

HAMPSHIRE COUNTY COUNCIL

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE HAMPSHIRE DEFINITIVE MAP AND STATEMENT OF PUBLIC
RIGHTS OF WAY (DATED 15TH DECEMBER 2007)**

**THE HAMPSHIRE (TEST VALLEY BOROUGH NO. 66)
(PARISH OF TANGLEY)
DEFINITIVE MAP MODIFICATION ORDER 2020**

On the 16 August 2022, the Secretary of State for Environment, Food and Rural Affairs confirmed this Order with modifications.

The effect of the Order as confirmed is to upgrade Tangley Footpath 12 to restricted byway status.

A copy of the Order and the Order map have been placed and may be seen free of charge at the offices of Hampshire County Council, The Castle, Winchester, SO23 8UJ, and at the offices of Test Valley Borough Council, Beech Hurst, Weyhill Road, Andover, SP10 3AJ at all reasonable hours, or online at <http://www.hants.gov.uk/publicnotices>. Copies of the Order and the map can be provided on request.

The Order came into force on 16 August 2022 but if any person aggrieved by the Order wants to question its validity or that of any provision contained in it on the ground that is not within the powers of the Wildlife and Countryside Act 1981, or on the ground that any requirement of the Act, or any regulation made under the Act has not been complied with in relation to the Order, he or she may under paragraph 12 of Schedule 15 to the Act within forty two days from 30 September 2022 make application for the purpose to the High Court.

DATED this 30th day of September 2022

FELICITY ROE, Director of Culture, Communities and Business Services, The Castle, Winchester, SO23 8UJ

HAMPSHIRE COUNTY COUNCIL

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE HAMPSHIRE DEFINITIVE MAP OF PUBLIC RIGHTS OF WAY AND
THE HAMPSHIRE DEFINITIVE STATEMENT OF PUBLIC RIGHTS OF WAY
(DATED 15TH DECEMBER 2007)**

**THE HAMPSHIRE (TEST VALLEY BOROUGH NO. 66)
(PARISH OF TANGLEY)
DEFINITIVE MAP MODIFICATION ORDER 2020**

This Order is made by Hampshire County Council under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because the Secretary of State for Environment, Food and Rural Affairs has directed under paragraph 4(2) of Schedule 14 of the Act that The Definitive Map Of Public Rights of Way and The Definitive Statement of Public Rights of Way (Dated 15th December 2007) requires modification in consequence of the occurrence of an event specified in Section 53(3) and Paragraph 4(1) of Schedule 14 of the Act namely:-

c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows

- that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description;

The authority has consulted with every local authority whose area includes the land to which the Order relates.

Hampshire County Council hereby orders that:

- For the purposes of the Order the relevant date is 17 March 2020.
- The Hampshire Definitive Map of Public Rights of Way and The Hampshire Definitive Statement of Public Rights of Way (Dated 15th December 2007) shall be modified as described in Part I and Part II of the Schedule as shown on the map attached to the Order.
- This Order shall take effect on the date it is made and may be cited as The Hampshire (Test Valley Borough No.66)(Parish of Tangley Footpath no.12) Definitive Map Modification Order 2020.

GIVEN this *28th* day of *August* 2020

The foregoing order is hereby confirmed
subject to the red ink modifications thereon

Alan Beckett

An Inspector appointed by The Secretary
of State for Environment, Food and
Rural Affairs

16 AUG 2022

THE COMMON SEAL of HAMPSHIRE)
COUNTY COUNCIL was hereunto)
affixed in the presence of:-)

S.A. Acute
Authorised Signatory



SCHEDULE

PART I

Description of Public Right of Way to be upgraded

Tangley Footpath 12 From SU 3466 5304 to SU 3533 5342

Commencing at a junction with Clay Copse Lane (Road T56), northwards along an enclosed, metalled track and continuing past Whistler's Farm buildings and to a junction with Andover Road (Road C33).

A total length of 1200 metres

PART II

Modification of Definitive Statement Variation of particulars of path or way

The following modification shall be added to the Definitive Statement for the Parish of Tangley:

Delete:

Tangley Footpath 12

From Road U.56, northwards and then eastwards along earth road 7 ft. wide enclosed approx. 20 ft. wide between hedges, along cart track approx. 6 ft. wide enclosed 12 ft. wide between wire fences, northeastwards along track enclosed approx. 14 ft. wide between wire fences, along track between Whistler's farm buildings and wire fence, and then along earth path enclosed approx. 9 ft. wide between hedges to Parish Boundary, then southeastwards along grass track 8 ft. wide (approx.) between trees and bushes to Road C.33.

