

**Wiltshire Council**

**Southern Area Planning Committee**

**29 March 2012**

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**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE DEFINITIVE MAP AND STATEMENT FOR THE SALISBURY AND WILTON  
RURAL DISTRICT AREA DATED 1953 AS MODIFIED UNDER THE PROVISIONS OF  
THE WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL (SHEET SU 13 SW) (PARISH OF SALISBURY PATH 107  
– BRIDGE MEAD) RIGHTS OF WAY MODIFICATION ORDER NO. 8 2011**

**Purpose of Report**

1. To:
  - (i) Consider the evidence and nine duly made objections relating to the above Order to add a public right of way on foot to the Definitive Map and Statement at Stratford-sub-Castle, Salisbury.
  - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance.

**Description of the Route**

2. The Order is attached to this report at **Appendix 1** and contains a map showing the claimed route.
3. The route leads across a field beside the River Avon linking the Avon Valley Nature Reserve with Salisbury Footpath Number 11 at Stratford-sub-Castle.

**Background**

4. On 19 June 2011 Wiltshire Council received an application from a member of the public for an Order to modify the Definitive Map and Statement by recording a footpath linking the Avon Valley Nature Reserve with Salisbury Footpath Number 11 at Stratford-sub-Castle. The application was supported by 99 User Evidence Forms (UEFs), maps, some photographs, hand written letters and an excerpt from a newspaper.
5. The Council has a duty to investigate this evidence and to make an Order if, on the balance of probability it is either reasonably alleged, or shown, that public rights subsist over the ways. Pursuant to this duty, consultations and investigations were carried out between July and the end of October 2011.

6. A considerable amount of correspondence was received, both in support of, and in objection to, the application.
7. Officers considered all of the evidence available and on 11 November 2011 a decision was made to make an Order. The Decision Report is appended here at **Appendix 2**.
8. The Order was made on the basis that it is reasonably alleged that Section 31 of the Highways Act 1980 applies. Broadly, this gives that where a right of way has been used without interruption by the public 'as of right' for a period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate, then public rights are deemed to have been dedicated. 'As of right' means without force, without permission and without secrecy.
9. In deciding to make the Order the Council was bound by the case of R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P and CR 402 which gives that the Council must apply one of two tests.  
  
Test A: Does a right of way subsist on the balance of probabilities? This requires that there is clear evidence in favour of public rights and no evidence to the contrary.  
  
Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? This requires that the allegation of public rights is reasonable and that there is no incontrovertible evidence to the contrary.
10. Test B is the weaker of the two tests and was applied to make this Order.
11. The Order has been advertised in accordance with the regulations and nine objections to it have been received.
12. The Order must now be forwarded to the Secretary of State for determination. The test for confirmation of the Order that will be applied by The Secretary of State will be Test A, i.e. that on the balance of probabilities a right of way subsists.

### **The Evidence in Support**

13. Of the 99 members of the public who submitted UEFs a number had not used the application route across the field but had instead walked alongside the river. This practice was prevented in 2007 by the sale of the riverside to Salisbury and District Angling Club and the riverside is now protected by fencing and locked gates. 92 members of the public claimed to have used the application route for varying periods of time.
14. The 20 year window to be considered for the application of Section 31 of the Highways Act was taken to be between 1977 and 1997. In 1997 a Deposit and Statutory Declaration was made by the then landowner under Section 31(6) of the 1980 Act and this was taken as incontrovertible evidence defeating the acquisition of public rights under Section 31(1) of the 1980 Act at that time. The deposit was valid for six years (i.e. 1997 to 2003) and provides an interruption to use for the purposes of the Act though the applicant and witnesses were unaware that the deposit had been made. As a result, it is necessary to discount some of the witness evidence submitted as it outside of the relevant period (1997 to 2011).

15. When the period 1977 to 1997 is considered, there remain 40 members of the public who submitted UEFs covering the full 20 years, 41 who used the route for some of that time and two who used the route before this period. Of the 40 who submitted UEFs for the full 20 years three of these state they only used the riverside route until 2007.
16. In summary, for the years 1977 to 1997 37 people used the route for the full period and 41 for part of this period.
17. Of these 78 people only one recorded that they knew of any challenge (had been “told that fishermen had” challenged) during that period. However, 18 of the 78 recorded that they had been challenged by the new landowner in the spring of 2011. It was this challenge that brought about the application for an Order in June 2011.
18. 73 of these 78 members of the public thought that the landowner was aware of their use.
19. Members of the public reported accessing the route by a number of means which included over stiles, over gates, through open gates and by climbing between bridge rails. No-one reported needing to use any force or secrecy.
20. Members of the public reported signs at the entrances to the route in the mid to late 2000s. These signs made it clear that permission to use the route could be withdrawn and were erected by the then landowner at Parsonage Farm, Mr Warren Armstrong. The signs were maintained and remained in place between the period 2004 to 2011.
21. Before this time, evidence has been given that some signs were in place at the entrances to the field but that these had said “beware of the bull” or had been a request to use an alternative route when cattle were grazing in the field.
22. All users report seeing other users on the path.
23. The UEFs are summarised at **Appendix 2(A)** and present at least a reasonable allegation that public rights have been acquired.

### **The Evidence Against the Order**

24. Prior to making the Order evidence was adduced by the current landowner, previous landowners, a tenant of the field and some local residents. This evidence is amongst that considered at **Appendix 2 pages 22 to 27**.
25. Nothing in this evidence was considered incontrovertible (i.e. not able to be denied or disputed) and capable of defeating Test B referred to at paragraph 9 above, hence, the Order was made.
26. The Order was advertised from 8 December 2011 to 23 January 2012 and attracted nine duly made objections and one objection which was delivered to the Council outside of the statutory period.

27. The submissions of the objectors are summarised and commented on below. The late objection is included (number 10) but it is noted that this is not a duly made objection and may be treated differently to the other 9 by the Secretary of State.

No and Name	Nature of Objection	Officer's Comment
<p>1. Mrs M Douglas Wiltshire Councillor Salisbury St Francis and Stratford</p>	<p>Concerned about contradictions in the evidence, especially:</p> <p>(i) Frequency with which gate at southern end was open, shut or locked and appearance and use of stile at this location.</p> <p>(ii) Means by which public accessed the northern end.</p> <p>(iii) Presence of signs.</p> <p>(iv) Issue of challenge.</p> <p>Requests that order is determined by the Secretary of State.</p>	<p>It is agreed that there are contradictions in the evidence which would be best given verbally at Public Inquiry and subject to cross-examination. The case has an unusually high level of evidence from both sides over a long period of time, parts of the land have had four owners since the 1970s and there have been changes to gating, fencing and grazing arrangements during this time. Differing memories of events is an inevitable consequence.</p> <p>Having received objections the Order must be forwarded to, and determined by, the Secretary of State.</p>
<p>2. Mr D Amey  Local resident and conservation volunteer</p>	<p>(i) Considers that the large number of witnesses is owed to "social networking" and notices.</p> <p>(ii) Users do not want a footpath but a field to exercise dogs in.</p> <p>(iii) Has seen fences cut by people to allow more convenient access to the field.</p> <p>(iv) Notices can be put up to control behaviour but he is a volunteer for Avon Valley Nature Reserve (and has known the area for nearly 70 years) and knows from experience that people will not obey notices.</p> <p>(v) This water meadow is a valuable habitat that should be protected.</p>	<p>(i) It is irrelevant how applicants contact users. It is the quality of the evidence submitted by them that is important.</p> <p>(ii) Need or desirability are not factors the Council may consider. It may only consider evidence of past use.</p> <p>(iii) The use of force is an important issue to consider and could defeat the application. In a site meeting with Mr Amey he pointed out where the fence had been cut and reported it but this was not on the Order route.</p> <p>(iv) Controlling behaviour is not something the Council may consider at this stage; it may only consider whether use has been 'as of right'.</p> <p>(v) This is not something that may be considered in determining whether public rights have been acquired or not though if recorded the Council would need to consider biodiversity in any management of the way.</p>

