



Order Decision

Inquiry opened on 5 December 2024

by **Claire Tregembo BA (Hons) MIPROW**

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

Decision date: 18 December 2024

Order Ref: ROW/3320533

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Hertfordshire County Council (Kelshall 18, 19, 21 and 22) Modification Order 2022.
- The Order is dated 17 February 2022 and proposes to modify the Definitive Map and Statement for the area by adding two byways open to all traffic, a restricted byway and a bridleway, upgrading a footpath to a bridleway, and amending the particulars of several paths as shown on the Order maps and described in the Order Schedule.
- There were seven objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision

Procedural Matters

1. I undertook an unaccompanied site visit on 4 November 2024 where I walked most of the Order routes, and the connecting routes Therfield Byway Open to All Traffic (BOAT) 36 and 41 (T36 and T41). I only viewed the cross-field section of the proposed Kelshall 22 (K22) from either end. I also undertook an accompanied site visit during the Inquiry with representatives of Hertfordshire County Council (HCC), the objectors, and other interested parties to look at a point in the middle of the cross-field section of K22.
2. I will refer to various points and sections shown on the Order maps, and I have appended copies to the end of my decision for ease of reference. To the north of Collins Green and T41, there is a watercourse which some parties called a stream and others a ditch or drain. I will refer to it as a watercourse.

Preliminary Matters

3. Therfield Heath and Greens Conservators (THGC) considered that public rights do not exist along T41 over Collins Green and questioned its width if public rights do exist. The Definitive Map and Statement (DMS) is conclusive evidence as to the particulars contained therein and T41 is shown although a width is not recorded. Although I have the power to modify Orders if the evidence indicates I should, I can only do this for routes shown within the area covered by the Order map. T41 over Collins Green is not fully shown on the Order map. A full investigation into T41 has not been undertaken. Therefore, I do not consider it would be fair or in the interests of natural justice to consider the existence, status, or width of T41 when considering the Order before me.
4. THGC also raised concerns about the modifications to the statement for Kelshall Footpath 17 (K17) because the Order map does not show its full length. However, the Order does not propose to modify the Definitive Map (DM) for K17 and only

proposes to modify the Definitive Statement (DS) for the northern end where it joins an Order route at point F. Therefore, I am satisfied the full length of K17 does not need to be shown on the Order map.

5. A large number of anonymous user evidence forms were received. As it is not possible to identify the user, their information cannot be verified or tested, and I cannot be sure the forms are not duplicates. Therefore, I will not take these forms into account.

The Main Issues

6. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) in consequence of events under section 53(3)(c)(i), (ii), and (iii). This requires me to consider if, on the balance of probabilities, the evidence shows that public rights of way not shown in the DMS subsist along the Order routes, that a highway shown as a footpath in the DMS should be shown as a bridleway, and that particulars contained in the DMS should be modified. For routes not already recorded in the DMS, this is a higher standard of proof than the reasonably alleged to subsist test to determine if an Order should be made.
7. The Order has been made on the basis of documentary evidence. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
8. I shall examine the evidence as a whole to establish whether public rights of way for vehicles exist along the Order routes. However, the Natural Environment and Rural Communities Act 2006 (the 2006 Act) extinguished rights for mechanically propelled vehicles subject to certain exceptions set out in section 67 of that Act.
9. It was agreed that Exception 67(2)(b) applied for Order routes A-C and A-F. Some parties also considered that some of the exceptions of the 2006 Act also applied to the proposed restricted byway (RB). The exceptions they believed to apply are:

Exception 67(2)(a): it is a way whose main use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles (MPVs).

Exception 67(2)(b): immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under Section 36(6) of the 1980 Act (c. 66) (list of highways maintainable at public expense)
10. To support the Exception 67(2)(a) evidence of use by mechanically propelled vehicles was provided. Additional evidence of use by walkers, cyclists, and horse riders was submitted with the application for the public rights of way. The user evidence was provided in relation to the definition of a BOAT as set out by Section 66(1) of the 1981 Act which is 'a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are used'. None of the parties are relying on user evidence to show the presumption of dedication arising from tests laid out in section 31 of the 1980 Act.

Reasons

Documentary Evidence

Inclosure Awards

11. A map of the Enclosed part of Therfield, 1724 shows section B-C of the Order route coloured sepia, without a plot number. Other public carriageways including T36, and Rooks Nest Lane are shown in the same way but so is the start of Kelshall Footpath 19 (K19). T41 and section H-I are not shown, and the rest of the Order routes are not in or directly abutting the area covered by the map.
12. The Kelshall Inclosure Award, 1795 sets out six public roads in the north of the parish. The Order routes are in the south of the parish and are not set out. The Order routes are shown on the Kelshall Inclosure map, 1797 in the same way as awarded public carriageways including The Street and Kelshall BOAT 18 (K18) and T41. However, a cul-de-sac route is also shown in the same way and an adjoining plot describes it as a '*private lane*'. K18 forms a continuous route with Order route A-F. The Order routes form a network of roads along with The Street, K18, T36, and T41.
13. The Therfield Inclosure map, 1848 shows a short section of B-C from point C joining Buntingford Road (T36) coloured sepia and labelled '*from Kelshall*'. Other public carriageways including T36 and T41 are shown in the same way. The start of K19 is also shown where it joins T36, but Order route D-I is not shown where it joins T41 at point I. The watercourse is also not shown alongside T41 but is shown south of Chapel Green.

