

From: F M

Sent: 20 November 2023 15:46

To: Sparks, Helen <helen.sparks@planninginspectorate.gov.uk>; Rightsofway <Rightsofway2@planninginspectorate.gov.uk>; Edwards, Michael

<Michael.Edwards@planninginspectorate.gov.uk>

Cc: janice.green@wiltshire.gov.uk; david.vigar@wiltshire.gov.uk

Subject: ROW/3295476 - Church Lane, Upper Studley, Trowbridge BA14 0EH

Dear Helen Sparks,

I refer to the statements of case of the Order Making Authority and Councillor David Vigar in this matter.

Under current legislation, the determination of the highway status of Church Lane is challenging.

I disagree with the OMA on a number of points of highway law, and as these are crucial to its analysis of the evidence, particularly the user evidence, I do not agree with the decision it reached to make The Wiltshire Council Trowbridge Path No. 8 Definitive Map and Statement Modification Order 2021, made on 19th January 2021, or its decision to seek its confirmation without modification.

The sheer volume of the OMA's statement of case (1,307 sheets, including 4 unnumbered sheets between pages 532 and 533) makes it impracticable to identify every statement of fact or law I disagree with; so, I will concentrate on the issues, and try to cross-reference them to the Agenda Report 29 September 2021 (SoC 6 to 22) and the Decision Report 26 October 2020 (SoC 27 to 95) in the first instance.

The first issue is the exclusion of part of Church Lane from the Order (see [4] at SoC 7). Whilst the Adopted Highway Plan at Appendix C (SoC 26) shows a portion of Church Lane as adopted (and therefore as being "Highways maintainable at the public expense" in accordance with Section 36(6) of the Highways Act 1980), that does not determine or show that it is a highway "over which the public have a right with vehicles", which is a quite separate issue about its highway status, and therefore ought to be addressed in the Order. As matters stand, it is unclear whether its exclusion from the Order means that it retains its existing status of footpath in the Definitive Map and Statement, or loses any highway status at all by virtue of the Order.

[4] - "The adopted highway does not extend to Frome Road and Church Lane is presently used with vehicles to access properties, St Johns Church and the Church Hall." In fact, although only partially adopted, the whole of Church Lane is already a highway (viz. Trowbridge Path No. 8), and it is also the sole vehicular access for the substantial number of dwellings (about 20) in Church Fields. Indeed, in my submission, Church Lane is "a way whose main lawful use by the public" both

now and for many years past "was use for mechanically propelled vehicles". So, the second issue is why the OMA excluded these uses in its analysis of the user evidence submitted to it.

That leads on to a terminological issue throughout the OMA's statement of case on what is meant by "a right with vehicles". Indeed, there are similar references in [5] to "any public vehicular use", "public vehicular use" and "vehicular use" in connection with Section 67(2) of NERCA 2006, even though the scope of that piece of legislation is specific to public rights of way for mechanically propelled vehicles, and does not apply to any other vehicular uses, such as horse-drawn carts and carriages, bicycles, scooters, perambulators, etc.

[6] - the date shown, 26 November 2021, appears to be erroneous.

[13] (SoC 9) - "*by the public as of right*" - the meaning of these words in Section 31(1) of the Highways Act 1980 and their impact on the OMA's approach to the user evidence is one of the main points of disagreement - see below.

[14] - "excluding the central section of adopted highway" - see above.

[18] (SoC 10) - "people on mobility scooters" are certainly vehicular use, and probably use by mechanically propelled vehicles; "non-motorised road users" includes vehicular use, particularly bicycles; and "in addition to its residents, the churchgoers and visitors to Church Hall" is mainly use by mechanically propelled vehicles; "not suitable for more motor vehicles" confirms that point - see above.

[19] - Bicycles are a vehicular use, and such use is equally consistent with Church Lane being a BOAT, as claimed by the Applicants. Under the English law approach to prescriptive rights, it all depends on what opinion the owner of the way formed of that use when he first observed it - see below.

[20] - "*most people in the area have cars*" - this is in line with all the other user evidence.

[21] - "insufficient evidence of public vehicular rights over the way" - this is an incorrect conclusion based on an incorrect approach to the user evidence based on an error of law as to the meaning of "by the public as of right". I do not agree that "Mr Reed provides no evidence that the route of Church Lane has been used by the public at large with vehicles, (in addition to private vehicular use to access property)" - see below.

[25] (SoC 12) - "(which cannot be recorded as bridleway where it is already highway)" - this is an error of law. The whole of Church Lane is already a highway (viz. Trowbridge Path No. 8) - see above.

[27] (4th bullet point) (SoC 13) - "Use of Church Lane by motorcycles has been a problem in the past" - this is clear evidence of frequent use by mechanically propelled vehicles.

[27] (5th, 6th & 7th bullet points) - "Difficulties are already noted on Sundays and religious holidays where the traffic to and from the church car park intensifies and leaves cars stuck in queues.", "If the volume of traffic increased ...", "...any traffic in addition to the residents it already serves." - these are all clear evidence of the scale of the existing use of Church Lane by mechanically propelled vehicles.

[30] (SoC 14) - "as a through route with vehicles", "to prevent through vehicular traffic" - how a Local Highway Authority (past or present) uses Traffic Regulation Orders, or its general powers under Road Traffic Regulation or Highways Acts, to control traffic on highways is irrelevant to the status of such highways.

[31] (SoC 15) - there does not appear to be any evidence that barriers have been erected in Church Lane under Section 66(3) of the Highways Act 1980 (Footways and guard-rails etc. for publicly maintainable highways) - which is specifically limited to adopted highway consisting of footpaths or bridleways only.

[32] (see also SoC 273) As Mr Trevor McGrath suggests that it is Wiltshire Council's responsibility to maintain Church Lane, rather than his own (and other frontagers), he appears to agree with me that it is not a "Private Street" within the meaning of Part XI (Making Up of Private Streets) of the Highways Act 1980 (Sections 203 to 237 and Schedule 15), and that the whole of it should be added to the List of Streets maintainable at the public expense under Section 36(6) as an adopted highway.

Private rights (SoC 16-18) - in my opinion, none have been demonstrated, such as to justify the exclusion of any of the user evidence.

[34] (SoC16) - "the rights of property owners to access their properties with vehicles", "private rights to access their properties" - a public right of way on foot over the entire length (and breadth) of Church Lane already exists and is recorded on the Definitive Map and Statement as Trowbridge Path No. 8; So, it is odd, to say the least, that these property owners (not apparently confined to frontagers of Church Lane, but including the 20 or so dwellings in Church Fields) rely on public highway rights to access their properties on foot, but claim private rights over Church Lane to access their properties with motor vehicles.

[34] (see also SoC 250) - "Mrs Evans-Wylie writes '*As residents of Church Lane we enjoy "the benefit of a right of way over the roadway known as Church Lane leading into Frome Road" (quote from our property Title Deed)*' " - which property this is, and whether the title deeds of any other frontagers of Church Lane contain the same or similar wording, is unclear, but, on the face of it, it does not appear to claim anything beyond the existing public right of way recorded as Trowbridge Path No. 8.

