

DECISION REPORT

Application 2012/04 Heddington 5 (part)

1 The Application

1.1 Details

Application number:	2012/04
Application date:	02/03/12
Applicant:	Mr Andrew Fenwick, Coach House, Heddington, Calne
Application to:	“Upgrading to Public Vehicular Carriageway or byway open to all traffic the footpath/bridleway/restricted byway leading from Church Road, Heddington, in a North Easterly direction alongside The Old Coachworks to the Field behind.”
Width:	5.5 metres to 3.8 metres to 6 metres
Basis of Application:	That public rights exist that are higher than shown in the definitive map and statement.
Application contents:	Form 1 Notice of Application for Modification Order Form 2 Copy of Notice of Application for Modification Order Form 3 Certificate of Service of Notice of Application - no landowners identified Extract from a Finance Act Map 1910 showing an uncoloured section between hereditaments 69 and 21 coincident with the application route.

NB On the 6th March 2012 officers wrote to Mr Fenwick and gave permission for him to post notice of application on site. This was done on the 9th March 2012 and Mr Fenwick returned Form 3 confirming this and enclosed a photograph of the notice prominently displayed. Officers have subsequently found that the north eastern end of the claimed route is registered to Mr D Tyler of Home Farm (see para. 4.0 Land Ownership). However, Mr Tyler would have passed by the site notice and has been consulted at an early stage, it is therefore considered he has not been disadvantaged by this omission. (*Dyson L J para. 65 Winchester College and Humphrey Feeds Ltd and Hampshire County council and SoSEFRA [2008] EWCA Civ 431*).

2 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 event referred to in subsection 2 above relevant to this case is:

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

(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 This application was not compliant with Schedule 14 when made as the applicant had failed to identify a landowner or occupier and had not requested permission to erect site notices. Permission to erect notices was given and this was carried out soon after. As a result it is considered that the application was Sch. 14 compliant on the 9th March 2013.

2.8 In any case 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.

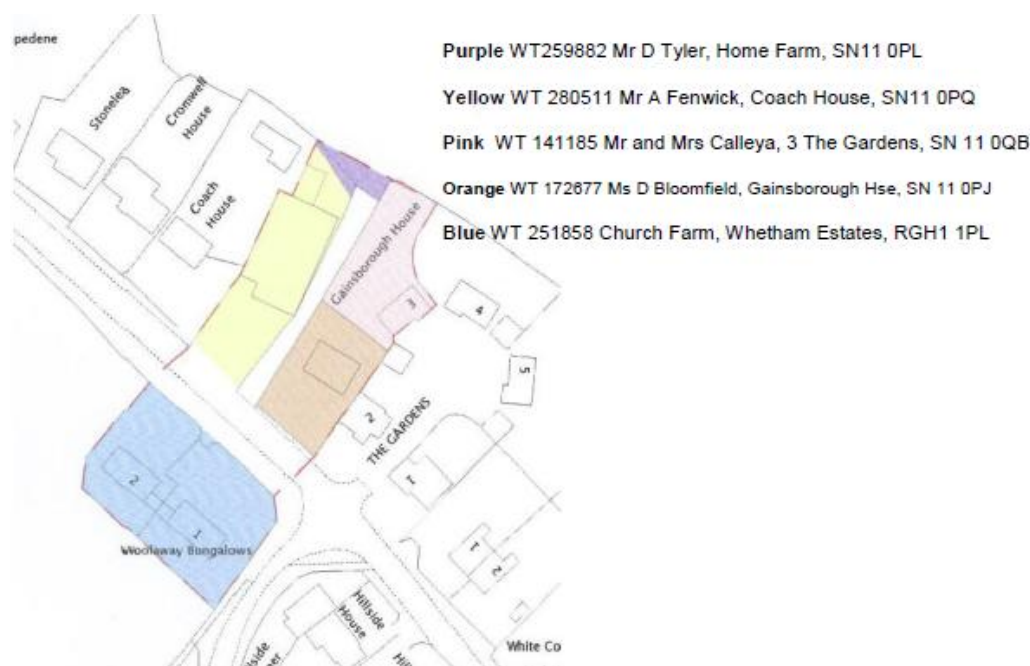
- 2.9 Although it is clear that it is possible to proceed with most applications that are not strictly compliant with Schedule 14, legislation enacted in May 2006 (Natural Environment and Rural Communities Act 2006 (NERC Act 2006) means it is necessary for the Council to consider strict compliance where an exemption from the extinguishment of public rights for mechanically propelled vehicles (MPVs) under s.67(3) may apply.
- 2.10 The application was received in 2012 and is therefore not liable to an exemption under s.67(3) NERC Act 2006. However, the applicant route may be liable to other exemptions from the act if historic public vehicular rights are found.
- 2.11 For the NERC Act 2006 to apply it is first necessary to establish whether, on the balance of probabilities, a public vehicular right existed **before** the 2nd May 2006. If it did then it is necessary to investigate whether or not that right was extinguished by the 2006 Act. As a result NERC Act 2006 consideration will be discussed later in this report at section 15.
- 2.12 This report will now investigate evidence relating to whether a public vehicular right subsisted over the claimed route prior to the 2nd May 2006.

3.0 Background

- 3.1 In 2011 a fence was erected at the boundary of Heddington path 5 with the applicant's property, the Coach House (WT280511). In the course of investigating whether this fence formed an obstruction to the highway, officers of the Council looked at some historical documents relating to the way and produced 2 reports. These reports are appended here at Appendix A and B.
- 3.2 The reports found that the width of Heddington path number 5 at this point extended between land boundaries in different ownership (those boundaries having been laid out with respect to the highway) and that if there was any encroachment of the new boundary fence, it was de minimis.
- 3.3 The investigations did not reveal sufficient evidence relating to the existence of higher rights to provoke further action by the Council in line with its duties under s.53(2) of the 1981 Act.
- 3.4 Subsequent to this, (reports issued to Mr Fenwick in the latter part of 2011), an application to upgrade this section of Heddington 5 was received in March 2012.
- 3.5 The application was accepted by Wiltshire Council and entered onto its register of applications for modification orders.
- 3.6 The Council failed to determine the application within one year and the applicant appealed to the Planning Inspectorate (PINS) for a direction under Schedule 14 (3)(2) to the 1981 Act.

3.7 In July 2013 PINS directed Wiltshire Council to determine the application by the end of July 2014. A copy of the Inspector's decision is appended at Appendix C.

4.0 Land Ownership



4.1 The majority of the applicant route has no registered owner and local enquiry has not revealed who owns it. The Tithe Commissioners in their survey of 1840 identified that the applicant route formed part of land now owned by Mr Tyler of Home Farm but no records since that time have identified an owner.

4.2 The applicant for a DMMO and owner of WT280511 Mr Fenwick, claims long term use of the route for access to his property with vehicles and has lodged a statutory declaration to that effect with Land Registry who refer to it in the Register Entry for WT280511. However, there is no other evidence to support this and in a response to planning application no 11/02318/REM, a Mr Brown responded that he had been born in Heddington 70 years ago and had worked for companies on either side of the applicant route in the late 1950s and 1960s. He recalls that there was never access or right of way to WT280511 (coach works and yard), the only route past being the footpath.

5.0 Current records

5.1 **Wildlife and Countryside Act 1981 s.56**

(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely –

(a) where the map shows a footpath, the map shall be conclusive evidence that the public had thereover a right of way on foot, so however that this paragraph shall be

without prejudice to any question whether the public had at that date any right of way other than that right.

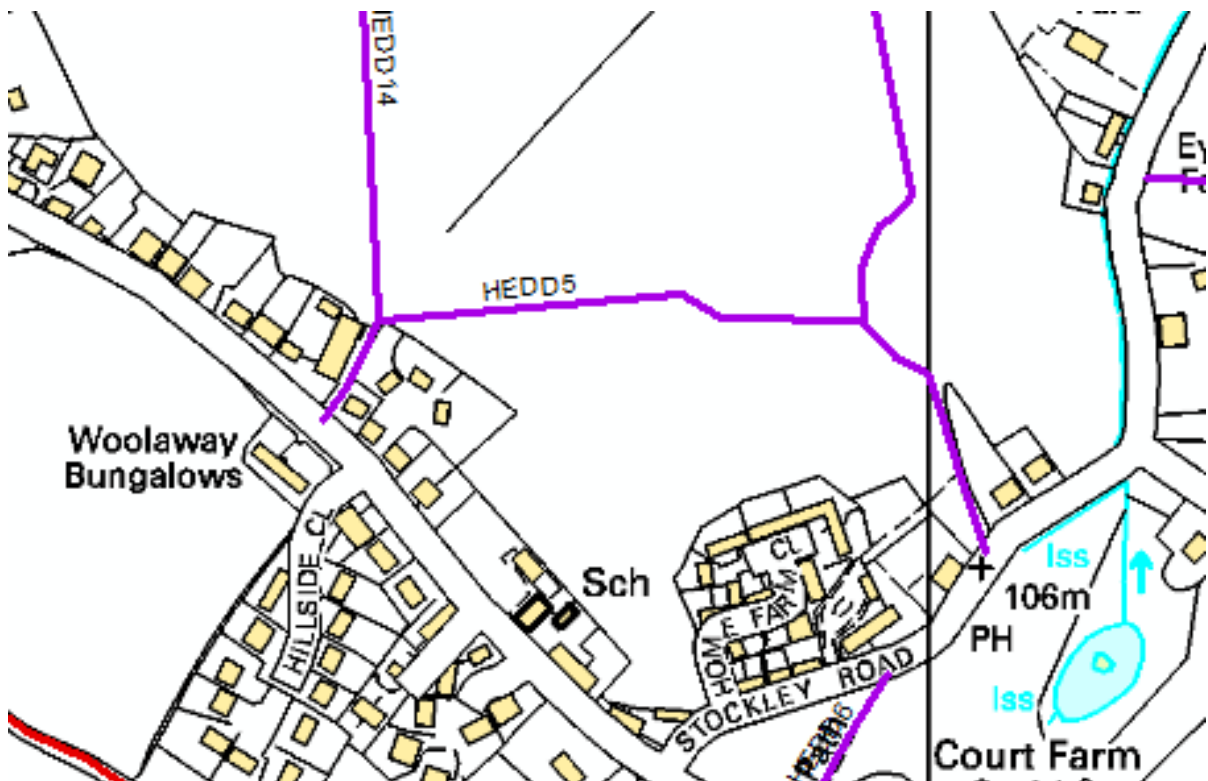
5.2 Heddington path no. 5 was claimed by the parish council in 1950 as a public right of way leading from the road (C.247) opposite Rectory Drive leading north and east to path number 4 north of Ivy Inn. The parish claim card states that there was a field gate near to the road end and the width was described as undefined but in answer to whether it was fenced or open the parish council responded that it was “open except for a small portion at road end”.

