

Jouldings Lane: response to objectors (2)

A. Introduction

A.1. This is the response of the applicant to a further statement of objections dated 24 September 2018. It addresses the comments in the 'Summary of additional comments' dated 24 September 2018. No comments are directed to the 'specific comments on applicant's second submission' in appendix 14, which appears to add little to the summary.

A.2. We do not intend to address comments on the user evidence: such comments will be addressed separately by Ms Nicola Greenwood.

A.3. However, we pause here to note that photographs are available on the internet of several dozen horses and riders using Jouldings Ford during an [endurance event on 4 September 2011](#). This photography in itself demonstrates that witness evidence submitted by the objectors alleging that the ford is dangerous and impassable, and that the application way is unused, is unsupportable, and calls into question the objectors' witness evidence as a whole.

B. Well House Lane ford

B.1. We say here a few words about the status of the ford across the Blackwater River at the head of Well House Lane.

B.2. Both Well House Lane and Forges Lane (the road opposite leading to New Mill Road) are now recorded in the list of streets for Hampshire County Council and Wokingham Borough Council respectively.

B.3. Both lists show the publicly maintainable highway ceasing short of the ford: in both cases, the cessation occurs at access to private premises. A footpath connects the two roads on a detour via a footbridge across the Blackwater River to the north. In neither case is there sufficient reason to explain why a public road should cease merely at the access to such premises, with no continuation for horses or vehicles.

B.4. Old maps show Well House Lane connected with Forges Lane via a ford across the Blackwater River in the vicinity of Well House Farm.

B.5. The minutes of Wokingham Rural District Council Highway Committee 1923–1925 show that the committee accepted responsibility for maintaining 'Well House Farm Road' in Eversley 'as far as the entrance to the meadow leading to the Farm. The length as to which the responsibility was accepted can only relate to the continuation of Well House Lane, beyond the entrance to the farm, through the ford, and along what is now Forges Lane. The minutes confirm that Well House Lane was a through route that connected with Forges Lane.

The Surveyor presented a letter he had received from Mr. F. W. Hughes, of Embrook, calling attention to the danger existing at the junction of the Oxford Road, Wokingham, with the Main Reading to Wokingham Road, and suggested same being forwarded to the Berkshire County Surveyor with a view to the erection of a danger signal post.

The Committee agreed.

The Surveyor presented letters he had received from Mr. D. C. Bright, and Mr. W. C. Coombe, with reference to the repair of Well House Farm Road, Eversley.

After consideration of same, on the motion of Mr. Alexander, it was resolved to repair that portion of the road which is within this Rural District as far as the entrance to the meadow leading to the Farm.

The Surveyor presented Applications from the Post Office Telegraphs for permission to erect Overhead telegraph line along the Wokingham New Road, Crowthrone, and an Overhead telegraph line along Park Lane and Landsend Lane, Woodley, and an Underground telegraph line in Park Lane, Woodley.

The Committee approved subject to such lines being laid to the satisfaction of this Council's Surveyor.

Illustration 1: Wokingham RDC minute

B.6. The application in question does not relate to the route between Well House Lane and Forges Lane. But the public status of that route is relevant to this application, and we shall refer to it elsewhere in this submission.