[34] - Rachel Hunt's petition (see also SoC 264-266), which includes at least 2 properties in Church Fields, is vague and undocumented as to the extent to which it claims anything further than Mrs Evans-Wylie's Title Deed.

In my opinion, the "*Evidence of Prescriptive Right of Way*" shown is more consistent with a public prescriptive right of way under common law, or under the Rights of Way Act 1932, or under its re-enactment in Section 31 of the Highways Act 1980.

What is entirely lacking is any documentary evidence of the past Grant of any Easement over Church Lane by its owner (who appears to be unknown), or of any successful proceedings under the Prescription Act 1832 claiming any private prescriptive right of way over Church Lane.

There is no evidence that Church Lane itself was ever owned by the Church of England. That claim appears to be based solely on its current name, but is refuted by the documentary evidence that it was previously known as Quar Lane, and was already in existence long before St John's Church was built (see also my own Statement of Case).

Indeed, the usual evidence that a street is a "Private Street" within the meaning of 1980 Act is completely lacking (viz. a Development Scheme and Title Deeds recording its provisions). The fact that the use of Church Lane with mechanically propelled vehicles has occurred over many years and without complaint does not demonstrate that any private prescriptive rights of way over it exist, and indeed is more consistent with it being a BOAT, as the Applicants claim. The manner in which Church Fields took access over Church Lane without any formal procedure adds weight to that conclusion.

It is relevant that although the properties in Church Fields could have been granted private right of way easements over their road (which the Developer could lawfully have granted as the owner of the servient land), but not strictly necessary if a Section 40 Agreement (now equivalent to a Section 38 Agreement) with the Local Highway Authority had been entered into and implemented, as indicated by Minute 866 (Unadopted Roads) of Trowbridge UDC's Highways & Planning Committee 10/06/1971 (see SoC 210), no-one has demonstrated that they were granted any similar private right of way over Church Lane. It should be noted too that the adoption minute in respect of Church Fields and part of Church Lane does not mention/specify the highway status of either.

"*Evidence of Right of Way by Necessity*" (SoC 17) - it is doubtful that any such private right of way could be established if there is already a public right of way to the properties in question (even if only on foot), and any such right of way of necessity would primarily arise over the land from which the building plots were conveyed away - which in most cases was land developed off White Row Park, not Church Lane.

[35] - "their private rights to access properties" - see above.

[36] (see also SoC 272) - "complete freedom of vehicular access to their properties without restriction" - that is consistent with Church Lane being a BOAT, as the Applicants claim. The problem seems to be that some residents of Church Lane and Church Fields are determined not to allow others to have the same freedom!

[36] (see also SoC 273) - "*We understand that we [all] have legal rights to access our properties under common law ...*" - Trevor McGrath's understanding is correct in respect of a prescriptive public right of way over Church Lane, but is otherwise mistaken (*viz.* as regards any private right of access) - see above.

[37] (SoC 17) - "Wiltshire Council, as the Highway Authority, does not record private rights and cannot give advice or comment on private rights." - I agree that it is not the role of the OMA to decide who does and who does not have private rights over Church Lane, but it has failed to apply that important point in its approach to and analysis of the user evidence of Church Lane it has gathered and presented in its Decision Report 26 October 2020 and Agenda Report 29 September 2021.

Unhappily, the OMA has conflated the meaning of "private rights", which are not the concern of the Local Highway Authority, with "Private Streets", which undoubtedly are, as Local Highway Authorities have considerable powers over them (see above); so, their meanings are entirely different.

[37] - "... it is likely that the making up of the unadopted section of Church Lane was carried out under that [private street works] programme when Church Fields estate was adopted ..." - *viz.*, not done (or funded) by the Developers of the Church Fields estate or by the frontagers of Church Lane.

[37] (see also SoC 217-219) - The accuracy of some of Wiltshire Council's comments in its letter to BLB Solicitors 12/04/1991, particularly the back to front logic in it, is doubted. The true position is

that the greater part of Church Lane is a "Private Street" because it has not been adopted; the question of its highway status is quite different. The OMA's comments on it are equally flawed.

[38] (SoC 18) There is no justification for the OMA ignoring all vehicular use of Church Lane simply on the basis that it is not a public right (and nor currently is bridleway use) - that is precisely the question the OMA is supposed to be investigating.

The cul-de-sac cases (see below), both urban and rural, demonstrate clearly that they can be BOATs, even if their main use is to access properties. Indeed, in the case of Church Fields, the use of Church Lane is not to access properties directly but to bridge the gap between two unconnected pieces of adopted highway.

Equally, there is no justification for including all the uses of Church Lane to access properties on foot, horseback and bicycle, but excluding all such uses by motor vehicles.

The OMA's approach to the user evidence that only "through" traffic is relevant (viz., past the obstruction at its junction with Acorn Meadow) is similarly mistaken (and an error of law). The use of all parts of Church Lane, including its junctions with Frome Road and Church Fields, needs to be considered to apply the legal tests correctly.

[38] - I have already commented on the last sentence in my e-mail to Wiltshire Council Sat 09/10/2021 15:47 (see TROW 24 at SoC 1300) and in my own Statement of Case.

[56] (SoC 22) I agree with the OMA that "The matter of the barrier and private rights are not a matter for this Order ..." and therefore I regard it as a shortcoming of the process and an error of law by the OMA that a great deal of the user evidence has been excluded from proper consideration on the basis of its assumptions about "private rights" which are entirely unproven and largely if not wholly unfounded in fact or law.

Appendix D Decision Report 26 October 2020 (SoC 27 to 95) - my comments will not always cross-reference issues/points already commented upon above in respect of the Agenda Report 29 September 2021 (SoC 6 to 22).

Executive Summary of Decision Report (SoC 27 to 29) - see comments below on the Decision Report itself.

[4.3] (SoC 31) - "having a right for the public with vehicles" - where is the specific documentary evidence for this (viz. beyond the evidence for the entirety of Church Lane)?

[7.1] (SoC 33) - "According to Wiltshire Council - Wiltshire Community History, ... the present church was built in the 15th century and much re-built in 1862." - I do not believe there was any church on this particular site in 1773 or 1810 (the dates of Andrews' and Dury's Maps of Wiltshire) or in 1816 (the date of the Trowbridge Inclosure Award Map) or in 1808-11 (the date of the survey work for Sheet 14 of the Old Series Ordnance Survey Map published in 1817), nor that St John's Church, built in 1862, was re-built from an earlier church there.

[7.3] - Please see the comments in my Statement of Case.

[9] Documentary Evidence (SoC 36 to 44) - Please see the comments in my Statement of Case.

[9.4] - "... the church, which we know to be present on the site at that time." - I believe to be erroneous (see the comments in my Statement of Case).

