



WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53, SCHEDULE 14
APPLICATION TO UPGRADE AX1/19 (part) AND AX1/20 (part)
IN THE PARISH OF AXBRIDGE AND AX13/7 IN THE PARISH OF CHEDAR
TO BRIDLEWAYS, RESTRICTED BYWAYS OR BYWAYS OPEN TO ALL
TRAFFIC
820m

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1. Introduction

1.1. On the 08/10/2015 Mrs Venetia Craggs made an application under Schedule 14 and Section 53(5) of the Wildlife & Countryside Act 1981, for an Order to amend the Definitive Map and Statement (DMS) by upgrading parts of footpaths AX1/19 and AX1/20 and the full length of AX13/7 to either a bridleway, restricted byway, or byway open to all traffic (BOAT) as described in paragraph 2 below.

1.2. A public bridleway can be used by the public on foot, bicycle or leading or riding a horse. In addition, on a restricted byway the public can use non-mechanically propelled vehicles (e.g. a horse and cart), and on a Byway Open to All Traffic (BOAT) mechanically propelled vehicles.

1.3. The purpose of the report is to establish what public rights, if any, exist.

2. The Application

2.1. The application is based on documentary evidence and includes Land Registry title documents only.

2.2. In addition, the applicant made SCC aware of the Shipham and Winscombe Inclosure Award, and the Order Decision relating to Winscombe Drove, made 19th February 2013.

2.3. No user evidence was submitted with the application. User evidence submitted during the investigation is discussed at section 8.

3. Description of Route

3.1. The application route is shown coloured blue on Appendix 1. At point A the surface consists of earth and stones, with a metal vehicular gate and pedestrian gate across the route slightly north of point A. The track, wide enough for vehicular access, slopes upwards towards point B. Approximately 300 metres north of point A, the current definitive line of footpath AX1/19 diverges north-east from the made track for about 45 metres over an undefined but accessible route to a metal pedestrian gate. The next circa 40 metres running north east to point B is undefined on the ground and inaccessible due to vegetation. The used route on the ground runs slightly to the west through point D, and would be accessible to vehicles if the gates were open.

3.2. At point D the application route meets definitive bridleway AX29/37 which runs between D and Di (the county boundary). Bridleway AX29/37/10 continues west from point Di in North Somerset to the A38. D to Di does not form part of the application route, but has been referred to in this report as,

together with AX29/37/10 in North Somerset, it forms a continuation of the linear way and a connection to the public vehicular road.

3.3. From B to C a drystone wall, in varying state of repair, defines the parish boundary to the north of the application route. The definitive line of footpath AX1/20 runs adjacent to the wall. From B to Bi there is a varying gap between the drystone wall and the used track on the ground, the latter diverging in a southerly direction by up to 20 metres.

3.4. At Bi a short section of stone wall protrudes south from the northern boundary from which a wooden field gate extends, and then a metal kissing gate, before the stone wall continues south. To the east of point Bi the route is defined on the north and south by drystone walls 8 metres 35 cm (about 27 feet) apart.

3.5. At the point where footpath AX1/14 crosses Callow Drove and continues north as a footpath in North Somerset (i.e. approximately half way between points Bi and Bii) an ancient stone structure (now with a modern gate) provides access through the drystone wall to the north of the application route.

3.6. At point Bii there are three stone gate posts across the route, the layout of which is shown in appendix 2.

3.7. From Bii to C no drystone wall to the south is visible.

3.8. Towards point C the route becomes very steep, with a stile and fence before the exit onto the road. A drystone wall extends south from C.

3.9. Photographs of the claimed route taken on 07/09/2018 are at Appendix 2.

3.10. Vehicular access would be physically possible at least from D to B and tracks on the ground suggest at least some vehicular access occurs. Presumably vehicular access on the used track takes place from B for an uncertain distance east although, at the time of the visit this was blocked by a locked gate. Vehicular access from C in a westerly direction is not possible today as there is a stile and fence across the route. It is doubtful whether 'normal' vehicular traffic would be able to access the route via C even if the fence was removed. This is due to the condition of the surface and, more particularly, the gradient.

3.11. A land registry search was carried out on 26/04/2018 which identified 3 registered owners or joint owners of the application route. Bi – Bii is unregistered. Ten owners or joint owners of adjacent land were identified. The relevant landownership is shown at Appendix 3¹.

¹ The ownership of parcels of land too small to show easily on the plan, or which relate to mines and minerals and therefore not the surface, have been omitted. No relevant comments were received from these landowners.

3.12. The parish boundary between Axbridge and Compton Bishop in the vicinity of the application route has moved about 845 meters west since the majority of the evidence considered in this investigation was created. Point Bi on appendix 1 corresponds with the previous position of the Compton Bishop / Axbridge parish boundary. Bii is the parish boundary between Axbridge and Cheddar. The application route is now wholly within the parishes of Axbridge and Cheddar.

3.13. The case file, including the application, accompanying evidence and consultation responses can be viewed by Members by appointment.

4. Relevant Legislation

4.1. The Wildlife and Countryside Act 1981 specifies in Section 53(2)(b), that the County Council must keep the Definitive Map and Statement under continuous review and must make such modifications as appear to them to be requisite in the light of certain specified events. In this case sections 53(3)(b) and 53(3)(c)(ii) are of particular relevance.

4.2. Section 53(3)(b) requires the Map and Statement to be modified on *“the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path”*.

4.3. 53 (3) (c) (ii) states that the Map and Statement should be modified where the County Council discover evidence which, when considered with all the other available evidence, shows *“that a highway shown on the map and statement as a highway of a particular description ought to be shown as a highway of a different description”*.

4.4. Later in the same Act section 53(5) enables any person to apply to the Authority (Somerset County Council) for an Order to be made modifying the Definitive Map and Statement in respect of a number of ‘events’ including those specified in Section 53(3)(b) and (c) of the Act as quoted above. On receipt of such an application the County Council is under a duty to investigate the status of the route. It was under these provisions that Mrs Craggs made her application.

4.5. The purpose of Section 53 of the Wildlife and Countryside Act 1981 is to allow the DMS to be modified so that it accurately records the rights that already exist. It is not to create or delete the rights themselves but simply to add rights which are found to already exist and to remove those that do not, from the DMS. Practical considerations such as suitability, security, and wishes of landowners or user groups cannot be considered under the legislation.

4.6. Twenty years use by the general public can give rise to the presumption of dedication of a way under Section 31 of the Highways Act 1980. The period of 20 years is measured backwards from the date of

challenge by some means sufficient to bring it home to the public that their right to use the way is being challenged. Section 31 (1) states “where a way over any land, other than a way of such character that use of it by the public could not give rise at Common Law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.

4.7. Section 32 of the Highways Act 1980 states that “a Court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence and shall give weight thereto as the Court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled and the custody in which it has been kept and from which it is produced”.

4.8. The Natural England and Rural Communities (NERC) Act 2006, Section 66 and 67, extinguished rights for mechanically propelled vehicles (MPV’s) over any routes that were recorded on the Definitive Map as footpath, bridleway or restricted byway and over any routes that were not recorded on the Definitive Map or the list of highways maintained at public expense. There are a few exceptions to the general rule outlined above, none of which appear to apply in this case. There is therefore no question of rights for MPV’s existing over the claimed route.

4.9. Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be in the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness evidence). The decision is a quasi-judicial one in which the decision maker must make an objective assessment of the available evidence and then conclude whether or not the relevant tests set out above have been met.

5. Documentary Evidence

5.1. The tables below lists the documentary evidence sources examined as part of this investigation. In some cases it has not been possible to view the original copy of a document and it has instead been necessary to rely entirely on an extract. Where this is the case the words ‘extract only’ follow the title of the document. If it has been necessary to give those documents less weight on account of them only being viewed in part this has been made clear in the description and interpretation of the evidence.

5.2. Throughout discussion of the evidence comparison is frequently made to the way in which other routes in the immediate vicinity of application route 820M have been recorded. Where other rights of way, roads or physical features have been referred to their location has been identified on the relevant appendices.

<p>5.3. Pre-Inclosure Maps</p>
<p>5.3.1. Day and Master's Map, 1782. Appendix number: 4 Source: SHT</p>
<p>5.3.2. Day and Master's shows a route in approximately the position of Winscombe Drove (now a bridleway, AX 21/37 partly in North Somerset) which continues in a south-westerly direction over approximately B to A. That route is shown by parallel broken lines. The key identifies this as 'open roads over commons and downs' (as opposed to inclosed roads, or turnpike roads). No route is shown from the A38 through Di, D, and B to C.</p> <p>5.3.3. Day and Master's key does not state whether the term 'road' is used exclusively for routes which were considered to be public nor can it be assumed that it implies vehicular use.</p> <p>5.3.4. This map suggests there was an unenclosed linear way running on approximately the line of the application route between A and B, and no significant or prominent linear way between B and C at the time of the survey. However, it does not demonstrate that no linear way at all existed between B and C at this time. Given the scale of the map it might be considered that it would be more likely that the routes it shows were considered to be public by the map makers, but this is not certain, and can be given only minimal weight. Ultimately this map is of little help in determining the status of the route between A and B, and none in relation to the rest of the application route.</p>
<p>5.3.5. Map of the manor of Winscombe and Shipham, belonging to the Dean and Chapter of Wells, 1792. South West Heritage Trust (SWHT) reference number: DD/CC/T/10762. Appendix number: 5</p>
<p>5.3.6. Linear ways are mostly shown with solid casing lines. The area between D and C is shown at the edge of the mapped area. Point A falls outside of the mapped area. Coloured tinting along the boundaries corresponds with the different parishes.</p> <p>5.3.7. In what is now North Somerset from the now A38 in an easterly direction to the county boundary a route is shown between parallel broken lines.</p> <p>5.3.8. For the entirety of the route between Di-B-C the northern casing line is formed by a dashed and double dotted line. The southern casing line is formed by a broken line from point Di to about 290 metres west of Bii</p>

where parallel broken lines turn slightly to the south away from the application route for a very short distance. The only break in this dashed southern casing line, is where there is a short section of solid line which turns south at either end and appears to be indicating the northern edge of an enclosed area.

5.3.9. From B to approximately Bii the coloured tinting which corresponds with boundaries of the different parishes omits the application route leaving it uncoloured between the tinted lines.

5.3.10. From Bii to C there is no southern casing line and therefore no linear way shown, except for a short section where there is a solid line, turned sharply south at either end, again probably indicating the northern edge of an enclosed area. There is no uncoloured gap between the brown (Cheddar) and green (Winscombe) tinting, even where the southern casing line is solid. There is no linear way shown in the position of what is now Shipham Road.

5.3.11. A symbol consisting of a dot within a circle with a cross extending from it appears on the application route approximately 425 metres west of point C. Although this is similar to the modern symbol used on OS maps for a church with a spire, the meaning on this map is unknown.

5.3.12. At about point B parallel dashed lines extend south-west (towards point A) for a very short distance to the edge of the mapped area.