5.3 The route was added to the Calne and Chippenham Rural District Council definitive Map and Statement as Heddington footpath 5 in 1953. The path has remained unaltered since this time.

5.4 The statement reads:

F.P. From the Heddington Wick – Heddington road, C.247, opposite Rectory Drive, Heddington, leading north-east and east to path no. 4 north of Ivy Inn. Approximate length 300 yards.

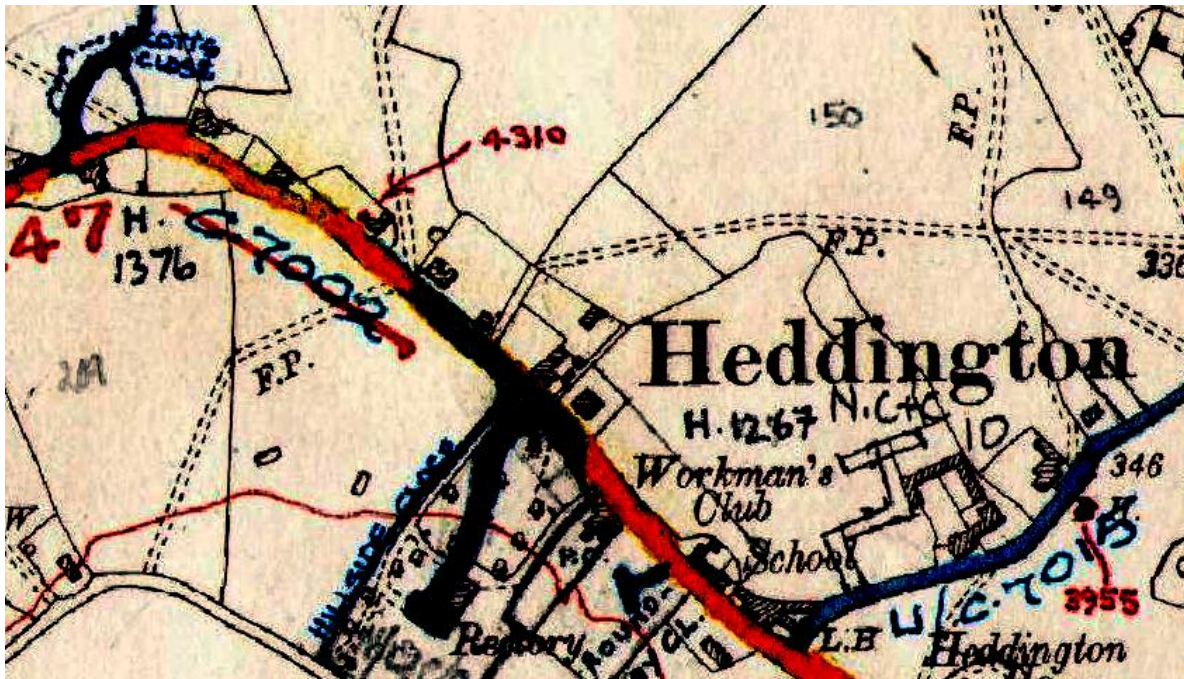
5.5 Working copy (footpaths in purple):



5.6 The applicant route was not handed over by Calne and Chippenham Rural District Council to Wiltshire County Council as a publicly maintainable road under the terms

of the Local Government Act 1929 and is not coloured or numbered as a publicly maintainable road in Wiltshire Council's highway record.

5.7 Wiltshire Council's Highway Record:



6.0 Initial Consultation

6.1 Photographs have been taken of the applicant route. It is a wide route leading north north west from the road to a field gateway. Length of this section = approx 50 m.



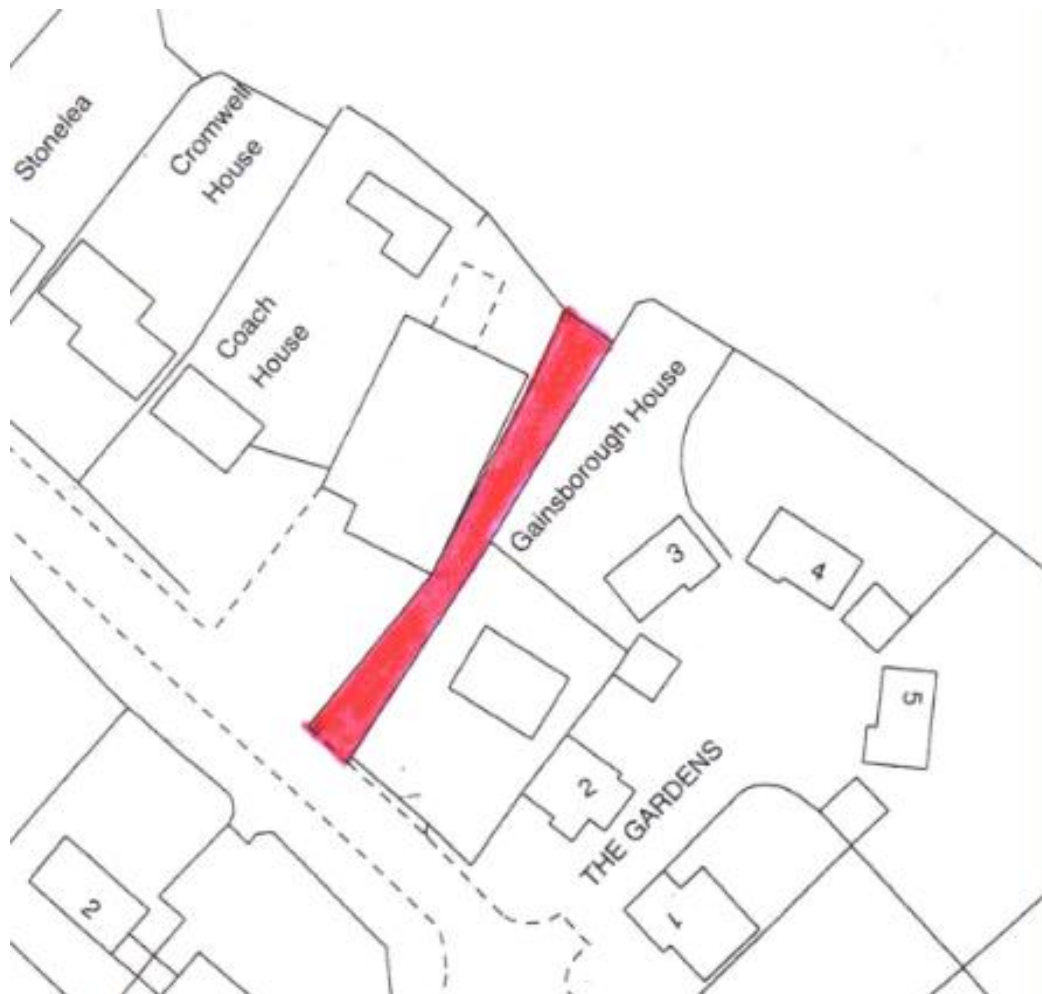
6.2 The following letter and plan was circulated on the 22nd August 2013:

“In March 2012 Wiltshire Council received an application for an order to modify the definitive map and statement to record part of Heddington footpath no. 5 as a byway open to all traffic. Further to an appeal to the Secretary of State for the Environment Food and Rural Affairs, Wiltshire Council has been directed to determine the application by the end of July 2014.

The application relates only to the length of footpath no. 5 that extends from the C.247 (the road leading west from Heddington towards Bromham) heading north west for a distance of approximately 25 metres to the field gateway. Please see attached plans (the claimed route is shown in red on the more detailed plan).

The applicant claims that this route is an ancient public vehicular highway and that such rights have been preserved and should be recorded in the definitive map and statement. The application relies on historical evidence and matters such as need, desirability, health and safety or the environment are not matters that may be considered.

If you have any evidence relating to this route (perhaps old maps, photographs or memories of use) I would be pleased to receive it. Please respond by Friday 5th October 2013.”



NB The plan circulated is the plan submitted as part of the application.

6.3 This was sent to the following:

The Auto Cycle Union
Commons, Open Spaces & Footpaths Society
Wiltshire Bridleways Association
Cycling Touring Club
British Horse Society (local and national)
Heddington Parish Council
Wiltshire Councillor Christine Crisp
Byways and Bridleways Trust
British Driving Society
Wiltshire Council Senior Rights of Way Warden
Ramblers
Mr B Riley
Trail Riders Fellowship
Mr A Fenwick (applicant and adjoining landowner)
Mr D Tyler (landowner and adjoining landowner)
Owner/occupier Gainsborough House (adjoining landowner)
Owner/occupier no 3 The Gardens (adjoining landowner)
Mr A Roberts, Ramblers

6.4 Additional to the responses that follow, officers have also considered responses received to 4 applications for planning consent affecting the applicant route.

Application nos: 08/00341/OUT
 10/04628/REM
 11/02318/REM
 11/03636/S73

6.5 The proposed development uses footpath 5 as vehicular access to some of the houses and attracted over 94 responses. Not all respondents mentioned the right of way but those that did referred to it being only a footpath and did not recall or consider that any higher rights subsisted over it. Memories went back as far as 70 years.