[10] User Evidence (SoC 44 to 90) - there are references to a great deal of caselaw in this section (as well as reliance on certain other legal sources). In my opinion, the most important cases are on the meaning of "as of right" in the four judgments of the House of Lords on the matter (Sunningwell Parish Council v Oxfordshire County Council [1999] UKHL 28 (24/06/1999); Beresford v Sunderland City Council [2003] UKHL 60 (13/11/2003); Oxfordshire County Council v Oxford City Council [2006] UKHL 25 (24/05/2006); Godmanchester Town Council v SSEFRA [2007] UKHL 28 (20/06/2007)) and the three of the Supreme Court (Lewis v Redcar & Cleveland Borough Council [2010] UKSC 11 (03/03/2010); Barkas v North Yorkshire County Council [2014] UKSC 31 (21/05/2014); Newhaven Port v East Sussex County Council [2015] UKSC 7 (25/02/2015)). Whilst all of them address aspects of the English law of prescriptive rights, all but one of them do so in relation to Town and Village Green applications, the exception being Godmanchester, which relates directly to its meaning in Section 31(1) of the Highways Act 1980.

[10.16] (SoC 53) - "*It is acknowledged that several, if not all the frontagers on the section of the PROW have taken out insurance should the owner emerge to deny them access.*" - it is telling that none of the residents of Church Lane loudly claiming to have existing private rights of way saw fit to disclose this, and the OMA makes no comment on it either. The conclusion of the Local Planning Authority in 2011 that "*Church Lane is well used by the wider public*" (SoC 54) has also not received the attention from the OMA it merits.

As of Right [10.36] to [10.52] (SoC 70 to 78) - this is, in my opinion, the part of the OMA's Statement of Case where it goes badly wrong in law, and it is notable that whilst it cites three of above cases

(Lewis, Barkas and Beresford), they are all Town and Village Green cases, where the issues are not identical to those applicable at Church Lane.

[10.38] - in Lewis, Lord Walker discusses "As of right" at [17] to [20]. Citing Lord Hoffman in Sunningwell on the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner, he states that this test is established by high authority, and at [17] he says that "The concept of user "as of right" is found (either in precisely those words or in similar terms) in various statutory provisions dealing with the acquisition of public or private rights". However, he makes the point that the subject and detail of it differs from one statute to another.

[10.46] - in Beresford, Lord Scott of Foscote discusses "as of right" too at [32] onwards, including the snippet in [34] cited by the OMA to back its mistaken approach to the user evidence at Church Lane.

However, he points out that it is derived from the law relating to the acquisition by prescription of private easements, and that the Prescription Act 1832 refers to rights of way or other easements "actually enjoyed by any person claiming right thereto ...". He continues that the concept was imported into the law relating to the dedication of land as a public highway. In the Rights of Way Act 1932, the phrase was repeated but changed to "actually enjoyed by the public as of right ...". In Section 22 of the Commons Registration Act 1965, the phrase changed again to "land ... on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right ...".

In [34], he adds that "It is a natural inclination to assume that these expressions, "claiming right thereto" (the 1832 Act), "as of right" (the 1932 Act and the 1980 Act) and "as of right" in the 1965 Act ... ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land ... To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous."

In [36], he refers back to the passage from Lord Hoffman's judgment in Sunningwell he quoted in [19], and adds "Lord Hoffman was absolutely right ... to say that the English theory of prescription is concerned with 'how the matter would have appeared to the owner of the land' ...".

In Godmanchester (at [57]), Lord Hope of Craighead discusses the evolution of Section 31(1) of the Highways Act 1980 in similar terms:

"Like the whole of the subsection of which it forms part, it was drafted against the background of the common law. The express exclusion of a way 'of such a character that use of it by the public could not give rise at common law to any presumption of dedication' demonstrates this point. So too does the use of the phrase 'actually enjoyed by the public as of right and without interruption', which can only be understood by referring to what is required for this purpose by the common

law. As for the proviso, the essential point is that the presumption of dedication at common law involves a dialogue between the landowner and the public."

In the same case, Lord Hoffman deals with the matter similarly:

In [8], "The law of private rights of way and certain other easements was reformed by the Prescription Act 1832 and since this provided a model for the 1932 [Rights of Way] Act, it is helpful to see how it worked ..."

In [4], "It [Section 31(1) of the Highways Act 1980] is derived from Section 1(1) of the Rights of Way Act 1932, which in turn built upon foundations laid by the common law."

In [5], [Under English law] "In the case of a public right of way, a lawful origin had to be found in dedication by the landowner at some unknown date in the past."

The conclusions to be drawn from these cases are:

i) The English law of prescriptive rights has been considered repeatedly by all the most senior judges in the land (including Lord Hoffman, Lord Scott of Foscote, Lord Hope of Craighead and Lord Walker, cited above), including the specific phrase "by the public as of right" in Section 31(1) of the Highways Act 1980, and there is no hint in any of their judgments of the restricted meaning of "the public" adopted by the OMA in its consideration of the user evidence of Church Lane.

ii) Indeed, the earlier decisions on the meaning of "actually enjoyed" remain unchallenged. For example, Rights of Way by John Riddall and John Trevelyan (3rd edition) states that the motive in using the way is irrelevant, citing *Hue v Whiteley* [1929] 1 Ch 440; *Dyfed County Council v Secretary of State for Wales* (1989) 58 P&CR 68; and *R v Secretary of State for Wales ex parte Emery* [1996] 4 AllER 1.

Since the motive of the user is irrelevant, there is no justification for restricting the uses/users taken into account by the OMA to recreational uses/users.

As Tomlin J. said in *Hue v Whiteley*, it is immaterial whether a person wishes to use the way "for business or social purposes, or for walking for health, or for a stroll through a beauty spot".

iii) As Lord Scott of Foscote explained in *Beresford*, there are a number of 'types' of prescriptive rights known to English law, including private easements "actually enjoyed by any person" in the Prescription Act 1832, which was the model for public rights of way "actually enjoyed by the public" in the Rights of Way Act 1932, and was itself followed by the town and village green uses that "the inhabitants of any locality" have indulged in in Section 22 of the Commons Registration Act 1965. So, it is clear that the words "by the public" in what is now Section 31(1) of the Highways Act

1980 is simply a label to distinguish it from "by any person" in the Prescription Act 1832, and is not meant to be a restriction on the well-understood phrase "as of right" which follows it.

iv) Under its theory behind public prescriptive rights, the English law takes it for granted that the owner of a way observing the users of it knows full well which of them he has executed a Grant of Easement with, and automatically excludes them from his assessment of the number of qualifying users "as of right" (viz, nec vi, nec clam, nec precario in Roman law) in deciding whether to dedicate the way to public use.

