Wiltshire Council
Where everybody matters

AGENDA

Meeting: **Eastern Area Planning Committee**

Place: **Wessex Room, Corn Exchange, The Market Place, Devizes SN10 1HS**

Date: **Thursday 22 March 2018**

Time: **3.00 pm**

Please direct any enquiries on this Agenda to Kieran Elliott, of Democratic Services, County Hall, Bythesea Road, Trowbridge, direct line 01225 718504 or email kieran.elliott@wiltshire.gov.uk

Press enquiries to Communications on direct lines (01225) 713114/713115.

This Agenda and all the documents referred to within it are available on the Council's website at www.wiltshire.gov.uk

Membership:

Cllr Mark Connolly (Chairman)
Cllr Paul Oatway QPM (Vice-Chairman)
Cllr Ian Blair-Pilling
Cllr Stewart Dobson
Cllr Peter Evans
Cllr Nick Fogg MBE
Cllr Richard Gamble
Cllr James Sheppard

Substitutes:

Cllr Ernie Clark
Cllr Anna Cuthbert
Cllr George Jeans
Cllr Jerry Kunkler
Cllr Christopher Williams
Cllr Graham Wright

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Public Participation

Please see the agenda list on following pages for details of deadlines for submission of questions and statements for this meeting.

For extended details on meeting procedure, submission and scope of questions and other matters, please consult Part 4 of the council's constitution.

The full constitution can be found at this link.

For assistance on these and other matters please contact the officer named above for details

AGENDA

Part I

Items to be considered when the meeting is open to the public

1 **Apologies**

To receive any apologies or substitutions for the meeting.

2 **Minutes of the Previous Meeting** *(Pages 5 - 8)*

To approve and sign as a correct record the minutes of the meeting held on 30 November 2017.

3 **Declarations of Interest**

To receive any declarations of disclosable interests or dispensations granted by the Standards Committee.

4 **Chairman's Announcements**

To receive any announcements through the Chair.

5 **Public Participation**

The Council welcomes contributions from members of the public.

Statements
Members of the public who wish to speak either in favour or against an application or any other item on this agenda are asked to register by phone, email or in person no later than 2.50pm on the day of the meeting.

The rules on public participation in respect of planning applications are detailed in the Council's Planning Code of Good Practice. The Chairman will allow up to 3 speakers in favour and up to 3 speakers against an application and up to 3 speakers on any other item on this agenda. Each speaker will be given up to 3 minutes and invited to speak immediately prior to the item being considered.

Members of the public will have had the opportunity to make representations on the planning applications and to contact and lobby their local member and any other members of the planning committee prior to the meeting. Lobbying once the debate has started at the meeting is not permitted, including the circulation of new information, written or photographic which have not been verified by planning officers.

Questions

To receive any questions from members of the public or members of the Council received in accordance with the constitution which excludes, in particular, questions on non-determined planning applications.

Those wishing to ask questions are required to give notice of any such questions in writing to the officer named on the front of this agenda no later than 5pm on 15 March 2018 in order to be guaranteed of a written response**.** In order to receive a verbal response questions must be submitted no later than 5pm on 19 March 2018. Please contact the officer named on the front of this agenda for further advice. Questions may be asked without notice if the Chairman decides that the matter is urgent.

Details of any questions received will be circulated to Committee members prior to the meeting and made available at the meeting and on the Council's website.

6 **Planning Appeals and Updates** *(Pages 9 - 12)*

To receive details of the completed and pending appeals, and any other updates as appropriate.

7 **ARTICLE 4 DIRECTION: Land at Crookwood Farm, Crookwood Lane, Potterne, Wiltshire, SN10 QS** *(Pages 13 - 26)*

8 **WILDLIFE AND COUNTRYSIDE ACT 1981: The Wiltshire Council Parish of Pewsey Path No. 82 and Path No. 82A and the Parish of Milton Lilbourne Path No.34 and Path No. 34A Definitive Map and Statement Modification Order 2017** *(Pages 27 - 164)*

9 **COMMONS ACT 2006 SECTION 15(1) AND (2): Application to Register Land as a Town or Village Green - The Play Area in Morris Road/College Fields in the Baron Park/College Fields Residential Area, Marlborough** *(Pages 165 - 240)*

10 **Urgent items**

Any other items of business which, in the opinion of the Chairman, should be taken as a matter of urgency

Part II

Items during whose consideration it is recommended that the public should be excluded because of the likelihood that exempt information would be disclosed

EASTERN AREA PLANNING COMMITTEE

MINUTES OF THE EASTERN AREA PLANNING COMMITTEE MEETING HELD ON 30 NOVEMBER 2017 AT WESSEX ROOM, CORN EXCHANGE, THE MARKET PLACE, DEVIZES SN10 1HS.

Present:
Cllr Mark Connolly (Chairman), Cllr Paul Oatway QPM (Vice-Chairman), Cllr Ian Blair-Pilling, Cllr Stewart Dobson, Cllr Peter Evans, Cllr Richard Gamble and Cllr Christopher Williams (Substitute)

Also Present:
Cllr Jerry Kunkler

59. **Apologies**

Apologies for absence were received from Cllr Nick Fogg MBE and Cllr James Sheppard who was substituted by Cllr Christopher Williams.

60. **Minutes of the Previous Meeting**

Resolved:

To approve and sign the minutes of the previous meeting held on 2 November 2017 as a correct record.

61. **Declarations of Interest**

There were no declarations of interest made at the meeting.

62. **Chairman's Announcements**

There were no Chairman's announcements made at the meeting.

63. **Public Participation**

The rules on public participation were noted.

64. **Planning Appeals and Updates**

There were no planning appeals or updates reported at the meeting.