C. Historical origins

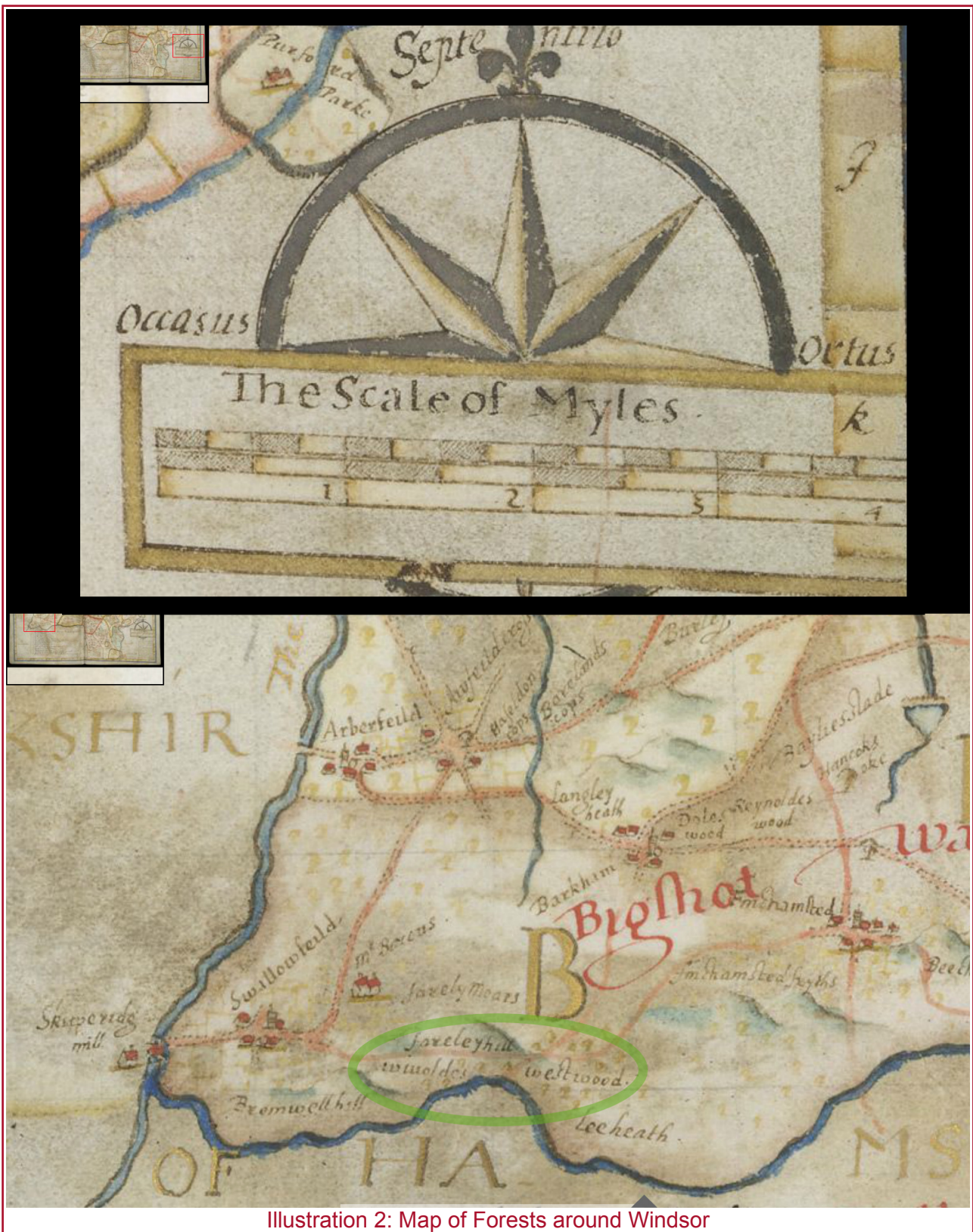
C.1. New evidence is presented here showing that the application way is of substantial age, and that its origin cannot be identified other than pre-dating modern records and mapping.

D. Map of the Forests around Windsor

D.1. **Date:** 1607

D.2. **Source:** British Library¹

¹ Harley MS 3749 ff.4v-4*



D.3. **Description:** Original scale: scale bar marked on map; orientation: unchanged (north).

D.4. Catalogued as a map of the forests around Windsor from 'A Description of the Honour of Windesor', Creator: John Norden; Medium: Ink and tempera on parchment.

D.5. The British Library offers the following description²:

The title page states that the survey was ‘taken and performed by the perambulation view and delineation of John Norden In Anno 1607’. The plans are the result of a survey conducted on foot by Norden. The maps in this volume show communication routes, individual buildings, field boundaries and parkland along with details of wildlife and human activity, such as stags in Windsor Park and people boating on the Thames. The scale at which the maps are presented varies throughout the volume, with feet, perches and miles being the units of measurement recorded by a scale bar.

John Norden is best known for his work ‘Speculum Britainiae’, literally a ‘Mirror of Britain’, which in its attempt to include the road names and town plans, lacking on many county maps of the period, was a direct ancestor of the modern A-Z. As well as producing several county maps in the 1590s, Norden worked as a land surveyor producing surveys for landowners and was the author of a work which outlines principles of surveying, known as the ‘Surveyor's Dialogue’.

D.6. The map shows principal roads, coloured pink, including a road east from ‘Swallowfeild’, to a junction of roads at ‘Farelyhill’, where roads pass north to Barkham, northeast to ‘Finchamsted’, and southwest to the (unlabelled) Blackwater River. There may be a slight pink pigmentation on the south side of the river. West of the crossing of the Blackwater River is a name the first character of which is partially defaced: it appears to read [J]wiuoldes.

D.7. **Conclusion:** The roads described above fit well with Church Road/Swallowfield Road/Bungler’s Hill from Swallowfield to Finchampstead, Sheerlands Road from Finchampstead to Barkham, and BOAT Barkham 18 I towards Finchampstead. The route southwest to the Blackwater River fits with the application way: it is south of Farley Hill, the distance between crossroads and river is short, it runs southwest, and it crosses the river just west of the distinctive section of the river which passes south to north at Well House Farm. The label on the map appears to read ‘Jwiuoldes’, presumably an early form of ‘Jouldings’. It is not clear whether a continuation is shown south of the river (there is some pink pigmentation to suggest that it is), but some other crossings of the river are not projected beyond (e.g. at Swallowfield and Arborfield), and there is no reason to suppose a lack of continuation. A perusal of the whole map shows no other road which is shown to terminate on any river. On a map which selectively represents only key roads, there is no reason for the map-maker to show a road projecting south from Farley Hill the short distance to the river, which had no continuation beyond.

D.8. The Norden map, dating from the early seventeenth century, shows that the application way was in existence as early as 1607. That date is long before the period during which the Bramshill estate is alleged by the objectors to have been in settlement (as to which, no evidence has been adduced).