5.3.13. The map does not explicitly differentiate between public or private status, or the type of traffic which might have used the routes depicted. However, it does suggest a physical feature existed from the A38 to point D and along the application route from point D to B, from B to approximately 290 metres west of Bii, possibly running south from this point for an unspecified distance and also running for an unknown distance south-west from point B towards point A. It also suggests this route either stopped to the west of Bii or changed character at this point, as for the most part no southern casing line is shown and the route is no longer left uncoloured between the coloured tinting between Bii and C. Even where shown, the application route is depicted differently to most of the linear ways shown on this map.

5.3.14. This map is good evidence for the existence of the features it shows, but does not help determine what public rights, if any, existed over the application route.

Description and interpretation of evidence

5.3.15. The pre-inclosure maps are good evidence that a linear way of some description existed prior to inclosure over A – B, and from the A38 through Di-D-B-to a point approximately 290 metres west of Bii.

5.3.16. The maps suggest that any route between approximately Bii and C was either less important or prominent than Di – Bii, or that no route at all existed between these points. The 1792 map might imply the route was in some way different from the rest of the linear ways shown on it, but whether this was a physical difference, an indication of different rights, or even just because the route was at the very edge of the mapped area is unknown.

5.3.17. Neither map indicates status, and neither shows a definite through route from the A38 through Di-D-B-C. However, the routes that are shown must have physically existed and been in use by someone prior to inclosure.

5.4. Inclosure Records:

Explanation of the type of evidence

5.4.1. Inclosure Awards are legal documents that can still be valid today. They usually consist of a written description of an area with a map attached. Awards resulted from a need by the landowners to gather together their lands and fence in their common lands. A local Act of Parliament was often needed to authorise the procedure and an Inclosure Commissioner was appointed as a result to oversee the compilation of the award and map. Land was divided into individual plots and fields and redistributed amongst the existing owners. Inclosure Awards provide statutory evidence of the existence of certain types of highway. They enabled public rights of way to be created, confirmed and endorsed and sometimes stopped up as necessary. Inclosure Commissioners surveyed land that was to be enclosed and had the power to 'set out and appoint public and private roads and paths' that were often situated over existing ancient ways.

5.4.2. **Shipham and Winscombe Inclosure Act, 1797**
Shipham and Winscombe Inclosure Award 1799.
South West Heritage Trust (SWHT) reference number: Q1RDE/13.
Appendix number: 6

Description and interpretation of evidence

5.4.3. The relevant act (1797) authorised the commissioners to set out public carriage roads of the breadth of at least 40 feet to be kept in repair in the same manner as other public roads in the parishes of Shipham and Winscombe. It further empowered the commissioners to set out "public bridle roads and Footways, private Roads and Ways, and also such Banks, Ditches, Drains, Watercourses, Bridges, Tunnels, Stiles, and other Conveniences" to be maintained as the commissioners directed. Any pre-existing road or way not set out in the award was to be deemed part of the commons and waste, and the commissioners had the power to stop-up roads and paths they deemed unnecessary. There was no additional requirement to stop-up roads or ways such as gaining the signatures of local justices. After the public and

private roads and ways had been set out and made it was not to be lawful for any person to use any other road or way, either public or private, over the said commons and waste lands. It therefore seems that any rights which existed prior to inclosure which were not set out in the award were legally stopped-up.

5.4.4. The plan which accompanies the Award shows a linear way running from the now A38 east to point D (approximately on the route of bridleway AX29/37/10 in North Somerset and AX29/37 in Somerset) and then from D to point C. The plan is labelled 'E' at the junction with the A38, 'K' at point D, 'L' at Bii, and 'G' at point C. E to K forms part of Lower Callow Road (now known as Winscombe Drove). Between D and Bii it is labelled 'Upper Callow Road'. Between Bii and C the route is shown slightly narrower and labelled 'Lion's Den Way'.

5.4.5. Between Bi and Bii, at a point labelled 'V' on the inclosure plan, a symbol resembling a stile is shown in the northern casing line of Upper Callow Drove at the point where footpath AX1/14 now crosses Callow Drove and continues north into North Somerset as a footpath. A feature corresponding with this structure can be seen on the ground today (see photographs at appendix 2) suggesting the northern boundary of Upper Callow Road as shown on the inclosure map, the drystone wall which runs along the parish boundary today, and the northern casing line of the application route are the same feature.

5.4.6. From point D to a point slightly west of Bi the route shown on the Inclosure Award map appears to be slightly to the north of the route used on the ground today.

5.4.7. Point A is outside of the area covered by the plan, but no linear way is shown extending from point B in that direction.

5.4.8. The Commissioner therefore had the power to set out public carriage roads 40 feet wide, as well as private ways and public footpaths and bridleways of no specified width. Pre-existing ways not set out in the award were effectively stopped-up. The application route between D-B-C was clearly depicted on the map between the letters K, L and G as two continuous routes called Upper Callow Road and Lion's Den Way. There is nothing to suggest a linear way from A to B, although almost the whole of any such route would have fallen outside of the mapped area.

5.4.9. The award lists Lower Callow Road, Upper Callow Road and Lion's Den Way under 'Private Roads or Ways in Winscombe'. All three are called 'private road' in their respective descriptions. The roads were to be delineated by ditches, walls or other fences, but it was not specified which type of boundary was to be used where.

5.4.10. The widths given in the award are as follows;

Name	Width
Lower Callow Road	24 feet

Upper Callow Road	24 feet
Lion's Den Way	10 feet

5.4.11. The award goes on to say that the private roads are for the benefit of the owners and occupiers of the allotments *“for the use and benefit of all and every the owners tenants and occupiers of the several and respective Divisions and allotments pieces and parcels of ground hereinafter mentioned to be by us set out allotted inclosed and awarded to them respectively with full liberty power and authority for them and **all and every other person and persons whomsoever** having any occasion whatsoever to go travel pass and repass in through upon and over the said Roads and ways and every or any or either of them on foot or on horseback or with horses cattle carts and other carriages loaded or unloaded at their and at their and every of their free wills and pleasure or otherwise howsoever as and when and as often as they or any or either of them shall think fit and proper”* (my emphasis). Maintenance of the private roads in Winscombe was to be at the expense of the owners and occupiers of the allotments set out in Winscombe.

5.4.12. Therefore, while called a private road, the description of those who were entitled to use the route would seem to encompass the general public. In such circumstances, it would normally be concluded that the Award set out the route from the A38 through Di-D-B-C as a public vehicular road. However, in this case there is a question mark over whether it was within the Commissioners powers to do so.

5.4.13. Another route (Barton Drove) set out in the same award as a private road, with the same stipulations for users, was considered in the High Court². The conclusion of Kay J. was that even if the commissioners had intended to award public vehicular rights over the route, it was only open for them to do so according to the terms of the Act. As mentioned above, the Act in this case requires that public carriage roads be set out to a width of at least 40 feet. Like D-B-C, Barton Drove was set out at a narrower width than this and as such it was concluded by the courts that the Commissioner had been acting ultra vires.

5.4.14. In Kay J.'s view:

“In this case I am in no doubt that the commissioners did not have power under the Act of 1797 to create a public highway otherwise than in accordance with the precise powers given under the statute. It was not open to them to circumvent the conditions necessary before a road would become a public highway by purporting to create a private way but to make it open to the public at large. Thus irrespective of the precise meaning of the user provision in the award, the inclosure award cannot have created a public highway. Mr. Hobson is right, in my judgement, to concede that the commissioners did not have

² Buckland and Capel v. S.o.S for the Environment, Transport and the Regions [2000] 3 All ER 205

the power to set out Barton Road as a public carriageway.

Equally, I am satisfied that Mr. Hobson is right when he submits that this lack of power does not prevent a way which is created pursuant to an award becoming a public highway. Where such a way is accepted by the adjoining landowners as a public highway and used by the public at large as a public right of way then notwithstanding the original lack of power to create a public highway in the purported manner, it may as a result of the user acquire the status of a public highway. However, to reach such a conclusion it is necessary to first acknowledge that the award of the commissioners did not in itself create a public highway and that the purported creation is ultra vires. Then, and only then, is it possible to look and see whether the evidence of user is sufficient to give rise to the presumption.”³

5.4.15. On this basis the order to record Barton Drove as a BOAT was quashed. However, it was not necessary for Kay. J. to decide what status should be afforded to the route on the basis of the evidence when so interpreted. In other words although he concluded that the Award did not create public vehicular rights, he did not consider whether it creates lower public rights, private rights only or no rights at all.

5.4.16. The same route was again considered by the Secretary of State in 2008 when the applicant appealed against North Somerset Council’s decision not to make an order in relation to a further application (Appendix 29). The Inspector, after referring to the judgement of Kay J. stated;

“It seems to me to follow from that that not only did the Award not create a public highway over Barton Drove, but that the section of the Award which, in Kay J’s judgement, purported to do so, was void, and created no rights of way of any kind.”⁴

and dismissed the appeal (see Appendix 29).

5.4.17. While the conclusions of the Secretary of State are not binding on the County Council, they clearly carry a great deal of weight and, in this case, are very persuasive.

5.4.18. Therefore, as Barton Drove was described in the same Inclosure Award and in the same way as application route 820M between D-B-C the same conclusions are reached. That is that no public rights of way were set

³ Kay, J. *Buckland v. Environment Sec.* (Q.B.D) [2000] in *The Weekly Law Report*, 27 October 2000, page 1960.

⁴ Millman, P. 5 February 2008, *Wildlife and Countryside Act 1981 Report into an appeal by Ms J Roseff of Woodsprings Bridleway Association against the decision of North Somerset District Council not to make an order under section 53(2) in respect of a claimed public Byway Open To All Traffic at Barton Drove, Winscombe.* Para.23, p5. Reference: NATROW/D0121/529A/06/32. **Appendix 29.**

out from the A38 through Di-D-B to C by the Inclosure Award, even if the Commissioner had intended to grant them. This does not preclude rights having come into existence at a later date.

5.4.19. Any private rights created by the Award (which would not have been ultra vires) would appear to have been for “*the owners tenants and occupiers of the several and respective Divisions and allotments pieces and parcels of ground hereinafter mentioned to be by us set out allotted inclosed and awarded to them respectively*”. Therefore, the private rights to use the application route were limited to holders of land included in the Shipham and Winscombe award and did not extend to those holding land in Compton Bishop (as then was), Axbridge or Cheddar.

5.4.20. **Cheddar Inclosure, Act 1795, Award 1801.**
South West Heritage Trust (SWHT) reference number: QRDE/38.
Appendix number: 7

Description and interpretation of evidence

5.4.21. The relevant Act (1795) authorised the commissioners to set out public Carriage Roads of the breadth of at least 40 feet which were to be kept in repair in the same manner as other public roads in the parish of Cheddar. It further empowered the commissioners to set out “public Bridle Roads and Foot Ways, and private Roads and Ways, and also such Banks, Ditches, Drains, Watercourses, Bridges, Stiles, and other Conveniences” to be maintained as the commissioners directed. Any pre-existing road or way not set out in the award was to be deemed part of the commons and waste, and it would no longer be lawful to use them.

5.4.22. The plan accompanying the Award shows a linear way from about point C for approximately 300 metres to the west. This section is shown by a broken line to the south of the boundary which forms the northern extent of the mapped area. The broken line runs between the letters ‘a’ and ‘R’ and is labelled ‘Callow Way’. No other feature resembling a linear way which might correspond with the application route is shown within the area covered by the plan.

