into the undergrowth.

I would note that whilst I have no objection to motor vehicles using established BOATS such as cross Salisbury Plain it would seem that the paths in issue are not suitable for use by motor vehicles. That particular part of Wiltshire has many existing BOATS which can be used for recreation. There is no commercial purpose for establishing new BOATS, it is only for recreational use and it goes without saying that the admission of motorised vehicles to paths used as bridleways will diminish the safety and amenity of those paths to users on foot or horseback.

I believe that Wiltshire Council would become responsible for the upkeep of a path which is converted to a BOAT which may not be best use of Council resources.”

9.5 Clarke Wilmott LLP – Acting for W R Curnick Ltd 26.01.12

“We have been instructed by the landowners of Southgrove Farm, W R Curnick Ltd, in relation to this application. Our clients own a large part of the land over which Grafton footpaths 29, 30 & 31, Burbage Bridleway 1 and the Collingbourne Kingston Footpaths pass.

At this stage we should be grateful if we could register the landowners’ strong objection to any order upgrading the status of the footpath. This is a path that has extremely restricted use.

We should also be grateful if at each stage of the process we were given the opportunity to provide objections and evidence. We would be grateful if you would provide us with a copy of the application made to upgrade that led to the contemplation of this order.”

NB Officers of the Council replied on the 27th February 2012 explaining about the documentary evidence and the process and advising that should an Order be made there is a 42 day statutory period for objections. Additionally, it was explained that a copy of the decision report would be submitted to them when a decision was made.

9.6 **Symonds and Sampsons – Acting for Mr G Crook** 24.02.12

“My client has informed me that he adamantly disagrees with any proposed upgrade as it is my client’s opinion that since his father purchased the farm in 1948, the footpath on his land has always only been used by the public on foot and therefore cannot see any evidence suggesting otherwise. We would like this objection noted and are happy to provide further sworn statements and information if required.”

NB Officers of the Council replied on the 27th February 2012 explaining about the documentary evidence and the process and advising that should an Order be made there is a 42 day statutory period for objections. Additionally, it was explained that a copy of the decision report would be submitted to them when a decision was made.

9.7 **Hosier Brothers Ltd** 06.03.12

“I write following your visit recently concerning the application to upgrade Footpaths 6A and 34, Grafton Footpaths 29 (part) and Burbage Bridleway to the status of Byways Open to All Traffic. This was detailed in your letter of 6th January 2012.

I have serious objections to this upgrade to the Byway Open to All Traffic as it would spoil an area of wonderful countryside for walkers and horses to access but any motorised vehicle would find it impossible to go over. The width of the path is not sufficient and in wet winters would be flooded and totally out of the question.

I believe that the status of a Restricted Byway is appropriate in this case.”

10.0 General Context *Some notes taken from Victoria County History Volume XVI*

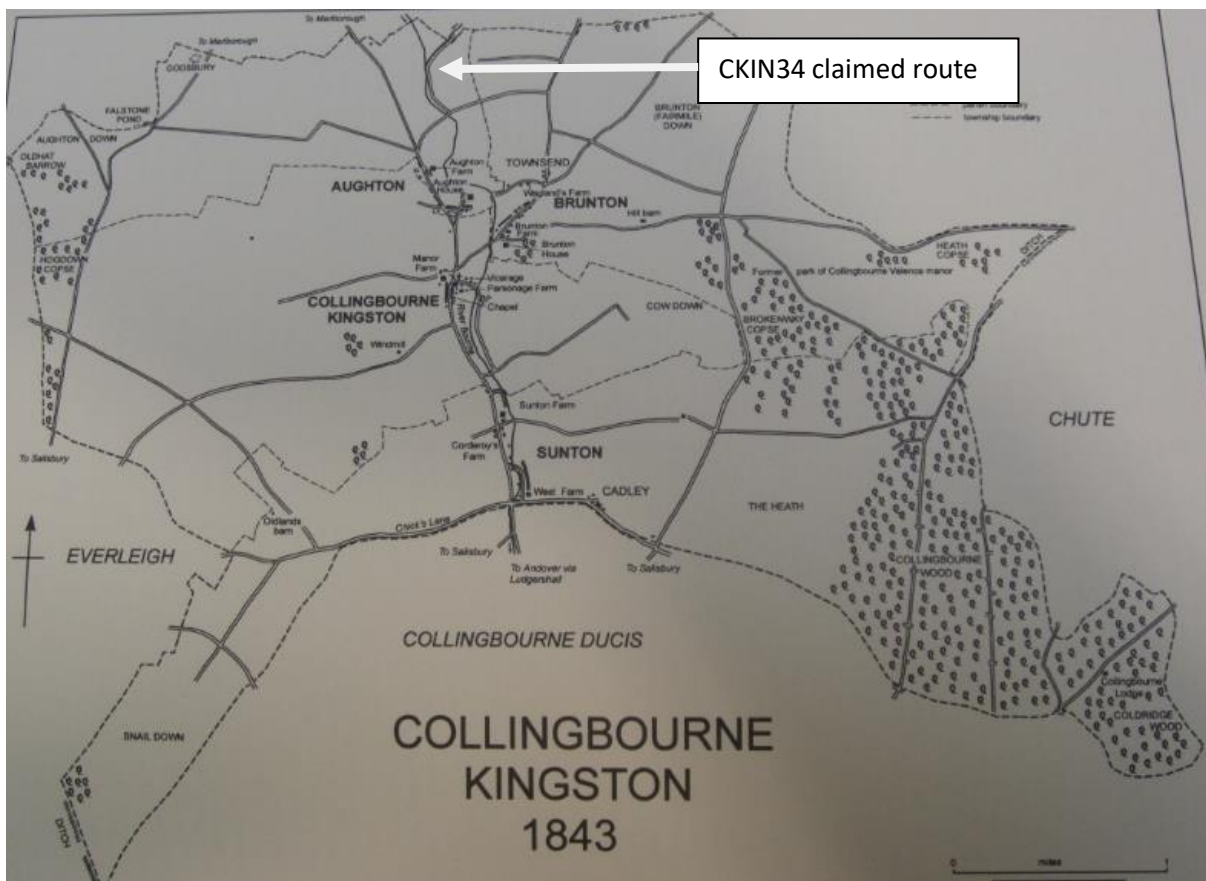
10.1 The rights of way as recorded in the definitive map and statement traverse three modern day parishes; Grafton, Burbage and Collingbourne Kingston. These parishes are within the historic Kinwardstone Hundred.

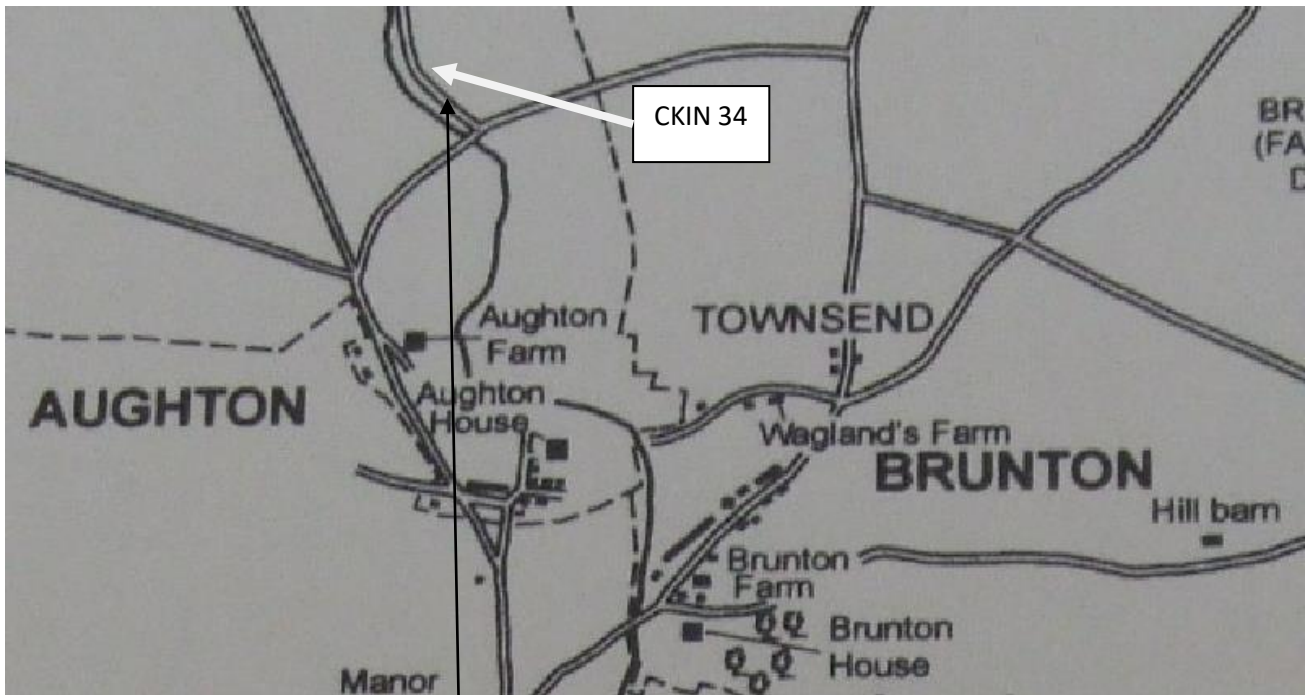
10.2 Evidence both adduced by the applicant and investigated by the Council demonstrates that the length of path known as Southgrove Lane (recorded as Grafton 29 and Burbage 1) lies wholly in the parish of Grafton and not in Burbage. Although there have been a number of changes to administrative boundaries in this area in the last 300 or so years, the boundary between Burbage and Great Bedwyn (now Grafton) has not altered in this time. Evidence will therefore show that notwithstanding the status of the rights of way, the path should not be recorded in the parish of Burbage but should be recorded in the parish of Grafton.

- 10.3 Grafton became a civil parish (C.P.) in 1895 having formerly been part of Great Bedwyn parish. The northern end of the claimed route is at West Grafton, the larger settlement of East Grafton lies to the east. Most of the land in Great Bedwyn parish (including the pre- 1895 inclusions of Grafton and Little Bedwyn) is suitable for arable use or pasture and there were few areas of woodland prior to the late 18th century. Up to the 17th century most if not all of the villages and hamlets had open fields and commonable land. The common pastures of West Grafton were inclosed between 1638 and 1657 with Parliamentary inclosure of the open fields occurring in 1792. The population of Grafton is not large and has ranged from 663 in 1901 to 547 in 1971 and 603 in 1991.
- 10.4 The farm at the northern end of the claimed route (GRAF29) is today called Manor Farm (there is also a Manor Farm in East Grafton) but was previously called West Grafton Farm. In 1867 the management of West Grafton Farm was said to be rather “slovenly” and ownership of lands was distributed between Sotwells Farm and Kingston Farm in 1905. These farms had land in other parishes in addition to Grafton.
- 10.5 Within the historic Great Bedwyn parish (including Grafton and Little Bedwyn) the route of the Kennet and Avon canal and the main line railway cross the parish north of the claimed route. The main line is the former Berks and Hants Extension Railway (operated by Great Western Railway) and was opened in 1862. However, plans for other railways schemes in the area were deposited with Parliament and one running north south to the east of the claimed route was built to the east of the claimed route.
- 10.6 This north south route was initially recorded as the Swindon, Marlborough and Andover Railway (1882 – 1883) and was vested in the Midland and South Western Junction Railway in 1884. The line passed north from Collingbourne Kingston to West Grafton where there was a station called Grafton and Burbage. The line closed in 1961. The line passed within 200 metres of the southern end of the claimed route Collingbourne Kingston 34.
- 10.7 This part of the claimed route (Collingbourne Kingston 34 - CKIN34) lies in the Aughton tithing of Collingbourne Kingston. This is a large parish on the eastern edge of Salisbury Plain and historically contained four small villages or hamlets; Collingbourne Kingston, Aughton, Brunton (formerly Valence), Sunton and part of Cadley hamlet.
- 10.8 In 1934 the parish was reduced when Sunton and part of Cadley were transferred to Collingbourne Ducis and again in 1987 when further parts were transferred to Collingbourne Ducis. Although the tithing of Aughton is no longer an administrative boundary the claimed route has always laid within in and within the parish of Collingbourne Kingston.
- 10.9 The parish is in the Upper Bourne Valley and the River Bourne flows north to south through it. The land is chalk and well drained and accordingly the River Bourne

frequently dries out. The route of adjoining right of way (in the south) Collingbourne Kingston 6A crosses the River Bourne as marked on the majority of maps but no maps record a ford at this location (a practice the Ordnance Survey would have followed if there had have been one) suggesting that the area is more likely *not* to have surface water on it than it would be to have surface water. The line of CKIN34 follows the line of the River Bourne for most of its length.

- 10.10 Although geographically a large agricultural parish, the population is not high and has ranged from 731 in 1801 to a high of 933 in 1841 before falling to 440 in 1951.
- 10.11 A Marlborough to Winchester road was important in the early middle ages and ran via Ludgershall and Andover following the River Bourne. Two other main roads crossed, one between Oxford and Salisbury via Hungerford across the eastern downs and one between Chipping Campden and Salisbury. Both were important in the later 17th century.
- 10.12 It is noted that the roads through the parish of Collingbourne Kingston that were turnpiked around the end of the 18th century (The Marlborough to Salisbury Road in 1762, the Hungerford Road in 1772 and the Bourne Valley Road to the west in 1835) remain for the large part the major routes now. These routes are all essentially north south routes and it is notable that none of the roads running east west across the parishes have become principal routes today although they are well represented on historical maps.





Extract from VCH map showing the southern end of CKIN34 east of the River Bourne joining CKIN6A

- 10.13 The area was also once active with railways and four railway schemes were promoted in Parliament for the area around CKIN6A alone. The Swindon, Marlborough and Andover Railway from 1882 operated as part of the Midland and South Western Junction Railway and ran close to the River Bourne. It was closed in 1961.
- 10.14 With respect to land division and enclosure in 1763 three of Aughton's four open fields (North, South and Low) were inclosed by a private agreement and the route of CKIN34 as "the Grafton Road" was used as a boundary to five of the allotments. Brakeham Field remained open and Aughton down remained in common use.

11.0 Historical Records

- 11.1 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 twenty 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.
- 11.2 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.”

- 11.3 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 for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

- 11.4 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)

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

12.0 Category A Evidence

12.1 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).

12.2 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.

12.3 Three inclosure awards have been viewed. One sets out and awards the claimed route in Great Bedwyn (Grafton) and two others record the route as pre-existing.

12.4 **Inclosure of land at Aughton by Agreement 1763 WSHC 9/13/12, 13 and 14**

12.5 **Agreement - Wiltshire and Swindon History Centre (WSHC) Ref. no 9/13/12**

This document is the agreement made prior to the inclosure award for the hamlet of Aughton dated 17th January 1763 and entitled "The Arbitrators Award for Inclosing and Dividing the Common fields and Downs in the Hamlet of Aughton within the Manor of Collingbourne Kingston in the County of Wilts." Award WSHC ref. no. 9/13/14.

12.6 Both the agreement and the award are signed and sealed.

12.7 There is also a survey book at WSHC ref. no 9/13/13 entitled "Survey of Aughton Field before the Inclosure in 1763". Further entitled "A Book of Particulars drawn from the survey of Aughton field in the Parish of Collingbourne Kingston where each furlong is numbered, and the progressive numbers in each furlong shows each person lands respectively as named to the Surveyor. 1762".

12.8 The survey book lists the following affected proprietors:

Mr Tho Gilbert
Mr Jn Dean
Mr Edwards
Mr Dan Tanner
Mr Ralph Tanner
Mrs Norris
Thomas Collins
Mrs Collins
Mrs Chandler
Mr Cannon
Mr Legg
Mr Greuill
Mr Jennings

- 12.09 The Agreement is clearly signed and sealed by 8 of these with there also being two unreadable signatures and 2 seals with no signatures. It is considered that on the balance of probability all proprietors signed and or sealed the agreement.
- 12.10 The Award records that the appointed arbitrators and referees were James Poor of Crux Easton, Yeoman, Thomas Compton of Cholderton, Yeoman and Richard Rawlins of Hildrop Farm. The Lord of the Manor of Collingbourne Kingston at that time was the Right Honorable Thomas Bruce Lord Bruce Baron of Tottenham.
- 12.11 The Award was signed and agreed, sealed and delivered by Thomas Gilbert, Ralph Tanner and John Chandler.
- 12.12 **Transcript of Agreement**

“Articles of Agreement ? had been made and fully agreed upon the twenty sixth day of January in the first year of the Reign of our Sovereign Lord George the Third by the Great God of Great Britain France and Ireland King and Defender of the faith and so forth and in this year of our Lord One thousand seven hundred and sixty one BETWEEN the Right Honorable Thomas Lord Bruce the Lord of the Manor of Collingbourne Kingston and in the County of Wilts Thomas Gilbert John George otherwise Edwards John Dean Edward Millington freeholder ffolk Greville Esq. and leaseholder Thomas Collins Mary Collins Ralph Tanner Richard Legg Elizabeth Chandler copy holder and the several other persons whos hand and seals are hereunto subscribed and sett Landholders or tenants or proprietors in possession or reversion of Common Lands within the hamlet of Aughton in the Manor of Collingbourne Kingston aforesaid WHEREAS the inclosing the common ffields common downs and other commonable places within the hamlet of Aughton will be a great advantage and improvement it is hereby mutually and reciprocally covenanted and agreed by and between all and every parties hereunto for themselves severally and respectively and not one of them for the other or others of them and for their several and respective ? ? and ? in manner following that is to say that it shall and

maybe lawfull for them the said parties hereto or the major part of them to nominate and appoint in writing under their hands four or three persons to be arbitrators or referees for the exchanging dividing and meteing the said common ffields downs and Commonable places and that such act ? or referred shall and may cause all the said premises to be measured and by writing under our hands and seals allot assign and sett out the same unto all and every the parties hereto ? and proportionally ? to the quantities and qualities of the Lands now held by each and every of them within the said ffields aforesaid having respect to the Quality of the land that shall be allocated to each of the said parties shall ffence in such part of what part of what shall be allotted to him or her or them respectively as shall be ordered and directed by the said arbitrators or referees so to be ? who shall also sett out such part of the said lands for proper and ? ways to each lott of land as they the said arbitrators shall adjudge proper and ? And that the lands so sett out and allotted to each and every the said parties hereunto shall be held and forever enjoyed by him her or them respectively in several in exchange for the Said lands and hereditaments now held and enjoyed by him or them ? to his and their respective estate rights and interest in such his her and their present lands and hereditaments and it is further agreed by and between the said parties that after the said arbitrators or referees shall have allotted Sett out and divided the said Common ffields downs and premises as aforesaid they the said parties hereunto their heir ? assigns shall and will make do or execute such deeds conveyences or other ? in the Law for the continuing the inclosing exchanging and dividing the premises and establishing the same for ever as by Council shall be reasonably advised AND it is further agreed that all the costs and expenses relating to the premises shall be born and paid by each of the said parties to whom the said Land shall be allotted in possession in proportion according to the number of acres allotted to him her or them Provided always and upon this Condition nevertheless that none of the Downs belonging to the said Lord Bruce or that shall be allotted to any of his tenants shall be broke up and that if the said arbitrators or referees are not appointed and do not allot divide and sett out the said premises and execute the powers in them hereby vested within the space of two years then these presents shall be void and of none effect ? where the said parties to these presents interchangeably have sett their hands and seals the day at year first above written”

On reverse:

“Memdum – That it is agreed by and between all and every of the said parties to the within written articles that the award to be made by the arbitrators or referees to be chosen as within mentioned shall not be carried into execution or be binding upon any of the said parties until the same shall be approved of and confirmed by the within names Thomas Bruce Lord Bruce and in case the said Lord Bruce shall refuse to do so then he doth in such case agree to pay all the costs and charges of such award and all other expenses that the said parties shall be put to relating hereto”

12.13 Extracts from the Award – Allotments bounding the Marlbro', Grafton and Oxford Roads

References to the Grafton Road highlighted by case officer.