Tithe Map

14. The Therfield Tithe Map, 1843 shows Order route A-C joining T36 at point C coloured sepia in the same way as other public carriageways including T36 and T41. Order route D-I is not shown where it joins T41. The watercourse is also not shown alongside T41 but is shown south of Chapel Green.
15. The purpose of tithe records was to identify titheable land capable of producing crops. They were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of such routes.

Commons Records

16. The Land Commissioners for England issued a Provisional Order for the Regulation of Therfield Heath and Greens, in pursuance of the Inclosure Acts, 1845-1878 on 25 February 1888. The Commissioners were satisfied the application would benefit the neighbourhood and private interests and a local inquiry should be held. The provisions gave the Conservators powers to determine the exercise of pasture, adjust rights, settle disputes, improve the commons, make byelaws and regulations to protect the Commons from nuisance and keep order, and general management. Booths or other erections on the common could only be erected with permission and supervision of the Conservators and payment could be taken. Residents of Therfield and Royston, and the neighbourhood have a right of free access at all times. The Greens had rights to pasture for cattle and horses but not sheep.

17. The Land Commission (Special Report), dated 6 April 1888, concerned the application under the Commons Act 1876 (the 1876 Act) for the Provisional Order. Collins Green was stated to be waste of the Manor. The report states the leading reason for the adjustment of rights was to prevent sheep from other parishes grazing the wastes. The Conservators would be able to set apart convenient spots for the playing of cricket, football, and other games but the Act would not allow the acquisition of a field for use as a recreation ground in exchange for part of the heath through a Provisional Order. Two local meetings were held and *'opinions expressed were entirely in favour of the Heath and the Greens being placed under proper management and control'*.
18. The Commons Regulation (Therfield) Provisional Order Confirmation Act, 1888 (the 1888 Act) confirmed the Provisional Order on 7 August 1888. The Award setting out the regulations, powers, and allotting stints or rights of pasture was sealed on 21 April 1893 (the Commons Award).
19. The boundaries of the Greens allotted in the Commons Award are outlined in green on the Commons Regulation (Therfield) Award map 1893 (the Commons map). Collins Green is outlined with a line across T41 at the eastern and southwestern ends. The watercourse appears to be outside of Collins Green with the northern boundary running along the parish boundary. Other Greens have a gap in the boundary where known public routes cross.
20. The Special Report, Provisional Order, 1888 Act, and Commons Award do not refer to the stopping up of highways and do not give powers to stop up highways. Any powers to stop up or divert highways under General Inclosure Acts required advertising for four successive weeks with a right of appeal to the Justice of the Peace by anyone who did not agree to the proposed changes. The 1876 Act allowed Inclosure Commissioners to insert terms and conditions into Provisional Orders for the setting out of public highways over commons if they would benefit the neighbourhood. However, it did not give powers to extinguish existing highways.
21. The Application for registration as common land under the Commons Registration Act 1965 (the 1965 Act) includes a map of Collins Green. The watercourse is shown on the north side of Collins Green with a gap in it at point I. Most of section H-I is shown as an enclosed route which crosses the watercourse into Collins Green. There are no lines drawn across it at point I.
22. Byelaws are in place to prevent horse riding and cycling on the Commons. However, the byelaws state *'nothing in or done under any of the provisions of these byelaws shall in any respect prejudice or injuriously affect any public right of way through the Heath or Greens'*. They also state *'no person shall, except in exercise of a lawful right or privilege, ride a horse in any part of the Heath or Greens'* with another byelaw applying the same wording to the riding of *'any bicycle or other similar machine'*.

Finance Act Maps 1910

23. The Order routes are all shown uncoloured and excluded from the surrounding hereditaments on the 1910 Finance Act maps. Other public carriageways including The Street, T18, and T36 are shown in the same way. T41 is shown coloured and

numbered hereditament 22 but the field and valuation books have not been provided.

24. The Finance Act, 1910 imposed a tax on the increase in land value, which was payable when the land changed hands. Maps were produced to show taxable land following a survey by the Board of Inland Revenue. It was a criminal offence to make false statements to reduce tax payments. The existence of public rights of way over land reduced its value and the liability for tax, so were recorded in the survey. The exclusion of the Order routes from the adjoining hereditaments could indicate public rights which were more likely to be vehicular. However, it could also be argued that private rights had the same effect on land.