Add:

Tangley Restricted Byway 12
SU 3466 5304 to SU 3533 5342

Commencing at a junction with Clay Copse Lane (Road T56), northwards along an enclosed, metalled track and continuing past Whistler's Farm buildings and to a junction with Andover Road (Road C33).

A width varying between ~~3.8~~ and ~~13.5~~ metres wide, as shown by grey shading on the Order map.
2.43 and 6.09

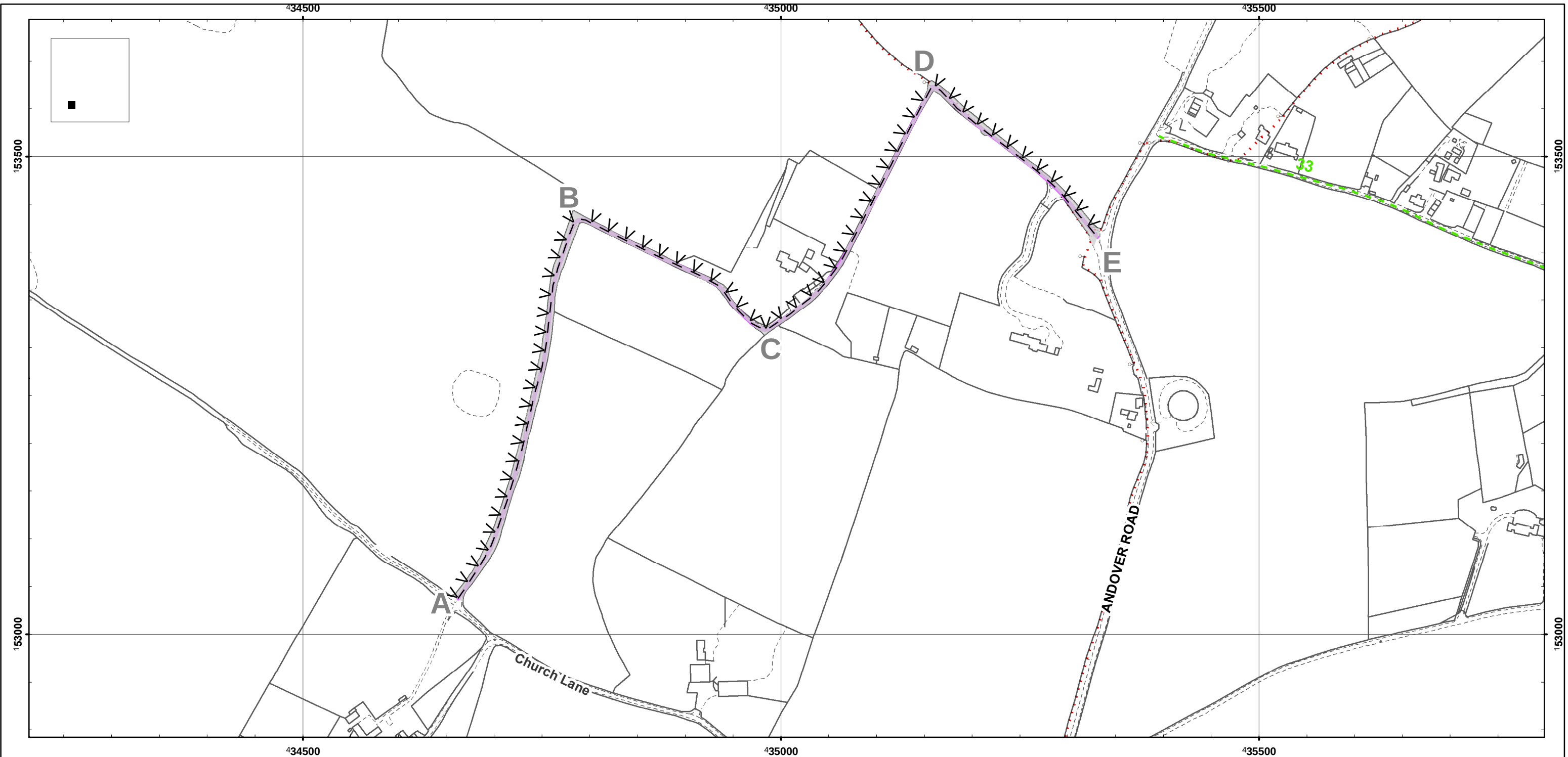
NOTE: ALL LENGTHS ARE APPROXIMATE

HAMPSHIRE COUNTY COUNCIL

MAP REFERRED TO IN

THE HAMPSHIRE (TEST VALLEY BOROUGH NO.66) (PARISH OF TANGLEY)