"..to...Thomas GilbertOne other piece of Land near Duck puddle ...bounded on the North by the Oxford Roadthe said Thomas Gilbert to make all the fences therof against the Oxford Road..."

"To John DeanOne piece of Land near Duck puddle....bounded on the North by the Oxford Road....and on the West by the Lot of the said Thomas Gilbert ...the said John Dean to make all the fences thereof against the Oxford Road..."

"To John George Edwards ...One piece of land near Duck puddle...bounded on the North by the Oxford Road..."

*"To Ralph Tanner...One piece of Land....bounded on the East by **Grafton Road**...and on the West by the Marlbro' Road...."*

"...to the said Mary Collins....bounded on the East by Brunton Lots, on the South by the Oxford Road, and on the West by a Drove called the Lot Drove"

*"To Elizabeth Chandler...bounded....on the East by **Grafton Road**....and on the West by the Marlbro' Road"*

*"...to the said Thomas Cannon...bounded on the North by a Lot of Elizabeth Chandlers, on the East by the **Grafton Road**, on the South by the Oxford Road, and on the West by the Marlbro's Road"*

"To Richard Legg...bounded...on the West by the Oxford Road"

*"...to the said Richard Legg...bounded on the East by the Drove called the Lot Drove, on the South by the Oxford Road and on the West by the **Grafton Road**".*

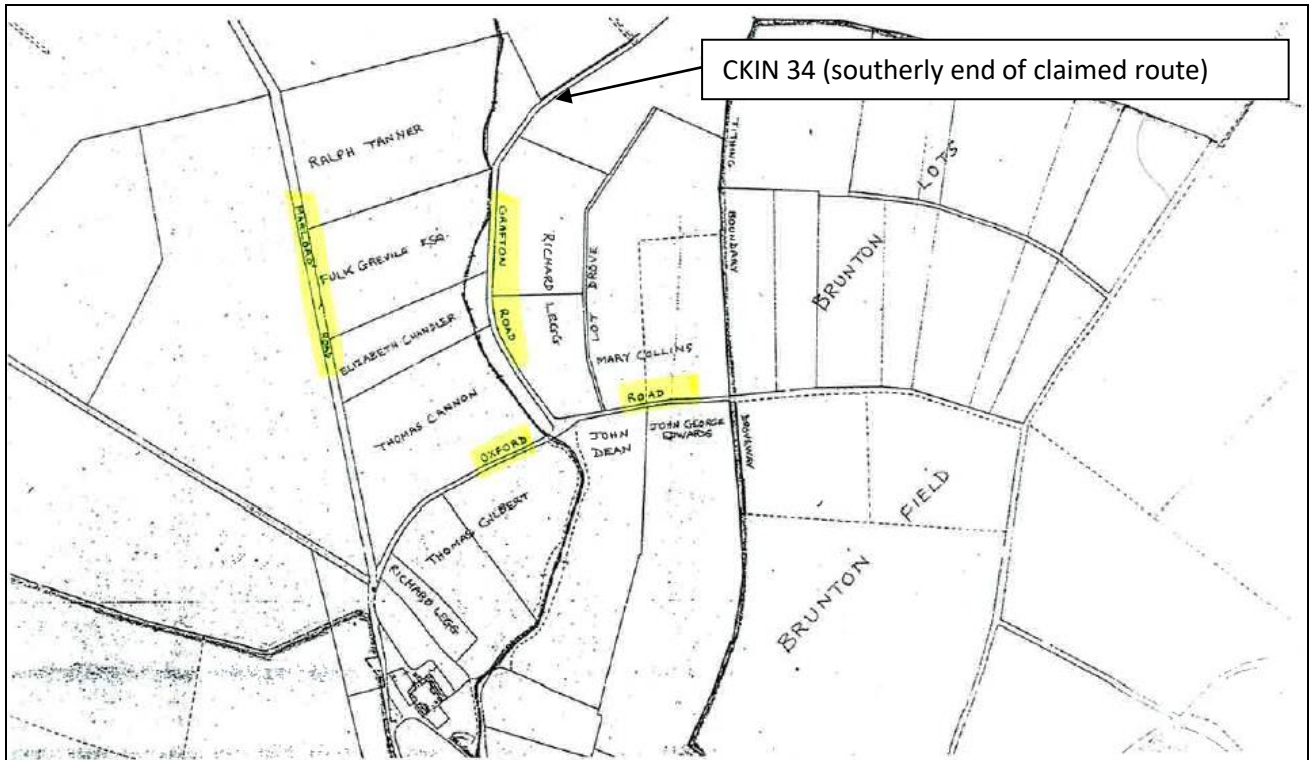
*"To Fulk Greville Esq...bounded...on the East...by the **Grafton Road**,....and on the West by the Marlbro' Road".*

12.14 There is no map accompanying any of the documents though it has been possible to re-construct parts of the award on a map based on the allotment descriptions, the roads and the boundary between Collingbourne Lots and Aughton Field.

12.15 Resultant Map

The tithe map for Collingbourne Kingston, produced some 80 years later, is a detailed document that assists with the position of landscape features and has been used as the basis for reconstructing a map, supported by an 1807 estate map. The "Marlbro' Road" referred to is clearly the Salisbury to Marlborough Road, the A338 and former Turnpike and the "Grafton Road" referred to is clearly Collingbourne Kingston 34 (subsequently awarded as the "Road from West Grafton to

Collingbourne” at the inclosure of the Great Bedwyn Grafton Tithing in 1792), accordingly, and knowing the boundaries of the Aughton Tithing, it is possible to demonstrate that the route referred to as the Oxford Road can, on the balance of probabilities, only be the route followed today by Collingbourne Kingston 6A. We know that the Grafton Road is not byway open to all traffic Grafton 26 because this route lies firmly within Brunton tithing and not within Aughton tithing.



12.16 Parliamentary Inclosure of Grafton Tithing 1790 – 1792

WSHC A1/215/23 and EA68

The inclosure of lands in Great Bedwyn (including the inclosure of land in Grafton tithing) was enabled by an Act of Parliament entitled “*An Act for dividing and Allotting Several Open and Common Lands and Grounds within the Parishes of Great Bedwin, Little Bedwin and Prechute, in the County of Wilts.*” 30 Geo. III 1790. WSHC A1/215/23.

12.17 The Act empowers the Commissioners to set out Roads as follows:

“And be it further enacted, That the said Commissioners shall, and they are hereby authorised and required to set out, ascertain, order, and appoint, both public and private Roads, Highways, Bridle Ways, and Foot Ways, Ditches, Drains, Hatches, Water-courses, Bridges, Gates, Stiles, Mounds, Fences, Banks, Bounds, and Land Marks, in, over, upon and through, or by the sides of the Lands and Grounds hereby

intended to be divided and allotted, with the Dimensions and Breadths thereof, so as all public Roads and Highways (except Bridle Ways and Foot Ways) shall be an remain Forty Feet broad at the least; and the said Commissioners, after they shall have ascertained all such public and private Roads and Ways, and caused the same to be marked and staked out, shall give Twenty-one Days Notice at least in The Salisbury and Winchester Journal, of the Day by them appointed to receive any Objections that may be made to any such public or private Roads and Ways, so set out, or omitted to be set out and ascertained in pursuance of this Act, and the said Objections, being maturely considered, shall, together with the Names of the Persons making the same, and the Resolutions of the Commissioners thereon, be entered in the Minutes of the Proceedings of the said Commissioners, in a Book to be kept for that Purpose, and such resolutions shall be binding and conclusive to all parties; and the said public Roads and Highways , so set out, shall at all Times for ever after be repaired and kept in Repair in such Manner as other public Roads and Highways are directed to be repaired by the Laws of this Realm; and all such private Ways, Ditches, Drains, Watercourse, Hatches, Bridges, Gates, Stiles, Mounds, Fences, Banks, Bounds, and Land Marks, shall be made, and from Time to Time be amended, cleansed, renewed, and kept in Repair, by such Person or Persons, and in such Manner, as the said Commissioners shall award, order, or direct; and that it shall not be lawful for any person, after such new Roads or Ways are set out, and the Objections (if any) are heard and determined on, to use any other Road or Way, either public or private, in, over, upon, or through the said Lands and Grounds; and that the Grass and Herbage growing and re-newing in and upon all and every public and private Roads and Ways so to be set out and ascertained as aforesaid shall be and for ever remain to and for the use and Benefit of such Person and Persons, as the said Commissioners shall, by their Award or Awards, order and appoint, and all former Roads and Ways which shall not be continued, set out and ascertained, shall be deemed Part of the Lands and Grounds to be divided and allotted pursuant to this Act.”

- 12.18 The Act makes it clear that the power for the Commissioners to draw up the Award followed the division and allotment of lands and *inter alia* Roads.

“And be it further Enacted That as soon as conveniently may be after the Division and Allotment of the said Lands and Grounds in all or any of the Parishes or Tythings where the said Lands and Grounds are situate shall be finished, pursuant to the Purport and Directions of this Act, the said Commissioners shall form and draw up, or cause to be formed and drawn up, an Award in Writing for describing and confirming the respective Divisions and Allotments of the said Lands and Grounds in each of the Parishes or Tythings where the same are respectively situate, as the said Commissioners shall judge most expedient, which Award or Awards respectively shall express the Quantity of Acres, Roods, and Perches, in Statute Measure, contained in the said Lands and Grounds respectively, and the Quantity of each and every Part and Parcel thereof, which shall be so allotted, assigned, or

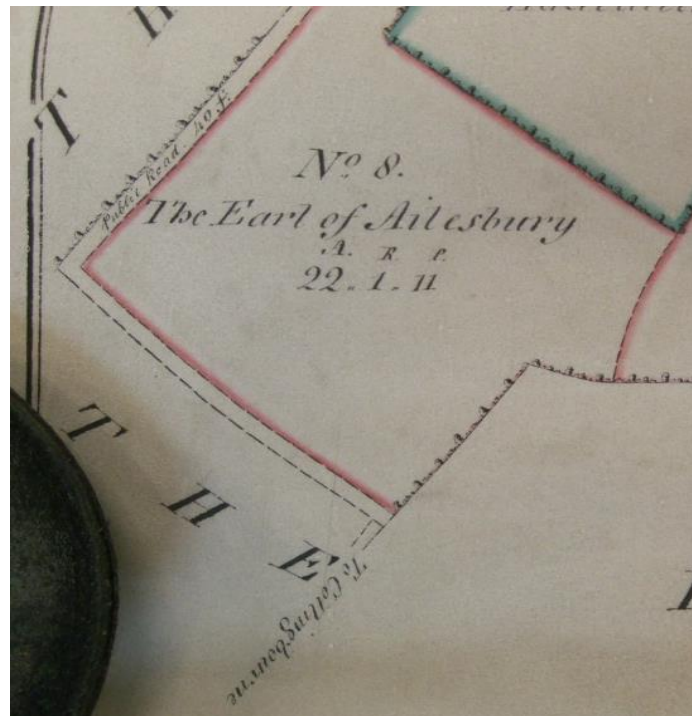
exchanged and Situations and Descriptions of the same respectively, and shall also contain a Description of the Roads, Ways, and Foot Paths, set out and appointed by the said Commissioners as aforesaid, and also such Ditches, Drains, and Watercourses, Hatches, Bridges, Gates, Stiles, Mounds, Fences, Banks, Bounds, and Land Marks, as the said Commissioners shall order and appoint by virtue of this Act, and shall also express and contain all such other Rules, orders, Agreements, regulations, Directions, and Determinations, as the said Commissioners shall think necessary, proper, or beneficial to the parties; which said Award or Awards shall be fairly engrossed or written on Parchment, and signed and sealed by the said Commissioners, and within Twelve Calendar Months after the same shall be so signed and sealed, or as soon as conveniently may be, shall be inrolled in One of His Majesty's Courts of Record at Westminster, or with the Clerk of the Peace for the County of Wilts....."

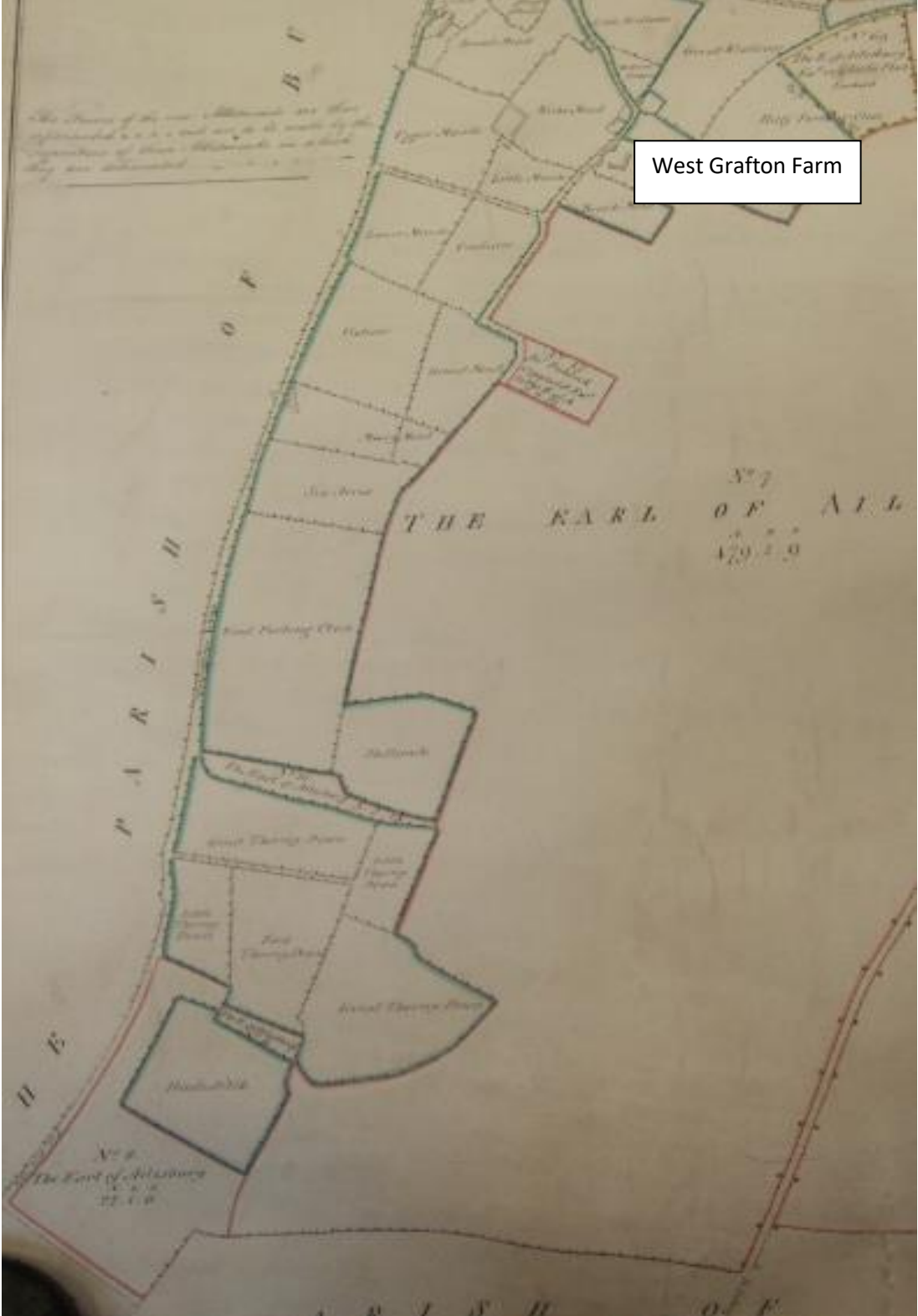
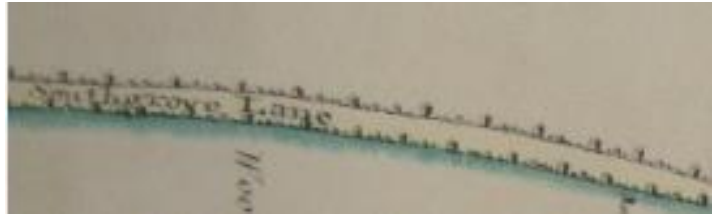
12.19 Tithes over land affected by this inclosure were also commuted to monetary charges by this Act.

12.20 Great Bedwyn (Grafton Tithing) Inclosure Award 1792 WSHC EA68

The whole of the route currently recorded as GRAF29, 30 and 31 and Burbage 1 is shown as a road on Plan A 'Grafton Tithings'. The road is inscribed with the words "Public Road. 40f" and "Southgrove Lane". The southern end, now recorded as CKIN34 is not shown, being in another parish but is shown as a continuation of the awarded road marked "To Collingbourne".

12.21





West Grafton Farm

12.22 The map is drawn at the scale of 5 chains to one inch and has a key to the effect that:

New allotments are bordered red.

Old enclosures exchanged are bordered yellow.

The remainder of the old enclosures are bordered green.

“The Fences of the new Allotments are thus represented And are to be made by the Proprietors of those Allotments in which they are delineated.”

12.23 The route is described in the Award as:

“Road from West Grafton to Collingbourne” “One other public Carriage Road and Drift Way of the breadth of forty feet beginning at the South end of South Grove Lane near the North-West Corner of an old Inclosure to the Right Honorable Thomas Bruce Earl of Ailesbury called little Thorny Down and from thence extending Southward until it comes to the South-West Corner of an Allotment to the said Earl of Hazelditch at which place it assumes an Eastward Direction and so continues unto the place of its usual Entrance into the Parish of Collingbourne the same being a Public Carriage Road and Drift Way leading from West Grafton towards Collingbourne.”

12.24 The Route froms the boundary of two allotments (number 8 and 10) being described in the award as follows:

Allotment No. 8 to the Earl of Ailesbury. A.r.p. 22.1.11

“One other allotment of arable land containing twenty two acres one rood and eleven perches situate at Hazleditch in West Grafton further field and bounded on the west and in part on the south by the road leading from West Grafton to Collingbourne in part and on the east and the remainder on the south by lands in the parish of Collingbourne in other part on the east by the allotment to the said Earl last described in other part on the north in other part on the east and in remaining part on the south by an old enclosure called Little Thorny Down.”