Highway Records

25. The Rural District of Ashfield (Main Road) Order, 1901 includes a highway *'from White's Barn to Kelshall as lies between Bleak Hall Road and the Kelshall and Therfield Road, commencing at the road leading to Bleak Hall, passing by Hagger's Farm, and terminating in the village of Kelshall, near the School, at its junction with the Main Road from Therfield to Kelshall*. White's Barn is at the junction of K19 and T36, and Bleak Hall is at point F. This description indicates T36 between K19 and point C, Order route A-C, and The Street are highways, but only The Street north of A is a Main Road. It also indicates that Order route A-F is a road. Order routes A-F and D-I are not included in the Order.
26. A map of Main and County Roads, 1927 shows The Street, Order Route A-C, and part of T36 between point C and K19 as Road 735, and A-F as Road 736. Order route D-I, K18, and most of T36 are not shown as roads.
27. Minutes from HCC's Highways Committee meeting on 26 May 1930 includes a schedule of roads in the Rural Districts which were taken over by the County Council on 1 April 1930. Order route A-F is included as *'Whites Lane, Kelshall from the end of existing road No. 49 to Bleak Hall'*. Section A-B is described as *'Keepers Lane, from end of existing road No. 49 south-eastwards to point where road takes a right-angle turn to the east'*. The road names appear to have been switched around and it is accepted by all parties that this is an error which has also been made on later Highway Records and the existing signage on site. Section B-C and Order route D-I are not included.
28. An extract of the Stanford Accident map, 1946 shows Order Routes A-C, A-F, The Street, K18, and part of T36 coloured red which the key indicates are County Roads. Order route D-I and most of T36 are not coloured.
29. In a memorandum dated 10 June 1969 the Northern Divisional Surveyor of HCC recommended that vehicular rights over Order routes A-C and A-F should be stopped up under section 108 of the Highways Act 1959. He stated *'both are metalled but not surface dressed and might be described as green lanes. I suggest bridleway status for both unless C.R.B. 18 becomes a By-way (sic) open to all traffic'*.
30. Kelshall Parish Meeting (KPM) and a local farmer both objected to this proposal. The Chair of KPM stated *'these roadways are used as a means of access by six different farmers and frequently used by members of the public in cars. The Parish Meeting therefore recommends that these roadways remain open as County Roads*

maintained by the Highway Authority'. The proposed stopping up was not proceeded with.

31. A printout of the 1997 List of Streets (LOS) includes routes '10222 KELSHALL STREET KELSHALL' and '10238 JUNC U49 KELSHALL TO RUPP18 WOODCOTES' (Road Used as a Public Path) which were stated to be Order routes A-C and A-F. I agree that route 10238 is Order route A-F and the grid reference corresponds with point F. However, it is not clear if 10222 includes Order route A-C. The grid reference is for the northern end of The Street, but no distance is given to determine its full length, so it is not possible to tell if it included any part of Order route A-C.
32. Section A-B and Order route A-F are on HCC's 2006 LOS as highways maintainable at public expense and are listed as unclassified roads. Section A-B is named Keepers Lane and described as running from 'KELSHALL STREET SOUTHEAST 320M TO LEFT HAND TURN' and a 'Highway as of 1/4/1930'. Section A-F is named Whites Lane and described as running from 'END OF KELSHALL STREET SWEST 645M TO JCTN' and 'maintainable from 1/4/1930'.

Definitive Map Records

33. On the Kelshall Parish Survey map, Order route A-C is labelled in grey as 'CRF No. 18' (carriage road used mainly as a footpath) and Order route A-F along with K18 are labelled as 'CRB No. 19' (carriage road used mainly as a bridleway). Annotations in red indicate sections A-F, A-C, and part of T36 are County Roads. Section G-I is claimed as part of 'F.P. No. 20'. The claimed routes were also renumbered in red. Section D-G is not claimed as a right of way.
34. The Parish Survey Schedule describes Order route A-C as 'F.P. from Kelshall Street to White's Barn... on Hagers Farm-White's Barn Road by a well defined cart track'. Handwritten in red it states, 'County Road Not shown on draft map'. Order route A-F is described with K18 as 'F.P. from Woodcotes to bottom of Kelshall Street' and 'along a well defined cart'. An additional remark states 'From Woodcotes to Bleakhall C.R.B. from Bleakhall to Kelshall Street H.C.C.' and a handwritten amendment states 'CRB from Woodcotes to Bleak Hall Remainder is county road' both effectively removes Order route A-F from the statement. Section G-I is described as 'F.P. White Barn to Collins Green' from point G it is described as 'field boundary F.P. turns in a S. Direction to Baulk, overgrown to a point 100 yds. approx. E. of Hawkins Wood at Parish Boundary.'
35. Kelshall Parish was surveyed by J.E. Page of the Ramblers Association in 1951. Comments on the Draft Map following this survey were sent to HCC by P.P.H Colbeck. A sketch map shows the approximate line of Order route D-I which is described as 'an old lane well defined by surface and hedgerow from A to B' (point I to the north corner of woods north of point G) 'afterwards being lost owing to landowner ploughing it out. The map recording, however, shows it as connecting at Collins Green and could therefore be admitted as a Bridle Road. It is an old lane which served Collins Green but lost is (sic) usefulness as such when Collins Green died a natural death'.
36. Hitchin Rural District Council (the RDC) were asked to investigate the omission of section D-I from the Draft map following a representation from the Youth Hostels Association (YHA). It was described as a 'Footpath from county road N. E. of Bleak

House thence S.E along old lane to join F.P.19'. The RDC responded stating that 'this path is comparatively clear to the first field boundary, from this point it is completely overgrown and impassible. From information I have received it has been in this state for about 20 years and for the same period has not been used by local people'.