6.6 **Wiltshire Bridleways Association 12.09.13**

“With reference to your letter of 22nd August 2013, regarding the application for an order to modify the definitive map and statement to record part of footpath Heddington no. 5 as a byway open to all traffic.

I write to state that the above was discussed at our committee meeting on 11th September 2013 and unfortunately, on this occasion, Wiltshire Bridleways Association is not aware of any evidence that would support this application.”

6.7 Mr M Brooks 07.05.13 (response in file from period immediately post application)

"I would like to register my objection to the proposed upgrading of HEDD5 to a public vehicle carriageway as proposed by my neighbour Mr Andrew Fenwick of Coach House, Heddington.

As background information, Mr Fenwick has been attempting to gain planning permission to use HEDD5 to provide a means of vehicle access to his land for many years, without success. If the planning background is relevant to your consideration, please contact Mr Simon Smith (the Wiltshire Council case officer) who has all the previous history."

6.8 Mr D Tyler, Kingsplay Farming Co Ltd 29.09.13

"The short length of track which is also the start of footpath no 5 has always been my access to the fields of Home Farm. This track has only ever been used by me since 1966 and my predecessors who have owned Home Farm for all farming operations.

The previous owners of the Coachworks, Mr Keen of Rimes Coaches tells me they at no time used this track.

In addition the previous owners of the gardens which was a demolition yard owned by the Barnes family verify no one other than the owners of Home Farm used this track. Mrs Barnes who is 93 will testify to this statement, she still lives on the site.

This application is an attempt to use this track as an entrance and right of way to a building site in order to obtain an extra property on site. This application must be refused."

6.9 Mr D W Brown 01.10.13

"I was born in the village in 1941, my family have farmed here for four generations. I left school at 15 and worked on a local farm for 2 years, in 1959 I was employed by B Barnes Demolition whose yard was on the right hand side of the lane opposite the coach works. When we wanted to unload timber in to the yard we first had to ask permission from Mr Lesley Perrett who was farming at Home Farm Heddington because the lane was Mr Perrett's access to agriculture land. After 4 years I changed my employment to G Keen and Sons coaches during my time driving coaches the lane was never used by the company and definitely no access to the rear of the workshop. This is firsthand knowledge that the lane between the coach works and Barnes Demolition Yard was access for Home Farm only."

6.10 Ms D Broomfield and Tennant 28.09.13

"We understand that the only 'evidence' to support the proposed change to the definitive map to show the section of HEDD5 as a Byway Open To All Traffic is that

the Finance Map of 1910 shows the land as uncoloured. Clearly this fact alone is insufficient to demonstrate that the land was designated highway at the time.

There are a number of other circumstances regarding this land/track that could account for why it was left uncoloured...it could even have been a mistake!

This narrow strip of land has a footpath running over it and agricultural access for one landowner (Home Farm), which would be strong reasons for the 1910 assessors to view it as having no commercial value.

Further, why would there be a highway that doesn't lead to anywhere?

The Public Right of Way claims form dated 1950 for Heddington path no. V states that there is a field gate near the road end; commensurate with the track being used by farm animals and not accessible by vehicles.

Mr David Brown has lived in Heddington all his life (born 1941) and his family has been in Heddington for 200 – 300 years. He has worked in Heddington since at least 1959 is adamant that vehicles have never been legally allowed on the track (with the exception of agricultural vehicles gaining access to Home Farm). He used to work at Barnes Demolition, which was the former use of the land on which Gainsborough House now stands, and also for George Keane Coachworks, where the current abandoned coachworks building is located. He swears that neither of these companies (either side of the track) were allowed their vehicles, or delivery vehicles, to use the track...even though it would have been more convenient to do so.

We therefore suggest that the balance of probabilities is strongly in favour of there never having been vehicle rights over this track and therefore no change should be made to the definitive map.”

6.11 Ramblers 02.10.13

“On behalf of the Ramblers I object to this application on the grounds that it neither benefits the walking public nor enhances the local footpath network, and I would urge you not to make the order.

The only evidence given that the claimed route is an ancient public vehicular highway is a rather narrow interpretation of just one old map. There is no supporting evidence provided by the applicant.

Indeed, none of the other maps that I have checked – 1835 Estate Map; 1841 Tithe Map; 1886 25” OS Map;

1900 25” OS Map; 1924 25” OS Map – show it as anything other than a fenced/hedged access track to the field.”

6.12 Heddington Parish Council 03.10.13

“ In reply to your letter of 22nd August 2013. Numerous individuals born and bred in Heddington and Stockley are prepared to confirm there has, in their lifetime, never been a

public vehicular access along footpath No. 5, apart from farmers' access from highway C247 to the field at the rear of the Gardens and the Old Coach Works.

Two residents of particular note are:-

Mrs. Barnes(93) who, with her late husband, ran a demolition yard to the east of footpath 5 where Gainsborough House and the Gardens now stand.

Mr. David Brown (71) who worked for both Barnes Demolition and Keen's Coaches on the west side of footpath 5. This is still known as "the old coachworks site" and has been the subject of a number of failed planning applications over many years.

Both Mrs. Barnes and Mr. D Brown have stated that there has never been a right of public vehicular access along footpath 5.

In addition to village residents, a member of the Keen family who ran the original coachworks has also stated that at no time during their years of trading was there ever a right of public vehicular access along footpath 5.

If you require further details please don't hesitate to contact me."

6.13 **Mr M Brooks 03.10.13**

"I am writing as a resident of Heddington in respect of the above. In summary, I do not believe there is a sound basis for regarding footpath Heddington no. 5 as a byway open to all traffic.

My family and I have lived in the village for 16 years. During this time Mr Fenwick has been a lone voice in the village claiming a variety of access rights over Heddington footpath no. 5. This is simply his latest attempt at gaining vehicular access over the footpath in order that he can legitimately gain access to his proposed residential development in the village.

During my time in the village it has been clear that footpath no. 5 only has vehicular rights of access in respect of agricultural use to access the fields beyond. Many villagers have lived in Heddington for much longer than I have (some back to the Second World war, long before Mr Fenwick came to the village). I believe they will be sending separate letters to you, explaining how businesses long before that of Mr Fenwick operated in the immediate area and none had vehicular access over footpath no. 5. This is supported by Parish Council records which show that the Police have been called in the past to remove vehicles illegally parked by Mr Fenwick along the footpath.

In addition to these personal recollections I would like to draw your attention to:

1. The Wildlife and Countryside Act 1981 – Definitive Map Orders: Consistency Guidelines (5th revision July 2013) states clearly in paragraph 11.9 that "it should not be assumed that the existence of public carriageway rights is the only explanation for the exclusion of a route from adjacent hereditaments although this may be a strong possibility, depending on the circumstances. It must be remembered that the production on such ways was very much incidental to the main purpose of the legislation."

2. The logic of intentionally classifying the short section of footpath no. 5 as 'highway' defeats me. It simply leads to a field.

On the balance of probabilities, it is clear that Heddington footpath no. 5, and always has been, a footpath without vehicular rights for all traffic."

7.0 Evaluating Historic Records

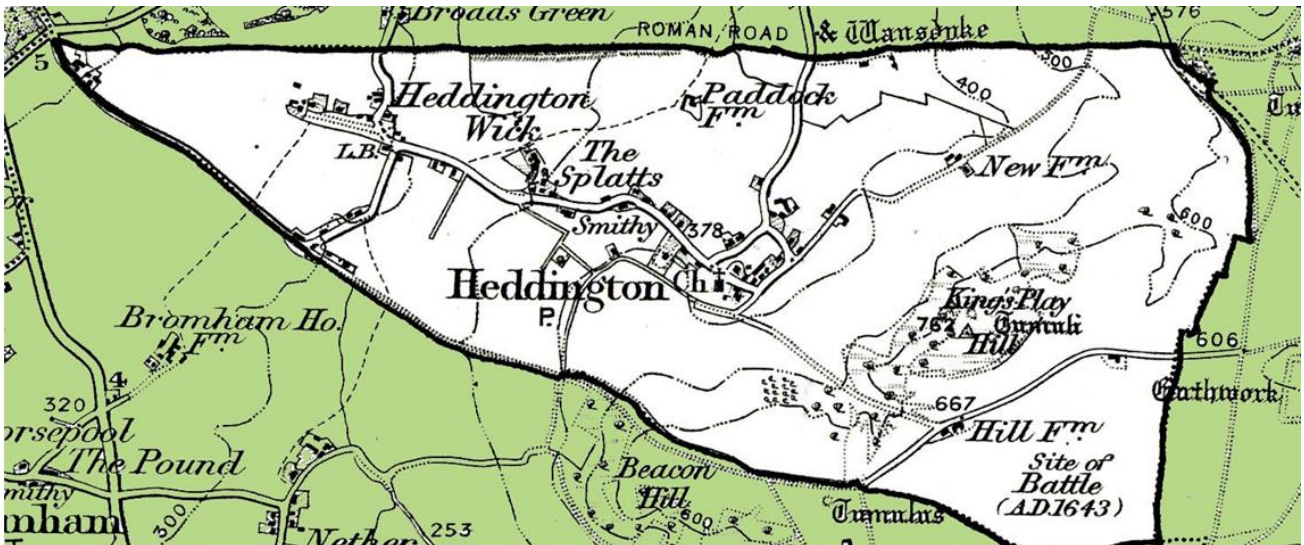
7.1 The physical feature of the applicant route has appeared on a number of historical documents. Although it can be helpful to present these in chronological order to show the consistent recording of a way over time it does not allow for the need to apply evidential weight to documents. For example although a way may appear on thirty commercial maps this 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 (s.32 Highways Act 1980 enables courts or tribunals to attach weight to evidence).

7.2 Therefore, 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 (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.

