

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	14 November 2018
Title:	Application for a Definitive Map Modification Order to record a restricted byway and a byway open to all traffic between Jouldings Lane and Well House Lane Parishes of Bramshill (Hampshire) and Swallowfield (Wokingham Borough)
Reference:	
Report From:	Director of Culture, Communities and Business Services

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1 Recommendation

- 1.1 That authority is given for the making of a Definitive Map Modification Order to record a byway open to all traffic varying between 7.9 and 13 metres in width, on the route shown between A – B on the location map.
- 1.2 That authority is given for the making of a Definitive Map Modification Order to record a restricted byway varying between 7.7 and 13 metres in width, on the route shown between B – D on the location map.

2 Executive Summary

- 2.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a restricted byway and a byway open to all traffic between Jouldings Lane (Parish of Swallowfield) and Well House Lane (Parish of Bramshill). The claim is supported by historic documentary evidence and some recent user evidence.
- 2.2 It is considered that the evidence submitted in support of this application is sufficient for it to be inferred that, on the balance of probabilities, the route can be reasonably alleged to have been dedicated as a public carriageway, and that an order should be made to record the route on the Definitive Map.
- 2.3 The claimed route runs through Jouldings Ford, situated on River Blackwater, which also marks the county boundary between Hampshire and Wokingham Borough. Rather than each authority carry out its own investigation and make a separate order for its own section of the route, it has been agreed that Hampshire County Council will investigate the application and make any resulting order to cover the entirety of

the route. Authority for this approach has been granted by Wokingham Borough Council, and the matter has been delegated in full to the County Council, under the provisions of Section 101 of the Local Government Act 1972.

- 2.4 The recording of the route (or not as the case may be) on the List of Streets Maintainable at Public Expense in each respective administrative area has had an impact on the status that is legally capable of being recorded on the Definitive Map. This issue is discussed later in this report.

3 Legal framework for the decision

WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

(3) The events referred to in sub-section (2) are as follows: -

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

i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way....

PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 – Section 67: Ending of certain existing unrecorded public rights of way

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, 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.

(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 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,
 - (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...

4 Description of the Route (please refer to the map attached to this report)

- 4.1 The claimed route, shown running between Points A and D on the accompanying map, links two other routes that are metalled and recorded on the List of Streets Maintainable at Public Expense - Jouldings Lane in Swallowfield, in the Borough of Wokingham (Point A), and Well House Lane in Bramshill, Hampshire (Point D). The route running between A-B is recorded on Wokingham's List of Streets Maintainable at Public Expense, but the remainder of the route (ie from the northern extent of the ford, and the continuation of the route in Hampshire) is not.
- 4.2 The claimed route, which is approximately 345 metres in length, commences at a junction with the metalled section of Jouldings Lane (Point A). The route proceeds south-westward, between the boundaries of Jouldings Farm to the east and an arable field to the west. After a distance of approximately 50 metres, the route meets Jouldings Ford, which crosses the River Blackwater at the county boundary. Modern mapping shows the ford to be about 13 metres wide, but it is apparent from historical mapping that the ford has previously had a much wider splay (a width of 37 metres was originally suggested by the applicant). From the ford the route continues in a south-westerly direction along an earth, running between the boundaries of adjacent properties. Historically the route was bounded by a line of hedgerow and tree on earth banks, but during the last few years the section in Hampshire has been fenced on the eastern side. The ownership of the majority of the route is unregistered.

5 Issues to be decided

- 5.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on route A-D, and if so, at what status the route should be recorded.
- 5.2 Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. The primary issue to be decided is whether there is clear evidence to show that public rights subsist or are reasonably alleged to subsist.

- 5.3 If it can be demonstrated that this is the case, consideration must also be given to whether any of the exemptions contained in Section 67 of the Natural Environment and Rural Communities (NERC) Act 2006 apply to those rights. If exemptions under NERC can be shown to apply, the county council would be under duty to recognise those rights by making an order to record the route as a byway open to all traffic (BOAT). In the event that no exemptions apply, the route may still be recorded as a right of way, and if vehicular rights can be shown to have been dedicated at some point in the past, the appropriate status for the route to be recorded at would be a restricted byway (enabling legal use by pedestrians, cyclists, horse riders and non-motorised vehicles).
- 5.4 Any changes to the Definitive Map must reflect public rights that already exist. It follows that decisions as to whether or not to amend the Definitive Map must not be taken for reasons of desirability or suitability. Therefore, before an Order changing the Definitive Map is made, the county council must be satisfied that public rights have come into being at some time in the past. This might be the distant past (demonstrated by historical documentary evidence) or in the recent past (demonstrated by witness evidence).
- 5.5 Historical documentary evidence has been examined to see whether depictions of the route point to it having acquired public rights as a result of a deemed dedication in the past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be assessed holistically, it being unlikely that a single document or map will provide sufficient evidence to justify a change to the Definitive Map. The county council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.