5.4.23. It is difficult to be certain because of the level of accuracy of the inclosure maps, but it seems reasonable to assume that the southern boundary of the Shipham and Winscombe Inclosure Award (discussed at 5.4.2 – 5.4.19) and the northern boundary of the Cheddar Inclosure Award both represent the same boundary separating the two areas being enclosed. It is acknowledged that this does not represent the current parish boundary, but given the features shown on each map and the extreme unlikelihood that the award areas would have overlapped, this is the most plausible conclusion.

5.4.24. Based upon this assumption, ‘Callow Way’ was in fact to the immediate south of the boundary and ‘Lion’s Den Way’ (discussed at 5.4.4 – 5.4.10) on the immediate north of the same boundary. The two routes were therefore conjoined, and ran parallel with a boundary feature down the middle,

rather than forming part of the same route at the time of inclosure. The application route is considered to follow Lion's Den Way rather than Callow Way. Nevertheless the way in which the Award refers to Callow Way sheds some light on the Commissioners views in relation to the status of Lion's Den Way.

5.4.25. The Award itself sets out Callow Way as a private carriage road and driftway between the letters 'R' and 'a', 20 feet wide, for the use of the owners and occupiers of the allotments to which it leads (whether newly set out or ancient inclosures). Repair was to be by the owners and occupiers of allotments on Cheddar Hill.

5.4.26. The award also sets out public and private footpaths, none of which correspond with the application route.

5.4.27. The Cheddar Inclosure Award is dated two years later than the Shipham and Winscombe award. Whilst the routes detailed in the Shipham and Winscombe award may not have been fully made up, it seems unlikely that the Cheddar commissioner would have been unaware of the Shipham and Winscombe award. The fact that the Commissioner felt it was necessary to set out Callow Way as a means of private access to several allotments suggests they did not believe public vehicular rights existed over that part of Lion's Den Way which abuts Callow Way. If they had, those rights would have provided access to the same allotments which Callow Way served, and it would not have been necessary for land to have been taken up by a private road in this location.

5.4.28. However, the weight that can be given to this as evidence that the application route did not have the reputation of a public vehicular road by 1801 is limited because it is not possible to be certain that the Cheddar commissioners were aware of Lion's Den Way and the status assigned to it (or intended to be assigned to it) when they were determining how access to the allotments they were setting out was to be achieved. Also, as Lion's Den Way was set out at 10 feet wide and Callow Way was set out at 20 feet wide it is also possible that Lion's Den Way was considered to be public, but not sufficiently wide for the use of the allotment holders in Cheddar.

5.4.29. **Axbridge Inclosure Award, 1801.**
South West Heritage Trust (SWHT) reference number: Q1RDE/67.
Appendix number: 8

Description and interpretation of evidence

5.4.30. The map shows Callow Drove from west of Bi to slightly east of Bii, a length of about 965 metres. The route is labelled 'Upper Callow Road' and where it is adjacent to plots of land to be enclosed is shown with solid casing lines. The section to the west of the enclosed land is shown with a solid casing line to the north and broken casing line to the south. The short section to the east of the enclosed land is shown with two broken casing lines.

5.4.31. The award states that no public roads were thought necessary.

Upper Callow Road (over which part of the application route runs) is not set out in this award, but two routes which are set out in this award connect with its southern boundary. The first is 'Middle Callow Road' which is set out as a private road, and then described as being for the use of a limited group of people. The second route connected to the application route is 'Callow Path'⁵ which is called a private footpath, but later in the award is called a public footpath.

5.4.32. Vehicular access or access on horseback to 20 small allotments (30 to 49) set out adjacent to the application route could only have been via other allotments or via the application route⁶. As the Axbridge Award does not create any public or private vehicular or equestrian rights over the application route, the commissioners must have believed that the adjacent allotment holders had the right to use the application route by virtue of the Shipham and Winscombe Award, or pre-existing rights which had not been stopped-up. As the Shipham and Winscombe Award does not set out private rights of access for allotments in neighbouring parishes, the most likely explanation is that the Axbridge Commissioner believed the application route to carry public rights.

5.4.33. Therefore, whilst implied rather than direct, the Axbridge Award does weigh in favour of public vehicular or equestrian rights existing over the application route between D and C (or part thereof) in 1801. However, the Axbridge Commissioner may have been relying on the terms of the Shipham and Winscombe Award rather than the existence of an actual route in use on the ground. It is possible that only two years after the Shipham and Winscombe Award some of the routes it sought to establish may not have been fully made up.

5.5. Deeds

5.5.1. Map, Papers Axbridge Estate, c.1811. SWHT reference number: DD\OB/27 Appendix number: 9

Description and interpretation of evidence

5.5.2. This hand drawn sketch map is labelled on the reverse 'Papers Axbridge Estate'. It would appear to relate to the sale of the estate with the land to be sold being coloured red. The application route is not included in the land for sale. There is no key relating to roads but a route (not the application route) which is shown as a single line in contrast to the other linear ways depicted is labelled 'Footpath to Shipham'.

5.5.3. The date of this map is uncertain. As it refers to the Axbridge Inclosure

⁵ Callow Path runs north-east from Middle Callow Road through allotments 29 to 35. It connects with the application route between Bi and Bii approximately 130 metres east of the junction between the application route and Middle Callow Road. Callow Path, and Middle Callow Road south of its junction with Callow Path now form footpath AX1/14.

⁶ Callow Path would have provided access to at least allotments 29 – 36, but only on foot as it was set out as a footpath.

it must date from 1801 or later. The SWHT refers to a map of circa 1811 forming part of this bundle of documents, but it is unclear whether it is this map or the one discussed at 5.5.7, below, which is referred to. The annotation relating to the fencing or making up or some other work to be done to the route of 'Lower Callow Road' is suggestive of a date relatively soon after inclosure.

5.5.4. The application route is shown from approximately 635 metres east of point B tapering out to the east of Bii. The southern casing line of the application route becomes the northern casing line of a linear way corresponding with the position of Callow Way as set out in the Cheddar Inclosure Award. The rest of the application route falls outside of the mapped area. Where shown, the application route is uncoloured, with one solid and one dotted casing line (alternating between north and south) with only a short section shown with a solid casing line on both sides. It is a convention on many maps for solid barriers such as fences and walls to be shown as solid lines, with dashed lines suggesting a change in character/surface but no physical boundary. However, it is unknown if this map followed this particular convention and it would therefore be unsafe to rely on this detail. The application route is labelled at the western extent of the map "Upper Callow road set out by C[omm?] of Axbridge".

5.5.5. A similar linear way is shown in the approximate position of footpath AX 1/14 labelled "L[ower?] Callow road to axbridge down [the] Coombe. 25 feet wide which Mr Payne must [...] at his own expense hence [...] [forth / fence?]"

5.5.6. Although the plan is a sketch, and the application route is at the northern extent of the mapped area, it does appear to have been drawn with some attention to detail, such as the alternating solid and broken casing lines. On many plans of a similar date this would indicate fenced or unfenced sections. If little care was being taken then this detail would be unlikely to be shown. Therefore, whilst the plan does have to be treated with some caution, the way in which features are depicted is more likely to be an attempt at accurate depiction rather than the result of careless cartography.

5.5.7. Plan titled "Plan of Axbridge Hill Estate – Land in Fee - bought by G. C. of axbridge commissioners and Lord Bath" Accompanying a release of 1813 from George Cumberland Esq. and his Trustree to Mr William Dovell ". Referred to as the '1801 – 1811 plan' in this report.

SWHT reference number: DD\OB/27

Appendix number: 10

5.5.8. The deed itself was of no assistance. The map accompanies a document of 1813, but is annotated with details of money spent in 1811, and refers to the Axbridge Inclosure Award. The title also suggests it may have been produced at or shortly after inclosure. It

therefore seems likely this document was produced between 1801 and 1811, at least two years after the application route between B and C was set out in the Shipham and Winscombe Inclosure Award.

5.5.9. The same area of land is tinted red / pink as on the c.1811 plan discussed at 5.5.1 and the overall mapped area is only slightly larger than the c.1811 plan and includes Shipham Road and ways slightly further south.

5.5.10. The application route, a route corresponding for the most part with AX1/14 and a route in about the position of the southern end of footpath AX1/10 are shown tinted green. The north end of footpath AX 1/14 is grey. Shipham Road and the Axbride / Cheddar Road appear to be a shade of yellow. There is no key identifying the meaning of the different colours used for the linear ways.

5.5.11. The application route is shown as a continuous through route between approximately Bi and C tinted green with either no observable casing line or faint, solid casing lines. On the north side of the application route there is a hand pointing west and the route is labelled "To Bristol road and Nailsea 10 m.". To the south it is labelled "road of Commissiona[...]"⁷. No route is shown in the position of Callow Way⁷.

5.5.12. Under the heading 'List of Pieces' on the left of the map is the note "all the dark line my fences – the others belong to L Bath and the other holdings" and "my mortar + stone wall – 15 B[... ..]". The only relevant section of darker line forms the southern boundary of the application route for a short distance west of point Bii. The mortar and stone wall referred to has not been identified.

5.5.13. Although some detail of money spent on fences, gates and making up of at least one road are mentioned, none of these notes appear to be relevant to the application route. Some of these notes appear to be later additions than the original map as the ink and possibly the handwriting are different.

Interpretation of the evidence

5.5.14. None of the plots for which details are given include any part of the application route. Both maps are sketches, and neither has a key distinguishing between public and private ways or different types of public way. Both maps appear to be associated with the sale and management of land, not with recording public rights.

5.5.15. Although the date of both plans is uncertain, neither can be earlier than 1801 and as such they are at least 2 years later than the Shipham and Winscombe Inclosure Award. The fact that the 1801-11

⁷ A route extending west from point C set out in the Cheddar Inclosure Award to the immediate south of the application route.

map shows the application route from C in a westerly direction is good evidence that the route was in physical existence at the time the map was made.

5.5.16. The circa 1811 map suggests at least part of the application route was in evidence, but may only have been fenced on one side, and may not have extended as far east as C, although Callow Way is shown. If this map is the earlier of the two maps this is simply explained by the application route not having been fully made up yet. If this is the later map, it suggests the route was already becoming difficult to discern on the ground, which would weigh against the route having come into use by the public with vehicles in the years following inclosure.

5.5.17. The label 'to Bristol road and Nailsea' on the 1801 – 1811 plan might be considered more likely on a public route than a private one as it implies the route formed part of a way to Bristol. It is possible that this label was included to assist with orientation, or to indicate that the way to Bristol could be reached via the (private) application route, but this explanation seems less likely.

5.5.18. Overall, the 1801 – 1811 map is strongly in favour of the application route, as far as it is shown, coming into physical existence within 12 years of inclosure, and is further suggestive of public rights because of the direction label. The c.1811 map might be evidence that the way quickly fell out of use, or that it was never completed, but without knowing whether it is the earlier or later of the two maps any conclusion must be treated with some caution. As evidence both maps are slightly weakened because they are sketches, they were not produced to show public rights of way and the date they were produced is uncertain. The weight that can be given to the 1801 – 811 plan is therefore a little reduced, but is ultimately in favour of public rights, probably higher than as a footpath.

