

**WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53**

**THE WILTSHIRE COUNCIL WHITEPARISH PATH NO.42 DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2022**

**Purpose of Report**

1. To:
  - (i) Consider objections and representations received following the making and advertisement of “The Wiltshire Council Whiteparish Path no.42 Definitive Map and Statement Modification Order 2022”.
  - (ii) Recommend that “The Wiltshire Council Whiteparish Path no.42 Definitive Map and Statement Modification Order 2022” be forwarded to the Secretary of State with a neutral stance from Wiltshire Council regarding the determination of the Order, as it is not possible for Wiltshire Council to reach a decision where the evidence is finely balanced and should be tested at a public inquiry.

**Relevance to the Council’s Business Plan**

2. Working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

**Background**

3. Wiltshire Council received an application dated 12 July 2020, made under Section 53 of the Wildlife and Countryside Act 1981, to add a Footpath to the definitive map and statement of public rights of way in the parish of Whiteparish, (The Drove), as shown on the application plan at **Appendix A**, (please also see Location Plan at **Appendix B** and aerial photographs at **Appendix C**). The application was made by Residents of Clay Street, on the grounds that a right of way for the public on foot subsists or can be reasonably alleged to subsist over the way, based on user and historical evidence, and which should be recorded within the definitive map and statement of public rights of way, as such. The application was supported by 27 completed user evidence forms and some documentary evidence.

4. The application route is known as “The Drove” from its junction with Common Road, approximately 135 metres south of Clay Street, leading west-south-west for approximately 180 metres before leading south-south-west for approximately 150 metres to its junction with Footpath no.6 Whiteparish, having a width varying between 3 and 9 metres. The route has an unmade surface and is enclosed for most of its route by fences, mature hedges and trees.
5. Before determining whether or not to make a Definitive Map Modification Order (DMMO) to add a public right of way in the parish of Whiteparish (The Drove), as a result of the application, Wiltshire Council undertook an initial consultation regarding the proposals. The representations, objections and additional evidence received are included at Appendix 4 of the Decision Report attached at **Appendix D**.
6. Following an investigation of the available evidence, including 27 completed witness evidence forms and documentary evidence submitted by the Applicant; objections and representations, Officers of Wiltshire Council produced a decision report in which a recommendation was made to Senior Officers that a footpath be added to the definitive map and statement of public rights of way between Common Road and Footpath no.6 Whiteparish, to the south of Clay Street, on the grounds that a footpath was reasonably alleged to subsist, please see Decision Report at **Appendix D**. Senior Officers approved the recommendation on 16 February 2022.
7. Wiltshire Council subsequently made a DMMO to add Footpath no.42 Whiteparish (The Drove), having a width varying between 3 and 9 metres, please see DMMO at **Appendix E**. Notice of the making of the Order was duly advertised, posted on site, and served on interested parties (including landowners; neighbouring properties; Whiteparish Parish Council and the Wiltshire Council Member for Alderbury and Whiteparish).
8. Following the making of the Order, the following representations and objections were received:

Objections:

- i) Mr P Davies – e-mail 11/06/22
- ii) Mr P Davies – e-mail 13/06/22
- iii) Mr P and Mrs C Davies – e-mail 08/07/22 and letter 22/06/22
- iv) Mrs S Cook – e-mail dated 20/07/22 attaching 6 letters of objection:
  - Mrs S Cook – 25/06/22
  - Ms J Cook – 27/06/22
  - Mr D Cook – 28/06/22
  - Mr M Jewell – 25/06/22
  - Mr A Cook – 21/06/22

- Mr R Bowles – 20/06/22
- v) Mr D Stockton-Chalk – e-mail 31/07/22
- vi) Mr G & Mrs J Peacop – e-mail 25/07/22 and letter 22/07/22
- vii) Mr C Dyson – e-mail 01/08/22 and letter undated
- viii) Mr T Rudman – e-mail 01/08/22
- ix) Zelda Investments C/O Mr M Richards – e-mail 01/08/22
- x) Mr M Leach – e-mail 08/08/22 - Withdrawing support for making “The Drove” a designated footpath
- xi) Mr S & Mrs S Aldhouse – Letter undated

Representations of Support:

- i) Mr P Woodruffe – e-mail 07/03/22 (pre-DMMO)
- ii) Mr J Hall – e-mail 06/04/22

No comment:

- i) Whiteparish Parish Council – e-mail 12/04/22
- ii) Whiteparish Parish Council – e-mail 13/05/22

9. The representations and objections are included in full at **Appendix F** and the comments on the objections and representations are set out at paragraphs 21 – 72 of this report.
10. Due to the unresolved objections, the Order now falls to be determined by the Secretary of State for the Environment, Food and Rural Affairs. Members of the Committee are requested to consider the objections and representations received against:
  - (i) the evidence already before the Council as the Surveying Authority in this case, and
  - (ii) the legal tests for making a DMMO under Section 53 of the Wildlife and Countryside Act 1981,
 in order to determine the Wiltshire Council recommendation to be attached to the Order when it is forwarded to the Secretary of State for decision.

**Main Considerations for the Council**

11. Section 53(2) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the definitive map and statement of public rights of way up to date and under continuous review.
12. The Order is made under Section 53(3)(c) of the Wildlife and Countryside Act 1981, based on:
 

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

(i) *that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.”*

13. Where witness evidence regarding the use of The Drove, Whiteparish is submitted, Section 31(1) of the Highways Act 1980 states:

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

14. Evidence is key and therefore the only valid objections to the making of the Order are those which challenge the evidence available to the Surveying Authority. The Authority is not able to consider other considerations such as, the suitability of the way for use by the public; environmental impacts of the proposal; the availability of suitable alternative paths; the “need” for the claimed route or private rights.

15. In determining whether or not to make an Order, the Surveying Authority has correctly considered the available evidence according to the legal tests, as set out above, and resolved to make a DMMO adding Footpath no.42 Whiteparish, where a right on foot for the public can be **reasonably alleged** to subsist, (please see Decision Report at **Appendix D**). The Order does not seek to create new rights of way, but simply to record existing public rights of way which can be reasonably alleged to subsist, based on the available evidence.

16. There will inevitably be points of conflict within the evidence of objectors and that of the supporters. For this reason, an Order can be made based on a reasonable allegation that a right of way for the public subsists, which is a lower test than the balance of probabilities. Where there is no incontrovertible evidence against this, it is in the public interest for a local authority to support the making of the Order. The case of *R v Secretary of State for the Environment, ex p. Bagshaw and Norton*, Queen’s Bench Division (Owen J.): April 28, 1994, deals with the applications of both Mrs Norton and Mr Bagshaw, who had applied to their respective County Councils for Orders to add public rights of way to the definitive maps and statements, based upon witness evidence of at least 20 years uninterrupted public user, and where the Councils determined not to make Orders. On appeal, in both cases, the Secretary of State considered that the Councils should not be directed to

make the Orders. At judicial review of those decisions, Owen J allowed both applications; quashed the Secretary of State's decisions and held that:

*“(1) under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, the tests which the county council and the then Secretary of State needed to apply were whether the evidence produced by the claimant, together with all the other evidence available, showed that either (a) a right of way subsisted or (b) that it was reasonable to allege that a right of way subsisted. On test (a) it would be necessary to show that the right of way did subsist on the balance of probabilities. On test (b) it would be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. Neither the claimant nor the court were to be the judge of that, and the decision of the Secretary of State was final if he had asked himself the right question, subject to an allegation of Wednesbury unreasonableness. The evidence necessary to establish that a right of way is reasonably alleged to subsist is less than that needed to show that a right of way does subsist. The Secretary of State had erred in law in both cases as he could not show that test (b) had been satisfied.”*

17. Owen J also held that:

*“(2) In a case where the evidence from witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.”*

18. It is notable in the Norton case that, the Secretary of State:

*“...notes that the user evidence submitted in support of a presumption of dedication is limited to four persons claiming 20 years of vehicular use as of right; he must weigh this against the statements from the landowner, supported by 115 signed forms and the Layham and Polstead Parish Councils, indicating the use of the route has been on a permissive basis and that active steps to prevent a presumption of dedication arising have been taken...”*

In both the Norton and Bagshaw cases Owen J concluded that:

*“If, however, as probably was so in each of these cases, there were to be conflicting evidence which could only be tested or evaluated by cross-examination, an Order would seem likely to be appropriate.”*

19. Even in a case with only limited supporting evidence and a large number of objections, Owen J held that an Order would seem appropriate. However, whilst a DMMO may be made on the weaker reasonably alleged “Test B”, at the confirmation of an Order, the more stringent balance of probabilities “Test A” must be applied.