As the House of Lords decided in Sunningwell, the owner of the way does not know what is in the mind of any other users; so, he would not exclude any others from his assessment of the number of qualifying users "as of right" even if some of them (or even if all of them) regarded themselves as exercising a private right of way. That is the ratio of the Sunningwell decision, which is as binding on the OMA as it is on everyone else.

v) At a very late stage, I have had access to a very poor (and in parts illegible) copy of an article " 'Public' and 'Private' use of a way" by Alex Lewis in Rights of Way Law Review March 2008 Section 6.1, which postulates (inter alia) that the Sunningwell decision can be circumvented by the approach the OMA has adopted to the user evidence of Church Lane. I strongly disagree. I hope the Planning Inspectorate has access to a better copy of this article, so that the Inspector fully understands my off-the-cuff opinion of it.

vi) My initial impression of Alex Lewis's article is that it is in fact far more limited in its scope and much more tentative in its conclusions than is suggested in the OMA's statement of case, and that it concedes that there is little if any judicial authority for its conclusions. It also makes crystal clear that the onus/burden of proof lies firmly on the OMA which is seeking to exclude user evidence to demonstrate that they are 'non-qualifying' uses/users. There is nothing in the OMA's statement of case that goes even remotely towards discharging that requirement.

[10.46] (SoC 74) - I do not agree that the views attributed to Alex Lewis, particularly that he "states that use should be disregarded for the purposes of Section 31 of the Highways Act 1980 if it is the exercise of a private right of passage", are a true and fair synopsis/summary of what he actually said in his article.

[10.47] This is misleading. Alex Lewis does not cite Harrison v Hill 1932 JC 13 (a Scottish case) at any point in his article for the meaning of "by the public" in Section 31(1) of the Highways Act 1980, but only in respect of the meaning of those words in Section 67(2)(a) of NERCA 2006 (which serves an entirely different purpose).

The case of *Harrison v Hill* concerns the meaning (in Scotland) of the phrase "to which the public has access" in the definition of 'road' in the Road Traffic Act 1930, and although it has been cited frequently in England in cases about dangerous driving, etc., I am not aware of it ever having been cited in cases about the meaning of Section 31(1) of the Highways Act 1980 - certainly, it is not cited in any of the seven cases referred to above (see [10] User Evidence).

[10.48] I do not agree that the user evidence of [motor] vehicles can properly be restricted in this way. The extract from Halsbury's Laws of England on the definition of highways deals with an entirely different point and is not relevant to the meaning of Section 31(1) of the Highways Act 1980.

[10.49] (SoC 76) I do not agree. The OMA's point is entirely circular and does not justify its conclusion - still less is it a true and fair synopsis/summary of Alex Lewis's conclusions.

[10.50] The difficulties with this Appeal Decision (FPS/Y3940/14A/14 - 19/03/2020) are that it is extremely brief and cites no authority at all for the views it expresses in [17], [18] and [20] about the meaning of Section 31 of the Highways Act 1980 and its application to the facts found in that case. In those circumstances, it is a decision which must be confined to the particular facts of that case and cannot be treated as a precedent for any other.

[10.51] (SoC 77) If the OMA is relying on Alex Lewis's article in this paragraph, my reading of it is that he reaches an entirely different conclusion, viz. that whilst the exclusion/exception provision in Section 67(2)(a) may well apply to circumstances like Church Lane (and I believe it does), Section 67(5) cannot, because there is no existing public right of way for mechanically propelled vehicles over Church Lane.

[10.52] I entirely disagree with the views expressed in [36] of the joint legal opinion dated 26/01/2007, which appear to me to restrict the meaning of Section 67(2)(a) far beyond what Parliament intended and fails to analyse Sections 67(3)(c) and (5) correctly either.

Thankfully, there is caselaw now available, such as *Trail Riders Fellowship v SSEFRA* [2022] EWHC 1804 (Admin) (16/06/2022 - Steyn J.), which deal with these matters authoritatively.

As of Right (SoC 78) - I do not agree with the second paragraph for the reasons set out above.

Natural Environment and Rural Communities Act 2006 (SoC 78- 82) - Like Alex Lewis's article, I do not consider that the meaning of "by the public" in Section 67(2)(a) is necessarily the same as it is in Section 31(1) of the Highways Act 1980, as the purpose of these provisions is entirely different. However, I do not consider that *Harrison v Hill* assists in understanding the meaning of either of them.

I consider that the requirement in Section 67(2)(a) that the "main lawful use" is by mechanically propelled vehicles has been more than adequately satisfied in the relevant period by Church Lane, if the correct legal criteria are applied to the whole of the user evidence.

[10.53] - I disagree - see above.

[10.57](SoC 79) - I disagree. There is no justification for limiting the user evidence of mechanically propelled vehicles to those accessing Acorn Meadow/Lambrok Road (what the OMA refers to elsewhere as through traffic). The user evidence of such traffic elsewhere in Church Lane, including that accessing Frome Road and Church Fields, should not have been ignored - see above.

[10.58] (SoC 80) - ditto

[10.59](SoC 81) - ditto

[10.63] (SoC 82) - I do not believe that anyone accessing properties in Church Lane (or Church Fields) with mechanically propelled vehicles can obtain the benefit of a statutory private right of way under Section 67(5) of NERCA 2006 unless Church Lane is found to be a BOAT as at 02/05/2006.

[10.64](SoC 83) - "excluding that section of adopted highway at Churchfields, as recorded within the highway records ..." - I disagree - see above.

[10.65] (see also Undated letter in Appendix 8 - SoC 213-216) - "*Church Lane is however a private street (except, of course, for the half width which has been adopted)*" - how does this tally with the Adopted Highway Plan (SoC 26), where the whole width of the carriageway is shown as adopted?

[10.83] (SoC 90) - "There is insufficient evidence of public vehicular rights over Path no. 8 Trowbridge .." - I disagree - see above.

[21.1] (SoC 94) (i) "There is insufficient documentary evidence of a public right of way with vehicles over path no. 8 Trowbridge. The available evidence suggests a private route for accessing property with vehicles, which does not give rise to a public right." - I disagree - see above.

(ii) "There is insufficient evidence that the way has been used as of right for a period of 20 years or more, without interruption, by 'The Public' with vehicles." - I disagree - see above.

[23] (SoC 95) - "excluding from the order that central section of adopted highway (Church Fields development), where there is insufficient evidence, both documentary and user, to support public vehicular rights over the path ..." - I disagree - see above.

Appendix 4 - Photographs (SoC 103) - "There is also a 'No Through Road' traffic sign located at this junction." - I am not certain that either photograph on the page illustrates that signage.

Councillor David Vigar's statement of case stresses that Church Lane is currently a cul-de-sac for motor vehicles.

However, the current law on cul-de-sacs appears to be as follows:

In *Easteye v Malhotra* [2020] EWHC 2606 (Ch) (HHJ Kramer - 01/06/2020), a passage from the judgment of Vice-Chancellor Sir Richard Malins in the case of *Souch v East London Railway Company* (1873) LR Eq Cas 108 is cited with approval:

"I was astonished to hear any argument going to the extent that a cul-de-sac is not just as much a public highway or public street as any other street. There are plenty of cul-de-sacs in London ... each of which is just as much a public street as any street which is a thoroughfare."