12.25 Collingbourne Kingston and Burbage Inclosure Award 1824 WSHC EA128

The final act of inclosing the remaining open downs and common places (including some exchanges of previously enclosed lands) in Collingbourne Kingston and Burbage was carried in 1824. This was made possible by a private Act of Parliament entitled “*An Act for Inclosing Lands in the Parishes of Collingbourne Kingston, and Burbage, and in the Tithing of Poulton, in the Parish of Mildenhall, in the County of Wilts*” 1815 (‘the private Act’) and a general act of 1801 (‘the general Act’) entitled “*An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure; and for facilitating the Mode of providing the several Facts usually required on the passing of such Acts.*”

12.26 The private Act has been read and considered and contains no additional provisions regarding highways over and above those in the general Act. It is however interesting to note that the private Act, in protecting the quickset hedges to be planted, recognises the practice of grazing animals on public highways as follows:

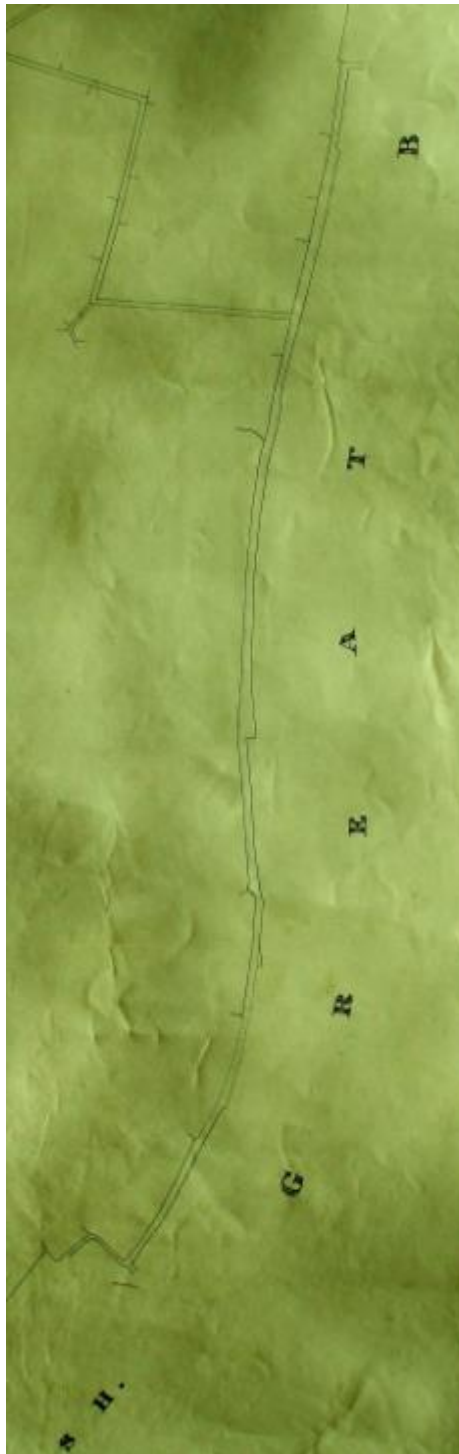
“And be it further enacted, That no Horses, Cows, Sheep, Lambs, Mules, Asses, Pigs, or any sort of Cattle, shall be permitted to graze in any of the Highways, Roads, Lanes, or Passages, which the said Commissioners shall set out as aforesaid, at all, after the Execution of the Award of the said Commissioners, nor in any of the Allotments to be made in pursuance of this Act, for the Space of Ten Years next after the Execution of the Award...”

12.27 On the Award map which is labelled “The Collingbourne Kingston Plan, CKIN34 is shown as a fenced road from what is now restricted byway CKIN6A leading in a northerly direction to the east of the River Bourne. It is likely to have been left uncoloured because it is not affected by the Award as none of the lands over which it leads are newly inclosed and only two small areas to the east of it are affected by exchanges. Other unaffected roads are also uncoloured (including the turnpike/A338).

12.28 The extent of inclosure delivered by the award is not great and the award sets out only four Public Carriage Roads and Highways in Collingbourne Kingston and these are shown coloured brown or sienna on the plan.



12.29 The above Act and award also covers the parish of Burbage which is shown on a separate map. Most of the claimed route is shown but being outside the parish (being in the parish of Great Bedwyn) it could not be affected by the award. No new enclosures adjoin the route. The award adduces little evidence for the claimed route beyond confirming the continued existence of the majority of the route at this time.



12.30 Other Category A Evidence – Railway Plans

Individual railway and canal schemes were promoted by Special Acts. The process for canal schemes was codified in 1792 by a Parliamentary Standing Order and these arrangements were extended to cover railway schemes in 1810. The requirements for railways were expanded in the 1845 Act, which requires public rights of way which cross the route of a railway to be retained unless their closure has been duly authorised. Therefore, although it was not the primary purpose of the deposited plans to record rights of way, these plans provide good evidence in this context as the law required provision to be made for existing routes crossing the line.

- 12.31 Clause 10 of the 1845 Act requires that true copies of such plans and books of reference ... certified by any such clerk of the peace shall be received by the courts of justice or elsewhere as evidence of the contents thereof. The Act also includes provisions for the crossing of the line by any highway and specifies (Clauses 46 to 51) the minimum bridge dimensions for public and private roads and the requirements for the gating of crossings on the level.
- 12.32 Railway deposited documents were in the public domain. The statutory process required for the authorisation of railway schemes was exacting and the Book of Reference and Deposited Plans made in the course of the process needed to be of a high standard. In particular, railway plans, which were normally specifically surveyed for the scheme, usually record topographical detail faithfully. They have been admitted by the courts as evidence of public rights of way.
- 12.33 The process for the authorisation of railway schemes provided for scrutiny of the plans by involved parties. Landowners would not have wished unnecessarily to cede ownership, Highway Authorities would not have wanted to take on unwarranted maintenance responsibilities, and Parish Councils would not have wished their parishioners to lose rights. Therefore an entry in the book of reference that a way was in the ownership of the 'Surveyor of Highways' may be persuasive evidence of a public right of some description.
- 12.34 Where schemes were not completed, the plans were still produced to form the basis for legislation and were still in the public domain.
- 12.35 Railway plan sections and cross-sections usually differentiate between public and private roads. Where this is not the case and the route is described as 'road' in the book of reference, it is sometimes possible to establish the nature of the way by reference to the description of other roads. Unless the existing roadway was less than 25 feet (in which case section 51 of the 1845 Act set the minimum by reference to the average available width for the passage of carriages within 50 yards of the point of crossing), the minimum width for bridges laid down in the 1845 Act is 25 feet (7.62 metres) for public roads and 12 feet (3.66 metres) for private roads. However, caution needs to be exercised regarding the latter as some high status estate roads had wider bridges. There were no specified widths for bridleways or footpaths.

12.36 The status of a way had an impact on the cost of the scheme and it is unlikely that railway plans would show a route at a higher status than was actually the case. There was no obligation to bridge footpaths under the 1845 Act and, as a general rule, unless there is specific provision in the Special Act, any public route requiring a bridge is of at least bridleway status. Bridleways and footpaths which are not shown on the plan are sometimes described in the associated Book of Reference.

12.37 It must be borne in mind that the procedure to be followed for deposited plans of public undertakings was strictly regulated by Standing Orders of the House of Lords. For example there was a requirement that plans, sections and books of reference, in duplicate, were deposited with Clerks of the Peace and Principal Sheriff Clerks; that Clerks of the Peace were to endorse them on receipt; that plans, sections and Books of Reference were to be deposited with clerks of the parishes through which the works were to be carried; that any plans showing variations had to also be deposited with the Clerks of the Peace and that copies of standing orders relating to the deposits were also to be delivered.

12.38 The claimed route is affected by four different railway schemes and accordingly four sets of deposited plans and books of reference have been viewed. Not all schemes were promoted by the same companies and accordingly the evidence has greater synergy as a result.

12.39 Manchester and Southampton Railway 1845 WSHC ref. no. A1/371/70

The plans and Book of Reference were deposited with the Clerk of the Peace at 4.30 pm on the 3rd November 1845. All records are duly signed.

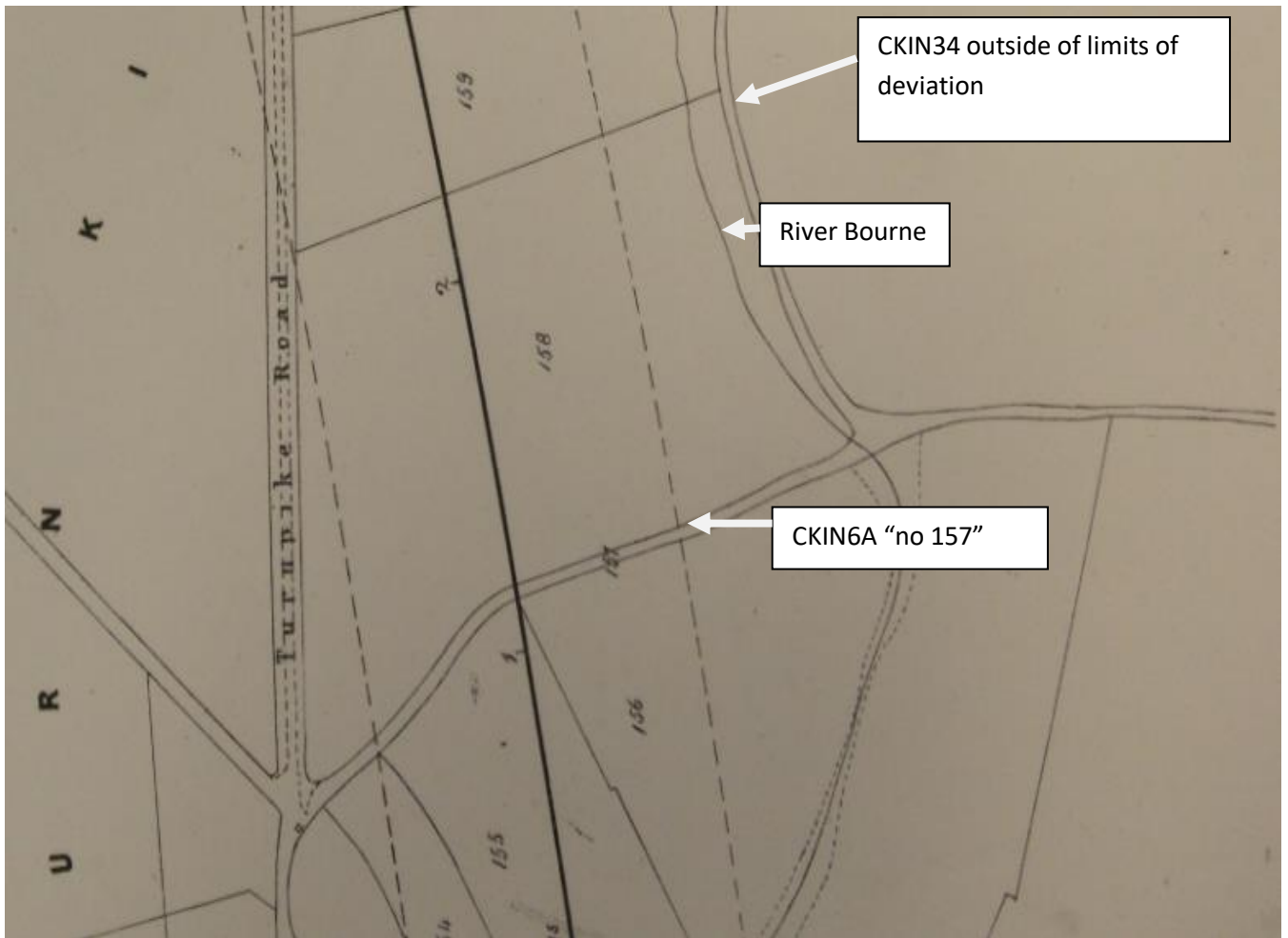
12.40 The proposed line passed to the west of the claimed route cutting across the former Turnpike (now A338) and the road now recorded as CKIN6A. The extent of deviation is shown on the plans by pecked lines and although the route of the claimed route CKIN34 is shown as a fenced road (approx. width 25 feet) in the same manner as other roads it is outside of the limits of deviation and hence not numbered and included in the Book of Reference.

12.41 CKIN6A, which has a junction with CKIN34, is recorded as number 157 on the plan and the Book of Reference records the following:

Parish of Collingbourne Kingston (page 5)

<u>No on Plan</u>	<u>Description of Property</u>	<u>Owner or Reputed Owner</u>
157	Public Highway	The Surveyor of Highways

No Lessee or reputed lessee and no Occupier.

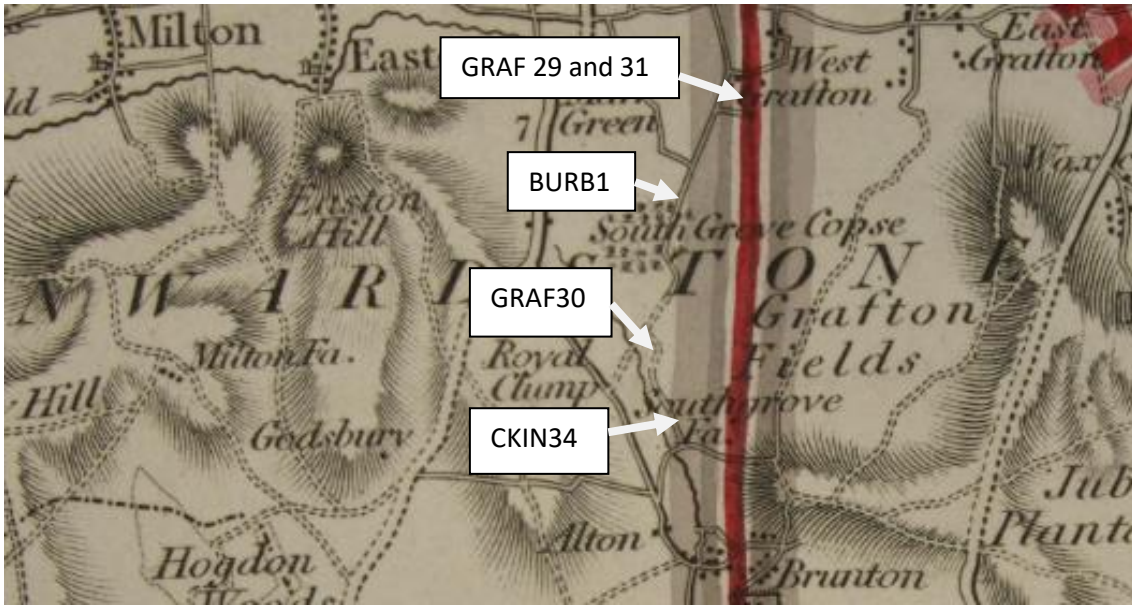


12.42 Manchester and Southampton Railway 1846 – 7 WSHC Ref. no. A1/371/78

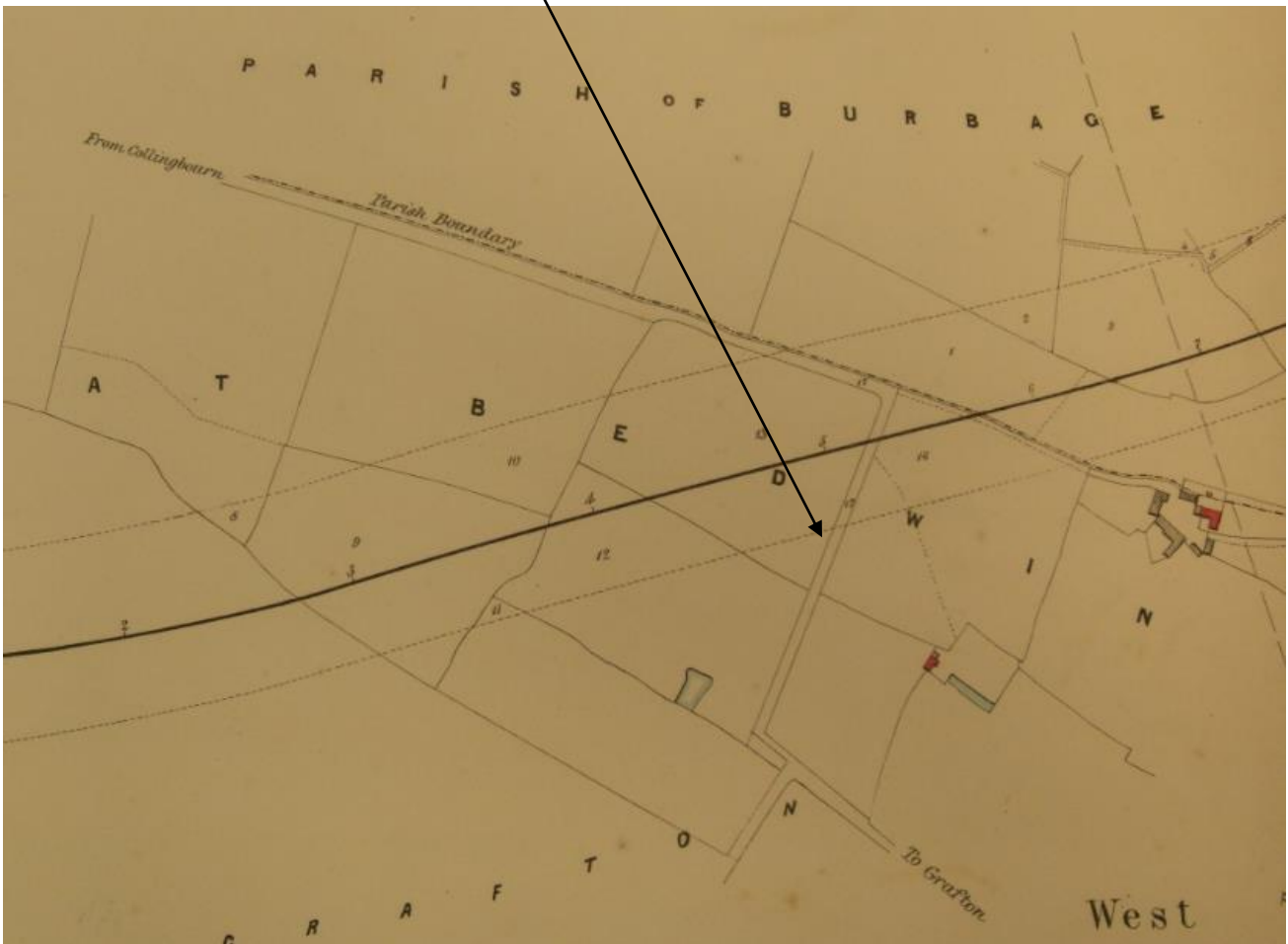
The Plans and Book of Reference were deposited with the Clerk of the Peace at 2.30 pm on the 30th November 1846 and have been duly signed.

The plans are accompanied by an overview map based on the Ordnance Survey's 1 inch to the mile map and show that the line proposed for this railway leads further east than the one above proposed in the previous year.

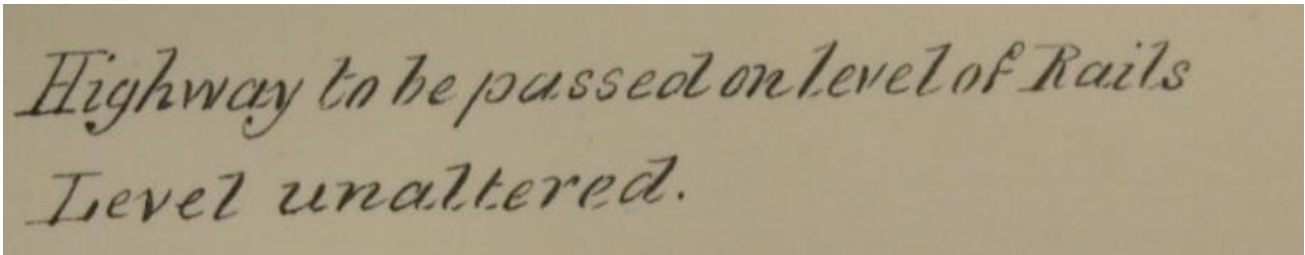
- 12.43 The overview plan shows the line in red passing east of CKIN34 (and therefore outside the limits of deviation) but affecting the claimed route of GRAF29 and 31 at West Grafton. The deposited plans, sections and Book of Reference give detail.



12.44 The plans at page 26 show the whole of GRAF31 and over 30 chains of GRAF29 as a fenced road, marked at the northern end "To Grafton" and at the southern end "To Collingbourn". The railway crosses at approximately 38 miles 5.25 furlongs. No. 17 in the parish of Great Bedwyn.



12.45 From the Section plans at page 16 it can be seen that at 38 miles 5.25 furlongs that the “Highway to be passed on Level of Rails. Level unaltered.”