20. Additionally, in the Court of Appeal, *Roxlena Ltd. R (on the application of) v Cumbria County Council* [2019] EWCA Civ 1639, considers the level of investigation to be undertaken by the Surveying Authority in the making of an Order: *“1. How should a surveying authority approach the evidence said to justify it making an order to add a footpath to its definitive map and statement of public rights of way under section 53 of the Wildlife and Countryside Act 1981?”*

Giving leading judgement Lord Justice Lindblom held that:

*“52. ...At the order-making stage of the statutory process, the consideration of evidence is necessarily less intense than at the stage of confirmation. The context here is the need to consider whether a right of way may reasonably be alleged to subsist. In that context, a surveying authority’s duty to “investigate” under paragraph 31(1)(a) of Schedule 14 to the 1981 Act does not constrain it to investigate a particular matter in greater depth and detail than it reasonably judges to be necessary in the circumstances...”*

*54. ...The county council did not have to go behind the user evidence forms...That evidence could reasonably be taken at face value at the order-making stage...It might or might not withstand questioning at the confirmation stage. But it did not have to be investigated more fully before the order could lawfully be made.”*

### **Comments on the Objections**

21. Objections to the Order are made on a number of grounds, as set out below with the Officers comments, (please see Objections and Representations to the making of the Order, in full at **Appendix F**):

#### **Obstruction of “The Drove”:**

22. A number of witnesses make reference to the obstruction of the path by overgrowth, including Mr C Dyson, who states: *“I did on one occasion many years ago mistakenly venture into what the order refers to as ‘the drove’. It was overgrown and it soon became obvious that there was no path through as it was blocked about 60 yards down and I was forced to turn around and retrace my steps...”*
23. Mr D Stockton-Chalk agrees that the footpath is *“...totally overgrown, and leads nowhere...”*
24. Mr and Mrs Aldhouse state that: *“The so call [sic] footpath “the drove” is not used as a footpath, it remains overgrown, and the track marked on the map does not lead to anywhere. Paths in the fields North of point B on the map have been blocked by homeowners on Common Rd, not allowing access to Common Rd.”*

25. Whilst it is not open to the Surveying Authority to consider the condition of a path in its determination of an application made under Section 53 of the Wildlife and Countryside Act 1981, in this case Objectors point to historic overgrowth and blockage of the path which would prevent public use, whilst witnesses in support of the application maintain that they have been able to use the path. In the supporters' evidence regarding the width of the path, witnesses confirm that the width is variable due to overgrowth, which narrows at points as follows:
- Minimum single file because of plant spread
  - Depending on the hedgerow's growth...the least 2.5 metres including bushes
  - Variable – narrow behind houses due to overgrown hedges...upkeep of which has varied over the years
  - Varying widths from 6 metres to about 1 metre depending on vegetation (hedges and trees)
  - Varies in width from 1 - 6 metres depending on vegetation (hedges and trees)
  - Variable widths – 8 metres including hedgerows and trees, but possibly 1 metre
  - About 20 feet although I believe it is now very overgrown
  - Varies due to vegetation – Between 1 metre and 3 metres
26. Although witnesses acknowledge that the overgrowth of vegetation on the route has narrowed the path to around 1 metre / single file in places and at varying times depending upon growth, they claim that this has not prevented their use of the way, as suggested by the Objectors. Only Ms S De Graffham confirms in evidence that she was prevented from using the path past the turn past the houses, during her user period in 2013-18 due to the barbed wire fence and thick brambles.
27. In this case, the evidence of overgrowth and obstruction of the path is disputed and inconclusive and whilst it may have been appropriate for the Council to make the Order based on a reasonable allegation, it is considered that, in the light of the evidence presented in the objections, the more stringent test of balance of probabilities, applicable at the confirmation of an Order, is finely balanced and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

#### **Insufficient Evidence of Use:**

28. A number of Objectors point to a lack of use of the way and insufficient evidence to suggest that a public right of way subsists: Mr D Stockton-Chalk who resides alongside the route in question states that: *"To my knowledge the path has not been used for ages."* Mr and Mrs Peacop add that the path: *"...has never been used as a footpath thoroughfare..."*

*“It seems implausible to apply for a ‘footpath; when it seems that, when accessed (by trespassing in our view), it has not been used as a ‘footpath’ but as a playground (not least because it doesn’t lead anywhere)...it has never been used or accessed as a footpath and the various testimonies should be subjected to greater scrutiny...we suggest that over time the areas known separately as ‘The Drove’ and ‘Secret Field’ have been conflated which has caused confusion...”*

*There is very little supporting evidence for Wiltshire Council to reach its conclusion that there is ‘sufficient evidence that a right of way for the public on foot can be reasonably alleged to subsist over The Drove...This judgement appears very subjective (section 10.72 on p66) and weak in arriving at the conclusion. Wiltshire Council needs to be held account to ensure that the appropriate levels of burden of proof have been demonstrably achieved.”*

29. Mr and Mrs Peacop consider the number of those giving evidence to be insufficient: *“There is palpably insufficient evidence by a statistically significant number of people to demonstrate the route has ever been used regularly or frequently as a ‘footpath’...”*

*“The extent of 27 ‘user statements’, some from the same families and many of whom have moved from the area some time ago, seems to be a statistically insignificant number for Wiltshire Council to conclude that the application should result in an Order being made. It should not be possible for so few people to have such a significant impact on the environment and local residents...we understand that some of those ‘user statements’ have subsequently been withdrawn which should mean The Order is even less valid than the already weak basis on which it was granted. It might also suggest that some local residents were coerced into supporting the application without understanding the ramifications of the footpath being granted...”*

*On the basis there is a limited number of user statements and that these coincide with the same objectors of the planning permission, we conclude that the level of (self) interests in granting the footpath is limited to people who live in the very close proximity to the proposed footpath. There is palpably no widespread village outcry.”*

30. Mr and Mrs Davies add: *“We believe evidence and statements submitted are insufficient, unsubstantiated, in error and miss-leading...”*

*We have no doubts people walked some of the drove 1983 to 2003, we feel confident however that the majority based on witness evidence refer to primarily walking the upper section Forest View to Common Road...*



*Witness 17 states he frequently used the Drove to access Common Road as a child 1979 to 1995...” given the location of his family home “...I do not believe as a child he meant that he went up his drive to Clay Street, left to footpath 4, along Footpath 6, North through a fence / hedge then up through cow pats, through a further fence and then east to common road where he could have crossed 50 metres the top of Secret Field by Forest View to the upper drove directly!”*

31. Mr and Mrs Davies undertake some investigation of the witness evidence on this point and submit the following findings:

Witness 1 - “Well-Trodden” partially correct where 1983 – 2003 upper section of Drove behind houses, having legal access, was well trodden. Lower section was heavily trodden by cows and not defined path as upper section.

Witness 3, 5 and 8 - same family having legal access to upper section.

Witness 4 – use by dog walkers from Common Road and local families – where are their witness statements? (Application was very well advertised locally).

Also recalls previous and current farming family were happy for public use – strongly suggest this comment applies to upper section with legal right, as confirmed by Mrs Andrews.

Witness 9 – has “forgotten over the years” but recalls gates.

Witness 10 – Legal access to upper section, recalls fenced hedge and use by cyclists/horse riders. How did cyclists and riders navigate hedges with integral fences and locked gates near Common Road?

Witness 11 and 12 – Occasionally viewed people using it but only used it themselves 3 times per year.

Witness 14 – Legal access to upper section, recalls using it on bicycle – suggest this only refers to upper section as lower drove rutted, had cows in it, cow pats and was not accessible due to hedge and fence (as remembered by her brother).

Witness 17 – Remembers wire fence – unlikely to have accessed lower drove.

Witness 18 – Many questions unanswered in questionnaire.

Witness 19 – Spoke to farmer but only occasional use / intermittent and not enough to be specific.

Witness 22 – Walked Drove twice a week, remembers barbed wire fence in 1995.

Witness 24 – walked the Drove monthly with dogs since 1990 and remembers fence blocking its path.

Witness 25 – Use since 1962, monthly but cannot remember gates which were present until late 1990’s.

