

Jouldings Lane DMMO application

Comments on the statement of objections to the application prepared on behalf of Nigel Martin Stoate Esq, of Bramshill Stud

These comments refer to the sections and paragraph numbers of the statement of objections prepared by Taylor Wessing LLP and dated 3 April 2018.

I. Summary

A.1. The applicant thanks the objector and his advisers for the analysis summarised in the executive summary prepared by Karen Jones, of counsel, dated 3 April 2018, and the detailed exposition submitted by Taylor Wessing of the same date.

A.2. The applicant, following further analysis, notes that plan prepared under the 1814–17 Swallowfield Inclosure Award does not show the application way (although it does contain some relevant evidence). The applicant also agrees that the plans and book of reference prepared for the Bristol and Dover Direct Junction Railway 1845 scheme must be considered carefully, in the light of its provenance during the first era of ‘railway mania’. However, the applicant concludes that the evidence presented by the objector relating to the Wokingham and Basingstoke Railway Deposited Plan 1896 is mistaken.

A.3. The applicant contends that, beyond these concessions:

- The status of the Bramshill estate allegedly in settlement is irrelevant to the status of the application way as a public road, any dedication having occurred prior to the alleged settlement.
- The object name book remains valuable evidence of the status of the way between A and B, and contains nothing which diminishes the evidence of the existence of the way between B and D.
- There was no intention on the part of the Ordnance Survey to investigate the existence of rights of way on Bramshill Common, and any conclusions as regards such matters are of little relevance to the application.
- The Finance Act evidence contains no evidence that the application way was regarded as only private.
- There is nothing in the 1865 inclosure award which tends to show the way is private, and evidence that it was regarded as public.
- There is strong evidence that the tithe survey shows that the way was regarded as public.
- None of the evidence suggests that the application way had the reputation of a cul de sac, or that it was regarded other than as a through way.

A.4. The applicant has reviewed the evidence presented in the application in the light of the objection, and finds that much of it is strengthened in consequence of such review, and further analysis and explanation is provided below. In particular:

- There is no evidence, and no explanation, for the application way ceasing to be a public way at the ford.

- The evidence shows that the Bramshill estate, at the time of its disposal in 1952, considered the application way to be public and not private.
- The evidence of the 1845 railway scheme remains good evidence of the status of the application way.

A.5. Finally, as also explained below, the applicant observes that the test for making a definitive map modification order is that the evidence shows that a right of way is ‘reasonably alleged’ to subsist, and on any reading of the evidence as a whole, that test is met.

II. General comments

A. Reasonable allegation

A.1. Under s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 (‘the 1981 Act’), the surveying authority¹ has a duty to make an order under s.53 on: ‘the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic’.

A.2. In *R v Secretary of State for Wales, ex parte Emery*², the Court of Appeal considered a challenge to the Secretary of State’s decision on an appeal against a surveying authority’s refusal to make a definitive map modification order on an application under s.53(5). The same principles apply to the surveying authority’s duty to determine an application. And although the case was primarily concerned with the juxtaposition of user evidence and the landowner’s evidence of intention not to dedicate, the court’s conclusions are equally applicable in relation to historical evidence.

A.3. Roch LJ (with whom the rest of the court agreed) said:

‘Where there is no credible evidence of 20 years’ user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s 31(6) of the 1980 Act...then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists.’

A.4. The judge then observed: ‘The problem arises where there is conflicting evidence on one or other or both issues.’ He advised that:

‘In approaching such cases, the authority and the Secretary of State must bear in mind that an order under s 53(2) made following a Sch 14 procedure still leaves both the applicant objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following a public inquiry.’

1 Strictly speaking, in this application, there are two surveying authorities: Hampshire County Council and Wokingham Borough Council. It is understood that the county council has an agency agreement with the borough council to act in respect of the whole of the application way.

2 www.bailii.org/ew/cases/EWCA/Civ/1997/2064.html

A.5. The judge quoted with approval from the judgment of Owen J in *R v Secretary of State for the Environment, ex p Bagshaw*³, who said:

‘the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right of way does subsist.’

A.6. In *Bagshaw*, Owen J continued:

‘...if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.’

A.7. Roch LJ went on to summarise the position (underscore added):

‘Where documents can be decisive of either Owen J's tests ‘A’ or ‘B’, for example where a landowner has taken the steps required by the provisions of s 31(3) and (5) or s 31(6), then the Secretary of State can reject the claim as an unreasonable allegation, because a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail. But where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.’

A.8. In the present case, there is credible evidence of the existence of a public right of way over the application way. The objector has produced no ‘smoking gun’ showing that no right of way exists: indeed, such evidence as has been produced or reinterpreted shows no such thing. It follows that the duty lies on the surveying authority to make the definitive map modification order sought in the application, which enables the: ‘objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following [if necessary] a public inquiry.’

B. *Eyre v New Forest Highways Board*

B.1. The applicant refers to *Eyre v New Forest Highways Board*⁴, a striking case decided by the Court of Appeal in 1892 and which remains a convenient summary of the law today. The case considered the powers of the highway board to metal a way across a common in the New Forest. The summing up at first instance of the judge, Wills J, to the jury is quoted in full in the report of the judgment of the Court of Appeal, and is a helpful exposi-

3 (1994) 68 P & CR 402

4 (1892) LVI JP 517

tion on the repair of pre-1835 highways, and on the question of dedication where land was, from a certain date, in the occupation of a life tenant.

B.2. In *Eyre*, it was suggested by the plaintiff that a public highway terminated at a gate onto the common, and that there was no defined highway across the common. In his summing up to the jury at first instance, Wills J said:

‘But supposing you think Tinker’s Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a *cul de sac*, and ends at a gate on to a common? Such things exist in large towns. In Leeds, which is a place where I have done a good deal of my hardest forensic work, there were scores of streets which ended with dead walls and which were repaired by the public. ...but who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? I have known it successfully established in a beautiful walk leading to a cliff end or a place on the sea shore. ...But what do you find such a thing for in this part of the world? I cannot conceive it. It is a just observation that if you think Tinker’s Lane was a public highway, an old and ancient public highway, why should it be so unless it leads across that common to some of these places beyond? I cannot conceive myself how that could be a public highway, or to what purpose it could be dedicated or in what way it could be used so as to become a public highway, unless it was to pass over from that side of the country to this side of the country. Therefore, it seems to me, after all said and done, that the evidence with regard to this little piece across the green cannot be severed from the other; and it is comparatively of little importance, because if I were a juror, and were satisfied in my own mind that Tinker’s Lane was really a public highway up to that gate, I do not know, but I think, it would take a great deal to persuade me that it was possible that that state of things should co-exist with no public way across the little piece of green.

B.3. The Court of Appeal decided that:

‘The summing up was copious and clear, and a complete exposition of the law on this subject; it was a clear and correct direction to the jury on all the points raised.’

B.4. The circumstances in relation to Jouldings Lane are all the more egregious. Whereas, in relation to Tinker’s Lane, the lane emerged onto the common at a gate, and there might have been some doubt as to whether there was a highway beyond, and if so, as to the particular direction taken, here, instead, there is a ford, and a defined direction beyond, with no evidence that traffic beyond the ford ever took to a different alignment. It is not (so far as the applicant can discern) disputed by the objector that Jouldings Lane is a public road as far as the ford (*i.e.* through A towards B or C). What possible origin or purpose could justify the dedication of a public road terminating in a ford, but no further, where the ford was historically negotiable by all traffic, where (at least at certain times in the past), a footbridge was available to pedestrians, where beyond the ford, the way led onto a common over which farmers would have exercised rights of grazing, and where journeys could continue across the common to other places?

B.5. The objector has given no explanation how such a curious state of affairs might have come about. In *Eyre*, Wills J said to the jury, ‘it would take a great deal to persuade me that it was possible that that state of things should co-exist with no public way across the little piece of green.’ This aspect is further explored in the next section.

C. *Terminus ad quem*

C.1. The objector appears to concede that the application way is a public road between A and B (or C — the position is unclear), but maintains that it is not a public right of way of any kind between B (or C) and D.