12.46 The Book of Reference for the Parish of Great Bedwyn records:

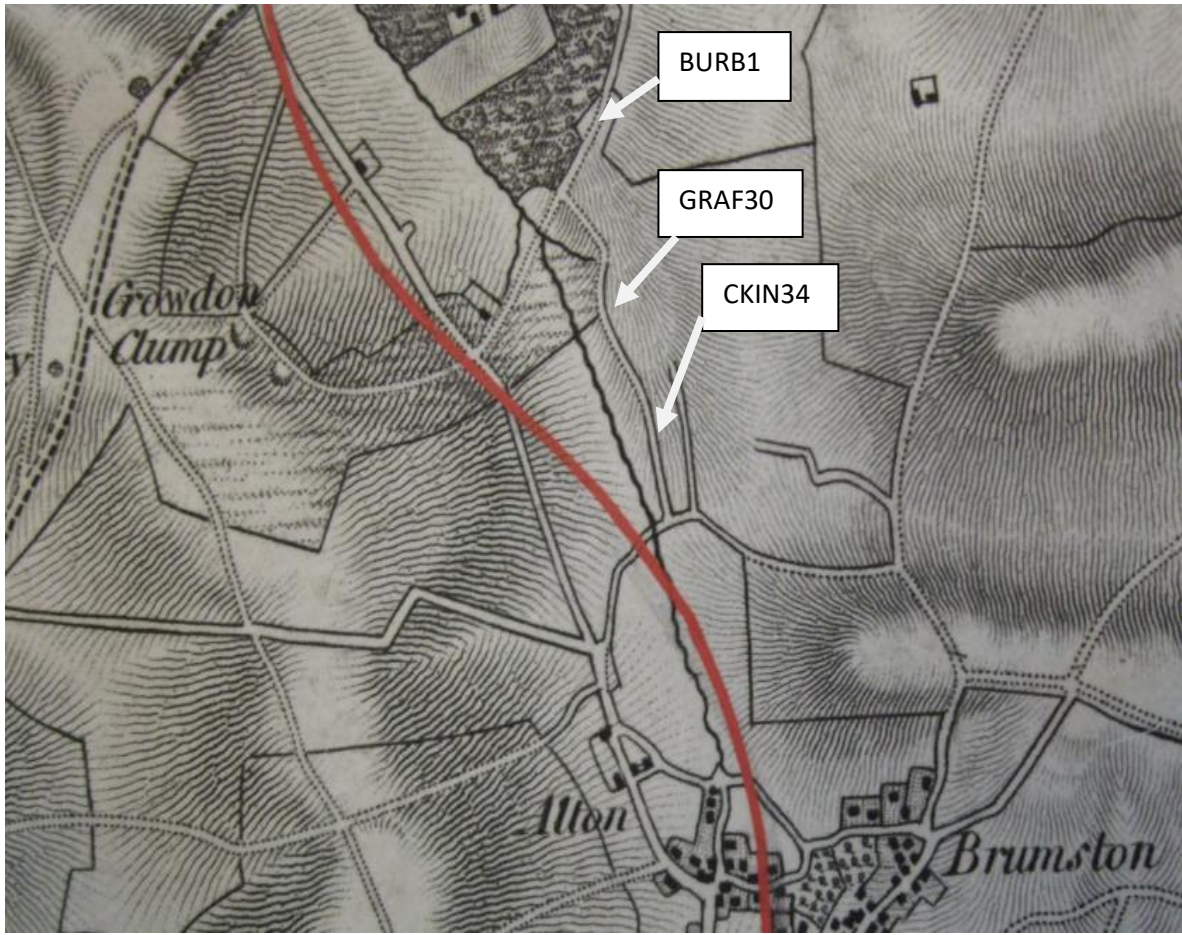
<u>No on Plan</u>	<u>Description of Property</u>	<u>Owner or reputed owner</u>
17	Public Highway	The Surveyor of Highways

12.47 **Manchester and Southampton Railway, Andover to Cheltenham 1847 – 8**
WSHC Ref. no. A1/371/80

Also Manchester and Southampton Railway Amendment A1/371/79

The plans and Book of Reference were deposited with the Clerk of the Peace between the hours of 9 and 10 o'clock am on the 30th November 1847. All records are duly signed. A further amended Book of Reference was subsequently deposited on the same day and duly accepted and signed.

12.50 An overview plan was also deposited based on the Ordnance Survey's one inch to one mile map and this shows the proposed line to the west of the River Bourne leading north west over the Turnpike Road (A338). The proposed line of the railway is shown in red.



12.51 CKIN34 is within the limits of deviation. Page 9 of the deposited plans show approximately 20 chains of CKIN34 fenced on the east side only, width approximately 18 feet. The road is numbered 152 on the plan.



12.52 Both the original Book of Reference and the amended one are the same in respect of CKIN34 and record it as follows:

Parish of Collingbourne Kingston

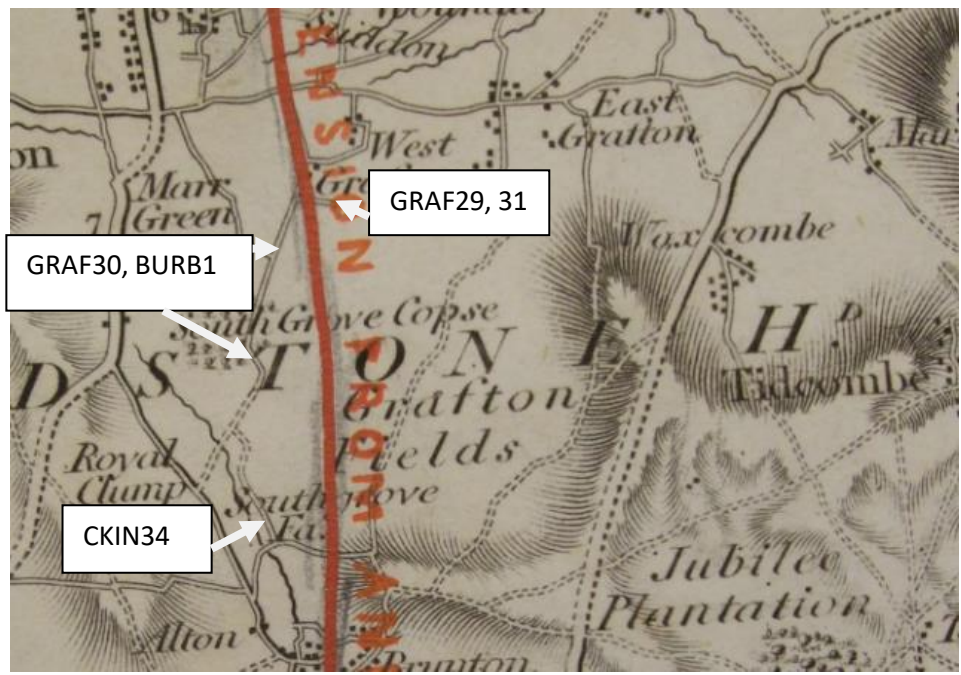
<i>No. on plan</i>	<i>Description of Property</i>	<i>Owner or Reputed Owner</i>
152	Road	The Surveyor of Highways

149	Road	The Surveyors of the Highways.	
150	Field and Watercourse	The Marquess of Ailesbury and his Trustees	Mary Hercomb.
151	Field and Watercourse	The Marquess of Ailesbury and his Trustees	Mary Hercomb.
152	Road	The Surveyors of the Highways.	
153	Field	The Marquess of Ailesbury and his Trustees	Deane William Clunes.
154	Field	The Marquess of Ailesbury and his Trustees	Deane William Clunes.
155	Field and Watercourse	The Marquess of Ailesbury and his Trustees	Mary Hercomb.
156	Field and Watercourse	The Marquess of Ailesbury and his Trustees	Mary Hercomb.

12.53 A copy of the Public Notice of the bill for the next session of Parliament was given in the Salisbury and Winchester Journal and the London Gazette. Copies of Plans, Sections and the Book of Reference were deposited for public inspection with the Clerk of the Peace for the County and a copy of so much as related to each parish with the parish clerk together with a copy of the notice. A copy of this notice is included in the archive A1/371/80.

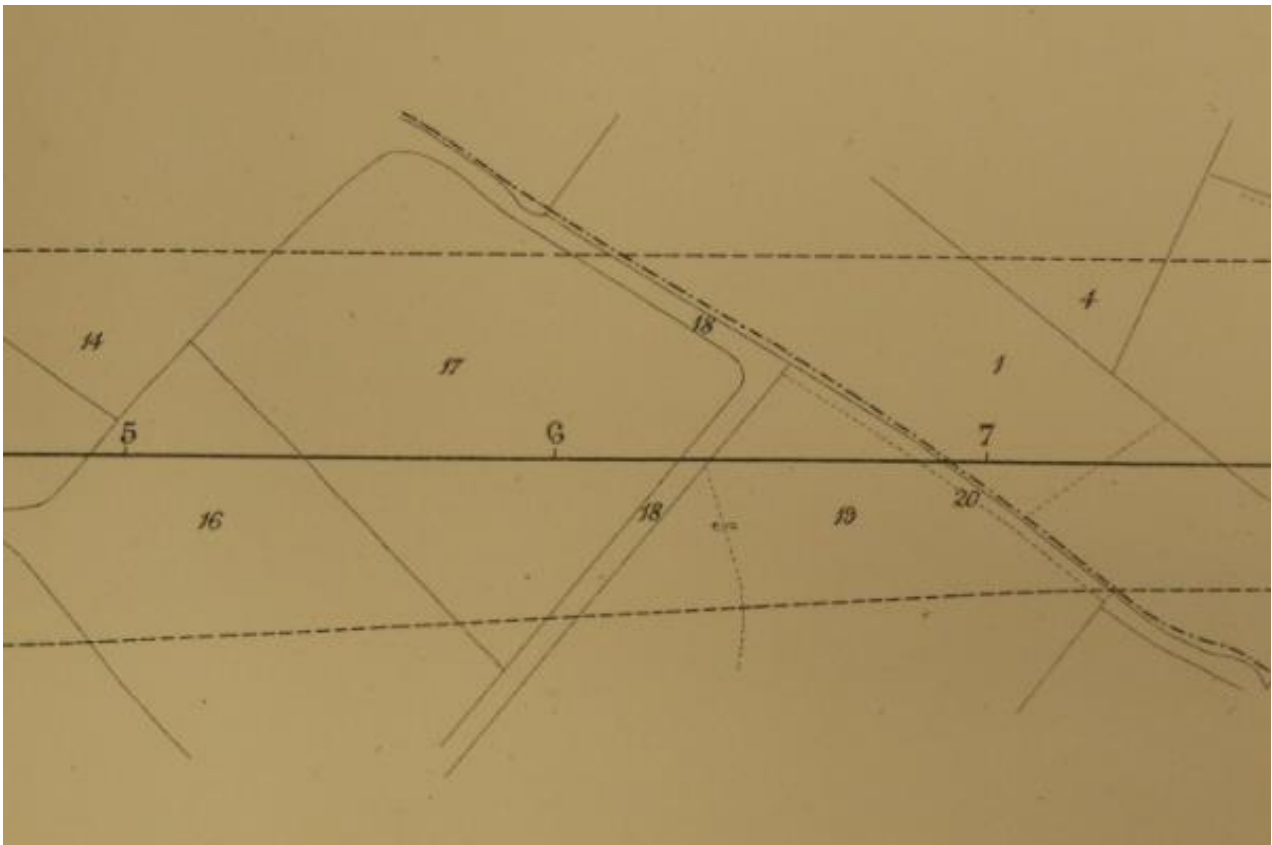
12.54 Andover and Redbridge Railway 1859 – 60 WSHC Ref. no. A1/371/96

The overview plan shows the proposed line of the railway in red.

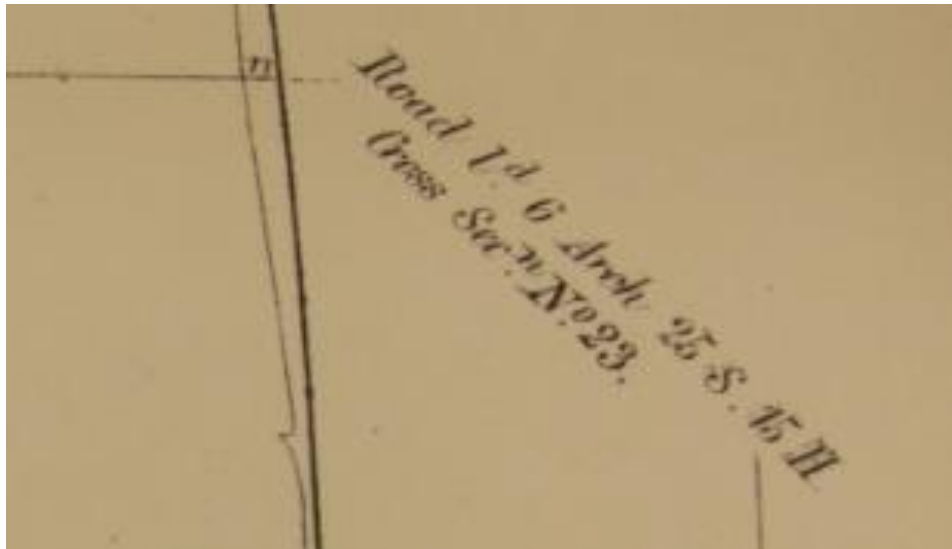


The Plans and Book of Reference were deposited with the Clerk of the Peace and duly signed. The proposed railway crosses CKIN6A a sufficient distance east of CKIN34 to make CKIN34 outside the limits of deviation but the line does cross GRAF29 and GRAF31.

12.54 The Deposited Plans show the east-west length of GRAF31 as a fenced road numbered 18 on the Plan. A length of GRAF29 branching south from GRAF31 is shown as a fenced road also numbered 18 on the Plan. The railway crosses at approximately 13 miles 6 furlongs and 3 chains. The Burbage parish boundary is shown by a bold pecked line north of route 18.



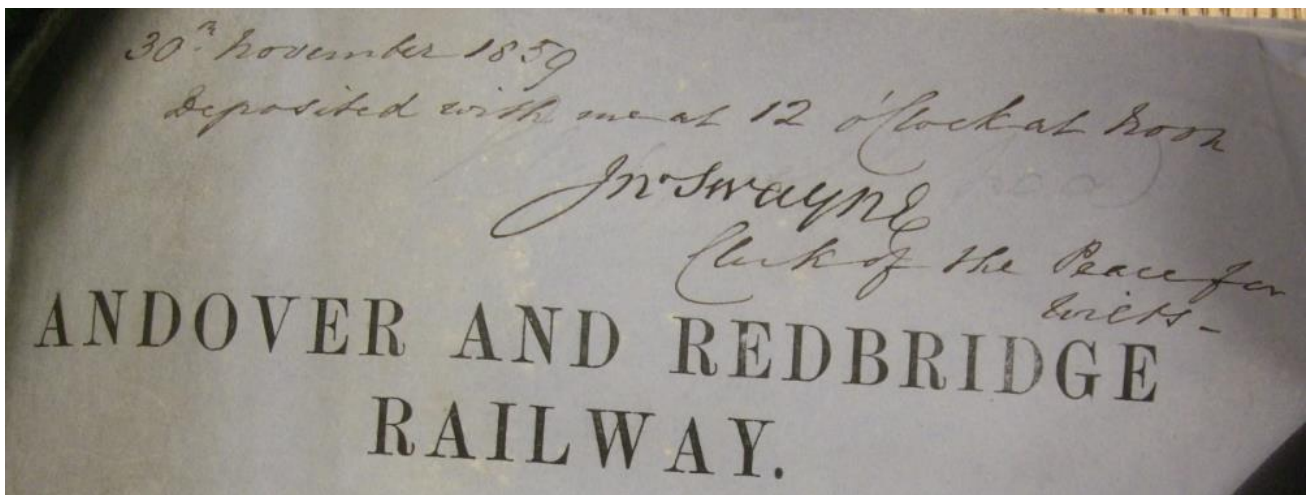
12.55 The Sections at page 15 at 13 miles 6 furlongs and 3 chains record “Road Id. 6 Arch 25S. 15H. Cross Secn. No. 23”.



12.56 Cross Section No 23 records that “Greatest Inclination of Present Road 1 in 30”
“Greatest inclination of Road when altered 1 in 20”.

12.57 The Book of Reference in the Parish of Great Bedwyn records that No. 18 on the Deposited Plan is a Public Road or driftway as follows:

<u>No on plan</u>	<u>Description of property</u>	<u>Owner or reputed owners</u>
18	Public road or driftway	Highway Surveyors



12.58 Any Other Category A Evidence

No record of any extinguishment or diversion of the highway has been found and the area is not affected by any canal plans. "An Order made by the Inclosure Commissioners under the General Land Drainage and Improvements Companies Act 1849" is retained in the WSHC archives and this is considered under Category B evidence as the representation of highways was not the primary purpose of the document.

13.0 Category B Evidence

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.

13.1 Order of the Inclosure Commissioners 1874 WSHC Ref. no. 529/245

This is entitled as follows:

Dated 26th March 1874

Counties of Wilts and Berks

Parishes of Collingbourne Kingston, Collingbourne Ducis, Shalbourne, Easton, Burbage, Great Bedwyn, Little Bedwyn, Froxfield, Mildenhall, Preshute, Savernake, Great Parks, Milton, Wootton Rivers, Chute, Blagdon and Hungerford

No. 356

The Marquis of Ailesburys'

Drainage, Roadmaking, Clearing, Farm Buildings, and Village Improvements

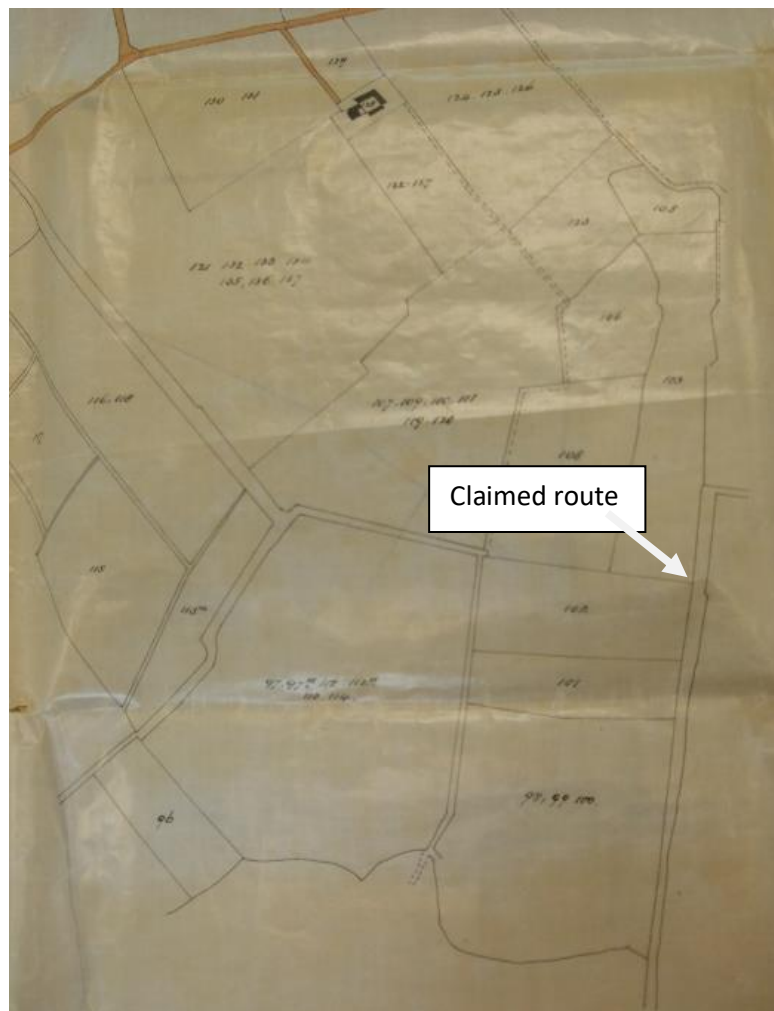
ABSOLUTE ORDER
OF THE
INCLOSURE COMMISSIONERS

13.2 The document comprises a signed, sealed and stamped order and plans showing the lands to be improved.

13.3 The Order commences: "*We the Inclosure Commissioners for England and Wales in pursuance of the General Land Drainage and Improvement Companies Act 1849 hereby declare and absolutely order that the inheritance of the lands mentioned in the schedule which is absolutely charged with the sum of £8,832 3/1d paid for the improvement by the dated....*" Payments are set for the following lands, all in the ownership of the Marquess of Ailesbury:

Collingbourne Brunton Farm
Scots Poor Farm
Kinwardstone Farm
Brunslade Farm
Burbage Manor Farm
Easton Farm
Wilton Farm
other "lands in hand"

- 13.4 The route of GRAF29 between GRAF31 and BURB1 and short spurs of GRAF31 and BURB1 is shown as a wide fenced road on Plan C "Kinwardstone Farm". It is interesting to note that by this time (1874) the road may have been starting to lose importance and is shown uncoloured in the same way that the byway open to all traffic CKIN2A and other minor highways is rather than coloured sienna as the Hungerford Road is.