32. Mr and Mrs Davies consider this to be: *“...a path of two sections and two histories an upper and lower section, nobody has ever questioned the upper section right of way between adjacent houses, if the question is actually **total** “Right of way” there is very negligible evidence to support that people really*

*used it for access from SU24642312 to SU24442292., the “vast majority” of map applications refer to upper section access...*

*Without doubt the truth is that although the map application is for a right of way SU24642312 to SU24442292 the vast majority of witnesses have not ever used SU24642312 to SU24442292, rather they have used a part of it which is **vastly different**.*

*1983 to 2003 were there cyclists SU24642312 to SU24442292 – no there was not!*

*1983 to 2003 were there horse riders SU24642312 to SU24442292 – no there was not!*

*1983 to 2003 were there ramblers and families enjoying a day out SU24642312 to SU24442292.....Very unlikely.*

*1983 to 2003 were there more than 3 or 4 people a year that walked the entirety SU24642312 to SU24442292 (Trespassing to do so) – No there was not!*

*1983 to 2003 were there 2 hedges each with barbed wire fences blocking the path SU24642312 to SU24442292 – Yes there were – and a gate by common road until 1999.”*

33. Mr M Richards, on behalf of the developer Zelda Investments Ltd, comments: *“5 neighbouring households, parents and children, represent 95% of the supporting applications...I think you will now find that people are withdrawing their support...”*

*“Where were all the other more widespread supporting letters for the footpath application for other users for 20 years uninterrupted and without force. Why is it just 5 households for whom many of the offspring have not lived in the area for many years.*

*The good thing is I imagine you are now receiving a broader spectrum of witness statements from people clearly pointing out the totally fabricated nature of the application.”*

34. Mr and Mrs Davies agree: *“27 total applications we do not consider substantial given that it was widely publicised by the Parish Council and we note every single map application is from OS SU24642312 to SU24442292, this means every single applicant has walked Common Road via a gate to the Upper Drove, left at Forest View having crossed a hedge and fence, ventured through an area potentially filled with livestock, crossed a hedge with a further integral fence (that has been there decades before 1983) or vice versa in the frequency they have given, we consider that extremely unlikely to have happened, it is miss-leading and poor quality information.*

*Looking at the period in question 1983 to 2003, if you take families as one application the number is actually 10. Only a very few applicants say they use the Drove frequently and if you remove all the applicants that have a legal*

*right to use the drove (High View towards Common Road Access Gate) the number that state frequent use (more than once a month) is **“extremely”** small (actually 3)...*

*We reservedly believe untruths are being told with the applications either knowingly or unwittingly (by reference to no fences or barriers and the OS coordinates), we believe a few of the 10 families used the upper drove, a much smaller number in dry weather trespassed past the hedge / fence down the lower drove exiting in the middle of the Lower Drove to Secret field (with cows) then across through another wire fence to Cooks Field then Footpath 4, only 2 individuals claim to have actually walked the entire drove (witness 19 and 22) before crossing the hedge (and trespassed more than once to do so) to Footpath 6.*

*Wiltshire Council has generated a right of way order OS SU24642312 to SU 24442292 based on “Reasonably Assured” statements when only 2 individuals have said they have used the path OS SU24642312 to SU 24442292 1983 to 2003.”*

35. The wording of the test set out at Section 31(1) of the Highways Act 1980, does not refer to a “significant number” of witnesses/users required to establish a public right and there is no statutory minimum level of user required, i.e. its honesty, accuracy, credibility and consistency are of much greater importance than the number of witnesses and in R (Lewis) V Redcar and Cleveland Borough Council UKSC 11 (03 March 2010), Lord Walker quotes Lindley LJ in the case of Hollins v Verney [1884] giving the judgement in the Court of Appeal:

*“...no actual user can be sufficient to satisfy the statute, unless during whole of the statutory term...the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right if not recognised, and if resistance to it is intended.”*

36. It is noted in the Norton and Bagshaw case where the evidence in support of the presumption of dedication was limited to four persons claiming 20 years public vehicular use as of right, against the statements of the landowner supported by 115 signed forms indicating that use had been on a permissive basis and that active steps had been taken to prevent a presumption of dedication arising, Owen J concluded that if there was conflicting evidence which could only be tested or evaluated by cross-examination, an Order would seem appropriate, even in a case with only limited supporting evidence and a large number of objections. Officers therefore consider that Wiltshire Council was correct to make an Order based on the “reasonably alleged test”, based upon the evidence available to the Council for sufficiency of user, at the making of the Order. The reasonably alleged test is in itself a relatively low

evidential bar and where there is no incontrovertible evidence against this, it is in the public interest to make the Order, (please see Norton and Bagshaw and Roxlena Ltd. caselaw at paragraphs 16 - 20 above). However, since the making of the Order, additional evidence has been submitted by Objectors and there is dispute regarding the level of use of the path, which would lead Officers to suggest that the more stringent balance of probabilities test to be applied at the confirmation of an Order, is finely balanced and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

### **The Route:**

37. Mr M Richards on behalf on the developer, Zelda Investments Ltd, considers the description of the path given to be in doubt: *"...is The Drove just the bit behind the houses or is it through Secret Field?!! Do witnesses actually know?? Given a grey description witnesses found it easier to say they walked "The Drove" as part of their protest against the development even though they could easily be referring to the section behind the houses before the barbed wire fence with cows the other side. Would it not be more appropriate to ensure total certainty in description before calling witnesses under oath so there can be no doubt?"*
38. Mr and Mrs Davies agree that this is a route of 2 parts and 2 histories, adding that: *"The middle of the Drove lower section is a natural drain for cottage field and venturing there after the heavy rain means sinking to one's knees in mud"*, (picture provided halfway along lower section of southern Drove, showing wet area).
39. Certainly, there is reference in the planning responses (objections), to the wet area described by Mr and Mrs Davies, which may affect public use of the lower Drove area:

Planning application no.18/06027/FUL Forest View and Land adjacent –  
Erection of one new dwelling and conversion of existing dwelling to  
accommodate rooms in roof and additional garage):

Mr and Mrs Harrison - letter dated 30 July 2018 - *"Surface water from the field (which is on higher ground) to the south of Clay Street is collected in an open ditch behind the properties on that side and discharged down The Drove to Forest View and beyond. This ditch is occasionally in flood..."*

This is repeated by Mr D Stiles in his objections to the planning application, dated 9 August 2018.

Planning application no.18/08737/FUL (Land south of Forest View – Erection of two dwellings) and 18/08738/FUL (Forest View – Retention of existing bungalow known as Forest View and additional dwelling on Land at Forest View including parking spaces):

Mr and Mr Harrison - correspondence dated 13 November 2018 -  
*“Development of The Drove must be prohibited as it includes a storm ditch that drains the field to the south which is higher land and discharges into the fields past this proposed development. At times of heavy rain this ditch is in flood...”*

Planning application no.20/04331/FUL (Plot 3, land off Forest View – Erection of single storey dwelling):

Mr and Mrs Harrison in correspondence dated 9 July 2020 do not mention the existence of the storm drain in The Drove.

Mr B Woodruffe - correspondence dated 11 June 2020 - *“In wet weather the Drove can become a spillway for water originating from the higher field and upper section of the track, water which was previously channelled along ditched bounding Forest View’s garden and along the field edge of plot 2.”*

40. In evidence witnesses do not produce their own maps with completed witness evidence forms, instead they are provided with a pre-drawn map including the application route, rather than a blank map upon which to individually record the route which they have used, and it may appear that a witness used the whole route even if they only used part of the route. However, all but one of the maps are signed to confirm that the map correctly records the route they have used, as P Hudson clarifies on her map: *“This is the path I have walked for over 30 years.”* 17 witnesses have added their own annotations to the map to indicate features which they recall such as fences / gates. Additionally, witnesses do independently provide a description of the route in their evidence forms which accord with the feature consistently shown on OS mapping and which is known as “The Drove”. However, the witnesses do not refer in evidence to how their use was affected by the wet section of the Lower Drove which appears to have been a spillway for the upper section of the track and the higher fields.
41. In a statutory public inquiry held to determine an Order made under Section 53 of the Wildlife and Countryside Act 1981, witnesses are not called under oath and the relevant legal test to be applied in the confirmation of an order is the balance of probabilities, i.e., it is more likely than not that a right of way for the public exists, there is no requirement for “conclusive” evidence. Officers consider that Wiltshire Council was correct to make an Order based on the reasonably alleged test and where there is no incontrovertible evidence, it is in the public interest to make the Order, please see Norton and Bagshaw and Roxlena Ltd. caselaw at paragraphs 16 - 20 above. However, there is dispute of the evidence regarding the route of the path, raised in the objections and Officers consider that the balance of probabilities test, applicable at the confirmation of an Order, is finely balanced and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

### Private Rights over “The Drove”:

42. Mr M Leach, formerly in support of the application to add a footpath, The Drove, writes:

*“I wish to remove my support for making “The Drove” a designated footpath. I was new to the village not long before this application was made. Having lived here longer now, I have met my neighbours on The Drove on several occasions, leading me to believe my neighbours do indeed use the path quite regularly. Therefore, it seems likely it was my neighbours (who have a right of way on the section of the drove behind my house) that I had previous seen through the hedge using this footpath, rather than the general public.”*

43. Mr and Mrs Davies suggest that: *“Barbara Kennard who states she used the drove **Daily** 1978 to 1987 refers to the upper section she was legally entitled to (based on her witness statement).”*
44. Officers would certainly agree that a number of the witnesses in this case, had a private right to use the upper section of the Drove, i.e. between their property, leading east towards Common Road, (over the land owned by the Cook family), the final approximately 30 metres towards Common Road being in the separate ownership of Mr H Urquhart, but also registered common over which the general public have a right on foot. The use of the two parts of The Drove is considered in the decision report at **Appendix D**, paragraphs 10:55 to 10:57. and it is concluded that even where the evidence of those who, as residents of the properties backing onto Clay Street have a private right to use the central section of The Drove to access their properties, (as granted by Mrs Cook’s Great Grandmother, Agnes, in 1957), is removed, 14 witnesses remain who claim to have used the whole of the route during the relevant user period, without any private rights of access; however, their use would be affected by matters such as the date of bringing into question of use of the route and the presence of fences on the claimed route.