Other cases of that period are included in a very full review of the caselaw on cul-de-sacs by Widgery J. in *Roberts v Webster* (1968) 66 LGR 298 (08/12/1967), which dismissed an appeal by Wirral UDC against a decision by Cheshire Quarter Sessions that a cul-de-sac in a rural area (Pipers Lane at Heswall) was a highway repairable at the public expense (and not a "private street").

The most recent case on rural cul-de-sacs, which reached the same conclusion, is *Trail Riders Fellowship v SSEFRA* [2023] EWHC 900 (Admin) (HHJ Jarman KC - 20/04/2023), which found (at [51]) that it is sufficient "that the cul-de-sacs led to several properties", a state of affairs that certainly applies to Church Lane.

The OMA's entire case that frontagers' access to their property (in Church Lane and Church Fields) is alone insufficient to support public rights of way for vehicles (*viz.* BOATs) has no basis in law.

Francis Morland

20 November 2023

[MORE TO FOLLOW - if time permits]

From: F M
Sent: 04 November 2023 14:32
To: janice.green@wiltshire.gov.uk <janice.green@wiltshire.gov.uk>; definitivemap@wiltshire.gov.uk <definitivemap@wiltshire.gov.uk>
Cc: Sparks, Helen <helen.sparks@planninginspectorate.gov.uk>; rightsofway2@planninginspectorate.gov.uk <rightsofway2@planninginspectorate.gov.uk>; david.vigar@wiltshire.gov.uk <david.vigar@wiltshire.gov.uk>
Subject: ROW/3295476 - Church Lane, Upper Studley, Trowbridge BA14 0EH

Dear Senior Definitive Map Officer,

Thank you for your e-mail Thu 02/11/2023 09:58.

In [10.46], [10.47], [10.49] and [10.51] of the Decision Report 26 October 2020 (SoC 75- 77), an article by Alex Lewis in the Rights of Way Law Review - Section 6: Creation of Highways - Public and private use of a way (p.13-19) is referred to and relied upon. Publication of the Rights of Way Law Review ceased some years ago, and I do not have access to Alex Lewis's article.

Similarly, in [10.52] (SoC 77-78), a legal opinion of George Laurence and Ros Crail dated 26/01/2007 - In the matter of Section 67 of NERCA 2006 - is referred to and relied upon, and which I also do not have access to.

I disagree with the legal conclusions the Decision Report appears to draw largely from these sources, and I wish to study them further.

Can you let me have copies, please?

Yours sincerely,

Francis Morland

From: Green, Janice <janice.green@wiltshire.gov.uk>
Sent: 02 November 2023 09:58
To:
Cc: helen.sparks@planninginspectorate.gov.uk <helen.sparks@planninginspectorate.gov.uk>
Subject: RE: ROW/3295476 - Church Lane, Upper Studley, Trowbridge BA14 0EH

Dear Mr Morland,

Wildlife and Countryside Act 1981 – Section 53

The Wiltshire Council Trowbridge Path no.8 Definitive Map and Statement Modification Order 2021

Planning Inspectorate ref: ROW/3295476

-

Thank you for your e-mail.

1. I'm afraid I have not located Andrews Lane or Choxalls Lane as part of my consideration of the Inclosure Award in this case. The Inclosure Award Documents are publicly available at the Wiltshire and Swindon History Centre and you may wish to view the original documents.
2. Thank you for your comments on the 1st edition OS map, I agree that this appears to be a later edition and I will request that p.1286 of the OMA Statement of Case (SoC) be amended with the 1st edition, which I will provide.
3. Appendices 7 and 8 of the Decision Report dated 29th October 2020, (pages 136 – 222 of OMA SoC), include all documents examined by Officers in the determination of the application. The Applicant adduces the evidence with the application at OMA Soc Tab 1 and any additional documents listed at Appendices 7 and 8 of the Decision report, are sourced by Officers, (at Appendix 8 the comments of the Applicant are included where the Applicant has submitted the document).

4. Officer's searched the Trowbridge UDC minutes available at the Wiltshire and Swindon History Centre, 1960 – 1974, including any relevant references to Church Lane. The documents are publicly available at the History Centre under reference no's G15/100/49 – G15/100/62 and you may wish to view the original documents.

As required, I will now proceed to respond to the matters contained in your SoC sent to the Planning Inspectorate on 9th October 2023 (with your e-mail dated 9th October 2021 attached), directly to the Planning Inspectorate by 20th November 2023.

Yours sincerely,

Janice Green

Senior Definitive Map Officer

Rights of Way and Countryside Wiltshire Council

County Hall Trowbridge BA14 8JN

Telephone: Internal 13345 External: +44 (0)1225 713345

Email: janice.green@wiltshire.gov.uk

From: F M

Sent: Thursday, October 26, 2023 1:34 PM

To: Green, Janice <janice.green@wiltshire.gov.uk>; Definitive Map <DefinitiveMap@wiltshire.gov.uk>

Cc: Sparks, Helen <helen.sparks@planninginspectorate.gov.uk>; rightsofway2@planninginspectorate.gov.uk; Vigar, David <David.Vigar@wiltshire.gov.uk>; Lance Allan <lance.allan@trowbridge.gov.uk>

Subject: ROW/3295476 - Church Lane, Upper Studley, Trowbridge BA14 0EH

Dear Senior Definitive Map Officer,

Does your copy of the Trowbridge Inclosure Award map - 1816 (TROW 19 - SoC 1273-1274) show either Andrew's Lane or Choxalls Lane?

In respect of the Ordnance Survey Old Series Map (TROW 23 - SoC 1286), although it is described as "Sheet no. 14 - Published 14th August 1817", it marks the railway line (Wilts Somerset & Weymouth Railway, opened Tuesday 5 September 1848) and Mortimer Street Trowbridge, which did not exist in 1817. The relevant part of Sheet 14 published in 1817 is at page 5 of The Old Series Ordnance

Survey Volume III South-central England (1981), which shows the map before those features were added.

In respect of TROW 1 (SoC 281-337), I assume that this comprises all the documents submitted by the Applicants for the DMMO. It includes extracts from the minutes of Trowbridge UDC from 1960 up to 4 April 1967 (SoC 185-329), with their comments on them, but none later than that.

Appendix 8 of the Decision Letter 26 October 2020 (SoC 182-222) also includes this material from the Applicants under the heading "Document and Significance by Applicant", but appears to add further material from the minutes of Trowbridge UDC from 1967 up to 7 December 1972 (SoC 206-213). Can you please let me know who supplied those additional documents, and on what criteria/basis they were selected?

My understanding is that Trowbridge UDC was the Local Highways Authority during this period (ceasing on 31 March 1974). Are all its minutes referring or relating to Church Lane included in Appendix 8 (including those in the period after 7 December 1972), or did the period of search end in 1972 - so that there may be further entries in the minutes of Trowbridge UDC relating to Church Lane after that date, which are not included in Appendix 8?