6 Background to the Application

- 6.1 The applications were submitted to the County Council in 2013, for and on behalf of the British Horse Society. Due to a backlog of applications, the matter was not taken up for investigation immediately. In 2016, the applicant made representations to the Secretary of State asking that they direct both Hampshire County Council and Wokingham Borough Council to determine the applications (under paragraph 3(2) of Schedule 14 to the Wildlife and Countryside Act 1981). In July 2017, the Secretary of State directed both councils to determine the applications (insofar as they affected the section of the route within their jurisdiction) by 21 March 2018 (but as per 2.3, responsibility for Wokingham's application has been delegated to Hampshire County Council).
- 6.2 The application was taken up for investigation and consulted upon in January 2018. During the consultation, representations were received on behalf of landowners adjacent to the application route, in opposition to the application. These representations offered a different interpretation to the conclusions of the applicant, as well as introducing some new evidence. In response to this submission, the applicant produced their own document which addressed these objections. One further round of submissions from each party ensued. Because of the lengthy

exchange of correspondence, and the discovery of further relevant information that resulted, the applicant agreed to a number of deferrals to allow these issues to be explored further, for which officers are grateful. The submissions of the objector are contained in Appendix 1; the responses from the applicant can be viewed on his website (with the original summary accompanying his application) at <http://www.craddocks.co.uk/apps/jouldings/index.htm>. Though weighty, the exchange of submissions illustrate of the extent to which the merits of this application have been debated prior to committee stage, and it may assist Members to review this extra material when considering this report.

- 6.3 Although the application was based solely on historical evidence, it is apparent that the route in question has been used by members of the public within living memory, primarily by horse riders. During the consultation a significant amount of user evidence was submitted to the county council by local equestrians. Officers have subsequently collected further user evidence forms or statements from users of the route. Both historic and user evidence is discussed further in this report.

7 Documentary Evidence

1.1. Early maps and plans

1.1.1. Map of Forests around Windsor – John Norden - 1607

This map, published on the website of the British Library, shows the forests around Windsor, and depicts a number of routes by faint pink lines. A route corresponding with Jouldings Lane can be seen leading north-eastwards towards 'Fareleyhill' (Farley Hill) from the county boundary (at which point an obscure annotation, suggested to be 'Jwiuoldes' by the applicant - possibly an early version of 'Jouldings' - can be seen). The depiction of other junctions with the county boundary on the map is inconsistent – the continuation of some are shown, others (which are now public roads) are not. The continuation of the claimed route south of point B is not shown, although it appears to be hinted at by a short pink stub that extends just south of the river. Notwithstanding any uncertainty about the route south of Point B, this map records the existence of a route leading to the river which appears to correspond with the location of Jouldings Ford.

1.1.2. Isaac Taylor's Map of Hampshire – 1759 (1 inch to 1 mile)

Taylor's Map of Hampshire actually shows the a route with solid boundaries matching the claimed route's location. The route is shown on both sides of the river, via a crossing which annotated 'Jouldins Ford', and is depicted forming a junction with a route crossing the common at Point D. The map's legend identifies the route as a 'Road inclos'd with hedges'. Taylor's map provides evidence of a through route at this location during in the mid-eighteenth century.

1.1.3. Rocque's Map of Berkshire – 1762-64

This map shows only section A-B of the application route, but nevertheless depicts it running south from Farley Hill to 'Jouldins Ford'. B-D is not shown, and none of the other routes which cross the River Blackwater in this area are shown extending

into Hampshire (although as established by Taylor's map of the same period, it is apparent that a route did continue south of the river at this time).

1.1.4. Ordnance Survey 'Old Series' – 1 inch drawing – 1806/1 inch to 1 mile map – 1810s

The Old Series map, and the 1 inch drawing that preceded it in 1806, show a continuous route with solid boundaries running between Farley Hill and Bramshill Common, crossing the river at '*Jouldens Ford*', of a significant width (when compared with other routes in the locality). The application route is shown linking Jouldings Lane and Bramshill Common at Well House Farm (annotated '*Well Ho. F.*'). From this point, two unenclosed routes (shown by pecked lines) fan out across the common – the first running in a south-westerly direction through a junction with Ford Lane and terminating at Riseley Mill, the second running south-eastward to meet the Bramshill Road near Eversley – both routes originate at a junction with the application route's southern end. Both the map and drawing provide evidence of a route crossing the Blackwater River, linking Jouldings Lane to other routes crossing the common.

1.1.5. Swallowfield Inclosure Award – 1814-17

This award empowered the appointed Commissioners to set out, divert and stop up public highways.

The south-western corner of the award map shows part of the route now recorded as Swallowfield BOAT 33 (the eastern end of which joins with Jouldings Lane to the north of the application route). The eastern end of the depicted section of this route is labelled '*To Bramshill*'. A public footway is also shown heading south from BOAT 33 towards the river, at which point the notation '*To Jouldings Ford and Bramshill*' indicates a route running eastward along the northern bank.