No and Name	Nature of Objection	Officer's Comment
<p>3A. Ms M Auchterlonie Landowner April 2011 to date</p> <p>FIRST SUBMISSION 21 December 2012</p>	<p>(i) There is insufficient evidence to show that a right of way subsists.</p> <p>(ii) There was never any intention to dedicate a public right of way.</p> <p>(iii) There has not been interrupted use of the path for a continuous period of 20 years.</p> <p>(iv) <b>NOTICES AND OBSTRUCTION</b> On 6 May 2011 the southern gate was closed and locked and 'Private No Access' signs erected, also placed at other access points.</p> <p>There were clear notices placed around the boundary of the land from 2004 to April 2011.</p> <p>There were notices put up on gates between 1999 and 2007 stating that the public should use the nearby footpath especially when cattle were in the field.</p>	<p>(i) There are no sufficiency guidelines just that the balance of probability must weigh in favour of the public rights. The quality of the evidence is important and this is best tested under cross-examination.</p> <p>(ii) S.31(1) does not require an intention to dedicate (though this is required under common law). S.31(1) requires evidence of intention <b>not</b> to dedicate (see <b>Appendix 2 paragraph 8.7</b> quote from Lord Hoffman in the Supreme Court). If a landowner does little or nothing then dedication may be deemed to have occurred.</p> <p>(iii) There needs to generally be uninterrupted use of the path for 20 years (Foot and Mouth closures exempt) and UEF's claim that this is so. However, there is also evidence that states that the gate was locked to prevent cattle straying. Users claim to have climbed the gate when this occurred.</p> <p>(iv) Agreed. This formed a clear and effective challenge directly leading to the application for an Order. Public use prevented.</p> <p>Agreed. These notices stated that the way was permissive and that this could be withdrawn. Public use continued.</p> <p>Notices were erected by Mr Hounslow who had the grazing licence but there is no evidence of maintenance of these signs or exactly what they said. To be effective for the purposes of S.31(3) of the 1980 Act the notices must be clear that there is no intention to dedicate to the public.</p>

No and Name	Nature of Objection	Officer's Comment
3A. M Auchterlonie (continued)	<p>There was a statutory declaration, deposit and map made for the area affected in 1997. It was deposited with Wiltshire Council.</p> <p>(v) <b>ACCESSES</b> Until 1999 there was only a perimeter stock proof fence around the field with gates not going in at either end until at least the early 1990s.</p> <p>(vi) <b>USE OF FORCE</b> There is significant evidence of the use of force from the early 1990s including signs being removed, people climbing over fences and gates, access through railings and fences being cut with wire cutters or broken down.</p> <p>(vii) <b>INTERRUPTION</b> The field is a water meadow and was flooded every year until the 1960s.</p>	<p>This deposit, plan and declaration were made with Salisbury District Council and subsequently accepted by Wiltshire County Council under s.31(6) of the 1980 Act and form an effective interruption to public use for the years 1997 to 2003.</p> <p>The aerial photograph taken on 2 August 1981 and appended here at <b>Appendix 3</b> shows a riverside track leading north alongside the river to the southern gate of the field. It is considered probable that this track led to an access point and was not just a 'dead end'.</p> <p>Access at the Stratford-sub-Castle end has been through the bridge rails in some instances and this has been possible since at least the 1970s.</p> <p>Evidence of the use of force is relevant evidence to consider. There is a range of users (young, old, male, female, with or without dogs) and none claim to have used force. However, the current landowner has submitted a list of events using force including eight reported crimes that have occurred since May 2011. This date coincides with the prevention of public access to the site. Only one earlier incident of wire cutting has been given (by Mr D Amey) but this was not on the Order route.</p> <p>There is very little evidence of use for this period, possibly as a result of this activity.</p>

<b>No and Name</b>	<b>Nature of Objection</b>	<b>Officer's Comment</b>
3A. M Auchterlonie (continued)	<p>(viii) <b>MAPS and PLANS</b> Aerial photographs show remains of water meadow feeder streams and drainage channels and not tracks or paths.</p> <p>(ix) <b>CHALLENGE</b> The tenant farm manager from 1959 to the early 1990s confirms that there was no intention to allow public access and that verbal challenges were given and that signs were in place.</p> <p>(x) <b>CONTINUOUS USE</b> Does not believe Order plan reflects application plan.</p> <p>(xi) <b>SUITABILITY</b> Does not believe the area is suitable for a route. The River is a SSSI and the field is a County Wildlife Site.</p>	<p>It is noted that aerial photographs only show physical features and cannot reflect public use and therefore may be of limited value. However, evidence from a previous landowner suggests the tracks were caused by his vehicle feeding cattle. The aerial photographs do show walked tracks leading to the claimed route and on the balance of probability it is considered that they do reflect use of some sort and not drainage.</p> <p>No witnesses reported being challenged during these times but 18 reported a challenge from the new owner in spring 2011.</p> <p>This is very difficult evidence to quantify and is best heard verbally and subject to cross-examination.</p> <p>The application plan and Order plan are at different scales which could lead to confusion. Additionally, the original application was for a 60 metre area of 'beach' to the river edge at Stratford-sub-Castle. An Order may only be made according to the evidence submitted (and may not be the same as the application). However, it is considered that the Order plan is a fair representation of the route claimed but may be modified at the Inspector's discretion if she or she sees fit.</p> <p>Suitability, desirability, safety, maintenance or any status (i.e. SSSI) cannot be considered by the Council under s.53 of the Wildlife and Countryside Act 1981. Only evidence of use, and relating to that use, may be considered.</p>