Yours sincerely,

Francis Morland

From: Steve Hobbs
Sent: 20 October 2023 15:36
To: F M
Cc: Lance Allan <lance.allan@trowbridge.gov.uk>; Trowbridge Town Council <info@trowbridge.gov.uk>; janice.green@wiltshire.gov.uk <janice.green@wiltshire.gov.uk>; david.vigar@wiltshire.gov.uk <david.vigar@wiltshire.gov.uk>; Sparks, Helen <helen.sparks@planninginspectorate.gov.uk>
Subject: Re: ROW/3295476 - Church Lane, Upper Studley, Trowbridge BA14 0EH

Francis

I think that the best way to locate those roads, Francis, is by studying the enclosure award map at the History Centre. Ref EA 101

Steve

Sent from my iPhone

On 20 Oct 2023, at 15:34, F M wrote:

Dear Town Clerk,

The deadline for comment on the Statements of Case is 20 November 2023.

The Trowbridge Inclosure Award of 1816 (see OMA's SoC 37-38, 136-143 and 1273-1274) affected areas totalling 98 acres at Studley Green, Quar Lane, Silver Street, Andrew's Lane, Holbrook Lane, Drynam Lane and Choxalls Lane (see Wiltshire Inclosure Awards ed. R.E. Sandell, WRS XXV (1971) p.128).

Quar Lane (part of which is now known as Church Lane) drew its name from a stone quarry on Arnold's Hill (at Grid Ref ST 8358 5711), then situated in the parish of Trowbridge (but transferred to Wingfield in 1934).

However, I cannot place either Andrew's Lane or Choxalls Lane. Can anyone point me in the right direction?

Yours sincerely,

Francis Morland

From: F M

Sent: 09 October 2023 11:14

To: Sparks, Helen <helen.sparks@planninginspectorate.gov.uk>;
rightsofway2@planninginspectorate.gov.uk <rightsofway2@planninginspectorate.gov.uk>

Cc: janice.green@wiltshire.gov.uk <janice.green@wiltshire.gov.uk>;
definitivemap@wiltshire.gov.uk <definitivemap@wiltshire.gov.uk>

parvis.khansari@wiltshire.gov.uk <parvis.khansari@wiltshire.gov.uk>

Subject: ROW/3295476 - Church Lane, Upper Studley, Trowbridge BA14 0EH

STATEMENT OF CASE

My name is Francis Morland and I live at .

For the reasons set out in my e-mail to the OMA below (sent Sat 09/10/2021 14:46), I consider that the whole of Church Lane Upper Studley Trowbridge BA14 0EH (from its junction with the A361 Frome Road at Whiterow Hill to its junction with Acorn Meadow BA14 9JA) is a highway maintainable at the public expense.

The passage quoted from [38] of the Agenda Report 29 Sep 2021 is at 18 of the OMA's SoC.

The relevant legislation is Section 36 of the Highways Act 1980 (see at: <https://www.legislation.gov.uk/ukpga/1980/66/section/36>).

The only reference to this legislation in the OMA's SoC is at 189-191 (App 8 of the Decision Report 26 Oct 2020).

The Trowbridge Inclosure Award Map 1816 is at TROW 19 (1273 & 1274) of the OMA's SoC. Other information is at [9.4] of the Decision Report 26 Oct 2020 (37-38) and in App 7 (136-143). However, the reference in [9.4] to the church being present on the site at that time (1816) is clearly erroneous. St. John's Church was not built until 1852 (see [34] of Agenda Report 29 Sep 2021 - OMA's SoC 16; App F to Agenda Report 29 Sep 2021 - OMA's SoC 265; and [20] of TROW 11 - OMA's SoC 575) or 1854 (see [10.24] of the Decision Report 26 Oct 2020 - OMA's SoC 61; and App 5 - OMA's SoC 122). Quar Lane is mentioned twice on 137 and three times on 138.

It should be noted that the extent of the Trowbridge Inclosure Award is limited to the areas in Trowbridge and Hilperton specified in the Private Act of Parliament which authorised it (55 Geo III c.28). These are summarised in Abstracts of Wiltshire Inclosure Awards and Agreements ed. R.E. Sandell, Wiltshire Record Society Volume XXV (1971) at p. 128-129 (see at: https://www.wiltshirerecordsociety.org.uk/s/wrs_v25.pdf).

The evidence for Church Lane being a highway called Quar Lane before 31 Aug 1835 in the Trowbridge Inclosure Award of 1816 is supported by:-

- The Andrews' and Dury's Maps of Wiltshire 1773 and 1810, at TROW 22 of the OMA's SoC (1279-1285), and at [9.13] of the Decision Report 26 Oct 2020 (42) and in App 7 (158-162). These show that the lane ran from high ground west of the stream (outside Trowbridge, presumably the site of the stone quarry referred to in its name) to Frome Road at Whiterow Hill, a distance of just over a kilometre.
- The Old Series Ordnance Survey Map (Sheet 14) published in 1817, at TROW 23 of the OMA's SoC (1286), and at [9.10] and [9.14] of the Decision Report 26 Oct 2020 (41-42). This shows the lane starting at or near the stream crossing, and with a length of about 650 metres. It should be noted that because of the Napoleonic Wars the publication of this map was delayed for a number of years, but the survey work for it took place in the period 1808-11 (the date of the Ordnance Surveyors' Drawing No. 61 - see The Old Series Ordnance Survey by Harley and O'Donoghue Volume III South-central England (1981), page xv, Figure 5 (attached)).

The judgments in the Fortune v Wiltshire Council cases are at <https://www.bailii.org/ew/cases/EWHC/Ch/2010/B33.html> (High Court), and <https://www.bailii.org/ew/cases/EWCA/Civ/2012/334.html> (Court of Appeal).

The passage quoted from [7.3] of the Decision Report 26 Oct 2020 is at 33 of the OMA's SoC.

The OMA's comments on Minute 866 of Trowbridge UDC's Highways & Planning Committee 10 Jun 1971 are at 210 of its SoC.

As I said in my e-mail to Helen Sparks (sent Mon 25/09/2023 15:00):-

"It is unfortunate that Wiltshire Council did not address my request (to add the whole of Church Lane to its List of Streets) before submitting the Order to you for confirmation, as they clearly impact on each other but, as case law such as Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs [2023] EWHC 900 (Admin) (20/04/2023) demonstrates, not in an entirely predictable manner."

However, following the example of Rowden Lane, Chippenham, I consider that the Applicants were correct to apply for Trowbridge No. 8 to be upgraded to a BOAT, but I do not think there is any justification for restricting that status to the portion of it shown on their Application Plan (see App A of the Agenda Report 29 Sep 2021 - OMA's SoC 24 and App 2 of the Decision Report 26 Oct 2020 - OMA's SoC 97).