Jouldings Lane falls outside of the lands inclosed under the award, and is not shown on the award map, so this document offers only indirect evidence relating to the application route. However, the annotation on both the route now recorded as BOAT 33 and the footway to the south refer to onward journeys to Bramshill. In the case of BOAT 33, to reach Bramshill in a vehicle from this location would only be possible via the application route – the only other option would be to take a much more circuitous route, exceeding two miles, via Farley Hill. The label relating to the footway (*to Jouldings Ford and Bramshill* – emphasis added) may suggest that it was possible to reach Bramshill via the application route on foot (subsequent OS mapping shows a footbridge at this location, although it also shows one other route which would have provided such access. The applicant asserts that the use of destination labels on maps of this period are generally associated with public, rather than private, ways. In this case, other similar annotations on the inclosure map appear adjacent to routes which are now recorded as public. The Swallowfield Inclosure Award therefore offers some indirect evidence of the claimed route's reputation as a public way.

1.1.6. Christopher Greenwood's Map of Hampshire – 1826 (1 inch to 1 mile)

By its solid parallel lines, Greenwood's map shows the route as an enclosed feature (in contrast to the routes crossing Bramshill Common which are marked by pecked lines), and depicts it crossing the river at the county boundary into Wiltshire ('*Part of Wilts*'), as was the case at the time. It is shown in similar fashion to the public roads

crossing Thatchers Ford and New Mill Ford. As with these other two routes, the application route is shown extending northward beyond the county boundary (although being a map of Hampshire, Greenwood's map shows no other features in the neighbouring county).

The legend to the map marks the route out as a 'cross road' - the meaning of this term, and the weight that can be attributed to Greenwood's map in determining the existence of public ways in general, has been the subject of much debate in the past. The Planning Inspectorate's *'DMMO Consistency Guidelines'* state that:

"In modern usage, the term "cross road"/"crossroads" is generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term. These include a highway running between, and joining, other highways, a byway and a road that joined regional centres."

The guidance goes on to caution that the evidential weight placed on Greenwood's map should be considered *"with the totality of all other relevant evidence."* When taken in context with other available evidence (both before and after the early nineteenth century), Greenwood's map provides some support to the application.

1.1.7. Map of Windsor Forest and vicinity – Henry Walter - 1823

This map (which was revised in 1856), shows that part of the application route lying in Wokingham. Jouldings Ford is annotated (*'Jouldins Ford'*). Other routes which ford the River Blackwater to the east and west of the claimed route are shown continuing into Hampshire, but no southward continuation of the claimed route itself is shown. However, this is also the case with Long Water Ford, situated a little over two miles to the east of Jouldings Ford, which provided a crossing point between Finchampstead and Eversley Cross and is now part of the B3016 Longwater Road. As a result of these inconsistencies, this document offers little support to the application beyond confirming the existence of the route north of the river, and that Jouldings Ford was known as such at this time.

1.1.8. Eversley Tithe Map and Award - 1837

The Eversley Tithe Map (which incorporated the parish of Bramshill) shows that part of the route that falls within Hampshire (C-D) as an enclosed route, shaded ochre. The plot number '665' is written within the boundaries of the route, which by solid lines is shown as being distinct from the river to the north, and Well House Lane to the south, suggesting the existence of gates. Well House Lane is not at this time detailed on the map, and in fact nothing falling within the area of Bramshill Common is shown, (presumably as it was not subject to tithing). A section in the award accompanying the tithe map is entitled *'Roads and Waste in the Parish of Bramshill'*, which describes number 665 as *'D^o through Swallowfield Ford'* ('D^o', or 'ditto', being a reference to the word *'Road'*, which appears in the foregoing entry).

Four other routes are listed in the *'Roads and Waste'* section of the tithe award. Three of these are now identifiable as public roads. The fourth – *'Road through Well House Farm Yard'* – is not currently recorded as public, but other evidence reviewed as part of this investigation suggests that it was considered to be so during the

nineteenth and twentieth century (see 7.2.7 and 7.2.13). On this basis, it could be said that all routes grouped in this section of the award were considered to be public.

Although the purpose of the tithe commissioners was not to record public or private ways, it is apparent that the other routes listed in the *'Roads and Waste'* section are all now (or, in the case of the route through Well House Farm, appear to have once been) considered to be public roads. The grouping of the application route with these other ways (as opposed to being excluded, as was the case with driveways or other private routes shown on the map), suggests that that the route was also considered to be a public road.

1.1.9. Swallowfield Tithe Map - 1838

The Swallowfield tithe map shows the application route lying north of the river, coloured ochre in the same fashion as other roads. It also annotates *'Jouldings Ford'*. The map does not extend far enough east or west to compare the depiction of the ford with Thatcher's Ford or New Mill Ford, and there is no detail shown south of the river. The Roads and Waste section of the award simply lists an aggregated area for the whole parish and does not list individual routes. Consequently, little weight can be attributed to this document in isolation, although it does establish the presence of a route leading to the ford on the north side of the river at the same time the Eversley award had established one to the south.

