

|  |
| --- |
| **Order Decision** |
| Site visit made on 8 April 2025 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 28 April 2025** |

|  |
| --- |
| **Order Ref: ROW/3328674** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Wiltshire Council Ramsbury 9B, 71 & 72 and Mildenhall 16 Definitive Map and Statement Modification Order 2022 * The Order is dated 27 April 2022 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding two public restricted byways and upgrading two sections of public footpath to public restricted byway in the parish of Ramsbury and upgrading one section of public footpath to public restricted byway in the parish of Mildenhall, all as shown on the Order Map and described in the Order Schedule. * There were two objections outstanding when Wiltshire Council (‘the Council’) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
|  |
| **Summary of Decision: The Order is confirmed.** |
|  |

Procedural Matters

1. I made an unaccompanied site inspection on 8 April 2025 when I was able to walk the whole of the Order route and view the immediately surrounding area.
2. In writing this decision I have found it convenient to refer to points marked on the Order Map, a copy of which is appended to this decision.
3. The Order was made by the Council under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i), (ii) and (iii). It proposes to add to the DMS restricted byways between points A to B and between points C to D and to upgrade to restricted byway the sections of footpath between points B to C and between points E to G, all as shown on the Order map.

**The Main Issues**

1. The requirements of Section 53(3)(c)(i) and (ii) of the 1981 Act are in two parts. The first is that there has been a discovery of evidence, being material that has not been considered previously in the context of the status of the Order route. The second element is that the ‘discovered’ evidence, when considered with all other relevant evidence available, should show either that a highway which is not shown in the DMS subsists or is reasonably alleged to subsist, or that a highway shown in the DMS as a highway of a particular description ought to be shown as a highway of a different description.
2. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway of the appropriate status.
3. The Order has been made solely on the basis of documentary evidence. There is no user evidence for me to consider.
4. The Order seeks to record the Order route as a restricted byway. For the Order to be confirmed it will be necessary for it to be established that the route was historically available for use by the public with vehicles but the right to use it with mechanically-propelled vehicles was extinguished by reason of the Natural Environment and Rural Communities Act 2006 (‘NERC’) section 67.

**Reasons**

Discovery of evidence

1. The discovery of evidence is a prerequisite to the making of an order in reliance upon section 53(3)(c). A wealth of documentary evidence has been adduced by the Applicant and this, and further material, has been investigated by the Council before making the Order. No issue is raised by the Objectors on this point, and I am satisfied that the requirement has been satisfied.

Physical characteristics

1. The Order route is described in the Order in five sections, but this is a consequence of the recording of various sections of the route on the current DMS. In reality the Order route is a single through route from point A, in the settlement of Axford in the north to point G on the A4 in the south.
2. I walked the Order route, commencing from point A, where the route is blocked by a metal gate which was locked shut at the time of my visit. The route is enclosed by hedges on both sides and there was no space either side of the gate for a pedestrian to pass. In consequence it was necessary for me to climb the gate to begin my walk.
3. From A the route comprises a track with a bare stoney surface of vehicular width and grass verges on each side enclosed by well-maintained hedges. The verge on the west side rises more steeply than that to the east. The route has the appearance of a well-used farm track, suitable for use with agricultural vehicles and equipment. The track rises to the south, gently at first but becoming steeper as the wood is approached. After passing through the wood the track straightens and levels out.
4. At B the track intersects with a track on a broadly east / west alignment, being part of Ramsbury FP 9B. This track is a wider feature than A to B. There is a defined bare track in the centre which showed signs of significant vehicular use. There are wide grass verges on both sides and the track is again enclosed by hedging to the south but is more open on the north side, with several mature trees. The section B to C is short and the track does not continue on the same alignment beyond C (although the footpath does continue). Instead, the track turns ninety degrees to the south and continues in a straight line to D.
5. Between C and D the track appears wide and is enclosed on both sides by hedging and trees which overarch giving the sense and character of an ancient lane. In places undergrowth has encroached to narrow the available width, although there is throughout more than ample room for a vehicle to pass.
6. At D the route again intersects with a track on a broadly east / west alignment (this is Ramsbury FP 44). This track continues to point F, although at E it again turns at almost a right angle. This section of the Order route is narrower and less well defined than C to D, although it is sunken and the course obvious as it passes through trees on both sides.
7. At point F a footpath (Mildenhall FP 16) branches out of the Order route, heading in a north-westerly direction. The Order route continues in a southerly direction, initially through woodland which extends on both sides, but to the west this quickly gives way to an open field. The track remains sunken and well defined. The last section, to G, has open fields on both sides but the track has steep banks topped by hedges on both sides. The track slopes steeply downhill to the A4. This section of the route is, or appears, narrower than the remainder of the route, although with room for a vehicle, but probably not for two vehicles to pass one another.
8. Although when seen on a map, and described in the Order, the route may seem disjointed, the overall impression from the site visit is of a single feature with throughout the character of an old, enclosed lane of sufficient dimension to accommodate wheeled vehicles.