C.2. The objector has failed to explain how Jouldings Lane might have become established as a lawful highway terminating at a ford across the Blackwater River.

C.3. Traditionally, every highway necessarily led from one place to another, and was required to have a *terminus a quo* and a *terminus ad quem*. In practice, in urban areas, the courts came to accept that a highway might form a cul de sac, where it was nevertheless used by a significant portion of the public (e.g. leading to a square or court).

C.4. However, the application way is not in an urban area, but in the countryside. In *Moser v Ambleside Urban District Council*, Pollock MR said:

‘It seems to me that there may be a number of cases in which the public have a need to go to a particular point, and there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the terminus ad quem to which the right of access is granted.’

while Atkin LJ said:

‘I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway.’

C.5. The applicant accepts that a river may be a legitimate *terminus ad quem* for a public right of way. But there must be some purpose in the public seeking to reach such a place: for example, to water livestock, to swim in the river, to admire the confluence of two rivers⁵, or to take sand from a tidal foreshore in accordance with a local right⁶. In such cases, the status of the right of way might be expected to be consistent with the character of the *terminus ad quem*: a driftway for cattle, a footpath to reach a viewpoint, perhaps a cartway to take sand.

C.6. But the objector has proposed no legitimate purpose for the public to seek to have access to the ford, still less for a carriageway to be established and maintained at public expense. No obvious purpose is apparent: it cannot be a watering place (the river is easily accessible elsewhere, there is no nearby drove road, and a carriageway would not be required for such a purpose). Yet all the evidence suggests that the application way between A and B has long been recognised as public, has never been distinguished from the rest of Jouldings Lane (to the north), and is likely to be an ancient highway⁷. What

⁵ *Campbell v Lang* (1853) 1 Eq Rep 98,

⁶ *Attorney-General and Newton Abbot Rural District Council v Dyer* [1947] Ch 67

⁷ The objector has implied that the application way between A and B (or C) did not become a public road until some time between 1898 and 1930 — see paras.C.1 to C.2 for the applicant’s analysis.

then was the lawful origin of this part of the application way, and how legitimately did it become publicly maintainable, if not as part of a public road continuing through the ford to Bramshill Common? These questions remain unanswered by the objector.

D. Historical context

D.1. The applicant contends that the historical origin of the application way, and the uncertainty over its status, can be explained in the following hypothesis.

D.2. The way provided a means of access from the villages north of the Blackwater River, and the enclosed farm holdings on that side of the river, south across the river to Bramshill Common, and across the common to Hartley Wintney, and places beyond via the road to Southampton. It is possible that the common also provided rights of grazing attached to farm holdings north of the Blackwater river, and livestock would have been driven to and from the common across the river and along the application way.

D.3. The Blackwater River has formed a county boundary since time immemorial. It continues to mark the administrative division between the Berkshire unitary borough of Wokingham and Hampshire. Consequently, the administrative highway records for the two parts of the application way which lie north and south of the river have always been maintained separately. It is far from unusual that a way which in one administrative area is regarded as a highway, in another is not, and discontinuities of some kind are commonplace. See, for example, the designation of Forges Lane as a public road in the list of streets held by Wokingham Borough Council, terminating at the Blackwater River, but continuing only as a footpath across the river to Well House Farm (a historical anomaly arising from the former ford across the river to Well House Lane).

D.4. In the present case, it is clear that, for whatever reason, the continuation of the application way in Hampshire has for many years been excluded from records held by the county council. That is why s.53 of the Wildlife and Countryside Act 1981 provides for the modification of the definitive map and statement on the discovery of evidence which shows that a right of way, not shown on the map and statement, subsists. S.53 recognises that such disparities may exist, and enables application to correct the record.

III. Comments on the statement of objection

A. Introduction

A.1. Para.2: The part of the application way between A and B (identified on the application map) is part of Jouldings Lane, being identified as such in the National Street Gazetteer with USRN 44700808⁸. Accordingly, it is slightly misleading to describe Jouldings Lane as 'To the north of the application route' — it is unquestionably part of the application route.

A.2. Para.4: The applicant does not dispute that the part of the application way between B and D may never have been known as Jouldings Lane. The purpose of the name given to the application way in the application is to render it immediately and memorably identifiable (as opposed to, say, 'the way between Jouldings Farm and Well House Lane via Jouldings Ford'). In the applicant's view, whether that part of the way was ever known as Jouldings Lane is immaterial to the determination of the application.

8 [portal.roadworks.org/data/dsp_usrnDetail.cfm?r=\(126190,2\)&lyrType=st](http://portal.roadworks.org/data/dsp_usrnDetail.cfm?r=(126190,2)&lyrType=st)

A.3. Para.5: The object of the application is to prove, on the balance of probability, that the application way is a historic highway⁹. As the evidence suggests that the highway originates in the distant part, and certainly before 1835, it follows that the way must be publicly maintainable¹⁰. Whether the application way between B and D has the reputation of a public right of way of any kind is therefore in question. The evidence suggests that it has.

B. The Bramshill estate (settlement)

B.1. Paras.6–9: It is suggested (although no evidence has been tendered) that the Bramshill estate was in strict settlement for many years (possibly between 1699 and 1935, though the duration of the settlement is not specified) and the application way could not have been dedicated during that period.

B.2. The applicant asserts that the application way is of ancient character: it is the continuation of a country lane, it crosses a named ford across a river which, owing to its size and capacity, has only limited crossing points, and it continues south across formerly unenclosed common land. Fords have much in common with other features of ancient ways, such as holloways, causeways and embanked ways — they tend to identify ways which have not changed their course over many years, constrained by the features of their surroundings, and the effect of the passage of traffic over a long period of time. The likelihood is that Jouldings Ford, and the approaches to it, have existed since time immemorial, and that it was dedicated (insofar as the legal fiction of dedication is relevant in such cases) long before the settlement of the Bramshill estate may have been in issue. The very fact that the ford is named is suggestive that it is a place of some considerable age.

B.3. Paras.10–11: This application was the first made by the applicant. As the statement notes at para.6, the applicant has now made a number of subsequent applications, which benefit from experience. The applicant acknowledges shortcomings in the quality and comprehensiveness of the documentation associated with this application, and is grateful to the objector's advisers for the additional material procured.

C. Object Name Book Evidence

C.1. Paras.15–16: The entry for Jouldings Lane as a 'parish road' in the object name book for Swallowfield parish has been altered to show the lane leading to Jouldings Ford vice Jouldings Farm. It is not clear when the alteration was made: the alteration is made in a blue pen, whereas the alterations of 1930 were made in a green pen.

C.2. It is stated that the alteration is evidence that the parish road formerly led only Jouldings Farm. It is stated (para.16) that the alteration 'is also consistent with the ford being a private feature associated only with Jouldings Farm and not a through route connecting with Bramshill Common.' Why then would Jouldings Lane (a 'parish road'), on the objector's interpretation, be 'extended' to project beyond a farm to a 'private feature'? An express decision by the highway authority, at some time between 1898 and 1930, to extend the public road (which appears to be the objector's contention) would hardly be justified over a stretch of road which served no public purpose whatsoever.

⁹ But see part.II.A above for the correct test for making an order.

¹⁰ See the Highway Act 1835, which provided that certain highways created after 1835 should not be publicly maintainable unless, in effect, 'adopted' by the highway authority.

C.3. On the contrary, the applicant's interpretation is that the alteration (whenever made) is merely the correction of an obvious mistake in the original entry, noting that Jouldings Farm and Jouldings Ford are adjacent, and that 'farm' and 'ford' are near synophones. It is suggested that it was noted (whether at the time of the original survey, or later) that the original entry in the object name book referred to the lane leading to a private farm, and not to the ford, and it was corrected to make explicit that the lane led to the ford. There was no change 'on the ground'.

C.4. Para.17: the applicant concedes (para.A.2 above) that there is no evidence that the application way south of Jouldings Ford is named Jouldings Lane.