1.1.10. Bristol and Dover Direct Junction Railway – 1845

This plan shows the intended line of a railway proposed for construction (but ultimately never built). Parcels of land shown falling within (and some outside) the permitted 'line of deviation' are numbered, and listed in an accompanying book of reference. A section of the application route running south of the river (C-D) is shown, labelled '47' – the plan does not extend far enough north to include the Blackwater River and the continuation of the route to the north, though it does include the annotation *'Swallowfield Ford'*. The accompanying book of reference records parcel number 47 as a *'Parish Road'* and lists the owner/occupier as the *'Surveyor of Highways'*. Other routes in the immediate vicinity are variously described as *'Road'*, *'Occupation Road'* or *'Private Road'*. The application route terminates at a junction with two other routes that match the location of Well House Lane – these are labelled '41' and '51', and both are described as *'Road'*, and being in the occupation of Sir John Cope. It is not clear how these routes differ from other routes which are referred to as occupation or private roads – possibly it is indicative of a public highway crossing private land (in contrast to a public highway vested in the highway authority). It is also unclear how the railway company intended to accommodate these routes, which would have crossed the proposed line to the west of the claimed route – no bridge or 'at grade' crossing is specified in the plans at this location, and because no other information relating to the scheme has been discovered, it is not known how this issue would have been addressed (if at all). In his submission of April 2018, the applicant suggests a possible reason for this apparent discrepancy:

"The railway company would doubtless have wished to minimise its expenditure on bridges; the lord of the manor and owner of the common would doubtless have cared little for the preservation of public rights, the parish surveyor may not have known which tracks were public, and which carried vehicular rights..."

As observed by the objectors, a number of discrepancies are present in the plans. Some entries in the book of reference are not depicted on the plan, and the River Blackwater is erroneously annotated '*to Farley Hill*', as if it were a road. The applicant asserts that these errors are associated with a survey of the landscape, and given the importance attached to the correct categorisation of public highways (which may have had to be accommodated through the construction of bridges), it is less likely that a mistake would have been made in respect of the route's status.

Although questions remain about the status of routes crossing the common (with which the claimed route connected), on balance, it is considered that some weight can be attributed to this document. The depiction of a parish road on the plans was unlikely to have been undertaken without first consulting local highway officials, and the status ascribed to the claimed route is consistent with its depiction on the tithe evidence, produced less than a decade prior.

1.1.11. London Newbury and Bath Direct Farnborough Extensions – 1845

This plan, produced the same year as the Bristol and Dover scheme (above), shows a proposed line following a similar route. Unlike the Bristol and Dover scheme, the approach adopted by the surveyor in preparing these plans was to exclude anything outside the limit of deviation from consideration – no route or parcel falling outside this limit was given a parcel number (including some private access roads which terminate directly on the line of deviation).

The proposed line runs through the area of common lying to the south of the application route - recorded as 'Bramshill Common', being in the ownership of Sir John Cope. The claimed route meets the common at a point outside of the line of deviation, and so consequently, no direct inference can be drawn as to the route's status. Further, none of the various routes crossing the common at the time (including the tracks that are shown on the Bristol and Dover plans) are detailed on the plan, and so it is not known whether the railway company regarded these routes as public or private. As a result, and in the absence of any additional evidence relating to the scheme's progress through Parliament, it is unclear as to whether (and how) these routes were to be accommodated in the event the line was built.

It is considered that little can be inferred from this document regarding the status of the application route - it is not directly addressed on the plan, and the routes which provided a continuation across the common are not detailed on the plan, so it is unclear as to whether they were considered to be private or public. Given the scrutiny on other routes falling within the line of deviation, it is possible that no consideration was given to the status of the routes crossing the common (as suggested by the applicant at 7.1.10).

1.1.12. Swallowfield Inclosure Award – 1865

The inclosure map shows that part of the claimed route lying in what is now Wokingham Borough (A-B), and the ford itself is also labelled ('*Jouldings Ford*'). Made under the authority of Inclosure Acts passed between 1846 and 1862, this award did not set out this part of the claimed route as highway, as it was pre-existing at the time of the award. However, the inclosure commissioners also had powers to stop up or divert roads, and the award does not provide for either in the case of

Jouldings Lane. The award allots several parcels of land immediately abutting Jouldings Lane at Point A, identified on the inclosure map as parcels 83 – 86 (all of which are recorded as *'common of pasture and other commonable rights'*). In each case, the award stipulates a requirement for the allottee to fence their parcel of land *'Against the Road'* (ie Jouldings Lane).

The award required that both private and public routes be fenced. However, the applicant points out that Jouldings Lane was not set out in the award, and as the award inclosed waste which lay either side of Jouldings Lane, he asserts these wastes must have formed part of the highway, and that it follows that Jouldings Lane, which was not extinguished by the award, must have been regarded as a pre-existing public road.