Documentary evidence

1. The Council has analysed the documentary evidence by reference to evidential weight and I have adopted the same approach in this decision. The basis for the categorisation has been developed by the Council and has five categories, A to E with the greatest weight being attached to evidence within category A.

*Category A*

1. Evidence within this category is given the highest weight because it usually involves a formal process the purpose of which is often to create or recognise a public right of way.

Inclosure Agreement 1727

1. The Council place reliance upon an Inclosure Agreement for land in Axford in Ramsbury dated 1727. Inclosure documents can be of significant value, especially where a public right of way is set out under statutory procedures. That is not the case with the Order route as inclosure was carried out by agreement rather than through a statutory process. There was no power to alter public rights of way by agreement, but an agreement might evidence dedication or provide evidence of existing public rights of way.
2. The 1727 agreement provides for “*Ways, Drove ways, Lanes, Private ways, Highways to be laid out for the conveniency of the Proprietors of the Enclosure”.* This process was undertaken in various stages, each such stage of the route having a different name, for example the Order route section A to B was named “Stone Lane Way”. The Agreement does not have an accompanying map, which could make interpretation difficult, but it does give a very detailed description of each section by reference to adjoining parcels of land and this has enabled the Applicant and the Council to identify the various elements of the Order route. The Agreement relates only to the parish of Ramsbury and thus does not include F to G which is in the parish of Mildenhall.
3. I accept that the Inclosure Agreement provides strong evidence of the Order route A to F being set out as a lane or way with a width of 33 feet, save for Stone Lane Way (A to B) which had a width of 16 feet. I accept the description of the route as a ‘lane’ indicates a route for use with wheeled vehicles. The Agreement does not specifically require the lanes to be dedicated as public rights of way but rather for them to be laid out so as to be convenient for the owners of the parcels of land allotted thereby. Whilst this suggests something less than dedication of a public right of way the value to be attributed to this evidence should be considered in the context of the evidence as a whole.

Railway and Canal plans

1. The construction of railways and canals was usually the result of a statutory process. As the construction would often interfere with public and private rights of way it was necessary for the statutory scheme to make appropriate provision for the continuance of such rights. Usually, the requirements for accommodating public rights of way were more significant than for private rights and it can be assumed the statutory undertaker would only recognise public rights where appropriately evidenced. On this basis significant weight can usually be attached to this evidence.
2. Three schemes are considered in the evidence: - Basingstoke and Didcot Junction Railway 1844, London, Bristol and South Wales Direct Railway 1845 and Central Wilts Light Railway 1903. Both the 1844 and 1845 schemes contemplated a route which would affect the section of the order route A to B. The Book of Reference for the 1844 scheme describes this section of the Order route as “Public Road” in the ownership of the “Surveyor of Highways for Axford Tithing”, the 1845 scheme as “Public Highway” owned by “Thomas Osmond Surveyor of Highways for the township of Axford”.
3. The 1903 scheme also contemplated crossing the Order route between A and B which it described as an “Occupation Road, Chalk Pit and Land” in the ownership of Sir Francis Burdett, Bart”.
4. There is thus a conflict in the attributed status of the Order route between the 1844 and 1845 schemes, which described a public road and the 1903 scheme which described an occupation road.