65. **Planning Applications**

The following planning applications were considered:

66. **17/09676/FUL: Kennet Valley C.E Aided Primary School, Lockeridge, Marlborough, Wiltshire, SN8 4EL**

Public Participation

Mr Malcolm Denyer, a local resident, spoke against the application
Ms Emma Russell, Headteacher, spoke in support of the application
Cllr David Woolley QC, representing Fyfield & West Overton Parish Council, spoke against the application

The Committee received a presentation from the Case Officer which set out the issues in respect of the application, with a recommendation that planning permission be granted.

Members then had the opportunity to ask technical questions after which they heard statements from members of the public as listed above, expressing their views regarding the planning application.

During discussion, Members considered that the proposed facility was very worthwhile but some felt that the location was wrong, it being close to adjoining properties and therefore causing nuisance to neighbours. However, it was pointed out that the school and its grounds were secured and locked during non school hours and therefore it was unlikely that nuisance would be caused. It was requested that the school limit the hours of use to 09.00 – 16.30 on school days only to minimise disturbance to neighbours.

On the proposal of Cllr Christopher Williams which was seconded by Cllr Ian Blair-Pilling,

Resolved:

To approve the application, subject to the following informative:-

INFORMATIVE TO APPLICANT:
The development has been approved in accordance with the following plans:

Drg Title: Location and Block Plan. Drg No: 3364-02. Rev: A.
Drg Title: Plan, Elevation and Photograph. Drg No: 3364-01. Rev: A. Received: 15/11/2017.

The school is requested to respect the privacy of the occupiers of neighbouring properties and to incorporate mitigation measures such as the use of rubber floor matting, additional planting and time limits on usage (between 9:00 and 16:30 on school days only).

67. **17/06803/FUL: Land to the Rear Of 5 London House, Market Place, Pewsey, Wiltshire, SN9 5AA**

Public Participation

Cllr Peter Deck, representing Pewsey Parish Council, spoke against the proposal.

The Committee received a presentation from the Case Officer which set out the main issues in respect of the application, with a recommendation that planning permission be granted, subject to conditions.

Members then had the opportunity to ask technical questions after which they heard a statement from a member of the public as detailed above, expressing the views of Pewsey Parish Council regarding the planning application.

Members then heard the views of Cllr Jerry Kunkler, the local Member, who stated that he concurred with the concerns of the Parish Council regarding disabled access to the proposed building and lack of car parking provision.

During discussion Members agreed with these concerns and furthermore expressed disquiet at the lack of suitable fire exits and stressed the need for suitably lit access to the building from the main road. Some Members also considered that the north-east corner of the construction would be so close to the adjoining property that its light would be adversely affected.

On the proposal of Cllr Stewart Dobson, which was seconded by Cllr Christopher Williams,

Resolved:

To refuse planning permission for the following reasons:-

The proposed dwelling would have restricted access arrangements, namely a narrow pedestrian passageway with stairs to navigate. It would therefore fail to provide safe and suitable access for pedestrians and vehicles, which would be detrimental to the reasonable living conditions of future occupiers of the dwelling. As such, the proposal would be contrary to Wiltshire Core Strategy Core Policy 57 point vii, which requires appropriate levels of amenity to be achievable within the development itself, to point ix which requires development to take account of the needs of potential occupants, through planning for diversity and adaptability and to point xi, which seeks to ensure the public realm, including new roads and other rights of way, are designed to create places of character which are legible, safe and accessible. Furthermore, the proposal is contrary to Paragraph 32 of the National Planning Policy Framework which requires that a safe and suitable access to the site is achievable for all people.

68. **Urgent items**

There were no items of urgent business.

(Duration of meeting: 3.00 pm - 4.30 pm)

The Officer who has produced these minutes is Roger Bishton of Democratic Services, direct line 01225 713035, e-mail roger.bishton@wiltshire.gov.uk

Press enquiries to Communications, direct line (01225) 713114/713115

Wiltshire Council
Eastern Area Planning Committee
22 March 2018

Planning Appeals Received between 20/10/2017 and 09/03/2018

Application No	Site Location	Parish	Proposal	DEL or COMM	Appeal Type	Officer Recommend	Appeal Start Date	Overturn at Cttee
16/10907/OUT	Land at Empress Way Ludgershall, Wiltshire	LUDGERSHALL	Outline application for up to 269 dwellings (Use Class C3), 2-form entry primary school, highways including extension to Empress Way, green infrastructure incl open space and landscaping, infrastructure, drainage, utilities and engineering works - External Access from Empress Way not reserved.	DEL	Hearing	Refuse	16/11/2017	No
17/01459/FUL	Land to the South West of Bridge House Cottage All Cannings, Devizes Wiltshire, SN10 3NR	ALL CANNINGS	Erection of 4 dwellings with garaging and access.	DEL	Written Representations	Refuse	21/12/2017	No
17/04174/FUL	7 The Keep, London Road, Devizes SN10 2GG	BISHOPS CANNINGS	Retrospective application for fence around perimeter of garden to ground floor flat (7 The Keep) and for shed within garden.	DEL	Written Representations	Refuse	21/12/2017	No
17/05008/FUL	Lovelock Cottage Pewsey, Wiltshire SN9 5NB	MILTON LILBOURNE	Conversion and extension of existing ancillary building to residential annexe	DEL	House Holder Appeal	Refuse	19/12/2017	No
17/05760/FUL	Aero View Manningford Abbots Pewsey, Wiltshire SN9 6JA	MANNINGFORD	To set back existing retaining wall and permitted 1 metre picket fence to achieve a 1 metre wide pedestrian refuge	DEL	Written Representations	Refuse	03/01/2018	No
17/07918/FUL	Cutting Hill House Cutting Hill, Hungerford RG17 0RN	SHALBOURNE	Two storey side extension to existing dwelling (pursuant to Permission No. 17/01595/FUL) and erection of three bay cartshed with room over and associated landscaping	DEL	House Holder Appeal	Refuse	01/03/2018	No
17/07964/LBC	Wall Cottage 16 The Green, Aldbourne SN8 2EN	ALDBOURNE	Replace windows to front of dwelling using hardwood thinlite double glazing units	DEL	Written Representations	Refuse	09/02/2018	No