DEFINITIVE MAP MODIFICATION ORDER 2020



SCALE 1:4,000

LEGEND

RESTRICTED BYWAY
TO BE ADDED TO
THE MAP:-

V-V-V-V-V-V-V-V-

EXISTING FOOTPATH
TO BE UPGRADED:-

—————

EXISTING RESTRICTED
BYWAY TO BE RETAINED:-

- - - - -

MAP No.474 PRODUCED FROM DIGITAL DATA
SUPPLIED BY ORDNANCE SURVEY

THE COMMON SEAL OF HAMPSHIRE COUNTY
COUNCIL WAS HEREUNTO AFFIXED IN THE
PRESENCE OF:-

.....AUTHORISED
SIGNATORY

DATE.....

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FELICITY ROE,
DIRECTOR OF CULTURE, COMMUNITIES
AND BUSINESS SERVICES, WINCHESTER



Order Decision

Site visit made on 23 May 2022

by Alan Beckett BA MSc MIPROW

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 16 August 2022

Order Ref: ROW/3281354

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Hampshire (Test Valley Borough No.66) (Parish of Tangley Footpath no.12) Definitive map Modification Order 2020.
- The Order is dated 28 August 2020 and proposes to modify the Definitive Map and Statement for the area by upgrading footpath 12 to the status of Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Hampshire County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination. Two representations in support of the Order had also been made.

Summary of Decision: the Order is confirmed with a modification, as set out in the Formal Decision below

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the Order route on Monday 23 May 2022.
2. In Part II of the Schedule to the Order, the width of the restricted byway is set out at varying between 3.8 and 13.5 metres. Both the objector to the Order and the British Horse Society ('BHS') contend that the suggested widths are at odds with those currently recorded in the definitive statement for footpath 12, are different to the widths set out in the published Notice, and do not reflect the width between boundaries shaded in the Order map. Both parties consider that, if confirmed, the order would require modification. The applicant for the Order contends that the width to be recorded should reflect the width shown as uncoloured on the Finance Act 1910 map.
3. The Council has adopted a neutral stance in relation to the confirmation of the Order, having been directed to make it following a successful appeal at the schedule 14 stage. In its previous submissions, the Council considered there was little difference between the width recorded in the Definitive Statement and those shown on the Ordnance Survey (OS) map used as a base for the Finance Act survey. The Council notes that an error has been made in the drafting of the Order and submits that it would have no objection to the width of the restricted byway being amended.
4. The current Definitive Statement for footpath 12 describes the path as running between defined boundaries with the width varying between 8 feet (2.43m) and 20 feet (6.09m). The widths specified in Part II for the restricted byway

are at odds with those currently recorded in the definitive statement and do not reflect the width which was available on the ground at the time of my site visit.

5. I have not been presented with any evidence to suggest that the greater width specified in the Order has historically been available to the public. I consider that if the Order were to be confirmed it should be modified to record a minimum and maximum width in accordance with those widths set out in the current definitive statement for footpath 12; that is, between 2.43m and 6.09m.

Legal Framework

6. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in Section 53(3)(c)(ii) of that Act. Section 53(3)(c)(ii) provides that a modification order shall be made where evidence is discovered which (when considered with all other relevant evidence available) shows that a highway shown in the Definitive Map and Statement ('DM&S') as a highway of a particular description ought to be there shown as a highway of a different description.
7. The evidence adduced in this case is documentary. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

The Main Issue

8. The main issue is therefore whether the documentary evidence adduced is sufficient to show, on the balance of probabilities, that footpath 12 ought to be shown in the DM&S as a Restricted Byway.

Reasons

Documentary evidence

Ordnance Survey Old Series

9. A route corresponding to the Order route is shown on the OS Old Series map of 1817 where the current Whistler's Farm is recorded as East End Farm. The route running to and beyond East End Farm is shown in the same manner as the roads to which it connects. Whilst the map does not provide evidence of the status of the Order route, the map demonstrates it was in existence as a through route between Church Lane and Andover Road at least 200 years ago.

Greenwood's map of Hampshire (1826)

10. This map shows the Order route as running to and beyond East End Farm in the same manner as the roads to which it connects. The key to Greenwood's map describes two types of roads; turnpikes and cross roads. The Order route is shown as a 'cross road'.
11. The applicant submits that as Greenwood's map was commercially produced for sale to the travelling public, it would be unlikely that routes would be included which the public were unable to use. The objectors contend that Greenwood depicted both public and private roads in his surveys and point to an

advertisement placed in the *Leeds Mercury* on 13 April 1815 for Greenwood's map of Yorkshire which expressly stated that private roads were to be mapped.