Other category A evidence

1. The London and Bath Turnpike Trust 1832 Book of Reference shows the section of the Order route A to B coloured sienna which is often indicative of a road. The 1835 deviation Book of Reference depicts the Order route section A to B dividing lands in different ownership and annotated “To Axford”, which can be indicative of a public right of way.
2. The National Parks and Access to the Countryside Act 1949 (the 1949 Act) required the Council to prepare a Definitive Map and Statement of public rights of way. As part of this process Mildenhall Parish Council claimed the Order route section F to G as a Carriage Road Bridleway (CRB) and described the surface as “tarred with loose gravel for light traffic.” This evidence suggests that in the mid-twentieth century this southern section of the Order route was considered to be a road, but also suggests that the route had been in decline such that bridleway or pedestrian use prevailed over any vehicular use at that time. Although this section of the order route was shown on the draft map as a CRB this designation was subsequently amended by hand to “FP”.

*Category B*

1. Evidence is attributed to this category where some formal, often statutory, process was involved but the primary purpose is not to record public rights of way.

Tithe Maps

1. The purpose of Tithe Awards and maps was to allocate a value to productive land. Roads, whether public or private, were shown on the map but as they were usually considered unproductive they were shown excluded from tithable land. Thus, whilst Tithe maps did depict the road network, it was not their function to distinguish between public and private routes.
2. Two versions of the Ramsbury Tithe Award 1842 and the map which accompanies the award have been considered in evidence. Both depict the Order route coloured sienna and excluded from any tithable parcel of land. In each case the southern end of the route is annotated ‘from’ or ‘to’ Bedwyn. This representation of the Order route is consistent with its existence as a public road, but other explanations are possible, and it can thus be regarded as only supporting evidence. The inclusion of a destination adds some weight to attribution of public status of some kind.
3. The Finance Act 1910 required the mapping and valuation of all land in private ownership. Public rights of way were excluded from duty. Public roads were usually shown uncoloured and excluded from dutiable hereditaments. Lesser public rights were usually shown within a coloured hereditament and dealt with by way of deduction.
4. The section of the Order route A to B is shown uncoloured and excluded from adjoining coloured hereditaments. The map showing the southern section of the Order route F to G has not been traced. The intervening section is shown within coloured hereditaments. No evidence is given whether any deduction was made for public rights of way within the hereditaments containing the intervening section of the Order route.
5. The treatment of the section B to F could be counter-indicative of public vehicular status. However, the evidence should be read in context, and it may be that by the early 20th century the utility of the Order route was changing. This may explain the 1903 Railway plan describing A to B as an occupation road, and it would be consistent with the treatment of the section F to G by Mildenhall Parish Council under the 1949 Act.

Category C

1. The Council include within this category records the purpose of which is concerned with the management of public rights and assets.
2. The 1949 survey for the parish of Ramsbury shows the section D to E as part of public footpath now recorded as Ramsbury 9B. The survey covers the length A to F but no other part of the Order route is claimed. The survey for the parish of Mildenhall (which covers F to G) claims this section as a CRB as described earlier.
3. The Marlborough Highway Board Survey of Roads 1865 describes the Order route section F to G (within the parish of Mildenhall) as “narrow, not space for two vehicles abreast, no metalling”. The entries for the parish of Ramsbury, Axford Tithing are unclear but seem to indicate that C to B was a road and could, at their highest, suggest the status applied to the whole section A to G.
4. The Marlborough RDC Rights of Way Map 1905 shows the section F to G coloured yellow and described as “Highway repaired by the District Council”. The yellow colouring is indicative of a road and contrasts with lesser routes which are shown coloured green.
5. The Marlborough RDC Takeover Map 1929 for the parish of Mildenhall shows the Order route section F to G coloured blue as an unclassified road (C5086). The map for the parish of Ramsbury shows the section north of F to part-way between A and B coloured brown, with the remaining section to A coloured blue (although this was subsequently amended to show the entirety of the order route coloured brown) indicating the lowest category of highway taken over and considered by the Council to represent a public highway with no maintenance responsibility.

Category D

1. Evidence falls within this category where highways are shown but that is not the principal or statutory purpose of the document. Usually, no statutory process or consultation was involved.
2. The Survey of Puttel farm (1717) is a private map showing the extent of land within an individual’s ownership. It shows the road that is now the A4 and leading from this the section of the Order route G to F coloured brown in the same manner as the A4.
3. The Vestry Map of Ramsbury 1839 shows the extent of the order route within the parish of Ramsbury (A to F) coloured sienna in the same manner as other routes considered to be public roads today.