5.5.19. Both these documents were deposited with the predecessor of the South West Heritage Trust in 1956, before which they were held by a firm of solicitors and were therefore unlikely to have been publicly accessible. The relevant date for the former Axbridge Rural District Council section of the DMS is 1956. Whilst it is not impossible, it seems unlikely that these maps would have been considered during the DMS preparation process, and they are therefore considered to constitute new evidence in relation to this route.

5.6. Greenwood's Map 1822. Appendix: 11

Interpretation of the evidence

5.6.1. The approximate line of the application route between the now A38 through Di, D, B and C is shown as a single dashed or dotted line, which

according to the key represents a parish or township boundary, not a linear way. No feature is shown on this map which corresponds with the application route between A and B. Whilst this does suggest that Callow Drove was not a significant route in 1822, it does not preclude the existence of public rights over it, and does not help determine what those rights were (if any).

5.7. Deposited Plans

Explanation of the type of evidence

5.7.1. Railways, canals and turnpike roads all required an Act of Parliament to authorise construction. Detailed plans had to be submitted that showed the effect on the land, highways and private accesses crossed by the proposed routes. Plans were accompanied by a Book of Reference, which itemised properties (fields, houses, roads etc) on the line of the utility and identified owners and occupiers. Where there is a reference to a highway or right of way these documents can generally be regarded as good supporting evidence of its status at that date.

5.7.2. **Plan of a new and direct Turnpike Road from Chaple's Corner at Pedwell in the Parish of Ashcott through Shapwick and other places into the Bristol Turnpike at Rowberrow in the County of Somerset, 1826. SWHT reference: Q\Rup/87.
Appendix number: 12**

Description and interpretation of evidence

5.7.3. The plan shows the route of the turnpike road in the position of Shipham Road coloured buff. Other linear ways are shown uncoloured where they join the turnpike. The east end of Winscombe Drove is shown as an uncoloured linear way between solid black casing lines and labelled 'to Banwell'. A single black line is shown in the position of Callow Drove, probably representing the parish boundary, although unlabelled. Neither route is numbered and none of the numbered plots of land are near enough to the application route to be of assistance. This would suggest that in 1826 at least the eastern end of Callow Drove was a less significant physical feature or a less important way than Winscombe Drove. However, it does not provide direct evidence of the status of the route and is certainly no evidence against footpath or bridleway rights.

5.8. Tithe Records:

Explanation of the type of evidence

5.8.1. Tithe maps and the written document which accompanied them, (the apportionment) were produced between 1837 and the early 1850's in response to the Tithe Commutation Act 1836, to show which landowner owned which pieces of land and as a result how much they owed in monetary terms. The tax replaced the previous 'payment in kind' system where one

tenth of the produce of the land was given over to the Church.

5.8.2. A map was produced by the Tithe Commissioners which showed parcels of land with unique reference numbers, and these were referred to in the apportionment document, which contained details of the land including its ownership, occupation and use.

5.8.3. Public roads which generated no titheable produce and were not given a tithe number. Some private roads, due to use could be equally not liable to a tithe. However, public and private roads could be subject to a tithe, if for instance, they produced a crop – grazing or hay cut from the verges.

5.8.4. The Map and Apportionment must be considered together. Roads are often listed at the end of the apportionment; there is also sometimes a separate list for private roads.

5.8.5. Tithe maps provide good topographical evidence that a route physically existed and can be used to interpret other contemporary documents but were not prepared for the purpose of distinguishing between public and private rights and so tend to be of limited weight.

5.8.6. **Compton Bishop Tithe Map and Apportionment, 1839.**
SWHT reference number: D\DRt/M/68 and D\DRt/A/68. Appendix number: 13

Description and interpretation of evidence

5.8.7. No feature corresponding with the application route is shown between point A and B. Only very short sections of a linear way relevant to the application route are depicted corresponding with the southern end of Winscombe Drove slightly north-west of point B and at the parish boundary between Compton Bishop and Axbridge.

5.8.8. The plot through which the application route runs is numbered 576. The apportionment identifies 576 as;

Landowners	Waste Land
Name and description of lands and premises	The hill
State of cultivation	Pasture

There are no remarks recorded.

5.8.9. It is unknown whether the application route between D, B and C was not recorded as a physical feature on this map because it was considered to fall into Winscombe Parish, or because it was not thought relevant, or wasn't a well-defined feature on the ground at the time.

5.8.10. No route is shown between A and B, but if the existence of a right of way did not affect the productivity of the land and was not fenced off from the surrounding plots then it was of no relevance to the tithe rate and may not have been recorded. However, a well defined physical feature like a fenced and metalled road (whether public or private) would be expected to be

shown on this map and this therefore suggests no such feature ran between A and B at this time.

5.8.11. Axbridge Tithe Map and Apportionment, 1839.

SWHT reference number: D\D\Rt\M/146 and D\D\Rt/A/146. Appendix number: 14

5.8.12. The application route is shown where it falls within the parish of Axbridge (between Bi and Bii) unnumbered, and coloured buff between solid casing lines. There is a transvers solid line across the application route at Bi and Bii, and also adjacent to the allotment numbered 279.

5.8.13. Cheddar Tithe Map and Apportionment, 1839.

SWHT reference number: D\D\Rt\M/245 and D\D\Rt/A/245. Appendix number: 15

5.8.14. Shipham Road is shown coloured buff between solid casing lines. A dotted line adjacent to the northern field boundary of 1298 defines a linear way, with dotted transverse lines at either end. This route corresponds with the eastern part of Callow Way as set out in the Cheddar Inclosure Award, which is not considered to correspond with the application route, but to run to its immediate south (see 5.4.22 – 5.4.25). Even if this section were considered to correspond with the application route, it would suggest an unfenced linear feature of a different character to the public vehicular road it connects to (Shipham Road) which terminated only a short distance west of point C.

5.8.15. The apportionment records 1298 as being 'On Cheddar Hill' and the state of cultivation as 'Sheepsleight'. However, as the linear way indicated through 1298 on the tithe map is not considered to form part of the application route this information is of no weight in this investigation.

5.8.16. Copy of Winscombe Tithe Map, 1843.

SWHT reference number: DD/CC/10761.

Appendix number: 16

5.8.17. Linear ways are uncoloured between solid casing lines. The edge of the mapped area covers the application route between D, B and C. A linear way is shown only between Bi and Bii (along the Axbridge / Winscombe parish boundary), but not at the Compton Bishop / Winscombe or Cheddar / Winscombe boundary.

5.8.18. From the western end of Winscombe Drove (about point D) to the now A38 no linear way is defined. Instead, this area is covered by a small apportionment numbered 705; it is described as 'Waste Land' in the apportionment. Winscombe Drove is clearly shown terminating at the eastern edge of this apportionment and not as continuing to the now A38, or south the county boundary.

5.8.19. The section of the application route which is defined is shown unnumbered and consists of a wider section to the west separated by a solid transverse line from a narrower section to the east.

Interpretation of the evidence

5.8.20. Taken together the four relevant tithe maps are consistent in showing a defined (and therefore presumably enclosed) linear way on the application route within the boundaries of what was then the parish of Axbridge (that is, between Bi and Bii), but not between A and B, Di-D-B and Bi or from Bii to C. It is particularly noted that the Winscombe map shows a defined linear way between Bi and Bii but no continuation east or west.

5.8.21. Bi-Bii may have been excluded from the numbered allotments because it was unproductive and therefore no tithe rate would be payable. However, both public and private ways could be unproductive. Therefore, beyond confirming the physical existence of a route, these documents are of little direct weight in terms of the existence of rights over Bi-Bii.

5.8.22. The rest of the application route (i.e. A to B, D to Bi, and Bii to C) is not shown on the tithe maps. Whilst the non-depiction of a route is no evidence against public bridleway or footpath rights, neither is it supportive of such rights.

5.9. Ordnance Survey Records:

Explanation of the type of evidence

5.9.1. The Ordnance Survey (OS) are generally accepted as producing an accurate map depiction of what was on the ground at the time of a survey.

5.9.2. OS Maps cannot generally be regarded as evidence of status; however they indicate the physical existence of a route at the date of survey.

OS David and Charles reprint, 1817 with railways inserted 1890 (extract only, supplied by landowner I).

Scale: 1 inch : 1 mile
Appendix: 17

5.9.3. Between A and B the application route is shown either without casing lines or with broken casing lines, as a white line through shading lines which indicate a slope. From the A38 through Di, D and B to Bii the route is shown between two solid, or one solid and one broken casing line. From Bii to C the southern casing line continues but no northern casing line or other feature indicating a linear way is shown.

5.9.4. Broken lines suggest part of the route was unfenced. The lack of any feature resembling a linear way between Bii and C suggests no significant physical feature was observed on the ground by the surveyor. This does not preclude the existence of public rights, particularly public footpath or bridleway rights which might not run over a defined linear way. It does weigh against this section of the route receiving significant vehicular use, and therefore against public vehicular use, as such a route would be expected to be visible on the ground and would therefore have been depicted with solid or broken casing lines.

OS County Series 1st Edition Map
Sheet No: XVII.12, XVII.16 and XVIII.9
Survey Date: 1884
Published: 1886
Scale: 1:2500
Appendix: 18

5.9.5. Between A and B and from the A38 through Di and D to B the application route is shown uncoloured between narrow spaced broken casing lines of equal thickness. Between B and Bi the same parallel broken lines continue branching into up to three separate routes in places, the northern most of which corresponds fairly well with the definitive line of footpath AX1/20 and the application route.

5.9.6. From Bi to Bii the application route is shown uncoloured between narrow casing lines of equal thickness and labelled Callow Drove. The northern casing line corresponds with the Winscombe / Axbridge parish boundary. This section has a solid transverse line across either end, which might represent a fence or a gate.

5.9.7. The enclosed way ends abruptly at Bii, and the parish boundary and field boundary at this point are staggered so their continuation east is from the centre of the end of the enclosed way running west. Parallel narrow spaced broken lines continue east slightly to the south of the parish and field boundary, braced with the surrounding field and labelled F. P in the margin of map sheet XVII.12.

5.9.8. The parallel dashed lines continue on map sheet XVII.9 labelled F.P. to point C. The broken lines are braced with the rest of the field.

OS County Series 2nd Edition Map
Sheet No: XVII.12, XVII.16 and XVIII.9
Survey Date: 1902 and 1929
Published: 1903 and 1930
Scale: 1:2500
Appendix: 19

5.9.9. Apart from the map not being coloured, there are only minor differences from the 1886 map. On the 1903 map between B and Bi the parallel broken lines split into only two routes which run further south than the application route before merging again. On the 1930 map they do not split, and follow the line of the application route. The broken lines are labelled 'Foot Path' instead of F. P., and on the 1930 map the route is also labelled 'Foot Path' between point B and Bii. Also on the 1930 map at Bii there is a gap in the line across the end of the enclosed way corresponding with the parallel broken lines which continue east.

OS Map (extract only, supplied by landowner C)
Date: 1960
Scale: 1:10,560
Appendix: 20

5.9.10. The route is shown in much the same way as on the other OS maps, except that from the Bii to point C the dashed line and label FP are on the north, not the south, side of the Cheddar / Shipham parish boundary.