12. Although the extract of the map provided shows some routes in the 'cross road' category as stubs ending in fields or as access to other land, the Order route is shown as providing a through route between Church Lane and Andover Road. The extract of the key provided does not indicate that the map intended to show footpaths and bridleways which suggests that the routes being depicted were capable of supporting vehicular traffic. As a through route on which no toll was payable, it is likely that Greenwood considered (rightly or wrongly) that the Order route was one which was available for public use with vehicles.

Tangley Tithe map 1836

13. The tithe map shows the entirety of the Order route as a road or track separated from adjacent fields by physical boundaries. The route has two apportionment numbers, 35 and 42, with that part of Church Lane to the south of Whistler's Farm carrying the apportionment number 57. None of these numbered plots appears to be listed within the apportionment.
14. The Applicant submits that land which produced no titheable crop such as a road would not have been included in the apportionment, but would have been included in the cumulative entry for 'roads and waste' found at the end of the apportionment. As the Order route does not appear to be 'waste', it is suggested that the route is more likely than not to have been a road.
15. The objectors agree that the most likely reason why parcels 35 and 42 were not identified in the apportionment was that they were included in the category of 'roads and waste'. However, it is submitted that as the 'roads and waste' identified in the tithe apportionment extended to 43 acres, it is likely to have included a number of private roads, given that the extent of maintainable highways in Tangley amounted to 8.3 miles¹. In addition, some numbered routes (such as 201 and 167) were private routes, being identified as owned and occupied by named individuals. It is not considered that the numbered route shown in the tithe map formed part of the ordinary highway network at the time.
16. Although the comparative exercise undertaken by the objector suggests that those roads identified by the Andover Highways Board would have accounted for less than half the area of 'roads and waste', (around 18 acres) this is based upon the objector's estimate of the width of the parish roads of being an average of 18 feet. However, the Highways Board records only provide evidence of the overall length of the network but not its breadth. If the average road width was greater than 18 feet, then the acreage of land occupied by the road network would have been a greater proportion of the 43 acres of 'road and waste' recorded in the apportionment. I place little weight upon the comparative exercise as demonstrating the private status of the Order route.
17. There appears to be a distinction drawn between those routes shown numbered on the tithe plan and which were included within the apportionment and those which were not. That the route was not assessed for tithe purposes suggests that it did not produce a crop; as both public and private routes which were not capable of producing a crop were not subject to assessment for tithe, the

¹ Andover Highway Board records, undated but believed to be mid to late-nineteenth century

representation of the Order route on the tithe map does not indicate whether it is public or private. However, I note the applicant's point regarding the Order route being depicted and numbered in the same way as part of Church Lane; this provides some support to the contention that these routes were of a similar status.

Highways records

18. The Order route is not shown on the map of roads maintainable at public expense within Andover Highway District compiled by the highway authority of the day. The map and corresponding list of the extent of the maintained network are undated but are considered to be from the mid to late-nineteenth century. Other parts of the current highway network which are known to be publicly maintainable (Church Lane, Holt Lane) are recorded as being publicly maintainable at the time the documents were compiled. The omission of the Order route from this document suggests that the highway authority of the day did not consider itself to be responsible for the maintenance of the way.
19. Under the provisions of the Local Government Act 1929 responsibility for highway maintenance was transferred between rural district councils and county councils. The documents prepared with regard to this handover do not show the Order route as being one which Andover District Council considered itself to have been responsible for. A similar document produced in 1946 also does not show the Order route as being maintained or as a route for which the County Council considered itself responsible.
20. Correspondence from 1963 between Solicitors acting for the then owners of Whistler's Farm and the County Council shows that a request was made that the County Council maintain the road. The response given was that the route was not maintained by the County Surveyor's department.

