



WILDLIFE AND COUNTRYSIDE ACT 1981
SECTION 53, SCHEDULE 14 APPLICATION TO: ADD A RESTRICTED BYWAY
AND UPGRADE PART OF FOOTPATH CH5/57 TO A RESTRICTED BYWAY
OVER PAINTMOOR LANE, CHARD AND CHAFFCOMBE

Application: 524M
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Date: April 2021

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to discuss the details.

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1. **Introduction**

1.1. In June 2008 the South Somerset Bridleways Association (SSBA) made an application under Schedule 14 and Section 53(5) of the Wildlife & Countryside Act 1981, for an Order to amend the Definitive Map and Statement by adding and upgrading the application route to a restricted byway as described in paragraph 2 below. The route in question is shown on drawing number H009-2017/524m (Appendix 1).

1.2. A restricted byway can be used by the public on foot, with horses or bicycles and with non-mechanically propelled vehicles (for example, a horse and cart).

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

2. **The Application and supporting evidence**

2.1. The application is based on documentary evidence and included extracts of the following documents:

- 1819 Chard Inclosure Award
- 1822 Greenwoods Map
- 1841 Chard Tithe Map
- 1903 OS Object Name Book
- 1910 Finance Act map
- 1927 Bartholomew's Map
- 1944 Hinton Unsettled Estate Sale Documents

2.2. Somerset County Council commissioned consultants, Robin Carr Associates, to investigate the application and produce a report containing a recommendation. Robin Carr Associates carried out an initial consultation, produced a draft report on which they carried out a second consultation and then produced a final report. That report was completed on 23 April 2018 and is included (minus appendices) at appendix 3 of this report. The report concluded that there was insufficient evidence to make an order. However, before the case was determined additional relevant evidence was submitted. It was therefore necessary to reconsider all the available evidence in light of the newly submitted documents. All the documentary evidence found or submitted, either with the original application or since, is discussed further in section 5 below.

2.3. Based on the documents they submitted the applicant has concluded that:

"45. All the evidence produced for the application route suggests that vehicular rights existed at the times the various pieces of evidence were created.

46. Over the centuries it has been referred to as a reference in public records. In all cases it has been consistently shown as a road. At no time have any of the adjacent landowners required an easement to use it. At no time has it ever been recorded as having a private owner.

47. The antiquity of the route shows that the highway existed prior to 1835. It will therefore be a highway maintainable at the public expense, and so should be added to the List of Streets maintained by the Council under s.36 (6) Highways Act 1980.

*48. The applicant requests the surveying authority to add the route to the definitive map as a restricted byway."*¹

2.4. No direct evidence of use was submitted with the application. The applicant later provided anecdotal evidence of use, but (apart from referring informally to their own use of the route) no direct evidence of use was submitted. Evidence of observed use is discussed in sections 6 and 7.

3. **Description of Route**

3.1. The application route runs from point A on Avishayes Road in a north-westerly direction for about 400 metres to point B. At point B the route turns generally north and runs for approximately 694 metres to point C1. The route then runs east, south, east and generally north around the eastern edge of Chard Reservoir for approximately 241 metres to point D1. The route then turns east north-east and runs for approximately 68 metres to a junction with Chaffcombe Lane at point D.

3.2. From point B to C public footpath CH5/57 runs over the application route. The rest of the application route is not currently recorded as carrying public rights.

3.3. Photographs of the claimed route taken by the applicant and submitted with the application are at Appendix 4.

¹ Sarah Bucks, South Somerset Bridleways Association 'Application Report'.

3.4. Land registry searches carried out on 9 January 2017 and 21 February 2020 identified 10 owners or adjacent owners. The application route has no registered owner from the Chard/Chaffcombe parish boundary to point D, and only mining rights are registered for the rest of the application route (landowner D). Three additional owners or adjacent owners were identified by other means. The Common Law presumption is that, in the absence of any evidence to the contrary, adjoining landowners own up to the centre point of a highway. However, determining the current ownership of the soil is not a question this report attempts, or needs, to answer. The landownership is shown at Appendix 2. Landowner D (mines and minerals only) is only shown where no other landowner is registered or has claimed ownership.

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

4. **Relevant Legislation**

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

4.2. Section 53(3)(C)(i) states that the Map and Statement should be modified where the County Council discover evidence which, when considered with all the other available evidence, shows "*that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path a restricted byway or, subject to section 54A, a byway open to all traffic*".

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

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

4.5. The purpose of Section 53 of the Wildlife and Countryside Act 1981 is to record, or delete the record of, rights rather than create or extinguish the rights themselves. Practical considerations such as suitability, security, wishes of adjacent landowners or user groups cannot be considered under the legislation.

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

4.7. Twenty years use by the general public can give rise to the presumption of dedication of a way under Section 31 of the Highways Act 1980. The period of 20 years is measured backwards from the date of challenge by some means sufficient to bring it home to the public that their right to use the way is being challenged. Section 31 (1) states *"where a way over any land, other than a way of such character that use of it by the public could not give rise at Common Law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it"*.

4.8. In addition to section 31 of the Highways Act 1980, rights of way can also be dedicated at Common Law. The requirements for a Common Law dedication is summarised in Halsbury's Law as follows:

"Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance ... An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; ... At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there

*was no one who could have dedicated the way lies on the person who denies the alleged dedication*².

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

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

5. **Documentary Evidence**

5.1. This section discusses each piece of documentary evidence that has been examined as part of this investigation in turn. In some cases it has not been possible to view the original document and it has instead been necessary to rely entirely on an extract supplied by the applicant. Where this is the case the words 'extract only' follow the title of the document. If it has been necessary to give those documents less weight on account of them only being viewed in part this has been made clear in the description and interpretation of the evidence.

5.2. Throughout discussion of the evidence comparison is frequently made to the way in which other routes in the immediate vicinity of the application route have been recorded. Where other rights of way, roads or physical features have been referred to their location has been identified on the relevant appendix or on Appendix 1.

5.3. It is worth noting that part of Paintmoor Lane (the application route) and Chaffcombe Lane with which the application route has a junction at point D,

² Halsbury's Law as quoted in paragraph 5.46 of the 'Planning Inspectorate (February 2016) *DMO: Consistency Guidelines 9th revision*,'

were diverted between about 1834 and 1841 to accommodate the newly built Chard Reservoir. Documents which pre-date the construction of the reservoir therefore show a linear way in a different position to the application route in the vicinity of point C1 to D. This is discussed further under the relevant sections, below.

5.4. It is also worth noting that the Chard / Chaffcombe Parish boundary crossed the application route between points C1 and D1 until at least around 1960. It has since been altered to run along the application route from the same point between C1 and D1 to point A. However, it is unknown exactly when this change was made.

5.5. **Inclosure Records**

Explanation of the type of evidence

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

Evidence

Chard Inclosure Act, 1815

Source: South West Heritage Trust (SWHT)

Reference: DD/WL/22

Appendix number: 5

Chard Inclosure Award, 1819

Source: SWHT

Reference: Q/Rde/103

Appendix number: 6

Description and interpretation of evidence

5.5.2. The Inclosure Award was considered by Robin Carr Associates, although the Act was not. However, as the interpretation of the new evidence submitted is affected by the Inclosure Award and Act and it is considered useful to review this evidence in detail here.

5.5.3. The Award map shows a linear way from point A to just north of C1 numbered 40 and labelled '30 feet'. At this point it meets a road numbered 13* (Chaffcombe Lane before it was diverted). Point D would have been to the north-east of C1 on the continuation of the road numbered 13*. No route is shown between C1 and D1. These routes were later diverted when Chard Reservoir was built (see 5.13, below).

5.5.4. The Award distinguishes clearly between 'public carriage roads and highways' and 'private roads'. Number 40 is described under the heading 'Private Roads' as a private road, thirty feet wide, and terminating at public carriage roads at either end. The private roads were to be maintained by the owners and proprietors of the inclosed lands. Number 13* (Chaffcombe Lane which Paintmoor Lane is shown joining at C1, referred to above) is described under the heading 'Public Carriage Roads' as a public carriage road.

5.5.5. The 1815 Act under which this Award was made specified at page 10 and 11 that the Commissioners could, with the approval of two Justices turn or divert "*...any public Highways or Highway, Bridle Roads or Bridle Road, Footways or Footway, or other Road or Roads, Way or Ways, Path or Paths ... which may in their judgment be diverted or turned, without inconvenience to the Public, into any other public Highways or Highway, Bridle Roads or Bridle Road, Footways or Footway, or other Road or Roads, Way or Ways, Path or Paths or be diverted or turned, so as to make the same more convenient to the Public, or be stopped up and destroyed as superfluous and unnecessary...*"

5.5.6. It has been suggested that this encompasses all ways whether described in the Award as public or private, and that as all ways were to be altered with reference to public convenience, all ways must have carried public rights regardless of whether they were called a public way or a private way (as a route over which the public did not have rights could not be said to be convenient for the public).

5.5.7. This interpretation is considered unlikely to be correct for the following reasons. Firstly, the 1815 Act incorporated the Inclosure Consolidation Act of 1801. The 1801 Act set out a number of provisions which could be incorporated into future acts. This included giving the Commissioner the power to set out private roads, public roads, bridleways, footways, quarries, bridges,

gates, stiles and other features. The 1801 Act clearly differentiated between public and private ways. Although the Act and Award do not specify who could use the private roads, the same was true of the Dunlop³ case in which it was ruled that the term 'private' refers to the lawful class of user of a route (i.e. private roads were for the use of a limited, if unspecified, section of society rather than the public as a whole). While that judgment is only likely to be binding in relation to the specific award being considered in Dunlop, the Planning Inspectorate advise that the term 'private' *"when used with other local acts which derive from the 1801 General Act probably have the same meaning"* as that described in the Dunlop case .

5.5.8. Secondly, the Act allows for the diversion of routes *"without inconvenience to the Public"* as well as *"to make the same more convenient to the Public"*. 'Inconvenience' to the public might have been caused by the diversion of a wholly private route (for example, by diverting it onto or across a public way) and therefore need not mean all routes that could potentially be diverted were considered to carry public rights. Even if it were to be accepted that the 1815 Act was specifying that all ways were only to be altered for greater public convenience (and not just 'without inconvenience'), that convenience might not come from the public travelling over them. For example, a private road over which the public had no rights might be altered to allow for the more convenient diversion of a public road. There is therefore no reason why the diversion of a private way might not be considered to be more convenient to the public.