C.5. Para.18–19: the object name book does not identify the status of Jouldings Ford, only its location. It does not describe the ford as private, or as public: there is no reason why it should, as the primary purpose of the object name book is to authenticate the name of the feature, not its purpose. But the ford is named, and a named ford is more likely than not to be a public place: all those fords named on the Ordnance Survey County Series first edition 1:2500 map along the Blackwater River between Farnborough and Jouldings Ford (only nearby Thatcher's Ford lies downstream) are today public roads. However, the applicant acknowledges that the entry for Jouldings Ford is neutral — it tells us nothing about the status of the ford, other than that it was named.

C.6. Para.21: The entries in the Swallowfield object name book confirm that Jouldings Lane, a public road, led to the ford, which was also the county boundary. They do not confirm that the road continued south of the ford — but the continuation was irrelevant to the entry in the object name book for the parish north of the county boundary. Indeed, if, as the objector contends (and the applicant accepts: see para.A.2 above), the application way south of the ford is not part of Jouldings Lane, then one might expect the entry in the name book for Jouldings Lane to refer only to the named part of the lane — the entry refers to Jouldings Lane 'leading southward from the Fox & Hounds P.H.', but makes no mention of the road with which it connects there. The entries do not provide any evidence that the road did not continue south of the ford.

C.7. Paras.22–29: The entries for Bramshill Common in the Heckfield and Bramshill object name books are of no relevance to determining the existence of public rights over the application way. The inquiry made by the Ordnance Survey in 1910 into the existence of rights on the common was to establish whether there were rights of common exercisable over the common, in order to clarify whether the land was common, woodland or forest, and should be so described. The correspondence reveals some uncertainty about what rights exist, with assertions of previous inclosure (although no records exist of such inclosure by Act of Parliament). The purpose was not to establish what public rights of way existed across Bramshill Common, which was of no interest to the Ordnance Survey (the objector notes at para.103 that maps disclaim any existence of a public right of way), but as some information as to such rights was given in the correspondence, it was noted in the object name book entry.

C.8. The evidence suggests that public roads have long existed along (but inside) the perimeters of the common, including Well House Lane, Ford Lane and Bramshill Road (see the Ordnance Survey One Inch Revised New Series 1896/1895 map¹¹ where these roads are shown as unfenced to the common). The reference to 'rights only on the public paths' and 'the right of way on footpaths' simply ignores the public roads. It is not credible that this statement, made in the context of superficial research into the existence of rights

11 maps.nls.uk/view/101168684

of common, was intended to deny the existence of the carriageway rights which subsisted on the common — and even if it was, dated 1910, it was too late to have any such effect.

C.9. Paras.30–32: The Ordnance Survey had no interest in researching public rights of way over Bramshill Common, but only in establishing whether rights of common existed in order to justify the name given to the land. The surveyor who initiated the correspondence was presumably not well informed about agricultural commoning, and a slightly unfocused question sparked a wider-ranging response than was sought. But the correspondence does nothing to reveal what public carriage roads exist on the common, and was undertaken at a date when it was far too late, in any case, to affect such rights.

C.10. Para.33: The applicant agrees that there is no evidence of a road in the enlargement of Jouldings Ford on the extract of the Ordnance Survey boundary remark book for Bramshill parish. But in the adjacent page showing the application way between B and D, the parish boundary is marked along the centre of the application way, and marked 'C.R.', *i.e.* 'centre of road'. Accordingly, the enlargement must be intended to show the detail of a road through the ford, because the surveyor had marked the way leading to the ford as a road. It was not necessary to the enlargement to label the features — only the details of the boundary.

C.11. Para.34: The analysis is incorrect. The meaning of the oblique lines is to show a change in the mereing of the parish boundary. In the particular case cited (p.37), the boundary to the east of the gate is mered to 3 feet from the root of hedge ('3ft.R.H. '), but in crossing the gap at the gate, it is mered to the face of the gate ('F–Gate') (see Ordnance Survey list of abbreviations¹²). As the parish boundary at the entrance to the application way turns down the centre of the way, only one change of mereing mark is required, and this is shown in the boundary remark book.

C.12. Para.35: Accordingly, the boundary remark books tell us nothing about the nature of the entrance to the application way at D, other than that it was gated (because the opening is closed by a solid line). It is entirely predictable that a minor road leading onto a common (and at the date of the boundary survey, it seems likely that the land was still being grazed in common) was gated: many public roads were gated in similar circumstances, and in upland areas, many still are. Indeed, the Ordnance Survey County Series first edition 1:2500 map shows a gate on Ford Lane at [SU74286325](#)¹³ (it was still present on the third edition sheet in 1911).

D. Finance Act evidence

D.1. Paras.36–40: We still know very little about the instructions under which valuers worked, and the practices adopted, in valuing land under the Finance (1909–1910) Act 1910. There is much apparent inconsistency between the practices of different valuers and different valuation districts. Perhaps, given the scale of the task (a valuation of every property in the United Kingdom), this should not be surprising.

D.2. Hereditament 34 includes Bramshill Common, but also Ordnance Survey parcel 23 (as identified on the Ordnance Survey County Series 1:2500 third edition map immediately west of the application way at D), together with the application way itself extending as far as Jouldings Ford, including the splay on the south side of the ford.

¹² www.ordnancesurvey.co.uk/resources/maps-and-geographic-resources/map-abbreviations.html

¹³ Hyperlink to old-maps.co.uk at www.old-maps.co.uk/#/Map/474279/163237/12/100266: zoom out or in as needed.

D.3. No firm conclusions can be drawn from the bundling of these separate elements. Bramshill Common, being used for silviculture and rough grazing, was of low value: the extent is recorded in the valuation book as a very round 1,000 acres, with a gross value of £14,440, or £14.40/acre, compared with double the areal value for adjacent hereditament 37, Smith's Farm.

D.4. It appears that the valuer, cognisant of the extensive but low value nature of the hereditament, did not distinguish the woodland from the public roads across the common, or parcel 23 (which is enclosed from the common). There was no need, and the exclusion of the public roads would have made little or no difference to the overall calculation.

D.5. Inspection of the neighbouring area shows that the application way, Ford Lane, Well House Lane, and the spur road connecting these last two to the northeast of Cordery's Farm, are all included in hereditament 34. On this and the subsequent maps, public roads have been coloured in red for ease of identification.



Illustration 1: Public roads on Finance Act map

D.6. Ford Lane is included as far north as Thatcher's (or Little) Ford on the county boundary. The Devil's Highway, a public road projecting west from Thatcher's Ford, appears to be included in the adjacent hereditament. The road to Well House Farm is included in hereditament 24. All of these roads, with the exception of the application way, are shown in the 1929 handover map as publicly maintainable roads — but they are not excluded from the hereditaments.

D.7. This practice of not excluding public roads across common land appear idiosyncratic, and is not one which the applicant has encountered before. But it may be a practice which was adopted by other valuers. The applicant researched two commons drawn at random in Cornwall (for which he has access to the relevant maps), at Minions and Goonhilly Downs, and found the same practice adopted: see the extracts below.