No and Name	Nature of Objection	Officer's Comment
<p>4. Mr J Stoddart, Salisbury and District Angling Club</p> <p>Owner of river bank on western edge of field</p>	<p>(i) The Club has held a licence to fish since at least 1960 and the earliest lease is dated 1975. Leases have been made with Mrs Coggan, The King's Fund and Mr Armstrong up to 2007 when the club bought the fishing and a strip of land.</p> <p>(ii) The terms of the lease make it clear the landowners had no intention of dedicating public rights and is specific about access for Angling Club members only. These access points are common to the application route.</p> <p>(iii) The Coggans challenged Angling Club members and excluded anyone not a member. The Kings Fund were absent landlords so could not challenge so readily. Mr Armstrong made it clear that access was for club members only and locked the gate at the bridge.</p> <p>No maps or plans show any other access or path and the club was required to "use its best endeavours to expel any persons poaching or trespassing.</p> <p>This demonstrates an intention not to dedicate.</p> <p>Later leases state that the Club is to "use reasonable endeavours to protect the river from trespassing and poaching" and that only they have free rights of way and use for fishing and for no other purpose whatsoever. Dogs were not permitted.</p> <p>(iv) Access at the bridge is for Angling Club members only and any wear on the ground or bridge rails is from their use only. Wear at the beach is from cattle drinking.</p> <p>It is usual for yearbooks to show footpaths near fisheries but none is shown here.</p> <p>Public use has been by trespass. Locks and chains have been cut.</p>	<p>(i) Officers are in no doubt that the intention of the fishing leases and licences was to allow access to the river bank and fishing to Salisbury and District Angling Club members only.</p> <p>(ii) It is likely that all members of the Angling Club were aware of their need to control this and to challenge anyone on the river bank or trying to fish.</p> <p>(iii)The words of Lord Hoffman in the Supreme Court (see <b>Appendix 2 paragraph 8.7</b>) are very important here. Any intention not to dedicate to the public must be brought to their attention. The Salisbury and District Angling Club cannot be taken to represent the general public.</p> <p>(iv) It is apparent that access was provided for the Angling Club since at least 1960 and that a gate was locked at the Stratford-sub-Castle bridge end sometime after 2004 when Mr Armstrong bought the land.</p> <p>However, there is no evidence that gates were installed or locked before then or during the years 1977 to 1997.</p> <p>It is accepted that any wear to the ground or bridge rails could have been due to anglers gaining access through the bridge rails.</p> <p>Evidence of locks and chains being removed by force may be of relevance depending on the position and date of incidents.</p>



No and Name	Nature of Objection	Officer's Comment
<p>5. Mr W Armstrong Landowner 2004 - 2011</p>	<p>(i) Disputes that there has been 20 years of continuous use of the Order route owing to use of the riverbank route until 2007.</p> <p>(ii) Believes his evidence has been misconstrued. He replaced the barbed wire and the gate with post and rail and a stile (at the bridge) simply because they had been so badly damaged over the years by people climbing over them and in some cases cutting them to gain access. The main motivation was to prevent animals straying and not to make public access easier.</p> <p>(iii) If the public are allowed access there would be more people crossing the river and trespassing on the land he still owns. He cannot police the bank and relies on notices to keep trespassers at bay. He re-habilitates dogs and uses his land for exercise. He cannot risk having the public endangered by approaching a dog. He has been verbally abused on several occasions removing people from his land. Since Mrs Auchterlonie fenced her land trespass on both banks has virtually ceased.</p>	<p>(i) Some UEFs record only use of the riverside route and these do not provide evidence for the Order route.</p> <p>Some UEFs record use of both the riverside route and the Order route depending on ground conditions. These provide some evidence for the Order.</p> <p>The majority of UEFs provide evidence for the Order route only. These provide evidence for the Order.</p> <p>(ii) This evidence, in part, suggests use by force when the wire was cut. Mr Armstrong owned the land between 2004 and 2011 which is outside of the relevant period (1977 to 1997) but he does refer to accumulated damage "over the years". The date the gate at the southern end was installed is not known.</p> <p>(iii) The Order does not seek to create a new right, merely to record something that has already been happening. It is not possible for the Council to consider desirability.</p> <p>Mr Armstrong provides further evidence of the effectiveness of Ms Auchterlonie's challenge to use.</p>

No and Name	Nature of Objection	Officer's Comment
<p>6. Mr R N Death</p> <p>Local resident (1986 to date) and conservation volunteer</p>	<p>(i) Unable to comment on whether the route was used as a footpath before 1979 but sees no advantage to recording it in 2012.</p> <p>(ii) Some users will not stay on the proposed path, will not keep dogs under control and will drop litter. This will have an effect disproportionate to their number and will lead to a negative impact on the wildlife by the river.</p> <p>(iii) His house has views over the water meadows and he regularly sees people walking the river bank and allowing dogs in the river. Also frequently sees people camping with open fires.</p> <p>(iv) The path will have no amenity value as there is an excellent standard path only a few yards away.</p> <p>(v) He strongly urges the Council to resist the pressure to extend the area of damage caused by a second footpath.</p>	<p>(i) Desirability is not considerable under s.53 of the Wildlife and Countryside Act 1981.</p> <p>(ii) These are not matters to be considered under s.53 of the Wildlife and Countryside Act 1981.</p> <p>(iii) If Mr Death's house has views over the Order route then he may have evidence of use to give, i.e. whether he saw people on the claimed route, how they accessed it etc. This could be given verbally at Public Inquiry.</p> <p>(iv) Amenity value is not considerable under s.53 of the Wildlife and Countryside Act 1981.</p> <p>(v) The Council must consider only the evidence of use and relating to that use.</p>
<p>7. Mr M Clarke</p> <p>Local resident 1993. Has known site since 1974.</p>	<p>(i) <b>THE CLAIMED ROUTE</b></p> <p>There is a fundamental inconsistency between the route applied for and the Order route. The route applied for is not shown in the Council's Decision Report and there is no evidence for a separate route to the beach area.</p>	<p>The decision report referred to by Mr Clarke is appended at <b>Appendix 2</b>. The map shown at paragraph 1.2 is the application map (reduced) and the beach area is clearly shown and described as area D in the application. The applicant's wording has been used at page 1. For the avoidance of doubt a copy of the original application is appended at <b>Appendix 4</b>.</p> <p>It is believed that the Order plan is a reasonable representation of the route applied for and allegedly used by the majority of users.</p> <p>The Order must be determined by the Secretary of State who has, in the event that the Order is confirmed, the power to amend the Order or Order plan.</p>