Category	May provide evidence for	Examples
A	<p>Legal creation of a highway</p> <p>Reputation of a way as a highway</p> <p>Physical existence of a way</p> <p>Conclusive evidence of public rights</p>	<p>Inclosure Acts, awards and plans</p> <p>Orders creating, diverting or extinguishing highways</p> <p>Railway and canal acts and plans</p> <p>Definitive map and statement</p>
B	<p>Reputation of a way as a highway</p> <p>Physical existence of a way</p>	<p>Documents, maps plans drawn up as a result of legislation, consulted upon, but whose primary purpose was not to record public rights.</p> <p>i.e. Tithe Commission, Inland Revenue Finance Act</p>
C	<p>Reputation of a way as a highway</p> <p>Physical existence of a way</p>	<p>Includes local government records (highway board, county council, parish council)</p>
D	<p>Reputation of a way as a highway</p> <p>Physical existence of way</p>	<p>Other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans, conveyances</p>
E	<p>Reputation of a way as a highway</p> <p>Physical existence of a way</p>	<p>Commercial maps, some Ordnance Survey records</p>
F	<p>Reputation of a way as a highway</p> <p>Physical evidence of a way</p>	<p>Local repute, consultation responses</p>

7.3 General Context Vol VII Victoria County History (map: Ordnance Survey 1880)



Heddington is a small parish to the south of Calne highlighted in white on the map above. The Domesday survey of 1086 records that the parish had only 10 acres of meadow and 8 acres of pasture with a population of around 140 people. The manor was held under various moieties but a large part was held by Lacock Abbey (between 1236 and 1539) with ownership passing to the Crown after the dissolution of the monasteries. The manor was sold to the Partridge Family in 1570 where it remained until the early 17th century. From this time on, Heddington manor was divided and sold in numerous portions of land.

7.5 Widespread enclosure does not seem to have occurred in Heddington. Two agreements from the end of the 18th century affecting some of the parish lands appear to be the only surviving documents relating to enclosure.

7.4 It is a relevant feature of the applicant route that it has, throughout its history, been bordered by lands that are largely in different ownership. A short fenced route leading to fields appears to have been an enduring feature of the landscape and is represented on maps from 1773 onwards.

8.0 Category A Evidence

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

8.2 Inclosure

Between 1545 and 1880 the old system of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners

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

8.3 Heddington Inclosure Agreements 1722 and 1757 (Wiltshire and Swindon History Centre 754/7 and EA6)

Neither agreement is accompanied by a map and the agreement of 1722 does not agree any paths or ways. The original document has been examined, read and transcribed as below:

NB A small section of the agreement has been damaged, this amounts to approximately 4 words at the beginning of some lines, the transcript records where damage has occurred. Where a word has not been readable by the transcriber (though not damaged) the word is represented like so: xxxxx.

“Articles of agreement xxxxx has made xxxxx fully agreed upon the fifth day of October 1722 by and between William Grubbe of Potterne in the County of Wilts Esq. and Walter Grubbe of the City of Bristol Gent Germanicus Sheppard of Calne in the said County of Wilts Gent Anthony Brooke of Heddington in the said County of Wilts Gent of the one part and John Reynalds of Heddington aforesaid Gent Nicholas Paarse Joseph Marshman Charles Hillier xxxx Coster Robert Frayling Richard Biggs Isaac Powell William Hughs John Hood and William Sloper all of Heddington aforesaid and yeoman John Laughton of the same place xxxx and Sarah Collier of the same place widow Francis Rogers of the University of Oxford a Master of Arts William Collier of xxxx in the said County of Wilts Gent John Townsend of the City of Bath xxx Burnard Walter of Marden in the said County of Wilts yeoman xxx Bear of Calne in the said County carpenter and Stephens of Rowde – hill in the County of Wilts on the other part. Wheras the feeding in the Common fields of Heddington aforesaid with sheep and other cattle lyes xxxxx in xxxxxx that the best advantage (some words damaged) made of the said xxxx the feeding belonging to the two great farms there (viz) that farm belonging to the said Walter Grubbs in the (some words damaged) his now for most for her life now in the possession of xxxx Coster and the farm belonging to the said Anthony Brook and now in his possession (some words damaged) the lands lyeing in the two fields called the Howells and part of the fields belonging to the tenants and freeholders in Heddington aforesaid (some words damaged) and xxx in so much that the best use cannot be made thereof unless the said lands be layed and put together NOW WITNESS ((some words damaged) in the said Common fields and lands in the said two fields called the Howells and other part of the fields belonging to the said tenants and freeholders and for other good and xxxx considerations it is mutually settled and agreed upon by and between the parties to these presents John Carpenter of Rowde in the County of Wilts Yeoman William Smith of Bromham in the said County Yeoman Ebenezer Kent of Potterne in the said County Yeoman

and Robert Galt of Cherhill in the said county Yeoman or any three of them shall have full power and authority to lay out xxx and divide the common pasture and feeding for the aforesaid two farms distinct and separate from the Common of pasture and feeding belonging to the other said tenants and freeholders of land with the said parish of Heddington. Then it is further agreed by and between all the said parties in these presents that a survey xxxx of the lands lyeing in the said two field called the Howells and other part of the lands belonging to the said tenants and freeholders shall at a portionable costs of all the aforesaid tenants and freeholders except the owners and proprietors of the two farms be had within three months next ensueing and that immediately from and after such survey and admeasurement shall be had and taken as a xxx xxxx the said John Carpenter and William Smith xxx Kent and Roger Bale or any three of them shall put lay together and all of each tenant and freeholders shall of land lyeing in the said two fields called the Bowells and in the other part of the fields belonging to the tenants and freeholders such manner as they the said John Carpenter William Smith xxx Kent and Roger Halt or any three of them shall think fit AND that from and after such distinct separation and dividing the feeding for the two farms as aforesaid and the laying together and allotment of the land in the said two fields called the Bowells and the other part of the fields belonging to the tenants aforesaid such and xxx of the parties hereto shall tend arrest the same allotment and xxx and ratify the same each to the other in such manner and by such ways and means as xxx xxx in the law shall advise xxx where of the parties to those presents their hands and seals have hereunto sett the day and year first above written.

Followed by 13 seals, signatures confirming sealing and delivery on reverse

8.4 The agreement of **1757** does not have a map and in relation to the roads says:

“The said Refferees Do hereby order set out and appoint the several public roads and ffoot paths or ways following that is to say a public horse and carriage road along or down a place called the Hill near said Thomas Hunt Grubbes old furlongs there to a Ground belonging to the said Rector called the Hook and leading towards Baton bridge as the same is now marked and fifty ffoot wide of ? of the ? or ditches adjoining thereto And also a horse or bridle road only in the east part of the said ffield extending from a place called Hickley Lodge to Blackland ffield as the same is now repaired and maintained in the same manner as the other public roads in the said parish of Heddington and by law required to be made repaired and maintained And also a footpath or way as now used extending from opposite a house called Follingtons now occupied by one William Green across part of the lands Allotted to Henry Brooks and Thomas Hunt Grubbs in that part of the said field under Knight Play across the ? road and through part of the said George Willy in the west part of the said ffield to the Turnpike Road above Hill and that proper and convenient Stiles shall be erected and provided by the proprietors of the Mounds and ffences it crosses and also another footpath or way in the east part of the said ffield extending from said John Hoods old furlong along Wansdyke to the road leading from Calne to Devizes. And also a private road or way adjoining to and on the side of Wansdyke through part of said John Hood from his allotment into the road leading from Blackland Field to Heddington and also another footpath or way now used leading from a ground called the Butty to the said part of Ground called the Hook.”

8.5 There is no evidence relating to the applicant route (or its continuation) contained within this evidence.

8.6 **Wiltshire Quarter Sessions Records**

There are no diversion, closure or creation orders relating to the applicant route from 1723 to 1971. Additionally Petty and Special Sessions Justices Minutes Books from 1787 to 1930 have been searched for highway references in Heddington and none relevant to the applicant route have been found.

8.7 **Calne and Chippenham Rural District Council Definitive Map and Statement 1953**

The applicant route was added to the Calne and Chippenham RDC definitive map and statement in 1953 as a footpath and has not been the subject of a legal order since that time or altered at definitive map reviews in 1958 and 1972.

8.8 **Deposited Plans for Public Undertakings**

The applicant route is not affected by any acts or plans related to public undertakings (for example railway or canal).

9.0 **Category B Evidence**

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

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

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

9.4 The Tithe Commissioners seconded Robert K Dawson from the Royal Engineers to organise and superintend the land surveys. Dawson had a background in surveying and produced a paper, the details of which it was considered all tithe maps should be drawn to. This paper (British Parliamentary Paper XLIV 405 1837) only ever served in an advisory capacity as the Tithe Act itself contained contradictory clauses

on the nature of maps (*Tithe Surveys for Historians* by Roger J P Kain and Hugh C. Prince) and was amended in 1837 allowing commissioners to accept maps of a variety of scales and dates.

- 9.5 The tithe map for Heddington is dated 1841 and the apportionment is dated 26 May 1841. The map is drawn to a scale of 8 chains to one inch and was surveyed by William Bryan Wood, Surveyor, Barnbridge, Chippenham. The tithe commissioners' stamp dated 11 June 1842 is on the map and the map has been signed by Richard Hale and Aneurin Owen (assistant tithe commissioner). The map is additionally certified by William Blamire and I W Buller, tithe commissioners. The map shows water bodies, houses, woods, arable land coloured, grassland coloured, field boundaries and ownerships.
- 9.6 Roads are coloured sienna and separately listed in the apportionment.
- 9.7 The applicant route is shown as being part of land parcel number 148 (now a field belonging to Mr Tyler) and is bordered by land parcels 159 (now The Coach House), 156 (now Gainsborough House and no 3 the Gardens) and 157 (now a field belonging to Mr Tyler).
- 9.8 Entries are:

No	Owner	Occupier	Name and use
148	Ralph Heale Esq.	John Ruts	Great and Little Woods Pasture
156	Glebe	Occ. In hand	Stables and gardens
157	Brice Pearse Esq.	Isaac Clarke	Woods Pasture
159	Ralph Heale Esq.	Thomas Fell	Cottage and garden

- 9.9 The applicant route appears gated at the road and not at the point it is now and is represented as part of the field. The surveyor has shown other highway 'spurs' as road coloured sienna (for example the cul-de-sac that is now Scotts Close) but not the applicant route. The applicant route is clearly part of field no. 148.