- 13.5 **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 titheable land in different states of cultivation.

- 13.2 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.
- 13.3 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.
- 13.4 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.
- 13.5 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.”

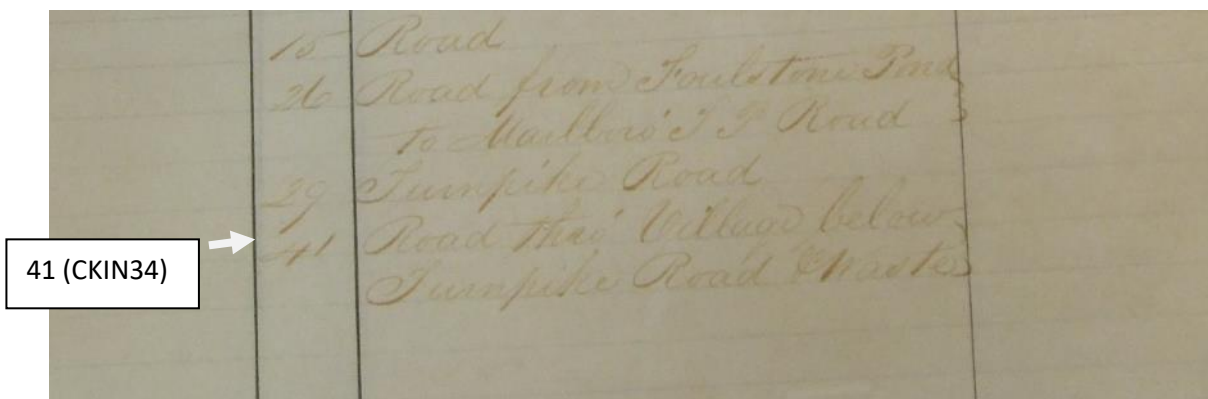
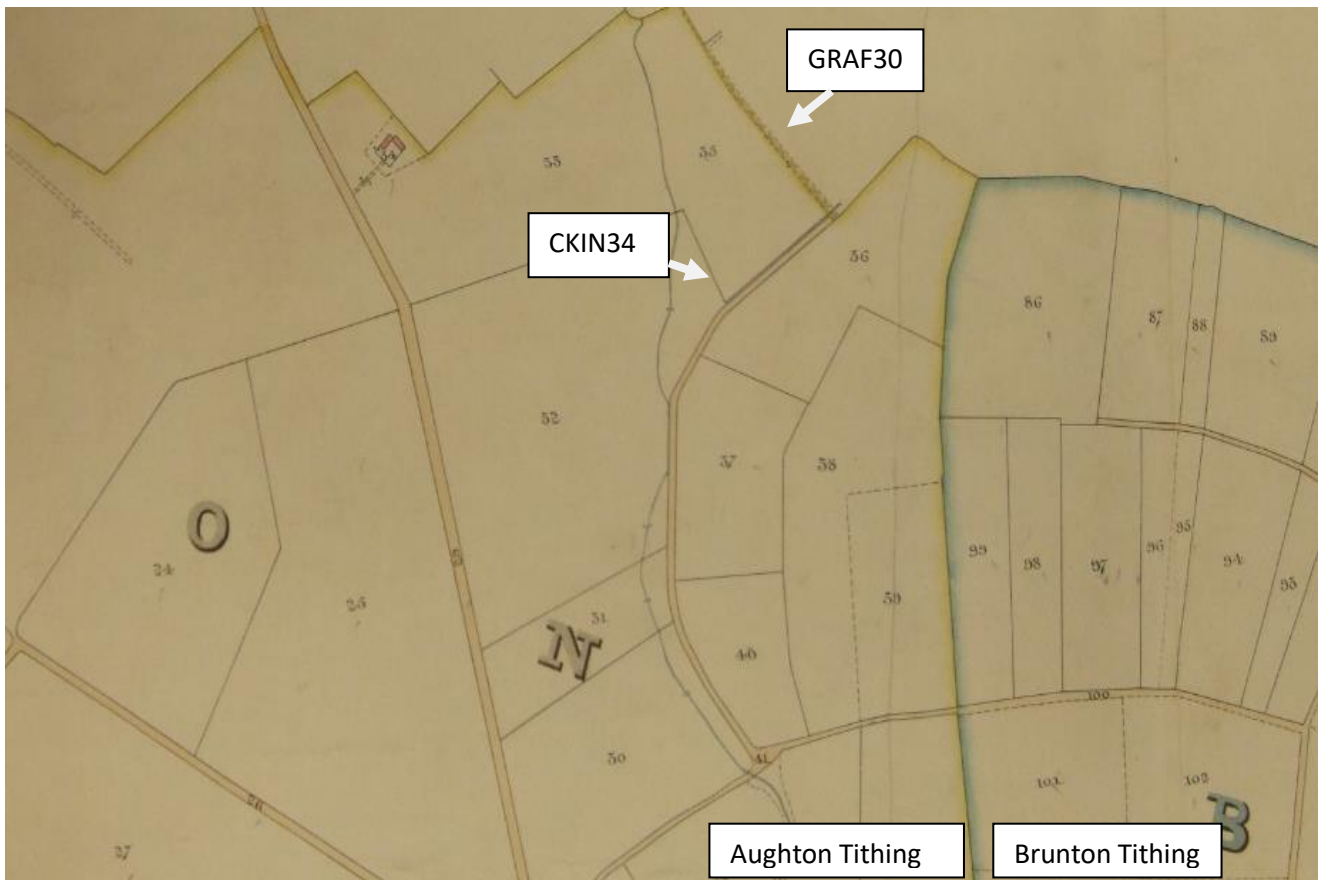
“Foot and Bridleways ...are sometimes explicitly annotated as such, but more usually they are indicated by single or double pecked lines.”

13.5 **Collingbourne Kingston Tithe Map and Apportionment WSHC Ref. no TA/Collingbourne Kingston**

The tithe map for Collingbourne Kingston is dated 1843 and is drawn at a scale of 6 chains to one inch. It is by A.M.May of Marlborough. Although the scale of the map falls short of Dawson’s ideal (3 chains to one inch), the map uses much of the symbology in the Parliamentary paper. Land detailed in the apportionment (which lists field names, land usage, ownership, acreage and details of payments) is

numbered on the plan to enable referencing. The road network is shown as either coloured sienna and numbered or unnumbered.

- 13.6 CKIN34 is shown as a fenced road (approximate width 25 feet) in the tithing of Aughton, coloured sienna and numbered '41' at its junction with CKIN6A . It is shown as part of the local road network and is described in the apportionment as '41' *'Road thro' village below Turnpike Road & Waste'*. No owner or occupier is recorded and it is tithe free. GRAF30 is show leading out of it at the parish boundary and is shown as an unfenced road leading north west along the parish boundary. A short length of the continuation in a north easterly direction is also shown.



13.7 Roads listed in the apportionment roll are as follows – all tithe free with no owner or occupier. The sum of roads and wastes appears at the end of the apportionment and are free of tithe.

Numbers on plan	Collingbourne Tithing	Description	A.R.P
15	Aughton	Road	7 – 1 – 20
26	Aughton	Road from Foulstone Pond to Marlboro' Turnpike Road	4 – 2 – 00
29	Aughton	Turnpike Road	5 – 1 – 10
41	Aughton	Road thro' Village below Turnpike Road and Waste	2 – 2 – 39
100	Brunton	Village Street & Road adjoining	13 – 0 – 20
204	Brunton	Turnpike Road and Hungerford Lane	7 – 0 – 27
230	Brunton	Knap Drove	1 – 2 – 24
292	Kingston	Road from Collingbourne Kingston toward Everley & part of Turnpike Road from Everley to Marlboro Etc	12 – 0 – 34
318 and 377	Kingston	Road Thro' Village and Adjacent Road from Turnpike	8 – 0 – 00
392	Sunton	Everley & Andover Turnpike Road	1 – 0 – 00
396	Sunton	Road from Everley & Andover Turnpike Road	4 – 0 – 20
414	Sunton	Turnpike Road	2 – 0 – 5
464	Sunton	Turnpike Road to Hungerford	3 – 1 – 20

CKIN34

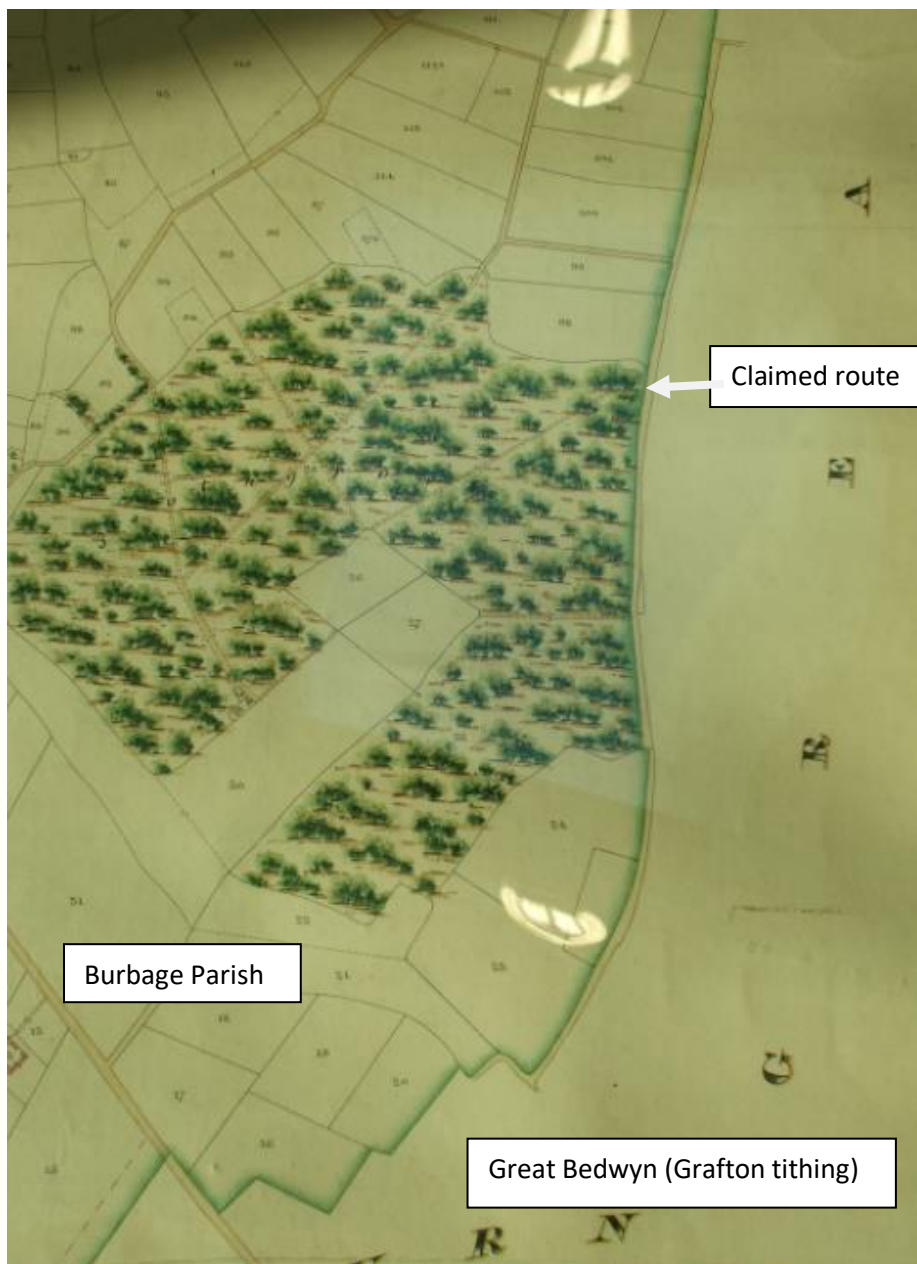


13.8 Great Bedwyn Tithe Award

The tithes were commuted in the tithing of Grafton in the parish of Great Bedwyn during the course of Parliamentary Inclosure in 1792 and accordingly there was no need to produce any further documents as a result of the Tithe Commutation Act 1836.

13.9 Burbage Tithe Award WSHC reference no: T/A Burbage

The map is dated 1844 and the apportionment 1840. It is produced to the scale of 6 chains to 1 inch by A. M May. Most of the claimed route is shown as a hedged or fenced road and coloured sienna, however, it is clearly shown outside of the parish of Burbage and in neighbouring Great Bedwyn.



13.10 Other Category B Evidence

13.11 Inland Revenue Finance Act 1909/1910 Records

Plans WSHC L8/10/42

Valuation Book WSHC L8/1/56

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.

- 13.12 The working copy of the Finance Act plans held at Wiltshire and Swindon History centre (WSHC) have been viewed. The base maps for these records were the Second Edition of the Ordnance Survey's County Series maps at a scale of 1:2500. These maps had been revised in 1899 by the OS and provide the most accurate record of the landscape that we have for this area at that time. Sheets 42/3, 42/7 and 42/11 cover the area of the claimed route (GRAF29, 30,31, BURB1 and CKIN34).
- 13.13 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.
- 13.14 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".
- 13.15 Although the claimed route was identified as a public road in the possession of the Surveyor of Highways for the purposes of depositing plans with the Government in the period 1845 to 1860 it is likely that by the time of the Finance Act Survey (1910) these unimproved and soft surfaced roads had fallen into disuse owing to the improvement of neighbouring roads. Certainly, the representation of the roads by the Ordnance Survey in plans dating from the end of the 19th century onwards do not record the prominent, double hedged and laid out routes recorded by the Inclosure or Tithe Commissioners from the late 18th century to the mid-19th century.

13.16 The claimed route is shown coloured as part of hereditaments 469, 677 and 8 on the three plans. No deductions are made for public rights of user.



BURB1 and GRAF30

CKIN34

14.0 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.

14.1 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.

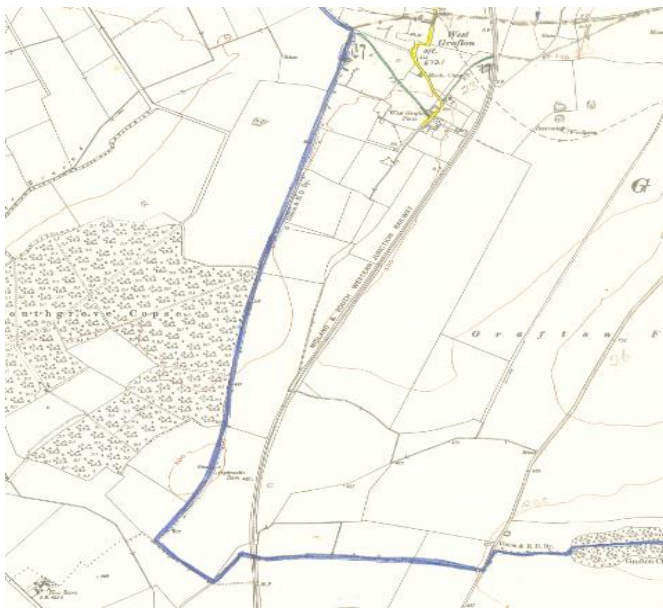
14.2 National Parks and Access to the Countryside Act 1949

Section 27 of the National Parks and Access to the Countryside Act 1949 required Wiltshire County Council (WCC) to carry out a survey of all lands in their area (with some exceptions) over which a right of way is alleged to exist. Section 28 required the authority to consult with parish and district councils and ultimately to compile a draft definitive map showing the public rights of way that existed or were reasonably alleged to exist.

14.3 WCC required parish councils to conduct their surveys in 1950 and records relating to these parish surveys have survived.

14.4 Parish Surveys in Marlborough and Ramsbury Rural District Council area

Grafton Parish Council did not identify a number of rights of way, GRAF29, 30 and 31 being amongst those not shown on their claim map (Grafton Parish Council identified only 22 rights of way out of the 35 recorded in the 1952 definitive map and statement).



Parish boundary in blue

14.5 Parish Surveys in Pewsey Rural District Council area

Collingbourne Kingston Parish Council did not identify a number of rights of way including CKIN34 and adjoining route CKIN6A both of which were missing from the original claim despite being prominent historic routes.



- 14.6 Burbage Parish Council identified BURB1 as a 30 foot wide “fenced and hedged” brideway though drew it outside of their parish boundary (hence in Grafton) on their parish claim map:



- 14.7 The route ends at the Collingbourne Kingston Parish Boundary, presumably with the expectation that the continuation in Collingbourne Kingston would have been claimed by that parish.
- 14.8 The process required that Draft Definitive Maps containing information arising from the parish claims were advertised and published. These maps were held in all parishes for a period of not less than four months during which time representations and objections could be made to WCC.
- 14.9 WCC received objections to the omission of the linking paths that became GRAF29, 30 and 31 and CKIN34 from the Ramblers Association who considered the tracks were shown as “old roads” on “old maps”. WCC records reveal the following:

MARLBOROUGH 4125
(and 4126)
D27, D28

Parish-Grafton and Collingbourne Kingston

The Ramblers' Association claims that public paths have been omitted

- (a) from Kinwardstone to West Grafton
 - (b) from (a) to Collingbourne Kingston
 - (c) from the end of the County road at West Grafton Farm to (b) xxx
- as shown on the sketch map below (in yellow)

Reasons.

Although a step stile at one point indicates that these tracks are now used only by pedestrians, old maps show all these tracks as old roads. The middle section of (b) is claimed by Burbage Parish.