The position with regard to the continuation in Hampshire is unclear – in some areas shown on the inclosure map, public routes are discontinued where they reach the edge of the map and continue outside the scope of the award, in others, no onward route is shown.

The 1865 inclosure award confirms the existence of the claimed route between A-B, and supports the notion that the route north of the river was considered to be a pre-existing public road at the time of the award.

1.2. **Ordnance Survey and 20th Century Evidence**

1.2.1. Ordnance Survey Boundary Remark Book – 1871

This document provides an enlarged view of the ford and also provides some detail of the route running between C-D, which at the time accommodated the parish boundary between Bramshill and Odiham (detached). The boundary coincides with a pecked line and the abbreviation 'CR' ('Centre of Road'). The applicant asserts that the parish boundary, like the claimed route, is likely to be of a great age, and the fact that the two coincide is consistent with the route being public. It is noted that other routes in Hampshire run along parish boundaries, but it cannot be said with certainty that this is the case with the claimed route. On balance, it is considered that little can be inferred from this evidence as to the route's status.

1.2.2. Ordnance Survey County Series Map and Book of Reference (First Edition) – 1871 (25 inches to 1 mile)

The route either side of the ford is shown as an enclosed way for most of its length, bounded on both sides by fences or hedges. A-B is shown by solid parallel lines varying between approximately 7.7 and 13 metres in width (the route further to the north is labelled *'Jouldings Lane'*). The parcel number '97' is allocated to the route, but the book of reference for Swallowfield has not been located. The route widens when it reaches the parcel comprising the ford, between B-C (annotated *'Jouldings Ford'*). The western part of the ford is bounded by a *'Foot Bridge'*, shown by parallel lines between 1-2 metres apart. The width of the route through the ford is less clear, but an indicative route, marked by parallel pecked lines, is shown running through the centre of the ford. The width at this location has been calculated based on the

extent of the available route between the foot bridge and the boundary on the eastern side of the route south of the river (13 metres at Point C).

The continuation of the route between C-D is also shown by solid parallel lines. A broken black line running down the centre of this section of the route denotes the parish boundary between the parish of Bramshill and the hundred of Odiham (detached). On the Odiham side of this line, the route is annotated with the parcel number '11', which the relevant book of reference entry describes as 'Road'. The line is also labelled 'CR' (as per the Boundary Remark Book).

By single black lines, the route is shown to be gated approximately 40 metres south-west of the river, and again approximately 40 metres north-east of Well House Lane.

The OS evidence of the 1870s shows the route as an enclosed feature, described by the surveyor (in Hampshire at least) as having the appearance of a road.

This map (and subsequent large-scale Ordnance Survey mapping) has been used to calculate the width of the routes between boundaries defined by solid line features.

1.2.3. Ordnance Survey County Series Map (Second Edition) – 1896 - 1899 (25 inches to 1 mile)

The County Series map dating from the end of the 19th century records the route in similar fashion to the 1871 plan. The width of the route is unchanged, and the gates shown on the first edition are still in situ, although by this point there is no depiction of a footbridge crossing the ford.

1.2.4. Finance Act 1910

The Finance Act 1910 caused every property in England and Wales to be valued for the purposes of taxation, and the process to be followed was set out by legislation. The maps for the area show Section A-B of the claimed route as excluded from the adjacent hereditaments, which is consistent with its current status as a route recorded on the List of Streets. However, the remainder of the route between B-D comprises part of assessment unit 34, which also encompasses Bramshill Common. A deduction of £50 for rights of way across this unit appears in the accompanying field book, but the entry provides no further insight into the routes to which this deduction relates.

The list of land parcels assessed as part of unit 34 does provide some insight into the route's status. The list includes a number of small parcels, as well as the unenclosed common itself (parcel 21). However, it does not include the parcel number ascribed to the claimed route (parcel 7). Nor does it include Ford Lane (covered by parcel numbers 12 and 75). It therefore appears that these routes were not taken into account when the common was assessed. The applicant has identified examples elsewhere in the country where the practise of not specifically drawing out public highways that crossed commons was also employed (detailed in his April 2018 submission).

The exemption of the route from valuation between A-B indicates that it was vested in the highway authority (as opposed to being privately owned), and is suggestive

of the fact that at the time the route was considered to be public vehicular highway. The evidence is less clear with regard to B-D, but the presence within unit 34 of another public highway which was excluded from assessment would appear to counter arguments that the route was considered private at the time.

1.2.5. Ordnance Survey County Series Map (Third Edition) – 1911 (25 inches to 1 mile)

The Third Edition map depicts the claimed route in similar fashion to the second edition, although the northern gate has by now disappeared.