### Lack of Documentary Evidence:

45. Mr and Mrs Peacop consider that: *“Significant ‘evidence’ has been considered by Wiltshire Council in assessing the application and consequently Wiltshire Council has determined that ‘There is insufficient documentary evidence of a public right of way over The Drove, Whiteparish.”* This is also listed by Mr and Mrs Peacop as an error within the Order and the application should have been dismissed on this basis alone in their view.
46. Officers would agree that there is insufficient documentary evidence to support the existence of a public footpath over the route, as set out in Section 9 and Appendix 6 (Historical Evidence Summary), of the decision report at **Appendix D**. There is no category A evidence, such as Inclosure

Award and although the route is recorded on the Tithe Award; Estate map and OS mapping, it was not the main purpose of the tithe award maps to record public rights of way and OS maps are topographical in nature, i.e., recording only physical features visible to the surveyor at the time of survey and give no indication of public rights. Whilst these documents can be useful in supporting other evidence, as stand-alone documents to record the status of a path, they are not sufficient.

47. However, whilst the historical evidence is insufficient to support public rights over the claimed route, the Surveying Authority also has a duty to investigate the witness evidence submitted and an Order can be made based upon witness evidence alone, i.e. Section 31(1) Highways Act 1981, deemed dedication of a public right of way where there is 20 years user by the public, as of right and without interruption, unless there is sufficient evidence that there was no intention by the landowner to dedicate a public right of way during that period. The application cannot simply be dismissed where there is no documentary evidence, the Survey Authority must consider **all** available evidence and failing to do so could lead the Applicant to challenge the Council's decision to refuse the application, by way of appeal to the Secretary of State, who may then direct the Surveying Authority to make an Order if there is sufficient evidence that a right of way can be reasonably alleged to subsist, or subsist on the balance of probabilities.

#### **Natural Environment and Rural Communities Act (NERCA) 2006:**

48. Mr and Mrs Peacop would: *"...be interested to understand the extent to which Wiltshire Council has given consideration the provisions the Natural Environment and Rural Communities Act 2006 which, amongst other things, has the objective of giving more certainty to people purchasing land."*
49. NERCA, as regards an application made under Section 53 of the Wildlife Act 1981, has not been considered in this case, where the evidence examined is not supportive of public vehicular rights over the way. Section 67(1) of NERCA has the effect of ending certain unrecorded public vehicular rights of way, (save for a number of exemptions), which would give landowners / prospective purchasers greater certainty regarding unrecorded public vehicular rights, but there is no affect upon the claiming of a public right on foot.

#### **Fence at Secret Field Prior to 2003:**

50. In making the Order based on a relevant user period of 1983 – 2003, i.e. the date on which a three strand barbed wire fence was erected across The Drove at "Secret Field", just south of the turn leading south-south-west (from Common Road), bringing public use of the way into question, Officers considered that there was insufficient evidence of a previous two strand

barbed wire fence at this location which may have brought public use into question, at an earlier date. However, following the making of the Order, further evidence regarding the presence of an earlier fence across the Drove at Secret Field, has been submitted by the previous landowner, Mrs S Cook, and her family:

*S Cook – “From 1989 to 2003 I helped my father with the cows at Cottage Farm.*

*The Drove from Common Road was blocked by a barbed wire stock fence at the back garden of Forest View otherwise the cows would have got out from Secret Field.*

*We visited my Granny (Marjorie Andrews) every Tuesday from 1989 (when I had my daughter [REDACTED]) until October 2006 (when my Granny went into a nursing home and after my son finished at Whiteparish Primary School). All my three children went to Whiteparish Primary School.*

*When my father retired in 2003, I took over the farm with my mother and we ran it together renting it out for horses.*

*In 2003 we replaced the 2-strand barbed wire fence at the corner of Secret Field and Forest View with a 3-strand barbed wire fence to stop teenagers who had started to climb through with their bicycles.*

*The developer who bought Secret Field from us in 2019 replaced the 3-strand barbed wire fence with a close board fence.”*

*J Cook – “We used to visit Great Granny’s house (Marjorie Andrews, Cottage Farm Bungalow, at the corner of Common Road and The Drove) every Tuesday – I can remember clearly from aged 8 (1997) until Great Granny went into a nursing home in October 2006.*

*We could walk down The Drove from Great Gran’s house behind people’s back gardens, but the path was blocked with a barbed wire fence after the last house Forest View.*

*I kept horses in Secret Field from 2003 to 2007 and the corner of Secret Field and The Drove was still blocked by a barbed wire fence otherwise the horses would have escaped.”*

*D Cook – “I, like my sister who is 2 years older than me, used to go to Great Granny’s house (Marjorie Andrews, Cottage Farm Bungalow, at the corner of Common Road and The Drove) every Tuesday after school from as early as I can remember (2001) until Great Gran went into a nursing home in October 2006. Sometimes I would go with friends from school, and we would pick blackberries.*

*The Drove was open from Common Road down past the back gardens of the houses, but the path was blocked with a barbed wire fence to keep the cows the other side at the junction of the cow field and the last house Forest View.”*

*M Jewell – “Marjorie and Leonard farmed Cottage Farm together from the 1950’s and took over from their parents John and Agnes.*



*I married Monica Andrews, Marjorie's daughter.*

*I did contract work on the farm up until 1989, at which point I took over from Leonard.*

*In my time from 1989 to 2003 the boundaries of the farm were stock fenced to keep the cows in, including the top of Secret Field at its junction with Forest View back garden and The Drove.*

*I sold my whole herd of approximately 235 cows in March 2003 and retired ( [REDACTED] ).*

*From March to October every year there were 30 or more heifers at Cottage Farm including Secret Field.*

*In my time not a single heifer escaped onto Common Road."*

*A Cook – "In 1979 I did my year practical work for Bryces Farms Ltd before going to Sparsholt Agricultural College.*

*As part of this work I assisted in contract hay making at Cottage Farm.*

*I clearly remember cutting turning and carting hay from these fields. I was driving a Fiat 780 tractor registration JCG 660S.*

*In all of my year from 01/09/1979 to 31/08/1980 the northeast corner of what is known as Secret Field was blocked with a 2-strand barbed wire stock fence so neither you nor cows could get through to access Common Road. Coming from Common Road on what is known as The Drove, you could access the rear garden gates of the houses, but your path was blocked immediately after the last gate to Forest View by the 2-strand barbed wire stock fence."*

*R Bowles – "I have worked alongside Alan Cook of Bryces Farm in many different roles since 1995. Throughout this period from 1995 to present as part of my job I have checked and maintained the fences at Cottage Farm, Whiteparish.*

*There has always been a stock fence across the corner of The Drove at the back garden of Forest View. Owners of the bordering houses can walk to their back garden gates from Common Road, but the route was always blocked after the last garden gate at Forest View.*

*In 2003 I replaced the two-strand barbed wire fence with a three strand barbed wire fence.*

*At no point did I need to repair the fence, it blocked the route and no cows ever got out from Secret Field to Common Road."*

51. The presence of the earlier fence is supported by other Objectors:

Mr M Richards on behalf of Zelda Investments Ltd:

*"In the main applicants (Patricia Woodruffe) testimony she features the 3-strand barbed wire fence blocking the proposed route. In law a barbed wire fence has never shown to operate as a style. In the previous statements upon which you based your decision, little reference was made to the fence that predated the 3-strand barbed wire fence, but it is erroneous for you to*