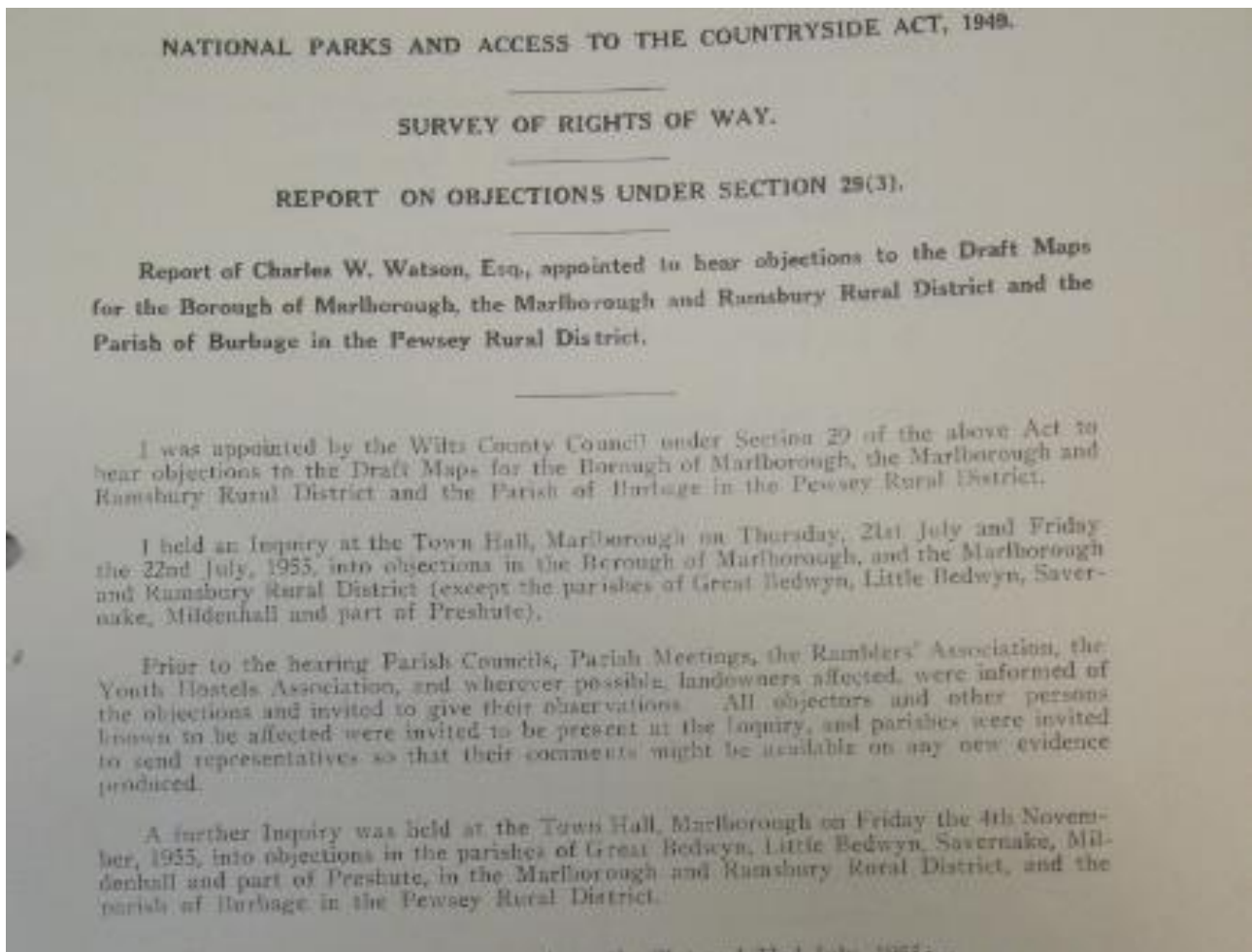
The northern paths are all open, the southern section has not yet been inspected.



23

14.10 The objection to the omission from the definitive map and statement was considered by inspectors appointed to hear the objections at public meetings held at the Town Hall, Marlborough on 21st and 22nd July 1955 and at Pewsey RDC offices held on the 25th and 26th January 1956. The inspector's reports are held at the Wiltshire and History Centre catalogue number F2/273/8 and F2/273/10 and has been viewed. This reveals that the rights of way Grafton 29, 30 and 31 and Collingbourne Kingston

34 were added to the definitive map and statement as the result of the objection by agreement in all parishes.



		Addition	By agreement
2 (41/26, (a) 41/25)	F.P's omitted From the N. end of path No. 17 leading S. along the Burbage boundary to Burbage path No. 1, then from the S. end of Burbage path No. 1 leading S.E. along the Collingbourne Kingston boundary until the path branches S.W. (Continuation claimed in Collingbourne Kingston, Pewsey R.D.).	—	

NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT, 1949.

SURVEY OF RIGHTS OF WAY.

REPORT ON OBJECTIONS UNDER SEC. 29(3).

Report of Charles W. Watson, Esq., appointed to hear objections to the Draft Map for the Pewsey Rural District (except the parish of Burbage which was dealt with as part of the Savernake Estate in Marlborough and Ramsbury Rural District).

I was appointed by the Wilts County Council under Section 29 of the above Act to hear objections to the Draft Map for the Pewsey Rural District.

I held an Inquiry at the Rural District Council Offices, Pewsey, on Wednesday, 25th and Thursday, 26th January, 1956.

Prior to the hearing Parish Councils, Parish Meetings, the Ramblers Association, and wherever possible, landowners affected, were informed of the objections and invited to give their observations. All objectors and other persons known to be affected were invited to be present at the Inquiry and parishes were invited to send representatives, so that their comments might be available on any new evidence produced.

No. and Objection that path omitted from Draft Map. Reference.	Objection to path included in Draft Map.	Modification of Draft Map recommended.	Reasons
Parish of Collingbourne Kingston—continued.			
13 (41/25) F.P. omitted from Grafton boundary, W. of the Railway, S.W. to the river and S. and S.E. to path No. 6A. (Continuation at N. end claimed in Grafton item 2).	—	Addition.	By agreement. Continuation in Grafton added on objection.

14.11 It is noted that although the Ramblers Association recognised that the routes were recorded as “old roads” on “old maps” use in the 1950s was clearly only on foot as stiles limited use. It is not uncommon for additions to only be recorded as footpaths in Wiltshire at this time, indeed, the survey was often referred to as “the footpath survey”.

4. Reasons for claiming the path.

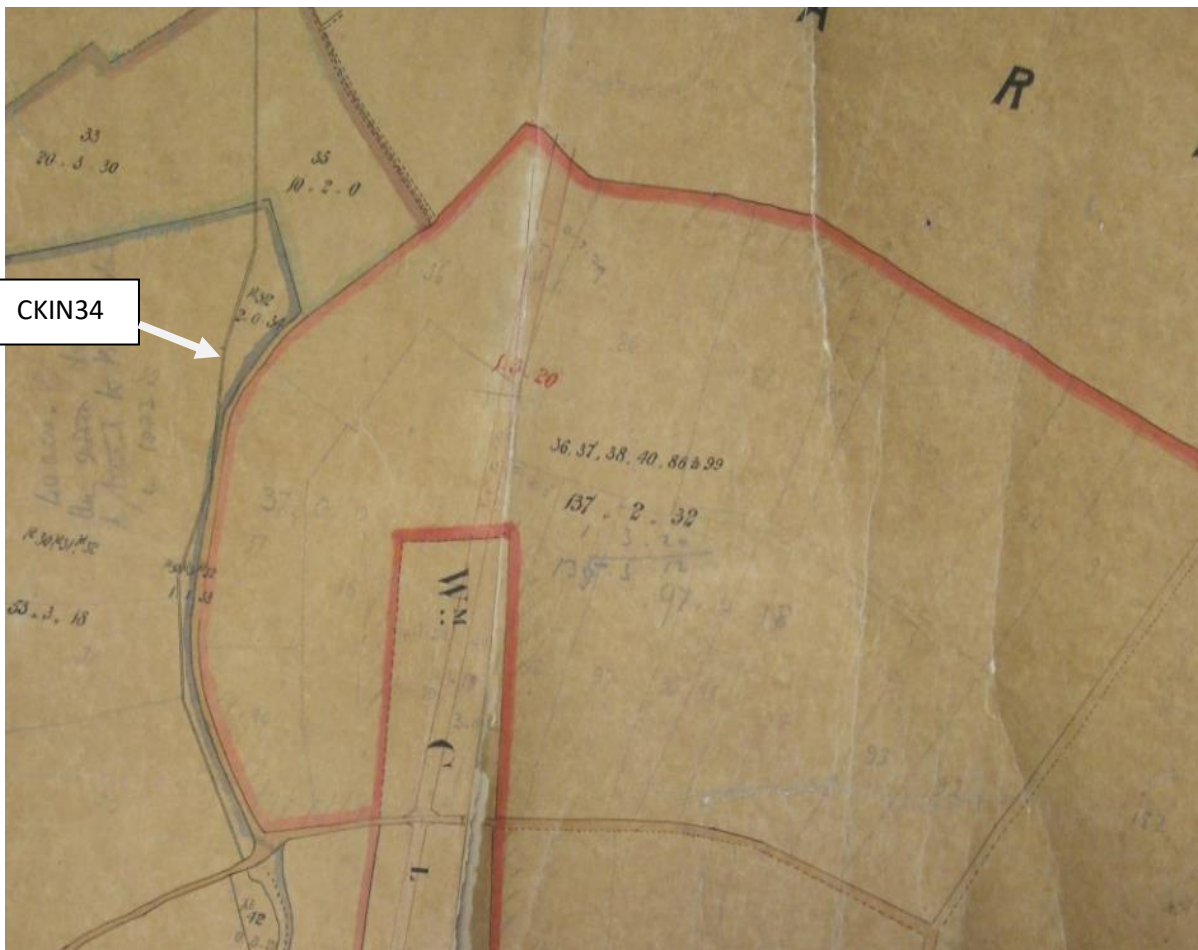
Although a step stile at one point indicates that these tracks are now used only by pedestrians, old maps show all these tracks as old roads. ^{possible} The middle section of (A) is claimed by Burbage parish. The northern paths are all open.

5. Documents if any

15.3 Plan of the Parish of Collingbourne Kingston, Belonging to The Most Hon. The Marquis of Ailesbury Revised from Old Plans November 1880 WSHC Ref. no 3354L

This is detailed and coloured plan of the parish showing lands owned by the Marquis of Ailesbury (given by plot numbers) and land owned by others. The plan also shows rivers, dwellings, buildings and the local road network which is coloured sienna. The map also shows the railway line crossing the road that is now CKIN6A.

15.4 Most of CKIN34 is shown as a fenced road coloured sienna, at the northern end a length of the road is uncoloured and fenced only on the south east. The route has a width of approximately 30 feet. GRAF30 and part of BURB1 is also shown though it outside of the parish and not coloured as part of the survey.

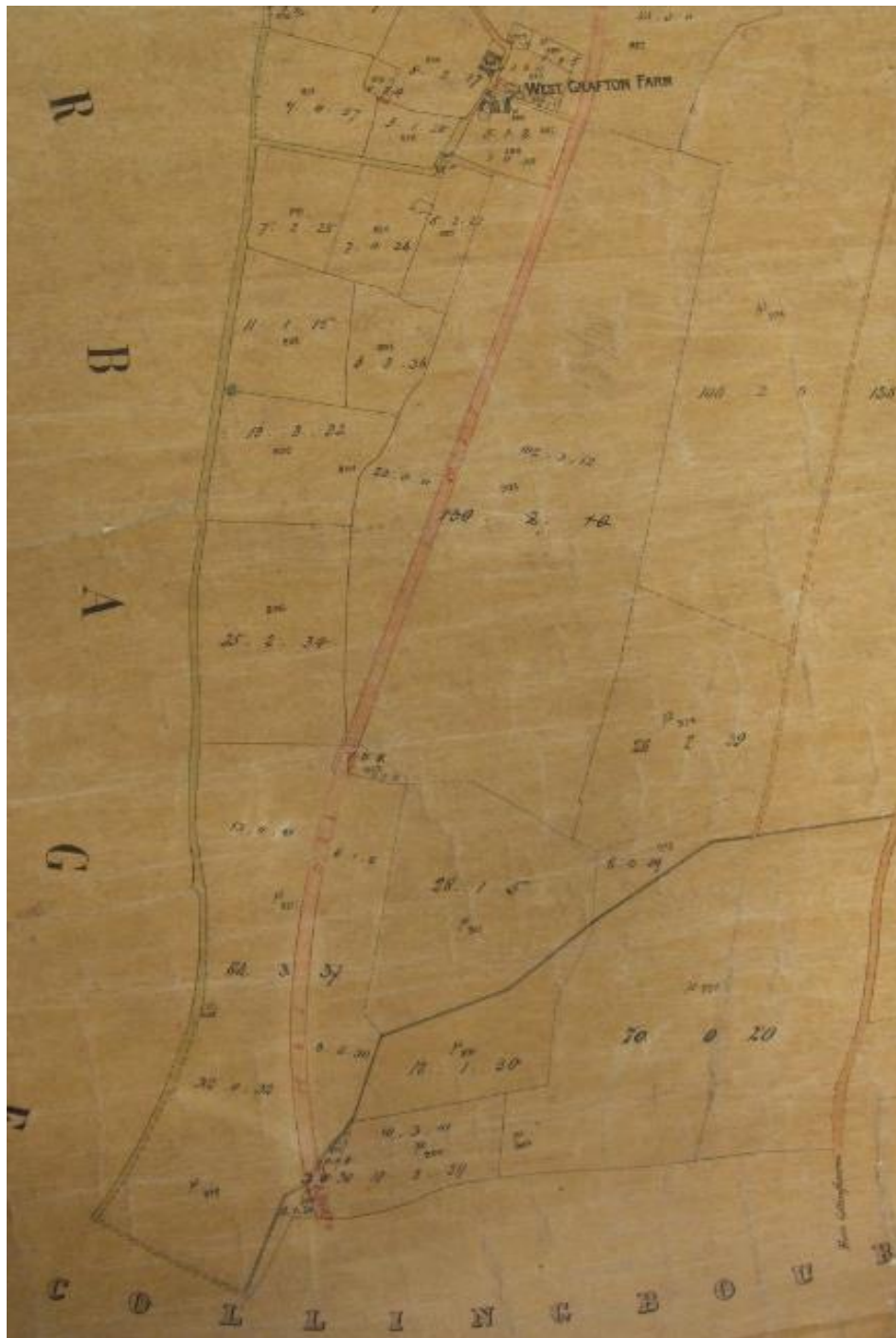


15.5 Plan of the Lands in Great Bedwyn Parish. Revised from Old Plans 1880 WSHC 3354

The map is entitled “Plan of Lands in Great Bedwyn Parish, Wilts The Property of The Most Hon. Marquis of Ailesbury Revised from Old Plans 1880 Scale 6 chains to 1 inch.” “Savernake Estate Office Marlborough” is printed in the bottom right corner.

Fields are numbered and, in some cases, measured and in some enclosures vegetation is shown (trees are drawn). Buildings are shown coloured red and blue. Some place names are shown as are neighbouring parish boundaries. Roads and tracks are shown coloured sienna or green. Routes coloured green seem to accord with unmetalled routes. Watercourses are shown blue. The line of the railway is shown coloured pink.

- 15.6 The whole of the route GRAF29, 30 and 31 and BURB 1 is shown in Grafton parish as a route coloured green. Widths can be measured at approximately 40 feet.



16.0 Category E Evidence

Evidence in this category includes commercial maps and Ordnance Survey maps, plans and documents. It is usual for there to be a significant quantity of 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.

16.1 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.

16.2 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. The applicant has adduced a list of a considerable number of these maps and only some of them have been viewed, however, a full list of those adduced can be found at 16.20.

16.3 Andrews' and Dury's Map of Wiltshire 1773

This map was produced at the scale of 2 inches to one mile over 18 sheets. The area over which the claimed route leads is on sheets 9 and 12. However the area does not appear to be well surveyed as the tithings of Brunton and Aughton are incorrectly recorded with the map showing Brunton to the west of Aughton instead of the other way around. However, the route of CKIN6A with CKIN34 leading from it is discernible at the River Bourne though not further north.

From Sheet 9:

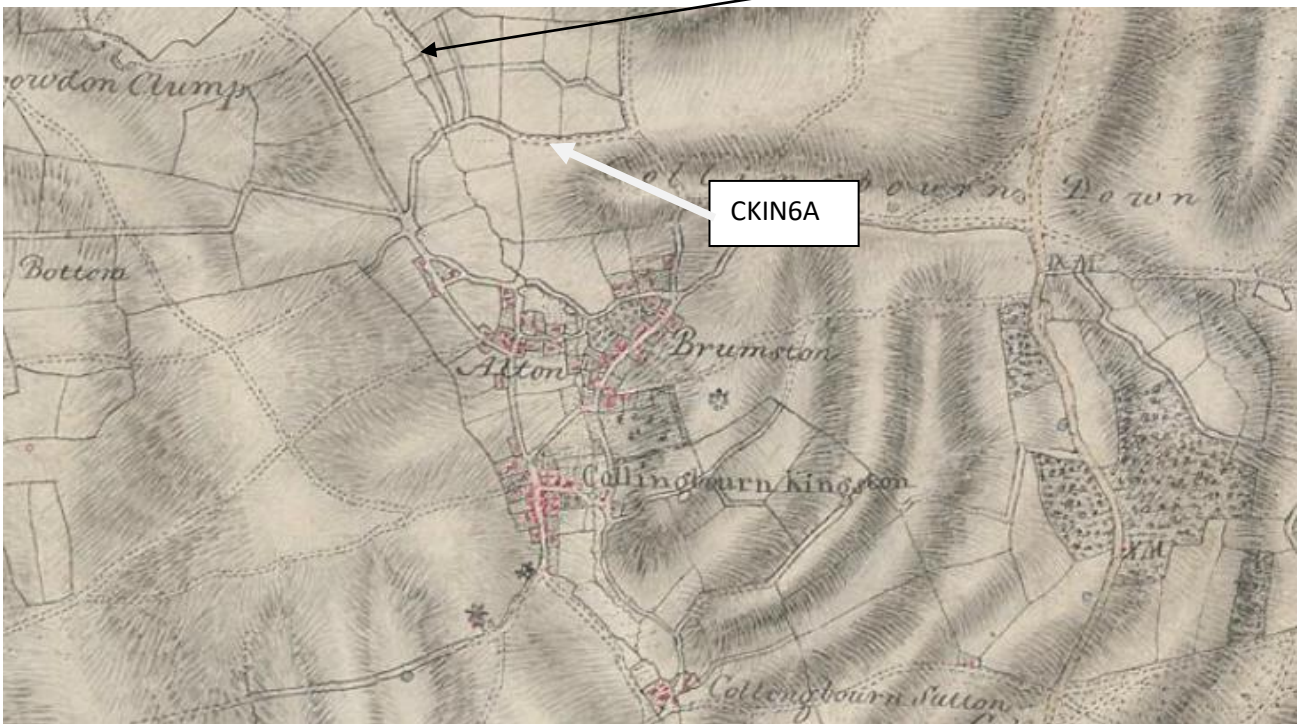


16.4 Sheet 12 predates inclosure of the area and shows a partially fenced and then unfenced route on the course of CKIN34 and GRAF30 leading to Southgrove Wood, but no routes are shown leading across Grafton Field to West Grafton. It is also noted that Puddleduck Lane is wrongly recorded – this is the name for CKIN6A but is shown on this map alongside the Turnpike Road north from Collingbourne Aughton.



16.5 Ordnance Survey – Surveyor’s Drawing 1808 – British Library

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 surveyor’s drawings have been examined and the Hungerford Sheet clearly shows the route of CKIN6A as a road and part of the local network with CKIN34 leading north from it. It is further noted that this drawing supports the position of the drove prior to the 1826 inclosure and hence further supports the interpretation of the Collingbourne Aughton Inclosure Award of 1763 and the production of the simulated map included here at 12.14. **CKIN34**



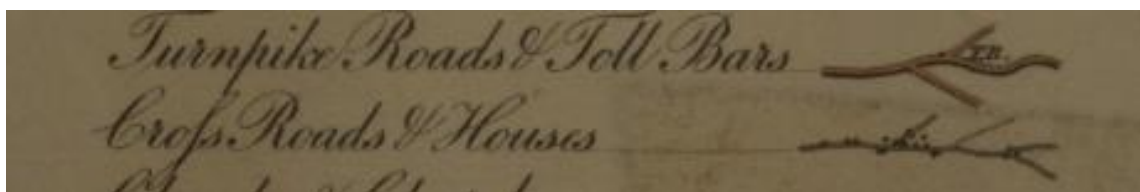
16.6 The full route of GRAF 29, 30 and 31, BURB1 and CKIN34 is shown as a wide track or road, fenced on both sides from West Grafton to and alongside South Grove Wood where it leads south east across enclosures as an unfenced track before becoming fenced (or hedged) on its eastern side for the length in Collingbourne Kingston east of the river.