Minions IR 128/5/326 – Cornwall 28/6



Illustration 2: Extract of Finance Act map of common land, Cornwall

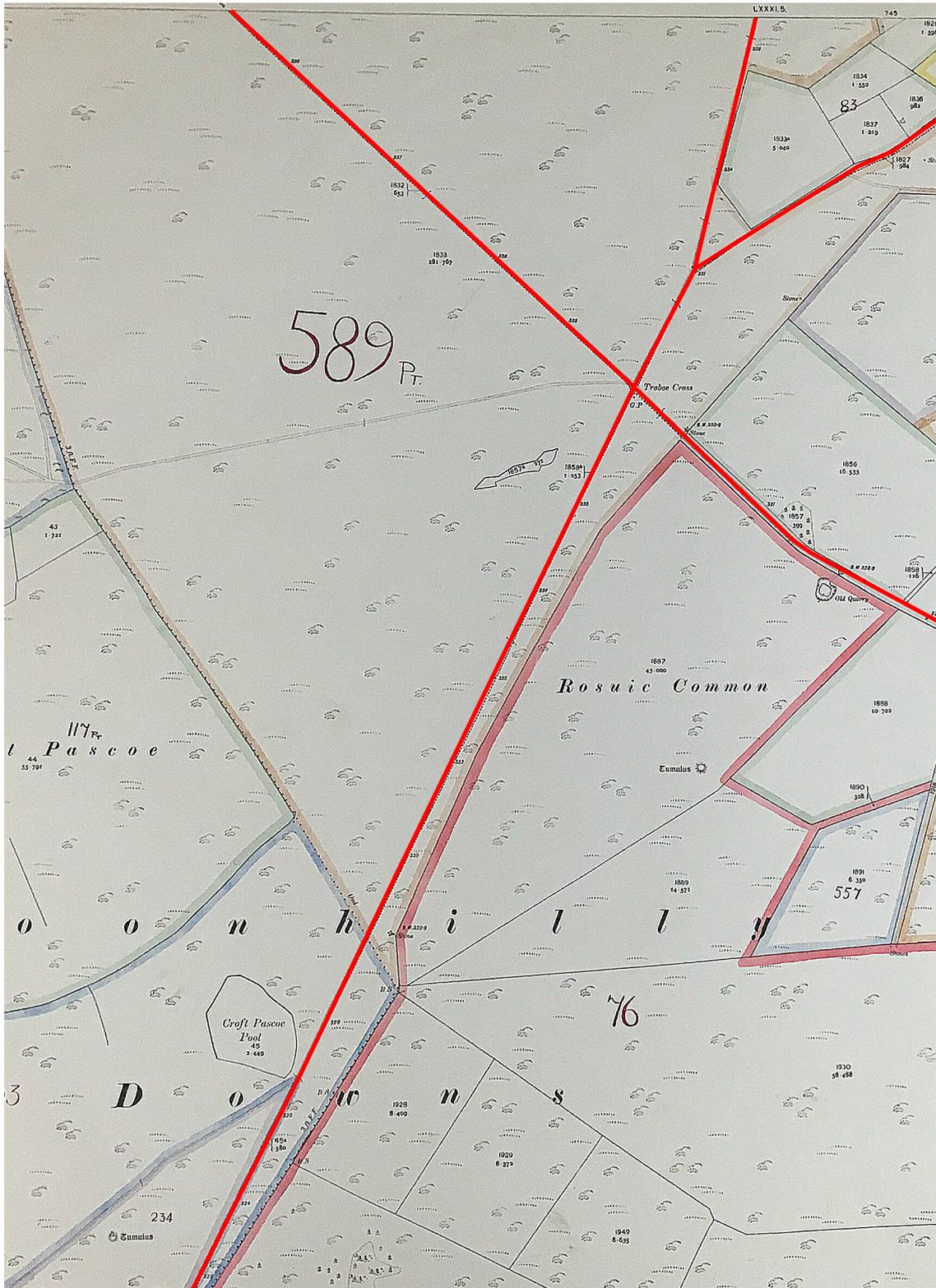


Illustration 3: Extract of Finance Act map of common land, Cornwall

D.8. Accordingly, no inferences can be drawn about the status of the application way based on the 1910 Act records.

E. Other new evidence

E.1. Para.41–57: The applicant does not dispute that the application way is not recorded in more recent documents, beginning with the local highway authority handover maps of 1929. It is almost inevitable that, where application is made to record a way on the definitive map and statement, that way will not, at the time of application, be shown. Similarly, it is unsurprising if such a way, omitted from the definitive map and statement at the time of the initial survey under the National Parks and Access to the Countryside Act 1949, was also omitted from contemporary documents, such as the 1929 handover maps and the parish records.

E.2. No conclusions can be drawn from these omissions, other than that the application way was not considered, at the relevant dates in the twentieth century, to be a publicly maintainable highway (as regards the handover maps) or a way eligible to be recorded on the definitive map and statement.

E.3. It is hardly surprising that the application way was not identified in the handover maps. Many unsealed roads, which had not been tarred during the early part of the twentieth century, were discarded, unlawfully, from the maintenance responsibilities of highway authorities in later years. Such authorities either forgot the extent of their former highway network, or concentrated their resources on those roads which had been tarred. The omission of unsealed roads, such as the application way, from handover maps, is commonplace.

E.4. No records have been discovered to explain why the application way was not recorded on the definitive map and statement, and no conclusions can be drawn about the omission. It is possible, for example, that Bramshill parish council believed the application way to be a public road which was not eligible to be recorded on the definitive map. We do not know.

E.5. Para.58: If, as reported, the relevant Highways and Sanitation Boards Minutes 1880–1930 contain no mention of the application way, this too is hardly surprising. Some highways needed little repair or maintenance. The application way from B to D appears to have lain across the waste of Bramshill, and may have needed little attention. In *Eyre*, the judge at first instance was reported to have said in his summing up:

‘A great many old highways in country places are highways, which from the time they were first used, have never had a spadeful of gravel thrown upon them, or a shilling’s worth of repairs done to them at any spot.’

E.6. That is likely to have been the case here: the application way has survived, in continuing use, for perhaps over a century since the highway authority ceased to accept responsibility for it — yet, with perhaps minimal maintenance by neighbouring landowners, it remains passable to this day.

F. Early map evidence

F.1. Paras.59–60: The provenance for Taylor’s Map is clear: it is held by the Hampshire Record Office. The map is indeed small scale, but the crossing of the Blackwater River is labelled as Jouldings Ford, and the approach to it from the south is consistent with the road pattern today. It is clear evidence that the application way has been in use since the middle of the eighteenth century.

F.2. Paras.61–62: The Ordnance Survey drawing and Old Series one inch map show a remarkable resemblance between the enclosed road network in the vicinity of the application way, and the public road network today, and some weight may be given to that assessment.

F.3. A number of unenclosed ways are shown across Bramshill Common, as may be expected of any extensive area of unenclosed land. We do not know today which of those may have become established as highways, but the answer does not assist, because the application way is shown as enclosed.

G. 1814–17 Swallowfield Inclosure Award

G.1. Paras.65–66: On further analysis, the applicant agrees that the award map does not show Jouldings Ford, but a footpath crossing of the Blackwater River further west at SU75016354.

G.2. The award map therefore refers to the footpath from the footbridge crossing at SU75016354 east along the north bank of the Blackwater River as leading ‘to Jouldings Ford and Bramshill’. The map also marks BOAT 33 as leading ‘to Bramshill’. These labels must refer to reaching Bramshill via the application way. The use of a destination label on maps of this period is generally associated with public, rather than private, ways.

H. Greenwood’s Map 1826

H.1. Paras.67–69: The map is of sufficient scale to confer clarity that the application way is depicted: the ford is shown across the Blackwater River, and is correctly shown approximately equidistant between Thatcher’s Ford and New Mill Ford.

H.2. Greenwood’s maps show ways which may not be public roads, such as those leading to named country houses. However, the application way is shown at the apex of two roads across common land, continuing across the Blackwater River into (what was then) Wiltshire. Greenwood’s map was sold commercially to customers who would have wished to use them for navigation — there is no reason to expect him to show as apparently public roads, routes which were in fact private and unavailable to the public, whereas ways leading to country houses would obviously have been of use only to those visiting them. In this case, the application way must have been considered by Greenwood’s surveyor to be public and meriting inclusion on the map.

H.3. In *Fortune and others v Wiltshire Council and another*¹⁴, the Court of Appeal reviewed the High Court consideration of a Greenwood map in determining the status of Rowden Lane. Lewison LJ said:

‘Greenwood was a well-known commercial map-maker who produced maps of many English counties. The judge considered that this map also showed a thoroughfare which included Rowden Lane. Prof Williamson agreed. It was not coloured in the same way as the Bath road; but nor were a multitude of other roads linking disparate settlements. The legend of the map showed that the colouring of the Bath Road meant that it was a turnpike or toll road, whereas that of Rowden Lane meant that it was a “cross road”. As the judge pointed out, in 1829 the expression “cross road” did not have its modern meaning of a point at which two roads cross. Rather in “old maps and documents, a “cross road” included a highway running between, and joining other, regional

¹⁴ www.bailii.org/ew/cases/EWCA/Civ/2012/334.html

centres". Indeed that is the first meaning given to the expression in the Oxford English Dictionary ("A road crossing another, or running across between two main roads; a by-road"). Prof Williamson agreed in cross-examination that a "cross road" was a reference to a road forming part of a thoroughfare. The judge gave a further explanation of the significance of the expression later in his judgment (§ 733) by reference to guidance given to the Planning Inspectorate:

"In modern usage, the term "cross road" and "crossroads" are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term "cross road". These include a highway running between, and joining, other regional centres. Inspectors will, therefore, need to take account that the meaning of the term may vary depending on a road pattern/markings in each map."