Description and interpretation of evidence

5.9.11. From 1883 the annotation F.P. was used so that the public would not mistake a way as one being traversable by horses or wheeled traffic⁸. This suggests that from at least 1884 the section of the application route that ran between the Bii and point C was in a physical condition which made it, by the standards of the OS, unusable by horses, and that from 1929 the section between the A38 through Di, D, B and Bi was similarly considered unsuitable for horses or wheeled traffic.

5.9.12. Parallel broken lines indicate an unfenced route and solid casing lines indicate fences or gates. Where they are present the solid lines which traverse the route at either end of the enclosed section (between Bi and Bii) indicate a fence or more likely in this location, a gate. Gates on public vehicular roads are rare, but not impossible. They are common place on footpaths and bridleways.

5.9.13. The OS maps also consistently show the northern casing line to be staggered or to stop at Bii. In effect this is either suggestive of a pinch point or a physical change in the route at this point. The 1960 map shows the same staggered boundary, but a footpath is indicated to the north, rather than

⁸ Oliver, R (2005) *Ordnance Survey Maps. A concise guide for historians*, The Charles Close Society, London

the south, of this line. It is unknown whether this was an error, or whether in 1960 a physical feature which the OS considered to be a footpath was observable in this location, but not to the south.

5.9.14. The OS maps are an excellent record of the physical features on the ground at the time of the survey but do not provide direct evidence for status, an interpretation which is supported by case law⁹.

5.9.15. The map of 1817 strongly suggests the eastern end of the application route from Bii to C either did not physically exist or was of a less significant physical feature than the route from the A38 through Di and D to Bii.

5.9.16. On the later maps the application route is shown in several different ways even on the same map, but overall, the way in which the OS have recorded the application route weighs against it being used as a through route by vehicles or equestrians at the time of each survey as sections of the route were recorded as unsuitable for such traffic. However, routes which carry public rights can, and do, fall into disuse. Therefore the fact that parts of the application route were unsuitable for certain forms of traffic is not evidence against rights having been dedicated prior to the date of survey (i.e. 1884).

5.10. 1910 Finance Act

Explanation of the type of evidence

5.10.1. The Finance Act of 1910 provided, among other things, for the levy and collection of a duty on the incremental value of all land in the United Kingdom.

5.10.2. Land was broken into ownership units known as hereditaments and given a number. Land could be excluded from payment of taxes on the grounds that it was a public highway and reductions in value were sometimes made if land was crossed by a public right of way. Finance Act records consist of two sets of documents which are:-

- Working Plans and Valuation Books. Surviving copies of both records may be held at the Local Records Office. Working maps may vary in details of annotation and shading. The Valuation Books generally show records at a preparatory stage of the survey.
- The record plans and Field Books (small bound books) are the final record of assessment and contain more detail than the working records. The Record Plans and Field Books are deposited at The National Archives, Kew.

5.10.3. While the Valuation and Field Books were generally kept untouched after 1920, many of the working and record maps remained in use by the Valuation Offices and sometimes information was added after the initial

⁹ Moser v Ambleside Urban District Council (1925) 89 JP 118 at 119, Pollock MR

Valuation process.

5.10.4. The 1910 Finance Act material did not become widely available until the mid 1980's. It cannot therefore have been considered during the Definitive map making process and can be considered "new evidence". This is of particular importance for meeting the requirements of section 53(3) of the Wildlife and Countryside Act 1981 which requires the 'discovery' of new evidence (i.e. evidence not considered when the Definitive Map was originally drawn up or last reviewed) before an order to amend the definitive map can be made.

**5.10.5. Working plans, SWHT reference numbers: DD\IR/OS/17/12, DD\IR/OS/17/16 and DD\IR/OS/18/9.
Valuation books, SWHT reference number: DD\IR/W/36/3, DD\IR/W/41/1 and DD\IR/W/43/4
Appendix: 21**

Description and interpretation of evidence

5.10.6. The application route and the route between the A38 Di and D are included within the numbered hereditaments along the whole length.

5.10.7. The books record the plots through which the application route runs as follows;

No. of Assessment	Description of Property
128	Land
58	Land
61	Land Allotments
818	Land

No deductions were recorded for Public Right of Way or User, or for Easements.

5.10.8. Landowners were not obliged to claim a reduction in value for any public right of way even if it was to their advantage to do so. In this case, the landowners did not even claim a reduction for the footpaths which are recorded today. Therefore these documents are neither supportive of, nor do they weight against, public rights over the application route.

5.11. Highways Records

Explanation of the type of evidence

5.11.1. Over time responsibility for maintenance of highways has passed between various different authorities. On each occasion a map was typically produced showing those highways which were considered publically maintainable.

Description and Interpretation

5.11.2. The application route is not shown as a road maintainable at public expense on the 1930s or 1950s road records (the 1929 handover map for this area has not been found). This is excellent evidence that from the 1930s the application route was not considered to be a publically maintainable vehicular road. However, it does not necessarily follow that it was not a highway. These records did not typically record public rights of way nor would they record highways which were not publically maintainable. Furthermore, rights may have existed which the highway authority who produced the records were simply unaware of. Therefore, while these documents do not provide evidence in support of public rights of any kind over the route, they do not preclude the existence of such rights.

5.12. Aerial photograph, 1946. Appendix: 22

5.12.1. A worn or surfaced path is clearly visible between A and B, although for most of this section is less than 3 metres wide.

5.12.2. From the A38 through Di and D to B a clearly defined worn route can be seen on the ground, more clearly defined and possibly surfaced in some way from the A38 to about Di.

5.12.3. From B to Bi there is a clear route in the form of at least two, and in some places up to four, worn / slightly hollowed tracks. The wall which runs along the parish boundary to the immediate north of the application route is clearly visible but the worn tracks run slightly further south. Towards the eastern end of this section a linear feature about 6 metres wide (about 20 feet) can be seen running along the immediate south of the wall, becoming clearer as it nears Bi, although shrub-like vegetation can be seen over parts of it. The surface of all these tracks appears to be grass / earth.

5.12.4. From Bi to the Bii the application route runs between clearly defined boundary walls, banks or hedges of a fairly consistent width of about 7 metres (23 feet).

5.12.5. At Bii the defined track which follows the application route abruptly ends. The field boundary which follows the Shipham / Cheddar parish boundary from this point east, and appears to be a wall, commences in the centre of the end of the track. This is consistent with the way the parish boundary is shown on the OS Maps from 1884 onwards (5.9). From Bii to C there is no visible track of any kind.

5.12.6. The aerial photograph confirms the physical features on the ground in 1946, but does not provide direct evidence for or against public rights over the application route.

5.13. Definitive Map and Statement preparation records

Explanation of the type of evidence

5.13.1. The Definitive Map and Statement were produced after the National Parks and Access to the Countryside Act 1949 placed a duty on County Councils to survey and map, all public rights of way in their area. The process was undertaken in a number of stages:

- Walking Survey Cards and maps - Parish Councils were required to survey the paths they thought were public paths at that time and mark them on a map. The route was described on a survey card, on the reverse were details of who walked the route and when. Queries for the whole parish are often noted on a separate card.
- Draft Map – Somerset County Council produced the Draft Map from the details shown on the Survey Map. These Maps were agreed by the County Works Committee and the date of this Committee became the ‘relevant date’ for the area. The map was then published for public consultation; amongst other things this included parish and district councils being contacted directly and notices appearing in local newspapers. Any objections received were recorded in a Summary of Objections found in the District file.
- Draft Modification Map – This stage in the process was non statutory. SCC produced a map to show any proposed changes as a result of objections to the Draft Map. Any objections received were recorded in a summary of Counter Objections to the Draft Modification map, found in the District file.
- Provisional Map – This map incorporates the information from the Draft Maps and the successful results of objections to the Modification Maps. These were put on deposited in the Parishes and District Council offices at this point only the tenant, occupier or landowner could object.
- Definitive Map and Statement – Any path shown is conclusive evidence of the existence and status of a public right of way until proved otherwise. The Definitive Map is without prejudice to other or higher rights.

**Survey Map
Appendix: 23**

5.13.2. Because the application route runs through two parishes, Axbridge and Cheddar, it appears on two sets of documents.

5.13.3. Axbridge: The whole of the application route which falls within Axbridge (i.e. A-B and D-Bi) is coloured orange. Between A and B is numbered 19 and between B and Bii is numbered 20. From D to the A38 the orange line continues in a directly westerly direction along the county boundary

5.13.4. Cheddar: A note in the top right corner of the map sheet written in orange says “County Roads in Orange”. Amongst others, Shipham Road is coloured in this shade of orange. That part of the application route which falls within Cheddar (i.e. Bi-Bii-C) is coloured a different shade of orange / brown

and labelled in red ink '7'. The part of the parish including Callow Drove which falls to the west of this map sheet has been drawn into the margin.

5.13.5. A key on another sheet of the Cheddar Parish Survey identifies the same shade of orange / brown which is used to identify the application route as "RIGHTS OF WAY". Although similar, it is possible to discern the two different shades used on the map for county roads and rights of way.

**Survey Card
Appendix: 23**

5.13.6. Axbridge: No. 19. Kind of Path: B.R.
"This path starts at a pond about half-way between the top of "Goatacre" and the Axbridge to Bristol main road and forks off to the right from the road described on No.18 & then proceeds to the west of an old quarry and then across the site of the old bull-baiting ring and continues along the side of the hill called "Shute Shelf" keeping to the right of the road and to the left of another disused quarry past two groups of fir trees – one group known as the "Seven Sisters" and then joins up with a roadway leading to Callow Drove and Winscombe Drove. No objection."

5.13.7. Axbridge: No. 20. Kind of path: Not specified.
"Callow Drove starts from the main Bridgwater to Bristol road at a point opposite Mr Northcotts garage and proceeds steeply in an easterly direction to the top of the Hill where there is a wide iron gate (no stile). From here onwards the road is fairly level and averages about 8 yards wide between the stone walls which border it on either side. The Drove is very much obstructed by brambles. Loose stones and overhanging branches and trees and is chiefly used by tractors and other farm vehicles. No objection"

5.13.8. Cheddar: No. 7. Kind of path: F.P.
"The path starts at N.E. corner of O.S. No.40 close to the Northern boundary of this field to the N.W. corner of same, linking up with Callow Drove in Axbridge parish. This path is called Callow Way in the Award Map."

Draft Map

5.13.9. The current recorded routes of footpaths AX 1/19, AX 1/20 and AX 13/7 are shown in purple ink and labelled 1/19 1/20 and 13/7. The routes of currently recorded bridleways AX29/37 and AX29/37/10 are also shown in purple ink.

Summary of Objections to the Draft map

5.13.10. No objections to the draft map were recorded.

Draft Modification Map

5.13.11. No part of the application route is shown on the Draft Modification Map. This is consistent with no objections having been received

to the draft map.

Summary of Counter Objections to the Draft Modification Map

5.13.12. There were no counter objections to the draft modification map recorded.

Provisional Map

5.13.13. The current recorded routes of footpaths AX 1/19, AX 1/20 and AX 13/7 are shown in purple ink as footpaths and labelled 1/19, 1/20 and 13/7. The routes of currently recorded bridleways AX29/37 and AX29/37/10 are also shown in purple ink.