37. The Ramblers Association withdrew their objection to the route's omission from the Draft map because the person who raised it had moved and they had no one in the area to provide evidence.
38. On the first DM, relevant date 1 November 1953, Order routes A-C, A-F, and The Street are shown coloured yellow which the key indicates are unclassified roads. K18 is shown with green dashes which the key indicates are 'C.R.B. or C.R.F (Roads Used as Public Paths)' and it is recorded in the DS as a C.R.B. The statements for Kelshall Footpath 15 (K15), K17, and K18, refer to Order route A-F as a 'county road'. Section G-I is shown as part of K19 in the DMS. Section D-G is not coloured on the DM or included in the DS. The statement for T41 states '*commences from C.R.B.36 (Kelshall Lane) N.W. of Chapel Green thence S.W. along parish boundary & Collins Green to join Notley Lane at N.W. corner of parish*'.
39. A letter dated 12 December 1978 from the Chair of Kelshall Parish Meeting stated Keepers Lane is a Byway maintained by HCC and there is a continuation of Keepers Lane, namely Kelshall Lane. They stated, '*it would be in the Parish interest to keep this stretch a byway*'.
40. The current DS for K15, K17, and K18 refer to Order route A-F as a 'county road'. The current statement for T41 states it '*commences from BOAT36 (Kelshall) Lane* (sic) *NW of Chapel Green thence SW along parish boundary to join Notley Lane at SW corner of parish*'.

Commercial Maps

41. Bryant's 1822 map of Hertfordshire drawn from an original survey shows the Order routes as '*Lanes and Bridleways*'. Other public carriageways including The Street, K18, T36, and T41 are shown in the same way. K18 and The Street form a continuous through route with Order route A-F. The Order routes form of a network of roads along with The Street, K18, T36, and T41.
42. The Order routes are shown on Bartholomew's half inch-map of 1903 as roads which '*are inferior not to be recommended for cyclists*'. The map was aimed at cyclists with input from the Cyclists' Touring Club. Other public carriageways including The Street, K18, T36, and T41 are shown in the same way and they and the Order routes are a road network. K18 forms a continuous route with Order route A-F.
43. The commercial maps indicate the existence of the Order routes. They are suggestive of public rights which were considered by the map makers to be of a higher status than footpath.

Ordnance Survey Maps and Records

44. Ordnance Survey (OS) drawings from the map of Anstey, 1799 shows Order routes A-C and A-F with solid edges. A route is shown on a similar line to Order route D-I

- in the same way. Other public carriageways including The Street, K18, T36, and T41 are shown in the same way and the Order routes form a road network with them. K18 forms a continuous route with Order route A-F.
45. The 1874 Kelshall OS Boundary Book and 1875 Kelshall OS Boundary Plan both show a short length of section B-C from point C with double solid edges. A short length of section G-I from point I is also shown in the same way. T36 and T41 are shown on both plans with double solid edges. The 1875 Boundary Plan also shows the western end of K18 in the same way.
 46. On the 1874 Boundary Book, there is a line with a circle at both ends on either side of point C at the junction with T36 and point I at the junction with T41. This symbol indicates a change of boundary. Between these symbols at point C the junction is labelled 'C.C' and it is labelled 'Und.' at point I. 'C.C.' could indicate several different features and none of the parties referred to it. 'Und.' indicates the parish boundary is undefined. On either side of the junctions the boundary is labelled '4 ft. R.H' which indicates the parish boundary runs 4 feet east of the root of the hedge along the western side of T36, and 4 feet south of the roots of the hedge along the northern side of T41. I consider this indicates there were no hedges across the Order routes at points C and I and there was unobstructed access to the adjoining routes. Point C is shown in the same way on the 1875 Boundary Plan but there are no symbols at point I. Both routes are still shown 4 feet from the roots of the same hedges. T41 is labelled 'Collin Green Lane' on the Boundary Book and Boundary Plan.
 47. The Order routes are shown on the First Edition 1878 1:2500 OS map with double solid edges. Some sections have double dashed lines within the solid lines which are likely to indicate a track between verges. Order route A-F is parcel 80, A-C is part of parcel 133, and Order route D-I is parcel 157. Parcel 133 also includes The Street. All three plots are listed as 'Road' in the Book of Reference for Kelshall parish and T41 is listed as 'Road' in the Book of Reference for Therfield. There are no dashed lines within the solid edges of T41.
 48. There is a line across Order route D-I at point I which is likely to indicate a gate, or a hedge. This line continues east and west with trees shown along it. There is also a watercourse on the south side of the hedge shown by a single line with no bridge over it at point I. K18 forms a continuous route with Order route A-F. T41 is labelled 'Collins Green'. Other public carriageways including The Street, K18, T36, and T41 are shown in the same way and the Order routes form a road network with them.
 49. The Order routes and parish boundaries are shown in the same way on the second edition 1898 1:2500 OS map. The watercourse now appears wider and is coloured blue with a bridge labelled 'F.B.' over it at point I. There is a line near the southern end of the bridge which is likely to indicate a gate. The Order routes and parish boundaries are shown in the same way on the 1923 1:2500 OS map. There is still a bridge shown but not labelled at point I, which is open to T41. On the 1923 map, there are trees shown within most of section D-G. There were no trees shown on the 1898 OS map and only along the hedges on the 1878 OS map.
 50. The Order routes are shown on the 1883 six-inch OS map. There is a line across the southern end of Order route D-I which could indicate a gate. The Order routes appear to form part of a network of roads along with K18, T36, and T41.