Planning Appeals Decided between 20/10/2017 and 09/03/2018

Application No	Site Location	Parish	Proposal	DEL or COMM	Appeal Type	Officer Recommend	Appeal Decision	Decision Date	Costs Awarded?
16/01094/ENF	5 Spaines Great Bedwyn Marlborough, Wiltshire SN8 3LT	GREAT BEDWYN	Unauthorised construction of a building and associated timber decking within the curtilage of the property	DEL	Written Reps	-	Dismissed	05/03/2018	None
16/03260/FUL	Land adjacent to 19 Brook Street Great Bedwyn Wiltshire, SN8 3LZ	GREAT BEDWYN	Erection for 1 dwelling on land adjacent to 19 Brook Street	DEL	Written Reps	Refuse	Dismissed	18/12/2017	None
16/10907/OUT	Land at Empress Way Ludgershall Wiltshire	LUDGERSHALL	Outline application for up to 269 dwellings (Use Class C3), 2-form entry primary school, highways including extension to Empress Way, green infrastructure incl open space and landscaping, infrastructure, drainage, utilities and engineering works - External Access from Empress Way not reserved.	DEL	Hearing	Refuse	Dismissed	06/02/2018	Wiltshire Council applied for Costs - **REFUSED**
17/00571/FUL	Werg Gardens, Werg Mildenhall, Marlborough Wiltshire, SN8 2LY	MILDENHALL	Replacement dwelling (resubmission of 16/01672/FUL)	DEL	Written Reps	Refuse	Dismissed	15/12/2017	None
17/00680/FUL	Durley Gate, 10 Durley Marlborough, Wiltshire SN8 3AZ	BURBAGE	Stopping up of existing vehicular access onto highway and formation of new main access from existing access point. Demolition of existing ancillary garage/ stable and erection of ancillary self-contained residential annex. Erection of cartshed parking and store, with home office above (re-submission of 16/10300/FUL).	DEL	Written Reps	Refuse	Dismissed	01/12/2017	None
17/03525/FUL	9 Gason Hill Road Tidworth, Wiltshire SP9 7JX	TIDWORTH	Proposed 2 storey extension and porch	DEL	House Holder Appeal	Refuse	Dismissed	01/12/2017	None
17/05008/FUL	Lovelock Cottage Pewsey, Wiltshire SN9 5NB	MILTON LILBOURNE	Conversion and extension of existing ancillary building to residential annexe	DEL	House Holder Appeal	Refuse	Dismissed	24/01/2017	None
17/05760/FUL	Aero View Manningford Abbots Pewsey, Wiltshire SN9 6JA	MANNINGFORD	To set back existing retaining wall and permitted 1 metre picket fence to achieve a 1 metre wide pedestrian refuge	DEL	Written Reps	Refuse	Allowed with Conditions	01/03/2018	Appellant applied for Costs - **REFUSED**

Information Report from the Head of Service for Development Management – Mike Willmott

The legal duty to state the reasons for making decisions on planning applications

A recent Court case (Dover District Council v CPRE Kent – December 2017) has set out more clearly the need for Councils to give reasons for their decisions when making planning decisions. Whilst this has been well known in relation to refusals of planning permission, the judgment adds more clarity as to what is required when decisions are taken to approve applications, and particularly when the decision is to approve an application against officer recommendation. This note looks at the implications of that court decision.

1. Refusal of applications and the addition of conditions

It has long been the case that local planning authorities must give reasons for refusing permission or imposing conditions. This is because there is a statutory right of appeal against the refusal or the imposition of conditions. Article 35(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 states that the authority in their decision notice must 'state clearly and precisely their full reasons'.

Members will be aware that in both delegated and committee reports, reasons for refusal are clearly set out by officers, and where members wish to refuse an application against officer recommendation, officers will prompt them for 'clear and precise' planning reasons. There is nothing new in this aspect. Members will also be aware that when officers are issuing delegated approvals, or recommending applications to committee for approval, the reasons for any conditions to be attached are identified in the decision notice or committee report.

2. Approval of planning applications

In relation to delegated decisions, there is a duty to produce a written record of the decision 'along with the reasons for that decision' and 'details of alternative options, if any, considered or rejected' (regulation 7, Openness of Local Government Bodies Regulations 2014). The Council complies with this requirement in relation to planning applications by issuing a decision notice and preparing a separate delegated report. Both of these are then uploaded to the Council's web site so that any interested person can discover both the decision on the application and the reasons that the decision has been made. The judgment re-affirms that what is required is an adequate explanation of the ultimate decision.

In relation to committee decisions, where an application is recommended for approval by officers, the judgment makes it clear that if the recommendation is accepted by members, no further reasons are normally needed, as the Planning Officer's Report will set out the relevant background material and policies before making a reasoned conclusion and it will be clear what has been decided and why.

The Judgment breaks new ground by providing greater clarity on what is required in the circumstances where members of a planning committee choose to grant planning permission when this has not been the course recommended by officers in the Planning Officers Report.