No and Name	Nature of Objection	Officer's Comment
<p>7. Mr M Clarke (continued)</p>	<p>(ii) It is important to be clear about the 'beach area'. When the photograph was taken the water was very low and that this area is usually part of the river.</p> <p>If there is a valid claim at all I believe it is to pass from point A to B and vice versa from the Nature Reserve. Access to the river bank would only be claimed if people wished to access the river which is not a right they can claim through the Wildlife and Countryside Act.</p> <p>"While I realise that the provisions of the Wildlife and Countryside Act relating to rights of way do not have regard to conservation, riparian owners and Councils do have obligations to do what they can to prevent harm to wildlife and cSAC/SSSIs in particular.</p> <p>The aerial photograph of 1981 does not show a track, it shows drainage channels. Wear in the footbridge area is attributable to fishermen.</p>	<p>Evidence was submitted that the public went to water's edge and the Order plan seeks to reflect this. This would be a point of public resort and hence admissible to be a right of way. The site was visited weekly throughout December and January and the beach was always visible.</p> <p>A river itself may not become a right of way; this is given in <i>Attorney-General ex rel Yorkshire Derwent Trust Ltd v Brotherton (1992)</i>. Here a right to navigate along a river failed to be established but it is noted that public rights can exist through rivers at fords. Access to the river bank is considered possible and there are other examples of it in Wiltshire on rights of way.</p> <p>The public have a right to pass and repass over a right of way and in <i>Hickman v Maisey (1900)</i> Smith LJ said that "<i>If a man while using a highway for passage, sat down for a time to rest himself, to call that a trespass would be unreasonable. Similarly, if a man took a sketch from a highway I would say that no reasonable person would treat that as act of trespass.</i>"</p> <p>Wiltshire Council has duties to consider biodiversity and must not harm wildlife and habitat where possible. However, these are not considerations for s.53 Wildlife and Countryside Act processes but would be a consideration for future management of the path in the event that the Order were confirmed.</p> <p>The alleged track shown in the aerial photograph is similar to the riverside track leading south to Salisbury which is not a drainage channel.</p>

No and Name	Nature of Objection	Officer's Comment
7. Mr M Clarke (continued)	<p>(iii) <b>THE RELEVANT PERIOD</b>  <i>“Based on the evidence you have determined that the date any right was called into question is in 1997 when a Statutory Declaration was deposited. Because this was discovered late on in your investigation, it has affected the writing of your report, as mention of this important fact does not appear until page 27 (as a note) and only substantively on page 32 out of a 36 page report. It therefore follows that the vast majority of the claimants’ evidence and the photographs taken after 1997 in the report are not relevant to a consideration of the application. I believe this is so significant that it should be drawn to the attention of the Planning Committee as the way in which the report has been drafted is prejudicial to a proper consideration of the balance of probabilities between the claimants and the owners of the land in the relevant period. Any decision should only be on the relevant facts and evidence.”</i></p> <p>(iv) <b>WITHOUT INTERRUPTION</b>  At the northern end witnesses state that they accessed the route by means of a stile, over a gate or through the bridge rails. The fence on Salisbury 11 may have been vandalised but there is no evidence that it was not repaired and maintained. This makes it clear that the landlord intended to interrupt the passage of people other than those by permission and was not merely to contain stock.</p>	<p>(iii) Sec 53(3) of the Wildlife and Countryside Act 1981 requires the Council to consider all evidence discovered and all other relevant evidence available to them.</p> <p>Hence, it is necessary for officers to consider all evidence and the Decision report (<b>Appendix 2</b>) seeks to do this.</p> <p>It is the opinion of officers that the Statutory Deposit made in 1997 forms a calling into question of the way and that Mr Armstrong’s notices and maintenance of same form an effective challenge to the public right. However, this may not be the view of this committee or Inspector appointed by the Secretary of State and it is important that all of the evidence adduced is presented.</p> <p>For the avoidance of doubt the Order was made based on evidence from the period 1977 to 1997 and this report makes this clear (paragraphs 14 to 22).</p> <p>(iv) Evidence dating back to 1800 supports that this land has been fenced though there have been changes. Fencing arrangements at Stratford-sub-Castle were different in the first half of the 1900s and access was possible to the ‘beach area’ from path number 11 (see maps at <b>Appendix 2 pages 11 and 12</b> labelled ‘ford’) and it is known that there were also stiles along path 9 suggesting that the northern boundary of the field was not as it is now. The maintenance of a secure fence and gating arrangements was necessary to maintain any sort of gazing arrangement. Objection 3B(iii)</p>

No and Name	Nature of Objection	Officer's Comment
7. Mr M Clarke (continued)	<p>(iv) continued</p> <p>There are differences about access at the southern end.</p> <p>It is irrelevant to consider access at either point C or the southern end as the northern end clearly proved a barrier to the establishment of a right.</p>	<p>supports that a primary concern of the person grazing was to keep stock within a defined area. It is considered more likely that fencing and gating was maintained to contain stock rather than keep the public out but this is another example of evidence best given verbally by the landowner and subject to cross-examination.</p> <p>Agreed. Some witnesses claim to have gone through an open gate or climbed over one while others claim to have used an old stile to the side. This stile may be an access point for licenced anglers. The gate post dates the relevant period. No users of the path claim the gate was locked but evidence from objectors states that the gate was locked for periods of time. This is another example of evidence best given verbally by the landowner and subject to cross-examination.</p> <p>Access arrangements on all of the Order routes are an important consideration. Fishermen have had access to the land since at least 1960 (evidence of Salisbury and District Angling Club) suggesting some form of usable access arrangement other than through or over a wire fence.</p> <p>The mid-point access at point C was affected by the presence of a large willow tree. Verbal evidence received from Mr Amey suggests that it was only when the tree fell that this access became usable. The date is not known.</p>

No and Name	Nature of Objection	Officer's Comment
<p>7. Mr M Clarke (continued)</p>	<p>(iv) continued</p> <p>More weight should have been given to Mr Coggan's statement (his family was a tenant from 1959 to 1999). Mr Phil Coggan gave evidence that he personally challenged people when cattle were in the field and when fishing without a licence. Mr Amey, who has also known the area for a long time, also understood that access was at the discretion of the owner. Mr Armstrong requested permission to walk there from the then landowner, through the agent Cluttons (1997). This was granted subject to animals being present. This shows a clear intention to give permissive access only when there were no cattle and was a practice going back at least to 1959.</p> <p>(v) <b>USE OF FORCE (VANDALISM)</b></p> <p>The fence along Salisbury 11 has been damaged from time to time. It would appear that many walkers go out with wire cutters on them to deal with legitimate obstructions put in their way. A police report (submitted) about an incident involving two escaped cows from land to the north stated that <i>"most trespassers are dog walkers who have in the past damaged fences...this is an ongoing situation...styles are not used and dog walkers continue to cut wire fences."</i> Also a woman told the tenant's wife that <i>"she had a right to walk her dog in their fields"</i>. Mr Clarke states that not all trespassers are reported to the police but <i>"it would not surprise me that the cutting of the wire and the destruction of</i></p>	<p>Officers have no doubt that the Coggan family, Cluttons, Mr Armstrong or Ms Aucterlonie had no intention to dedicate a right of way to the public. Indeed, Cluttons, Mr Armstrong and Ms Aucterlonie appear to have made obvious attempts to convey this to the public. However, the judgement of Lord Hoffman in Godmanchester (see <b>Appendix 2 para 8.7</b>) makes it clear that actions must be "perceptible outside the landowner's consciousness" and no witnesses claim to have received permission or been challenged before either the signs that Mr Armstrong erected or the challenges that Ms Aucterlonie issued.</p> <p>There is no incontrovertible evidence of publicly perceptible challenge within the period 1977 to 1997 and this evidence is best given verbally and subjected to cross-examination.</p> <p>(v) The incident that is referred to here is not on the claimed route and it must be borne in mind that neither is the incident referred to by Mr Amey in his verbal evidence at a site meeting. Additionally, although Ms Aucterlonie details a considerable number of incidents (and police log numbers) these are various and relate to the property as a whole. However, it seems reasonable that a relatively high level of vandalism occurs in this area and that the public would not have needed to use force on some occasions to gain access.</p>