55. The guidance went on to urge caution as the judge recognised:

"In considering evidence it should be borne in mind that the recording of a way as a cross road on a map or other document may not be proof that the way was a public highway, or enjoyed a particular status at the time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere – as sometimes happened – that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality of the evidence in reaching a decision."

56. The judge concluded that Greenwood's map supported "the emerging picture" of an established thoroughfare. In our judgment the label "cross road" added further support.'

H.4. The Court of Appeal's decision suggests that the depiction of the application way as a 'cross road' merits some weight, when considered in the wider context. In *Trafford v St Faith's Rural District Council*¹⁵, the Chancery Division of the High Court held that a Greenwood map, produced from the British Museum by the proper official, were admissible as some evidence of reputation as a public road. (The provenance of the present Greenwood map extract does not appear to be disputed.) The finding was followed in *Ridley v Secretary of State Environment, Food & Rural Affairs*¹⁶, in the High Court, in which the judge:

'agree[d] to some extent that the routes would be unlikely to be shown on small-scale maps unless they were available for public use. ... I consider that the overall weight of evidence I can give to these maps is small, but I find them suggestive of a route with a higher status than footpath.'

H.5. Accordingly, the representation of the application way on the Greenwood map merits some weight as tending to show a bridleway or public road.

15 (1910) 74 JP 297

16 www.bailii.org/ew/cases/EWHC/Admin/2009/171.html

is assigned parcel number 509, which does not appear in the table of *Roads and Waste*. On the contrary, the inclusion of the farm drive elsewhere in the apportionment suggests that the entries in the table of *Roads and Waste* are exclusively public roads. This analysis is supported by the other entries for roads, all of which, save the application way and the road through Well House Farm Yard, are recognised today as public roads. As to the latter, there is evidence on nineteenth century maps that the road to Well House Farm formerly continued through a ford to continue along the road past Greenacres Farm — this explains the odd termination of Well House Lane, a public road, adjacent to Well House Farm, but pointing towards a crossing of the river, and the equally odd termination of Forges Lane on the opposite bank¹⁸.

J.3. Para.78: The applicant acknowledges, from copious evidence, that the application way was formerly gated near Well House Lane. The applicant has no objection to a limitation being recorded to this effect. However, the presence of a gate is of no significance in determining the status of the way: see para.C.12 above.

J.4. Para.79: The objector suggests that the absence of any continuation of the way shown on the tithe map north of the Blackwater River suggests that it was not a through way. Yet the objector also suggests, in relation to other evidence, that the absence of a continuation shown south of the Blackwater River suggests that the application way was not a through way. Plainly, the evidence clearly shows the existence of the way leading to Jouldings Ford from both directions. Any claim that it was not a through way does not correspond with the evidence. If the objector's case is taken at face value, it is alleged that roads lead to Jouldings Ford from both directions, the river itself is capable of being forded (as it is at neighbouring locations, and as it is today), the ford has been expressly named as Jouldings Ford since at least the eighteenth century — but for reasons unexplained, it has never been used as a public ford. The objector is invited to explain this analysis more fully.

J.5. It should be noted that at both Great Ford and Thatcher's Ford (the latter slightly downstream of Jouldings Ford, the former nearby on the Whitewater River), there is space on the tithe map to show the full and considerable extent of the fords, and to show the course of the maintained carriageway. Jouldings Ford, located at the very edge of the map, provides a less generous opportunity — indeed, only the pool on the south side of the river is shown, and the river itself is off-map. There is therefore nothing further capable of being shown.

J.6. Para.80: Well House Lane is shown on the tithe map as parcel 664 (marked in red on the extract below).

¹⁸ See also the exclusion of Well House Lane and Forges Lane from the land offered for sale by the Bramshill Estate in 1952: part R below.

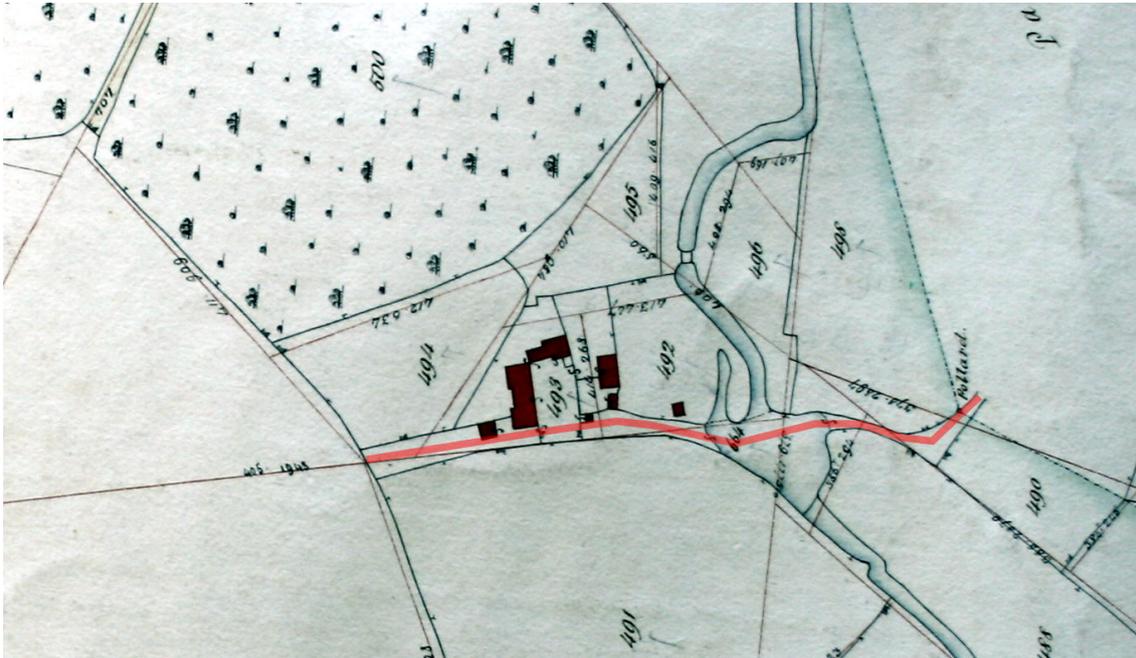


Illustration 5: Well House Lane on the tithe map

J.7. The tithe evidence therefore does support the status of the application way in Bramshill parish as a public road. The evidence of a gate is accepted but of no probative value. The map does not show the carriageway being continued through the ford (as elsewhere), not least because it does not show the river.

J.8. If, as the objector claims, the evidence as a whole shows the application way stopping at the river both from the south and the north, and the existence of a ford over hundreds of years to the present day is undisputed, the logical and indeed only conclusion is that the way continued through the river.

K. Bristol and Dover Direct Junction Railway 1845

K.1. Paras.82–92: Every railway proposal brought to Parliament in a Bill was required by Parliamentary Standing Orders to be documented in plans and books of reference established by prior survey, deposited in Parliament and in the localities affected, and with extracts sent to the landowners affected. The prior survey by necessity required local engagement — with landowners, parish surveyors and local gentry (whose support might be required). Whether the railway was ‘approved’ by Royal Assent granted to the Bill (and whether it was built or not), or not granted Royal Assent, the Standing Orders were applied in the same way, and the deposited documents were crafted according to the same requirements.