Sales particulars

21. That part of the route A – B – C and part of the route C – D is shown on a sale plan of the Tangle Estate dated 1876. The route is shown separate from adjacent land and in contrast to other roads which are coloured ochre, the Order route is uncoloured. The extract of the sale plan submitted does not provide a key to the colouring used.
22. As noted above, only part of the route C – D is shown, and the absence of the remainder of the route is more likely than not to reflect that the northern and eastern end of the Order route was beyond the scope of the plan compiled to show those parts of the Tangle Estate being offered for sale.
23. The sales particulars for the Upton Estate and Bourne Farm (1898) show the Order route by means of a sepia-tinted line in the same way that other known public roads were shown. Whistler's Farm and other land adjacent to the road formed part of Lot 4. The description of Lot 4 and the accompanying schedule does not suggest that any part of the Order route was included in the sale.
24. Clump and Whistler's Farm were offered for sale again in 1917. The sale plan shows the Order route uncoloured with parts of Lot 1 to the north and east of the road. Lot 2 (accommodation arable land) was to the east of A – B and north of Church Lane. Although Church Lane is annotated 'to Andover', the description of Lot 2 was that it was '*bounded on the south and west by accommodation roads*'. Although the term 'accommodation road' would suggest

that the roads were private, Church Lane was a public carriageway. There is nothing in the sale particulars to suggest that any part of the Order route was offered for sale.

25. Whilst not a sale particular, the objector has submitted an extract from a conveyance of 1 July 1970 in which a private right of access to Whistler's Farm from the corner of Church Lane to A and then on to the farm entrance was included in the conveyance. The objector contends that this is evidence that there was no public vehicular right over the Order route; it is submitted that had such a right existed, there would have been no reason for such private rights to be included in the conveyance.

Ordnance Survey mapping

26. The OS 25-inch to 1-mile maps published between 1870 and 1931 consistently show the Order route separated from surrounding land by means of solid parallel lines which indicate that the route was bounded by hedges or fences at the time the area was surveyed. The first edition map of 1873 identifies the Order route as land parcels 85, 91 and 93 in Tangley parish and parcel 397 where D – E straddles the parish boundary. In the book of reference for Tangley parish, these parcels are described as 'Road'.
27. The BHS also draws attention to the fact that both Cow Down Lane (OS land parcel 77) and Holt Lane (OS land parcel 36) are also described in the Book of Reference as 'road'; the inference drawn is that the Order route and these acknowledged public roads were of the same status when the first edition map was surveyed.

Commercial maps

28. Bartholomew's half inch map of 1902 depicts footpaths and bridleways by means of line of dots with roads being divided into four categories. Three of the road categories ('first class', 'secondary good' and 'indifferent passable') are shown by means of colour and varying width between the boundary lines. The fourth category of road ('*inferior and not to be recommended to cyclists*') are shown uncoloured between solid parallel lines. The Order route is shown by Bartholomew as being in this latter category.
29. Whilst the Order route is clearly shown, the map carries a disclaimer to the effect that the depiction of a route does not provide evidence of a public right of way. Although the Bartholomew map provides evidence of the continued existence of the Order route and the depiction of it being an '*inferior road*', little weight can be placed upon it as evidence of the status of the route.

Finance Act 1910

30. Sections B – C – D – E of the Order route are shown excluded from adjacent hereditaments on the valuation plan prepared as part of the assessment for incremental land value duty introduced by the Finance Act 1910. Section A – B is shown separate from hereditament 486 (to the east), but the extract of the plan submitted does not show the land to the west of A – B as having been assessed. It is therefore debateable as to whether A – B was or was not excluded from the valuation. Nonetheless, B – C – D – E is depicted in the same way as Andover Road to which the Order route connects.

31. The applicant contends that as the Order route was excluded from valuation, it would have been considered to be a road which belonged to a rating authority; land held by or on behalf of a rating authority being exempt from valuation under s35 of the 1910 Act. The objectors submit that the exemption would apply to those public authorities with the power to raise a local rate to be put towards public local purposes, and would not be applicable to highway authorities where the surface of the road may be vested in it for maintenance and repair.
32. It is likely to be a matter of debate as to whether the exemption as a rating authority would apply equally to those rating authorities which carried out the dual function as a highway authority. I consider that this would be the case as the maintenance and repair of district highways would be a 'local public purpose' to which the monies raised by the rate could be put.
33. The objectors submit that B – E was omitted from valuation as it fell between different hereditaments and the ownership was unknown. Whilst it may be that in some cases a route is shown excluded from valuation as it provides access to land for a number of adjacent owners, this does not appear to be the case here. Of the hereditaments adjacent to the Order route, only Whistler's Farm appears to have required the Order route to access land and property which would otherwise be land-locked. Land to the east and south of Whistler's Farm appears to have been served by Church Lane and Andover Road, but no part of the route has been assessed as being the property of Whistler's Farm.
34. Whilst the Order route may have provided access to Whistler's Farm from the east and south and may have been used for such purposes, the exclusion from the adjacent hereditaments suggests that it was considered to be a public through route. As footpaths and bridleways were dealt with by way of a deduction being made from the site value of the land crossed by them, the exclusion from valuation suggests that the Order route was one which was considered to be available for the public to use with vehicles. I consider that the Finance Act records provide evidence of some weight with regard to the status of the Order route.