I confirm that the contents of this Statement of Case are true to the best of my knowledge and belief.

I wish to attend the Inspector's Site Visit.

Francis Morland

9 October 2023

From: Roberts, Noreen <Noreen.Roberts@wiltshire.gov.uk> on behalf of Khansari, Parvis <Parvis.Khansari@wiltshire.gov.uk>
Sent: 11 October 2021 09:05
To: 'F M'
Subject: RE: Church Lane, Upper Studley, Trowbridge BA14 0EH

Good morning Mr Morland

Thank you for your email. I am writing to acknowledge receipt of your email and a further response will be sent to you.

Kind regards

Noreen

Noreen Roberts

PA to Parvis Khansari Director of Highways & Environment

Email: Parvis.Khansari@wiltshire.gov.uk Email: Noreen.Roberts@wiltshire.gov.uk

From: F M

Sent: 09 October 2021 15:47

To: Fox, Sam <sam.fox@wiltshire.gov.uk>; Khansari, Parvis <Parvis.Khansari@wiltshire.gov.uk>

Cc: McClelland, Mark <Mark.McClelland@wiltshire.gov.uk>; Vigar, David

<David.Vigar@wiltshire.gov.uk>

Subject: Church Lane, Upper Studley, Trowbridge BA14 0EH

Dear Sirs,

I refer to comments in a recent Agenda Report (see at [38] of Agenda Item 7a, Western Area Planning Committee, Wednesday 29 September 2021):-

"If, however, property owners are relying upon a public vehicular right of way to access property, they have not submitted additional evidence which would support public vehicular rights over Church Lane and lead the Council to take an alternative view of the evidence already before it."

Pursuant to Section 36 of the Highways Act 1980, I wish to apply to Wiltshire Council, as the current Local Highway Authority, to add the whole of Church Lane, Upper Studley Trowbridge BA14 0EH (from its junction with the A361 Frome Road at Whiterow Hill to its junction with Acorn Meadow BA14 9JA) to its List of Streets, as being a highway maintainable at the public expense. At present, only a length of about 75 metres of Church Lane adjacent to its junction with Church Fields, Upper Studley BA14 0EJ is so recorded.

The grounds of my application are:-

Firstly, it was a highway before 31st August 1835. The evidence for this is in the Trowbridge Inclosure Award of 1816. It is marked on the Award Map by double broken lines, and it is identified in the Award itself by the name of Quar Lane (see, for example, in the description of allotment No. 199 to Elizabeth Mortimer). This marking and its name are compelling evidence that it was not just a footpath at that time, but an ancient (i.e. pre-Inclosure) highway, presumably leading to a stone quarry some distance away, and that it carried vehicular traffic.

The case law on this subject is set out in *Fortune v Wiltshire Council* [2010] EWHC B33 (Ch) and [2012] EWCA Civ 334 relating to a similar highway at Rowden Lane, Chippenham.

Secondly, it is clear that Church Lane has been maintained at the public expense from time to time since 31st August 1835. A recent Report (see at [7.3] of a Decision Report dated 26 October 2020) said:-

"The lane has a bound tarmac surface for most of its length (leading from Frome Road), with a verge to the western side."

In its comments on Minute 866 of Trowbridge U.D.C.'s Highways & Planning Committee of 10th June 1971, the Report added:-

"866 refers to the formal adoption of Church Fields as a highway maintainable at the public expense. The remainder of Church Lane, however, is treated differently under the private street works programme. Church Lane being a priority for 1972/73 phase of the 1972-1975 programme, where the Church Fields development is completed. The making up of the unadopted section of Church Lane from Church Fields to Frome Road, that we see today is likely to have been carried out as part of this programme. That section north of the adopted section has not been made up to the same standard where there is less use with vehicles to access residential properties."

It is established, therefore, that Trowbridge U.D.C., then the Local Highway Authority, did indeed maintain Church Lane at the public expense, including laying the bound tarmac surface described in [7.3].

Thirdly, the adoption of Church Fields as a highway maintainable at the public expense by that Minute could not have been implemented without a lawful vehicular access from another adopted highway. At the date in question, that would have been along Church Lane, Upper Studley from the A361 Frome Road at Whiterow Hill, Otherwise, the adoption of Church Fields would not have been effective (and would not be effective even now).

Yours faithfully,

Francis Morland

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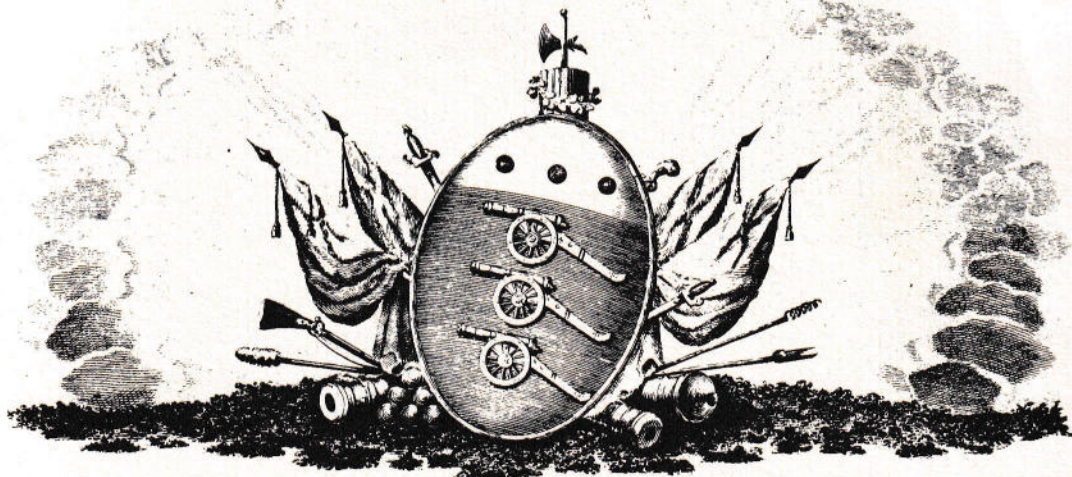
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THE OLD SERIES ORDNANCE SURVEY MAPS OF ENGLAND AND WALES