No and Name	Nature of Objection	Officer's Comment
<p>7. Mr M Clarke (continued)</p>	<p><i>gates and signs in the land on which the right of way is claimed encouraged some of the people who claim that their rights have been obtained without force, to take the short cut to and from the Nature Reserve."</i></p> <p><b>(vi) The River Bank – Fishing Rights</b> The right to fish at the 'beach area' is owned by Mr Clarke but shared with Salisbury and District Angling Club since 1995. Fishing from the river bank south from here has been subject to licensing agreements from various landowners (Mrs Coggan, King Edward's Hospital Fund and Mr Armstrong) to Salisbury and District Angling Club. All licences have been clear that access was on foot only at points A and B (either side of Stratford sub Castle bridge). The 1983 agreement had a specific prohibition <i>"not to take dogs to the riverbank or on any part of the adjoining land of the landlord, tenant or licensees"</i> and <i>"not to permit the said right and privilege to be exercised by any person other than a member of SDAC."</i></p> <p><b>Access</b> The western end of the footbridge has been an access point for fishermen and evidence of access is a result of this. It is also probably that fishermen climbed between the bridge rails.</p> <p>Since 1993 Mr Clarke has repeatedly pointed out that the public have no right to use 'the beach area' and has asked them to move away. In some cases he has had to call the police to explain the legal position. Prior to his ownership the local water bailiff fished these waters and lived within sight of them and was active in removing those who had no right to be there.</p>	<p>However, it would appear that fences were maintained and yet the public were still able to gain access over a considerable period of time, albeit coincident with anglers under the terms of their licence.</p> <p>(vi) This provides further evidence of the intention of the landowners not to dedicate a public right of way over the land but it is not apparent that the details of the angling licences were conveyed to the general public.</p> <p>It is agreed that it is not possible to attribute wear on the ground to any specific type of user.</p> <p>Mr Clarke has clearly issued a challenge to some people using 'the beach area', however, the Council has before it evidence from people who claim to have used 'this area' without challenge.</p> <p>Their evidence would be best examined when given verbally and under cross-examination.</p> <p>The question of how the public challenged by Mr Clarke got to 'the beach area' may be relevant as Mr Clarke's challenge appears to only extend to the use of this area.</p>

No and Name	Nature of Objection	Officer's Comment
7. Mr M Clarke (continued)	<p>(vi) continued</p> <p><b>Practice of fishing</b></p> <p>The casting of a fly requires considerable space behind the angler and for this reason a 10 metre strip of land was sold to Salisbury and District Angling Club. It is considered that this buffer zone would also apply to Mr Clarke's fishing rights and demonstrates a lack of intention to dedicate a right of way to the public by the landowner.</p>	<p>It is agreed that the licences granted to Salisbury and District Angling Club are clear in not granting access to any other person. However, for s.31(1) of the Highways Act to succeed the landowner must bring his intention not to dedicate to the attention of the public to form a satisfactory interruption to their use.</p>
8. Dr D M Balston and Mrs H B Balston  Local resident	<p>(i) The decision appears to have been taken on the basis of claimed recent use and that history and ecology have not been considered. Also the views of local people have not been sought.</p> <p>(ii) If the footpath is approved the field will not be grazed and will revert to scrub.</p> <p>(iii) Have lived in Mill Lane since 1987 and many years ago used to occasionally walk across the meadow. However since path no. 9 was improved have used that as there is little reason to walk across the scrubland that the field is now.</p>	<p>(i) The decision report at <b>Appendix 2</b> investigates historical evidence in the forms of maps and plans as appropriate to s.32 of the Highways Act 1980. Ecology is not a relevant consideration for s.53 of the Wildlife and Countryside Act 1981. The purpose of making and advertising Orders such as this in local papers and on site is to alert local people to the Order and invites representations and objections such as this one. Prior to the Order being made the parish council, landowners and user groups were asked for evidence.</p> <p>(ii) If the Order is confirmed it will record a pre-existing activity which need not alter the character of the land. Public footpaths across farm land are common place and co-exist with grazing arrangements in hundreds of cases.</p> <p>(iii) Salisbury path 9 was improved in 2000/2001 as part of an initiative promoting walking for health. Dr and Mrs Balston walked the Order route occasionally sometime between 1987 and 2000.</p>



No and Name	Nature of Objection	Officer's Comment
<p>8. Dr D M Balston and Mrs H B Balston</p> <p>Local resident (continued)</p>	<p>(iv) The field was grazed in the past and when it was grazed they were happy to avoid it. Until a 'few years ago' the meadow on the opposite bank was open to the river and cows often crossed the river to graze the west bank.</p> <p>(v) <i>"It saddens us that decisions such as the one proposed seem to take place apparently without any consideration of the wider issues involved and we urge the Council to review the decision and reverse it."</i></p>	<p>(iv) Other witnesses have also said that cattle grazed more than just the field through which the Order route leads.</p> <p>(v) Wiltshire Council can only consider the evidence relating to the public rights and whether or not they have, on the balance of probability, been acquired. It cannot consider any 'wider issues'. Having received objections the Order must now be forwarded to the Secretary of State for determination.</p>
<p>9. Mr D Mills</p> <p>Local resident</p>	<p>(i) Does not consider that the evidence supporting the Order meets Test A which the Council used to make the Order.</p> <p>(ii) Only 30 of the 99 witnesses regularly used the route from 1977 to 1997.</p> <p>(iii) There is variation in statements relating to gates and stiles.</p> <p>(iv) It is highly unlikely that a sign saying "private" referred to fishing as other River Avon signs say "Private Fishing".</p>	<p>(i) The Council did not make the Order based on Test A (see paragraph 9 of this report). The Order was made based on Test B – that it was reasonably alleged that public rights subsisted. This required there to be no incontrovertible evidence that they did not. For the period 1977 to 1997 there has been no evidence found that is incontrovertible.</p> <p>(ii) It is considered that 77 used it within this period, 37 of them for the full 20 years.</p> <p>(iii) This is agreed and the evidence will be best heard verbally and subject to cross-examination. However there have been changes with time.</p> <p>(iv) For a sign to satisfy s.31(3) of the Highways Act 1980 the sign must be "inconsistent with the dedication of the way as a highway". It has been held that a sign simply saying "private" does not satisfy this.</p>