1.2.6. Ordnance Survey Name Book – 1896-1930

OS Name Books recorded the authority for the names that appeared on OS maps, commencing with the County Series Second Edition map. The authority given for the entries in the book for Swallowfield (which is dated May 1898 and also covers the parish of Finchampstead) is Mr Charles Gibbs, who at the time was the Assistant Overseer for Finchampstead.

An entry for Jouldings Lane is recorded: *“Applies to a parish road leading southward from the Fox & Hounds PH to Jouldings ~~Farm~~ Ford”*. The word ‘Farm’ has been crossed out and amended to ‘Ford’ in blue ink. This may have been done soon after the original entry (suggested by the fact that further annotations made in 1930, in green ink, state that no further changes were made during a review of that date). An entry is also recorded for Jouldings Ford: *“Applies to a Ford on the Blackwater River, close to Jouldings Farm.”*

The reference in the OS Name Book to a ‘parish road’ provides good evidence that local highway officials considered Jouldings Lane to be a public road. The correction to the entry for Jouldings Lane makes it clear that the route extended past Jouldings Farm all the way to the ford (and thus incorporated A-B). However, it provides no insight into the status of the route south of the county boundary.

1.2.7. Wokingham Rural District Council Highway Committee - 1923–1925

The minute book of the WRDC Highway Committee for the period 1923–25 records the following:

“The surveyor presented letters he had received from Mr D.C. Bright and Mr W.C. Coombe, with reference to the repair of Well House Farm Road, Eversley. After consideration of the same, on the motion of Mr Alexander, it was resolved to repair that portion of the road which is within this Rural District as far as the entrance to the meadow leading to the Farm.”

This entry appears to confirm that as late as the early part of the 20th century, a through route linked Well House Farm in Hampshire to Forges Lane in Wokingham (now apparently a spur of New Mill Road), via the Blackwater River. The route is shown on OS maps from the late 19th century and early 20th century. The minute book confirms that the highway authority north of the county boundary accepted maintenance responsibility for the section of the route lying within its jurisdiction. It also goes some way to explain the present anomaly between the recorded highways

on either side of the county boundary, which arose from the recording of the section lying in Hampshire as a public footpath on the first definitive map in the 1950s, whilst the route in Wokingham was recorded as a publicly maintainable highway. It is apparent that the respective highway authorities took a different view as to the extent of their responsibilities. However, this evidence is nevertheless suggestive of the existence of a continuous public road running through Well House Farm, and tallies with the inclusion of the route in Roads and Waste section of the Eversley Tithe Award of 1837. This lends weight to the proposition that those routes listed in the 1837 award (including the claimed route) were all public.

1.2.8. Highways Handover Map – Hartley Wintney Rural District – 1929

This map was prepared by Hartley Wintney Rural District Council to show those routes that it considered publicly maintainable highways at the time responsibility was transferred to the County Council (under the provisions of the Local Government Act of the same year). The map purports to show public footpaths as well as carriageways. Well House Lane is shaded to indicate that it was publicly maintainable up to Well House Farm, but the claimed route is not.

This was an internal working document which was not subject to public scrutiny - little is known about how it was compiled and the researches undertaken as part of its preparation. It was also chiefly concerned with maintenance responsibilities. It is therefore unlikely to be a comprehensive record of public rights in the locality at this time. Nevertheless, this document illustrates that at the time, the RDC did not consider the claimed route to be its responsibility to maintain.

1.2.9. Map showing publicly maintainable highways – Wokingham Rural District Council – (date unknown)

The map, provided by Wokingham Borough Council, provides a picture of public maintenance responsibility north of the county boundary (the date of its origin is unclear, but it has been drawn onto the OS National Grid series map of the 1960s/70s). The map shows Jouldings Lane shaded yellow (in keeping with other publicly maintainable highways) to a line depicting the then county boundary, at the edge of the ford. A second line is shown slightly to the south of this line, running through the centre of the River Blackwater, labelled "*centre line, new county boundary 01/04/91*". However, the extent of publicly maintainable highway does not appear to have been revised in line with the county boundary change, and so the extent of publicly maintainable highway terminates at the edge of the ford, rather than at the centre of the river, on the county boundary.

1.2.10. Highways Maintenance Map (Hampshire) – 1946

This map provided an updated picture of those routes held to be publicly maintainable by the county council. It reflects the position in 1929, with the claimed route being unshaded, whilst Well House Lane is shaded as far as farm. Again, whilst this document provides an indication of how the county council viewed its maintenance liabilities, it was not subject to public scrutiny, and it is not known what researches were carried out during its preparation.

1.2.11. Ordnance Survey One Inch Popular Edition - 1946

The OS map of 1946 shows the route by solid parallel lines, described in the legend as "*under 14 feet of metalling, Bad*" and "*not classified by M of T* [Ministry of

Transport]”. Whilst it records the route’s existence at this time, it offers no insight into its status.