5.5.9. These documents are therefore considered extremely strong evidence that private rather than public rights were set out over A to C1 by the inclosure of 1819. They do not, however, preclude public rights coming into existence after inclosure.

5.5.10. Having said this, a short section of the application route between D and D1 does appear to have formed part of the public carriage road numbered 13* at the time of inclosure and therefore is extremely strong evidence that this part of the application route carried public vehicular rights at that time. However, it also appears those rights were later diverted when Chard Reservoir was built, and this is discussed further, below.

5.6. Tithe Records

³ Dunlop v SSE and Cambridgeshire County Council [1995] 70 P & CR 307, 94 LGR 427

Explanation of the type of evidence

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

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

5.6.3. Public roads which generated no titheable produce were not generally given a tithe number. For the same reason some private roads were also not liable to a tithe. However, both public and private roads could be subject to a tithe, if for instance, they produced a crop e.g. for grazing or hay cut from the verges

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

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

Evidence

5.6.6. **Chard Tithe Map, 1841**
Source: SWHT
Reference: D/D/rt/M/412
Appendix number: 7

Chard Tithe Map, 1841 (extract only)
Source: National Archives
Reference: IR 30/30/93
Appendix number: 7

Chaffcombe Tithe Map, 1841
Source: SWHT
Reference: D/D/rt/M/242

Appendix number: 8

Chaffcombe Tithe Map, 1840 (extract only)

Source: National Archives

Reference: IR 30/30/91.

Appendix number: 8

Description and interpretation of evidence

5.6.7. Robin Carr Associates' report describes the tithe maps as follows: *"The Tithe Map for Chard shows part the [sic] Application Route. The map does not include any colouration. The Tithe Map for Chaffcombe shows part of the Application Route and it appears to be shaded in the same manner as other roads in the area."* And *"The tithe maps indicate that in 1840/1 the Application Route physically existed. It does not, however, provide any commentary on the status of the route, and any brown colouring is not indicative of highway status, it simply indicates that it was not subject to tithe (i.e. it was non-productive land)."*

5.6.8. No reason has been found to depart from this analysis, except to add that the Chaffcombe Tithe Map shows two routes extending from point D both of which correspond with part of the application route. One in a south-westerly direction from D to D1 which then continues as an uncoloured route into the reservoir (following, as far as it is shown, the pre-diversion line of Chaffcombe Lane, discussed further below, and shown on the Inclosure Award plan, discussed above). The second runs in a southerly direction, corresponding with the application route where it crosses the (then) Chard / Chaffcombe parish boundary. The Chard Tithe map shows a route which corresponds with the application route within what was then Chard parish.

5.6.9. No difference of any significance to this investigation was observed between the copies held by the SWHT and The National Archives.

5.7. **Ordnance Survey Maps**

Explanation of the type of evidence

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

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

Evidence

5.7.3. **1809 - 1811 OS 'old series' map Cassini Timeline reprint**
Original scale: 1:63,360/one inch to the mile
Appendix number: 9

5.7.4. This map was not submitted with the original application and was not therefore considered in Robin Carr Associates' report. Although not the original version of the OS 'old series' maps, the Cassini Timeline reprints are reliable copies, re-projected and enlarged to match modern 1:50,000 mapping.

5.7.5. This map shows the pre-inclosure landscape. No linear way is shown in the position of the application route. This shows that either there was no linear way in this location, or it was not a significant enough feature for the OS to show it.

5.7.6. **1887 OS County Series 1st Edition Map**
Sheet No: XCII:1 and LXXXVIII.13
Survey Date: 1886

1888 OS County Series 1st Edition Map
Sheet No: LXXXVII.16
Survey Date: 1885

Scale: 1:2500
Appendix number: 10

5.7.7. These maps were not included in Robin Carr Associates' report. The application route is shown uncoloured between casing lines of equal thickness between point A and D and labelled 'Paintmoor Lane'. Different parts of the application route have different parcel numbers.

5.7.8. **1903 and 1930 OS County Series 2nd and 3rd Edition Map**
Sheet No: XCII:1
Revised: 1901 and 1928

1903 and 1929 OS County Series 2nd and 3rd Edition Map
Sheet No: LXXXVIII.13
Revised: 1901 and 1928

1902 and 1930 OS County Series 2nd and 3rd Edition Map

Sheet No: LXXXVII.16
Revised: 1901 and 1928

Scale: 1:2500
Appendix number: 11

5.7.9. These maps were not included in Robin Carr Associates' report. These maps are uncoloured, but the application route is otherwise shown in much the same way as on the 1887 and 1888 County Series maps, without any differences of significance to this investigation. Different parts of the application route have different parcel numbers.

5.7.10. **1898 - 1900 OS Revised New Series Map Timeline Reprint (extract only)**
Sheet 193
Original Scale: 1:63,360 (one inch to the mile)
Appendix number: 12

5.7.11. This map was not included in Robin Carr Associates' report. Although not the original version of the OS's Revised New Series maps, the Cassini Timeline reprints are reliable copies, re-projected and enlarged to match modern 1:50,000 mapping.

5.7.12. The application route is shown as a fenced metalled road, third class (uncoloured between casing lines of equal thickness).

5.7.13. **1919 OS 'popular edition' Map Cassini Timeline reprint (extract only)**
Original scale: 1:63360 (one inch to the mile)
Appendix number: 13

5.7.14. This map was not included in Robin Carr Associates' report. Although not the original version of the OS's Popular Edition maps, the Cassini Timeline reprints are reliable copies, re-projected and enlarged to match modern 1:50,000 mapping.

5.7.15. A to about C1 is shown uncoloured as 'roads under 14' wide' in bad condition according to the key. The key also includes the statement 'Private roads are uncoloured'. However, this does not necessarily mean that all uncoloured roads are private. It is therefore not possible to tell whether the application route between A and C1 was considered to be private, or a 'road under 14' wide in bad condition, or both.

5.7.16. Between about C1 and D the application route is shown with broken yellow colouring. It has been suggested that this colouring is the continuation of a contour line which runs along the route. It is true that a contour line does join the application route near to C1. However, at the same point there is also a thicker yellow line. The key identifies this as an 'Indifferent or winding road'.

5.7.17. It has been pointed out that, if all private roads are uncoloured, the user could reasonably infer that all coloured roads were considered to be public⁴. The inference would therefore be that at least C1 to D was thought to be a public road by the OS in 1919. This comment is considered in more detail below.

5.7.18. **1928 OS Road Map (extract only)**
Sheet No: 37
Scale: ½ inch to 1 mile
Appendix number: 14

5.7.19. This map was not included in Robin Carr Associates' report. The application route is shown uncoloured. The key identifies uncoloured roads as 'other Motor Roads, narrow, bad' or 'Minor Roads' (shown between narrower spaced casing lines). However, from the extract provided it is not possible to be certain whether the route is shown between narrower or wider casing lines. It does, however, appear to be the same width as nearby yellow roads suggesting it is probably depicted as 'Other Motor Roads, narrow, bad'.

5.7.20. The 1924 OS document *"Instructions to field revisers and draftsmen for the revision and preparation of the small scale maps for reproduction by heliozincography"* included the direction that *"No road should have any colour on it which is not easily practicable for horse drawn vehicles, or passable for ordinary touring motor cars. The user of the map will then understand that if he takes an uncoloured road, he does so at his own risk. Private roads, and roads which have been laid out for building purposes, are not coloured, even though their surface may be up to standard"*⁵. Therefore, despite being identified by the key as a motoring road, if these instructions were followed in the preparation of this map, it is not possible to tell whether the application route was considered to be a public or private road by the OS.

5.7.21. **1946 OS New Popular Edition Map (extract only)**
Sheet No: 177
Revised: 1930
Scale: 1 inch to 1 mile.
Appendix number: 15

⁴ Hodson, Y. (1999) *Popular Maps*, The Charles Close Society, London, p 134.

⁵ Transcribed in Hodson, Y. (1999) *Popular Maps*, The Charles Close Society, London, p 242 - 243

5.7.22. This map was not included in Robin Carr Associates' report. The application route is identified by the key as 'Minor Roads in towns. Drives and Unmetalled Roads'.

5.7.23. **1883 OS Boundary Remark Book for Chaffcombe and associated letter (extract only).**
1885 OS Boundary Sketch map for Chard (extract only).
1885 OS Boundary Sketch map for Cudworth, Chaffcombe, Cricket St. Thomas and Winsham (extract only).
Appendix number: 16

5.7.24. These documents were not included in Robin Carr Associates' report. The Boundary Remark Book shows a short section of the application route between D1 and C1 on either side of the (then) Chard / Chaffcombe parish boundary on page 8. It is shown in the same way as Chaffcombe Lane (with the exception that Chaffcombe Lane is labelled at either end with its destinations) and a short section of track now forming part of footpath CH5/42.

5.7.25. The accompanying letter shows that the boundary shown on page 8 of the Boundary Remark Book (described above, showing part of the application route) was taken from a new survey because the boundary shown on the Chard and Chaffcombe tithe maps was too inaccurate. It does not mention the application route, but does suggest that the physical features shown in the area covered would have been accurately recorded.

5.7.26. The Boundary Sketch Map for Chard shows a similar section of the application route on either side of the Chard/Chaffcombe parish boundary. Chaffcombe Lane is shown in the same way, except that it is also labelled at either end with its destinations. A short section of the track over which footpath CH5/42 runs is also shown in the same way as the application route.

5.7.27. The extract of the Boundary Sketch Map for Chaffcombe is out of focus, but a similar section of the application route is shown in the same way as Chaffcombe Lane. The extract provided does not cover the track over which footpath CH5/42 runs, and Chaffcombe Lane is not labelled with its destinations.

5.7.28. The purpose of these plans was not to record the status of ways, but to define boundaries. Physical features could be and were referred to where helpful or necessary to describe or delineate the boundary. Nothing has been found which suggests surveyors did not or should not have used private roads as one of those features. Any sufficiently permanent or substantial feature would have made a good reference point, and a private road set out at inclosure

for the use of multiple adjacent landowners would be such a feature, as would a public road. Neither document has a key showing different statuses of way. It is unknown whether public roads, footpath CH5/42 and the application route are shown in the same way because the meresmen and surveyor believed them to have the same status, or whether they were using single thickness black lines for the majority of features on the map and were not attempting to distinguish between public and private ways, or different types of public rights.

Description and interpretation of evidence

5.7.29. The 1809 – 1811 Old Series map shows that no significant physical feature existed in the location of the application route at the time.