9.10 Excerpt from the Tithe Map and apportionment 1841: Applicant route



Stable Sand	991. 1. 23
Meadow	
Pasture and	} 745. 2. 21
Homesteads	
Woods	4 . . .
Waste	29 . 1. 11
Roads	10 . 1. 20
	1710. 2. 35

9.12 **Inland Revenue Finance Act 1909/1910** 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 carefully identified and included in the documentation.

9.13 The following is taken from the Journal of the Society of Archivists (JSA, Vol 8(2) no 2, Oct 1986 p 95-103 "An Edwardian Land Survey: the Finance (1909-10) Act and describes the process by which this was achieved.

"The Valuation Department assumed responsibility of valuation for rating purposes, and the hereditaments of 1910 provided the basis for their work for very many years, so that the documents of that time often continued to be used as working documents long after the repeal of land clauses".

"A land valuation officer was appointed to each income tax parish. These were almost always the existing assessors of income tax (who were also frequently assistant overseers), and some several thousand were appointed nationally. This enabled the Inland Revenue to have local people with local knowledge undertaking the crucial task of identifying each hereditament."

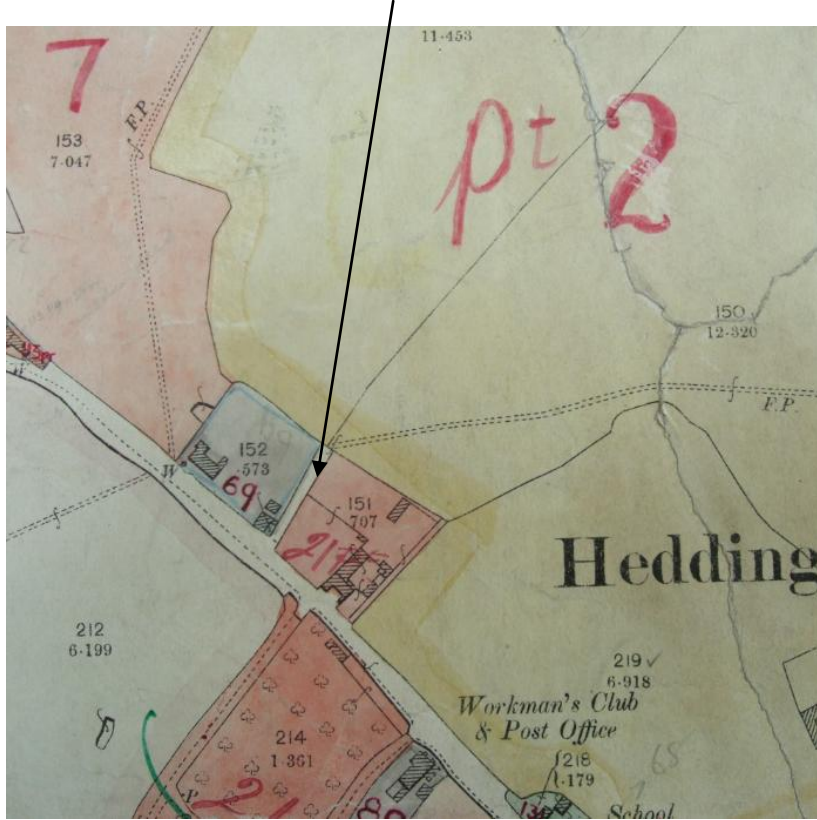
NB Heddington was assessed by G Peak Garland of Heddington.

9.14 The working copy of the Finance Act plans held at Wiltshire and Swindon History Centre (WSHC) have been viewed as has the record copy held at The National Archive at Kew. The base maps for these records are the Second Edition of the Ordnance Survey (OS) County Series maps at a scale of 1:2500. These maps had been revised in 1899 by the OS and undoubtedly provided the most accurate record of the landscape that we have for that time. Sheet 34.1(L8/10/34 and IR125/11/380/XXXIV.1) shows the applicant route.

9.15 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 Inland Revenue surveyor could show that something was un-connected with an adjoining feature.

- 9.16 The Finance Act is not specific about the exclusion of roads though they may be excluded under s.25 (3) or s.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”. S.25(3) states that “The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject...any public rights of way”.
- 9.17 The Planning Inspectorate (PINS) Consistency Guidelines at 11.7 consider that the exclusion of a route from surrounding hereditaments may be good evidence that the way was considered a public vehicular highway since footpaths and bridleways were *usually* dealt with by deductions recorded in the forms and field books. However, PINS goes on to consider that there may be other reasons to explain its exclusion. “It has been noted, for example, that there are some cases of a private road set out in an inclosure award for the use of a number of people but without its ownership being assigned to an individual, being shown excluded from hereditaments; however this has not been a consistent approach.”
- 9.18 Instructions issued by the Inland Revenue to valuers in the field deal with the exclusion of ‘roadways’ from plans but do not explicitly spell out all the circumstances in which such an exclusion would apply.
- 9.19 Although it is clear that the applicant route is uncoloured and excluded from adjoining hereditaments in both the working and record copies of the plans it is also noted that the valuation book records deductions for public rights of way to the sum of £100 for hereditament no 2. This is a large hereditament of 184 acres and it is not possible to determine where the rights of way that were forming the deduction were.
- 9.20 It can be helpful to look at the practice of the surveyor in other parts of the parish. It is noted that in Heddington a number of other routes were left uncoloured that are not public rights of way in the definitive map and statement today and these include short roadways leading only to fields.
- 9.21 The value of Finance Act evidence has been recently considered by the courts in the case of *Fortune v Wiltshire CC [2012] EWCA Civ 334*. In this case the evidence of an excluded route was given due consideration with Lewison J concluding that the Finance Act records are “simply one piece of the jigsaw puzzle” to be considered along with other relevant material particular to each case.

9.22 Working Copy extract: Application route



9.23 Working copy extract: Other uncoloured route not in definitive map and statement (off Heddington path no. 10)



9.24 Record Copy extract:



9.25 The valuation book records the following in relation to the adjoining hereditaments:

No	Occupier	Owner	Deductions	PROW	Description
2	H J Pocock	Capt J E P Spicer	£100		Lower Farm
21pt	Revd J H Bland	Glebe	none		House and Land
69	Louisa Hunt	Louisa Hunt	none		Cottage and Garden

10.0 Category C Evidence

10.1 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.

10.2 These can be important records as they relate to maintenance liability and can be a clear indication of public acceptance.

10.3 Parish Council Claims – National Parks and Access to the Countryside Act 1949

10.4 The National Parks and Access to the Countryside Act 1949 required Wiltshire County Council to produce a definitive map and statement of public rights of way. As a part of this process Parish Councils had to submit details of all the ways in their

parish that they considered to be public rights of way that should be included in the map and statement.

10.5 Although parish councils were directed to guidance on the matter and all parish councils submitted a claim in Wiltshire, there is significant variation in the extent and detail of the submissions between parishes.

10.6 Heddington parish council claimed the applicant route as a public right of way, fenced on both sides for this section. They recorded that the way was not repaired by parish, district, borough or county council. The way appeared on the draft and provisional maps, there were no objections to this and the way was added to the definitive map and statement as a public footpath.

10.7 **Calne and Chippenham Rural District Council Takeover Map**

As a result of the Local Government Act 1929 the rural district councils were required to hand over the maintenance responsibility for rural roads to the county council. In Wiltshire this procedure was recorded on a series of maps known as 'takeover maps'. The applicant route was not handed over to the county council and is uncoloured on the map (the adjoining road C.7002/C.247 is coloured).

10.8 **Wiltshire Council Highway Record**

Wiltshire County Council produced a record of publicly maintainable highways from the takeover maps and these maps are still in use today. Publicly maintainable roads are shown coloured. The applicant route is shown uncoloured.



10.9 **Rural District Highway Board Minutes**

There are no references to the applicant route.

10.10 Wiltshire County Council Roads & Bridges Committee Minutes 1894 – 1974

There are no references to the applicant route.

11 Category D Evidence

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

11.2 WSHC 1553/98 Estate map Nicholas Pearse 1801

This is a highly detailed map drawn at a scale of 6 chains to one inch as surveyed by F Whishaw. The map is entitled “A Map of AN ESTATE at Heddington IN Wilts belonging to Nicholas Pearse Esq.” The map shows land to the east of the claimed route but not the route itself. Roads are shown coloured sienna.

11.3 The Glebe land is clearly shown to the west of where the route is now and the land beyond (that is now Mr Tyler’s land) is shown belonging to Walter Brooke.



Site of claimed route

11.4 WSHC 1553/99 Estate Map of Brice Pearse 1835

This is another well drawn and detailed map. It is drawn at a scale of 6 chains to one inch and was surveyed by W R Wood, Devizes. The map is entitled “Map of an

Estate in the Parish of Heddington in the County of Wilts belonging to Brice Pearse Esq. 1835". The map shows roads with destinations on them (e.g. "To Calstone"), buildings, field boundaries, vegetation type, land ownership and gates.

11.5 The applicant route is shown as a short fenced track leading to two fields, one in the ownership of the Trustees of R Heale and the other in the ownership of Brice Pearse. The property that is now Mr Fenwick's Coach Works is in the ownership of the Trustees of R Heale and the land that is now Gainsborough House is still shown belonging to the Glebe. The track is not coloured and does not have a destination on it.

11.6 Applicant route



11.7 The northern end of the applicant route has two gates drawn on it showing access to two fields from the route, one in the ownership of Brice Pearse and the other the Trustees of R Heale. No access is shown to either the Glebe land or the plot that is now the Coach Works. The photograph is less clear than the original document.



11.8 **WSHC 1720/607 Sales Particulars dated 1902**

The sales particulars for the sale of lands and properties belonging to the estate of Miss Elizabeth Clark deceased have been viewed. On the 30th July 1902 at The Bear Hotel land a number of lots were auctioned. Lot 11 was land that included The Coach House and Coach Works adjacent to the claimed route, but not the claimed route.