Category E

1. Within this category are a range of maps including commercial maps from the eighteenth and nineteenth centuries and Ordnance Survey (OS) maps. The earliest map produced in evidence is Andrews and Dury’s map of 1773. Sixteen commercial maps are in evidence, some being different editions by the same mapmaker. Most depict the entire length of the Order route as a minor road or a cross road, suggesting a public vehicular route. Of those that do not show this, some show the route in two sections, A to F and F to G but attribute cross road status to both sections and in a few cases slight deviations of route are shown.
2. Various editions of OS maps have been examined commencing with the 1828 Old Series. The OS Boundary Remark Books and sketches have also been considered. For the period up to the early twentieth century all OS evidence shows the Order route as a continuous physical feature, in no case annotated as a bridleway (BR) or footpath (FP). Whilst it was not a function of the OS to distinguish between public and private routes (and most contained a disclaimer to this effect) the key would often give an indication pf the condition of the routes shown. In the case of the Order route, it is variously shown as a “Minor Road”, a “Fenced minor road”, a “Third Class unmetalled Road”, and an “Unmetalled Road”. The Order route has been named “Axford Lane” on OS maps since at least 1886.
3. The OS representation of the Order route from the mid-twentieth century may be suggestive that it had diminished in use and importance., however it continued to be depicted as an “Other road (not classified by the Ministry of Transport)” and without being annotated either BR or FP.
4. Whilst the OS evidence is not determinative of status, it is consistent with the Order route having historical status of a vehicular highway.
5. Although the weight that can be attributed to this class of evidence is limited, the quantity and consistency of the depiction of the Order route is compelling supporting evidence

*Conclusions on documentary evidence*

1. No single piece of evidence is conclusive as to the status of the Order route. I am required to reach a conclusion on a balance of probabilities. One Objector asserts that the evidence is insufficient to satisfy this test.
2. The totality of the evidence demonstrates overwhelmingly that the Order route has existed since at least the late 17th century as a single physical feature capable of carrying vehicular traffic. The feature remains readily evident in the landscape today. There is no evidence to contradict or challenge this conclusion. To the extent that any of the evidence describes the Order route as anything less than a single through route, it is invariably by reference to parish boundaries such that the section F to G, which is in the parish of Mildenhall, is occasionally described separately to the section A to F which is in the parish of Ramsbury.
3. The question of the status of the Order route requires greater analysis, but ultimately, I find the conclusion equally compelling. The Order route appears to have developed in two stages, the first being the section G to F within the parish of Mildenhall. The earliest representation of this part of the Order route is on the 1717 map of Puttel Farm, where it is shown in the same manner as, and open to, the road which is now the A4, and which was then annotated as “London Road”.
4. The route A to F (within the parish of Ramsbury) has its origin in the 1727 Inclosure Agreement, which is evidence to which I must attach significant weight. I am satisfied that it shows the setting out of the Order route A to F as a vehicular through road. The only reservation about this evidence is the fact the component routes were said to be “for the conveniency of the Proprietors of the Enclosure” which might suggest something less than a public highway. However, the substantial map evidence from the nineteenth century suggests strongly by that time its status as a public road was well established.
5. Other category A evidence, in the form of Railway and Turnpike plans from the mid-nineteenth century, give a clear indication that by that time the Order route was regarded as a public road in the ownership of the relevant surveyor of highways. The 1903 Central Wilts Light Railway plan and schedule is at odds with this in describing the section A to B as an “occupation road”. The Mildenhall Parish Council Minutes for 1903, although not relevant to A to B, record a number of inaccuracies in the schedule and this must be borne in mind when considered against the clear attribution of public status in the two earlier railway schemes.
6. The Tithe evidence, whilst not determinative of status, is consistent with the Order and the annotation of the Order route with a destination (from or to Bedwyn) is suggestive of a route available to the public. The Finance Act evidence is mixed. The treatment of the section A to B as uncoloured and excluded from adjoining hereditaments, is supportive of public road status, but the inclusion of the section B to F within dutiable hereditaments is at odds with this. It would have been useful to see how the section F to G was dealt with, but this evidence is not available.
7. The evidence of the, mainly 19th century, commercial maps and highway records through to the 1929 Takeover Map indicate strongly that the Order route was considered, and used as a public road, albeit a minor route with little or no public maintenance being undertaken.
8. Evidence from the early-mid 20th century suggests that the Order route had declined in utility, and it may be that this was, at least in part, due to the rise of the motor car and the unsuitability of a minor, unmade road for use by such vehicles. It is clear that by the time of the compilation of the First DMS the characteristics of the route as a road were still recognised, but that its utility was mainly for lesser classes of traffic, and it is noted that no public right of way is recorded over two sections of the Order route.
9. The picture painted by the totality of the evidence is of a route which has existed on the ground for almost three hundred years, possibly longer. The main section came into being to provide access to lands allotted on inclosure, but it would seem clear that by the mid-nineteenth century it was used by the public at large as a means of accessing Axford from the major road, now the A4. The route would appear to have had greater significance and utility before the coming of the motor car. However, the evidence for the two-hundred-year period from the early 18th century is strongly indicative of a public vehicular highway. I recognise that there is some evidence which is not consistent with this premise, for example the treatment of the central section of the route under the Finance Act 1910. I consider it possible that this may be reflective of diminishing use of the route into the twentieth century
10. I am required to reach my conclusion on a balance of probability. I am satisfied that the evidence from the 19th century is sufficient to demonstrate at that time the route had the status of a public vehicular highway. Applying the principle ‘once a highway, always a highway’ that status would continue unless the route was stopped up or diverted by formal process. There is no evidence of that. Accordingly, and notwithstanding any later changes to the use and reputation of the Order route, the status continues today. The present physical characteristics of the Order route are wholly consistent with this conclusion.