In short, the Judgment makes it clear that there is a principle of 'fairness' that needs to be applied, so that those who may be opposed to the decision can understand the planning reasons why members have arrived at their decision. There is no question that members are of course entitled to depart from their officers recommendation for good reasons, but the judgment makes clear that these reasons need to be 'capable of articulation and open to public scrutiny'. The Judgment cites an extract from 'The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) as giving the following 'useful advice':

'Do make sure if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion/decision. These reasons must be given prior to the vote and recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge'

A further paragraph of the Code is cited that offers the following advice:

'Do come to your decision only after due consideration of all the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse'

The underlying purpose of the judgment is to ensure that members can demonstrate that when granting permission they have properly understood the key issues and reached a rational conclusion on them on relevant planning grounds. The Judgment notes that this is particularly important in circumstances where they are doing so in the face of substantial public opposition and against the advice of officers for projects involving major departures from the development plan or other policies of recognised importance. This enables those opposing the decision to understand how members have arrived at their decision.

3. Practical Implications of the Judgment

The judgment re-affirms that the Council's existing practices and procedures are suitable to meet the legal duties imposed on it in relation to decision making on planning applications. The two key points are that where significant new information is provided shortly before a decision is due to be made, it is appropriate for members to ask for it to be explained, or if they consider that more time is required for themselves or officers to assess and understand it, to consider deferring a decision to provide suitable time. Secondly, when approving applications against officer recommendation, particularly those that are in sensitive areas or are controversial, the reasons why members consider that the harm identified can either be suitably mitigated or the reasons why a departure from policy is justified must be explained and recorded to demonstrate to those opposing the development how the Council has reached a rational conclusion. Members need to engage with the recommendations of the officer and explain the reasons for departure from those recommendations. If no rational explanation on planning grounds is recorded, any such decision could be at risk of challenge in the Courts.

Mike Wilmott

Head of Development Management

Wiltshire Council

Eastern Area Planning Committee

22 March 2018

Subject: Article 4 Direction
At: Land at Crookwood Farm, Crookwood Lane, Potterne, Wiltshire, SN10 5QS

1 Purpose of Report

1.1 To consider the making of a Direction under Article 4 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended) (An "Article 4 Direction") to remove 'permitted development' rights for the above Land, as outlined in red on the Location Plan at Appendix 1, under Part 4, Class B (Temporary Use of Land) of Schedule 2.

1.2 Having regard to all relevant considerations, the recommendation is that a 'non immediate' Article 4 Direction is made.

2. Background

2.1 The Land, comprising approx. 5.3 ha of mainly open field, is located between Potterne and Urchfont in the countryside. To its south-west side the Land adjoins a bridleway (URCH34) which connects with Crookwood Lane (and Stroud Lane), ('C'-classifications) approximately 1km to the north and a by-way (URCH34/EAST4) approximately 0.6km to the south. The bridleway is also a farm track providing 'tractor' access to fields along its route, and vehicular access to the Land is only really possible via it. Crookwood Lane is a typical rural lane, with single width and double width sections, linking Potterne (via the A360 at Potterne Wick) and Urchfont. To the immediate south-east of the Land is a railway line in a cutting. Beyond this and on all sides are further fields or woodland. Ground levels vary across the Land, although rising generally from the north-west side to the south-east side.

2.2 The Land's current use is agriculture (livestock grazing) forming part of Crookwood Farm, although in 2017 it was used temporarily for two unrelated 'motocross' motor-cycle racing events on two separate weekends. With this temporary use there was related overnight camping, catering, etc., and some operational development – notably, the formation of earth mounds for jumps along the course of the temporary grass/earth race track formed on the Land, and the laying of stone/'hoggin'-type material on the surface of the bridleway to provide a more useable vehicular access from Crookwood Lane.

3. 'Permitted Development' entitlement

3.1 Under the terms of Part 4, Class B of the Town and Country Planning (General Permitted Development) Order 2015 (as amended), the following is 'permitted development' (that is, permitted by the Order and so not requiring planning permission from the local planning authority):

> *The use of any land for any purpose for not more than 28 days in total in any calendar year, of which not more than 14 days in total may be for the purposes of —*

(a) the holding of a market;
(b) motor car and motorcycle racing including trials of speed, and practising for these activities,

and the provision on the land of any moveable structure for the purposes of the permitted use.

The entitlement is subject to conditions set out in the Order, although these are not relevant to this case.

4. Recent History

4.1 In July 2017 complaints were received from local residents referring to works taking place on the Land to form a grass/earth motor cycle racetrack, this prior to a motocross event taking place place in mid-August. This event was Round 6 of the 'MX Nationals' series, with the 'Crookwood Motorparc' to be used in place of another track near Swindon.

4.2 When approached by the Planning Enforcement Officer the landowner advised that the Land would be used in accordance with the permitted development entitlement referred to above - that is, for temporary *motorcycle racing including trials of speed and practising for these activities* for no more than 14 days in any calendar year. At all other times the Land would be used for agricultural purposes – specifically, the grazing of livestock.

4.3 In isolation the earthworks on the Land – to form the jumps along the course of the racetrack – amount to 'engineering operations' and so require planning permission for this reason. This separate requirement does not affect the permitted development entitlement under Part 4. An application has been made, and is referred to in Section 5 of this report below.

4.4 Prior to the mid-August event taking place a 'briefing note' was circulated by Wiltshire Council to all local Parish Council's setting out what was known at that time. The note was informed by information provided by the event organiser and relevant Wiltshire Council Services. Of note in this briefing note are the following:

- The event organiser anticipated c. 1,000 attendees at the event, of which c. 250 would be motocross riders. The event organiser had certification from relevant bodies which oversee motor sport events; this certification is subject to conditions requiring compliance with other legislation, including the Motor Vehicles (Off-Road Events) Regulations 1995.
- Wiltshire Council Highways had received an informal 'traffic management plan' from the event organiser which provided some assurance that the organiser was experienced in event and traffic management, and that marshals would be in place to direct traffic and provide signage.
- Wiltshire Council Rights of Way had no immediate issues regarding the re-surfacing works to the bridleway, which to all intents and purposes had improved it. Any concerns over potential 'illegal' use of the bridleway would be a matter for Rights of Way to separately address.
- Wiltshire Council Public Protection referred to a motorsport Code of Practice for managing noise at motocross and grass-track events. Notwithstanding the potential for noise generation, the code refers to between 6 and 10 events per

annum on single days and with minimum 4 week breaks in-between being potentially acceptable in any event.