*conclude that there wasn't a fence. What is your sufficient evidence that there wasn't a fence which was replaced by the 3 strand barbed wire fence?...Secret Field has operated as part of a dairy farm for over 50 years with livestock contained within Secret Field by a 2 strand barbed wire fence which was only upgraded to a 3 strand when the cattle were retired with a generational change of farmer replaced the cows with horses (which are not as curious as cows so kids from the back gardens area then started to climb through with their bikes...If you would like to see the farm accounts they are available, I have studied the ones from 1985 to 1998. If you would like to see the student project done on the farm in 1989 by Victoria Pratt for Sparshalt College, then please ask. The workings of the farm are very clear, including the well-known (and nationally recognised) breeding programme for Hampshire Cattle Breeders of which Secret Field formed an integral part. The Jewell/Cook family have farmed it without break since 1929. When you effectively say there was no fence to keep the cows in Secret Field you are effectively telling them that they farmed without stock fencing, i.e., neglected a standard part of farming which under the 1971 Animals Act they would have then been culpable for every cow that escaped onto Common Road. But obviously there is not a single occurrence recorded."*

Mr and Mrs Davies:

*"...we confidently believe there was a hawthorn hedge and fence in place 1983 to 2003 behind Forest View across the Drove to contain the Heifers in the lower Drove, public access through that section was trespass, the fence divided the upper and lower Drove to keep livestock in secret field / Lower Drove, walking any path especially back in time when memories are strained does not mean it was done so legally. We know for an indisputable fact that pregnant heifers were in Secret field and The Drove June to September 1989, it [is] impossible that they were not fence contained..."*

*There was a hedge with a barbed wire fence across the dove 1983 to 2003, I have removed the remnants of it from the Ash tree to protect our dogs..."*  
(Photograph of one end of its connection showing two rings/scars in the tree at 2 and 4 foot levels, where the tree has grown around the wire for decades since, contrasting with photo of fallen ash having 3 scars/rings where Mrs Cook and her husband installed 3 barbed wire strand upgrade, please see Mr and Mrs Davies correspondence dated 22 June 2022 at **Appendix F**).

*"...hedge in the drove with integral wire fence went diagonally from the edge of Forest View hedge end to the right corner apex of the drove approximately 3 to 4 metres down where you see the bend..."*

*The farmer has a legal duty under the Animals Act of 1971 to keep animals contained and were any to escape to Common Road the penalties would*

*have been very large, there was a locked gate at the exit to CL82 Common Land but no cows were ever in the upper section of the drove, the farmer knew well that householders were legally allowed to use it and kept his cows securely contained by a hedge and fence.”*

52. The supporters’ evidence of the 2-strand barbed wire fence is less clear. Those whose use ceased prior to 2003, (i.e., when the 3-strand barbed wire fence was installed), who would not be confusing the 2 fences, provide the following evidence, (please see plan at **Appendix A** for reference points X and B):

C Bicknell – use ceased 1990 - no stiles, gates, other barriers

B Kennard – use ceased 1987 – *“possible small stile in hedge not far from our back gate as on a few occasions we entered the top field alongside The Drove to pick blackberries but I cannot remember its actual location or if there was one, we may have entered the field via the large gate to the top cow field”* - (stile or gate on south side of The Drove to access the adjacent field – no mention of fence across the width of The Drove).

*“I believe also a gate at the bottom end of The Drove where it joined the bottom cow field”* (at southern end).

N Harrison – use ceased 2000 – No stiles, no gates, hedge at X but did not prevent use.

C Woodruffe – use ceased 1995 when moved away (now only occasional use whilst visiting since 1995) – No gates or stiles – *“possibly a strand of wire occasionally put across at SU2444 2292 to deter the livestock from wandering up the drove at point B”* (not point X).

L Harrison – use ceased 2001 - no gates, no stiles, no barriers.

Other witnesses whose use continued after 2003 provided the following details:

Pat and Brian Woodruffe – *“There was no fence prior to 2003. It was put in when the field was grazed by horses, after Lenard and Marjorie Andrews ceased to actively manage the land.”*

Darren Stiles – Does not recall pre-2003 fence.

John Hall – *“As we only moved to the village in 2007, I can’t comment personally on any previous fencing apart from saying that various more established residents including some since departed have told me that the drove has been walkable over many years.”*

Pat Hudson – *“I don’t ever recall a three-strand barbed wire fence at X. In the time I remember there was one strand of barbed wire around which someone had kindly fixed some plastic piping making it easy to step over.”*

Elvin Klapp – *“Not sure.”*

David Wise – *“I don’t recall a previous fence.”*

Mr and Mrs Karmy – *“We don’t remember any sort of fence in the early years prior to 2003, but in later years someone put in some sort of fence because of fears that horses might otherwise get through the natural barriers and escape.”* (This may be a reference to the 2003 fence where it is understood that horses were kept on the land from around 2003).

*“We think that one could push through the fences and hedges at the point which you describe, to obtain access. Or you could turn and follow the Drove itself, but that became heavily obstructed by bushes and brambles in later years. It is difficult to date when this happened.”*

53. Additionally, Mr P Hudson in her witness evidence form, states that her use of the path began in 1984 and she suggests that there has always been a wire fence, which supports the Cook family’s additional comments that there has always been a fence. Whilst there is no photographic evidence of the pre-2003 fence in place on the land, the Cook family provide compelling evidence of the presence of a fence across The Drove between 1979-1980 and then 1989 to 2003 when it was upgraded, (the likelihood being that the presence of the fence was continuous from 1980-1989, the land having been used to graze cattle as evidenced by the Cook family, who were clearly frequent visitors to the land, S Cook; M Jewell; A Cook and R Bowles having worked on the land):
- S Cook – Visiting Grandmother (Marjorie) at Cottage Farm Bungalow (Common Road), since 1989 and then taking over the running of the farm on her father’s retirement in 2003, until the sale of the land to Zelda Investments Ltd in 2019.
  - M Jewell – Mrs Cooks father, farmed the land from 1989 (before 1989 contract work on the land and then from 1989 took over farming the land from Leonard Andrews), until his retirement in 2003.
  - A Cook – Mrs Cook’s husband, worked the land from 1979 – 1980 and then from 2003 with Mrs Cook.
  - R Bowles – Worked with Mr A Cook on the land from 1995 to present.
54. This additional evidence regarding the presence of a fence prior to 2003, may affect: i) the date of bringing into question of public use of The Drove, ii) public user during the identified user period 1983 - 2003, based upon which the order is made and iii) use of the route as of right, i.e., without force.
55. It is possible to consider an alternative user period prior to 1979, (the earliest reference to the 2-strand fence), i.e., 1959 - 1979, however, as the user evidence chart records, (Appendix 8 of decision report at **Appendix D**), there is evidence from only 6 users to support use prior to 1979:
- P Woodruffe - use 1969 – 2020
  - B Woodruffe – use early 1970’s - 2020
  - C Bicknell – use 1972 - 1990
  - B Kennard – use 1978 - 1987
  - Mr and Mrs B Rutter – use 1962 - 2020
- With the earliest user period commencing in 1962, there is no evidence of a full 20-year user period before 1979, the date of bringing into question of public use of the way, as the earliest reference to the 2-strand fence across the route at Secret Field.
56. The presence of the fence would suggest users engaging in force to continue on the Drove by climbing over the 2-strand barbed wire fence located at Secret Field, which is not qualifying user “as of right”, after 1979.

57. There is dispute in the evidence regarding the presence of a fence prior to 2003 and where the Order is made only on a reasonable allegation, Officers would suggest that as a result of the additional evidence submitted on this point following the making of the Order, the balance of probabilities test applicable at the confirmation of an Order, is finely balanced and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

**No Junction of “The Drove” with Footpath no.6 Whiteparish:**

58. The DMMO application plan, (please see **Appendix A**) records the route junctioning with Footpath no.6 Whiteparish and users claim that they have used the Drove and connected with path no.6, which is reflected in the Order as made, (please see **Appendix E**); however, the Objectors dispute that this has ever been the case:

*Mr and Mrs Peacop – “Whatever has been loosely referred to as ‘The Drove’ and on the route which the footpath is now proposed, has never (demonstrably on the evidence on which The Order is predicated) joined with anything, it has never had a ‘junction with Path no.6 Whiteparish’...” This is also listed by Mr and Mrs Peacop as an error within the Order: “The Order is, therefore, incorrect and should be dismissed on this basis.”*

*Mr M Richards on behalf of Zelda Investments Ltd – “Equally erroneous, no applicant states that there was ever a connection through to FP6 at the southern end of the applicant’s route – so why are you filling in the blanks by assuming this was the case let alone considering that there was a route uninterrupted, without force, for 20 years? Isn’t it rather clear that this was simply the corner of a field with barbed wire fence and thick hedge where livestock, particularly pregnant cows and young calves, gathered under the trees for more protection. This was an enclosed protected area, the opposite of a way through to a public footpath!*

*The main applicant Patricia Woodruffe (on her annual visit) states: ‘it is recognised that, to link the Drove to WHT6 would require some clearance of vegetation’...*

*The main applicant’s husband Brian Woodruffe states: ‘link to FP6 through hedge required’*

*So how is it that when the main applicant and her husband clearly state that there was no link to FP6 and that one would be desirable in order to not use the top of FP6 as it ‘goes through a private garden. The owners are amenable, but I would prefer not to use it’...how do you get from this to any presumption at all that people have been passing through the hedge/fence to join FP6 for 20 years, uninterrupted and without force?”*

Mr and Mrs Davies comment that the Wiltshire County Council, Clerks Office, Planning Appeal Map - Land at rear of Common Road and Clay Street, Whiteparish – Residential Development and Construction of Vehicular Access

1972, shows: “Gates existed at both ends of the Drove, the Upper gates that join the Common land CL82 before Common Road remained until the late 1990’s.”