5.7.30. The application route has been shown with separate parcel numbers from the adjacent fields on the 25 inch mapping. The Consistency Guidelines state that it has been argued that all parcels which have the shape of a way and are numbered are therefore highways but *“This argument has not been substantiated. Such depiction is far from conclusive for the confirmation of highway status”*.⁶ No weight for or against the existence of public rights is therefore attached to the fact that the application route has parcel numbers on some OS maps.

5.7.31. Most of the rest of the OS maps which show the application route do no more than confirm the physical existence of the route on the ground, and offer no evidence for or against the existence of public rights over it. This interpretation is supported by case law which states that *“If the proper rule applicable to Ordnance maps is to be applied, it seems to me that those maps are not indicative of the rights of the parties, they are only indicative of what are the physical qualities of the area which they delineate...”*⁷. In fact, since 1888 OS maps have carried the statement *“The representation on this map of a road, track or footpath is no evidence of the existence of a right of way”*⁸.

5.7.32. However, despite this, the Popular Edition (discussed at 5.7.13) does include the statement in the key that private roads are uncoloured. The logical inference to be drawn is that coloured roads were not considered to be private, and therefore were public⁹. A short section of the application route (C1-D) is shown coloured. This suggests that at least that short section was considered to be a public road by the OS. The OS surveyor would have been an objective

⁶ DMO Consistency Guidelines, 2016, section 12.31, page 9.

⁷ Moser v Ambleside Urban District Council (1925) 89 JP 118 at 119, Pollock MR

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

⁹ Hodson, Y. (1999) *Popular Maps*, The Charles Close Society, London, p 134.

record maker. However the primary focus of the OS was the accurate depiction of physical features and not to research or record public rights. There is also nothing to suggest that the surveyor consulted widely to ascertain the status of routes, or on how they would be depicted on the finished map. The depiction may therefore have been no more than a reliable record of the opinion of the surveyor and as such can be given very limited weight.

5.7.33. Whilst the colouring on the Popular Edition only applies to a short section of the application route, little reason has been found to explain a change in status at C1. No obvious place of public resort has been identified which would explain cul-de-sac public rights. It is, however, acknowledged that a cul-de-sac is possible. Therefore, this evidence is considered to be in favour of public rights over the whole route, although of less weight in relation to A to C1.

5.8. **OS Object Name Book**

Explanation of the type of evidence

5.8.1. In preparing the second edition County Series map, the Ordnance Survey produced an 'object name book' the primary purpose of which was to ensure that the various names recorded on the maps (names of farms, roads, places etc.) were accurate and correctly spelt. To this end each book contained a list of those names and a description of the feature to which they related. Each of the names in those books was later corroborated by a prominent member of the local community (e.g. a landowner or clergyman).

5.8.2. **OS Object Name Book**

Source: National Archives (extract only)

Reference number: OS 35/6423, OS 35/6426 and OS 35/6431

Appendix number: 17

Description and interpretation of evidence

5.8.3. At the time that they produced their report Robin Carr Associates only had an entry from OS map sheet LXXXVIII.SW (reference OS35/6426) available to them. However, the application route crosses three map sheets and it therefore appears in three Object Name Books (ONBs). Since Robin Carr Associates produced their report the two additional entries have been submitted.

5.8.4. The entry for OS map sheet LXXXVII. S.E. (reference OS35/6423), like the entry considered by Robin Carr Associates, describes the application route as 'a road' and the authority for the mode of spelling is given as an agent. However, in the book covering map sheet XCII.N.W. (reference OS 35/6431) Paintmoor Lane is described as 'a public road' running between two 'parish' roads. The original description (entered in July 1901) was 'an occupation road' but this was altered in red ink in August 1901 by crossing out 'n occupation' and adding 'public'. This was not altered in 1928 when the page appears to have been revised again, on that occasion in green ink.

5.8.5. At the top of the page OS 35/6431 is written 'Names as altered & initialled in red by A. F. Smith [...] in august 1901'. The alteration to the description of Paintmoor Lane from an occupation road to a public road has not been initialled. Seen in isolation this might cast doubt on the origin of the changes. However, there are several red alterations on this page of the ONB none of which have been initialled. It seems implausible to suggest that none of the red alterations were made by the OS in 1901 as this would contradict the text which clearly states that A.F. Smith did make at least some alterations in red at that time. It is far more likely that all of the red text was Mr Smith's but that he did not initial it. This argument is supported by the fact that the documents have been kept in safe custody (first by the OS and later by the National Archives) since they were produced. In the circumstances it seems highly likely that the changes to Paintmoor Lane (and others in red on the same page) were made by the OS in 1901.

5.8.6. Although each description was written in relation to one map sheet, and therefore might be considered to apply only to that part of the Lane which crosses the map sheet in question, all three entries describe the full physical extent of the application route from point A to D. Therefore, it must be assumed that the author of each ONB had the whole of the route in mind when describing it.

5.8.7. The description of the route as 'a public road' in one ONB therefore weighs in favour of the full length of the route carrying public rights. While recording the status of a route was not central to the purpose of the document, it is clear that the author did give it some consideration as the term 'occupation' was deliberately deleted and 'public' substituted.

5.8.8. Whilst 'road' might be more commonly associated with vehicular traffic, it is also possible for it to be used to describe lower rights (for example, bridle road). The ONB is therefore less helpful in indicating the type of public rights that were thought to exist.

5.8.9. It is uncertain why two out of the three ONBs simply refer to the route as a 'road' without giving an indication of public or private status. However, as they give no indication of status, the way they describe the route would be consistent with the application route carrying public rights (or not) and therefore do not contradict the description in the third ONB.

5.8.10. Overall, ONB OS 35/6431 is of some weight in favour of public rights over the whole length of the application route, and the other ONB entries concerning the route do not weigh against the existence of such rights.

5.9. **1910 Finance Act**

Explanation of the type of evidence

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

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

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

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

5.9.4. The 1910 Finance Act material did not become widely available until the mid 1980s. It cannot therefore have been considered during the Definitive Map making process and can be considered "new evidence". This is of particular importance for meeting the requirements of section 53(3) of the Wildlife and Countryside Act 1981 which requires the 'discovery' of new evidence (i.e.

evidence not considered when the Definitive Map was originally drawn up or last reviewed) before an order to amend the Definitive Map can be made.

Evidence

5.9.5. **Finance Act 1910 Record Plans (extract only)**

Source: National Archives

Reference: IR 128/9/1067, IR 128/9/1080 and IR 128/9/1120

Appendix number: 18

Description and interpretation of evidence

5.9.6. Robin Carr Associates' report describes the Finance Act record plan as follows *"The 1910 Finance Act Index maps show that the Application Route were excluded from valuation."* and *"Documents produced as part of the 1910 Finance Act valuation process can provide very good evidence in support of the existence of public rights of way. It is generally accepted that the exclusion of a route from valuation can provide strong evidence in support of the proposition that it is a public highway of some description. However, as indicated in the Planning Inspectorate's consistency guidelines on the subject (Appendix 22) there are alternative interpretations. For instance, where a route is used by multiple land owners/occupiers for access to land and property (as in this case), and it is set out in the Inclosure Award as a private road (as in this case), such exclusion has been interpreted, albeit not consistently, as not being supportive of the existence of public highway rights. The documents must be considered in the context of the other evidence."*

5.9.7. No reason has been found to depart from this analysis. The extracts of the Planning Inspectorate's consistency guidelines which Robin Carr Associates' included in their appendix 22 can be found at appendix 19 of this report.

5.10. **Highway Road Records held by the County Council, 1929, 1930s and 1950s.**

Appendix number: 39

Explanation of the type of evidence

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

Description and interpretation of evidence

5.10.2. Robin Carr Associates' report described these documents as follows: *"These documents use an Ordnance Survey map as their base and therefore show the Application Route. It is not however coloured up on any of the records as being highway maintainable at public expense."* and *"These records provide no evidence of highway status, but when considered alongside the Inclosure Award, may be considered to be supportive of the proposition that the Application Route does not enjoy any public highway rights (other than footpath rights over B-C on plan 1)."*

5.10.3. These documents provide no evidence in favour of the existence of public rights and are consistent with the existence of private vehicular rights as set out by the Inclosure Award. However, that does not necessarily mean that they weigh against the existence of public rights. The application route may not have been included on these documents because it did not to carry any public rights, but it might equally have been omitted because:

- i) it carried lower public rights (footpath or bridleway) which were not usually recorded on these types of maps;
- ii) it carried public rights but was not publicly maintainable; or
- iii) it carried public rights but the highway authority was unaware that they existed.

This is all the more apparent as part of the application route is recorded as a public footpath, and therefore is a highway, and is in no way indicated on these records.

5.10.4. Overall, these documents provide no evidence for the existence of public rights over the application route, but neither do they preclude public rights existing. They are very good evidence that the application route did not have the reputation of being a publicly maintainable vehicular highway at the time the records were created, but do not provide evidence against the existence of any public rights, and particularly not against a bridleway or footpath.

5.11. **Definitive Map and Statement preparation records** **Appendix number: 20**

Explanation of the type of evidence

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

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

Evidence

5.11.2. Robin Carr Associates' report describes the Definitive Map and Statement and preparation documents as follows: *"These records show that the Application route was not originally claimed by the respective Parish/Town Councils at the initiation of the Definitive Map preparation process. The centre section (B-C on Plan 1) was however subject to an objection (due to its omission) at the draft stage of preparation. The grounds stated for its inclusion are that it*

was shown on the Tithe Map.” and “This document set suggests that at the time of the compilation of the Definitive Map the Application Route had, in part, the reputation of being a public footpath, and that the remainder of the route was either considered not to be public, or to enjoy rights higher than those to be recorded on the Definitive Map (i.e. public carriageway).

The recording of section B – C (on Plan 1) of the Application Route as a footpath was probably entirely consistent with the use that it was receiving at the time, but would not preclude the possible existence of higher rights.”

5.11.3. Whilst no reason has been found to depart from this overall analysis, the point has been raised in response to Robin Carr Associates’ report that, although most of Paintmoor Lane was not itself recorded as a public right of way, two parish surveys record a route which terminated at Paintmoor Lane. It has been suggested that the parish councils must therefore have believed the application route to have carried public vehicular rights. This evidence is therefore reviewed in more detail.

5.11.4. Paintmoor Lane itself is uncoloured on the Chard parish survey map but most routes which are today public vehicular roads are coloured orange.