E. Rocque’s map of Berkshire

E.1. **Date:** 1762–64

² www.bl.uk/onlinegallery/onlineex/unvbrit/m/001hrl000003749u00004vrb.html

E.2. **Source:** University of Bern³



Illustration 3: Rocque's map of Berkshire

E.3. **Description:** Original scale: scale bar marked on map; orientation: unchanged (north).

E.4. This map, surveyed by the well-known cartographer, John Rocque, appears to be a later edition, possibly published in 1764. A copy of the 1761 edition can be found elsewhere⁴.

E.5. Although slightly obscured by colouring, which may represent an enclosure of Wiltshire, a road is shown approaching the Blackwater River (not labelled) from the north, and the crossing is marked 'Jouldins Ford'. The map is similar in appearance to Taylor's map of Hampshire (q.v.).

E.6. **Conclusion:** Rocque's map shows the approach to Jouldings Ford from the north. The ford is labelled, and although no route is shown to the south, this is in common with all other crossings of the Blackwater River to the east, where the river forms the county boundary. The map is therefore strongly suggestive of a continuation to the south.

³ aleph.unibas.ch/F/YB9DBUXABIEGYLAI3MJ9PNIK1TYS5VGS7HDNJU5IBS4ERIM3II-00673?func=find-acc&acc_sequence=011167366&CON_LNG=ENG

⁴ Royal Collection Trust: www.rct.uk/collection/700042/rocques-map-of-berkshire

F. Cary New and Correct English Atlas

F.1. **Date:** 1787

F.2. **Source:** British Library⁵

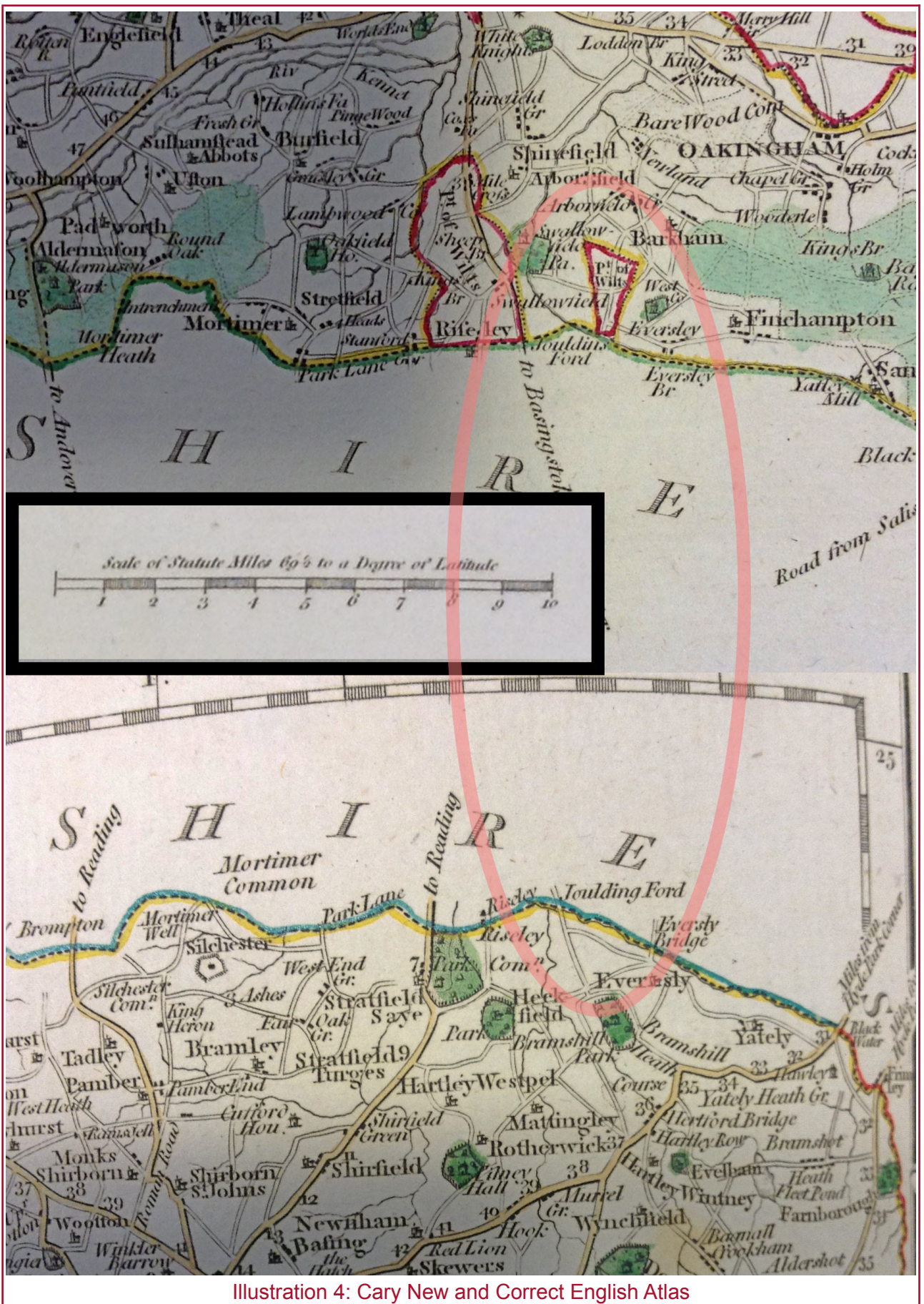


Illustration 4: Cary New and Correct English Atlas

F.3. **Description:** Original scale: scale bar marked on map; orientation: unchanged (north).