Scale: 1 inch to 1 mile

A REPRODUCTION OF THE 110 SHEETS OF THE SURVEY
IN EARLY STATE IN 10 VOLUMES

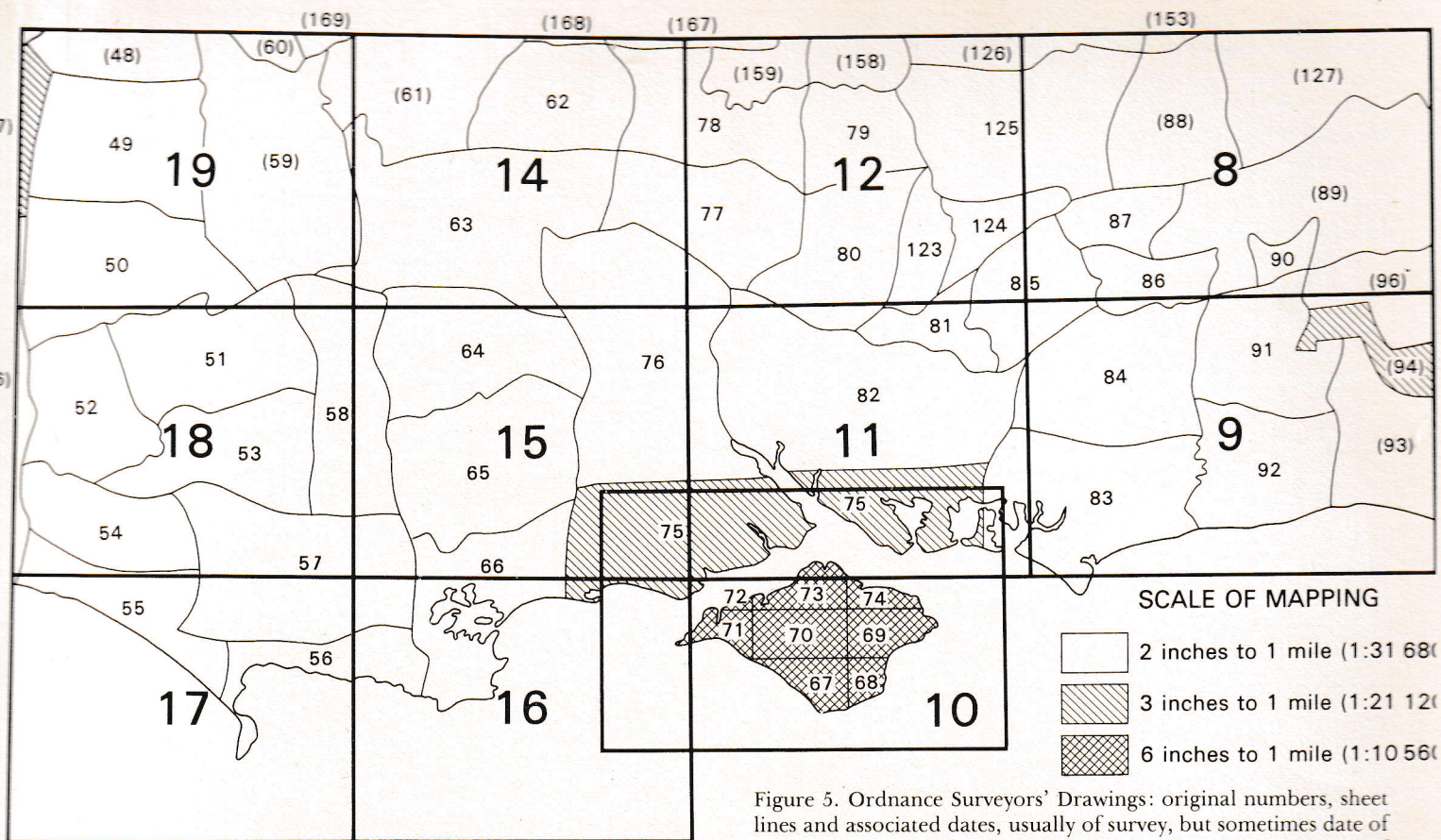
Introduction by
J. B. HARLEY AND YOLANDE O'DONOGHUE



VOLUME III
South-central England

(Hampshire and the Isle of Wight and parts of Berkshire, Dorset,
Somerset, Surrey, Sussex and Wiltshire)

HARRY MARGARY LYMPNE CASTLE, KENT



Dates associated with the Ordnance Surveyors' Drawings

Sheet No.	Date	Sheet No.	Date
46	1806-7	77	1808
47	1809-17	78	1808-9
48	1810	79	1817
49	1811	80	1808
50	1811	81	1808
51	1808-10	82	1806-10
52	1807-8	83	1805-6
53	1808-9	84	1808-13
54	1806-7	85	1808-9
55	1806-7	86	1810
56	1805-6	87	1809
57	1805-6	88	1806-7
58	1808-9	89	1806-10
59	1808-10	90	1810
60	1815	91	1806-7
61	1808-11	92	1806-7
62	1808-11	93	1789-1806
63	1808-10	94	1797-1810
64	1807-8	96	1808
65	1807-8	123	1808-10
66	1805-7	124	1808-10
67	1810	125	1792-1817
68	1793-4	126	1809-10
69	1793-4	127	1804-6
70	1810	153	1811-22
71	1793-4	158	1808-17
72	1810	159	1812-13
73	1810	167	1816
74	1810	168	1815
75	1797-1810	169	1813-15
76	1807-8		

for developing the practice of military surveying. A recent study of *Maps of Portsmouth before 1801* reveals a coastal zone with a remarkably full cartographic record from the mid-sixteenth century onwards.⁷³ In the majority of cases these were maps and plans drawn by military surveyors and draughtsmen on the payroll of the Board of Ordnance.⁷⁴ The whole area, containing as it did the main base for the Royal Navy, was regarded as a target for invasion. As a result, permanent and field fortifications had been constructed to guard entrances of Portsmouth Harbour, to Portsea

Figure 5. Ordnance Surveyors' Drawings: original numbers, sheet lines and associated dates, usually of survey, but sometimes date of receipt of surveyor's bill in the Tower of London, or date of publication. The originals are in the British Library, Map Library.

with its dockyard, to the Needles passages, to Southampton Water, and to other likely places where an enemy might land. It was in connection with such works that large-scale military plans were prepared from the 1780s onwards.

Ordnance Surveyors' Drawings relating to the Isle of Wight afford the most elaborate example in the region of this type of military cartography. They were executed to a scale of six-inches to one mile. After 1779 it was generally feared that the French would seize the island as an advanced base for a full invasion of the mainland⁷⁵ but it was not until 1791, after similar surveys had been ordered around Plymouth, and in Jersey, Guernsey and Kent, that surveys were put in hand in the Isle of Wight. At that date the Master General had instructed that 'Mr William Gardner the Chief Surveying Draftsman' was

'to proceed with the survey of the Isle of Wight, and had approved of his taking with him as many assistants as he might want, exclusive of Messrs Yeakell and McLauchan, from the Drawing Room at the Tower.'⁷⁶

There is also a later reference to Gardner having accompanied the trigonometrical party in 1793 and 1794. Mudge and Dalby noted

'Mr. Gardner, and the gentlemen of his department, accompanied us in the Survey of the coast of Hampshire and the Isle of Wight, and have since finished a military description of both, drawn on a scale of three inches to a mile.'⁷⁷

These plans were 'for the use of Government, and not submitted, from obvious motives of policy, to public inspection',⁷⁸ but it seems as if several versions were in official circulation. As well as the three-inch plans referred to by Mudge there is an earlier rough manuscript survey, relating to only part of the island, at two-inches to one mile, one section of which has been signed Frederick George Mulcaster and is endorsed