51. On the 1956 1:25000 OS map, the Order routes are shown largely with double solid edges, although section G-I is shown with solid and dashed lines. Order route D-I does not appear to connect to T41 at point I. Instead, another route is shown with double dashed lines running parallel to T41 on the north side of the hedge which may join T41 at K17 and continues west to a public road. Other public carriageways including K18, T36, and part of T41 are shown in the same way as the Order routes. K18 forms a continuous route with Order route A-F. The Order routes form part of a network of roads along with K18, T36, and T41. Footpaths are shown labelled 'F.P.' largely with single dashed lines. T41 is bounded by the watercourse to the north and a hedge to the south. The parish boundary is shown on the south side of the watercourse.
52. Order routes A-C and A-F are shown on the 1975 1:2500 OS map in the same way as on the earlier 1:2500 editions. Order route D-I is not shown between D-H but section H-I is shown largely with a single dashed line and partly with a double dashed line with trees within it. At the southern end it does not join T41 at point I but heads southwest on the north side of a hedge for a short distance to a footbridge across the watercourse at the end of the hedge. A route is shown with double dashed lines continuing across Collins Green to join T41 which is also shown with double dashed lines labelled '*path (um)*' (unmetalled). To the east of the footbridge, the parish boundary is 1.22m from the track of hedge and to the west it is undefined. The parish boundary is on the south side of the footbridge and watercourse.
53. The OS maps provide evidence of the physical existence of the Order routes. However, since the late 19th Century, OS maps have carried a disclaimer stating tracks and paths shown provide no evidence of the existence of public rights.

Aerial Photographs

54. Order routes A-C and A-F are visible on the 1947 and 1971 aerial photographs as routes enclosed between hedges. On the 1947 aerial photograph route D-I is visible for approximately 280 metres south of point D as a route enclosed between hedges. After this a line of larger trees can be seen along the Order route, but it is not visible until south of G where it is partly visible. T41 is also obscured by trees either side of point I. On the 1971 aerial photograph, the field boundaries south of D have been removed but Order route D-I is visible as a line across the cropped field. There appears to be a narrow worn line alongside the hedge between points I-G and in parts alongside the hedge north of the wood alongside section G-H. However, it is not clear if the worn line between H and I is alongside the western boundary of the Order route or along it. It does appear to continue into T41 at point I.

Conclusions on the Documentary Evidence

Section A-C

55. Order route A-C is shown to physically exist on all the maps since 1797 and the 1724 Inclosure map shows its eastern end. It is shown in the same way as other public carriageways and BOATs on the 1797 Inclosure Map. The 1724 Inclosure map, 1843 Tithe map, and 1848 Inclosure map all show a short section west of C in the same way as other public carriageways. It is shown on the Finance Act map in a way that is consistent with public vehicular rights. The Commercial maps suggest

at least bridleway rights and I consider the OS maps and Book of Reference to be suggestive of public vehicular rights.

56. The 1901 Main Roads Order refers to Order route A-C as part of a longer highway, although it is not part of a main road. It is shown as a road on the 1927 Main and County Road map and a County Road on the 1946 Accident map. The Kelshall Parish Survey map and Schedule also refer to it as a County Road and it is shown as an unclassified road on the first Definitive Map. Only section A-B is listed in the schedule of roads taken over by HCC in 1930 and recorded on the 2006 LOS. Consideration was given to stopping up vehicular rights along Order route A-C in 1969 but not pursued due to local opposition. I consider these records provide good evidence that Order route A-C was a public vehicular highway between 1901 and 2006.
57. Therefore, I conclude the evidence is sufficient to show that, on the balance of probabilities, vehicular rights exist over Order Route A-C.

Section A-F

58. Order route A-F is shown to physically exist on all the maps since 1797. It is shown in the same way as other public carriageways and BOATs on the 1797 Inclosure Award. It is shown on the Finance Act map in a way that is consistent with public vehicular rights. The Commercial maps suggest at least bridleway rights and I consider the OS maps and Book of Reference to be suggestive of public vehicular rights.
59. The 1901 Main Roads Order refers to Order Route A-F as a road although it is not listed as a main road. It is shown as road on the 1927 Main and County Road map and a County Road on the 1946 Accident map. The Kelshall Parish Survey map, Schedule, first and current DS also refer to it as a County Road and it is shown as an unclassified road on the first Definitive Map. Order route A-F is listed in the schedule of roads taken over by HCC in 1930 and is recorded on the 1997 and 2006 LOS. Consideration was given to stopping up vehicular rights along it in 1969 but not pursued due to local opposition. I consider these records provide good evidence that Order route A-F is a public vehicular highway.
60. Therefore, I conclude the evidence is sufficient to show that, on the balance of probabilities, vehicular rights exist over Order Route A-F.