F.4. Cary's map of Berkshire is said to be based on Rocque, and that of Hampshire on Taylor. The maps show Jouldings Ford, labelled on both maps, as one of a small number of crossings of the Blackwater River, with a road leading to the ford from both south and north.

F.5. **Conclusion:** Cary's map show that Jouldings Ford was a named feature on a road giving access between Hampshire and Berkshire⁶.

G. Summary of additional comments: Introduction

G.1. Summary, paras.3–4: agree.

G.2. Summary, para.5: disagree, but please see below.

G.3. Summary, para.6: the user evidence gives rise to two alternative possibilities. Either the way is a historical right of way (at least of bridleway status) and such user was by right, and evidence of the reputation of the way as a right of way. Or, alternatively, the way is not historically a right of way, and the user evidence is evidence of use as of right — as to which, we say that the evidence is sufficient in its own right to show presumed dedication

H. Summary: Assessing the historic evidence

H.1. Summary, para.8: we agree that *Restoring the Record* is not an independent academic text. However, the applicant does not rely on *Restoring the Record* as tending to prove the application, but as a useful summary guide to the application's strength. We are content that the application is assessed on its merits. However, the courts have given guidance on how evidence of highway status is to be considered. In *Fortune and Others v Wiltshire Council and Another*⁷, Lewison LJ said, at paragraph 22,

'In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

H.2. The Planning Inspectorate *Consistency Guidelines* recognise that several pieces of evidence which are individually lightweight in themselves (such as an historic map or a tithe map) may, collectively, convey a greater impact:

⁶ Although at that time, the land immediately north of the ford was an enclosure of Wiltshire.

⁷ [2012] EWCA Civ 334

‘If, however, there is synergy between relatively lightweight pieces of highway status evidence (e.g. an OS map, a commercial map and a Tithe map), then this synergy (co-ordination as distinct from repetition) would significantly increase the collective impact of those documents. The concept of synergism may not always apply, but it should always be borne in mind.’⁸

H.3. The correct test under s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 is whether:

‘the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path...’.

The surveying authority must therefore make an order consequent on this application where the evidence (of the application, taken with any other evidence) shows that there is a reasonable allegation of the existence of the application way.

H.4. While no single piece of evidence is conclusive, we believe that, taken as a whole, the evidence which we have put forward demonstrates highway reputation over many years, indicating that the route does indeed have highway status, and that prior to the Natural Environment and Rural Communities Act 2006, there were full vehicular rights over it.

H.5. It is in assessing the evidence as a whole that the approach commended in *Restoring the Record* is intended to be helpful.

H.6. Moreover, it is abundantly plain that the test of a reasonable allegation of the existence of a right of way is met: there is substantial evidence that the way exists, and no credible evidence that it does not (see s.A in our response of April 2018).

I. Summary: The Applicant’s case for a public carriageway – the documentary evidence

I.1. Summary, para.9: the objectors refer to the applicant ‘postulating potential scenarios’, and elsewhere, repeatedly, to ‘supposition’. As the objectors will be well aware, in addressing an application relating to historical evidence, the available evidence may be limited in extent and sometimes unclear as to its meaning in relation to whether a right of way exists. It is often possible reasonably to draw sound conclusions from a particular piece of evidence: for example, a tithe award may mark a way on the map with a parcel number, and expressly refer to it in the award as a ‘public road’.

I.2. In other cases, the position can be less certain, and different parties may contest that different interpretations should be drawn from the evidence. It may be helpful to offer an explanation of how the facts can be reconciled with the evidence. The explanation is not itself evidence, and cannot be proven — but it may provide a legitimate, and sometimes compelling, explanation of the circumstances. It is, of course, open to any party to put forward such an explanation, or to criticise an explanation put forward by another, and this is part of the usual process of determining the application.

8 [Consistency Guidelines](#): para.2.17.

I.3. As the objectors state, 'It is not sufficient to postulate potential scenarios.' But it may assist in the determination of the application.

I.4. The objectors states that it is not for them to prove that the way is private. The applicant agrees. We address the specific criticism in para.9 (in relation to the Finance Act evidence) below.

J. Summary: The evidence of status A–B

J.1. Summary, para.10: the assertion that there is no evidence of a right of way south of B was addressed in our response of April 2018. Insofar as that rebuttal is addressed in the objectors' second submission, we comment below.