K.2. The prior survey necessarily required consultation with the parish surveyor, who would advise of the status of highways in the parish on the basis of what was known at the time. There were few documentary records of the status of ways, but public roads were generally recognised and accepted. Railway companies were obliged by the Railways Clauses Consolidation Act 1845¹⁹ to build bridges over, or under, public roads to a considerably higher standard than those over private roads, and it was not in the interests of the company, and therefore of its surveyor, to misallocate resources to construct an unnecessarily costly bridge. Therefore, it was essential that there was local liaison — even if,

¹⁹ See ss.49 and 50 as to the specification of road bridges.

sometimes, the parish surveyor might not hold the same view of the status of a way in the parish as, for example, the landowner.

K.3. We do not know how far the Bill progressed in Parliament, and whether a Bill committee held hearings into the Bill. But it is unlikely that the status of the application way as a parish road would have been challenged, given that its status would have been derived from the parish surveyor.

K.4. The objector rightly identifies errors elsewhere in the plan. The objector is doubtless right to identify the Bristol and Dover Railway 1845 as one of a number of schemes developed during the years of 'railway mania' in the mid-1840s. But the status of ordinary, enclosed, public roads was one of the easiest questions to be addressed by the railway surveyor, by means of enquiry to the parish surveyor. The applicant agrees that parcel 19, identified as a parish road in the book of reference, is not identified on the plan — but it is quite certainly Ford Lane (south from Thatcher's Ford), taking account of the numbering sequence, and its identification on the section as 'Road edge of Common level unaltered' at 20 miles 5³/₄f.

K.5. The applicant agrees that it is notable that no continuation of the application way beyond D is identified in the book of reference as a public road. In common with most commons, it is clear from the plan and contemporary maps that Bramshill Common, being open and unenclosed, was crossed by numerous tracks, essentially desire lines. The status of these, and particularly whether each track was public and publicly maintainable, would have been uncertain, and of little moment to the parish surveyor, who would have no cause to undertake maintenance of any of them, as the public could stray where the ground became 'foundrous'. Indeed, being open and unenclosed, and grazed by commoners' animals, and of little value to the lord of the manor of Bramshill, the public would not have encountered any restrictions on crossing the common. 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 (which, alone among highways, demanded that bridges be built under the 1845 Act). As the objector states, perhaps the absence of any provision for a public road crossing of the railway east of Ford Lane was or would have been challenged in Parliament, but in the event, it was of no moment: the plans were not authorised.

K.6. The objector suggests that (para.89), 'The fact that the "parish road" connects only with a private common and private roads suggests it is an error.' On the contrary, it is often the case that highways give access onto a common, but for the precise nature of public rights beyond to remain uncertain, even to the present day. This was exactly the challenge before the court in *Eyre* (part B above), and can be seen along the boundaries of commons throughout England and Wales. The applicant does not accept that the railway plan was correct in failing to identify any public routes across the common — but that even if it was (at that date) correct, the position of a public road purporting to give out at the gate onto the common was perfectly normal, and commonplace. The applicant also notes that the status of Well House Lane, near the northern perimeter of the common, as a public road, was abundantly clear by the early twentieth century.

K.7. We do not know what rights of way existed across Bramshill Common, whether carriageways, bridleways or footpaths. The objector notes (para.23) the landowner's admission in 1909 that, 'The public have rights only on the public paths.' By 1929 the handover map (para.41) recognises the existence of a public road along Well House Lane,

yet both Smith's Farm and Well House Farm, as well as the application way, demanded access along the north perimeter of Bramshill Common, as well as access across the common to the south. Whether or not Well House Lane was a public road at the time of the 1845 proposal, no recognition is given in the plans to the existence of any requirement for access across the common, and no public rights of way of any kind are recorded. In practice, it is likely that the railway company, if authorised to construct the railway, would have provided level crossings to accommodate any private or public rights of way other than public carriageways.

K.8. Oddly, the objector suggests that the termination of a claimed public road at the gate onto the common at or near D suggests the status of the road must be an error (notwithstanding the broad range of possible journeys available to the user on reaching the common gate, and the likelihood that those journeys might be made along unrecorded rights of way). Yet the objector also asserts that the same public road, of that acknowledged status, terminates at a ford across the Blackwater River at B, which holds no intrinsic attraction for the user, and that its continuation south towards the common is not public. If the objector's suggestion at para.89 of an error were well-founded, the objector's assertion that the public road terminates at B must be without foundation.

L. Wokingham and Basingstoke Railway Deposited Plan 1896

L.1. The applicant respectfully questions whether the plans shown in appendix 13 are those of the 1896 scheme. They, and the Hampshire Record Office reference, appear to relate to the London Newbury and Bath Direct Farnboro' Extensions scheme of 1845: this is confirmed by the heading to the book of reference extract. The applicant will proceed on the assumption that the plans and book of reference relate to the 1845 scheme, but would be grateful to be informed if this is mistaken. The applicant notes from a detailed online analysis²⁰ that the 1896 scheme adopted a course across the southeastern corner of Bramshill Common, and is unlikely to have contained information useful to the application. Again, the applicant would gratefully receive advice to the contrary.

L.2. Paras.93–95: The objector rightly notes that the application way lay outside the limits of deviation, and the railway surveyor was not required or expected to index those parcels of land which would not be affected by the railway scheme. The neighbouring parcels of enclosed fields adjacent to the application way, south of the Blackwater River, are also unlabelled. No conclusions therefore can be drawn on the status of the application way.

L.3. The position as regards the common itself is exactly as described above in relation to the Bristol and Dover Direct Junction Railway 1845. As the objector states, this scheme too is likely to have been the product of 'railway mania'.

M. Swallowfield Inclosure Award 1865

M.1. Paras.96–97: The objector has identified one example of a private carriage road, awarded under the 1865 inclosure, of very brief length, against which the award also contains an obligation to fence against. But neither the application way between A and B, nor Jouldings Lane to the north, is awarded as a private carriage road, nor has the objector suggested that Jouldings Lane (north of the ford) is not a public road.

²⁰ www.arborfieldhistory.org.uk/properties_railway_ad.htm

M.2. Moreover, the award incloses waste which lay either side of Jouldings Lane, including waste in the vicinity of the ford itself. As waste, these lands must have formed part of the highway, else they could not have been waste — it is inconceivable that waste land, subject to rights of common, could have lain either side of a private road, but without physical separation. If that were so (however unlikely), the road itself, albeit private, must have been part of the waste, and the award would have needed to extinguish any rights which endured over the road as well as the waste. It did not. Accordingly, we can conclude — as seems overwhelmingly probable, and is not disputed — the road between A and B was treated by the award as an existing public road.

M.3. Para.98: Agreed. It has not been asserted to the contrary: the award related to Swallowfield parish.

M.4. Para.99: The objector states that: ‘This is to be contrasted with every point on the award map where a route continues to a destination, when the map uses a direction marker combined with an extension for the lines delineating the road.’ This is a subjective assessment, which appears to rely on interpreting whether a particular route ‘continues to a destination’. There are many routes which are not marked with a destination: whether, in the objector’s analysis, these routes lack a ‘destination’ is immaterial, though the applicant notes that the application way itself does not lead directly to any significant settlement. Moreover, the ford, which is on the parish boundary, is itself identified and labelled, and this obviates any requirement for a destination, because the place can be identified by name.

M.5. As for ‘an extension for the lines delineating the road’, this is not borne out by analysis: the lines are discontinued where they cease to have any purpose: see examples below.