Claimed route

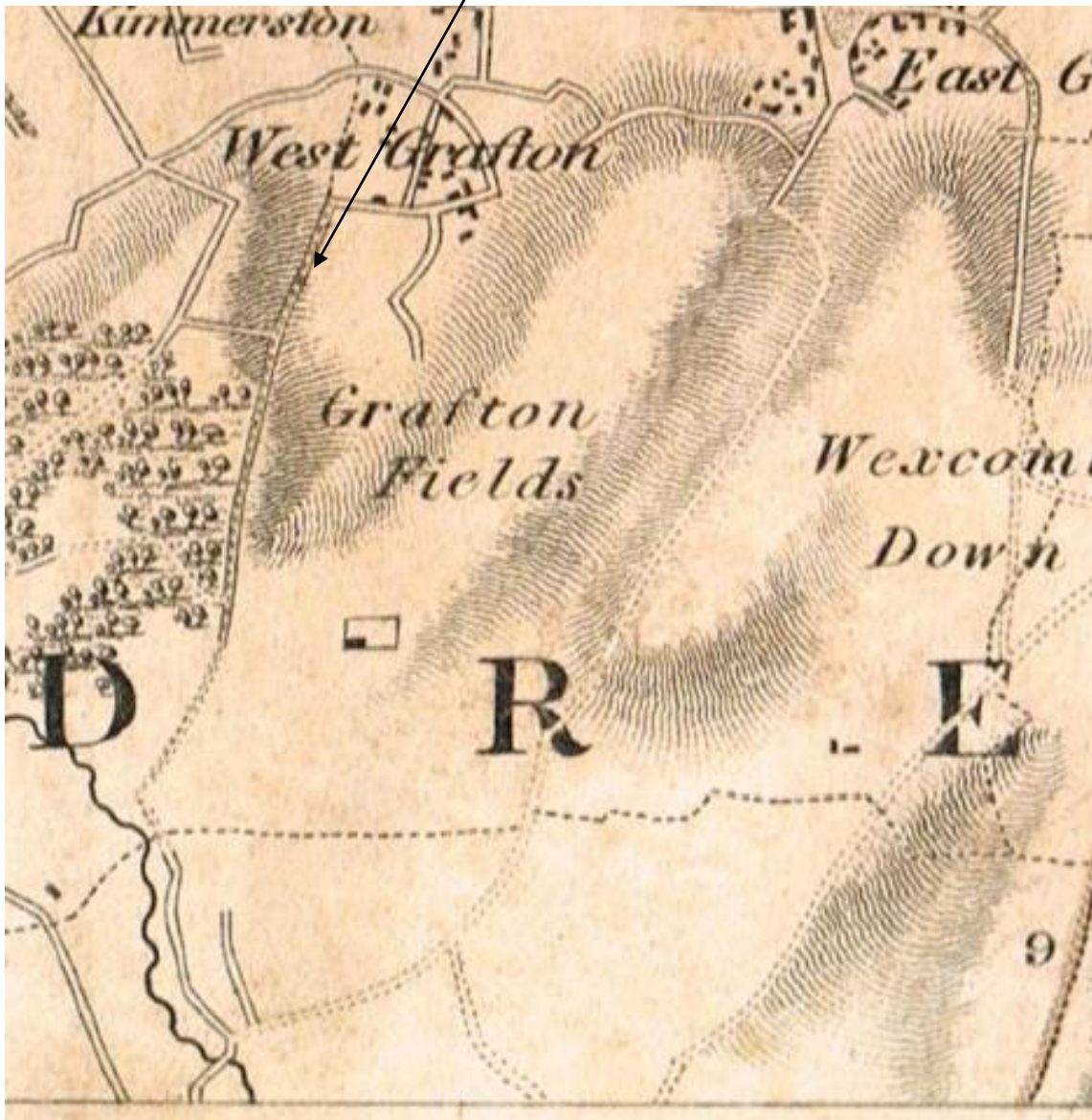


16.7 C and I Greenwood's Map of Wiltshire 1820 and 1829 WSHC Ref. no 3.3

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 bridleways.



16.8 The larger scale map of 1820 shows the entire claimed route as a “cross road”, largely fenced. The route beside South Grove Wood is shown in Grafton (Great Bedwyn) and not in Burbage. Claimed route



16.9 The reduced scale map of 1829 shows the entire claimed route as a “Cross Road” fenced (or hedged) on both sides from West Grafton to part way alongside South Grove Wood where it is shown as an unfenced route returning to a fenced route for the length in Collingbourne Kingston.

1829 map. Claimed route



16.10 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..."

16.11 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."

16.12 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".

16.13 John Cary's Half Inch Map Sheet 18 1823 and 1832 (WSHC Ref. no 3.2 & 3.4)

Both maps show the claimed route as a "Parochial Road". The extract below is from the 1823 map.

Claimed route



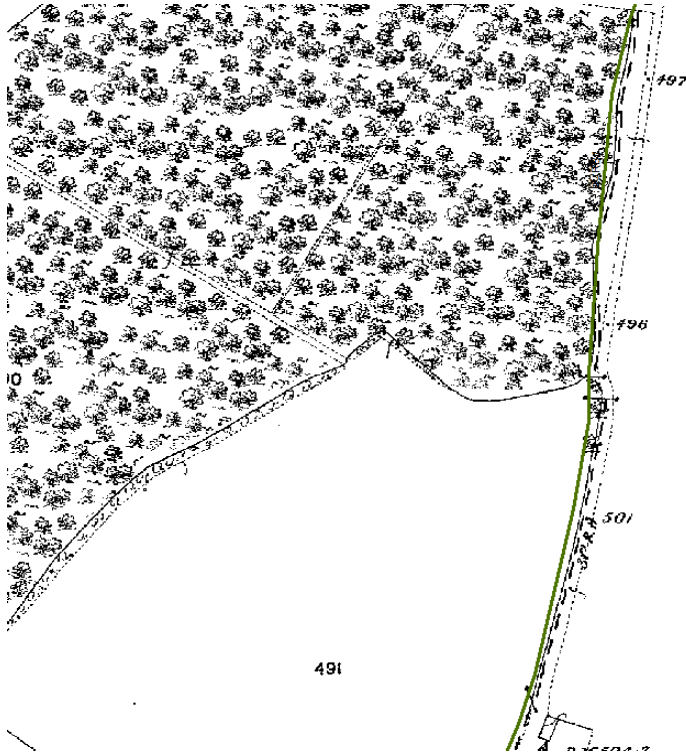
The 1932 map shows the route in same manner:



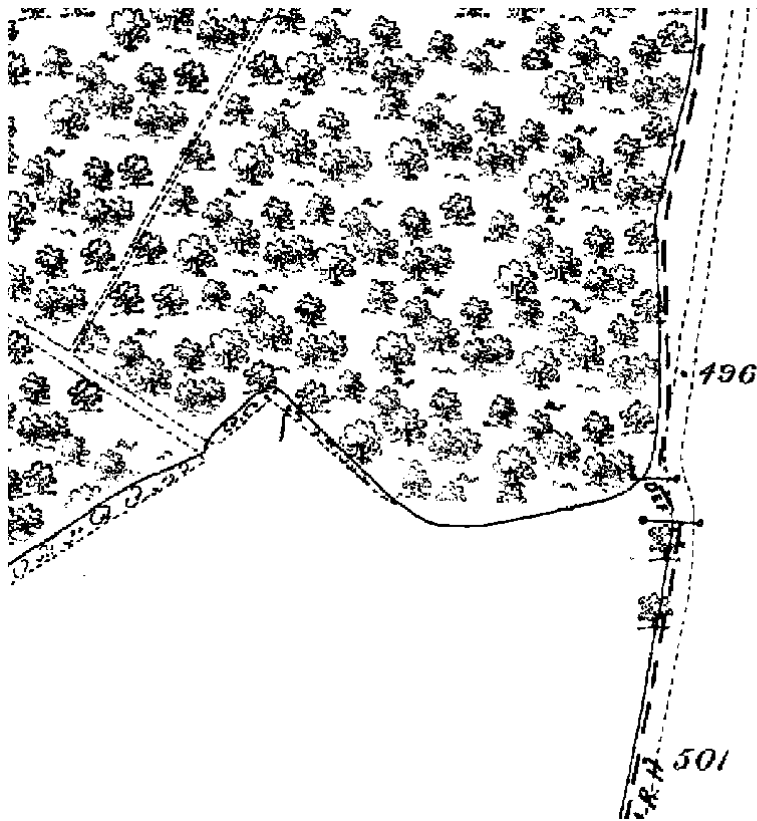
16.14 Ordnance Survey Mapping – The County Series 1:2500 1878 - 1924

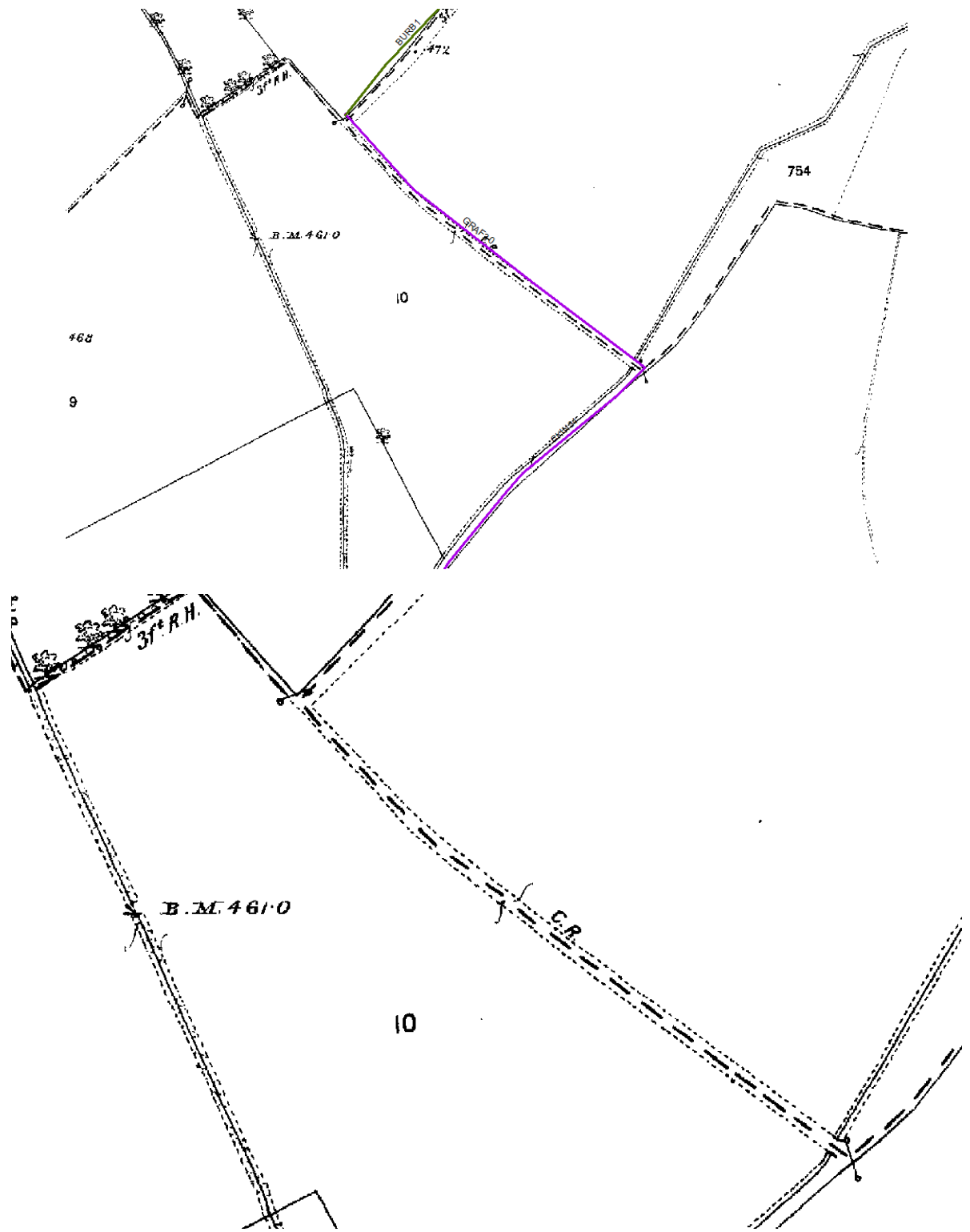
The 1:2500 scale was introduced in 1853-4 and by 1896 it covered the whole of what were considered the cultivated parts of Britain. Sheets 42.3, 42.7 and 42.11 cover the claimed route. J B Harley, historian of the Ordnance Survey, records that “the maps delineate the landscape with great detail and accuracy. 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”.

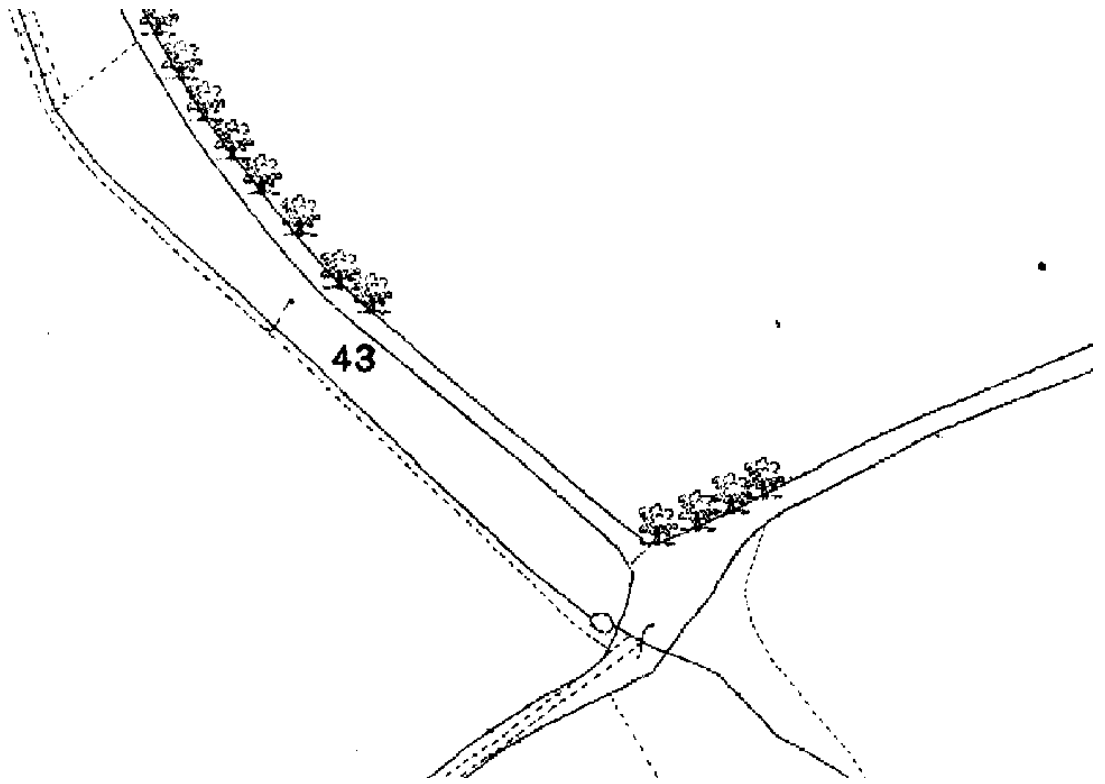
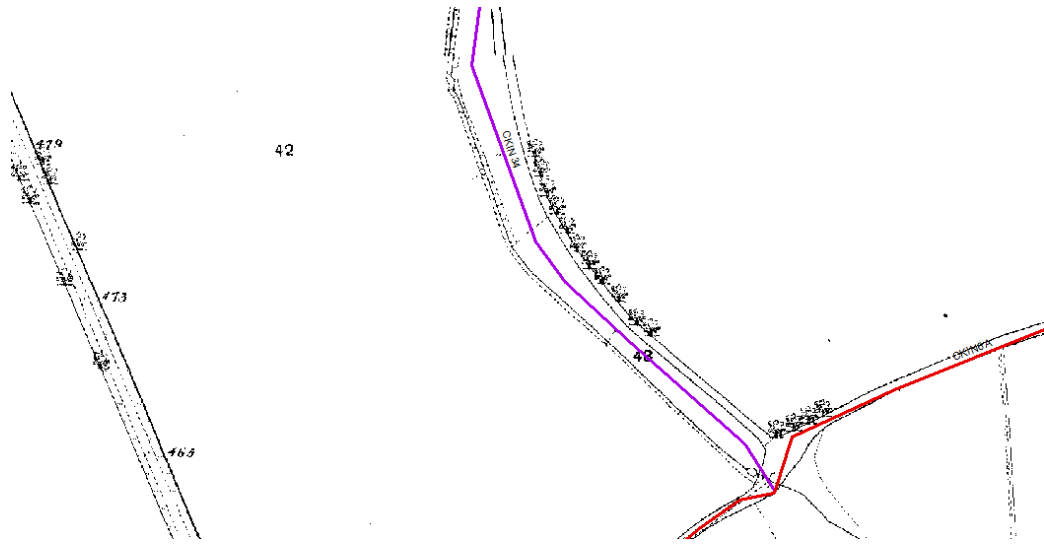
- 16.15 Richard Oliver in his book “Ordnance Survey Maps a complete guide for historians” recognises that surveying errors (and paper distortion during printing) cannot be ruled out, particularly where detail is sparse, but in practice such errors are likely to be very hard to demonstrate, because of a general paucity of suitable sources rivalling or bettering the OS in planimetric accuracy and completeness of depiction.”
- 16.16 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.
- 16.17 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. Unfortunately the First Edition maps in this area do not have land use information available for them at the Wiltshire and Swindon History Centre.



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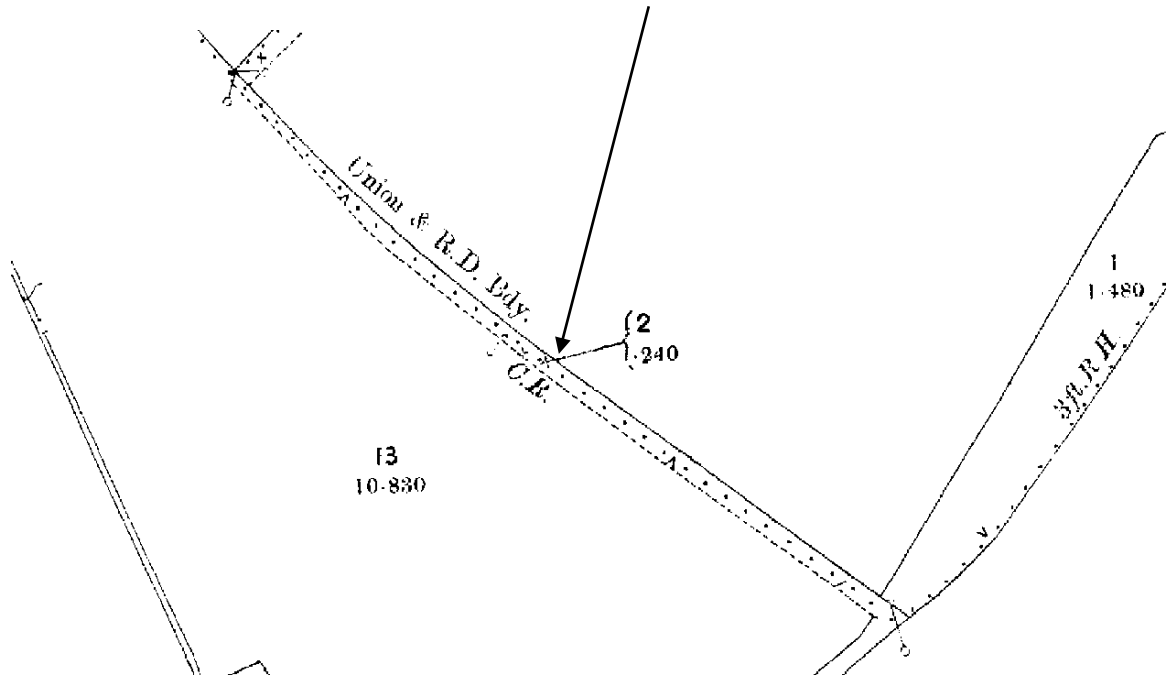


16.19 Second Edition 1900 Sheets 42.3, 42.7 and 42.11 Surveyed 1878 revised 1899

Grafton 31: A wide road, mainly fenced.