J.2. The objectors state that, '...B has consistently been treated as the end point for any parish road in a series of documents.' Indeed, as B was (and C now is) the county boundary and the parish boundary, it is hardly surprising that B is documented as the end point for the parish road: it was (and C now is) the point at which highway maintenance responsibilities ceased for the authorities north and south of the Blackwater River. What matters is not whether documents treat the river as a boundary of matters of relevance to the document (which it invariably is), but what the evidence collectively shows as to the status of the way north and south of the river.

J.3. Summary, para.11: we agree that the inclusion of A–B on the list of streets of Wokingham Borough Council is not in itself conclusive evidence of the status of that way as a carriageway. But it is, in the absence of credible evidence to the contrary (of which there is none), evidence that A–B is a publicly maintainable highway. We are content to rely on the evidence as a whole to demonstrate that the whole of the application way is a carriageway.

J.4. Summary, para.12: it is correct that 'it was not the main purpose of the [Finance (1909–1910) Act 1910] legislation to record public ways'. The primary purpose was to charge a tax (increment levy) on any increase in value when property was later sold or inherited. However, public vehicular roads were usually excluded from adjoining landholdings and shown as 'white roads'. This is because s.35 of the 1910 Act provided,

'No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.'

J.5. A highway authority was a rating authority. Accordingly, the exclusion of public vehicular roads was necessary to the proper implementation of the Act. As the *Consistency Guidelines* state (quoted by the objectors at para.12):

'It should not be assumed that the existence of public carriageway rights is the only explanation for the exclusion of a route from adjacent hereditaments although this may be a strong possibility, depending on the circumstances.'

J.6. The question is what other circumstances might explain the exclusion of A–B? Those usually cited are:

- the way is a private road in multiple ownership (typically, because the road gives access to several different parcels of land in separate ownerships);
- the way is a private carriage road awarded under an inclosure award (in practice, these first two are similar in character).

J.7. Neither is likely or even suggested here. The way A–B is a continuation of an acknowledged public road, Jouldings Lane, from the turning to Jouldings Farm to Jouldings Farm. Not only is no private right registered in the Land Registry over A–B, nor any asserted, but none is claimed over the remainder of the application way. There is no evidence that A–B was set out in an enclosure award as a private carriage road — indeed, the Swallowfield inclosure award of 1865 treats A–B identically to the rest of Jouldings Lane.

J.8. The only remaining explanation is that A–B was excluded by the surveyor because it was identified as part of the public highway, Jouldings Lane.

J.9. Summary, para.13: we cannot exclude the possibility that the object name book reference to Jouldings Lane as a ‘parish road’ might mean a bridle road. But it is not a usage which we have encountered, and we note that the objectors also cite no precedent. We think that the possibility is therefore unlikely. We suggest the same analysis and conclusion in relation to the Swallowfield Inclosure Award of 1865.

J.10. Summary, para.14: if there is any uncertainty about the status of A–B in the light of the documentary evidence (which we doubt), it remains that nothing distinguishes A–B from Jouldings Lane north of B, other than its unsealed character. It does not appear to be disputed by the objectors that Jouldings Lane north of A is a carriageway — why then should it cease to be a carriageway south of A?

K. Summary: Evidence of status B–D — the evidence for the continuation of public rights

OS and commercial maps

K.1. Summary, para.15: we agree that the appearance of any road on early Ordnance Survey and commercial maps does not, in itself, demonstrate public status. However, it is fair and reasonable to draw such inferences as are justified by the context. For example, where a way is shown leading only to a farm or isolated house, it may be reasonable to assume that it could have been a private road (with or without a right of way on foot or on horseback, with which the map maker may not have been concerned). However, where a way is shown consistently on commercial maps as fulfilling more than a means of access to an individual premises, but as a link in the road network, and there is no reasonable alternative explanation for its inclusion (such as to provide a means of access to an individual premises shown part way along it), it is reasonable to infer that the map maker, wishing to produce and market a map which would be of use to clients and customers in navigating the landscape, would have tended to show ways which were open to the public, and not ways which were private (or over which existed only a public right of way on foot).

K.2. In the present case, the way is shown as a link in the road network on the Map of the Forests around Windsor (1607), Taylor’s map of Hampshire (1759), Rocque’s map of Berkshire (1764), Cary’s New and Correct English Atlas (1787), Greenwood’s map of Hampshire (1826), and the Walter map of Windsor Forest and its vicinity (revised 1856, north from Jouldings Ford only).

K.3. We disagree with the assessment at para.16: in *Fortune*, there was a considerable body of evidence both for and against status of the disputed way as a carriage road (the status of the way as a public path was not in doubt). The judge at first instance said that⁹:

⁹ *Fortune & Ors v Wiltshire Council & Anor* [2012] EWCA Civ 334, quoted at para.55, then at para.56.

‘In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality of the evidence in reaching a decision.’

K.4. The Court of Appeal found that:

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

K.5. In *Fortune*, the evidence derived from the Greenwood map was modest but nonetheless significant. The application way is likewise shown as a ‘cross road’, and likewise the evidence from the Greenwood map supports other evidence of a public carriage road.