No and Name	Nature of Objection	Officer's Comment
<p>9. Mr D Mills Local resident</p>	<p>(v) The aerial photographs do not show that the route was being used as a public right of way. Any animals or vehicle movement could cause this and given the regular flooding of the land in winter, any animals would use the dry route. Mr Coggan's evidence had said it was used by tractors.</p> <p>(vi) The Order route does not connect to a public highway.</p> <p>(vii) The Order route does not follow a natural line and veers towards the river bank at Stratford sub Castle. The bank has been significantly eroded by cattle and human activity since 1993 causing this 'beach' effect. If the path were in a direct line it would not encroach on the river bank.</p> <p>(viii) Between 1993 (when Mr Mills' use started) and 2001 Salisbury 9 was difficult to use and was impassable at times. This might have encouraged some use of the adjoining field but since 2001 Salisbury 9 has been routinely passable making it extraordinary that the Council is seeking to agree a new path.</p>	<p>(v) It is agreed that the aerial photographs cannot show what caused the apparent tracks on the ground. However, it is noted that the representation of a track along the Order route is similar to an apparent path leading south from the Order route alongside the river (see <b>Appendix 3</b>).</p> <p>(vi) This is agreed. The southern end of the Order route connects to the Avon Valley Nature Reserve which is considered to be a place of public resort.</p> <p>(vii) The Order route reflects the evidence adduced by the applicant which includes people visiting the 'beach area'. The Order cannot put the path on a different route to that supported by the evidence.</p> <p>(viii) The Council is not seeking to agree a new path. It has a duty to consider an application such as this and to make an Order if it is reasonably alleged that on the balance of probabilities a public right has been acquired.</p>
<p>3B. Ms M Auchterlonie Landowner April 2011 to date</p> <p>SECOND SUBMISSION 18 January 2012</p> <p>A4 lever arch file and CD-ROM</p>	<p>(i) Does not believe there is any credible evidence that a right of way subsists or that there was ever any intention to dedicate one. Does not believe that there has been 20 years continuous use for a period of 20 years prior to the application made in June 2011. The owner and/or occupiers rights to exclusive use of the land have always been positively maintained.</p>	<p>(i) The clear conflicts in evidence highlighted demonstrate the need to test the evidence from both sides verbally. However, it is noted that for the application to succeed under s.31 of the Highway Act 1980 it is not necessary for the owner to intend to dedicate to the public. Instead he must demonstrate that he had no intention to dedicate.</p>

No and Name	Nature of Objection	Officer's Comment
<p>3B. Ms M Auchterlonie Landowner April 2011 to date</p> <p>SECOND SUBMISSION 18 January 2012</p> <p>A4 lever arch file and CD-ROM</p>	<p>(ii) The Order route does not accord with the route indicated on the application forms and maps or at any other time.</p> <p>(iii) <b>Fencing</b> A comprehensive body of evidence has been produced that shows that the field has been securely fenced and used for cattle grazing since the Coggan family bought the land in 1920. The evidence also comprises statements from Mr Pat Coggan who knew the land when it was managed by Reg Coggan (1920 – 1956) and managed the land (as a tenant) from 1959 to the early 1990s. Letters from Mr Pat Coggan's son, Phil Coggan (who was born at Parsonage Farm in 1957 and grew up there and worked on the farm for a 4 year period) and Mr Hounslow who held the grazing licence from 1999 – 2007 are also included and form a cohesive picture of land management from the 1920s through to the late 1990s.</p> <p>Mr Pat Coggan's statement is clear about access arrangements to the field. <i>"There were no gates at the north or the south of the field... There was a stile at the south end, next to the river for the fishermen."</i> An annotated plan shows this stile was in place until 2007 which ties in with the purchase of some of the land by the Angling Club and the resultant changes to access arrangements. Also <i>"The fishermen used the railings at the north end to gain access to the river bank..."</i>.</p> <p>Access was only altered post 1999.</p>	<p>(ii) It is considered that the Order route best reflects a route that the public claim to have used. The Secretary of State has the power to modify the map to reflect any errors in the event that the Order is confirmed.</p> <p>This is an example of how evidence may be tested at Inquiry – for instance a witness may be asked whether they went to the riverbank when they walked through the field.</p> <p>(iii) This evidence shows, on the balance of probabilities, that the field was securely fenced from at least 1920 onwards.</p> <p>The evidence also shows that access to the field from the northern (bridge) end was through or over bridge rails and at the southern end was over a stile up to 1999. These access points were used by fishermen. The large gate at the southern end is not mentioned in the Coggan family's evidence and the date of installation seems to have coincided with Mr Hounslow grazing the Nature Reserve extension which he is known to have done (1999 on).</p> <p>It is clear that even though the field was maintained in a stock proof condition, access was still possible. By witnesses giving evidence verbally and being subject to cross-examination it should be possible to test whether the dates that people accessed the land agree with the means by which they did it.</p> <p>Gate/Stile N end – installed 2004 Stile S end – removed 2007 Gate S end – installed 1999</p>

No and Name	Nature of Objection	Officer's Comment
<p>3B. Ms M Auchterlonie Landowner April 2011 to date</p> <p>SECOND SUBMISSION 18 January 2012</p> <p>A4 lever arch file and CD-ROM</p>	<p><b>Challenge</b> The evidence also states that Reg Coggan (between 1920 and 1956) was very thorough in challenging people on the land and from 1950 to 1999 Mr Pat Coggan (1959 to 1999) <i>'challenged anyone on the water meadow and asked them to leave'</i>. Mr Hounslow (1999 – 2007) also challenged users <i>"and got them to go back and use the correct footpath"</i>.</p> <p><b>Signs</b> The evidence of Mr Pat Coggan covering the years from 1959 to 1999 states that <i>"Signs were put up to warn the public of the dangers of a bull. There was never any intention for there to be public access or the bull would not have been allowed to run freely in the fields."</i></p> <p>Mr Hounslow put up notices <i>"asking people to use the footpath around the field mainly because I had a bull with the cows."</i></p> <p>Mr Armstrong (2004 to 2011) erected signs stating the public use was permissive and could be withdrawn.</p>	<p>There is evidence of verbal challenge covering nearly 100 years. However, there is no evidence of challenge (pre-dating spring 2011) submitted by witnesses claiming to have used the path.</p> <p>It must be noted that this area is very heavily used by the public and on site visits officers have always seen between 5 and 15 members of the public (usually walking dogs) on the paths and fields adjoining the claimed route. Officers have not seen anyone using the claimed route demonstrating how effective Ms Auchterlonie's challenge to their use has been. However, it is likely that the challenges by the Coggan family and Mr Hounslow were not so effective resulting in a mixture of people who had and had not been challenged.</p> <p>This is another example of the benefit of hearing evidence verbally and subjecting it to cross- examination.</p> <p>The signs which warn the public of the dangers of the bull do not specifically show no intention to dedicate a right of way and to satisfy s.31(3) of the Highways Act 1980, it is important that they do.</p> <p>It must be borne in mind that whilst the landowners and tenants did not want the public on their land, arrangements were in place to enable the Angling Club access and there would have been people in the field at times when the bull was there.</p> <p>It is considered that Mr Armstrong's signs, which were maintained, form an effective challenge.</p>