The event took place, with monitoring by Wiltshire Council. The event organiser used marshals and signs to manage traffic. After the event the Land was inspected by a Planning Enforcement Officer; all paraphernalia associated with the motocross activities had been removed and livestock returned to the Land.

4.5 After the event some further complaints were received from third parties referring to issues arising including noise, traffic inconvenience and incompatibility with another event taking place in the locality.

4.6 On 17 September the event organiser notified Wiltshire Council of a second planned motocross event, to be held over the weekend of 23 & 24 September. This event was for the 'Severn Valley Schoolboy Scramble Club', with 200 riders anticipated. Although the prior notice was short, the Council actioned formal monitoring of this event. The outcomes from the monitoring of the second event are summarised as follows:

- Wiltshire Council Highways local division officers observed marshalling and a one way traffic system in place. They received no complaints directly in relation to highway safety matters.
- Wiltshire Council Public Protection witnessed noise from motor cycles and/or loud speakers in some locations but not in others – this depending at least in part on the wind direction.
- Wiltshire Council Rights of Way inspected the bridleway after the event and reported no damage or matters to follow-up in terms of its condition.

4.7 After the event the Land was again inspected by a Planning Enforcement Officer; and again all paraphernalia associated with the motocross event had been removed and livestock returned to the Land.

4.8 Also after the event the wider road network was inspected by a Wiltshire Council Highways Officer – to assess its wider capability to accommodate event traffic in general. The Highways Officers' full assessment and conclusions follow –

The junction of the A360 / Crookwood Lane has a shortfall in visibility to the south and there is a shortfall in visibility for northbound vehicles of a vehicle waiting to turn right into the lane.

The lane leading into the site via Potterne Wick has narrow sections interspersed with some short sections wide enough for 2 vehicles to pass. There are some passing opportunities on the narrow sections. Parts are winding and of poor horizontal and vertical alignment. Other sections are of good straight alignment although still of a width too narrow for 2 vehicles to pass until the site is reached.

The site access is on a bend and has satisfactory visibility in each direction.

The section of Crookwood lane leading to the main road network at Urchfont has generally better width and alignment, although still has considerable sections too narrow for 2 vehicles to easily pass. There are frequent passing opportunities however. I would not expect the majority of event traffic to use this route, as it accesses the B3098 which runs west to east rather than the A360 with its north / south alignment towards the M4 and A303 / A36 to the south.

The junction of Crookwood Lane and the B3098 has a shortfall in visibility to the east but is satisfactory to the west.

There was some signs of minor verge overrunning but no evident significant damage to the lane and first section of bridleway caused by the recent events.

Given the standard of the A360 / Crookwood Lane junction and the standard of the lane leading in from Potterne Wick I consider a limited number of events could be accepted within the 14 day (permitted development) rule providing there is adequate marshalling - particularly of the A360 / Crookwood Lane junction, the B3098 / Crookwood Lane junction, and the site access. It would be important that there are event warning signs located warning northbound A360 traffic before the Crookwood Lane junction. Local residents should be provided with better notice of events and an informal one-way system (in from Potterne Wick and out via Urchfont) should be encouraged.

These points are important, but providing the authority can be satisfied that they will be put in place I consider a highway objection to a small number of events through the year would be difficult to justify.

4.9 Since first being notified of the activities at the Land the Planning Enforcement Team has closely monitored matters and attempted to enter into constructive dialogue with the event organisers. To a certain extent this engagement has been successful – the event organiser having provided an informal traffic management plan for the first event, and having notified the Council of the second event (albeit at very short notice) and actioned the plan to a point.

5. 'Live' planning application

5.1 Following the Planning Enforcement Officer's initial investigation a planning application was made by the event organiser in October 2017 – for the use of the site as a temporary motocross track and for agriculture with associated earthworks for jumps. Following submission of further essential information the application was validated and registered on 31 January 2018. More recently the applicant has requested that the description is changed to just refer to the matters that require planning permission from Wiltshire Council – these being the mounds forming the racetrack jumps. At the time of writing of this report, re-consultations with neighbours and interested parties on the revised description had just commenced.

5.2 As the planning application now 'only' relates to the mounds its relevance to the consideration of the making of an Article 4 Direction has diminished. This said, the application is accompanied by a statement which provides additional information about the management of events, and this is relevant in the context of the comments made by the consultees referred to above. The statement is referred to in Section 6 of this report and is attached as Appendix 2.

6. 'Events Management Plan'

6.1 The events' organiser has stated in the live planning application, effectively in an Events Management Plan, that he is agreeable to the following –

- Meet/liaise with local parish councils;
- Provide advance warning of planned events through site notices and local advertisement;

- Provide advance warning of changes to dates in view of forecast inclement weather;
- Limit numbers of competitors "…. *an event can only have forty rides in each class with a maximum of nine classes* [=] *360*";
- Provide traffic management – "…. *marshals with radio contact monitoring the roads at the times when traffic will be at its peak ….. signs directing competitors* ….";
- Carry out noise monitoring – "*Our organisation carries out noise testing throughout our events and any bikes that are over the limit for noises would be stopped from competing with immediate effect"; "No Tannoys … till 8:30 in the morning and all Tannoys off by 18:00 …".*

6.2 The event organiser has further stated that four weekend events are proposed in 2018 – on 21/22 April, 12/13 May, 23/24 June and 1/2 September.