K.6. Summary, para.17: we agree that the representation of the application way on historical Ordnance Survey maps carries little if any weight in establishing public status. But its representation on commercial historical maps, including the Greenwood map, does attract some evidential weight — such maps are a legitimate strand or cord of a rope referred to by Pollock CB (see para.H.1 above).

Eversley Tithe map

K.7. Summary, paras.18–19: we agree that it was not the purpose of tithe records to show public or private ways but lands subject to tithe. We agree that, on some tithe awards, non-titheable private as well as public routes were excluded. However, we do not agree that no useful conclusions can be drawn in this case.

K.8. First, the application way, forming parcel 665 on the tithe map, appears to be coloured sienna, although the colouring is faded. This is suggestive of a highway, being consistent with the conventions commended by Lt Dawson to the Tithe Commissioners for England and Wales¹⁰.

K.9. Secondly, the application way is recorded in the apportionment in a table of ‘Roads and Waste’. It is not inevitable that such a class exclusively comprises public roads and waste land. But, contrary to the objectors’ assertion, all other ways listed in the table are indeed public roads — see s.B above as to Well House Lane and its continuation across the Blackwater River to Forges Lane. It is therefore reasonable to assume that only roads *eiusdem generis* — i.e. public roads — were included in the table.

K.10. Thirdly, the purpose of tithe apportionment was to assess the area and rent charge assigned to each parcel of land. None of the entries in the table of roads and waste contains a rent charge, and none was assigned. The objectors are quite correct in contending that, in some tithe assessments, some private roads were excluded from assessment, and indeed, some public roads were included for assessment. Decisions whether to include or exclude are likely to have been predicated on whether the road in question gave rise to any productive use capable of attracting a rent charge, or if not in productive use (being ‘barren’), whether it was capable of being brought into productive use.

K.11. One can well understand that some private roads, particularly those subject to multiple private rights (such as those conferred under an inclosure award), being confined

¹⁰ Reproduced from House of Commons Sessional Papers 1837 (103) XLI 383

between hedges or walls, no wider than necessary for the passage of carts, and metalled with no significant grazing capacity, may have been excluded on the basis that they were both barren and incapable of ever giving rise to productive use.

K.12. Equally, one can well understand that some public roads, across productive land, where the road was privately maintained, or the right of grazing was held by the landowner, were acknowledged as having productive use and capable of attracting a rent charge, notwithstanding the public status of the way.

K.13. However, the application way, as recorded on the tithe map, is of generous width, having a splay at the ford which may be as wide as 37m, and which throughout is of width 8.5–10.5m. Such a way, not being metalled, and being of generous proportions, would have given rise to significant grazing potential (just as most country lanes today, even those which are tarred, have significant verges or shoulders which are capable of being grazed). If the use of the way was limited to a small number of persons with private rights (none of whom, we note, have been identified, nor have such rights endured), the grazing potential would have been enhanced by the low level of user. A right to graze the land, presumably exercisable by the owner of the road, would have been a right of some value to him — all the more so because, as the applicant has conceded, most of the application way south of the ford was capable of being enclosed by gates. Why would such a valuable piece of land not have been assigned to its owner in the apportionment, and a rent charge imputed?

K.14. But it was not assigned. Instead, the apportionment does not assign the land to any owner, but in common with other roads in the table, treats them as not subject to assessment. The only logical conclusion in the circumstances is that, again in common with other roads in the table, the application way was considered to be a public road, and any grazing on the road was vested in the surveyor of the parish, who was not liable to assessment.

The Railway records — Bristol and Dover 1845; London, Newbury and Bath Direct Farnboro' Extension 1845

K.15. Summary, para.20: we agree that the survey for the Bristol and Dover railway show significant errors. However, these are errors of survey of the landscape, and of preparation of the plans. An error is far less likely to have arisen in respect of the categorisation of the application way as a 'parish road' for two reasons.

K.16. First, the assessment of the application way as a public road would, *prima facie*, have demanded the provision of a bridge over or under the railway in accordance with ss.49–50 of the Railways Clauses Consolidation Act 1845, which would have been incorporated with the Act to enable the railway to be built (if the latter had been passed by Parliament). The additional costs of providing a bridge, where either none would otherwise have been necessary, or where a bridge would have been necessary to the standards required in ss.49–50 for a private carriage road, would be substantial. No railway company would have willingly entered into such a commitment if it could be evaded. Even if the enabling Bill contained clauses providing for the construction of a level crossing in place of a bridge, the company could well have faced opposition in Parliament to such provision, and the risk of delay or amendment.

K.17. Secondly, the status of the way must have been a matter on which the railway company surveyor conferred with the parish surveyor of the parishes through which the railway was planned to pass. There is no other conceivable means by which the status could reliably have been discerned — it was hardly a matter on which the railway company

surveyor could have made an informed guess, given the additional liability, or exposure to criticism and possible censure in Parliament, that several wrong calls could generate. Notice of application to Parliament, and extracts of the plans and book of reference, were required to be sent to the overseers of each parish, who would alight on any manifest error. Therefore, the status must be commensurate with the opinion of the parish surveyor at that time.