“We moved to [REDACTED] at the end of January with a fairly good understanding of The Drove. On a practical basis the “need” to access beyond High View south on foot was always limited and impractical. The Drove itself (Lower or entire) as a footpath is and always was a path to nowhere, the lower section Forest View to end is 150 metres there and 150 metres back, 2 solitary applications mention using it to join SU24442292 (which is not the Drove but in Rough Field – 532/536) at Footpath 6, this requires going through a fence and hedge for access – obvious and blatant trespass.”

“The Drove does not and never has connected to footpath 6, (Point B in the MR1 is very misleading) you can go to the end and back which is not OS SU24442292 it is where it joins area 489 that is still part of cottage farm land, the hedge on rough field has many decades of growth and an integral wire fence that was there long before 1983.” 2002 Google Earth image – Mr and Mrs Davies claim that this shows nearly the same extent of growth at the end of the Drove as in 2021, please see correspondence dated 22 June 2022 at **Appendix F**). Looking at the two photographs, Officers would disagree on this point and suggest that the 2002 photograph appears to show a gap in the vegetation or less dense vegetation at the southern end of “The Drove”, than that on either side of it. Although more overgrowth is shown in the 2021 photograph, there still appears to be less vegetation at the southern end of The Drove, as can be seen in the aerial photographs attached at **Appendix C**, particularly that dated 2020/21. However, it is not clear from these photographs whether or not Footpath 6 is accessible from the southern end of The Drove, certainly when Officers visited in 2021, the junction was overgrown and inaccessible.

“The Drove does not and never has had a junction with footpath 6, Pat Woodruffe in her statement suggests it would be nice to have one, but the south-south-westerly part of the drove goes to the end stops and goes no further. (Other than back the way you came)  
I would be grateful if you would correct the order, please as it is one of the key factors for ourselves.”

As shown on the OS plan from the Farm Deeds included with Mr Davies’ correspondence dated 13<sup>th</sup> June 2022 (**Appendix F**), “Area 507 (.543 acres) is the Drove, Area 489 is still farmland, it was never part of the Drove, and the Drove has never joined footpath 6 in any capacity ever.”

59. The objections provide additional evidence regarding the junction of The Drove, with Footpath no.6. Certainly, when Officers made a site inspection in 2021, it was not possible to connect with Footpath no.6 from the Drove due to

overgrowth and a thick hedge. Mr and Mrs Davies suggest that there was a fence within the hedge, (the hedge is now too overgrown to see within), Mr Stiles and Mr C Woodruffe also mention barbed wire at point B and Mrs Kennard mentions a gate at this location, supported by the Wiltshire County Council, Clerks Office, Planning Appeal Map – Land at rear of Common Road and Clay Street, Whiteparish – Residential Development and Construction of Vehicular Access 1972, which appears to show a gate at the southern end of The Drove. Only the 6" OS map dated 1885 records a gap at the southern end of the claimed route. The 25" 1876 OS map appears to show a hedge across the southern end and the 1901 and 1926 OS 25" maps record a solid boundary at the southern end of the path and the applicant confirms in the application: *"Securing the Drove as a public footpath would offer both improved short walks and also longer walks over and beyond the A36, linking footpaths at Earldoms and hence to Langley Wood National Nature Reserve. It is recognised that, to link the Drove to WHIT6 would require some clearance of vegetation."* and in her evidence form: *"Link to FP6 through hedge required"*; however, 21 witnesses confirm that the route junctions with Footpath no.6, so the evidence of connections with Footpath no.6 is contradictory and disputed. Officers considered overall that the evidence was sufficient to make an Order on the weaker reasonably alleged test, however, the evidence regarding the connection of "The Drove" with Footpath no.6, is disputed in the objections received following the making of the Order and Officers consider that the more stringent balance of probabilities test, applicable at the confirmation of an Order, is finely balanced and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry. This is relevant where it is not possible to claim a cul-de-sac footpath unless there is place of popular resort at the end of the footpath which the public would legitimately wish to reach and return by the same route, such as a view. In this case there is no evidence of a "place of popular resort" at the termination point B on the footpath, which the public would legitimately wish to reach.

#### **Landowner Intention:**

60. At Section 31(1) of the Highways Act 1980, a right of way may be deemed to be dedicated where there is use by the public, as of right and without interruption for a period of 20 years or more, unless there is sufficient evidence that there was no intention during that period to dedicate it. Mr and Mrs Davies comment: *"Your report conclusion bases a lot on the fact that the farmer in 1983 – 2003 was aware of applicants presence in the Drove...Witnesses 3,5,9 and 10 all have legal access in their deeds to the upper Drove, they are the only witnesses in this list who mention talking / conversing with the farmer and why would they not? Driving cows up and down the Drove (which Mrs Andrews said did not happen) would be a danger to the public and prohibited by the 1971 animals act, if it did happen which was very unwise it provides no evidence of a public right of way, it potentially*

would have meant a milking herd of cows were free to roam the upper drove which was never the case...Witnesses 11 and 12 have made “an assumption” – that is not evidence, Witness 14 had legal access to the upper drove so would expect to see the farmer and visa versa, witness 17 might well be referring to the upper section and Mr Andrews (confirmed appropriately as the **LANDOWNER**), cattle were free to roam / herd in the lower section as they were kept in by a fence / barrier at Forest View, Witness 19 passed the time of day cordially with the farmer, but states she only used the Drove occasionally. **Must have been a farmer with very few duties**, Witness 22 recalls the “2 strand wire fence” but also refers to “Driving my tractor down it – every few months 1987-2020” – extremely difficult to believe especially when Mr Harrison in his statement states that walking it (which he has the right to part of it) has been difficult the **last 25 years due [to] poor maintenance and blockage**, Witness 24 (who also remembers the fence) again make an assumption which is not evidence, Witness 26 makes reference to the local stables and a leased field – they were not the landowners and have no connection to this application, none have come forward to present evidence.”

61. Mr and Mrs Davies suggest that the discussions with the landowners may have taken place on the upper section of The Drove, over which some of the witnesses had a private right of way, and where the landowner would have expected to see these witnesses using the path, which is of course very feasible. There is insufficient evidence provided regarding the incidents of discussions with the landowner which may have led members of the public to consider that the landowner was aware of use and acquiesced in that use and there is still little evidence of the landowners non-intention to dedicate additional rights of way, save for the pre-2003 fence at Secret Field which the Cook family provide additional evidence for, being present in 1979, for the purposes of keeping stock secure. There is no evidence of notices being placed on site to deter public use at any time and there is no deposit made by the landowners under Section 31(6) of the Highways Act 1980, which would serve to negative the landowner’s intention to dedicate additional public rights of way over the land.
62. Whilst the evidence of the landowner’s non-intention to dedicate additional rights over the way, was sufficient for the making of an Order on the reasonably alleged test, it is considered that the evidence is finely balanced in the balance of probabilities test, which is applicable at the confirmation of an Order, and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

#### **Use of “The Drove” As of Right:**

63. In order for an application to be successful, based on user evidence, qualifying user must be “as of right”, i.e., without force, without secrecy and without permission. Mr T Rudman has lived in Whiteparish most of his life,



since 1962: *"I know the area very well and was a very explorative child, as were my friends, in the 1970s/80s.*

*I remember on many occasions seemingly moving freely through numerous fields, irrespective of whether we were allowed. We would have frequently entered private farmland, perhaps scaling a gate or fence, in the full awareness that we would not have an assumed right of way or access.*

*...with friends I would have ventured into the Drove/Secret Field, knowing full well that this was private land. Indeed as well as breaching gates/fences to enter these areas from time to time we would have been challenged by the farmer, and asked to leave."*