7. Article 4

7.1 Article 4 of the Town and Country Planning (General Permitted Development) Order (GPDO) provides the Council (or the Secretary of State for Communities and Local Government) with the power to make a direction in particular areas which can remove specified permitted development rights which would otherwise be available.

7.2 The Planning Practice Guidance (PPG) gives guidance on the use of Article 4 Directions, including the form they should take. This states, amongst other things, that "*the use of Article 4 Directions to remove national permitted development rights should be limited to situations where this is necessary to protect local amenity or the wellbeing of the area. The potential harm that the direction is intended to address should be clearly identified*".

7.3 Article 4 Directions can be immediate or non-immediate. A non-immediate Direction is one which does not come into force at the point at which it is made, rather it comes into force on a later date to be determined by the Council. An immediate Direction can withdraw permitted development rights straight away; however they must be confirmed by the Council within 6 months of coming into effect to remain in force. Confirmation occurs after the Council has carried out a local consultation.

7.4 The PPG advises that the circumstances in which an immediate Direction can restrict development are limited. Immediate Directions can be made in relation to development permitted by Parts 1 to 4 and 31 of Schedule 2 to the GPDO, where the development presents an immediate threat to local amenity or prejudices the proper planning of an area. In all cases the local planning authorities must have already begun the consultation processes towards the making of a non-immediate Article 4 Direction.

7.5 The procedures for making an Article 4 Direction are set out in article 5 of the GPDO, and in article 6 for Directions with immediate effect. The PPG provides guidance on modifying or cancelling Article 4 Directions and advises that "*an Article 4 Direction can remain in place permanently once it has been confirmed. However, local planning authorities should regularly monitor any article 4 directions to make certain that the original reasons the direction was made remain valid. Where an Article 4 Direction is no longer necessary it should be cancelled*".

7.6 The Secretary of State must be informed of all Article 4 Directions to be made and when they have been confirmed. The Secretary of State does not have to approve

Article 4 Directions, and will only intervene when there are clear reasons for doing so. Such intervention can prevent the Council from subsequently confirming a Direction (via a 'holding notice'). The Secretary of State has the power to modify or cancel Article 4 Directions at any time before or after they are made, with a few exceptions. One exception being that directions with immediate effect removing permitted development rights under Parts 1, 2, 3, 4 and 31 of Schedule 2 to the General Permitted Development Order may not be modified. Ensuring the Council is satisfied with the supporting case for designating an Article 4 Direction will reduce this risk of intervention.

7.7 To make and confirm a 'non-immediate' Article 4 Direction the following process must be followed (with indicative timeline for this case) –

- The making of the non-immediate Article 4 Direction (April 2018);
- Advising the Secretary of State of the non-immediate Article 4 Direction (April 2018);
- Consultation on non-immediate Article 4 Direction (c. May-July 2018);
- Consideration of consultation responses and decision on whether to confirm non-immediate Article 4 Direction (c. August-September 2018);
- If confirmed, Implementation and monitoring.

8 The Implications of an Article 4 Direction

8.1 The practical effect of an Article 4 Direction, when in force, is not to automatically prevent development which would otherwise have been permitted, but to require an application for planning permission for that development. The existence of a Direction does not convey any more restrictive policy approach to the determination of such applications.

8.2 A constraint on the use of Article 4 Directions – and in particular 'immediate' Article 4 Directions – is a possible claim of compensation for abortive expenditure or loss of income directly attributed to the withdrawal of permitted development rights, if permission is later refused or granted subject to more limiting conditions. There are also time limits to paying compensation following the Direction coming into effect and the refusal of planning permission.

8.3 A Direction cannot be made retrospectively; therefore permitted development already carried out at a site cannot be made unlawful by a Direction coming into force.

9. Need for an Article 4 Direction

9.1 In view of the government advice set out above, an Article 4 Direction must be justified both in terms of purpose and extent, and it is necessary to assess the need for making it. In this case, such an assessment should be based on whether the exercise of permitted development rights at the site will in the future cause harm to matters of acknowledged importance – notably in this case highway safety, residential amenity and general tranquillity – and, therefore, whether it is considered necessary to bring the matter within planning control in the wider public interest.

9.2 In assessing the necessity for planning control the Council has the benefit of the outcomes from its monitoring of the two motocross events that have already taken place. It also has the benefit of statements of intent on the part of the events' organiser to manage future events.

9.3 With regard to the residential amenity consideration – and more particularly, the noise consideration – the Council's Public Protection officers witnessed at the second event noise in some locations (depending on wind direction); in one instance this noise was considered to be "intrusive".

9.4 By their very nature motor cycles generate noise, and with this in mind there is a Code of Practice on Noise from Organised Off-road Motor Cycle Sport, produced by the Noise Council in association with a number of motorcycle user groups. In general, and in relation to the timings of events, the Code states the following:

It should be borne in mind by all Organising Bodies that motor cycling recreational events have a potential to create noise nuisance. It is preferable to organise events on land remote from noise sensitive areas. However, if this is not possible, in planning an event on a site in proximity to noise sensitive areas, careful attention should be given to the need for noise control. ……

There are technical limitations in controlling noise from individual machines. Other methods may have to be used to limit the overall noise of the event, this minimising the impact of noise heard by neighbours. The following factors are relevant:

(a) Access/egress for cars and the location for parking;
(b) Location of start line, paddock and noise test area;
(c) Times and duration of events;
(d) Numbers of machines in operation simultaneously;
(e) Public address systems;
(f) Physical barriers provided to reduce sound propagation. …….

A judgement needs to be made on the suitability of a site taking into account the proposed frequency of its use. It is suggested that a site may be used for not more than 10 days per year, with at least 4 weeks between events. In practice many clubs only require a site for 3 or 4 meetings per year. In noise-sensitive areas, the event should be limited to a single day. A slightly longer single day is preferable to a 2 day event.