5.11.5. By comparing the Chard parish survey map and the survey cards it seems a footpath numbered 44 was shown on the map which formed a cul-de-sac terminating at Paintmoor Lane. This implies that either this point on Paintmoor Lane was considered a place of public resort (which seems highly unlikely) or that the initial surveyors believed higher public rights continued over Paintmoor Lane (had they believed footpath or bridleway rights only existed they would surely have recorded them).

5.11.6. However, it also seems this anomaly was resolved following the initial survey, as the parish survey map and card were altered to show path 44 continuing north to the Chard / Chaffcombe parish boundary instead of meeting with Paintmoor Lane. It is unknown whether these changes were made by the Parish Council prior to the completion of the survey or by the County Council when preparing the Draft Map. In any case there is nothing to suggest that the Parish Council opposed the alterations made to path 44. In those circumstances it is unsafe to conclude that the Parish Council were definitely of the view that footpath 44 terminated at Paintmoor Lane and that this is therefore evidence that they were of the view that the Lane carried public vehicular rights. Having said this, none of the above amounts to substantial evidence that such rights did not exist.

5.11.7. As with the Chard Parish Survey, Paintmoor Lane itself is uncoloured on the Chaffcombe parish survey map. Most routes which are today public vehicular roads are coloured orange on that map.

5.11.8. The Chaffcombe parish survey map and card recorded a footpath numbered 15 in the same position as path 44 on the Chard map, crossing what was then the Chard / Chaffcombe parish boundary and terminating at Paintmoor Lane. It was described as *"Much overgrown emerging into Paintmoor Lane thro decayed gate. Very difficult to trace path. No indication of recent usage."* Again, this might imply that the original surveyor believed there were public vehicular rights over Paintmoor Lane. Alternatively, they stopped their survey at this point as they had strayed into the next parish and any continuation was considered a different path. As discussed above, the route fell outside of Chaffcombe, and was no longer shown as terminating at Paintmoor Lane on the Draft Map.

5.11.9. In any case, the route eventually recorded on the DMS was a footpath running in part over B to C of Paintmoor Lane. This is definitive evidence of the existence of public footpath rights in this location, but no evidence against higher or additional rights over the application route. In light of the above, the same conclusions are drawn in relation to this evidence as were drawn by Robin Carr Associates.

5.12. Local Authority Records

5.12.1. Somerset County Council Rights of Way Files Appendix number: 21

Description and interpretation of evidence

5.12.2. Robin Carr Associates' report describes this evidence as follows: *"The County Council's Rights of Way Files contain correspondence relating to the Application Route from 1993 - 1997. This correspondence suggests that the status of the route was in question at that time."* and *"The correspondence of these files show that the issue of the status of the Application was the subject of some discussion and speculation in the 1990s but are of limited evidential value in the determination of the application."*

5.12.3. No reason has been found to depart from this analysis.

5.13. **Deposited Plans**

Explanation of the type of evidence

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

5.13.2. Robin Carr Associates did consider some documents discussed below related to the construction of Chard Canal. However, additional documents have been submitted and it is therefore considered useful to reassess all the evidence relating to the construction of the canal and reservoir.

5.13.3. **Line of the Intended Bridgwater and Seaton Canal, 1810 (extract only)**

Source: SWHT

Reference: Q/Rup/30

Appendix number: 40

Description and interpretation of evidence

5.13.4. This pre-inclosure plan shows the intended line of a canal and associated reservoir. This scheme was never built and is fairly different from the later Chard Canal and Reservoir which was eventually constructed (and which is discussed from 5.13.9, below).

5.13.5. The plan depicts the pre-diversion line of Chaffcombe Lane which included D to D1 of the application route (see below). However, no route is shown between D1 and A of the application route.

5.13.6. The scale and apparent level of accuracy of the plan make it very difficult to label it accurately with the same lettered points as are shown on appendix 1. Therefore, no lettered points are shown on appendix 40.

5.13.7. Avishayes Road, which the application route joins at point A, is numbered 39a and recorded in the book of reference as a parish road. Chaffcombe Lane does not appear to be numbered.

5.13.8. This plan provides no evidence for a physical route existing between A and C1 in 1810, which is consistent with the pre-inclosure OS map (see 5.7.3). However, it does not actually preclude a route existing in this location, particularly as it would have been towards the edge of the mapped area, and possibly under the reservoir depicted.

5.13.9. **Plan of Proposed Canal from the Bridgwater and Taunton Canal at Creech St. Michael to Chard in the County of Somerset, 1834 (extract only)**

Source: Parliamentary Archives

Reference: HL/PO/PB/3/plan99

Appendix number: 22

Description and interpretation of evidence

5.13.10. This document was not available to Robin Carr Associates.

5.13.11. The plan is coloured with water shown blue, land divisions in black and linear ways coloured yellow. However, there is no key, other than a note that 'The red lines on the Plan denote the course of the canal and position of the other intended works'. The plan includes a reservoir in approximately the same position as Chard Reservoir is today.

5.13.12. A to B of the application route falls outside of the mapped area and is not depicted. The plan shows the application route coloured yellow and numbered 103 from about point B to C1 where it forms a junction with another road (Chaffcombe Lane pre-diversion, see below). The book of reference describes 103 as a 'Parish Road'. No route is shown in the position of the application route between C1 and D1 but a route in red labelled 'Diversion' is shown on a different line between these two points. D1 to D of the application route corresponds with part of Chaffcombe Lane before it, too, was diverted (see below).

5.13.13. Chaffcombe Lane is shown running through the proposed reservoir and is labelled in red 'Road to be diverted' and numbered 168. Number 168 is described in the Book of Reference as a 'Parish Road' with no owner or occupier. The replacement route for Chaffcombe Lane is shown in red labelled 'Diversion of Road'. This diversion corresponds with the line which Chaffcombe Lane follows on the ground today.

5.13.14. All linear ways appear to be coloured yellow, including public vehicular roads and short cul-de-sac leading only to fields which are unlikely to carry unrecorded public rights (marked with a star on appendix 22). The yellow

colouring of the application route does not therefore appear to be indicating status on this plan and is of no further use in this investigation.

5.13.15. Whilst the whole book of reference has not been analysed, other routes in Chard described as a 'Parish Road' (in addition to the application route and Chaffcombe Lane) include number 71, 81 and 88 which now all form part of restricted byway CH5/68. In contrast, Black Bench Drove which today has no recorded public rights over it is numbered 16 on the plan and is described in the book of reference as 'Road to Fields' with no owner or occupier given.

5.13.16. Elsewhere in the book of reference the terms 'Private Road' (no owner given), 'Public Road' (owned by the Trustees of Taunton Turnpike) and 'Turnpike Road' (owned by the T'ees of Ilminster Turnpike) are used, although it has not been possible to find these on the plan and therefore compare them to their recorded status today.

5.13.17. The intention appears to have been to divert Chaffcombe Lane onto the line it follows today on the north bank of the intended reservoir, and to divert (and lengthen) Paintmoor Lane over the south-eastern tip of the intended reservoir from C1 in a fairly direct line to D1 and then onto part of the old line of Chaffcombe Lane between D1 and D. The new junction between Paintmoor Lane and Chaffcombe Lane being moved from about C1 to D. Ultimately, a slightly different diversion of Paintmoor Lane onto the current application route was made (discussed more fully below).

5.13.18. **Plan of Proposed Canal from the Bridgwater and Taunton Canal at Creech St. Michael to Chard in the County of Somerset, 1833**
Source: SWHT
Reference: A/BEN/60
Appendix number: 23

5.13.19. This document was not considered by Robin Carr Associates. This plan, dated 1833, is very similar to that held at the Parliamentary Archives, discussed above. However, none of the linear ways on this plan are coloured and the application route is not numbered.

5.13.20. **Plan of Proposed Canal from the Bridgwater and Taunton Canal at Creech St. Michael to Chard in the County of Somerset, 1833**
Source: SWHT
Reference: Q/Rup/119 (thought to be the plan referred to by the applicant as 'DP119').
Appendix number: 24

5.13.21. This document was not considered by Robin Carr Associates. The plan is dated 1833, is very similar to the two plans discussed above. The linear ways are coloured yellow, and the application route is numbered 103 between point B and C1. There was no book of reference accompanying this plan.

5.13.22. **Plan accompanying a Bill for making a navigable canal from the Bridgwater and Taunton canal, in the parish of Creech St. Michael, in the County of Somerset, and terminating in the parish of Chard, in the same County, with a collateral cut therein described, 1834.**

Source: SWHT

Reference: DD/SAS/C909/127

Appendix number: 25

5.13.23. This plan was considered by Robin Carr Associates. The plan which apparently accompanied the Bill is dated 1833 and is very similar to that held at the Parliamentary Archives, and discussed above. However, none of the linear ways on this plan are coloured and the application route is not numbered.

5.13.24. **An Act for making a navigable canal from the Bridgwater and Taunton canal in the parish of Creech St. Michael in the County of Somerset, and terminating in the parish of Chard in the same County, with a collateral cut therein described, 1834.**

Source: SWHT

Reference: DD/SAS/C2402/34

An Act to enable the Chard Canal Company to raise further Monies and to amend the Act relating to the same Canal, 1840.

Source: SWHT

Reference: T348.42

Appendix number: 26

5.13.25. These documents were not considered by Robin Carr Associates. The 1834 Act gave the Chard Canal Company the power to *"...widen, deepen, enlarge, divert, alter, or vary all and every of the Roads or Ways which may be situate within the line of the said intended canal, Cut, or other Works, or which may prevent, impede, or obstruct the making of the same ..."*. Other general stipulations for diverting or temporarily closing roads are included, but do not relate specifically to any individual route. The 1840 Act recited the 1834 Act and stated *"That all the Powers, Authorities, Regulations, Clauses, Provisions, Matters, and Things contained in the said recited Act, (except such of them, or such parts thereof respectively as are by this Act repealed, altered, or otherwise provided for,) shall extend to and operate in respect of this Act, and the Objects and Purposes of this Act, as fully and effectually, to all Intents and Purposes*

whatsoever, as if the same Powers, Authorities, Regulations, Clauses, Provisions, Matters, and Things were repeated and re-enacted in this Act, and made Part thereof". No part of the 1840 Act repealed or altered the provisions for diverting or altering roads or ways. It therefore seems the Chard Canal Company had the legal authority to carry out the diversions detailed in the plans dated 1833/4 discussed above, and those in the plans dated 1840, discussed below.

5.13.26. The 1834 Act also makes reference to a plan, sections and book of reference for the works having been deposited with the Clerk of the Peace. This is thought to be Q/Rup/119, discussed above at 5.13.20.