11.9 The land included in the sale is shown coloured blue on the sales plan and is described as a “superior freehold pasture land known as “Pontings” containing an area of 7a 0r 7p or thereabouts with capital Pond of Water, lying adjacent to the road from Heddington to Bishops Cannings and bounded by the lands of Captain Spicer and Mr W G Mitchell. It is now in the occupation of Mr H J Perrett on a Candelmas tenancy, at a rent apportioned for the purposes of this sale at £5.15s per annum together with two good brick built and thatched cottages with gardens adjoining the said land.”

11.10 A newspaper cutting included in the file recorded that lot 11 was bought at £425.

11.11 There is no mention of access to or from the applicant route and although the Bishops Cannings to Heddington road is described in the sales particulars as adjacent to lot 11 there is no reference to the applicant route being part of that road, nor is it logical that it would be.

11.12 Extract from Sales Particulars Plan A.



11.13 **WSHC 776/788 Sales Particulars dated 1918**

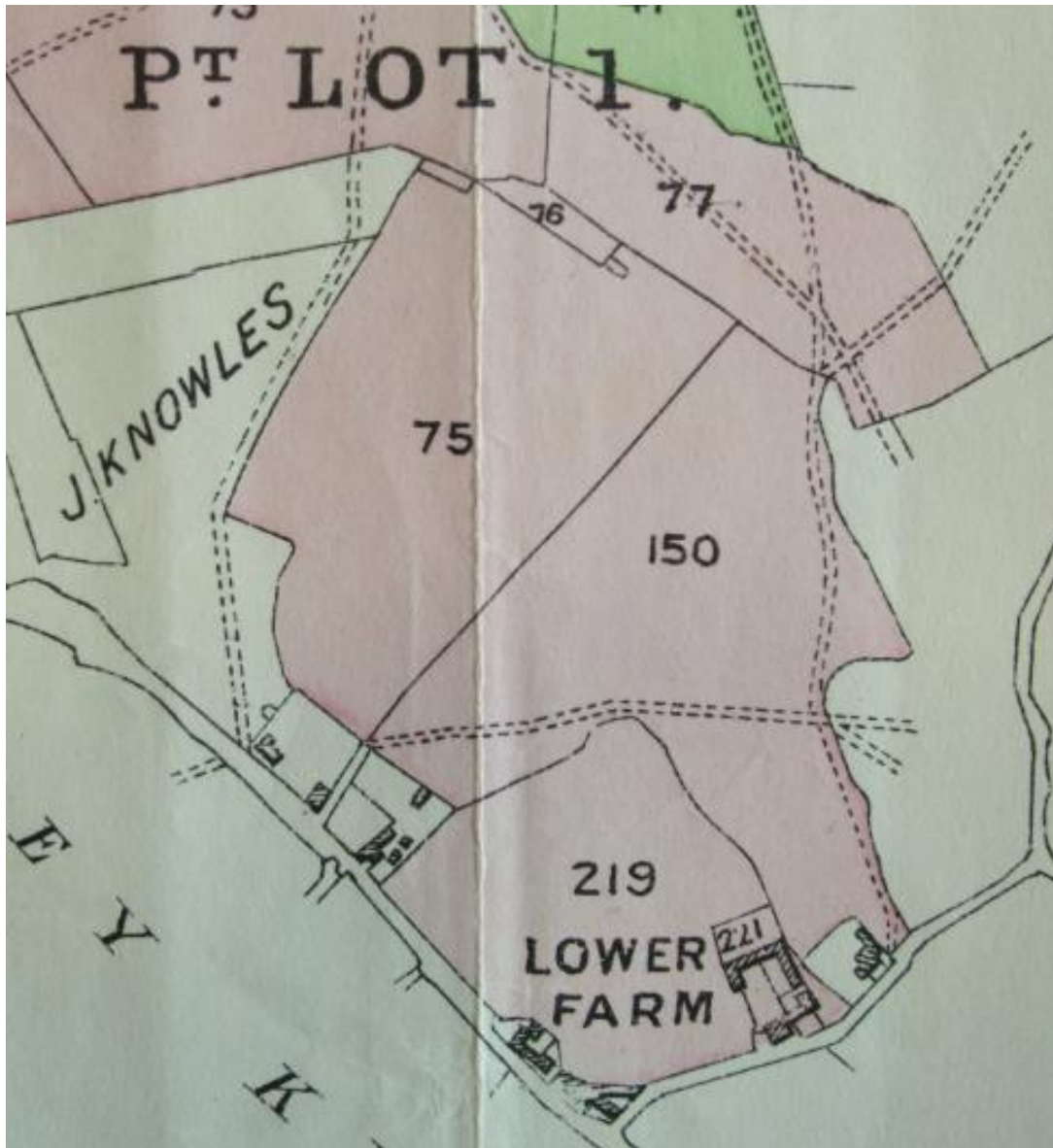
This sale of land and property at Heddington took place on the 21st June 1918 and Lot 1 was a property called Lower Farm. The land for sale included those fields north east of the claimed route (and now owned by Mr D Tyler) but not the claimed route which was excluded from the sale.

11.14 There is no further information in the sales catalogues regarding access to the land at this point. The exclusion of the claimed route from the land to the north east is clearly at odds with the Tithe Commissioners survey of 1841 which included the claimed route in the field, though it is possible that the claimed route simply wasn't part of this sale.

11.15 This map carries a disclaimer relating to its accuracy.

NOTE.
*This Plan is believed to be correct but
its accuracy is in no way guaranteed.*

11.16 Extract from sales catalogue plan.



12 Category E Evidence

- 12.1 Evidence in this category includes commercial maps and Ordnance Survey (OS) 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.
- 12.2 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 county maps produced by Andrews and Dury , John Cary , C & I Greenwood and the Ordnance Survey. Neither Cary (1823 and 1832) or Greenwood (1820) show the claimed route.
- 12.3 It must also be considered that even when surveys produced by the OS 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's were continually revised and early versions were verified by the Cyclists Touring Club and Popular Series maps produced by the OS were revised with reference to highway surveyors from the highway authority and parish councils.
- 12.4 **Andrews' and Dury's Map of Wiltshire 1773** The map is drawn at the scale of 2 inches to one mile. It does not have a key but Andrews' and Dury's map of Hertfordshire does and the symbology appears to be the same. The applicant route is shown as a hedged road leading to open land or fields. It is the style of the map makers to represent routes leading to enclosures in this manner and a good example of this is in the nearby tithing of Coate, Bishops Cannings. Here it is known that the routes lead to land that was divided at enclosure and that there was no public access at that time and that there are no public rights of way recorded today. Paragraphs 12.7 and 12.8 illustrate.
- 12.5 It is considered that the most likely explanation for the claimed route in Heddington being shown is this way is for the same reason.

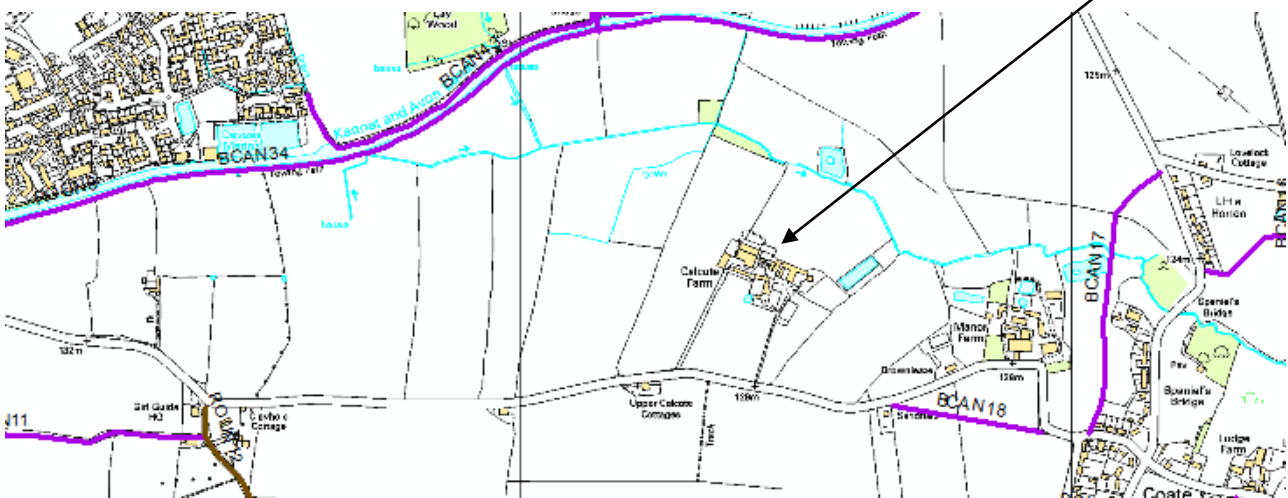
12.6 Extract from the map showing the applicant route:



12.7 Representation of routes in the same way at Coate, Bishops Cannings:



12.8 Current working copy of the definitive map showing area at 11.7: Corcutt Farm

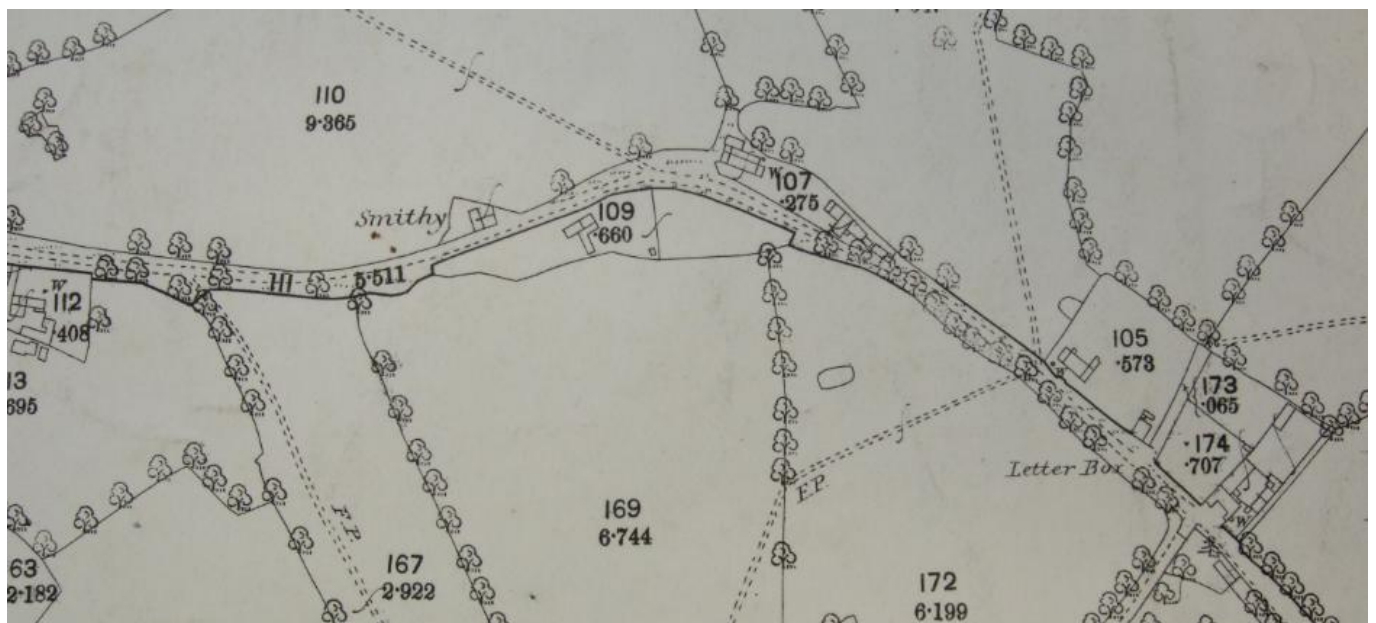
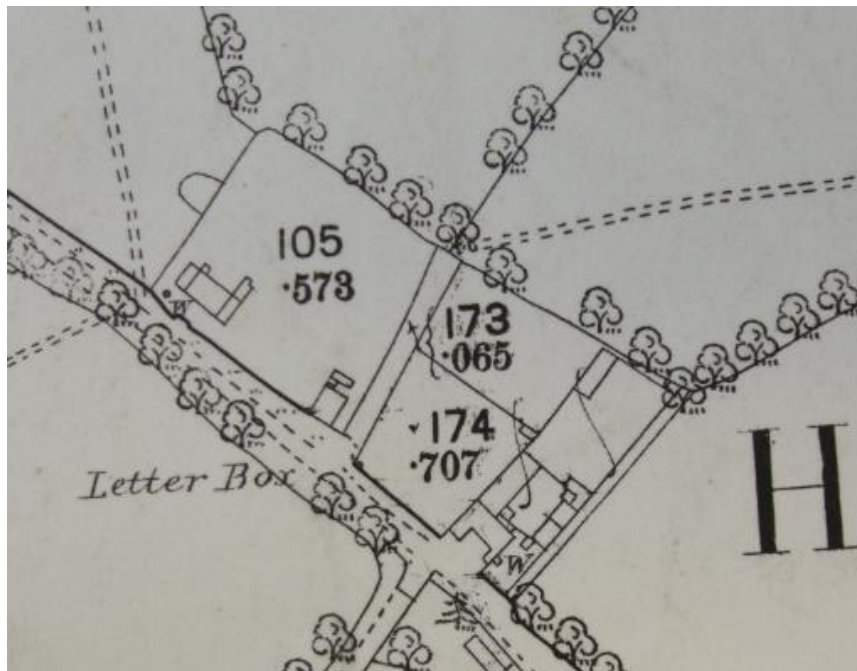


12.9 Ordnance Survey 1:2500 County Series mapping 1886 to 1924

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. Sheet 34.1 covers the applicant route. J B Harley, historian of the Ordnance Survey, records that “the maps delineate the landscape with great detail and accuracy. In fact practically all the significant man made features to be found on the ground are depicted. Many phenomena make their debut on the printed map and as a topographical record the series transcends all previous maps. Every road...., field...., stream and building are shown; non-agricultural land is distinguished...quarries, sand, gravel and clay pits are depicted separately; all administrative boundaries..are shown;...hundreds of minor place names...appear on the map for the first time. Where appropriate, all topographical features are shown to scale. The series is thus a standard topographical authority”.

- 12.10 Richard Oliver in his book “Ordnance Survey Maps a complete guide for historians” recognises that surveying errors (and paper distortion during printing) cannot be ruled out, particularly where detail is sparse, “but in practice such errors are likely to be very hard to demonstrate, because of a general paucity of suitable sources rivalling or bettering the OS in planimetric accuracy and completeness of depiction.”
- 12.11 Ordnance Survey maps from 1888, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.
- 12.12 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 and land use information was dropped. Unfortunately the First Edition maps in this area do not show land use information as they were printed relatively late in the series.
- 12.13 The claimed route is shown on Sheet 34.1 and the First Edition of 1886 (surveyed 1884), the Second Edition of 1900 (surveyed 1884 reviewed 1899) and the Third Edition of 1924 (surveyed 1884 revised 1922) have been viewed.

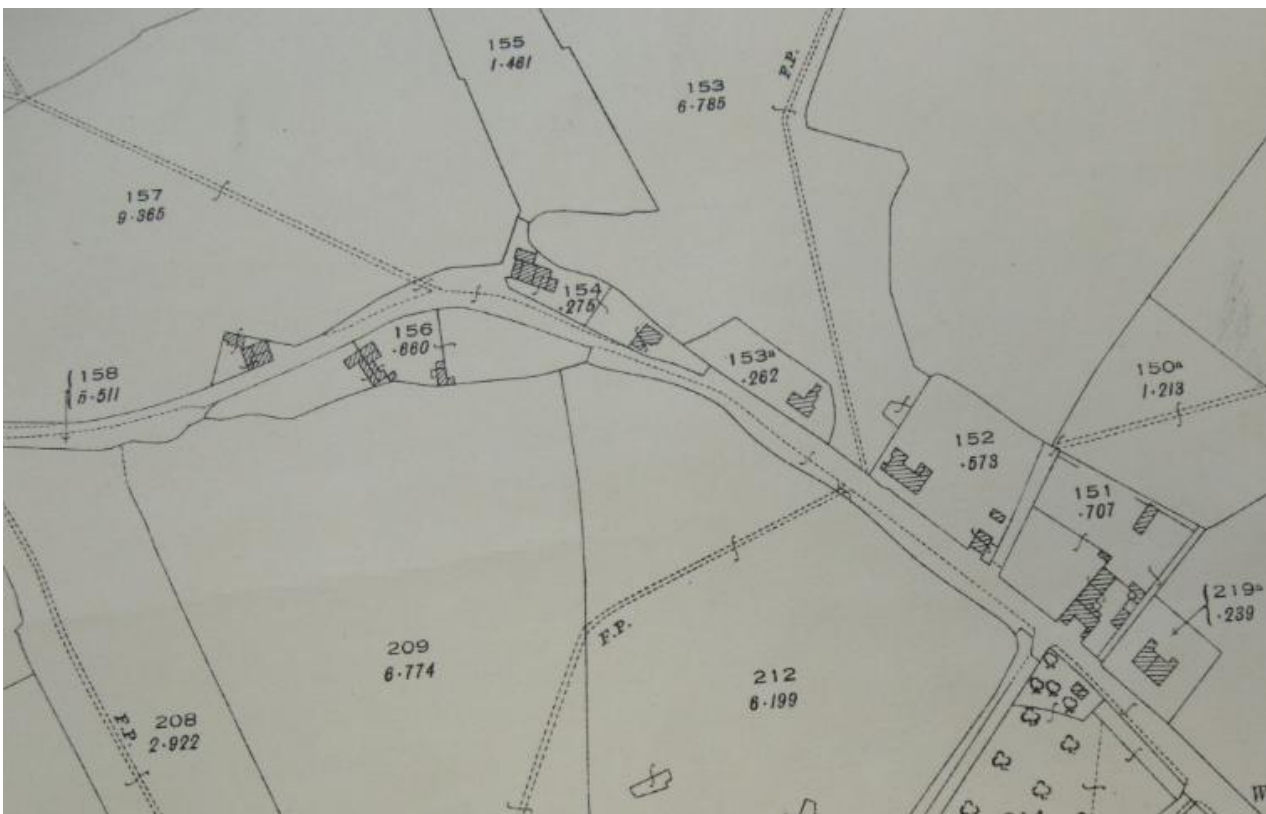
12.14 **First Edition 1886** The claimed route is braced with neighbouring land parcel 173. The adjoining road is separately numbered and measured (no. 111 5.511 acres).



12.15 **Second Edition 1900** The claimed route is braced with a different piece of land – parcel no. 150 – and the adjoining road is separately numbered and measured (no. 158 5.511 acres).



12.16 **Edition of 1924** The claimed route is shown braced with the adjoining field (no. 150a) which has been divided since the 1900 edition. The adjoining road is separately numbered and measured (no. 158 5.511 acres).



12.17 **Ordnance Survey 1:10560 Sheet 34 1889 Edition** This series of maps were produced as a reduction of the 1:2500 series and were based on the same survey. The claimed route is shown as a hedged feature and as a minor road.



12.18 **Ordnance Survey 1:63360 Series (one inch to one mile) – ‘Old Series’**

Between 1805 and 1874 the whole of England and Wales was covered by a series of maps produced at the scale of one inch to one mile (1:63360). In preparation for this the country was surveyed at a scale of 2 inches to one mile and the surveyor's drawing for this are available at the British Library. The drawing for Bradford, Wiltshire includes Heddington and is dated 1808. The drawing does not show the claimed route, though does show other cul-de-sac routes.