1.2.12. National Parks and Access to the Countryside Act 1949

As part of the preparations for drafting the first Definitive Map of Public Rights of Way (as required by the 1949 Act), all parishes in Hampshire were asked to submit a plan showing the routes that they wished to be included on the map. The claimed route is not shown on the maps submitted by Bramshill Parish Council, and thus it was not included on the Definitive Map for the area, which was published in 1955. The reason for the route’s omission is unclear, and there is no reference to it in any of the parish correspondence held by the County Council.

1.2.13. Sale Particulars – Bramshill Estate - 1952

The map forming part of the sale particulars, produced when the Estate was sold in 1952, shows the claimed route running between two coloured plots listed for sale (Lot 7, which is coloured blue and listed as “*Well House Farm*”, and Lot 10, which is coloured pink and listed as “*Bottom Farm*”). Some of the shading on the plan is imprecise, and in some cases it has bled onto routes which are otherwise unshaded. Such is the case with the route between C-D - the area of the ford lying in Hampshire is unshaded, and although some shading has bled onto the route, it appears to be excluded from the area of land for sale (it has been given no parcel number). Other routes which provide private access to lots for sale (including driveways serving Smith’s Farm and Cordery’s Farm) are included.

Other routes which are unshaded include Well House Lane, Ford Lane and the road through Well House Farm – routes which are either now recorded as public roads or apparently were once considered to be (this evidence appears to reinforce the position with regard to the road through Well House Farm outlined at 7.1.8 and 7.2.7).

This document offers some support to the proposition that the claimed route was considered by the Bramshill Estate to be a public highway at the point of sale.

7.3 User Evidence

7.3.1 During the investigation, thirty-three user evidence forms were submitted by a member of the British Horse Society from the Wokingham area, charting use dating back to the 1960s. Some users who completed forms were subsequently interviewed and provided statements relating to their use. This evidence is briefly summarised below.

- The majority of users gave evidence of use on horseback (although some users claim to have used the route on foot and in a horse-drawn carriage). The earliest given date of use is 1965.
- Most users stated that they used the route once a week or more. The others provided evidence of use at a frequency between twice weekly to yearly.

- None of those providing evidence of use indicated that their use of the route had ever been challenged, or that their use of the route was on a permissive basis.
- With the exception of one user, nobody indicated that they had ever encountered any gates or stiles on the route.

7.3.2 Officers have also received correspondence from local trail riders who claim to have used the route on a motorcycle. Jouldings Ford is recorded on wetroads.co.uk, which claims to be an online guide to every UK ford, watersplash and tidal road, and relies on user contributions. The entry for Jouldings Ford (submitted in 2006) reads:

“Looks like a gravel/mud bottom. Its used regularly by horses, but right of way is unknown and probably doubtful. A woman came out of house on the south end and told me horses use it regularly and seemed friendly enough. Approach from the north is down a narrow dirt track in good condition. I would say it was approachable by most vehicles, but I am not sure about the ford though.”

Another (undated) submission reads:

“It is right on the border and the legal status is unknown as neither Hants or Berks want to claim it so as not to maintain it. My local motorcyle club and myself have used it for over 30 years without being challenged. However, it is for experienced off roaders only as it is always deep with a muddy bottom. The exits cannot be seen from either side and it has been known for some to follow the river by mistake! After heavy rain it can get VERY deep and FAST flowing. Even 4x4s can get into trouble.”

Further investigation and interviews would be necessary to enable more weight to be placed upon any of the above information. However, it does offer an insight into how the route has been used since the latter part of the twentieth century.

7.3.3 The evidence provided indicates that the claimed route has been in regular use by the public since the 1960s. If this evidence were to be relied upon (in lieu of the historic documentary evidence) then it would only give rise to bridleway rights, as it provides insufficient evidence of vehicular use.

2. Consultations

2.1. The following people and organisations have been consulted on this application: The Ramblers, Auto Cycle Union, British Driving Society, Byways and Bridleways Trust, Cyclists’ Touring Club, Open Spaces Society, Trail Riders Fellowship, All Wheel Driving Club, Bramshill and Swallowfield Parish Councils, Basingstoke and Deane Borough Council, County Councillors Stuart Munro and David Simpson, Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager).

2.2. The Ramblers

“The route leads to a ford, very like Thatcher’s Ford further along the lane, and as such it is unlikely to be used by Ramblers in its present form. If it were designated

as a walking route it would need a footbridge. If it had a FB, then it could be a useful route because it connects with the lane to the north of the river. However, there are 3 good FB over the river nearby: at New Mill, Well House Farm, and just to the north of Thatcher's Ford.

Overall, it might seem reasonable to support an ROW on the marked route, but only if it were also viable to build a bridge over quite a wide stretch in the river."

2.3. Trail Riders' Fellowship

The TRF supports the application, and has indicated that some of its members used the route during the 1990s and early 2000s.

No other comments have been received.