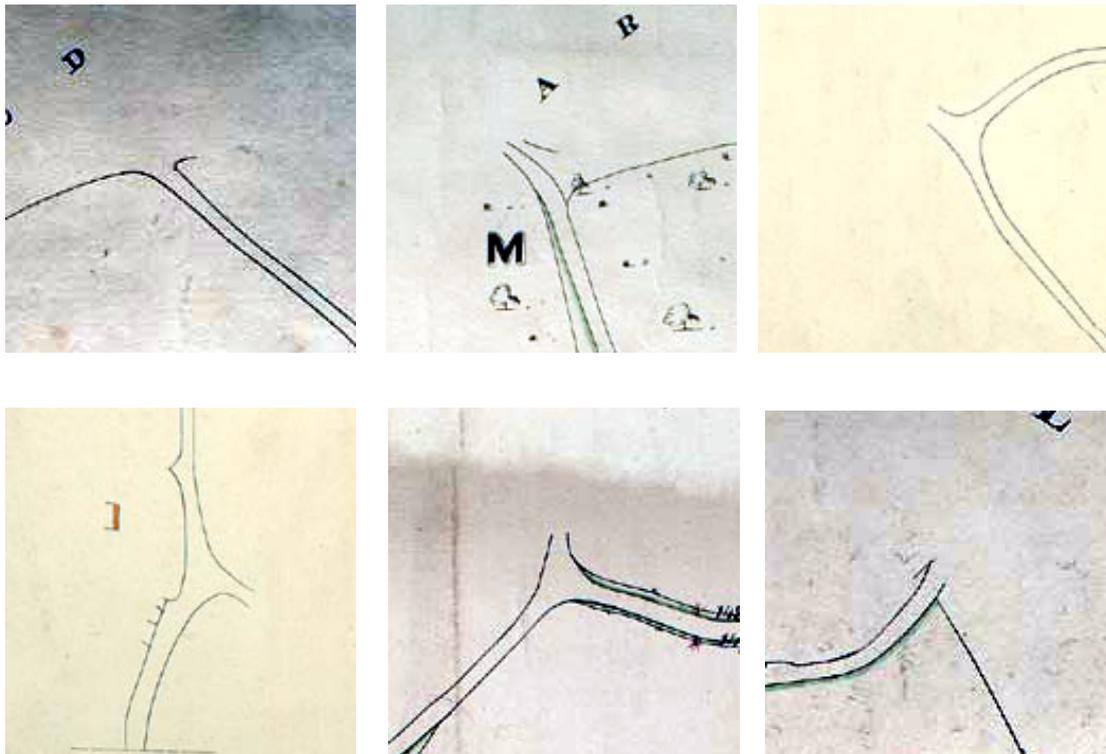


Illustration 6: Road ‘endings’ on the Swallowfield inclosure map

N. OS Boundary Remark Book 1871

N.1. Paras.102–103: The Ordnance Survey boundary maps date from the late 1860s and early 1870s, and record the Ordnance Survey's surveyors efforts to capture the precise location of parish boundaries from local knowledge. These maps were drawn up following perambulation of the boundaries by the surveyor accompanied by the parish meresman (that is, a long-standing resident of the parish who was specially tasked with knowledge of the parish's boundaries, and who very likely would have acquired such knowledge first hand from his predecessor as meresman).

N.2. The administrative parish supplanted the manorial estate during the mediæval period: parish boundaries were frequently coterminous with those of manors. Accordingly, historical parish boundaries (*i.e.*, those which were not established as part of local government reform after 1894) are frequently of great age, and derived from boundaries established in the mediæval period or earlier. Where, as here, they are documented to follow a road, it is highly likely that both road and boundary are ancient in origin, and that the road is a public road. Ordnance Survey maps did not carry a disclaimer until 1888. The applicant agrees that the legend, 'centre of road', does not prove that the application way is a public road — but it does demonstrate that the application way was, at the date of the survey, considered to be a road, and the applicant reiterates that, in the context of a parish boundary which follows the road, it is highly likely to have been a public road.

N.3. The objector refers to the boundary nearby which follows a fence. But it does not follow any fence, but the very probably ancient boundary between Bramshill Common and the inclosures of Smith's Farm to the north, comprising a bank formerly topped by a hedge. This boundary too has probably remained unchanged since it was established in early mediæval times. Indeed, the whole of the boundary of this detached part of the parish of Odiham²¹ follows either the boundary of the common, or the river.

N.4. Para.104: The boundary plan shows only that the mouth of the application way was gated near D. This is what would be expected where a public road debouches onto a common — see para.C.12 above. The oblique mark denotes that the mereing of the boundary changes from 3 ft from the root of hedge, to the centre of the road (*i.e.* of the application way).

N.5. Para.105: Contrary to the objector's claim, there is no evidence that there are no public rights of way across Bramshill Common, indeed, the correspondence arising in the context of the Ordnance Survey Object Name Book Evidence refers to public paths and rights of way on the common (see para.C.8 above).

O. OS Map Six Inch 1871

O.1. Para.106: It is absurd to assert that the placing of the road name (*i.e.* Jouldings Lane) on the Ordnance Survey six inch map of 1871 above the junction with BOAT 33 means that the part of the road south of the junction with BOAT 33 is not named Jouldings Lane. The placing simply reflects the availability of a straight stretch of road with space for the label. There is no reason why the road name would not apply to the whole road, at least as far as the ford, and there is ample evidence, not least from the Object Name book, that it does.

²¹ Detached portions of parishes, such as this one, at some distance from the 'parent' parish of Odiham, also reflect the manorial origins of parishes: it is likely that, for some reason, the land at Smith's Farm, north of the common, was formerly held as part of the manor of Odiham.

O.2. Para.107: As stated elsewhere (para.C.12 above), the presence of lines across the application way signifies the presence of gates. The applicant agrees that there is evidence from early Ordnance Survey large scale maps that there may have been two gates across the application way, one shortly south of C, and one shortly north of D. The latter gate is discussed elsewhere (para.C.12 above). The former gate may be a consequence of the unenclosed waste in the vicinity of Jouldings Ford and in Jouldings Lane (the waste in Jouldings Lane was inclosed under the Swallowfield Inclosure Award 1865): a gate would have been necessary to prevent grazing livestock passing south towards Bramshill Common.

O.3. Para.108: There is no basis for the inference that the footbridge shown on the first edition six inch map was temporary. Footbridges are commonplace at fords, provided to enable pedestrians to cross where equestrians and horse-drawn vehicles might use the ford. The footbridges were usually the responsibility of the parish. On the Ordnance Survey County Series first edition 1:2,500 map, footbridges can be found (downstream of Jouldings Ford) at Thatcher's Ford (still present today), and at Great Ford (now replaced by a road bridge). The footbridge at Jouldings Ford tends to show that the crossing was regarded as publicly maintainable highway, for who else would erect such a bridge, around 50m long, over the river? The most likely explanation for the disappearance of the bridge, apparently by the end of the nineteenth century (it does not appear on the second edition map published around the turn of the century) coincides with the explanation for the absence of the application way from the handover map in 1929 — the highway authority purported not to be responsible for their maintenance, perhaps on account of the high cost of maintaining both a major footbridge and a ford through the river, where fords and footbridges existed not far away, up- and downstream, and were equally costly to maintain.

O.4. Para.109: No evidence has been shown that there were no public rights across Bramshill common.

P. OS Map Twenty five inch 1896 and 1899

P.1. Para.111: The applicant acknowledges that the first editions of the Ordnance Survey County Series large scale maps show the presence of two gates across the application way — see para.O.2 above. No third gate is shown on the 1896–99 map: the line across the application way about two-fifths of the distance between C and D is used to identify the label for the area of the small part of the wood (parcel no.23) on the west side of the application way which appears on sheet Berkshire XLVI/9.

Q. OS one inch 1945 (New Popular Edition)

Q.1. Para.117: The applicant is grateful for the correction, and agrees that the Ordnance Survey New Popular Edition one inch map shows the application way as 'Under 14ft of Metalling, Bad'.