5.13.27. **Chard Canal, enlargement of reservoir and abandonment of collateral cut, 1840.**

Source: SWHT

Reference: Q/Rup/157

Appendix number: 27

5.13.28. This document was considered by Robin Carr Associates. The plan is dated 1840. None of the linear ways on the plan are coloured. The plan shows Paintmoor Lane between solid black casing lines and numbered 103 from about point B to C1. From C1 to D a route is shown between broken red casing lines labelled "*Diversion of Road*". This diversion corresponds very closely (although not exactly) with the application route between C1 and D. At about point B the application route is labelled "*From Avishays*". A to B falls outside of the mapped area and is not depicted.

5.13.29. Chaffcombe Lane is shown on its current line (as diverted in the 1833/4 plans discussed above) labelled 'ROAD' and unnumbered. The old route of Chaffcombe Lane is shown where it does not lie within the reservoir. Part of the old line of Chaffcombe Lane today forms the application route between D and D1.

5.13.30. The Book of Reference describes 103 (the application route) as a "*Parish Road*" without any owner or occupier.

5.13.31. Most linear ways on the plan are unlabelled, but Chaffcombe Lane is labelled 'ROAD' and Avishays Lane is so named. Several routes in addition to the application route are labelled with destinations, all of which are recorded as at least an unclassified highway today.

5.13.32. **Chard Canal, enlargement of reservoir and abandonment of collateral cut, 1840.**

Source: Parliamentary Archives

Reference: HL/PO/PB/3/plan290

Appendix number: 28

5.13.33. This document was not available to Robin Carr Associates.

5.13.34. The plan is very similar to that discussed at 5.13.27, above. The application route is again numbered 103 and described in the Book of Reference as a 'Parish Road'.

5.14. Interpretation of evidence

5.14.1. The planned Chard Reservoir necessitated the diversion of Chaffcombe Lane. In order for a junction to be maintained between Chaffcombe Lane and Paintmoor Lane, Paintmoor Lane also had to be diverted. At least two slightly different diversions of Paintmoor Lane are shown on the plans, although it appears to be the later route, incorporating part of the old line of Chaffcombe Lane between D1 and D, which was eventually constructed as this corresponds very closely with the route which actually exists on the ground today.

5.14.2. Whilst D to D1 passes over the same line as the pre-diversion route of Chaffcombe lane, and Chaffcombe Lane was set out in the Inclosure Award as a public carriage road, those rights appear to have been legally diverted onto a new line over which Chaffcombe Lane runs today. In turn, whatever rights existed over Paintmoor Lane (whether public or private, or both) appear to have been legally diverted onto D to D1 by the 1840 Act (reciting the 1834 Act) and Plans. It is therefore necessary to consider what rights the canal company and those scrutinising their plans thought were being diverted.

5.14.3. An undertaking such as a canal would have required considerable investment, and it would have been a major concern of the commissioners of the plan to ensure information such as the owner of land through which the canal would pass was accurate. If there were inaccuracies in the plan it could have prevented, or at least delayed, the private act's passage through Parliament.

5.14.4. Parliamentary Standing Orders for 1814 and 1838 both required notice of the intention to apply for a private bill to build or alter a canal to be given three times in a newspaper in every county in which works were to be undertaken, for all owners or reputed owners and occupiers of land affected by the works to be informed, and a list supplied indicating whether the owners / occupiers assented or dissented to the scheme or remained neutral. Plans were

also to be deposited for public inspection with the Clerk of the Peace and Parish Clerk¹⁰.

5.14.5. Whilst it is unknown exactly what provisions were contained within the Standing Orders under which the 1834 or 1840 Acts referred to above were made, it seems reasonable to assume the requirements would have been similar. There was therefore a high degree of consultation in the process of the Bill becoming an Act. The resulting plans and books of reference deposited with the Clerk of the Peace and Parliamentary Archives are therefore considered very reliable in relation to the information they contain.

5.14.6. Paintmoor Lane is identified in the books of reference for both the 1834 and 1840 plans as a 'Parish Road'. These documents are therefore very reliable evidence that the application route was considered to be a 'parish road' at the time. However, the documents do not give a definition of 'parish road'. It is therefore necessary to consider what the Chard Canal Company, and those viewing their documents, would have considered a parish road to be.

5.14.7. Two other nearby routes are identified as 'parish road' in the books of reference and today carry public vehicular rights, in particular Chaffcombe Lane which was set out as a public road in the Inclosure Award 15 years earlier and therefore almost certainly carried public vehicular rights at the time the Chard Canal documents were produced. In contrast, a route over which no public rights are today recorded and which is a cul-de-sac leading only to fields (and therefore unlikely to carry unrecorded public rights) is recorded as a 'road to fields'. It is accepted that only extracts of the documents held by the Parliamentary Archives have been examined, but based on the available internal evidence it seems more likely than not that 'parish road' was considered a road over which the public had vehicular rights by the Chard Canal Company.

5.14.8. From 1554 to 1875 parish Surveyors of Highways were appointed, as (unless it could be shown that liability to repair rested on another body or individual) maintenance of highways was the responsibility of the inhabitants at large of the parish through which the highway ran. The parish Surveyors of

¹⁰ Lumley, B. (1838) *Parliamentary Practice in Passing Private Bills through the House of Commons and The Parliamentary Measures of the House of Lords*, Saunders and Benning, London and Unknown. (1826) *Standing Orders of the House of Commons Relating to Private Bills and Other Matters 1685 – 1822*, Hansard, London. Both viewed via Google Books 09/03/2020 https://books.google.co.uk/books?id=IWJjAAAAcAAJ&pg=RA1-PA14&lpg=RA1-PA14&dq=%22Act+1+Vict.+C.+83%22&source=bl&ots=LSW7gu2T1m&sig=ACfU3U3bZrwxyEXxZA2avPRmFvj2_AA1_w&hl=en&sa=X&ved=2ahUKewjA_uaeoY3oAhXARBUIHfPrDIcQ6AEwAHoECAQQAQ#v=onepage&q=%22Act%201%20Vict.%20C.%2083%22&f=false and https://books.google.co.uk/books?id=jC8AAAAAQAAJ&pg=RA1-PA1&dq=%22Standing+Orders%22+Private+Bills&hl=en&sa=X&ved=0ahUKewiQsqTNRy3oAHwKI8AKHYrmD_0Q6AEIODAC#v=onepage&q=canal&f=false

Highways had powers to ensure this maintenance was carried out¹¹. A dictionary of 1826 gives a definition of 'parish' as *"Belonging to the parish, having the care of the parish; **maintained by the parish.**"*¹² (emphasis added). Therefore the term 'parish road' used in 1834 – 1840 may well have been referring to routes maintained by the parish, although no direct evidence of the parish actually carrying out maintenance on the application route has been found. Whilst there is no reason why the parish could not carry out repairs on a route which was not public highway it seems unlikely this would happen often because it would involve unnecessary expense and might lead to protest from those parishioners who were contributing to, but not benefiting from, the maintenance of the route.

5.14.9. In addition, the Inclosure Award of only 15 years earlier (1819) made the maintenance of the private roads, including A to C1 of the application route, the responsibility of the owners of the inclosed lands. It therefore seems even less likely that the parish would voluntarily maintain routes for which maintenance liability had so recently been assigned elsewhere, unless the routes had become public highways.

5.14.10. Although there were exceptions, a brief examination of a number of 19th century publications suggest that a 'parish road' was commonly considered to be highway maintained by the parish. For example, from the Journal of the Royal Agricultural Society of England, 1841 *"...So long as the present system is continued of employing nothing but a few old men three-parts worn out, or perhaps a drunken old butler or gardener (that the squire of the parish can no longer permit to remain in his service), as the only labourers on parish-roads, so long the highways in general must cost large sums, and still remain in bad repair."*¹³

5.14.11. It therefore seems very likely (although not certain) that the Chard Canal Company considered the routes identified as 'parish road' to be public highways, probably vehicular highways, and that this is how the term would have been commonly understood by those consulting the documents.

¹¹ Riddall, J. and Trevelyan, J. (2007) *Rights of Way. A Guide to Law and Practice (4th Ed)*. The Ramblers Association and the Open Spaces Society, London, 273 – 275.

¹² Walker, John. (1826) *A Critical Pronouncing Dictionary and Expositor of the English Language*, Ernest Fleischer, London p.343

¹³ Challoner, C. B. (1841) 'XXXII. Practical Instructions for Improving and Economically Maintaining Turnpike and Parish Roads upon the Mile System' in Journal of the Royal Agricultural Society of England, Vol.2, p353 – 363. Viewed via Google Books 10/03/2020 <https://books.google.co.uk/books?id=Wasn0IY41dsC&pg=PA353&dq=%22parish+road%22&hl=en&sa=X&ved=0ahUKEwjCgaf-8OLnAhWDonEKHdEpBQE4FBD0AQg2MAI#v=onepage&q=%22parish%20road%22&f=false>

5.14.12. The documents relating to Chard Canal are therefore collectively strong evidence that the application route carried public rights, probably public vehicular rights, between D and B in 1834 and 1840. A to B is not shown on these plans as it falls outside of the mapped area. However, other evidence shows that the route physically continued to point A, there is no reason to believe the status of the route changed at point B, and no place of public resort has been found at point B which would explain cul-de-sac rights. These documents therefore strongly imply that that the rights continued to point A.

5.15. **Commercial Maps**

Explanation of the type of evidence

5.15.1. 'Commercial maps' are those produced for sale to the public¹⁴. They vary widely in terms of their quality and were not all produced for the same purpose. As such the weight to be given to them also varies.

Evidence

5.15.2. **Greenwoods 1822** **Appendix number: 29**

5.15.3. Robin Carr Associates' report describes Greenwood's map as follows:
"Greenwood is known to have included both public and private ways on his maps, and therefore must be treated with a degree of caution, especially in view of the fact that the Inclosure Award was produced only three years prior to its publication."

5.15.4. No reason has been found to depart from this analysis. However, it is noted that the route shown on Greenwood's map does not show Paintmoor Lane between C1 and D1 as Greenwood's map pre-dates the construction of Chard Reservoir.

5.15.5. **Business Map of the Southern Parliamentary Division of the County of Somerset, 1904** **Source: SWHT** **Reference: A/BEN/47** **Appendix number: 30**

¹⁴ It is accepted that some OS maps were also made for sale to the public but these are dealt with elsewhere in this report.