Section D-I

61. Order route D-I is shown to physically exist on maps between 1797 and the mid-1950s as an enclosed route but later hedges were removed. It is shown in the same way as other public carriage roads and BOATs on the 1797 Inclosure Award. It is also shown on the Finance Act map in a way that is consistent with public vehicular rights. The Commercial maps suggest at least bridleway rights. Some of the OS maps and Book of Reference are suggestive of public vehicular rights but other OS maps show a footbridge at the southern end over the watercourse on the north side of T41. As the OS do not have a symbol for bridleway bridges, this could indicate a bridge available to horse riders as well as pedestrians, but not vehicles.
62. Unlike Order routes A-C and A-F, Order route D-I is not shown on any of the Highway or Definitive Map Records as a vehicular highway. Only section G-I was

claimed in the Parish Survey as a footpath. However, the Ramblers and YHA both claimed section D-I as a public right of way with the Ramblers considering it to be a bridleway which had been useful in the past. Comments indicated that it had been partly ploughed out with other sections overgrown. However, highways can only be extinguished by due legal procedure. Therefore, if the Order route were not available due to overgrown vegetation or a missing bridge it would still legally exist and would not be extinguished or diverted by lack of use, or use of an alternative route.

63. I consider the evidence dating back to 1795 shows public rights along the full length of Order route D-I. With regards to the status, the evidence is finely balanced between bridleway and vehicular rights. Although Order route D-I is shown on some of the documents in the same way as other vehicular highways, there may have been other reasons for them to be shown in that way, including the existence of bridleway rights. The Order routes were not set out in the 1795 Inclosure Award and other documents were not produced to show highway status. Some OS maps indicate the bridge at point I was not capable of taking vehicles over the watercourse. Therefore, weighing up the evidence as a whole I consider that, on the balance of probabilities, bridleway rights exist over Order route D-I.
64. THGC stated Order route D-I has never connect to T41 at point I and asserted that T41 is only 1.9m wide and runs on a surfaced track along the middle of Collins Green with the land on either side being waste of the manor not highway verge. They claimed Order route D-I ends at the parish boundary on the north side of Collins Green with T41 running along its centre. They believed there was a hedge on the south side of the watercourse on the parish boundary which prevented anyone joining T41.
65. THGC considered Order route D-I to be an occupation road and the bridge was only for use by commoners. They stated any existing highway rights or occupation roads over Collins Green were stopped up by the Provisional Order, 1888 Act, and Commons Award as agreed at the two public local meetings held in December 1887. They stated common land could not be a highway citing section 22 of the 1965 Act which states common land *'does not include...any land which forms part of a highway'*.
66. THGC referred to byelaws prohibiting horse riding and cycling over Collins Green. They stated any horse riders crossing the bridge and verges to join T41 would have been in breach of the byelaws. They claimed permission would have been needed from THGC to erect bridge abutments on Collins Green due to regulations set out in the Provisional Order and Commons Award and they would not have given permission for a bridge for horses because the byelaws prohibited horse riding on Collins Green. THGC also referred to there being no bridge over the watercourse for many years. There was a single plank to the west in the past, and the 1975 OS map shows a footbridge to the west of point I.
67. There is no recorded width for T41, but HCC considered the documentary evidence indicates it is the full width of Collins Green as shown on the OS maps. HCC stated the surfaced track was provided after its inclusion in the DMS. They considered that if T41 is not the full width of Collins Green, it runs along the parish boundary as indicated by the DS. HCC does not consider the Provisional Order, 1888 Act, and Commons Award extinguished any pre-existing public rights over Collins Green.

They also do not consider the 1965 Act extinguished any public rights as section 21 provides that the registration as common land '*shall not apply for the purpose of deciding whether any land forms part of a highway.*' They do not believe T41 would have been shown in the DMS if the Commons Award had extinguished public rights.