K.18. It is appropriate therefore to ask how and why the railway company surveyor might have made a mistake which would have incurred significant further cost to the railway scheme? It can of course be suggested that the information gleaned from the parish surveyor by the railway company surveyor may have been incorrect — that the parish surveyor was wrong to regard the application way as a parish road. But the status as a parish road is consistent with the contemporary evidence.

K.19. Summary, para.21: the plans for the Bristol and Dover direct junction railway can certainly be criticised in other respects. It may be that the plans do not expressly allow for any public highway continuation of the application way. Our April 2018 analysis at para.K5 explained how the plans may have failed to make a true account of all the paths and tracks across Bramshill Common. We note that the book of reference distinguishes ‘Occupation Road’ (parcel 24) from ‘Road’ (parcels 26–28), and it may be that the latter are public highways which are privately maintainable, or roads as to which there was uncertainty as to status. It is possible that the Bill deposited in Parliament made specific provision for roads and paths across the common to be traversed by level crossings, but as the Bill has not been archived, we cannot know.

K.20. Summary, para.23: the limits of deviation of the London Newbury and Bath Direct Farnboro’ Extension railway do not extend to the application way, and therefore no conclusions can be drawn about the status of the application way — there is no reason why it should have been labelled and itemised in the book of reference.

K.21. However, contrary to the inference drawn by the objectors, the plans do suggest that the application way is public. This is because the planned line of railway would have sequestered the part of Bramshill Common north of the railway — there was, as the objectors point out, no provision for any passage over this part of the railway, whether by public or private carriage road. How then was access to be obtained to this part of the common, other than along the application way? And if the application way were a private road, how could the railway company surveyor conclude that all those with a need to access this part of the common, including those with rights of common, would have sufficient private rights to use the application way?

Finance Act evidence

K.22. Summary, para.25: we agree that the evidence south of C does not show that the application way was a public road. But we have shown, by comparison to other local roads across Bramshill Common known to be public, and roads in Cornwall across common land, that a practice was adopted by some valuers of not excluding roads (of whatever status) across common land. It is not possible to assert on the evidence, as the objectors do, that it ‘actually points away from a through route existing along the whole AR’ — there is no basis for such a conclusion.

Bramshill estate sale

K.23. Summary, para.26: the objectors state that, 'On sale of an Estate, there would have been no need for the allotment of a private road to one plot of another as ownership and associated access rights would be shared between the lots by presumption or inference of law.' This is merely a repetition, in different words, of the position adopted in the objectors' initial analysis, fully addressed in our April 2018 response.

K.24. There is some authority for the proposition that ownership of a private occupation road may pass *ad medium filum* (*Holmes v Bellingham* (1859) 7 CB (NS) 329), although the principle is by no means as firmly and generally established as in relation to public highways, and still less so where, on the offer for sale in 1952, the Bramshill estate expressly left the way uncoloured, but coloured-in known private occupation roads. However, there is no basis for inferring access rights for the objectors or any other person by 'presumption or inference of law', first because the 1952 conditions of sale made comprehensive, detailed and express provision for the grant of private rights where necessary, and secondly, because no such private right are necessary: none of the premises frontaging the application way relies on access along the application way, and indeed, none of them appears to use it. Indeed, Mr John Saunders states of Jouldings Ford that, 'that no one uses it'; Mr Michael Thumbwood that, 'I have never seen any member of the public using the application route'; Mr Nigel Stoate that there were 'numerous' occasions 'when the application route was impassable for many weeks and months'; and Mr Thomas Stoate that, 'Occasionally we would cross the ford with a tractor to access the land on the other side, but with difficulty as the ford was deep.' This is hardly a promising basis on which to claim a right of way of necessity — even were it not for the obvious fact that no necessity exists.

K.25. Summary, para.27: the objectors state that, 'routes that are private or public non-vehicular were excluded between different hereditaments (for example, the uncoloured track between lots 11 and 7, from the end of Well House Lane and continuing south-east from Well House Farm).' However, as explained at s.B above, that track appears to be an unrecorded public road. The objectors appear to rely on this 'example' as the sole exception to the practice adopted in the Bramshill estate sale documentation that public roads were shown uncoloured, and not included in the lots (except so far as the presumption *ad medium filum* applies), and private roads were coloured to a particular lot, and private rights were conferred where necessary. But on the contrary, it is not an exception at all, but merely confirmation that the uncoloured track in continuation from Well House Farm was also regarded by the Bramshill estate as a public road.

K.26. The evidence of Mr Thomas Stoate is of no significance set against the plain intention of the Bramshill estate. It is abundantly clear that the estate recognised the application way as a public road, did not include the way as part of the estate sale (except so far as the presumption *ad medium filum* applies), and did not confer any private right over the way for the benefit of any purchasers of adjacent lots because none was necessary (it being public). It is also apparent that none of the adjacent landowners has claimed or now claim a private right of way over the application way, and that none of them has acquired a right to use it by virtue of ownership. This is not a question of 'supposition' (Detailed comments, s.I/B), it is a matter of fact, as to which the objectors have been unable to adduce any contrary evidence whatsoever.