5.15.6. Robin Carr Associates did not consider this map. The map was printed for Stephens & Mackintosh, Advertising Contractors. Apart from the boundary of the parliamentary divisions and the polling stations (which are shown in red) the map is printed in black ink. No other features are included in the key. The map itself is surrounded by adverts for local businesses and inset maps of towns. It was presumably produced as a vehicle for this advertising, the intention being that people would keep the map because it was useful, and therefore also the adverts.

5.15.7. All linear ways on the map are shown in the same way, between black casing lines. However, whilst it is possible to discern some routes which are shown between much more closely spaced casing lines, the widths of the routes shown varies between widely spaced and closely spaced or even touching over quite short stretches of linear way. There is no observable differentiation between different types of linear way.

5.15.8. Whilst the majority of the linear ways shown are today vehicular highways, there are routes with no recorded public status, or lower recorded public rights. For example, Wreath Lane, Nutshole Lane, Woodhouse Lane, the route over which footpaths CH4/16, CH4/17, CH4/18 and part of CH9/1 run, and Limekiln Lane which continues from CH9/1 with no recorded status.

5.15.9. The survey on which this map is based is unknown and the most prominent feature appears to be the parliamentary divisions and polling stations. It does not claim to show the status of linear ways. As a commercial map it would be expected that it would concentrate on showing routes of use to the public, but the application route is shown in the same way as both recorded vehicular highways, but also routes with lower, or no, recorded rights. There is also no reason why the public would not find it useful to be aware of private roads leading to property, as some members of the public might have business there. The applicant states that this map was used by commercial travellers. If this was the case, then showing private roads which led to property might be of particular assistance to them.

5.15.10. Therefore, whilst this map confirms the physical existence of the application route, it provides no evidence for the existence of public rights over it. However, neither does it provide any evidence against the existence of public rights over the application route, and it certainly does not preclude them existing.

5.15.11. **Bartholomew's Map, 1911 and 1927 (extract only)**
Appendix number: 31

5.15.12. Only the 1927 edition of Bartholomew's Map, and not the 1911 edition, was available to Robin Carr Associates. It is therefore considered useful to consider both editions of this map in more detail. The 1911 map shows the application route uncoloured. According to the key on the 1911 edition "*The uncoloured roads are inferior and not to be recommended to cyclists.*" Footpaths and bridlepaths are shown with a broken line.

5.15.13. The 1927 edition also shows the application route uncoloured. Three types of 'Motoring Road' are identified in the key (all coloured), then 'Indifferent Roads' which were passable for cyclists (coloured), followed by the statement that "*The uncoloured roads are inferior and not to be recommended*".

5.15.14. Bartholomew's maps are also known to carry a disclaimer to the effect that the representation of a road or way is no evidence of a right of way.

5.15.15. Bartholomew's maps (1901 and 1911 editions) were considered in *The Commission for New Towns and Worcestershire County Council v J.J. Gallagher Limited*¹⁵. In that case it was considered that the implication was that the uncoloured roads on Bartholomew's map were considered public carriageways. After referring to the disclaimer (see above) Neuberger J. went on to say at paragraph 108 "*I do not consider that that means that one can cast aside what one could otherwise glean from Bartholomew as being of assistance, but the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps, or indeed on any map which does not have the positive function of identifying public carriageways.*" Later in the same judgment (at paragraph 121) Bartholomew's map is referred to as being "*actually of assistance to the argument that it [the application route in that instance] was a public carriageway*".

5.15.16. Following the same reasoning, Bartholomew's maps are considered to be in favour of the application route carrying public rights. However, they are given very little weight.

5.16. **Sale Particulars and Documents**

5.16.1. Of the documents listed in this section, Robin Carr Associates' report only considered the 1944 sale documents, discussed at 5.16.11. The additional sale documents discussed below were submitted after Robin Carr Associates completed their report.

¹⁵ [2002]EWHC 2668 (Ch)

5.16.2. **Sales particulars, Avishays House and Estate, 1859**

Source: SWHT

Reference: DD/SAS/C909/134

Appendix number: 32

5.16.3. The application route is shown on the plan between point A and C, uncoloured and not included in any lot for sale. A short section of the application route is also shown extending from point D. However, the two sections are not shown joining up as the area in which they would meet falls outside of the mapped area. The route is not labelled.

5.16.4. All the linear ways on the plan are shown in the same way, except within Lot 1 where some routes are tinted green (as is the surrounding land) and at least one is numbered. The green tinted or numbered routes do not form part of the application route and are today recorded as public footpaths, or have no recorded public rights.

5.16.5. Some roads are labelled with their destination, including public roads and one route which is labelled as 'Occupation Road' and which today is recorded as public footpath CH5/64, but with an undetermined modification application to record the route as a restricted byway.

5.16.6. The plan has no key but includes the note *"Taken from the Tithe Commutation Maps excepting Nos 94 and 103 resurveyed"*.

5.16.7. Parts of lots 2 and 3 adjoin, or could have been accessed via, the application route. The particulars of lot 2 make no mention of the application route or of easements or means of access to the land. Lot 3 is described as *"on the High Road from Chard to Cudworth"* but this is considered to refer to the route now known as Chaffcombe Lane, which is labelled 'From Chard' and 'To Cudworth' on the plan.

5.16.8. This document confirms the physical existence of the application route as far as it is shown, although as it was copied from the tithe map is of very little additional weight (the tithe map was presumably considered to show the area to a tolerable degree of accuracy for the purposes of the sales particulars). Nothing in the particulars weighs for or against the existence of public rights over the application route, and this document would be compatible with the application route carrying public vehicular rights or being a private road with or without lower public rights running over it.

5.16.9. **Sales particulars, Chaffcombe House Estate, 1923**

Source: SWHT

Reference: DD/X/BUSH/2

Appendix number: 33

5.16.10. The application route is shown from D to about point C1. No lots for sale are adjacent to or are accessed via the application route. There is no key on the plan. The plan includes two notes: 'This plan is published for identification only, and although believed to be correct its accuracy is not guaranteed' and 'This Plan is reproduced from the Ordnance Survey, with sanction of the Controller of H. M. Stationery Office'. The 'Remarks and Stipulations' state that the plan is based on the OS Second Edition, 1902 and 1903 and are for reference only, and that they have been carefully revised and are believed to be correct. The information on the base map therefore adds nothing to the evidence provided by OS maps, which are discussed at 5.7.

5.16.11. Sales particulars, The Hinton Unsettled Estate, 1944

Source: SWHT

Reference: DD\KW/32

Appendix number: 34

5.16.12. Robin Carr Associates' report describes these documents as follows: *"Documents relating to the sale of lands forming part of the Hinton Unsettled Estate in 1944 show that land in the vicinity of the Application Route was for sale, and the sale catalogue refers to Paintmoor Lane by name. It does not however attribute the lane any status."* and *"Whilst the property sale catalogue makes reference to Paintmoor Lane it is completely silent on the matter of its status. This document adds nothing to support the application."*

5.16.13. No reason to depart from this analysis has been found. However, it is noted that the 'General Remarks & Stipulations' for the sale include that *"The properties are sold subject to all Rights-of-Way, Rights of Water, Easements of every description that may affect the same ... and the Purchasers are to be deemed to have notice thereof whether mentioned in these particulars or not."* This statement makes it clear that it cannot be presumed that access over the application route must have been by virtue of public rights because no private easement over the application route was mentioned in the particulars.

5.16.14. Conveyance, 1952 (extract only)

Source: National Archives

Reference: CRES 59-69

Appendix number: 35

5.16.15. The Conveyance includes a plan which shows land adjacent to Paintmoor Lane coloured pink. No part of the application route is coloured pink and was therefore presumably not being conveyed. The base mapping appears

to be an OS map, and the application route is shown from approximately point C to D, with a portion drawn in by hand in the margin where it crossed onto another map sheet. OS mapping is discussed at 5.7. Only the introductory paragraph of the conveyance has been included. Whilst this confirms the physical existence of the application route, and that it was not being conveyed as part of this sale in 1952, this document offers no evidence for or against the existence of public rights.

5.16.16. **Sales particulars, Walscombe Farm, 1997 (extract only)**

Source: Owned by applicant

Appendix number: 36

5.16.17. The full length of the application route is shown and is not included in any of the lots for sale. Lot 3 and 4 would have been accessed via the application route. Both lots are describes as having access from Paintmoor Lane. However, it is not stated whether this was by virtue of a public or private right. These documents therefore offer evidence in favour of vehicular access to Paintmoor Lane in 1997 (as vehicular access would presumably have been required to the lots for sale) but are of no weight in favour or against those rights being public.

5.16.18. The particulars include the statement *"This plan is for identification purposes only, and although believed to be correct, its accuracy is not guaranteed. Reproduced from Ordnance Survey Map with the permission of H.M.S.O Crown Copyright Reserved."* The base mapping therefore confirms the physical existence of the application route in 1997 but is of no additional weight than OS mapping.

5.17. **Other Sources**

5.17.1. **Ministry of Food National Farm Survey 1941-42 (extract only)**

Source: National Archives

Reference: MAF 73/36/87, MAF 73/36/88 and MAF 73/36/92.

Appendix number: 37

5.17.2. These documents were not available to Robin Carr Associates. The National Farm Survey was commissioned to assist the work of the County War Agricultural Executive Committees by assessing Britain's ability to feed itself in wartime. The data was gathered on a map and four forms. It included information on the location of the Farm in relation to (public) roads and the condition of the farm roads.

5.17.3. Where the application route runs between different coloured holdings, it is excluded from those holdings. Other routes which are today public vehicular roads are similarly excluded. However, so is at least one route over which part of public footpath CH5/57 is recorded, which is a short cul-de-sac leading from the application route only to fields. This cul-de-sac was also apparently included in the lands conveyed in 1997 (discussed at 5.16.15). Whilst this is only one example in a small area, it does at least raise the possibility that there were other reasons why a linear way might have been excluded from the surrounding holdings.

5.17.4. Whilst the proximity to public roads and condition of any farm roads was included in the survey, it was not the primary purpose of the survey, and the written portion of the records has not been seen in this case. In a recent decision issued by the Secretary of State it was considered that, although recording public rights of way was not the primary purpose of this survey *"The exclusion of part of the routes may nevertheless indicate that the routes were considered to be vehicular highways. The weight to be given to this evidence is however very limited."*¹⁶. Following this reasoning, the same documents may be evidence in favour of public vehicular rights over the application route in this case, but are given very limited weight, particularly given the example of a route apparently excluded for some other reason which connects with the application route.