**Definitive Map
Appendix: 24**

5.13.14. Public footpaths AX 1/19, AX 1/20 and AX 13/7 are recorded over the application route. Although there is some slight variation between the recorded line of the footpaths and the application route in the vicinity of point B, this probably results from the thickness of the lines on both the definitive map and the map accompanying the application. The routes of bridleways AX29/37 and AX29/37/10 are shown in purple ink.

**Definitive Map Statement
Appendix: 24**

5.13.15. The definitive statement is consistent with the way AX 1/19, AX 1/20 and AX 13/7 are shown on the definitive map. All three are recorded as footpaths.

Description and interpretation of evidence

5.13.16. The DMS is definitive of what it shows, but not of what it omits. Therefore, it is definitive evidence of the existence of footpaths AX 1/19, AX 1/20, and AX 13/7, but it is not evidence against the existence of higher rights over the same routes or against rights existing where none are currently recorded.

5.13.17. The parish survey raises the possibility that AX1/19 was considered by at least some people to have been a bridleway, but ultimately came to be recorded as a footpath without objection.

5.14. **Cheddar Parish Council Minutes. SWHT Reference: D/PC/1/2/6.
Appendix: 25.**

Explanation of the type of evidence

5.14.1. The parish council minutes for Cheddar in 1950 and 1951 appear to show the parish council carried out the parish survey of public rights of way with care, and that after consultation they received no complaints of error or omission.

5.15. Cheddar Parish File (containing Rights of Way information held by SCC). Appendix: 26

Description and interpretation of evidence

5.15.1. The file includes a letter from the clerk of Cheddar Parish Council dated 12 February 1951 describing the process by which the Parish Council surveyed the rights of way network in preparation for the definitive map.

5.15.2. Although members of the public clearly had the opportunity to comment on the map (referred to by the parish council as a 'draft' map, but forming the parish survey element of the definitive map preparation process) none attended the meeting called to report any errors or omissions.

5.15.3. This document adds no weight to the parish survey itself, but does show that the parish council publicised the map and consulted on the contents.

5.16. Investigation report into definitive map modification application 115M "Wildlife and Countryside Act 1981 Proposed Modification to the Definitive Map: Addition of Bridleways and Upgrading of Public Footpaths AX1/18 (PT), AX 1/19 (PT), and AX 1/20 (PT) to Bridlways at Shute Shelve Hill, Axbridge" 1996. Appendix: 27

5.16.1. An application was made in 1991 to record a route as a bridleway, and was given case number 115M. Part of application route 115M corresponds with the application route under consideration here from A to a point about 70 metres south of D, as shown on the plan forming part of appendix 27.

5.16.2. Another section of application route 115M ran slightly to the south of the current application route over Callow Drove, between D and Bi, before turning south.

5.16.3. All the relevant documentary evidence considered as part of application 115M is considered in this report, although the application was largely based on user evidence.

5.16.4. Although parts of application route 115M and part of application 820M are close together, only a relatively short section of the two routes actually correspond.

5.16.5. The conclusion in relation to the user evidence for 115M was that it was insufficient to meet the requirements of section 31 of the Highways Act 1980. The additional user evidence discovered during this investigation (see 8, below) is insufficient to alter this conclusion.

5.17. The Planning Inspectorate Order Decision, 19/02/2013, reference FPS/G3300/7/87 and FPS/D0121/7/15. Appendix: 28

5.17.1. The applicant has referred to a decision made by the Secretary of State in relation to Winscombe Drove. Like Callow Drove, Winscombe Drove is also set out as a private road in the Shipham and Winscombe Inclosure Award of 1799 (called Lower Callow Road in that document). Two orders were made, one by Somerset County Council and one by North Somerset Council (the application route fell partly in each county), to upgrade Winscombe Drove from a footpath to a bridleway. There were objections to the order and so the matter was passed to the Secretary of State for consideration. The Secretary of State appointed an Inspector who held an inquiry in order to hear all the evidence.

5.17.2. The Order Decision of the Inspector was that Winscombe Drove should be recorded as a public bridleway. The decision was based on analysis of the user evidence and the relevant 20 years was considered to be 1971 – 1991. The Order Decision notes at paragraph 10 that the Council¹⁰ did not consider there was sufficient documentary evidence to show that Winscombe Drove should be upgraded from a footpath to a bridleway.

5.17.3. As the Inspector's decision was not based on the historic documentary evidence, there is no reason to conclude that Winscombe Drove would have been upgraded on the basis of that evidence. Therefore, any similarities between the documentary evidence in the Winscombe Drove case and the present case is therefore of little direct assistance.

5.17.4. Other sources of Primary Documentary Evidence which either did not cover the relevant area or did show the claimed route but do not assist in determining the status include:

Compton Bishop Inclosure Award 1779, Q\RDE/117
Highway Road Records held by the County Council
Winscombe Parish Council Minutes
Axbridge Town Council Survey, D\PC\ax/7/1
Parish File (Axbridge) held by SCC and containing matters relating to rights of way.
District File (Sedgemoor) held by SCC and containing matters relating to rights of way.

¹⁰ Somerset County Council and North Somerset Council

6. Landowner Evidence & Evidence from those against the application.

6.1. This section of the report includes information provided by the landowners.

Landowner and response
<p>Landowner A.</p> <p>Returned a map showing the land in their ownership but made no other comments.</p>
<p>Landowner C.</p> <p>Returned a map showing the land in their ownership. Provided copies of OS maps dated 1885, 1903, 1930 and 1960. OS Maps are discussed at 5.9. They consider the application route to be a footpath. Landowner C expressed concerns about potential delays to commercial operations.</p>
<p>Landowner F.</p> <p>Returned maps showing the land in their ownership but made no other comments.</p>
<p>Landowner I.</p> <p>Landowner I provided a map showing the area of land they owned. They also provided extracts from the documents listed below and their own analysis of these documents.</p> <ul style="list-style-type: none">Shipham and Winscombe Inclosure Award 1799OS Map, David and Charles reprint, 1 inch : 1 mile, 1817Greenwood's Map, 1822Road Records, 1930sOS Map, sheet 17.SE, 1:10560, 1888OS Map, sheet 17.SE, 1:2500, 1930Finance Act working plans <p>All of these documents are discussed in section 5 above, except for OS Map Sheet 17:SE, 1:10560, 1888¹¹ which did not add any information in addition to that contained in the other OS maps already discussed.</p> <p>Landowner I also claimed ownership of a section of Callow Drove not registered with The Land Registry, and referred to documents which</p>

¹¹ This map was probably surveyed and published in 1884, not 1888, as no 1888 version of this map has been found.

demonstrated this, but did not provide copies.

Landowner I does not believe the route is a public highway other than a footpath and that the evidence they have provided demonstrates this.

7. Comments on Landowner Evidence.

7.1. All the documentary evidence provided by the landowners is discussed under section 5, except OS map sheet 17.SE, 1888, supplied by landowner I which added no information in addition to the other OS maps already discussed.

7.2. The wishes of the landowners regarding the status of the route or their desire to resolve doubts about the status of the route in order to achieve another objective, whilst perfectly understandable, are not relevant. This investigation is to determine what, if any, public rights already exist over the application route and therefore whether or not the DMS needs to be changed to accurately record those rights. Only relevant evidence can be considered.

7.3. The ownership of the application route or sections of it are also highly unlikely to be relevant to the investigation. Public rights of way of all descriptions can and do run over privately owned land, whether or not it is registered with The Land Registry. Whilst documents relating to land ownership may contain details of assistance to determining a case, proof of ownership in itself is not relevant.

8. User Evidence

8.1. One member of the public contacted SCC on 16/07/2018 after seeing notices posted at the application route. They stated "I am contacting you to provide evidence of my historic use of the drove, almost exclusively by bike, since 2001". No further details were provided. A blank User Evidence Form (UEF) was sent to the user, but no completed form was returned.

8.2. A summary of how public rights can be presumed to have been dedicated by virtue of section 31 of the Highways Act 1980 can be found in paragraph 4.6. In addition, public use can also be evidence of a dedication at Common Law. Evidence of one person using the route for less than 20 years is insufficient to meet either the tests set out in Section 31 or those at Common Law. It is therefore unnecessary to go on to consider whether this use was 'as of right' or whether there was evidence of a lack of intention to dedicate. However, it is noted that landowners or adjacent landowners, including Landowner B (who does not claim ownership of any part of the application route but uses parts of the application route to access their land) report locked gates across the application route at several points.

9. Consultations and other submissions

9.1. Consultations regarding the claimed route were sent out to all landowners and relevant local and national user group organisations on 18th and 30th August 2018. The table below shows who was consulted and gives brief details of replies that were received.

Consultee and response
Axbridge Parish Council “I can confirm that the Council considered this at its meeting on Monday 18 th June 2018. Please note that the Council has no evidence/information on this matter - only anecdotally being known as a footpath.”
Cheddar Parish Council “Cheddar Parish Council have reviewed the details you provided and wish to advise you that unfortunately we have no further information or evidence to assist you in your investigation.”
Compton Bishop Parish Council Three photographs from the early 20 th century of Shute Shelve Hill were provided. The application route could not be identified on any of them. A copy of an OS map of 1898 was also provided. OS maps are discussed at 5.9.
SCC Highways No comments or evidence.
Local Member Wished to ensure all relevant parish councils had been consulted but made no other comments.
South Sedgemoor Bridleways Association Expressed a hope that the investigation would show that the application route should be upgraded, but had no evidence to offer.
Somerset Trail Riders Fellowship Intended to consult members to identify and produce evidence to support the application to BOAT status. Referred to the application route as a historic road. No further comments or evidence was submitted.

No response was received from the following organisations:

Sedgemoor District Council
Ramblers Association
Sedgemoor Ramblers
British Horse Society
Byways and Bridleways Trust
County Access and Bridleways Officer, British Horse Society
All Wheels Drive Club
British Driving Society
Auto Cycle Union
Cycling UK
Club Zulu
Open Spaces Society
Natural England
Historic England

Only evidence which helps determine whether the application route is a public right of way and if so, what type of public rights exist, has been considered in this investigation. Whilst the wishes of individuals or organisations for a route to be a higher or lower status, or left unchanged, are perfectly understandable, they are of no weight in this investigation.

9.2. Responses to the Draft Report Consultation

9.2.1. A draft of this report was circulated to interested parties on 19/12/2018. Six responses contained relevant comments or submissions which are summarised below. The full comments are available for members to view, with the rest of the investigation file, by appointment.

9.2.2. The Applicant

The applicant commented that Day and Master's map is important as it shows a through route to Cheddar.

SCC Comments. Day and Master's map is discussed at 5.3.1.

9.2.3. Landowner B.

Landowner B objected to the application. Landowner B has used A to B of the application route for 67 years and in that time has only known themselves and neighbouring landowners to have vehicular access over the track. They have never been able to drive between points B and C and do not believe the public have been able to gain vehicular access from A to C. Landowner B has always known a locked gate to be at point Bi. They note other gates have been installed on the route which are also locked, at least one of which has been in place for about 20 years.

SCC Comments. User evidence is discussed in section 8.