**NERC**

1. NERC section 67(1) provides for the automatic extinguishment of the right of the public to use mechanically-propelled vehicles (MPV) on a way which, immediately before commencement of the Act was: -

(a) not shown in the DMS, or

(b) was shown in a DMS only as a footpath, bridleway or restricted byway.

1. At the commencement of NERC the Order route was in part shown on the DMS as a public footpath and for the remainder was not shown. Accordingly, the provisions of section 67 are engaged.
2. Section 67(2) sets out five exceptions to automatic extinguishment under section 67(1). These are:

(a) The main lawful use of the way by the public in the period of 5 years before commencement was use for MPVs. There is no evidence before me of any public use of the Order route by MPVs, thus this exception does not apply.

(b) Immediately before commencement the Order route was not shown in the DMS but was shown in the list of streets. Order route sections B to C, D to F and F to G are recorded in the DMS so this exception cannot apply to them. The Council state that the remaining sections, A to B and C to D are not recorded in the list of streets and on this basis the exception does not apply.

(c) That the Order route was created on express terms providing for it to be a right of way for MPVs. The evidence indicates that the Order route was set out in 1727, long before MPVs. This exception does not apply.

(d) That the order route was created in exercise of statutory powers as a road intended to be used by MPVs. This does not apply.

(e) That the Order route was created by use by MPVs during a period ending before 1930. There is no evidence to this effect and the exception does not apply.

As none of the exceptions are engaged, I am satisfied that any right to use the Order route with MPVs was extinguished by reason of NERC Section 67(1).

**Other matters**

1. An objection was made in relation to the possible consequences of the Order route being recorded as a restricted byway, particularly the possibility of the route attracting use by motor vehicles, especially motor bikes. Concern is expressed about damage to the route, and the environment, from such use and increased security concerns. I understand the motivation for the concerns which are expressed, but these are not factors which I am entitled to take into account; my task is to determine only whether the evidence shows that the route has the historical status claimed.

**Width**

1. The widths to be recorded are, for the section A to F, taken from the 1727 Inclosure Agreement and provide for a width of 33 feet save for the section A to B where the width is 16 feet. The width of the section F to G is 11 feet (3.5m). I agree this is an appropriate approach to establishing the historical width of the route and accords with what is evident on the ground.

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should be confirmed.

**Formal Decision**

1. The Order is confirmed.

Nigel Farthing

Inspector