9.5 By operating the events under the permitted development entitlement the good practice referred to in this Code cannot be assumed; and as the event organisers have only provided what may best be described as a loose Events Management Plan to cover matters such as prior notice periods for events and noise controls, there are no assurances that amenity will be safeguarded and that intrusive disturbance will not be kept to a minimum. In view of local concerns in relation to amenity, this is considered to be justification for an Article 4 Direction. An Article 4 Direction would result in a requirement for a planning application, and in the event of planning permission being given this could be subject to conditions to properly address and, if necessary, enforce potential noise issues, numbers of events, and so on.

9.6 With regard to highway safety, the monitoring of the previous events confirmed that there was some management of traffic – with marshals, informal signage and the informal operation of a one way system. However, in view of the Highway Officer's concerns over the adequacy of the Crookwood Lane / A360 junction and Crookwood Lane in general, and the related need for signage and appropriate marshalling; and as there is, again, no all-embracing Event Management Plan to set 'ground rules' for prior notification of events, provision of signs and marshals, and management, the highway safety concerns in general are considered adequate further justification for an Article 4 Direction. Again, an Article 4 Direction would result in a requirement for a planning application, and in the event of planning permission being given this could be subject

to conditions to ensure highway safety measures are required to be put in place, and thereafter enforced.

9.7 In terms of approach it is recommended that a non-immediate Article 4 Direction is made. As stated above, a non-immediate Direction is one which does not come into force at the point at which it is made, rather it comes into force on a later date to be determined. This approach is recommended here for three reasons – firstly, to allow the events' organiser to run the events already planned over the next 8 months (at relatively short notice it is considered unreasonable to put at risk the running of these events as a consequence of the Direction); secondly, and in the meantime, to allow the events' organiser time to make alternative arrangements for future events; and(/or) thirdly, to allow the applicant time to apply for planning permission to use the site for occasional motocross events in any event, this application to include a meaningful, and enforceable, Events Management Plan. Allowing the 2018 events to take place would also allow the events' organisers to put into practice their management plan and allow monitoring of this by the Council's Services. The results of this monitoring could then inform any parallel planning application process.

9.8 An immediate Article 4 Direction is not recommended because the Council may then be liable to pay compensation to the landowner and/or the event organiser for forcing cancellation of planned events and/or if planning permission is subsequently refused for the development to which the Direction applies. The risk of a compensation claim would reduce where there is a 'lead in' period as provided by a non-immediate Direction.

9.9 An extensive consultation exercise will take place if the recommendation is agreed by the Planning Committee. The consultation will take place over several weeks following publication of the notice and include publication of the notice on the Council's website.

10. Other options

10.1 The other option would be to do nothing, and so to allow continued and unregulated exercise of the permitted development entitlement. This option is not considered appropriate as although a loose events management plan has now been presented by the events' organisers, this lacks sufficient detail and is unenforceable by the Council in any event.

11. Conclusion

11.1 The Town and Country Planning (General Permitted Development) Order grants planning permission for the temporary use of land for motorcycle racing and related practice for up to 14 days in any calendar year. It can reasonably be assumed that those who drafted the Order considered that in these terms such temporary use of land would not normally need regulation through a planning application process. This should be the starting point in considering the need to introduce regulation to remove permitted development.

11.2 The above notwithstanding, the Order does allow regulation to be introduced via Article 4 Directions. Guidance advises that the use of Article 4 Directions to remove national permitted development rights should be limited to situations where this is necessary to protect local amenity or the wellbeing of the area; and that the potential harm that the direction is intended to address should be clearly identified.

11.3 In this case it is considered that having regard to the circumstances of this particular Land – namely, its tranquil situation with scattered nearby residential development and

its access via relatively narrow country lanes – there is a prospect of harm being caused to residential amenity and highway safety unless formal controls and measures are put in place to manage events. By all accounts these circumstances of the Land are not ideal for the exercise of permitted development rights for temporary uses of this nature, and as such a non-immediate Article 4 Direction is considered appropriate. In the event of a planning application then being made, and then being approved, measures – for regulation and, where/if necessary, enforcement - could then at least be put in place to ensure local amenity and the well-being of the wider area is safeguarded.

Recommendation

That the Head of Development Management be authorised to:

1) **Make a non-immediate Direction under Article 4 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended), to remove 'permitted development' rights under Part 4, Class B of Schedule 2 with all necessary public consultation; and**

2) **Following public consultation to provide a further report to the Eastern Area Planning Committee setting out the responses and, in the light of these and other evidence gathered, to recommend the confirmation or otherwise of the Direction at that time.**