9.2.4. Landowner C

Landowner C had no objection to the findings in the consultation report and supports the recommendation for refusal.

9.2.5. Landowner F

“I note the application was recommended for refusal, and would like to add that we favour this recommendation on the basis that increased cycle, horse, or vehicular traffic is likely to have a detrimental effect on the notable ground flora along and around the route. This is particularly noteworthy between A and Bi, where the route passes through the Crook Peak to Shute Shelve Hill SSSI.”¹²

SCC Comment. Whilst the points raised by landowner F are perfectly understandable, only evidence which helps determine the status of the application route can be considered and factors such as the effect on wildlife cannot be taken into account.

9.2.6. Landowner I

“We agree with and support the report recommendation to refuse the application to upgrade the route between A and B and between D to C to a bridleway or restricted byway. However, we feel that the examined documents provide much stronger evidence that there has never been any higher public rights along the application route than has been depicted in the report”

Landowner I then went on to make specific comments on the report. The most significant points raised are (summarised);

- The topography of the route has not been properly considered. The public would not have used the route in vehicles or on horseback because it is too steep in places and other, more desirable routes are available.
- The evidence of use by one person on bicycle should not be referred to as it is unsupported and no user evidence form was submitted.
- Appendix 3 which shows the land ownership is not accurate.
- Landowner I disagrees with the interpretation of a number of documents, and has suggested alternative conclusions or wording. In particular, they feel that several pieces of evidence which have been assessed as providing no evidence in support of public rights should be interpreted as providing evidence against the existence of public rights / higher public rights.

SCC Comments. Landowner I's comments have either been addressed within the report, or no change to the report in response to the comments was

¹² Site of Special Scientific Interest.

felt necessary. The error on Appendix 3 has been corrected and now shows land ownership as recorded with The Land Registry.

9.2.7. Landowner K

9.2.8. Landowner K raised a number of concerns about the effect of upgrading the application route from a footpath to a bridleway or restricted byway via telephone, including

- SSSI status of the site
- The regeneration of the woodland
- The presence of pigs (part of the woodland regeneration plan)
- Fly tipping
- Four wheel drive access
- The route would be dangerous to use
- Other nearby routes are already available

SCC Comments. Whilst the concerns and points raised by landowner K are perfectly understandable, only evidence which helps determine the status of the application route can be considered and factors such as security and the effect on conservation cannot be taken into account.

10. Discussion of the evidence

The section of linear way between the now A38 running east to Di falls outside of the county of Somerset and is therefore not considered below in great detail.

Winscombe Drove

10.1. Although relied upon by the applicant, the Order Decision of 19/02/2013 in relation to Winscombe Drove¹³ is of little assistance in this investigation. Winscombe Drove was set out as a private road in the Shipham and Winscombe Inclosure Award of 1799 (called Lower Callow Road in that document) in the same way as D-B-C of the application route under consideration here. The Order Decision was that Winscombe Drove should be recorded as a public bridleway. It has been suggested that this is evidence that D-B-C of the current application route should also be recorded as a bridleway. However, the decision in relation to Winscombe Drove was based on user evidence rather than the Inclosure Award. In fact, the Order Decision notes at paragraph 10 that, at the time, the Council¹⁴ did not consider there was sufficient documentary evidence before them to show that Winscombe Drove should be upgraded from a footpath to a bridleway. The decision in relation to Winscombe Drove is therefore not relevant to the interpretation of the documentary evidence in relation to 820M.

Pre-inclosure evidence

¹³ Planning Inspectorate reference number FPS/G3300/7/87 and FPS/D0121/7/15.

¹⁴ Somerset County Council and North Somerset Council

10.2. The pre-inclosure maps (discussed at 5.3) suggest that a physical feature corresponding with the application route existed between A and B and from the now A38 through Di and D to Bii immediately prior to inclosure. However, whilst they may be considered slightly in favour of public rights over these sections of the application route, they are of insufficient weight to conclude such rights existed.

Inclosure

10.3. The application route from D through B to C was called a private road in the Shipham and Winscombe Inclosure Award (5.4.2 – 5.4.19). It was set out at 24 feet wide from D to Bii, and 10 feet wide between Bii and C. The route was then described in a way which equates with public vehicular rights running over it.

10.4. The nearby route of Barton Drove was set out in the same Inclosure Award and in the same way as the current application route (i.e. called a private road but with a description of use equating with public vehicular rights). When considering the status of Barton Drove the High Court determined that the Inclosure Commissioner could not have set out public vehicular rights on routes less than 40 feet wide as the relevant Act required all public carriage roads to be at least that wide. Any attempt to set out public vehicular rights on a route less than the stipulated width by calling it a private road but then describing public vehicular rights over it, was *ultra vires*. The same principle must apply to D-C-B and so it is concluded that the Award failed to set out public vehicular rights.

10.5. Some parties have attempted to challenge the Barton Drove judgement, or at least to restrict its application. They have suggested that the term 'public highway' does not encompass public rights of way or 'common ways' over which the public had the right to use vehicles. Similarly it has been argued that 'public carriage way' does not encompass all ways over which the public had a right to travel with vehicles. Therefore the judgement that the Inclosure Commissioner did not have the power to set out a 'public highway' in relation to Barton Drove does not mean they could not set out a route over which the public had the right to use vehicles. Following this logic, the correct interpretation of the Inclosure documents would therefore be that the Commissioner did not have the power to set out a *public highway* at less than the stipulated width. However, he did not attempt to set out Barton Drove as a *public highway* (or *public carriage road*) at less than the stipulated width. Instead he set out a *public right of way for vehicles* over Barton Drove. There was no minimum width for such public vehicular ways and so he was not acting *ultra vires* in doing so.

10.6. However, this interpretation does not appear to have received approval from the Planning Inspectorate. In fact, very similar points were considered by

the Inspector in 2008 in relation to Barton Drove¹⁵ at paragraph 26 and 27 of the report.

“26. Public ways are of three basic sorts, as described in the Court of Appeal by Lord Denning in *R v Secretary of State for the Environment Ex Parte Hood* (1975) qb 891. The following passage from his judgement was quoted with approval, also in the Court of Appeal, by Roch L J in *Masters v Secretary of State for the Environment, Transport and the Regions* [2000] EWCA Civ 249: “*In order to understand the statutes, one must remember the classification of highways at common law. It was threefold. First, it may be a “Footway”, appropriated to the sole use of pedestrians; secondly, a “packe and prime way” (called a bridleway) which is both a horseway and a footway; third, a “cartway”, which comprehends the other two and is also a cart or carriageway (see Coke upon Littleton, vol. 1, 56a); but, to whichever of these classes it belongs, it is still a highway,” ‘highway’ is the genus of all public ways, as well as cart, horse and footways”*: see *Reg. v Saintiff* (1705) 6 Mod.Rep. 255, per Sir John Holt C.J. *That classification formed the basis of the statutory classification in section 27(6) of the National Parks and Access to the Countryside Act 1949*”.

“27. In my view this passage shows that the law does not now, if it ever did, recognize the distinction the appellant tries to draw between public highways or carriageways and public vehicular rights of way.”

10.7. In light of the above, there is no reason to depart from the precedent set in the Barton Drove case; i.e. that, irrespective of the Commissioners intentions, public vehicular rights could not have been awarded over the application route on account of their widths. Any attempt to set out public vehicular rights would have been ultra vires.

10.8. However, the High Court case in relation to Barton Drove did not deal directly with the question of lower rights; could these have been set out over D-B-C by the Shipham and Winscombe Award? The relevant act did give the commissioner the power to set out public bridleways for which no minimum width was stipulated. The award states that D-B-C could have been used by those “on foot or on horseback or with horses...” as well as vehicular users. Public use of the route on or leading a horse was therefore explicitly included by the commissioner.

10.9. However, when the status of Barton Drove was considered by the Planning Inspectorate for a second time in 2008 it was determined that, because the inclosure commissioner had acted ultra vires in attempting to set out public vehicular rights over a route less than 40 feet wide, even the lesser public rights described (for which no width restriction existed in the Act) could not legally have been set out by this award. Whilst this determination is not binding, the view of an Inspector given in relation to the same Inclosure Award

¹⁵ Report to the Secretary of State for Environment, Food and Rural Affairs, NATROW/D0121/529A/06/32, 05/02/2008.

is persuasive. The Shipham and Winscombe Inclosure Award therefore set out no public rights over the application route between D and C.

10.10. The Axbridge Inclosure Award (1801) is of no direct assistance in determining the status of any part of the application route, but does confirm its physical existence as far as it is shown on the award map (i.e. from a point to the west of Bi to slightly east of Bii). Further inferences which can be taken from this Award are dealt with below.

10.11. The Cheddar Inclosure Award sets out Callow Way, which probably ran to the immediate south of Lion's Den Way (set out in the Shipham and Winscombe Award and forming part of the application route), as a private road, but does not cover or depict any part of the application route.

10.12. A – B is not covered by any Inclosure Award that has been found.

Post-inclosure dedication

10.13. Although the Inclosure Award did not legally set out public rights over any part of the application route, that does not preclude rights having come into existence at a later date.

10.14. Of particular importance in this respect is the commissioners clear intention to set out public vehicular rights over D-B-C in the Shipham and Winscombe Award. Although it has been determined that the award could not have created public rights, if the landowners accepted the public had bridleway or vehicular rights and the public then used the route as a vehicular road or bridleway then those rights would have come into existence. The route is currently recorded as a public footpath, and therefore at least footpath rights have come into existence at some point since inclosure.

10.15. As with consideration of whether or not the rights set out at inclosure were ultra vires, comparison with the Barton Drove case is once again helpful. In relation to that case Kay. J said “...if there was evidence that the whole length of Barton Road had been laid out in accordance with the award, that might provide very powerful evidence that a public highway had come into existence... Such a situation would still require any other evidence to be examined to see if it pointed in a different direction”¹⁶ He went on to say “...in this case, the evidence did not permit of a firm conclusion that the whole route had been laid out, and the tithe map provided evidence to suggest that at the date of the document, the land over which it is suggested part of the route ran was treated as titheable land”¹⁷.

10.16. The judge was therefore looking for evidence that the route had come into physical existence as a through route after the inclosure award. In considering this point he said “*The 1817 Mudge Old Series map showed a*

¹⁶ Kay, J. Buckland v. Environment Sec. (Q.B.D) [2000] in *The Weekly Law Report*, 27 October 2000, page 1961.

¹⁷ Kay, J. Buckland v. Environment Sec. (Q.B.D) [2000] in *The Weekly Law Report*, 27 October 2000, page 1961.

route through to the hamlet of Barton on the line of the order route. Greenwood's map of 1822 showed a route for most of the way but was unclear at its western end. The 1840 Winscombe tithe map showed an enclosed lane as far as the Drove gate and another further west. However that part of the route which is undefined on the land today ran over titheable land and was not shown."

10.17. Evidence of the application route under consideration in this report having come into existence in the years after inclosure is similar to that considered by the judge in the Barton Drove case.

10.18. There is good evidence for D-Bii having come into existence. However, no linear way is shown between Bii and C on the 1817 map (see 5.9.3 – 5.9.4), no linear way at all is shown between D and C on Greenwood's map of 1822 (5.6), and the tithe maps of circa 1840 only show a defined linear way over the part of the application route which falls within Axbridge, and therefore not connecting with accepted highways at either end.