Ministry of Agriculture Farm Survey (1941)

35. The farm survey plan shows the land of Whistler's Farm by brown shading which appears to include B – C of the Order route. The farm roads are said to be 'fair' but the 'situation in regard to road' is said to be 'bad'. However, there is no further information about what these terms relate to, or where or how the distinction was drawn between a 'farm road' or other 'road'. The information contained within the farm survey in relation to B – C contrasts and conflicts with that found in the earlier Finance Act documents.
36. The edge of the brown shading is imprecise along parts of the boundary of the holding, but A – B and C – D – E does not appear to have been considered to be part of Whistler's Farm or other adjacent land.

Survey of public rights of way

37. The parish survey conducted under the provisions of the National Parks and Access to the Countryside Act 1949 recorded the Order route as a public footpath. The route was shown on the draft, provisional and definitive maps as a public footpath; whilst objections were received to some routes within

Tangley, there were no objections or challenges to the recording of the route as a public footpath.

38. Whilst the DM&S provides conclusive proof of the existence of a public right of way on foot, the recording of the route as a public footpath does not preclude the existence of higher public rights which are unrecorded.

List of streets

39. The Order route is currently recorded as an unclassified road (Whistler's Farm Road) being a highway maintainable at public expense. Correspondence from 1982 between the then owner of Whistler's Farm (a Mr Hobbins) and the County Secretary in respect of assistance being sought with the clearing of snow from the access road to the farm shows that the Council had undertaken an investigation into its liability for maintenance. The conclusion of the Council's investigation at that time was that the Order route was an unclassified public road and an ancient highway.
40. In a letter dated 25 March 1982, the Assistant County Secretary states that an investigation of tithe and other maps has been undertaken in the Hampshire Record Office. Particular reference was made to the OS Old Series map of 1808, Greenwood's map of 1826, and the tithe map of 1838. Reliance had been placed upon parcels 35 and 42 in the tithe map as being untithed as evidence of the status of the route as a public road, and a conclusion drawn that that the Order route should be recorded in the List of Streets as an unmetalled road.
41. In subsequent correspondence of 3 December 1982, the Assistant County Secretary further confirmed the County Council's view that the Order route was an unclassified road and was considered to be an ancient highway *"because it was in existence as a public road on 20 March 1836"*.
42. In correspondence in 2002 with the then owner of Whistler's Farm, the Council re-iterated that the whole of the Order route was a publicly maintainable highway, stating *"It has been established that the section of highway was wrongly defined, as it was an ancient highway pre-dating 1835"*.
43. Other correspondence shows that in 1983 approval had been obtained for the surface of the Order route to be improved by laying 'coated macadam' from the U56 junction to the entrance to Whistler's Farm, and that the remainder of the route was to be dealt with *'in piecemeal fashion'*. Other correspondence shows that parts of the Order route had been surfaced by the Council in 2004.
44. In correspondence with Sir George Young Bt MP in September 2002 in relation to a claim for damage to his vehicle suffered by Mr Hobbins in using Whistler's Farm Road, the Head of Legal Practice acknowledged that *"All of Whistler's Farm Road is highway rather than just the metalled section"*. This letter states that the unmetalled section had been considered to be a Byway Open to All Traffic and therefore not subject to the maintenance regime enjoyed by the ordinary road network. However, the County Council conceded that the section of road north of Whistler's Farm had been wrongly defined, and that it was *"an ancient highway pre-dating 1835"*. Further correspondence demonstrates that the County Council settled the claim for damages.
45. The objector contends that the addition of the Order route to the List of Streets was erroneous, and was undertaken as a result of a cursory examination of

historic documents and in response to pressure being exerted by Mr Hobbins, reinforced by the sitting MP. However, the letter of 25 March 1982 does not suggest that the investigation had been 'cursory'; Mr Hobbins had raised the question of maintenance in December 1981 and the Assistant County Secretary had sought the input of both the County Surveyor and the County Archivist before responding. The involvement of Mr Hobbins' MP is understandable given that the Council had initially denied liability for damage having informed Mr Hobbins 20 years earlier that the Council had accepted liability for the maintenance of the Order route.