No and Name	Nature of Objection	Officer's Comment
<p>3B. Ms M Auchterlonie Landowner April 2011 to date</p> <p>SECOND SUBMISSION 18 January 2012</p> <p>A4 lever arch file and CD-ROM</p>	<p><b>Permission</b> Permission to access the land to launch boats and survey wildlife was sought and granted in 1980 and 2001.</p> <p>(iv) <b>Historic Maps and Aerial photos</b> None of the maps considered in <b>Appendix 2</b> show a path through any part of the field.</p> <p><b>Aerial Photographs</b> The aerial photographs do not show evidence of a track or path but instead align directly with the geological remains of the water meadow. There is no evidence of a track or path.</p> <p>There are numerous aerial photographs dated 1920, 1929, 1946, 1953, 1970, 1975 and 1988 held at the English heritage National Monument record centre in Swindon and the Wiltshire and Swindon Historical Record centre in Chippenham and none of these show a track or discolouration in the area of the alleged route.</p>	<p>Neither of these activities are relevant to a claim for a public right of way.</p> <p>(iv) This is agreed. Early OS 1:2500 maps (County Series) could show a path that appeared as a physical feature (whether public or not) and the surveyors for the period 1881 to 1936 clearly did not find one across the field. Later OS maps draw their information from the definitive map and are less likely to show an unrecorded path.</p> <p>It is suggested that the lighter areas are drainage features (Ms Auchterlonie), a track caused by cattle and a tractor (Mr Coggan) or a worn track similar to walked paths in the area (i.e. the riverside path south to Salisbury where it is an unimproved surface).</p> <p>The 2001 aerial photo in <b>Appendix 1</b> shows such a clear track both in the field and leading towards the newly installed kissing gate and link to Footpath 9 that it is difficult to support another explanation other than surface wear caused by feet.</p> <p>Whatever the explanation of the feature accordant with the Order route aerial photographs carry very little evidential weight as even if it possible to show a worn path exists, the photograph cannot show who or what made the path or track.</p>

No and Name	Nature of Objection	Officer's Comment
<p>3B. Ms M Auchterlonie Landowner April 2011 to date</p> <p>SECOND SUBMISSION 18 January 2012</p> <p>A4 lever arch file and CD-ROM</p>	<p>(v) <b>Avon Valley Nature Reserve</b> The reserve was designated in 1993 and prior to that was part of Cowslip Farm. Before 1993 there was no public access to the southern end of the claimed route as the land was privately owned and a cattle farm. Information boards for the Reserve do not show access extending into the field and along the Order route.</p> <p>(vi) <b>Salisbury and District Angling Club</b> The 'daybooks' of 1964/65 and 1974 show access points at the northern end of the Order route only. A southern access point to the river bank is shown much further south at the boundary of the recreation grounds.</p> <p>The licences granted to the angling club specifically states that the club is responsible for protecting the privilege of access and that they should "<i>take all reasonable steps to deter poachers or trespassers from entering on the owner's land</i>".</p> <p>(vii) <b>Land Use, conservation, agriculture, flood management and recreation</b> The field is a County Wildlife Site and is wet for six months of the year. It was surveyed in 1981, 1982, 1984, 1994 and 2002 and it is recorded that the field was grazed by cattle at varying intensities.</p>	<p>(v) The southern end of the Order route joins the northern end of the Nature Reserve. This area is known as the 'extension' to the reserve and has been managed differently to the more southerly reserve having been grazed by cattle post 1993 (1999 onwards). To access the southern end of the Order route the public would have needed to walk in this field and it is considered likely that the most attractive and likely walk would have been beside the river as is in use today. Access to this area appears to have been granted to anglers suggesting a physical availability.</p> <p>This evidence agrees only in part with the statement of Mr Coggan who recalls an access stile for fishermen at the southern end of the claimed route. However, the Angling Club plan is crudely drawn and could be representing the access point that Mr Coggan (and some witnesses) refer to or one coincident with the southern end of the reserve extension.</p> <p>This evidence agrees with that submitted by Salisbury and District Angling Club and is further evidence of the owner's lack of intention to dedicate a route to the public.</p> <p>However it must be borne in mind that this intention must be brought to the notice of the public to be an effective challenge to s.31(1) of the Highways Act 1980.</p> <p>This supports the secure fencing of the land throughout these dates.</p>

No and Name	Nature of Objection	Officer's Comment
<p>3B. Ms M Auchterlonie Landowner April 2011 to date</p> <p>SECOND SUBMISSION 18 January 2012</p> <p>A4 lever arch file and CD-ROM</p>	<p>The field is marked 'liable to flood' and was flooded every year to the 1960s meaning the Order route was unavailable at certain times of the year.</p> <p>Salisbury walking for Health promotion included SALS 9 and 11 in a promoted route in 2001 though the routes were well used in 1993 and 1999 also.</p> <p>SALS 9 and 11 are historic paths identified in 1951 for inclusion in the definitive map. Had the Order route existed then it would have been claimed by the relevant Council.</p> <p><b>(viii) Suitability</b> The Order route does not follow the permitted route (2004 to 2011) and would damage a variety of plants. The development of a new footpath would not be compatible with maintaining a balance between agriculture, preservation of the rural environment, conservation, recreational facilities or new development.</p>	<p>There is very little evidence of use prior to the 1960s.</p> <p>It is probable that in 1951 no well used path subsisted though it is noted that definitive map processes were far from exhaustive.</p> <p>If the Order is confirmed the Inspector has the power to alter the map to reflect any errors. However, the route <b>MUST</b> reflect any used route and the purpose of the Order is to record an existing right of way and not to create a new one.</p> <p>It is the evidence that is key to whether this Order is confirmed or not and issues relating to Local Structure Plans, etc. cannot be considered.</p>
<p>10. J Platt</p> <p>Local resident</p> <p>NOT DULY MADE OBJECTION</p>	<p>(i) The water meadow needs to be properly grazed by sheep and cattle as it has been for hundreds of years. A footpath would obstruct this and in the latter part of the 20<sup>th</sup> century farmers including the Coggans went to great lengths to keep dog walkers out.</p>	<p>(i) It is not clear how Mr Platt was made aware of the Coggans "great lengths" or what they entailed. His evidence would be best heard verbally and subject to cross-examination.</p>

## **Main Considerations for the Council**

28. The Council, as the surveying authority for the County of Wiltshire excluding the Borough of Swindon, has a duty under Section 53 of the Wildlife and Countryside Act 1981 to investigate the application made by Mr M Quigley. Section 53 of the Wildlife and Countryside Act 1981 deals with the duty to keep the Definitive Map and Statement under continuous review.
29. Section 53(2)(b) states:
- “as regards every definitive map and statement, the surveying authority shall: “as from that date (the commencement date), keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event”.*
30. The events referred to in Section 53(2)(b) relevant to this case are set out below in Section 53(3)(c)(i):
- “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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 to which this Part applies.”*
31. In considering and determining the application, Wiltshire Council must have regard to ‘*all other relevant evidence available to them*’, as the statute demands.
32. Dedication of a way as highway can be presumed after public use for 20 years provided it satisfies the requirements of Section 31 of the Highways Act 1980. The Section states:
- “where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.*
33. The Section provides that where a way has 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 the way.
34. The term 'as of right' means without force, secrecy and permission. People using the way must do so openly without damaging the property and not be reliant on being given permission to use the path by the owner of the land over which the path runs.