68. The 1878 OS map shows a treelined hedge on the north side of the watercourse and the parish boundary on the south side of the watercourse 4 feet from the route of the hedge. There are no trees on the south side of the watercourse to indicate a hedge there. The other OS maps also show a hedge on the north side of the watercourse and the parish boundary to the south of the watercourse. The location of the hedge on the north side of the watercourse is clear when you follow the lines east to the junction of T41 and T36 where the hedge and watercourse diverge. The hedge continues east then north, and the watercourse continues east then south. Therefore, I do not agree there was a hedge on the south side of the watercourse preventing access to Collins Green and T41 as claimed by THGC.
69. On the 1791 Inclosure map, Bryant's map, the 1923 OS map, Bartholomew's map, and the Commons Application map, Order route D-I is shown open to Collins Green and T41. The OS Boundary Book shows the parish boundary undefined at point I with the boundary being 4 feet from the hedge on either side of it. I consider this indicates the Order route passes through a gap in the hedge to access Collins Green and join T41. The 1971 aerial photograph suggests a connection to T41 at point I, and the Ramblers comments on the Parish Survey refer to it connecting to Collins Green. Some of the maps show bridges over the watercourse into Collins Green and T41. I consider a bridge over the watercourse would not have been provided if there was no access to T41 and Collins Green.
70. Not all the maps show a bridge over the watercourse, but this does not mean the routes did not connect. The mapping evidence dates back over 200 years. The width and depth of the watercourse today mean a bridge is needed to cross it, but this may not always have been the case. Historically, the watercourse may have been narrower and shallower, a culvert crossing may have been available that did not appear on maps, and evidence of past crossings is unlikely to still be visible with the passage of time. Furthermore, the watercourse is not shown at point I on the 1843 Tithe map or 1848 Inclosure map and appears wider on the 1898 OS map than on the 1878 edition.
71. On the 1975 OS map, Order route D-I does not connect to T41 at point I. Instead, it continues west for a short distance to a footbridge over the watercourse then crosses Collins Green, as shown by double dashed lines, to meet T41 which is labelled as an unmetalled track. However, the Highways Act 1959 permits Highway Authorities to rebuild bridges within 200 yards of an existing bridge. Order route D-I also does not connect to T41 at point I on the 1956 OS map but an alternative route is shown heading west to K17.
72. Other evidence suggests Order route D-I may have fallen out of use due to the removal of hedges, ploughing, the loss or relocation of the bridge, and overgrown vegetation. However, this would not have resulted in the diversion or extinguishment of any existing public rights, only due legal process can do this.

73. The 1878 OS map shows a line across the Order route on the north side of the watercourse and the 1898 OS map shows a line across the footbridge. I consider these lines are likely to indicate gates which could have been required to prevent livestock grazing on Collins Green entering the Order route rather than an obstruction which would have prevented use.
74. Order routes A-C, A-F, and T36 are shown in a way that would suggest a track with verges on either side between boundaries on the 1878, 1898, 1923, and 1975 OS maps. T41 is only shown in this way on maps after 1975. This suggests T41 has physically changed over time and historically a wider width was available for use. Although I am not determining the width of T41, I consider it would be unsound to determine the existing surfaced track is the actual width of T41. In any event, the 1975 OS map shows Order route D-I connecting to the unmetalled track along Collins Green, albeit to the west of point I.
75. I consider the Special Report, Provisional Order, 1888 Act, and the Commons Award would have stated they were stopping up public and private ways if they intended to do so. There is no evidence before me to show public rights were extinguished under General Inclosure Act powers and the 1876 Act did not provide powers to extinguish existing highways. Nothing in the 1965 Act extinguishes public rights over recorded commons. The Commons map was produced to show the extent of Heath and Greens and did not intend to show public highways so the omission of public rights of way does not mean they were extinguished or did not exist.
76. The byelaws state they do not affect any public rights of way or lawful right to ride a horse or bicycle over the Commons. This would indicate that public highways can exist over common land. Public rights of way can also be recorded over common land, and I am aware of other commons with public highways over them and highway verges that are registered commons.
77. Therefore, I consider the evidence indicates, on the balance of probabilities, that Order route D-I connects to T41 at point I and does not end at the parish boundary.
78. The Order states route D-I runs *'on the E side of the field boundary for approximately 185m to cross a stream and join Therfield BOAT 41 at the parish boundary at TL 3358 3494'*. This makes it clear that the two routes connect. However, the parish boundary runs along the northern boundary of Collins Green not the centre of T41, therefore I consider this to be misleading particularly as there is no recorded width for T41 and questions have been raised about its width. Furthermore, the grid reference in the Order for point I is at the centre of T41, whilst the grid reference for the parish boundary would be TL 3358 3495.
79. Point I is shown on the Order map at the parish boundary rather than the centre of T41 and there appears to be a gap in the line between T41 and Order route D-I. This gap could be due to the line style for bridleways which is a dashed line with cross bars. However, other routes are shown without gaps between them effectively showing paths joining at their centre rather than at their edge.
80. In the interests of clarity, and to account for the unrecorded width of T41, I consider the Order should be modified to remove the reference to the parish boundary and to show point I at the centre of T41 rather than on the parish boundary. These

modifications will not require advertising as it is clear from the Order that the proposed bridleway connects to T41.