64. Mr and Mrs Davies recall similar memories, *"As children we would daily cross fences and hedges to access fields and farms the majority with no stiles or similar. With friends for over a decade we visited fields filled with cows, farm buildings, tracks, barns, and lots more "always" with the conscious knowledge that having crossed unmarked fences we were knowingly "trespassing". ...I myself crossed fruit orchards (Blackmore estates) unchallenged, we played with farm machinery unchallenged, we frequently transited many separate fields with rough paths through fences, or hedges, we were very seldom told or advised to "Move along" – farmers or their staff had better things to do back then with more pressing obligations than policing their lands."*

*"We find your "Without Force" comment 10.46 to be in error, Mrs Cook made it quite clear that in 2003 the fence was "**Upgraded**" not "Erected" as part of a series of measures to deter local children on their bikes using secret field, are we really expected to believe the farmer would fit a barbed wire fence and wrap it for protection (kind of defeats the object of fitting BARBED wire really) its quite obvious looking at the pictures (below) that secret field would have been accessed far easier in 2003 than through the Drove (footpath 4 and 6 already there), Mrs Cook and her husband's actions were to cover all angles...you can clearly see local children would hardly have ridden their bicycles down a heavily overgrown Drove and made access through a hedge with its integral fence when they could come down Clay Street and footpath 4."*

65. Mr Rudman and Mr and Mrs Davies provide evidence that as children they trespassed onto farmland etc; however, it is true that all rights of way claims will begin with a period of trespass against the landowner. Certainly, the climbing of gates would not be user "as of right", where it is user "by force" and it is suggested in this case, through additional evidence of the 2-strand wire fence at Secret Field from 1979, that user after that date would not be qualifying user, as of right, where the public would be required to continue on the route by climbing over the fence. Evidence regarding the presence of a fence across the route before 2003 is conflicting and disputed and Officers consider that the more stringent balance of probabilities test applicable at the confirmation of an Order, is finely balanced and may only be resolved by

witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

### **Width Recorded in DMMO:**

66. The width of the path recorded in the DMMO as varying between 3 – 9 metres, is disputed by the Objectors. Mr and Mrs Peacop state: *“To be clear, up to ‘9 metres’ potentially takes the proposed footpath up to the eastern wall of [redacted] house, cutting right across [redacted] land and threatening the security and value of [redacted].”*

Mr M Richards, Zelda Investments Ltd: *“And a presumption of a path varying between 3m and 9m? How can you suggest any path at all let alone a variable width of great magnitude when there is no evidence to show any path existed at all through the hedge/fence at the southern boundary nor at the overgrown hedge/fence turn into Secret Field from the top section of The Drove by the rear gates to the houses. The path to the back gardens in front of the 2-strand fence was 0.3m wide at Westways. Secret Field was approximately 50m wide. When kids with bikes trespassed through a barbed wire fence how much did they use, 9m?! So where does a footpath width of 3m-9m emanate from?! Wishful preservation order for a type of terrain? Certainly not a footpath! However, when seen in the context of the applicants trying to be as obstructive as possible to a development you can understand that a large and varying width could be the most effective.”*

Mr and Mrs Davies – *“We see in your conclusion the issue of an order is “not” based on OS or historic documentary evidence. However, “The historical OS mapping and user evidence support a width varying between 3m and 9m to be recorded over the footpath, as shown on the proposed order plan at Appendix 10” being proposed for the Drove width. OS mapping of agricultural land and boundaries is notoriously inaccurate at close scale, boundaries themselves can actually be up to 2 metres wide. None of the submitted evidence suggests the width is 9 metres some suggesting it is a mere 1 metre. We would strongly question why a public right of way for a “Footpath” has to be wider than a two-lane highway, every single comment from residents states “access on foot”. **Why also would you support the OS mapping for a footpath that OS itself does not dedicate to be such.**”*

67. As Mr and Mrs Davies point out, and as concluded in the decision report at **Appendix D**, there is insufficient documentary evidence to support public rights over The Drove, however, OS mapping does consistently record a feature on the ground in the location of The Drove, (OS maps being topographical in nature). Therefore, whilst the OS mapping cannot on its own support public rights, it can support the width of the feature on the ground and assist in identifying an area available to the public and the width has been taken from OS mapping which consistently records the route, excluding that

section adjacent to Common Road, which is not recorded on OS mapping and where the Order width is taken from witness evidence of the “used” area. The Objectors present no other evidence to suggest an alternative route other than the user evidence, some of which suggests 1 metre, or 0.3 metres to the back gardens, as suggested by Mr M Richards; however, Officers considered that from the evidence of users giving varying widths over different parts of the path, it is very difficult to establish a median width from these values. Officers consider that the width of 1 metre in user evidence is a result of overgrowth and that the way may in fact be wider, many witnesses point to a varying width depending upon the vegetation growth, as witness 12 states “*I feel that it used to be wider*”. Additionally, in Secret Field, the avenue of trees which can be seen to exist still on the 2020/21 aerial photograph, (please see **Appendix C**), accords with the width of The Drove, as recorded in the OS mapping.

### **Other Objections:**

68. Objectors make further representations on the following points:
- No need for a Public Footpath – where there are suitable alternative paths available.
  - Vexatious Application – to disrupt planning and to preserve historic Drove.
  - Planning granted for the development of the new properties alongside The Drove – As the same Authority granting planning permission, Wiltshire Council should dismiss the DMMO application.
  - Negative impact on properties.
  - Costs in making and determining DMMO.
69. Once an application is made under Section 53 of the Wildlife and Countryside Act 1981 and evidence is brought to the attention of the Surveying Authority, it is the duty of the Authority to consider the evidence in order to determine the application. In the consideration of an application made under Section 53 of the Wildlife and Countryside Act 1981 to add a footpath to the definitive map and statement of public rights of way, the Surveying Authority, is not permitted to take into account the matters listed above, and the only valid objections are those which challenge the available evidence. The consideration of the Authority is limited to the available evidence and the correct recording of existing public rights, amending an error in the definitive map and statement. The Order does not seek to create a “new” footpath, but simply record a footpath which can be reasonably alleged to subsist, based on the available evidence.

## **Objections regarding procedural matters:**

### **Consultation:**

70. One of the landowners has raised concerns that they were not consulted on the proposals to add a footpath until the making of the Order, by letter dated 29 March 2022. At the initial consultation regarding the application in August 2020, they were not registered landowners. Given that the new properties were being built and sold throughout the application and order making process, Wiltshire Council has tried to ensure that new owners are added and consulted at each stage. All parties will now receive opportunity to make their representations to the Southern Area Planning Committee and then to the Planning Inspectorate in the Order determination process. It is therefore considered that landowners have not been prejudiced and have received / will receive opportunity to make their representations.

### **Errors in Order:**

71. The letter from Wiltshire Council, dated 29 March 2022, giving notice of the making of the Order, quotes the route of the footpath from its junction with Common Road, leading west-south-west for approximately **180 metres** and then south-south-west for approximately **180 metres**, which is inconsistent with the Order which refers to the path leading south-south-west for approximately 150 metres. The reference to the path leading south-south-west for approximately **180 metres** in the covering letter is a typing error and Officers offer apologies for any confusion which this may have caused. The route description contained in the Order enclosed with the letter is correct, i.e., leading from “...its junction with Common Road, Whiteparish, in a generally west-south-westerly direction for approximately 180 metres, before leading south-south-west for approximately 150 metres...”
72. “The Order does not use the latest Definitive Map - we have a more recent version in our Land Registry title deeds, so the Order has been made on the basis of the incorrect Map.” Where the area has been/is being developed, Officers have used the most up to date mapping available to Wiltshire Council at the time of making the Order. The base map used does not amend the effect of the Order despite later revisions to the OS base mapping.

### **Overview and Scrutiny Engagement**

73. Overview and Scrutiny Engagement is not required in this case. The Council must follow the statutory process which is set out under Section 53 of the Wildlife and Countryside Act 1981 and within The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, (Statutory Instruments 1993 No.12).

### **Safeguarding Considerations**

74. Considerations relating to safeguarding anyone affected by the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

### **Public Health Implications**

75. Considerations relating to the public health implications in the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

### **Corporate Procurement Implications**

76. Where an Order is forwarded to the Secretary of State for determination, there are a number of opportunities for expenditure to occur and these are considered at paragraphs 80 - 83 of this report.

### **Environmental and Climate Change Impact of the Proposal**

77. Considerations relating to the environmental or climate change impact of the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

### **Equalities Impact of the Proposal**

78. Considerations relating to the equalities impact of the making and confirmation of an Order under Section 53(2) of the Wildlife and Countryside Act 1981 are not considerations permitted within the Act. Any such Order must be made and confirmed based on the relevant evidence alone.