12.19 The corresponding 1 inch to one mile map does not show the claimed route.



12.20 Ordnance Survey Popular Edition 1919 One inch to one mile

The Popular Edition maps represented a departure in purpose by the Ordnance Survey. The 1" Popular series maps were a new series aimed at travellers on the roads and were undoubtedly aimed at motorists. They were the subject of frequent revision and the scheme took evidence from both the Royal Automobile Club and the Road Board. In practice the maps also went before the Rural District Council Surveyor. .

Yolande Hodson, in her book "Popular Maps" (ISBN 1-870598-15-6) states:

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

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

12.21 The claimed route is not shown on the Popular Edition of 1919 Sheet 112. The adjoining road is shown as an "indifferent or bad winding road with over 14 feet of metalling". Roads in the parish that are now restricted byways (for example Heddington 8) are shown as "Minor Roads".



12.22 Note on the representation of footpaths on County Series (1:2500) Maps

From Ordnance Survey Maps – a concise guide for historians by Richard Oliver:

“Footpaths

From 1882 onwards footpaths were shown by ‘F.P.’, ‘the object of...F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic’ (from Southampton Circular 16.2.83).

In 1893 it was specified that ‘all footpaths over which there is a well known and undisputed public right of way were to be shown and also ‘private footpaths through fields (but not in gardens)...if they are of a permanent character. This will generally be indicated by their being made or gravelled or provided with stiles and footgates...all gravelled and paved paths in public parks, gardens and recreation grounds...the principal paths in market and allotment gardens...should be shown...Mere convenience footpaths for the use of a household, cottage or farm, or for the temporary use of workmen should not be shown, but paths leading to any well defined object of use or interest, as to a public well, should be shown.’

12.23 The Ordnance Survey showed a F.P. continuing from the claimed route but not along it. It was not the practice of the OS to show an F.P. over a fenced route though they did retain the ability to separately number and measure public roads. All maps

carried the disclaimer regarding the representation of rights of way and the mapping in this area is a clear example of why this was necessary. The claimed route was not shown as a public road (as it was not separately numbered and measured) but it could not be shown as a footpath (as it was fenced) although the continuation across the field was shown in this way.

13 CATEGORY F EVIDENCE

- 13.1 This evidence category includes local repute or any consultation responses that are not covered elsewhere.
- 13.2 There was a change in the law in 2006 relating to the use of mechanically propelled vehicles (MPVs) on routes that were not already recorded in the definitive map and statement as byways open to all traffic and this will be addressed later in this report as part of the Council's decision but it is noteworthy that no evidence to support the continuation of any public mechanically propelled vehicular rights post 2006 has been adduced by any party (including the applicant and vehicular user groups).
- 13.3 Responses received indicate that local memory of the route extend to back to at least the mid 1940s. All responses indicate that there has never been use of the applicant route by vehicles other than those of the farmer or by permission.
- 13.4 Whilst it is recognised that this evidence is not necessarily relevant where a historic right has already been established but the way has fallen into disuse (*Dawes and Hawkins 1860* 'once a highway, always a highway'), however it is relevant when considering the effect of the NERC Act 2006. In considering whether any public vehicular right that may have existed prior to 2nd May 2006 (s.67(2)(a) survives by virtue of the main use of the way being by MPVs in the period 2001 to 2006 this evidence may be considered.

14.0 Decision

- 14.1 The law requires that any evidence of higher rights, lesser rights or greater width must be shown 'on the balance of probabilities' to bring about a change to the legal record. This means that it is more likely than not that something is shown.
- 14.2 The application is to record the full width between physical boundaries of a section of Heddington footpath no. 5 as a byway open to all traffic and adduces evidence from the Finance Act 1909/1910 to support this.
- 14.3 Officers of the Council have examined this evidence and a considerable amount of other evidence available to them.

14.4 **Category A Evidence**

There is no evidence relating to the existence of higher rights on the claimed route in this category.

14.5 **Category B Evidence**

The Tithe Commission Survey is clear that the claimed route formed part of an adjoining field and was not part of the road network.

The Finance Act 1909/1910 Records exclude the claimed route from all hereditaments in the same manner that public roads are shown. This can be good evidence of the existence of public vehicular rights but is not conclusive. If the route was awarded at enclosure (though in this case no records of this survive) to provide access to more than one allotment this may be a reason for exclusion (see PINS Consistency Guidelines section 11). Additionally although case law has found Finance Act exclusions to be good evidence (*Robinson Webster (Holdings) Ltd v Agombar [2001] EWHC 510 (ch)*, *Maltbridge Island Management Co v SSE (31/7/98)* and most recently *Fortune v Wiltshire CC [2012] EWCA Civ 334*) it is clear that it must be supported by other evidence; it is not of sufficient value on its own.

14.6 **Category C Evidence**

There is no evidence in this category supportive of any higher right over the claimed route. The Parish Claim (National Parks and Access to the Countryside Act 1949) is supportive of the existence of footpath rights over the entire width of the claimed path.

14.7 **Category D Evidence**

There is no evidence in this category supportive of any higher right over the claimed route. The claimed route is shown as a fenced route in an estate plan of 1835 giving access to two pieces of land in different ownership.

14.8 **Category E Evidence**

Although Andrews' and Dury's Map of Wiltshire dated 1773 shows a fenced route at a location that could be the claimed route (though its existence at this time is not supported by the 1801 Estate Plan), it was their practice to show fenced routes to fields that did not necessarily carry public rights in this manner.

14.9 There is a large amount of evidence supportive of the existence of the route as a fenced (or hedged) way and the Ordnance Survey has consistently recorded it in this way, but not as a public road or as part of the adjoining public road. A footpath continuing from the claimed route has been consistently shown and it is more likely than not that the public enjoyed access over the entire width of the claimed route on foot since it formed part of a through route for them.

14.10 There is no evidence supportive of any higher right over the claimed route in this category.

14.11 **Category F Evidence**

The applicant claims to have a private right of access to his property along the claimed route. Although this is only supported by a declaration made by himself it is not supportive of the existence of a *public* vehicular right. If a public vehicular right existed, the property would not need a private right.

14.12 There is insufficient evidence to show that the claimed route was a public vehicular highway before the 2nd May 2006 and this application must be refused. It is therefore not necessary to consider the effect of the Natural Environment and Rural Communities Act 2006. However, in the event that the Council is directed to make an order, it may be useful to consider whether any rights for MPVs (mechanically propelled vehicles) would have been retained and this can be found in section 15.

14.13 Notwithstanding paragraph 14.12, a significant amount of evidence has been found that shows that on the balance of probabilities the footpath extended over the whole width of the claimed route and that under the Council's duty in s.53(2) of the 1981 Act a definitive map modification order should be made to record this.

15.0 **Natural Environment and Rural Communities Act 2006**

15.1 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:

(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*

15.2 Given the effect of s.67(1) of this act, where public MPV rights are extinguished, it is appropriate to consider each exemption in turn:

(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 of use by the public in MPV has been submitted for the period 2001 – 2006.

The claimed route would not meet the requirements of Sec(2)(a) NERC Act 2006 .

(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)

Public vehicular rights would not be preserved by this section.

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

There is no evidence for the creation of the way and therefore any public vehicular rights would not be preserved by this section.

(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 would not be preserved by this section.

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

There is no evidence relating to any use by the public with MPVs and public MPV rights would not be preserved by this section

(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.

The application was made 7 years after the relevant 'cut off' date.

15.3 There is no evidence to suggest that if a public vehicular right existed before the 2nd May 2006 it has been preserved.

16.0 Environmental Impact of the Recommendation

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

17.0 Equality Impact.

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

18.0 Legal Implications

- 18.1 The applicant has a right to appeal against the Council's decision to refuse the application under Schedule 14 to the 1981 Act. The appeal is dealt with by the Planning Inspectorate (PINS) on behalf of the Secretary of State, is routine and does not involve a significant amount of extra resources being used. PINS may decide to uphold the Council's decision not to make an order to record a byway open to all traffic. The applicant has a right to challenge the decision of PINS through the Courts.
- 18.2 If any appeal is successful the Council may be directed to make and advertise an order.
- 18.3 The making of a definitive map modification order to correctly record the width of the claimed route is in line with the Council's duty contained within s.53(2) of the 1981 Act to keep the definitive map under continual review. It is not likely that the Council would be challenged if acting in pursuit of this duty.
- 18.4 If the Council fails to make an Order to record the width it may be subject to judicial review for non adherence to its duty. This could have significant cost implications (c. £50000).
- 18.5 If the Council makes an Order which receives objections it may be liable to pay subsequent costs if it acts in an unreasonable manner at public inquiry. Costs awards of this nature are rare and may be in the region of c.£10000.
- 18.6 Any final decision made on an order that has been objected to is made by the Secretary of State for Food, Environment and Rural Affairs (SoSEFRA) and not Wiltshire Council. Hence any challenge to that decision is against SoSEFRA and not the Council.

19.0 Risk Assessment

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

- 19.2 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.
- 19.3 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.
- 19.4 The application for an order to record a byway open to all traffic is to be refused as a result of this decision and the applicant will be informed that his application has been refused but that the Council will proceed to make an order to record the width of the claimed route in line with its duty under s.53(2) of the 1981 Act.
- 19.5 The applicant may appeal this decision with the Secretary of State under sch. 14 to the 1981 Act which could lead to Wiltshire Council being directed to make an order. Officers consider that this is highly unlikely on the grounds that insufficient evidence supporting the application has been found to date.

20.0 Financial Implications

- 20.1 The determination of Definitive Map Modification Orders and the continual review of the definitive map are statutory processes for which financial provision has been made.
- 20.2 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 SoSEFRA 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 £5000). There is no indication that any objections will be received.

21.0 RECOMMENDATIONS

- 21.1 That the application no. 2012/04 to record a byway open to all traffic over part of Heddington path no. 5 is refused.**
- 21.2 That the Order modifying the definitive map and statement to show that public rights on foot extend over the width of the claimed route appended at APPENDIX D is sealed and advertised in accordance with the provisions of Schedule 15 to the 1981 Act.**

Sally Madgwick

Rights of Way Officer

09 October 2013