Grafton 29 and Burbage 1: Road fenced on the western side in Grafton parish.

Grafton 30: Road fenced on north east side. Parish boundary shown along the centre of the road inscribed 'C.R.' (Centre of Road).



Collingbourne Kingston 34: Fenced road.

16.20 Other Commercial Maps

A number of other commercial maps have been adduced by the applicant. These have not been investigated by officers at the date of writing this report but are listed below (references in brackets are to WSHC catalogues):

Pigot's Map of Wiltshire 1831	'Cross Roads'
Pigot's Map of Wiltshire 1840	'Cross Roads'
Crutchley's Half Inch Map c.1865	Minor roads
Ordnance Survey 1:10560 First Edition 1879 and 1886	'Minor Roads
Ordnance Survey 1" New Series 1896	Minor roads
Gall and Inglis 'Half Inch' Map for Cyclists Tourists etc 1898	Minor roads
Gall and Inglis 2 and a half miles to 1" Map for Cyclists Tourists etc 1902	Minor roads
Bartholomew's half inch Survey Atlas of England and Wales 1903	Other Driving Roads
Bacon's half inch Cycling & Motoring Map c.1906	Minor roads
OS 1" 3 rd Edition 1908	'metalled Road 3 rd Class and Unmetalled Roads'

Bartholomew's half inch Map for Tourists and Cyclists	Uncoloured roads
Bartholomew's quarter inch Road Map 1919	'Other roads'
Bartholomew's half inch Map for Tourists & Cyclists 1920	Uncoloured roads
Geographia half inch Road Map of Wiltshire c.1930	'Other Roads'
Bartholomew's Revised half inch Map 1940	'Other Roads'

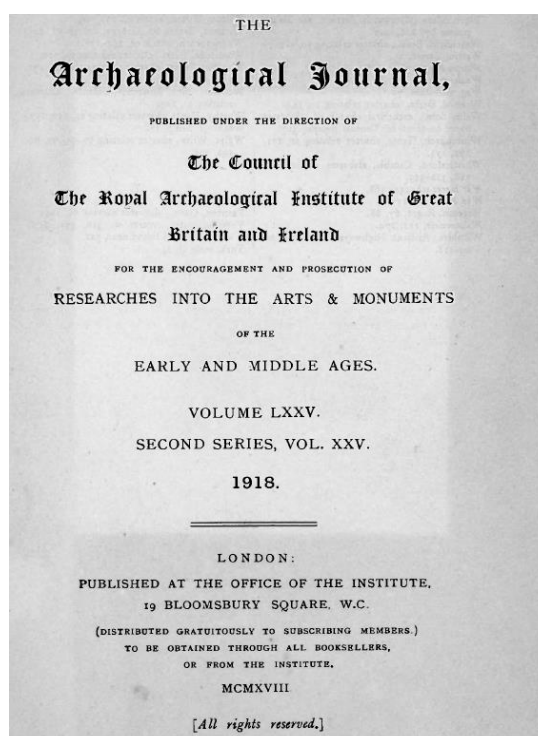
17.0 Category F Evidence

Evidence in this category includes any user or anecdotal evidence.

17.1 Saxon Charters AD961 & 968

Saxon charters are documents dating from the early medieval period often referring to a grant of land or other grant of privilege. The examination and translation of these documents is outside the scope of the case officers' knowledge and reliance has been placed on the interpretation of experts in this field from published sources. It is known that these documents have been held to hold legal status as to their contents and grants, often of land and rights. As such they would usually be evaluated as Category A evidence. However, owing to the reliance placed on secondary interpretation, albeit by an expert, they are included here.

17.2 Part of the claimed route (that section currently recorded as part Grafton 29 and Burbage 1) has been identified as a road in Saxon Charters dated AD 961 & 968 by G B Grundy D. Litt. M.A. in a paper published in the Archaeological Journal, Vol 75, in 1918.



- 17.3 The paper is entitled “*The Ancient Highways and Tracks of Wiltshire, Berkshire and Hampshire, and the Saxon Battle-fields of Wiltshire*. Grundy considers that the term ‘Weg’ (way) is a generic term which may be loosely applied to all kinds of roads of Saxon age but that it is more usually used for purely local roads, probably the tracks from the village to its outlying lands.
- 17.4 Grundy bases his identification of highways and tracks on 95 Saxon Charters in Wiltshire and considers that the foundation of the evidence is fairly wide and so large that it is necessary to present it in the guise of unadulterated fact unrelieved by imaginative considerations.
- 17.5 Part of Grafton 29 and Burbage 1 has been identified by Grundy as Road 30 ‘Weale Weg’/‘Waelue Weg’.

“Road 30. Road in Burbage and Grafton.

A road called in the Burbage charter¹ Weale Weg, and in the Bedwyn charter² Waelu Weg, ran along the line of the lane which now bounds those two parishes. It runs up the E. side of the big wood in the SE. part of Burbage. Owing to the variation of form it is uncertain what is the meaning of the name. Probably it is ‘wall way’, having reference to the fort or camp, Burb, from which Burbage gets its name.”

¹ B.1076 K.736

² B.1213 K.766

- 17.6 It is known from Grundy that the term ‘weg’ refers to roads or tracks but it is less clear what the prefix Waelu or Weale may refer to. The online Bosworth-Toller Anglo Saxon Dictionary gives the definition of Wealh as meaning a foreigner suggesting that use of the route may not be just by local people (i.e. a through route).
- 17.7 Although limited weight may be put on the exact translation of the description there is little doubt that the Charters describe part of the route now recorded as Burbage 1 and Grafton 29, thus establishing that this part of the route is a feature of extraordinary antiquity on the boundary between the two parishes.
- 17.8 **Other evidence** It is noted that the applicant did not adduce any evidence of use of the route with mechanically propelled vehicles (MPVs). In response to the consultation in 2012 for this route and adjoining CKIN6A Symonds and Sampson acting for Mr Crook responded by saying that since Mr Crook’s father had bought the land in 1948 that path had only ever been used by the public on foot. It is not possible to use the claimed route GRAF29,30 and 31, BURB1 and CKIN34 as a through route without using CKIN6A and accordingly it seems reasonable to assume that there had not been any use of the claimed route with mechanically propelled vehicles (MPVs) either. Indeed, CKIN6A was reclassified as a restricted byway without objection in 2016.

- 17.9 A consultation inviting evidence of use of the route with MPVs was conducted in January and February 2012 and no evidence of use was received. Both Burbage Parish Council and Mr Hosier considered that the status of restricted byway would be appropriate. The applicant did not advance any evidence of use with MPVs.
- 17.10 Although the common law principle of ‘once a highway, always a highway’ applies, where a route is found, on the balance of probabilities, to be a historic public road it is necessary to consider the use of the way with MPVs in order to evaluate the effect of the Natural Environment and Rural Communities Act 2006 on public rights with MPVs.

18.0 Natural Environment and Rural Communities Act 2006

18.1 On the 2nd May 2006 **the NERC Act 2006** commenced and section 67(1) of this Act had the effect of extinguishing the right to drive any mechanically propelled vehicle on any route that, immediately before commencement:

- (1) (a) *was not shown in a definitive map and statement, or*
(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

But this is subject to subsections (2) to (8)

Subsections 2 to 8 are parts of the Act that detail exemptions to the extinguishment of vehicular rights.

(2) *Subsection (1) does not apply to an existing public right of way if –*

- (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*
- (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),*
- (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*
- (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, or*
- (e) *it was created by virtue of use by such vehicles during a period ending before 1st December 1930.*

(3) *Subsection (1) does not apply to an existing public right of 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,

(b) before commencement the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement a person with an interest in land has made such an application immediately before commencement, use of the way for mechanically propelled vehicles –

(i) was reasonably necessary to enable that person to obtain access to the land or

(ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had an interest in that part only.

(4) “The relevant date” means –

(a) in relation to England, 20th January 2005;

(b) in relation to Wales, 19th May 2005.

(5) Where, immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies –

(a) was reasonably necessary to enable a person with an interest in land to obtain access to the land, or

(b) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had an interest in that part only, the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.

(6) For the purposes of subsection (3) an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act

(7) For the purposes of subsections 3(c)(i) and (5)(a), it is irrelevant whether the person was, immediately before commencement, in fact –

(a) exercising the existing public right of way, or

(b) able to exercise it.

(8) Nothing in this section applies in relation to an area in London to which Part 3 of the Wildlife and Countryside Act 1981 (c.69) does not apply.

(9) Any provision made by virtue of section 48(9) of the Countryside and Rights of Way Act 2000 (c.37) has effect to this section.

18.2 It is therefore necessary for the Council to consider the effect of the NERC Act 2006 if it is considered that on the balance of probability GRAF29, 30, 31, BURB1 and CKIN34 were, before the 2nd May 2006, a road or public carriageway.

19.0 Interim Decision regarding public rights over the applicant route prior to the 2nd May 2006 – was it, on the balance of probability, a public road before that date?

It is clear from the evidence examined and presented in this report that no records have shown any part of the claimed route to be a public footpath other than the definitive map and statement dated 1952. If Dr Grundy's translations of the Saxon Charters is considered, parts of the route have been a road since at least AD 961, a time over 200 years before the limit of legal memory. The road is again referred to in 1763 where the allotment of land in Collingbourne Kingston has boundaries defined in part by "The Grafton Road" in a position coincident with CKIN34. The earliest map viewed showing the route in its entirety is that of the Great Bedwyn (Grafton tithing) Inclosure award 1792 where the whole of the route currently recorded as Grafton 29, 30, 31, and Burbage 1 is awarded as a Public Carriage Road and Drift way with a width of forty feet during the process of Parliamentary inclosure of that part of the parish. The consistent representation in the deposited plans of public undertakings confirms that the route was laid out and endured in public knowledge to the mid to late 1800s at least. The road remains an enduring landscape feature in parts though clearly modern farming practices have altered the landscape through which it leads significantly.

19.1 The evidence for the route being an ancient road is very strong and 7 individual pieces of Category A evidence have been found that all support this. This is further supported by the Tithe award for Collingbourne Kingston which colours, numbers and lists part of the way as a Road and a number of additional plans that all show the way as a road and as part of the public road network. The evidence of four individual surveyors for both the Ordnance Survey and commercial outlets has been investigated and all of this is consistent with the route being a public road; albeit that Andrews and Dury clearly poorly surveyed this area (Aughton and Brunton are transposed). This is further supported by a number of commercial maps dating from 1831 to 1940 all of which represent the way as a road, as part of the local network and not as a footpath or bridleway. The evidence is summarised in the table below and is considered sufficient to show that on the balance of probability the Grafton Road comprising GRAF31, 29(pt), 30, BURB 1 (though in Grafton Parish) and CKIN34 was, before 2006, a public carriageway:

Cat.	Date	Document	Applicant rout represented
A	1763	Inclosure Agreement and Award Aughton tithing	5 references to it as the Grafton Road in the description of allotments being awarded and laid out
A	1790-92	Parliamentary Inclosure Grafton Tithing	Awarded as a Public Carriage Road and Drift way 40 feet wide (GRAF 30, 29 (pt) BURB1 and GRAF 30)
A	1824	Inclosure Act and Award Collingbourne Kingston	Shown as an existing fenced road unaffected by the award
A	1845	Deposited Plans - Manchester and Southern Railway	Shown as pre-existing fenced road in the plans but outside the limits of deviation. Joins "public road" CKIN6A
A	1846	Deposited Plans – Manchester and Southern Railway	"Public Highway". Owned by Surveyors of Highways Shown as wide fenced road labelled "to Grafton" and "to Collingbourn". Crossed by railway
A	1847 – 8	Deposited Plans Andover to Cheltenham Railway (and amended plans)	"Road" Owned by The Surveyor of Highways
A	1859	Deposited Plans Andover and Redbridge Railway	"Public road or driftway" owned by Highway Surveyors. "road" on section and cross section
B	1836	Tithe Map and Apportionment (Collingbourne Kingston)	"Road" no. 41, free of tithe. No owner or occupier
B	1840 -44	Tithe Map and Apportionment (Burbage)	Shown as sienna coloured road in Grafton tithing
B	1874	Inclosure Commissioners Drainage Order	Shown as a road and part of the network on the accompanying plan
C	1950 – 55	National Parks and Access to the Countryside Act 1949	Ramblers objection to omission from draft definitive map "old maps show all these tracks as old roads"
D	1807	Parish or Estate map	Sienna coloured road
D	1880	Estate Plan of the Parish	Green coloured road, part of local network
E	1808	Ordnance Survey 2" drawing	Shown as a road and part of the local network
E	1820 & 1829	C and I Greenwoods' Map of Wiltshire	"Cross Road"
E	1823 & 1832	John Cary's Map Sheet 18	"Parochial Road"
E	1878 – 1926	Ordnance Survey 1:2500	Separately numbered and measured as public road.
F	AD 961 and 968	Saxon Charters	BURB1 and GRAF29 (pt) identified as a boundary road in both Burbage and Grafton charters

20.0 Consideration of the Effect of NERCA 2006

It is appropriate to consider each exemption in turn:

- 20.1 **(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 route with MPVs in the period 2001 to 2006.

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

- 20.2 **(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 claimed route is shown in the definitive map and statement and is not shown in a list required to be kept under section 36(6) of the Highways Act 1980 (the Highway Record)

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

- 20.3 **(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.*

It is known that this road was awarded as a public carriage road in 1792, a time before mechanically propelled vehicles were provided for.

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

- 20.4 **(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.

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

Public MPV rights have not been preserved by this section.

- 20.6 **(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.

Although the application pre-dated the relevant date by nearly a year it is considered not to be strictly Schedule 14 compliant and hence not eligible for this exemption. See discussion at paragraphs 2.9 to 2.14.

- 20.7 It is concluded that the public's right to drive a motor vehicle over the route was extinguished on the 2nd May 2006. However, as the route was a public vehicular highway prior to this date, section 67(5) of the NERC Act 2006 applies with respect to private access rights to property:

(5) Where immediately before commencement, the exercise of an existing public right of way to which subsection (1) applies –

(a) was reasonably necessary to enable a person with an interest in land to obtain access to the land, or

(b) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had an interest in that part only, the right becomes a private right of way for mechanically propelled vehicles for the benefit of the land or (as the case may be) the part of the land.

This is in addition to any granted easements or consents that the Council is unaware of.

21.0 Legal and Financial Considerations

- 21.1 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 determining applications for DMMOs the Council is acting in pursuit of its statutory duty and cannot be challenged in so doing (subject to due process being followed).
- 21.2 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).
- 21.3 If the route is upgraded to restricted byway the highway authority is not placed under a specific duty to produce a suitable surface for use on horseback or for non-mechanically propelled vehicles. 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. No works to the route are currently identified beyond signage and the removal of some growth.

22.0 Risk Assessment

- 22.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety
- 22.2 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.
- 22.3 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.
- 22.4 Advice from the Planning Inspectorate is that a byway open to all traffic application should not be refused where the evidence supports the recording of any other status and an Order will be made as the Schedule 14 appeal process is not open in a case where other evidence subsists and the Council has a duty to make an Order. The Schedule 14 appeal procedure is only open to applicants where the Council refuses to make any order at all. The applicant's appeal route is thereby through objection to the Council's order. Officers consider it highly unlikely that neither the 2004 applicant or the various user groups would object to a restricted byway order as the effect of the NERC Act 2006 is generally well known and understood. It is noted from consultation responses that a number of respondents would only object to a byway open to all traffic, but not to a restricted byway. The recent upgrade from footpath to restricted byway of the adjoining route CKIN6A in the definitive map and statement was not objected to.

23.0 Environmental Impact of the Recommendation

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

24.0 Equality Impact

- 24.1 The character of the route will not alter with the making of an order to record the way as restricted byway. The legal right to pass and repass over the entire width will be protected which will ensure that obstructions and encroachments may be removed by Order of the Council. This could lead to greater accessibility. The width of the greater part of the route was awarded at 40 feet and the remainder will be as per the representation on the Ordnance Survey 1:2500 maps.
- 24.2 A restricted byway may be used by a horse and cart. Many people who cannot ride a horse for reasons of a disability drive horses and the recording of this long route as a restricted byway will increase the available network for them. This will lead to greater accessibility. This would offer a significant improvement to the network for carriage drivers.

24.3 The recording of the full width as a restricted byway is in line with the Council's duty under The Equality Act 2010. Equality is however not a material consideration contained within the Wildlife and Countryside Act 1981.

25.0 Safeguarding Considerations

25.0 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to safeguarding.

25.1 It is however noted that there are no considerations arising.

26.0 Public Health Considerations

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

27.0 Relationship to the Council's Business Plan

27.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. 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.

28.0 Options to Consider

- i) To make an Order to modify the definitive map and statement to show GRAF31, part of GRAF29, GRAF30, CKIN 34 as restricted byways and to delete that part of BURB1 in Burbage parish adjacent to where the awarded route leads through Grafton Parish and record it as a restricted byway in Grafton Parish (where it is currently provided for on the ground) .
- ii) To make an Order to modify the definitive map and statement to show GRAF31, GRAF29 (part), GRAF31 and additional length in Grafton Parish adjacent to BURB1 as restricted byway 40 feet wide; to show CKIN34 as a restricted byway 20 feet wide and to delete that length of BURB1 adjacent to the length to be added in Grafton.
- iii) To refuse the application for an Order

29.0 Reason for Recommendation

29.1 A substantive body of historical evidence supports that on the balance of probability the route should be recorded with a higher status than footpath and that the width should be recorded.

29.2 The route is an ancient one, the majority of the length being formalised during the process of Inclosure by Act of Parliament in 1792. The status of the route was further

recognised when four sets of railway plans were deposited between 1845 and 1859, the route being described as a public road in the ownership or reputed ownership of the Surveyor of Highways where the railway affected it . Provision was made for it to cross the railway lines at a level crossing and plans and sectional drawings also deposited support this. Considerable weight must be given to all of this evidence which is supported by a range of further records and plans dating from 1773 to 1944.

- 29.3 No evidence supports that the route is a footpath. No evidence supports that the route is in Burbage Parish. It is a boundary road but, for the section affected by this application, it lays within Grafton Parish where it was awarded at Inclosure. It is considered that the recording of the route in Burbage was an error during the definitive map process and that new evidence discovered by the Council shows that on the balance of probability this is so.
- 29.4 Public rights were affected by the NERC Act 2006 and Wiltshire Council must consider the effect of the Act on them.
- 29.5 It is clear that s.67(1) of the 2006 Act extinguished the public MPV right and officers have accordingly considered a number of exemptions to this given in s.67(2) and (3) of the same Act.
- 29.5 None of the exemptions have been found to apply and it is considered that the public right to use the way with a mechanically propelled vehicle was extinguished on the 2nd May 2006. Accordingly the way may only be recorded as a restricted byway and not as a byway open to all traffic as applied for.

30.0 Recommendation

That an Order is made under s.53(3)(c)(i)(ii) and (iii) of the Wildlife and Countryside Act 1981 to record GRAF31, 29(part) and 30 as restricted byways with a width of forty feet. To record CKIN34 as a restricted byway with a width of twenty feet. To add a section of restricted byway in Grafton parish with a width of forty feet linking GRAF29 with GRAF30 and to delete the adjacent section of BURB1 from the definitive map and statement.

Sally Madgwick

Definitive Map and Highway Records Manager
Wiltshire Council

01 November 2019