46. It would have been open to the County Council in 2002 to respond to the claim for damages by saying that the standard of maintenance which was required was that which would ensure use by the public on foot was possible; the route being shown on the DM&S as a public footpath. However, the Council's position reflected the conclusion to which it had arrived in 1982; that the route was a publicly maintainable carriageway. In consequence of that conclusion, the Council had surfaced the majority of the route in such a manner as to facilitate use by motor vehicles and had admitted liability for damage to a motor vehicle on that section which had not benefitted from a sealed surface.
47. It is accepted that the inclusion of the Order route on the List of Streets indicates that the route at issue is publicly maintainable and does not, of itself, provide evidence of the status of the route. However, the Council accepted that the route was an ancient highway based on its research of documentary sources that pre-dated, or were contemporaneous with, the Highways Act 1835. The admission of liability and the expenditure of public funds on such maintenance are factors which sit in the balance in support of the applicant's contention that the Order route was, and is, a public carriageway.

Evidence of use

48. Five user evidence forms have been submitted from individuals who claim to have used the Order route on foot, on horseback and with vehicles. Three of these forms have been completed by members of the Hobbins family who owned Whistler's Farm between 1970 and 2014. Mrs Hobbins states that her use was in pursuit of a private right of way whereas the other members of the family assert that they walked, rode, and drove along a public road as part of a journey between Tanglely and Upton.
49. The remaining two user evidence forms appear to have been completed by members of the public. One respondent claimed daily use on foot, horseback and with a vehicle between 1968 and 1979, whereas the other claimed monthly use on foot between 1982 and 2000; use on horseback between 1982 and 1996 (frequency not specified) and with a vehicle between 1990 and 2020 (frequency not specified).
50. The user evidence is limited in its extent, and that provided by members of the family of the previous owners of Whistler's Farm may have been undertaken in accordance with the private right of way which the objectors say Whistler's Farm enjoys over the access from Church Lane.
51. Contrary evidence of reputation has been provided by the objector in the form of correspondence from a former local resident (a Mr Peill) who had spent time at Whistler's Farm during childhood, his family living locally from 1947 – 1962. His recollection was that the road ran to the farm (known to him as Sturt's

Farm after the then owner) and that the extension to the east did not exist due to a fold yard being present. There was no recollection of seeing any member of the public using the road; it was not a through route as the section to the north and east of the farm was 'virtually impassable'.

52. Contemporaneous correspondence from 1963 between the Solicitors acting for the then owner of Whistlers Farm and the Council suggests however that the route was wholly passable at that time. The correspondence notes "*Whistler's Farm is approached from the road running from Pill Heath to Tangle and Mr Sturt maintains that the road running past his farmhouse is a public right of way and wonders whether the Council would be prepared to resurface it*". At the time when it is asserted that the route to the north of the farm did not exist, the owner of the farm understood that the way ran 'past' the farmhouse and did not solely run to it. I place little weight upon the assertions made in the statement submitted by the objector.
53. In my view, the user evidence adduced is of insufficient quality and quantity for a public right of way greater than that already recorded in the DM&S to have come into existence under the statutory scheme found in section 31 of the 1980 Act, or at common law. However, the evidence is not altogether without value as it demonstrates that there has been some (albeit limited) use of the route as an all-purpose through route by members of the public.

Conclusions on the evidence

54. There is a body of evidence which demonstrates that the Order route has physically existed as a through route since at least 1817. All the mapping consulted shows the Order route consistently through time as running between defined boundaries with no physical restrictions along its length which would have prevented access along it. Where those maps show the layout of the buildings at Whistler's Farm, those buildings appear to be laid out with reference to the road which is consistently shown as running to the east of any buildings present on the site.
55. Whilst the Order route has consistently been shown on maps of the locality, it does not automatically follow that it is a public carriageway. However, those early nineteenth century maps which show the road network (OS Old Series, Greenwood), show the route in the same manner as other known public carriageways which is suggestive of the order route being of a similar status.
56. Greenwood depicted the Order route as a 'cross road'; that is, a road which linked two other roads for which no toll was payable. Whilst not being conclusive as to whether this route was public or private, unlike other 'cross roads' which peter out in fields or other unmapped property, the Order route skirts Whistler's Farm and provides a through route to other roads and does not appear to serve solely as a means of access to the farm.
57. Although numbered on the tithe plan, the Order route is not separately identified within the apportionment unlike other numbered routes for which the owner and occupier was recorded. In this respect, the Order route is treated in the same way as other known public carriageways which were also numbered but had no recorded owner or occupier. This suggests that the tithe commissioners were able to differentiate between those routes which served a private purpose and those which served a public purpose. The inference which

can be drawn from the tithe documents is that the commissioners considered the order route to be part of the public highway network of the area.