10.19. The 1801 Axbridge Inclosure Award (which was not relevant to Barton Drove) does show part of the route but the mapped area does not extend east to C or west to D and consequently cannot show how much further the application route may or may not have extended. There are also two sketch maps dating between 1801 and 1811 (5.5), one of which does clearly show a route corresponding with the application route continuing to C.

10.20. A route of some description has come into existence on or near the application route as it is visible on the ground today and it is recorded as a public footpath on the DMS. However, the historic boundaries on the ground today are consistent with the boundaries shown on the tithe maps. The northern boundary from B to C consists of a stone wall, but only Bi to Bii has a clearly defined southern boundary, again in the form of a stone wall.

10.21. When taken together the strength of the evidence for the whole of D to C having been laid out in accordance with the Inclosure Award is at best comparable with that for the laying out of Barton Drove, and arguably weaker (as unlike Barton Drove it is not shown as a complete route on the 1817 map and is not shown at all on Greenwoods Map, and the section on the tithe maps is shown as an island not connecting with another highway at either end). While there probably was a physical route between points D and Bii in the years following inclosure, there is less evidence to suggest that that route extended on to point C. This is maybe not surprising given that steep gradient of part of the route between points Bii and C which is likely to have discouraged those who did not need to use it.

10.22. In the circumstances it would appear that, like Barton Drove, there is insufficient evidence to permit of a firm conclusion that the full length of application route between D and C was laid out and therefore came into use following inclosure.

10.23. It is accepted that a route used by horses but not vehicles would not necessarily be shown on the maps produced following inclosure. Therefore, the non-laying out of the whole length of the route in accordance with the Inclosure Award does not necessarily mean that it was not being used by horse riders. However, no positive evidence that the public, following the perceived awarding of public rights in the Inclosure Award, actually did use D to C with horses has been found either. For the ultra vires Inclosure Award to become the 'powerful evidence' of the establishment of public bridleway rights that Kaye J. had in mind in the Barton Drove case there must be some evidence that the public actually used the route following inclosure, not merely an absence of evidence against such use.

Dedication post c.1840

10.24. Evidence for dedication of higher rights after about 1840 is very weak.

10.25. OS maps are usually considered an excellent record of physical features. They suggest that in 1884 the route to the east of Bii was not considered physically suitable for horses or wheeled traffic by the OS. Later OS maps suggest the physical state of the route did not change substantially between 1884 and the creation of the DMS. Although it does not assist directly in determining public rights over the route, it does show that by the late 1800s part of the application route was probably not being used by anyone other than on foot.

10.26. The 1910 Finance Act documents are unhelpful in this instance. No deduction was claimed in any of the hereditaments through which the application route runs for any form of public right of way, but landowners were not obliged to do so, and even the footpath rights which are recorded today were not claimed.

10.27. The description of path 20 in the Parish Survey (5.13.7, D to Bii) implies vehicular access was possible. However, the type of vehicular access described would be consistent with either private rights of access to land or a public highway. Furthermore, obstructions including a gate and vegetation are also mentioned. The parish survey card for path 19 (A to B) identifies the type of route as 'B.R.', for Bridle Road. The fact that the Parish Council considered A-B was a bridleway certainly weighs in favour of it carrying that status. However, the weight to be given to it must be tempered by the fact that the County Council subsequently found it to be of a lower status (i.e. a footpath). It must be assumed that this divergence from the Parish Council's initial view was based on evidence available at the time. In any case, the application route appeared on the draft map as a footpath and no objections were recorded at any point in the definitive map preparation process, including from the parish council.

10.28. User evidence submitted in relation to application 115M is supportive of use of point A for about 280 metres towards B by horse riders. The conclusion in relation to that evidence was that it did not meet the legal tests, and no

order was made. No additional user evidence for the corresponding parts of the current application route has been submitted or found.

10.29. The user evidence for Callow Drove (D-B-C), although on bike and therefore consistent with a bridleway, is insufficient to raise the presumption of dedication. Some consultees believe the route to carry higher rights, or would be in favour of higher rights over the route, but offered no evidence which supported this.

10.30. However weak the documentary evidence of dedication or use of the application route (or parts thereof) post 1840 is, if public rights came into existence before 1840 and have never been legally stopped-up then they will still exist. No amount of non-user will remove a public right once it has come into existence. However, following the Barton Drove case, insufficient evidence has been found to show the whole of D to C was physically laid out following inclosure, nor has any other evidence of sufficient strength to show the route came into use on horseback or by vehicle been found.

11. Summary and Conclusions

11.1. The user evidence is insufficient to demonstrate public bridleway or vehicular rights have been dedicated over the application route under Section 31 of the Highways Act 1980.

11.2. A to B of the application route was not set out or stopped-up by any Inclosure Award that has been found. There is evidence that a linear way between A and B physically existed in 1782, 1792 and 1817, although the documents from these years shed little light on the routes status. The route is not shown on the Compton Bishop tithe map and is shown on OS maps from 1886 onwards in a way which is consistent with it being a footpath. Although the parish survey card records the route as a bridle road, the conclusion of the definitive map preparation process was that the route was a footpath. Much of the evidence discovered during this investigation would be compatible with higher rights over A to B, but does not positively indicate their existence and would be equally compatible with the currently recorded footpath rights or no rights at all. It is therefore considered insufficient to demonstrate the existence of a public bridleway or restricted byway over that part of the application route. The existence of footpath rights are demonstrated by the DMS.

11.3. The evidence in relation to the rest of the application route is stronger. The Shipham and Winscombe Inclosure Commissioner intended to set out public vehicular rights over D-B-C but was acting ultra vires in attempting to do so. In relation to Barton Drove which was set out in the same way as D-B-C in the same Inclosure Award, an Inspector appointed by the Secretary of State concluded that because the inclosure commissioner was acting ultra vires in relation to public vehicular rights he therefore did not set out any public rights over that route. If this is the case, then the award did not set out any public rights over D-B-C of Callow Drove either.

11.4. However, despite the Award being ultra vires, it might still provide “very powerful evidence” that a public highway had come into existence if there was evidence of post inclosure public use (see 10.15); for example if the route had come into physical existence as a through route. The public and landowners would almost certainly have expected that public rights had been created by the Award. If the public actually used the route in the years following inclosure then it is likely that the rights which the Inclosure Award attempted to create will have come into existence. Even if the route fell out of use as a vehicular highway or public bridleway, if those rights existed and have never been stopped-up they will still exist today. In the case of Barton Drove it was considered that evidence that the route had been laid out as a through route and in accordance with the award would constitute such ‘powerful evidence’.

11.5. There is strong evidence that D to Bii of Callow Drove came into physical existence following inclosure including the c.1811 plan, 1801 – 1811 plan and 1817 OS map. The Axbridge Inclosure Award also implies public vehicular or bridleway rights were thought to exist over at least part of D to Bii because this was the only vehicular or equestrian access to some plots of land set out in the Axbridge Award, and no private rights for Axbridge allotment holders were specified over the route. However, the Axbridge Award was only 2 years later than the Shipham and Winscombe Award and such a conclusion may have been based on the terms of the award rather than the observed situation on the ground.

11.6. Overall there appears to be good evidence that D-Bii came into physical existence in the period following inclosure. However, as mentioned above, in order to provide the ‘powerful evidence’ described in the Barton case there needs to be a combination of the route purportedly being set out as public (albeit ultra vires) and evidence of likely public use demonstrated by it having come into physical existence as a through route shortly after the award. In this case there is very little evidence that Bii-C existed on the ground in the early 1800s.

11.7. In fact the evidence that the full length of D to C came into existence in the years following inclosure is very similar to, or even weaker than, the evidence in relation to Barton Drove. Following the High Court judgment in relation to Barton Drove, this evidence is insufficient to conclude that the full route was laid out, and therefore that it came into public vehicular use.

11.8. No evidence which precludes the existence of bridleway rights over D to C has been found, but neither has any evidence positively suggesting the public took up the bridleway rights they may have thought they had been granted at inclosure. Therefore, there is insufficient evidence to show, on the balance of probabilities, that the application route should be upgraded to a bridleway between D and C.

11.9. Whilst the post 1840 evidence is not incompatible with the existence of higher rights over D to C, it is insufficient to demonstrate, on the balance of probabilities, dedication of the application route as a bridleway or public vehicular way took place.

12. Recommendation

I therefore recommend that the application to upgrade to a bridleway or restricted byway the route shown on Appendix 1 between A and B and D to C is **refused**.

List of Appendices

Please note that the document reproductions in the appendices are not to scale. The report writer has added the red letters A and B present on Appendix 1 to maps to help the reader identify the sections of the route the document is depicting. Red circles have also been added to some appendices to indicate the area of the claim where lettering is not appropriate.

1. Plan showing claimed route
2. Photographs of the claimed route
3. Landownership Plan
4. Day and Masters
5. Map of the manor of Winscombe and Shipham, belonging to the Dean and Chapter of Wells, 1792.
6. Shipham and Winscombe Inclosure Act 1797, Award 1799.
7. Cheddar Inclosure Act 1795, Award 1801
8. Axbridge Inclosure, 1801
9. Papers Axbridge Estate, c.1811.
10. Plan of Axbridge Hill Estate – Land in Fee - bought by G. C. of axbridge commissioners and Lord Bath” Accompanying a release of 1813 from George Cumberland Esq. and his Trustree to Mr William Dovell
11. Greenwood’s Map, 1822
12. Plan of a new and direct Turnpike Road from Chapple’s Corner at Pedwell in the Parish of Ashcott through Shapwick and other places into the Bristol Turnpike at Rowberrow in the County of Somerset, 1826
13. Compton Bishop Tithe Map and Apportionment, 1839
14. Axbridge Tithe Map and Apportionment, 1839.
15. Cheddar Tithe Map and Apportionment, 1839.
16. Copy of Winscombe Tithe Map, 1843
17. OS David and Charles reprint, 1817 with railways inserted 1890
18. OS County Series 1st Edition Map, 1886
19. OS County Series 2nd Edition Map, 1903 and 1930
20. OS Map, 1960
21. Finance Act 1910 working plan and valuation books.
22. Aerial Photograph, 1946
23. Parish Survey
24. Definitive Map and Statement
25. Cheddar Parish Council Minutes
26. Cheddar Parish File
27. “Wildlife and Countryside Act 1981 Proposed Modification to the Definitive Map: Addition of Bridleways and Upgrading of Public Footpaths AX1/18 (PT), AX 1/19 (PT), and AX 1/20 (PT) to Bridleways at Shute Shelve Hill, Axbridge
28. The Planning Inspectorate Order Decision, 19/02/2013, reference FPS/G3300/7/87 and FPS/D0121/7/15
29. Millman, P. 5 February 2008, *Wildlife and Countryside Act 1981 Report into an appeal by Ms J Roseff of Woodsprings Bridleway Association against the decision of North Somerset District Council not to make an*

order under section 53(2) in respect of a claimed public Byway Open To All Traffic at Barton Drove, Winscombe. Para.23, p5. Reference: NATROW/D0121/529A/06/32.