3. **Natural Environment and Rural Communities Act 2006**

3.1. There remains to be considered whether motorised vehicular rights have been extinguished by the NERC Act 2006. They will have been unless one of the exceptions contained within Section 67 of the Act applies. These exceptions are set out in Section 2 and are examined in turn below. In the event that none of the exemptions can be shown to apply to this route, the highest status at which the route can be recorded is restricted byway.

3.2. Section 67(2) – rights for mechanically-propelled vehicles will not have been extinguished on 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.***

There is no evidence to indicate that motorised use accounted for the 'main lawful use' by the public during the period 2001-2006.

(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 route was not recorded on the Definitive Map of either Hampshire County Council or Wokingham Borough Council on 2nd May 2006, nor was it recorded on Hampshire's List of Streets on this date. However, Jouldings Lane was recorded on Wokingham's List of Streets as far south as Jouldings Ford (Point B) on this date, and so in respect of A-B, this exception applies.

(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.***

The claimed route has existed since as a physical feature since at least the early part of the 17th century, and as such, public rights over it cannot be said to have come into existence as a result of an express dedication of rights for mechanically propelled vehicles, or under statute.

- (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.***

The route was not constructed as a road specifically for use by motorised vehicles. There is evidence to suggest that the route was in use as a public carriageway prior to the advent of the motor vehicle.

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

There is evidence that the route existed as a public highway before mechanically-propelled vehicles became commonplace, so it cannot be said that public vehicular rights were *created* as a result of use by such vehicles. They are more likely to have been created as a result of use by horse-drawn vehicles.

- 3.3. The exceptions in Section 67(3), which require that the application to record the route as public be made to the County Council prior to 20th January 2005, do not apply in this case.

4. Comments by the Landowners

- 4.1. Through two submissions made by Dr Karen Jones of counsel, the landowners who abut the section of the route lying within Hampshire (C-D) object to the application. In summary, the objectors' position is that the documentary evidence does not support the proposition that the application way is public:

- It is asserted that much of the documentary evidence has either a neutral effect, or actually points away from the claimed route having been public.
- It is also asserted that for a considerable period of time, the Bramshill Estate was in settlement, meaning that it would not have been possible for any rights to have been dedicated over the application way.
- The objectors also cast doubt on whether the public could be said to have acquired a right of way through use in recent years, citing interruptions to use which would have occurred during times of heavy flooding. The landowners residing on the south side of the river have also provided witness statements which assert that they have never seen members of the public using the route.

As highlighted earlier in this report, the full scope of the submissions both on the part of the objectors and the applicant are available either as appendices to this report, or online.

- 4.2. The owners of Jouldings Farm, which abuts section A-B of the claimed route, support the application, and have provided statements detailing their own use of the

route on horseback as well as their observations of use by members of the public on horseback dating back to the early 1990s.

5. Conclusions

- 5.1. In assessing whether or not it is appropriate to make an order, Members must consider whether public rights subsists, or are 'reasonably alleged' to subsist on this route. There is disagreement between the parties as to whether the test is met in this case (as set out in their submissions). Whether or not an order (if made) would be confirmed is another matter, and this would be subject to a different legal test, but on balance it is considered that there is sufficient evidence for the 'reasonably alleged' test to be met – there is evidence which positively identifies parts of the claimed route as public, and there appears to be no clear cut evidence which would warrant the refusal of the application (such as an extinguishment order).
- 5.2. There is evidence that the claimed route has existed as an unobstructed physical feature in the landscape since at least the beginning of the 17th century, and there are numerous documents which, when taken as a whole, support the proposition that the route formed part of the local public highway network. Some documents explicitly refer to at least part of the way as public (ie the Bristol and Dover railway evidence in Hampshire, and the OS Name Book in Wokingham), whilst other documents provide an indication as to status (Bramshill Estate sales particulars, Eversley Tithe Award and Finance Act evidence).
- 5.3. If the claimed route could be said to have been public, the evidence suggests that by the early 20th century its significance as part of the local highway network had diminished, as indicated by its omission from documents maintained by the highway authorities at the time. However, user evidence indicates that the route has been used by the public on horseback and in vehicles within living memory.
- 5.4. There is documentary evidence to suggest that the claimed route was once a public vehicular highway. The provisions of the NERC Act 2006 will have extinguished rights for mechanically propelled vehicles between B-D, which would limit any rights to be recorded on this section to restricted byway status. However, the exemption set out in s67(2)b within the Act applies to A-B, which can be recorded as a byway open to all traffic. There is no evidence to suggest that public rights on the route were extinguished prior to the enactment of the NERC Act 2006.
- 5.5. The user evidence which has been submitted would be supportive of bridleway status only. However, officers consider that the historic evidence, which would be supportive of carriageway status, is sufficiently strong to meet the 'reasonably alleged' test.
- 5.6. The width of the route, as measured on the Ordnance Survey maps of the late 19th century, varies between approximately 7.7 and 13.7 metres. It is also apparent that the route was gated at two locations (as shown on the 1st and 2nd editions of the OS County Series maps), and these should be reflected in any order that is made.