35. The case of *R. v. Oxford County Council ex parte Sunningwell Parish Council* (1999) considered the issue of public use of a way. Lord Hoffman presiding stated, “...*the actual state of mind of the road user is plainly irrelevant*”, it is immaterial therefore, whether the public thought the way was a 'public' path or not.
36. The case concluded that it is no longer necessary to establish whether the users believe they have a legal right to use the land. Instead, it should be shown that use has been without force, secrecy and permission.
37. The use of the way must be without interruption. Once the 20 year uninterrupted use 'as of right' has been proved, the burden then moves to the landowner to show there was no intention to dedicate, i.e. evidence of any overt acts by the landowner to deter the public from using the way, or conversely to permit the public to do so. Overt acts are covered in Section 31 (3) (4) (5) and (6) below:
38. Section 31 of the Highways Act states as follows:

**“31. Dedication of way as highway presumed after public use of 20 years**

*(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.*

*(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes –*

*(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*

*(b) has maintained the notice after 1 January 1934, or any later date on which it was erected.*

*(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.*

*(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.*

*(6) An owner of land may at any time deposit with the appropriate council -*

*(a) a map of the land on a scale of not less than 6 inches to 1 mile and*

*(b) a statement indicating what ways(if any) over the land he admits to having been dedicated as highways;*

*And, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time –*

*(i) within ten years from the date of deposit*

*(ii) within ten years from the date on which any previous declaration was last lodged under this section,*

*to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.*

*(7) For the purpose of the foregoing provisions of this section, ‘owner’, in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above ‘the appropriate council’ means the council of the county, metropolitan district or London Borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.*

*(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an Order making modifications so as to show the right on the definitive map and statement.*

*(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.*

*(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over the land as a highway would be incompatible with those purposes.”*

39. The Supreme Court (House of Lords) recently considered two cases which hinged on the intention to dedicate and the application of Section 31 of the Highways Act 1980. In the judgement delivered 20 June 2007 [2007] UKHL 28 Lord Hoffman reasoned:

*“It should first be noted that s.31(1) does not require a tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be a difficulty in satisfying such a requirement without any evidence at all.*

*It requires 'sufficient evidence' that there was no intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J, in Billson's Case [R v S of S for the Environment ex p. Billson [1999] QB374 it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience."*

### **Environmental Impact of the Recommendation**

40. Effects on the environment cannot be taken into consideration for an Order decision.

### **Risk Assessment**

41. Risks or safety cannot be taken into consideration for an Order decision.

### **Financial Implications**

42. It is considered that with this case, given the number of objectors and supporters and the need to test the evidence of both, that a Public Inquiry is unavoidable. However, the decision whether to determine the Order by Written Representations, a Public Hearing or a Public Inquiry rests with the Secretary of State.
43. The Council has a duty in law to support Orders where it is considered that on the balance of probability the order public rights subsist as shown in the Order. Budgetary provision has been made for this duty.
44. The Council may maintain a neutral stance where it is considered that although it was reasonably alleged that an Order be made, significant objections have been received. This incurs a smaller cost for which budgetary provision has been made.
45. It is rare for a Council to object to an Order, though it may do so. An example of this may be when an Order has been made and during the advertisement period evidence against the Order is brought to its attention that is incontrovertible. This would attract a similar cost to supporting an Order and could be in the region of £5,000 to £10,000.

### **Options Considered**

46. That:
- (i) The confirmation of the Order is supported as made.
  - (ii) The confirmation of the Order is supported with modifications.
  - (iii) The Council takes a neutral stance at Inquiry.
  - (iv) The confirmation of the Order is objected to.

## **Conclusions**

47. A substantive amount of information has been viewed both in support of, and in objection to, this application. Evidence submitted of use dates back to the 1940s and evidence submitted by landowners dates back directly to the 1950s and indirectly to 1920.
48. However, it is considered that this evidence supports that the relevant period for the acquisition of any public rights is between 1977 and 1997. Hence, if this is the case, it is only necessary to consider evidence within this period.
49. Use by the public between these dates must have been without interruption and 'as of right' that is without force, without challenge and without permission.
50. The access points during this period were through the bridge rails at the northern end and over a stile at the southern end. The gates were put in after this period (evidence of Mr Pat Coggan and Mr R Hounslow).
51. It seems likely that access was shared with members of the Salisbury and District Angling Club who held a licence to access the riverbank to fish.
52. There were signs in place during this period "to warn the public of the dangers of a bull" (evidence of Mr Pat Coggan, tenant farm manager, 1959 to the early 1990s).
53. The Salisbury and District Angling Club licences required club members to challenge anyone who was not a member.
54. Mr Pat Coggan challenged "anyone I found in the water meadow and asked them to leave" during this period as did his grandfather, wife and son.
55. No users of the way claim to have been challenged or to have requested permission.
56. No deposit under Section 31(6) of the Highways Act 1980 for the land was received by Wiltshire County Council during this period.
57. No evidence of force being used during this period has been adduced.

## **Reasons for Recommendation**

58. Many members of the public submitted evidence of use over a long period of time and their evidence is insufficiently detailed to record whether or when they used stiles, gates or bridge railings. This is perhaps not surprising as such details would not be relevant to them all the time they had access. Additionally, the passage of time will inevitably dull some memories. Some responses agree well with paragraph 50 access arrangements (i.e. Mr D Hopkinson mid 1960s to 2011 and Mrs E Evans 1970 – 2011) and the Order plan suggesting clear recollections of the period, whereas others do not.

59. It is also apparent that both the riverside path and the Order route were used by many. Some recorded that they only used the Order route after 2007 while others used both according to ground conditions.
60. It is clear that evidence of use (including means of access, route and challenge) needs to be given verbally and subject to any relevant cross-examination for clarity.
61. It is equally clear that evidence of challenge, signage and interruption also needs to be given verbally and subject to any relevant cross-examination for clarity.
62. No incontrovertible evidence exists for the dates 1977 to 1997 that would permit Wiltshire Council to oppose the Order.
63. As a matter of administration, the “New Sarum (Extension Order) 1954” came into effect on 1 April 1954 making the affected part of the administrative area for the City of New Sarum and not the Salisbury and Wilton Rural District Council as it had previously been. Therefore this Order needs to be amended to replace all references to the “Salisbury and Wilton Rural District Council” with the words “The City of Salisbury”. This is a modification that can be requested of the Secretary of State in the event the Order is confirmed.

### **Recommendation**

64. That the Wiltshire Council (Sheet SU 13 SW)(Parish of Salisbury Path 107 – Bridge Mead) Rights of Way Modification Order No 8 2011 is forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and that Wiltshire Council adopts a neutral stance at Public Inquiry. In the event that the Order is confirmed it is requested that all references to “Salisbury and Wilton Rural District Council” are removed and replaced with “City of Salisbury”.

### **MARK SMITH**

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Report Author

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Rights of Way Officer

### **The following unpublished documents have been relied on in the preparation of this Report:**

Correspondence with parish councils, user groups, other interested bodies and members of the public