5.17.5. **Aerial photograph 1946**
Appendix number: 38

5.17.6. Robin Carr Associates' report describes the aerial photographs as follows: *"Aerial photographs, like the Ordnance Survey maps, provide excellent evidence of the existence of physical features on the ground on the day they were taken. They are, however, completely silent on the matter of status. In this case they are of little assistance."* No reason has been found to depart from the analysis.

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

6.1. This section of the report includes information provided by the landowners and adjacent landowners. Their evidence is summarised or directly quoted. SCCs comments on their evidence (if any) are within square brackets

¹⁶ The Planning Inspectorate reference FPS/G3300/14A/18 and FPS/G3300/14A/19, page 8, paragraph 44.

and in section 7 of this report. Some landowners responded only to acknowledge the consultation letter / confirm the land which they owned and their comments are not included below.

Landowner and response
<p>Landowner B</p> <p>Landowner B states that both horse riders and vehicles have used the application route for over 20 years without hindrance. The current situation works perfectly well and so they question why the application has been made.</p> <p>They go on to highlight the poor state of repair that three quarters of the route is in. This is despite landowners having spent 'thousands of pounds' on its maintenance having been told by the council that it was not a highway.</p> <p>As well as being in poor repair, the route is also dangerous. It is narrow, has sharp bends and is bounded by deep ditches. Landowner B has had to tow vehicles out of the ditches before. If the route were to be used by a horse and cart it would be even more dangerous.</p> <p>Landowner B does not agree to the route being changed to a restricted byway</p> <p>They also point out that sections of the route are single track with sharp bends and deep ditches. It would therefore be dangerous to allow increased use of the route. In light of these comments, and their assertion that the adjacent landowner have been paying to maintain the route, Landowner B enquires as to who would be responsible for maintaining the route if it were to be recorded as a restricted byway.</p> <p>Landowner B also questions the applicant's motives for making the application.</p>
<p>Landowner C</p> <p>Landowner C raised questions regarding the ongoing maintenance and signing of the application route should it be recorded as a restricted byway.</p>
<p>Landowner K</p> <p>Landowner K submitted a landowner evidence form dated 08/07/2013.</p>

They do not believe they own the land over which the application route runs.

They do not believe the application route is public, except between B and C where they believe it to be a public footpath. They had held that belief for 30 years [since c.1983].

They have seen members of the public using the route "*occasional walkers, horse riders and cyclists*".

They have never stopped anyone from using the way. They answered 'yes' when asked if they had ever told anyone the way was not public having told a car driver in about 2011 that "*the track was very rough and might damage his car*".

Landowner K submitted a letter to Robin Carr Associates dated 01/03/2017 in which they said their deeds show B to C as a public footpath, but they did not submit copies.

Landowner K also commented on a draft version of this report which was made available in September 2020. At that time they raised the following points:

- the inclosure award provides strong evidence of the application route being private¹⁷;
- the addition of the word 'public' in the object name books description of part of the application route is unreliable¹⁸.
- The OS Popular Edition map is evidence of the route having been considered private¹⁹.
- Contrary to Canal evidence, the route has been maintained by local landowners not by the Parish. They ask, if the route is a restricted byway will the County Council take on responsibility for its maintenance?;
- Photographs submitted with the application only show ends of the route; most of route is like a rough cart track
- They and their neighbours have always considered it a private road. The bridge over the stream was funded by them and their neighbours.

Landowner L

Landowner L submitted a landowner evidence form dated 31/07/2013.

¹⁷ Those comments are dealt with in paragraph 5.5.9 above.

¹⁸ Those comments are dealt with in paragraph 5.8.5 above.

¹⁹ Those comments are dealt with in paragraph 5.7.15 and 5.7.16 above.

<p>They believe the application route crosses their land as they own land on both sides of the route.</p> <p>They do not believe the application route is public, except between B and C where they believe it to be a public footpath. They have held this belief for 64 years [since c.1949].</p> <p>They have seen members of the public using the route <i>“cyclists, walkers, horse riders occasional and spasmodic”</i>.</p> <p>In response to the question ‘Have you ever required people to ask your permission before using the way?’ they responded <i>“As there are and have been 5 houses and various landowners in the lane it is not practical to challenge people who may be visiting one of the properties”</i>. They also provided the following information <i>“In the past neighbours have stopped access in the lane at the Chaffcombe Road end”</i>, that they, or someone on their behalf, had told people that it was not a public right of way <i>“over many years”</i>, and that their neighbours had erected ‘Private’ signs which were then destroyed.</p> <p>Landowner L submitted a letter to Robin Carr Associates dated 04/03/2017 in which they repeated much the same information. They stated their deeds show part of the route recorded as a footpath, but did not submit copies.</p> <p>In response to Robin Carr Associates’ draft report consultation landowner L repeated their opposition to the recording of additional rights over the application route.</p>
<p>Landowner O</p> <p>Landowner O highlighted their need for continued vehicular access to their land.</p>

7. Comments on Landowner Evidence.

7.1.1. Where necessary, evidence and comments received have been fully considered under the appropriate section of this report. However, it is felt helpful to make the following specific comments.

7.2. Landowner K and L both state that their deeds show the application route as a footpath only between B and C, but as SCC has not seen these documents we are unable to assess this evidence or give weight to it. In any case this would be consistent with the way in which this section of the route is currently recorded on the Definitive Map. It does not in itself preclude the existence of higher public rights.

7.3. Three of the landowners refer to having seen people using the route on foot, horseback and with bicycles and at least one instance of vehicular use. Two of those three state that users have been challenged, private signs erected and then destroyed. However, the third (Landowner B) suggests that the use has been without hindrance.

7.4. Whilst the use observed by landowners would be consistent with at least public bridleway status, it is unknown how much of this use was 'as of right' or over what period it took place. Neither is it known how regular the challenges to use were, or when or for how long the signs were erected.

7.5. Collectively the landowners also refer to matters such as safety, the current physical suitability of the route and the motivations of the applicant. Whilst all perfectly understandable, these are not relevant to determining whether or not public rights already exist over the application routes and therefore not something that the decision maker is able to take into account.

7.6. Similarly, future liability for the maintenance of the route or the need for improvements are not relevant considerations in the determination of the application. As set out in paragraph 4.10, when determining an application such as this the decision maker must consider whether public rights already exist. The implications of that decision in terms of ongoing maintenance costs are not relevant.

7.7. Finally, it should be noted that Landowner B mentions that the 'council' have previously stated that the route was not a highway. If verified this might amount to evidence that, at the time of the comment, the council did not recognise public rights over part of the route. However, this is hardly surprising given that, with the exception of B-C, no public rights are shown on the Definitive Map.

8. Consultations and other submissions

8.1. Consultations regarding the claimed route were sent out to landowners and relevant local and national user group organisations by Robin Carr Associates. The table below shows who was consulted and gives brief details of replies that were received.

Consultee and response
SCC Highways – No records relating to maintenance of this route.

No response was received from the following organisations:

- Ramblers Area Secretary

- South Somerset Ramblers' Association (Western Area)
- The Ramblers' Association
- British Horse Society (local)
- British Horse Society (national)
- Auto Cycle Union
- Cyclists Touring Club
- All Wheels Drive Club
- Open Spaces Society
- Open Spaces Society (South Somerset Area)
- Natural England
- British Driving Society
- Trail Riders Fellowship
- Byways and Bridleways Trust
- Chard Town Council
- Chaffcombe Parish Council
- South Somerset District Council
- Councillors

9. **Discussion of the evidence**

9.1. As discussed in paragraph 4.1 above, the County Council is under a duty to modify the Definitive Map on the discovery of evidence which, when considered alongside all other available evidence, shows that rights different to those recorded exist.

9.2. The standard of proof for making an order to upgrade a route which is already recorded on the DMS is that there is sufficient evidence to show that the higher rights exist on the balance of probabilities. B to C of the application route is currently recorded as part of public footpath CH 5/57 and therefore this is the legal test that applies to this part of the application route.

9.3. The standard of proof for making an order in relation to a route over which no rights are currently recorded consists of two limbs. An order should be made to modify the Definitive Map if the evidence shows that a right of way;

- a) subsists; or
- b) is reasonably alleged to subsist.

9.4. If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right

of way has been reasonably alleged²⁰. This is the legal test which applies to A to B and C to D as these parts of the application route are not currently recorded on the DMS. This is a lower test than 'on the balance of probabilities'.

9.5. The test for confirming any order remains 'on the balance of probabilities'.

9.6. Although use of the route has been observed by landowners, and the applicant has referred to use of the route, no direct evidence of use has been submitted, and it is unknown whether the use that was observed was 'as of right', over how long it took place or how frequently it occurred. Similarly, the landowners refer to potential challenges to public use or demonstrations of a lack of intention to dedicate (such as erecting signs and telling people the route was not public) but the details are unknown. Ultimately there is insufficient evidence of 'as of right' use to raise the presumption of dedication under Section 31 (1) of the Highways Act (1980).

9.7. However, this does not mean that any rights which may have historically existed no longer exist. In fact, if the documentary evidence does show that rights have previously existed, and that those rights have not been extinguished, then they will need to be recorded on the definitive map and statement irrespective of the levels of recent of use.

9.8. The area through which the application route runs was subject to considerable change during the first half of the 19th century, most significantly inclosure in 1819 and the construction of the Chard Reservoir detailed in plans dated between 1833 and 1841 (discussed at 5.13). This included changes to the layout of both Paintmoor Lane, and Chaffcombe Lane with which the application route has a junction at point D.

9.9. The 1809 – 1811 OS map discussed at 5.7.3 and deposited plan of 1810 discussed at 5.13.3 pre-date inclosure and the construction of Chard Reservoir and do not show a linear way in the location of Paintmoor Lane. It is therefore concluded that the application route was first set out between A and about C1 by the Inclosure Award in 1819. At that time it was a private road with no public rights running over it.

9.10. C1 to D1 does not appear to have been set out in the Inclosure Award because Paintmoor Lane had its junction with Chaffcombe Lane just north of point C1 at the time. D to D1 probably corresponds with part of the public carriage road numbered 13* (or a continuation of it) in the Inclosure Award and

²⁰ R v SSW ex parte Emery (CA) [1998] 4 All ER 367
R v SSE ex parte Bagshaw and Norton [1994] 68 P & CR 402

therefore carried public vehicular rights in 1819. However, the public vehicular rights were later diverted away from this section and onto the current line of Chaffcombe Lane, and the rights which ran over the rest of Paintmoor Lane were diverted onto it. The Inclosure Award does not therefore weigh in favour of public vehicular rights existing over D to D1 today.

