

APPLICATION 1987/01 CHUTE 3, COLLINGBOURNE KINGSTON 33 and 1B(PART) **APPENDIX A**
CONSIDERATION OF THE EFFECT OF THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES
ACT 2006

APPLICATION MADE: 1st April 1987

APPLICANT: C J and M Newby Vincent, Highlands Farm, Collingbourne Ducis

APPLICATION TO: Upgrade to a byway open to all traffic the footpath and bridleway from C21 Hungerford Road "A" on plan through "B" and "c" on plan to the northerly end of Chantry Lane "D" on plan

APPLICATION COMPRISED: Wiltshire County Council Appendix 1 Form of Application for Modification Order

Wiltshire County Council Appendix C Form of Certificate of Service of Notice of Application for Modification Order
Served on: G Crook, Aughton Farm
J Crook, Parsonage Farm
N Hosier, Brunton Farm
P T Hosier, Wexcombe Farm
M Sykes, New Zealand Farm

List of Documents
Collingbourne Kingston Inclosure Award
Chute Inclosure Award
Tithe Award Chute 1841
All Ordnance Survey Maps
Greenwood's Map 1820
Andrews' and Dury's Map 1773
Cary's Map 1842

Extracts from Chute and Collingbourne Kingston Enclosure awards

Ordnance Survey Map Scale 1:25000 showing claimed route marked A to B to C to D

NB SERVICE OF NOTICE: Although Mr Newby Vincent certified that he had served notice on the landowners listed above, Collingbourne Kingston Parish Council wrote to WCC in 1995 stating that they had spoken to all of the landowners involved and none of them had received notice of the application. WCC. WCC wrote to Mr Newby Vincent in Nov 1995, June 1996 and Oct 1996 (by recorded delivery) asking for clarification but no response was received. In 2001 WCC notified the landowners of the claim, sent a plan and invited comment. An initial non-statutory consultation was also carried out at this time (11.11.2001 to 25.01.2002 extended to 22.03.2002).

SCHEDULE 14 COMPLIANCE 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.

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.*

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.

Comment The application, when received in 1987, in line with Defra advice and practice, appeared compliant with Schedule 14. Subsequent investigations by officers revealed that it is possible that Mr Newby Vincent failed to serve notice on the landowners despite certifying that he had. However, by the end of 2001, notice had definitely been served upon landowners.

Subsequent 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).

Following the Winchester Case' ([2008] EWCA Civ 431) 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)”

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 Newby Vincent has not included copies of any evidence, just a list of documents. The application is therefore not fully compliant with Schedule 14.

EFFECT OF NERCA 2006

Section 67 of NERCA 2006 extinguished all public mechanically propelled vehicular rights (MPV) on any way that was not recorded in the definitive map and statement as a byway open to all traffic. If public MPV rights existed along the claimed route, they were extinguished on the 2nd May 2006 by this Act.

However, the Act makes a number of ‘savings’ that allows public MPV rights to remain after the 2nd May 2006. There are 5 of these savings detailed in s.67(2) and 2 in s.67(3) that officers must consider with regard to this case before deciding whether any public MPV remains. These are detailed below and discussed with reference to this application:

IMPORTANT NOTE: The application NERCA 2006 is only relevant where, on the balance of probabilities, a public vehicular right existed prior to 02.05.2006. Prima facie the evidence supports that such a right did exist, hence the application of NERCA 2006 will be discussed under this presumption.

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:*

(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.*

(2) *The relevant date in England means January 2005*

(3) *refers to private rights*

(4) *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*

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*

There is no evidence before the council of any public MPV use during this period. This saving does not apply.

(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 was shown in the definitive map and statement and was not shown on any list required to be kept under s.36(6) of the Highways Act 1980. This saving does not apply.

(2)(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles.

There is evidence that the route existed as a road in 1773 and whilst it is not known what use this route may have had, subsequent acts of parliament permitted the route to be awarded to the public as a Carriage Road. Officers have not yet examined the wording of the acts or the awards and cannot definitely say that no provision for MPVs was made. However, although a parliamentary select committee considered a paper on steam driven vehicles as early as 1835, these awards, dated 1798 and 1820 significantly pre-date this and this saving is therefore not considered to apply.

(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

There is no evidence before the council that this saving applies.

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

The evidence shows it is likely that by 1820 the whole of the route was in a public carriage road. This saving appears to envisage that a route that was once perhaps a bridleway was used by the public in MPVs and they acquired the right to so by use. This does not appear to be an applicable saving for this route as the way has been a vehicular route since before MPVs were in use.

(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 this route is the subject of an application for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic the application IS affected by 'The Winchester Case' ruling and as a result this saving does not apply.

In 'The Winchester Case' ([2008] EWCA Civ 431) 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.

(3)(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

Wiltshire County Council did not make a determination with respect to this application and this saving

CONCLUSION

There is no evidence before the council to suggest that any public MPV right along the claimed route has been saved. As a result, the claimed route would be recorded (after due process) in the definitive map and statement as a restricted byway. However, the council is under a duty to investigate "all other relevant evidence available to them" (WCA 1981s.53(3)) and it is usual in cases such as this that a letter is sent to the applicant, landowners and statutory consultees advising them that any public MPV right has been extinguished by NERCA 2006 but inviting any evidence to the contrary.

Sally Madgwick

Rights of Way Officer

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