K.27. Instead, we are to believe that the Bramshill estate intended to sterilise the application way, so that following the 1953 sale, no-one had a right to pass along it — and no-one

had a right to use it as an adjunct to their neighbouring land. The evidence to the contrary is plain.

L. Cul de sac

L.1. Summary, paras.29–36: whether a cul de sac can be a highway is a matter of both law and fact. Indeed, in *Roberts v Webster* (cited by the objectors), the court held that a cul de sac could be a highway if there was some attraction at the end which might cause the public to wish to use it that could be sufficient to justify the conclusion that a public highway had been created.

L.2. The facts in relation to the application way are that there is no ‘attraction’ which might cause the public to wish to use it as far, and no further than, the ford. The objectors state that ‘It is not possible now to assess the reason for the cul de sac likely stemming from events some 200 years ago’, but that ‘The evidence is that one existed.’ That is far too convenient. There is no evidence that the highway terminated at the ford — only a series of documents which had no interest in showing a highway beyond the county boundary, and one (the object name book) which referred to the highway terminating at Jouldings Farm, later corrected to Jouldings Ford. Driven nonetheless to suggest a reason, the objectors lamely suggest that it was used to water stock. But a watering point would not demand carriageway rights, would be needed if there were a common, or a drove road or other significant road nearby with a need to water stock passing along it, and would require a broad stretch of river along which the stock could access the water. In fact, the second and third criteria are met on the south side of the ford — but not on the north.

L.3. And it is particularly odd that a public way, established to a watering point on the river, should cease at the ford, notwithstanding that the way continues south, through the ford, and on to Bramshill Common, where there would have been commoners’ rights, and destinations further south. One has to remark on an assertion that such a set of circumstances might exist, but no public rights should be established south of the ford over a period of time which is likely to amount to at least 400 years, and perhaps a millennium. Even without evidence, such a conclusion would be astonishing; with the evidence, it is perverse.

M. The common as a public terminus

M.1. Summary, paras.37–38: The nature of any right of way exercised as ancillary to a right of common will depend on the circumstances. There is no presumption or rule of law that such a right will be private, nor that use of a way ancillary to the right of common will necessarily give rise to a private right. If, for example, rights of common were established by prescription over Bramshill common as attached to several farms north of the Blackwater River, the use of the application way for the purposes of passing to and fro between the respective dominant tenements and the common would merely be user — user which was attributable to an existing public right of way, or capable of establishing, with other user, a public right of way, or in the absence of other use, capable of establishing a private right of way.

M.2. Summary, para.39: as to whether the common itself is capable of acting as a public ‘attraction’, the applicant says that it need not, because there have always been onwards means of passage beyond D, whether along Well House Lane (in either direction), or

continuing across the common. That such ways may not expressly be recognised as public rights of way in the nineteenth century is addressed at paras.K5–K7 of the April 2018 response.

M.3. The parallel with *Eyre v New Forest Highway Board* is remarkable: Wills J said: ‘... what would be the meaning in a country place...of a highway which ends in a *cul de sac*, and ends at a gate on to a common? ...who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? ...But what do you find such a thing for in this part of the world? I cannot conceive it.’ Likewise, what would be the meaning in a country place of a highway which ends in a ford?

M.4. And if we refer to the Ordnance Survey Old Series one inch map (item 6 in the application document summary), we see tracks onwards from D across the common west along the present course of Well House Lane to Ford Lane and Thatcher’s Ford, south-west to Riseley Mill (noting that a bridleway today is recorded west from Ford Lane to Riseley Mill) and southeast to Eversley. It is entirely likely that these ways were employed by the users of the application way to continue their journeys.

M.5. Whether these ways were public highways, then and now, cannot be proven. The 1845 railway schemes affecting Bramshill common did not make provision for any crossings on Bramshill common — but as the objectors have said, these surveys were unreliable, and as the applicant has explained at paras.K5–K7 of the April 2018 response, it is entirely credible that the status of ways across the common was uncertain and minimised by the railway companies.

M.6. Summary, para.40: Well House Lane is not the subject of this application. It has been recognised as a public road for many years, and it is by no means clear how or when its public status originated. Notwithstanding the 1845 railway surveys, Well House Lane may have been a public highway since time immemorial — we do not know. But it is probable that it is just one of a number of tracks across Bramshill common which have had public rights of some status for as long as the application way.

N. Widths

N.1. Summary, para.41: we agree that the splay across the Blackwater River at B and C may not entirely be highway waste.

N.2. Otherwise, the boundaries of the application way are clearly contiguous with the physical boundaries shown on successive Ordnance Survey County Series maps, where so defined.

O. Bridge

O.1. Summary, para.43: we agree that the evidence for a public bridge is limited, and the bridge does not form part of the application.