Natural Environment and Rural Communities Act 2006

81. As I am satisfied that Order route A-C and A-F have been shown, on the balance of probabilities, to carry public vehicular rights, I need to consider the impact of the 2006 Act on those rights.
82. The full length of Order route A-F, and section A-B were shown on the LOS at the commencement date of the 2006 Act. Therefore, exception 67(2)(b) applies, meaning that rights for MPVs have not been extinguished over these sections of the Order routes.
83. Section B-C was not shown on the LOS at the commencement date of the 2006 Act. Therefore, exception 67(2)(b) does not apply to this section. It was argued that some of the Highway Records show section B-C was maintained by the relevant highway authority in the past and these documents are a LOS. It was also suggested its omission from the 2006 LOS is an error.
84. Section 36(6) of the 1980 Act states councils '*shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at public expense*'. I consider this means there is only one LOS with the most up to date version being the current one. Therefore, I do not consider the other older Highway Records to be part of the LOS. Furthermore, the 1930 Highway Committee Minutes show that maintenance of section B-C was not taken on by HCC or included in the 1930 LOS.
85. I can only consider if the Order routes were shown in the LOS at the commencement of the 2006 Act. I am unable to consider if there is an error in the LOS and it would not affect exception 67(2)(b) even if there was an error.
86. Exception 67(2)(a) of the 2006 Act excepts ways that have been lawfully used more by MPVs than by other users, e.g. walkers, cyclists, horse-riders, and horse-drawn vehicles, in the five years preceding commencement, the intention being to except highways that are part of the 'ordinary road network'.
87. Ninety UEF were received from named individuals who used section B-C. However, not everyone who completed a UEF used it in the five years prior to the commencement date of the 2006 Act. Nine people used it on foot, bicycle, or horse between 2 May 2001 and 2 May 2006 and 16 people used it with an MPV. This would suggest there were more people using it with an MPV than by other means.
88. However, those using section B-C with an MPV used it less frequently with seven people using it once a year, six monthly, and one several times a week. Those using it on foot, bicycle, or horse used it more frequently with one person using it daily, three at least once a week, and two people monthly. When frequency is taken into account, MPV use accounts for around 30% of use, and use by walkers, cyclists, and horse riders accounts for around 70% of use. Therefore, use of section B-C cannot be described as having been lawfully used more by MPVs than other user if the five years prior to the commencement of NERC and I do not consider exception 67(2)(a) applies.

Definition of a BOAT

89. Some parties considered the main use of the proposed RB and BOATs to be by MPVs. They considered they were not recorded in the DMS when it was produced in the 1950s because they were ordinary roads with full vehicular rights rather than RUPPs. Furthermore, vehicular rights over them were not stopped up in 1969 due to objections from the parish meeting and claims they were used by vehicles.
90. The evidence shows section A-B and A-F were County Roads in the 1950s, but the LOS, County Road maps, and Highway Minutes do not indicate the amount of use by different categories of users. Section A-B was claimed as a CRF and Order route A-F as a CRB in the Parish Survey. I consider this indicates the routes were mainly used by walkers and horse riders in the early 1950s. To the south, east, and west, the Order routes connect to routes recorded in the DMS in the 1950s RUPPS and later as BOATs. This could suggest limited use of the Order routes by MPVs since at least the 1950s as they do not provide through routes between ordinary roads.
91. The proposed stopping up of vehicular rights in 1969 does not indicate the amount or type of use at the time. However, the intention to downgrade them to bridleway or BOAT suggests they were mostly used by walkers, horse riders, and cyclists. Reference to their condition suggests they would have been difficult to use by some MPVs. The objections indicated they were frequently used by vehicles but does not provide any evidence they were mostly used by MPVs.
92. Bartholomew's map states the Order routes were inferior and not recommended for cyclists in 1903. This also suggests they were not suitable for most MPVs and were more likely to have been used by horse riders and walkers. Today the Order routes have unsealed surfaces and are narrow with limited passing places. Some MPVs would have difficulty travelling along them and their character is likely to reduce use by MPVs. The user evidence also indicates the main use of Order routes A-C and A-F is on foot, horseback, or bicycle, not by MPVs.
93. Therefore, I consider section A-B and Order route A-F meet the definition of a byway open to all traffic as set out in section 66(1) of the 1981 Act.

Other Matters

94. Issues relating to the suitability and desirability of the Order routes and the confirmation of the Order as made were raised. These included impeding traffic on wider road network, the impact on arable land, the availability of alternative routes, disturbance by MPV's, costs to HCC, and that the routes were not needed for public use. Whilst I understand these concerns, they are not issues I can legally take into consideration.
95. Concerns were also raised about the loss of private rights over the restricted byway. However, the Order concerns public rights and does not affect any private rights over the Order routes.

Overall Conclusions

96. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

97. I confirm the Order subject to the following modifications:

In Part I of the Order Schedule under Description of Public Right of Way to be Upgraded and Part II of the Order Schedule under the new Statement for Kelshall 22

- Delete 'at the parish boundary'.

On the Order Map Part 2

- Amend the location of Point I as shown in red on the copy attached.

Claire Tregembo

INSPECTOR

APPEARANCES

For the Council

Daniel Kozelko Counsel for the Council

Dr Julia Gough Definitive Map Officer Hertfordshire County Council

In Objection to the Order:

Clive Hall Conservators of Therfield Heaths and Greens

Derek Scrivens Landowner

Chris Ward Landowner

Others who spoke:

Chris Hall

David Cook

Mark Westley East Herts Footpath Society

Peter Gartside Kelshall Parish Meeting

DOCUMENTS PRODUCED AT THE INQUIRY

User Evidence Forms from the BHS for Route A-C

Statement from East Herts Footpath Society

Wikipedia extract concerning Best Evidence Rule

Department of the Environment, Transport, and the Regions Unclassified Roads letter dated 24 August 1998

Extract from Ordnance Survey of Great Britain by Dr. Richard Oliver

Extract from a Computer Printout of the Gazetteer for the List of Streets from 1994

Order Maps