9.11. Whilst very slightly different from the route shown in the Inclosure Award, post inclosure maps consistently show the application route between point A and approximately point C1, confirming the physical existence of the route. Greenwoods 1822 map shows the post-inclosure and pre-reservoir layout, with the junction between Paintmoor Lane and Chaffcombe Lane very slightly north of point C1. The diversions of Paintmoor Lane and Chaffcombe Lane onto their current lines are discussed further with the Chard Reservoir and Canal documents, below.

9.12. The Inclosure Award clearly sets out the majority of the application route as a private road with no mention of any public rights running over it. However, this does not preclude public rights from having come into existence since inclosure.

9.13. The 1834 Chard Canal Act (see 5.13.24) effectively gave the Chard Canal Company the right to divert any road or way they needed to. The plans and book of reference which were deposited with both the Clerk of the Peace in accordance with the Act, and with Parliament, are discussed in section 5.13. Both show the application route numbered 103 and it is described in the book of reference held at the parliamentary archives as a 'parish road'. A diversion of both Chaffcombe Lane and the application route are shown on the plans.

9.14. In the course of building the canal it became necessary to alter the original design, resulting in the 1840 plans deposited with the Clerk of the Peace (see 5.13.27). These again show the application route numbered 103 and described in the book of reference as a 'parish road'. They show a slightly different diversion of the application route in the vicinity of point D onto the line it follows today. Whatever rights existed over the application route prior to 1834 would appear to have been legally diverted onto its current line by the Chard Canal Company between 1834 and about 1840.

9.15. The plan and book of reference produced by the Chard Canal Company would have been carefully surveyed, would have been available for public scrutiny and were referred to in the relevant Act. They are therefore considered extremely reliable evidence. Both the earlier and later plans refer to the application route as a 'parish road'. At the time, 'parish road' appears to have meant a public highway maintained by the parish. Whilst the parish would also have been responsible for maintaining footpaths and bridleways Chaffcombe

Lane, which was set out in the Inclosure Award as a public carriage road and therefore almost certainly carried public vehicular rights, was also referred to as a 'parish road' in these documents, strongly suggesting that a 'parish road' was considered to carry public vehicular rights. These documents are therefore very strong evidence that in 1834 and 1840 the application route was considered to carry public rights.

9.16. Whilst the documents relating to the Chard Canal would have been available for public scrutiny prior to the preparation of the DMS it seems highly unlikely that all of the documents discussed in section 5.13 were consulted, in particular those held in the Parliamentary Archives. Therefore they are considered to constitute the discovery of new evidence in accordance with section 53(3) of the Wildlife and Countryside Act 1981.

9.17. Also in favour of the application route having carried public rights is one of the three entries for Paintmoor Lane in the OS Object Name Book. This describes Paintmoor Lane as a 'public road' and then gives a description of the full length of the route (not just the section shown on the map sheet to which that particular entry referred). Whilst the purpose of this document was to verify names and not to record status, in this instance the term 'occupation road' (usually considered to be a private road) was deliberately crossed out and the word 'public' was inserted. This suggests that at least the person making the alteration in 1901 had good reason to believe the application route carried public rights.

9.18. The application route is excluded from the surrounding hereditaments on the 1910 Finance Act maps. This may be because the route was considered to carry public rights, usually, although not necessarily, vehicular. Another plausible explanation for exclusion is that the route was set out as private at inclosure (as the application route was) and for the use of multiple users. Given that the application route is described in the later Chard Canal documents as a parish road, and referred to in one Object Name Book as a public road, it might be considered more likely that the route was excluded from the hereditaments on the Finance Act maps because it was considered to carry public vehicular rights. The Finance Act documents are also considered to be new evidence.

9.19. Although OS maps are usually considered not to provide evidence of status, it is difficult to interpret the 1919 Popular Edition (discussed at 5.7.13 and 5.7.32 - 33) without inferring that coloured roads were considered to be public, and therefore that at least D to C1 of the application route which was coloured on that map was considered to be public. However, OS maps carry a disclaimer to the effect that they do not provide evidence of the existence of a public right of way, and the approach of the OS was to show the physical condition of routes and not status. Therefore, this map can only be considered

to have a little weight in favour of public vehicular rights. Although it is possible that any inference that can be drawn from this map in relation to the status of coloured routes might only apply to the section which was actually coloured (from D to about C1), no reason for the application route to change status at about C1 has been found suggesting that the rest of the route might also have been considered to be a public highway.

9.20. Bartholomew's maps of 1911 and 1927 carry very little weight, but are in favour of public rights existing over the application route. Similarly, the Ministry of Food National Farm Survey maps may have excluded the application route from the surrounding holdings because it was considered a public road, but this is uncertain, particularly given that a short cul-de-sac leading from the application route was also excluded yet is unlikely to carry unrecorded public rights and was later conveyed with other land.

9.21. The majority of OS maps, commercial maps, sale documents, the highway and other local authority records, the OS Boundary Remark book and Boundary Sketch map, the tithe maps and the aerial photographs confirm the physical existence of the application route, or parts of it. The way in which the route is shown suggests it was capable of taking vehicular traffic (even if it was considered a narrow or poorly maintained route), and given that it provides the only means of access to property it is assumed that vehicular use was taking place over it. While none of these documents are inconsistent with the private road set out at inclosure they are equally consistent with the application route having been dedicated as a public vehicular road at some point after inclosure as evidenced by the Chard Canal documents, the ONB and other documents referred to above.

9.22. There is therefore strong or explicit evidence in favour of public vehicular rights existing over the application route in 1834, 1840 and 1901, with weaker but still supportive evidence in 1910, 1911, 1919 and 1927. In addition, of relevance to A to B and C to D where the legal test is 'reasonably alleged' there is a conflict within the evidence in relation to the Ministry of Food National Farm Survey map because it may have excluded the route because it was considered to carry public vehicular rights, or for another reason.

9.23. Balanced against this, there is no evidence to suggest that the dedication of public vehicular rights did not take place at some point after inclosure.

10. **Summary and Conclusions**

10.1. Whilst many documents do no more than confirm the physical existence of the application route, are of little weight, or bear plausible alternative explanation, there is evidence in favour of the application route carrying public

rights and no incontrovertible evidence against the existence of those rights post-inclosure. Therefore, it is considered to be at least reasonably alleged that a restricted byway exists over the application route from A to B and from C to D.

10.2. B to C of the application route is currently recorded as a public footpath. Therefore the legal test for making an order in relation to this section of the route is 'on the balance of probabilities'.

10.3. The Inclosure Award is very strong evidence that in 1819 no public rights existed over A to C1, and that D1 to D formed part of a public vehicular highway. The documents relating to Chard Canal are considered very strong evidence that C1 to D and Chaffcombe Lane were diverted onto their current line and that Paintmoor Lane was already considered to carry public rights at that time. The diverted route (D to C1 of the application route) would therefore also carry those rights.

10.4. The term 'occupation road' was very deliberately removed from the Object Name Book and the term 'public road' substituted. Whilst this document was not created to record status, such a deliberate act using language explicit of status is supportive of the route having the reputation of carrying public rights at the time.

10.5. In addition, and although of little weight, Bartholomew's maps and the 1919 OS popular edition imply public vehicular rights over the application route. Based on the above it is suggested that the most likely reason for the application route to have been excluded from the Finance Act maps is that it was considered to carry public vehicular rights.

10.6. Therefore there is strong evidence in favour of public vehicular rights existing in 1834 and again in 1840, language explicit of public status used in 1901, and supportive evidence in 1910, 1911, 1919 and 1927. After the Inclosure Award there is no evidence which actually weighs against the existence of public rights. Therefore, on the balance of probabilities, public vehicular rights exist over B to C.

10.7. The NERC Act 2006 extinguished rights for mechanically propelled vehicles over any routes that were recorded on the Definitive Map as footpaths, bridleways or restricted byways and over any routes that were not recorded on the Definitive Map or the list of highways maintained at public expense. None of the exceptions to the general rule outlined above appear to apply to Paintmoor Lane. Therefore, only restricted byway rights exist over the application route today.

11. **Recommendation**

11.1. It is therefore recommended that:

- i. an Order be made, the effect of which would be to add to the Definitive Map and Statement a restricted byway between points A and D as shown on Appendix 1.
- ii. if there are no unwithdrawn objections to such an order it be confirmed
- iii. if objections are maintained to such an order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs

List of Appendices

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

1. Plan showing claimed route
2. Landownership Plan
3. Robin Carr Associates report dated 23 April 2018
4. Photographs of the application route submitted by the applicant.
5. Chard Inclosure Act, 1815
6. Chard Inclosure Award, 1819
7. Chard Tithe Map, 1841
8. Chaffcombe Tithe Map, 1841
9. 1809 - 1811 OS 'old series' map
10. OS County Series 1st Edition Maps
11. OS County Series 2nd and 3rd Edition Map
12. 1898 - 1900 OS Revised New Series Map Timeline Reprint
13. 1919 OS 'popular edition' Map Cassini Timeline reprint
14. 1928 OS Road Map
15. 1946 OS New Popular Edition Map
16. OS Boundary Remark Books and Boundary Sketch map
17. OS Object Name Book
18. Finance Act 1910 Record Plans
19. Planning Inspectorate's Consistency Guidelines
20. Definitive Map and Statement preparation records
21. Somerset County Council Rights of Way Files
22. Deposited Plans, Chard Canal, 1834, HL/PO/PB/3/plan99
23. Chard Canal Plan, 1833, A\BEN/60
24. Deposited Plans, Chard Canal, 1833, Q\Rup/119
25. Chard Canal Plan, 1834, DD\SAS/C909/127
26. Chard Canal Acts, 1834 and 1840
27. Deposited Plans, Chard Canal, 1840, Q\Rup/157
28. Deposited Plans, Chard Canal, 1840, HL/PO/PB/3/plan290
29. Greenwood's Map, 1822
30. Business Map of the Southern Parliamentary Division of the County of Somerset, 1904
31. Bartholomew's Map, 1911 and 1927
32. Sales particulars, Avishays House and Estate, 1859
33. Sales particulars, Chaffcombe House Estate, 1923
34. Sales particulars, The Hinton Unsettled Estate, 1944

35. Conveyance, 1952
36. Sales particulars, Walscombe Farm, 1997
37. Ministry of Food National Farm Survey 1941-42
38. Aerial photograph 1946
39. Highway Road Records held by the County Council
40. Line of the Intended Bridgwater and Seaton Canal, 1810