R. Bramshill Estate Sale 1952

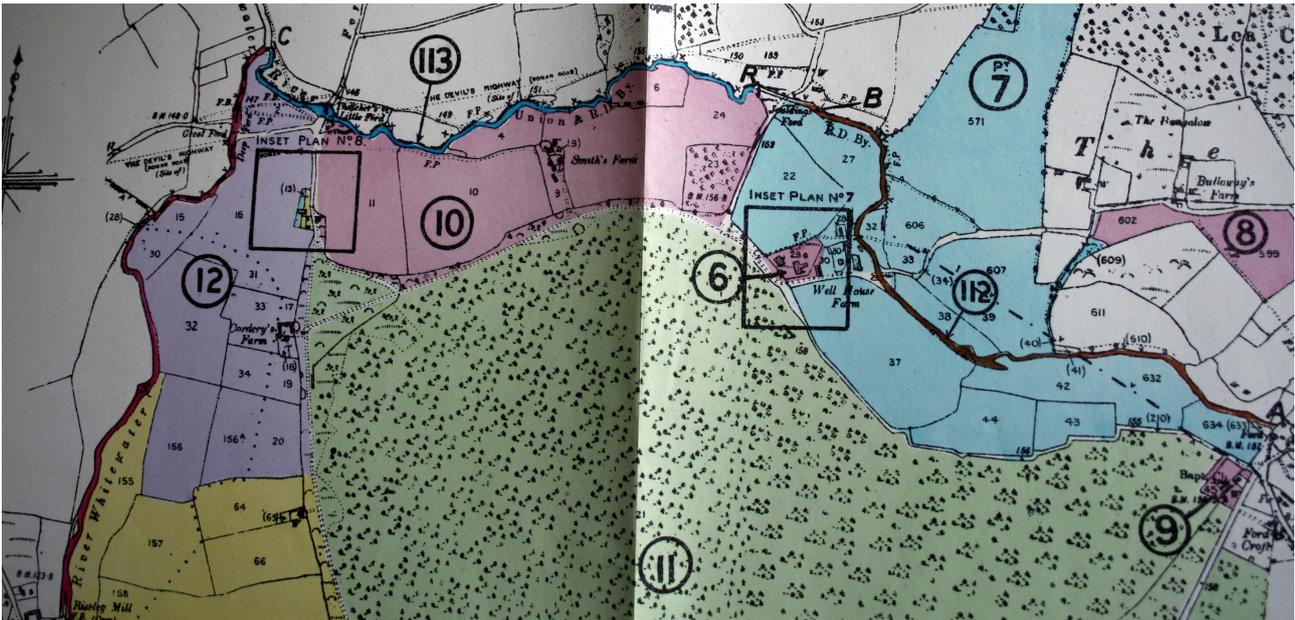


Illustration 7: Bramshill estate sale plan 1952

R.1. Para.118: The objector suggests that, 'A private route running between plots would be unlikely to be demarcated, with the normal presumption being that adjacent owners owned to the middle of the road.' On the contrary, one would expect a private road, or a private right of way over the road, to be sold to those who needed to use it. This is apparent from the Bramshill estate sale plan: the drives to Smith's Farm and Cordery's Farm are offered for sale along with the waste which lies between the nearest public road and the boundary of the respective farm.

R.2. But public roads are uncoloured and not offered for sale, in line with the convention that public roads are not part of the holding. Most of the public roads excepted from the sale are uncontroversial: Ford Lane, Well House Lane, the road through Great Ford (now bridged), the road connecting Ford Lane and Well House Lane (shown on the handover plan but no longer maintained as a public road), the road through Well House Farm (continuing through the ford and along Forges Lane to New Mill Road), and the application way. As previously discussed (para.J.2 above), the applicant considers that the road to Well House Farm formerly continued as a public road through the ford, on the alignment shown on the estate sale plan: this road is excluded from lot 7 notwithstanding that it is wholly surrounded by it.

R.3. It is clear that the Bramshill estate did not consider that the application way (between B and D) was a private road which it was at liberty to sell. The whole of the Bramshill estate was being disposed of. The estate could have had no purpose in retaining title to the application way, yet disposing of all other land which was contiguous or served by it. And if it was retained, why does the title to the application way remain unregistered to this day (save for the possessory title registered to part of the waste at the ford)?

R.4. The application way was not offered for sale as part of lot 7, nor lot 10²², the two lots adjacent to the application way, and the application way remains outside the

²² The slight pink bleed into the application way from lot 10 appears to be draughting carelessness, rather than intention.

registered title of these lands. Nor was any assurance offered as to private rights in the sale documentation: clause 10 of the stipulations as to sale sets out a number of private rights of way which are to be granted with the sale of various lots, but no reference is made to any private right granted over the application way (see extract accompanying this statement). Moreover, while the estate offered for sale waste alongside Well House Lane as part of lots 7 and 10, it did not offer for sale any part of the application way, or the waste adjacent to the ford.

R.5. The absence of any reference to the application way in the sale documentation suggests that the estate did not consider the application way to be part of the estate, and did consider it to be a highway, in common with the other ways similarly uncoloured in the sale documentation (all but one of which are demonstrably public roads). If the estate's solicitors had been questioned on title to the application way, they might well have offered the estate's opinion that the estate had title to the soil of the application way *ad medium filum* (and as the estate owned the land on both sides, it therefore owned the soil of the whole way), and that the title would accordingly pass to the purchasers of lots 7 and 10, *ad medium filum*: this is broadly the intention of clause 2 of the stipulations. But, as convention demanded, no express provision would have been made in the conveyances on completion of the sales.

R.6. But if the estate considered the application way to be private, it would have offered the purchasers of lots 7 and 10 an express right of way over it (perhaps together with a conveyance of the soil of the way, either in severalty, or to one or the other purchaser). There was no reason for the estate, and the purchasers, to rely on the uncertain application of the presumption of *ad medium filum* to a private road: if the estate owned the road in its entirety (as it surely did²³), it would have wished to dispose of it expressly, together with the creation of such private rights as were necessary. So far as we know, the estate did no such thing: no title to the application way has ever been registered (including by the objector or his predecessor in title), and no evidence has been produced of any grant of a private right of way over the application way.

R.7. There is no evidence of a private right of way held over the application way attached to any of the registered titles abutting it, and none has been registered. Nor is any such right attached to Bramshill Common, which is directly served by the application way. If, at the time of the sale, the title to the application way fell to the purchasers of lots 7 and 10 *ad medium filum*, neither would have acquired any right to use it (apart from as a public road) save by carefully navigating the way keeping to one side or the other, as the case may be — an absurd proposition. The purchaser of Bramshill Common would have had no right whatsoever (again, apart from as a public road).

R.8. Subsequent to the sale, lot 7 has been subdivided into a number of separate parcels, which include two separate titles abutting the application way. Again, in the absence of any private right, the proprietor of neither title has any right to the use of application way save in respect of the proprietor's right to half of the width of the application way abutting the respective title. It follows that neither proprietor has any right to use the application way in its entirety — except as a member of the public.

23 The applicant accepts that the soil of the land comprised in the application way between C and D has long been part of the Bramshill estate, and is now likely to be comprised in the estates of the various frontagers *ad medium filum*. The surface of the way, however, being a pre-1835 highway, and therefore publicly maintainable, must be vested in the highway authorities, under s.263 of the Highways Act 1980.

R.9. The applicant notes that the objector has not registered title to the application way, nor produced any evidence of a grant of private rights²⁴. The objector's analysis appears to demand the bizarre conclusion that, while the objector and other adjoining proprietors may have acquired title to half of the application way *ad medium filum*, no-one has any right to use the way as a whole (except perhaps the proprietor of title HP468155, to the west of the application way, by carefully navigating the way keeping to the west side).

R.10. The evidence therefore overwhelmingly suggests that, at the time of the offer for sale, the Bramshill estate (the successor to the Cope family) considered the application way to be a public road, and dealt with the application way in the same manner as other public roads across the estate.

R.11. Para.120: The description of Bottom's Farm refers only to the bounds to the north and south. If the vendor's agent had wished to refer to the bounds to the east and west, no doubt the agent would have done so — but no such reference was made, and no inferences can be drawn.

S. Width

S.1. Para.126: The evidence from older maps, including the Ordnance Survey County Series maps through several editions, is that the application way through Jouldings Ford spread out to find the best crossing of the river, and that the land occupied by the highway included extensive highway waste.

T. Bridge

T.1. Para.127: There is no evidence that the footbridge shown on the Ordnance Survey County Series 1:2500 first edition map is private. See para.O.3 above for further discussion.

U. Fences and gates

U.1. Para.128: The applicant does not accept that there is any evidence of relevant fences across the application way. The applicant does accept historical evidence for the existence of two gates in the application way between C and D, and these may be recorded as limitations.

Hugh Craddock for the British Horse Society
30 April 2018

²⁴ A statutory grant of private rights for mechanically propelled vehicles may have been acquired under s.67(5) of the Natural Environment and Rural Communities Act 2006, but only if the application way is indeed a public road.