### **Risk Assessment**

79. Wiltshire Council has a duty to keep the definitive map and statement of public rights of way under continuous review and therefore there is no risk associated with the Council pursuing this duty correctly. Evidence has been brought to the Council's attention that there is an error in the definitive map and statement of public rights of way which ought to be investigated and it would be unreasonable for the Council not to seek to address this fact. If the Council fails to fulfil this duty, it is liable to complaints to the Ombudsman. Ultimately, a request for judicial review could be made with significant costs against the Council if it is found to have acted unlawfully.

## **Financial Implications**

80. The determination of DMMO applications and the modification of the definitive map and statement of public rights of way, accordingly, are statutory duties for the Council, therefore the costs of processing such Orders must be borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.
81. Where objections are received to the making of the Order and not withdrawn, the Order falls to be determined by the Secretary of State and cannot simply be withdrawn. The Order will now be determined by an independent Inspector appointed on behalf of the Secretary of State by written representations, local hearing or local public inquiry, each of which has a financial implication for the Council.
82. Where the case is determined by written representations, the cost to the Council is negligible. However, where a local hearing is held, the costs to the Council are estimated at £300-£900. A public inquiry could cost between £3,000 and £6,000, if Wiltshire Council supports the Order, (i.e., where legal representation is required by the Council) and around £300-£900 where the Council no longer supports the making of the Order, or it takes a neutral stance, (i.e., where no legal representation is required by the Council and the case is presented by the applicant).
83. Where the Council makes an Order which receives objections, it may potentially be liable to pay subsequent costs if the Planning Inspectorate finds that it has acted in an unreasonable manner at the public inquiry. However, costs awards of this nature are rare, but may be in the region of up to £10,000.

## **Legal Implications**

84. Where the Council no longer supports the making of the Order, clear evidential reasons for this must be given, as the applicant may seek judicial review of the Council if this decision is seen by them to be incorrect or unjust.
85. The determination of an Order which has received objections is made by the Secretary of State and not Wiltshire Council. Therefore, any challenge to that decision is against the Secretary of State, (although the Council, as the Surveying Authority would be considered by the Court to be "interested party" and named as such in any Court proceedings). Any legal challenge would be heard in the High Court and would need to show that the Inspector, (appointed on behalf of the Secretary of State to preside over the inquiry and take the decision), has misinterpreted the law or erred in the making of the decision. If the challenge is successful, the Court could quash the decision and in cases where an error has been found, return the case to the Secretary

of State for re-determination. The losing party would be responsible for the costs of the successful party.

### **Options Considered**

86. Members of the Committee should now consider the objections and representations received and the evidence as a whole, in order to determine whether or not Wiltshire Council continues to support the making of the Order under Section 53(2) of the Wildlife and Countryside Act 1981. The making of the Order has been objected to; therefore, the Order must now be submitted to the Secretary of State for decision and Members of the Committee are required to determine the Wiltshire Council recommendation to be attached to the Order when it is forwarded to the Secretary of State. The options available to members, having considered the available evidence and the objections and representations, are as follows:
- (i) Members may resolve that Wiltshire Council continues to support the making of the Order, based on consideration of the available evidence, in which case the Committee should recommend that the Order be confirmed without modification;
  - (ii) Members may resolve that Wiltshire Council continues to support the making of the Order with modification, based on consideration of the available evidence, in which case the Committee should recommend that the Order be confirmed with modification;
  - (iii) Members may resolve that Wiltshire Council no longer supports the making of the Order, based on consideration of the available evidence, in which case the Committee should recommend that the Order is not confirmed with clear evidential reasons given for this resolution;
  - (iv) Members may resolve to take a neutral stance, if the Committee considers on consideration of the available evidence that a Wiltshire Council recommendation cannot be attached to the Order when it is forwarded to the Secretary of State for determination.
87. Please note that all references to the available evidence above, include the submissions made at the formal objection period, (please see correspondence at **Appendix F**), as well as the evidence considered within the decision report dated 2 December 2021, (included at **Appendix D**). Members should note that the evidence in full is available to be viewed at Wiltshire Council's Offices, County Hall, Trowbridge.

## Reason for Proposal

88. The Order was correctly made where rights for the public on foot could be on a reasonably alleged to subsist; however, following the making of the Order, additional evidence has been submitted which would lead Officers to consider that the more stringent balance of probabilities test, i.e. that it is more likely than not that public rights exists, which is applicable at the confirmation of an Order, is finely balanced and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry and a Wiltshire Council recommendation to confirm the Order cannot be attached. It is therefore recommended that Wiltshire Council takes a neutral stance in this matter when the Order is forwarded to the Secretary of State for determination. In particular the evidence is disputed on the following points:

- The Cook family provide additional evidence regarding the fencing of Secret Field, across the width of The Drove, (2-strand wire fence), since at least 1979 and 1980 and then from 1989 to 2003, (this fencing is likely to have continued from 1980 to 1989 due to the use of Cottage Farm, including Secret Field, for the grazing of cattle during these years, as evidenced by the Cook family). There is no photographic evidence of the 2-strand wire fence pre-2003 provided, other than the photographs provided by Mr and Mrs Davies showing scars/rings on the ash trees where the wires were previously located, please see correspondence dated 22 June 2022 at **Appendix F**; however, the Cook family are frequent visitors to the area and provide compelling evidence regarding the earlier fence from 1979 at least.
  - It is possible to then consider a user period prior to 1979 if the date of bringing use into question is now the fencing of the route in 1979. There are 6 witnesses who claim to have used the route prior to 1979; however, the earliest use of these witnesses is that of Mr and Mrs B Rutter who have used the route from 1962. Therefore, a 20-year user period prior to 1979 cannot be shown, the user period in question being 1959 – 1979, (the earliest use commencing in 1962).
  - The earlier dates of the fence also affect user “as of right” where any user from 1979 onwards would involve climbing/stepping over the fence, which is use by force and not qualifying use by the public “as of right”.
- Additional testimony regarding there being no junction with Footpath no.6 Whiteparish, at the southern end of The Drove. It is not possible to claim a cul-de-sac footpath unless there is a place of popular resort at the end of the path which the public would legitimately wish to reach, such as a view, and on which the public would return by retracing their steps. There is no evidence that there is a place of popular resort which the public would



legitimately wish to reach at the southern end of the footpath and upon which a cul-de-sac footpath may be added.

- There is dispute regarding the level of user by the public. It is noted that one of the witnesses previously in support of the application has now removed support for the Order where he now considers the use of the path by his neighbours, to be with permission, i.e., they have a right within their property deeds to use The Drove to the rear of their properties leading east towards Common Road, which is not qualifying user “as of right”.
- The additional comments/evidence from supporters do not raise the evidence from reasonably alleged to balance of probabilities which is applicable at the confirmation of an Order. Whilst Mr Hall and Mrs Woodruffe are supportive of the application, on the making of the Order Mrs Woodruffe comments that “...it is important that the owners recognise the status of the drove as an ancient monument and, hopefully, they will be encouraged to maintain it as such.” In the making and confirmation of a DMMO, the Surveying Authority cannot take into consideration the preservation of the monument, this is not the purpose of a DMMO, which seeks to record existing public rights and to correct the definitive map and statement of public rights of way.

89. In taking a neutral stance to the determination of the Order, Wiltshire Council, as the Surveying Authority, seeks to facilitate the process for testing and making full use of the evidence. Additional weight may be attached to oral evidence given under public inquiry conditions where it is tested through the process of cross-examination.

### **Proposal**

90. That “The Wiltshire Council Whiteparish Path no.42 Definitive Map and Statement Modification Order 2022” be forwarded to the Secretary of State with a neutral stance from Wiltshire Council regarding the determination of the order, as it is not possible for Wiltshire Council to reach a decision where the evidence is finely balanced in the balance of probabilities test and may only be resolved by witnesses giving evidence and being cross-examined on their evidence at a public inquiry.

**Samantha Howell**

Director Highways and Transport

Report Author:

**Janice Green**

Senior Definitive Map Officer

**The following unpublished documents have been relied upon in the preparation of this report:**

None

**Appendices:**

**Appendix A** – Application and Initial Consultation Plan

**Appendix B** – Location Plan

**Appendix C** – Aerial Photographs

**Appendix D** – Decision Report 2 December 2021

**Appendix E** – “The Wiltshire Council Whiteparish Path no.42 Definitive Map and Statement Modification Order 2022”

**Appendix F** – Objections and Representations

Completed witness evidence forms x 27 are available to be viewed at the Offices of Rights of Way and Countryside, Wiltshire Council, County Hall, Bythesea Road, Trowbridge, Wiltshire, BA14 8JN or using the following link:

[DMMO Search - Rights Of Way - Wiltshire Council](#)