58. The majority of the Order route is shown excluded from adjacent hereditaments on the Finance Act plan. Section A – B is not included within the hereditament to the east, and although the land to the west does not appear to have been valued, given the absence of ownership shown by the tithe documents and the evidence from 1941 Farm Survey, it is likely that this section would have been excluded from the land to the west.
59. Whilst the primary purpose of the Finance Act survey was not the ascertainment of public rights, the exclusion of routes such as this is considered to indicate the existence of a public route, usually vehicular. Although not conclusive, the Finance Act records provide evidence that at the time of the valuation, the route was considered to be a public carriageway.
60. There is, however, no record of the route being maintained at public expense until the County Council undertook its research in 1982 and concluded that it was liable for its maintenance. The Order route is not shown in the various lists of maintainable carriageways compiled between the mid to late nineteenth century and 1946. Furthermore, as late as 1963, the County Council was not of the view that the route was one which was publicly maintainable.
61. The objectors contend that if the Order route had the reputation of a public carriageway in the early nineteenth century and such rights pre-dated the Highways Act 1835, then such a route would have been publicly maintainable by virtue of the 1835 Act and should have appeared on the Andover Highway Board list. However, these documents are records of those public routes which were being maintained, but do not provide a record of those routes over which public rights existed (or were considered to exist) but which were not being maintained.
62. It is known that some of the routes currently recorded in the List of Streets as unclassified roads (such as Clay Copse Lane, Cow Down Lane and Rushmore Down Lane) were in existence in the mid-nineteenth century as they were shown (or parts of them were shown) on the OS Old Series and Greenwood's maps but were also not recorded in the Andover Highways District list. These routes appear to have been added to the list of maintainable highways at various points in time as the highway authority's understanding and knowledge of the extent of public rights increases. It would appear that the Council's decision to add the Order route to the List of Streets in 1982 was part of this ongoing process, and led to the Council surfacing part of the route and admitting liability for damage caused on that part of the route which remained unsurfaced.
63. I note that in 1963 a request was made for maintenance of the route to be undertaken which the Council declined, and that at the sale of Whistler's Farm in 1970, the vendor indicated that there was a private right of access to the farm along the Order route. The objectors submit that this is indicative of the absence of a public right of way with vehicles.
64. However, it is not clear on what basis or authority the vendor could grant such a right if the vendor was not the owner of the road. The tithe and Finance Act documents suggest that there was no known owner, and the 1898 and 1917 estate sales do not suggest that the Order route formed part of the sale of

Whistler's Farm. At best, the 1970 vendor would appear to have been able to declare that the route had been used to access the farm for some time and that a private right to do so had been acquired by prescription. However, this would not preclude the existence of public rights over the whole of the Order route.

65. I am not persuaded that the absence of the Order route from the records of highways maintainable at public expense prior to 1982 demonstrates that the Order route was solely a private access to property, or that public rights could not have existed over the route at the time such lists were compiled.
66. At the time of the survey of public rights of way under the 1949 Act, the parish council considered the Order route to be no greater than a public footpath. Mr Peill's recollection was that at that time that it was 'virtually impassable' beyond Whistler's Farm. If the route was only passable on foot at the time of the survey it may account for the parish council's conclusion. As noted above, the recording of the route in the DM&S as a public footpath does not preclude the existence of other, higher public rights.
67. None of the documentary sources adduced in this case provides conclusive evidence that the Order route was a public carriageway. However, when considered collectively, and taking into account the the limited evidence of public use which has been submitted, the evidence is sufficient to show, on a balance of probabilities, that the Order route carries a public vehicular right of way.

Overall Conclusion

68. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence adduced is sufficient to show, on a balance of probabilities, that footpath 12 ought to be shown in the DM&S as a restricted byway subject to the modifications set out in paragraph 4 above.

Formal Decision

69. I confirm the Order subject to the following modifications: in the Schedule, Part II amend lines 4 and 5 to read: "A width varying between 2.43 and 6.09 metres wide, as shown by grey shading on the Order map."

Alan Beckett

Inspector

ORDER MAP - COPY - NOT TO ORIGINAL SCALE

HAMPSHIRE COUNTY COUNCIL
 MAP REFERRED TO IN
 THE HAMPSHIRE (TEST VALLEY BOROUGH NO.66) (PARISH OF TANGLEY)
 DEFINITIVE MAP MODIFICATION ORDER 2020