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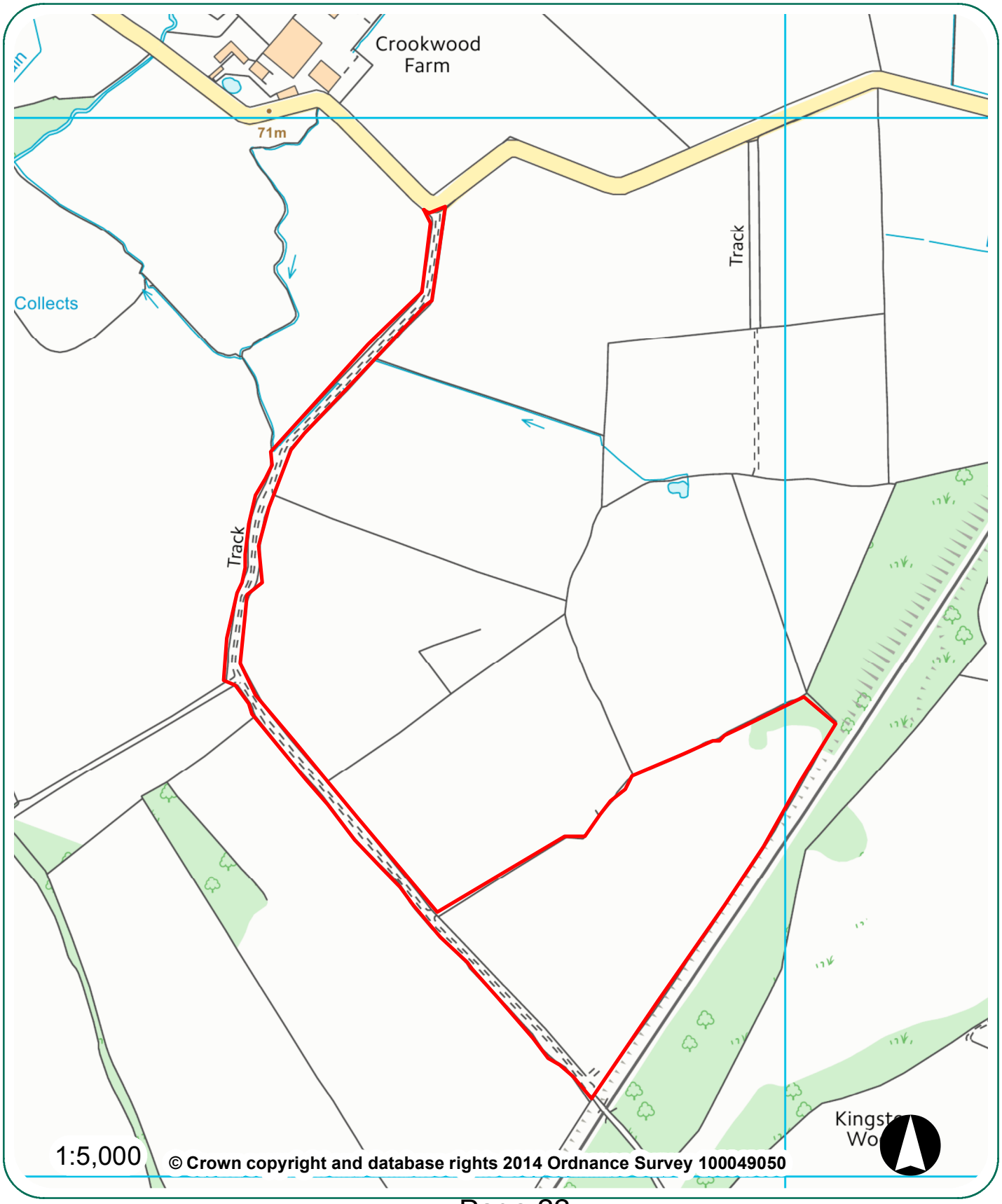
Wiltshire Council
Where everybody matters

Appendix 1 - Location Plan
Motocross Track
Crookwood
SN10 5QS



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(11)

Further to your e mail asking for more information for the a Management Plan around some points of concern to Wiltshire Council, I have provided details requested but if you would like to met myself and the secretary at any point to go over the points in more detail I am happy to arrange a date.
I am also happy to met with any locals and parish council to address any questions they have about any events that will be held at Crookwood or attend any local meeting if you provide me with dates and times to talk to them in person.

The date for 2018 meetings at Crookwood are planned for

21&22 .APRIL.18
12&13.MAY.18
23&24.JUNE.18
1&2.SEP.18

Which is well below the 14 that is allowed on anyone site per year.

Should the weather or any other issues arise that I am not able to run the planned events, then of course I will give the Council the minimum of 8 weeks notice of the change of date.
If you can see that any of the dates are going to clash with any other large event please advise me before the 30.1.18 and I can discuses more suitable dates that will not clash with any planned events within the communities of Crookwood.
I would really like the local residents to see the benefits of running the events for the youth of today and beyond and so if you can advise me of any dates I can go along and met local people they can then put a face to my name and may feel more happy about the sport: I feel working together and respecting each other way of life is key to the residents accepting the meetings in the area they live.

I am happy if you give me the contacts for any local magazine or local press to advertise the events, so that the local residents are obviously made aware of the dates and contact numbers for any questions.
I am also willing to post flyers within 3 miles to the track 14 days before the events with contact details for them to call with questions they may have.

The event numbers will be controlled as all competitors need to book into the event before the date. Booking in will close once the maximum rides have been achieved. The event can only have forty rides in each class with a maximum of nine classes 360 in total all events run last year did not have full classes and the average entries was 236.

I have attached a plan of the roads and signs we will be using in my last e mail and I will have marshals with radio contact monitoring the roads at the times when traffic will be at its peak,but again whilst I will help any congestion and put in place any requirements needed by the Council, the road is a public highway and all vehicle

coming and leaving the event like any other event held in the area the driver of the vecials would be responsibly for any road traffic offences committed and their actions whilst on the public highway.
The last 2 events we worked closely with the local police and have a on call contact number for them if any issues should arise we would of course contact them again.

Each event will have signs up directing the competitors but I am happy to put in place anything else the local authorities require me to do so.

Our organisation carries out noise testing through out our events and any bikes that are over the limit for noises would be stopped from competing with immediate effect. I am more than happy to share this information to any part of the council that has an interest in the noise that the event may create during or after any of the planned events.
No Tannoys will be turned on till 8.30 in the morning and all Tannoys off by 18.00 in the evening. It will also be keep to a minimum during the days racing.

One thing I cant control is the weather but like all our other event controlled by many different councils we will cancel the event should it look likely that the weather is going to cause major problems. If the weather turns whilst the event is running then we would carry out a further risk assement and put in place any actions that this may rise from any risk assessment carried out.

Hope this address all you concerns but I am more than happy to met with any governing bodies should you feel needed.

Tim Truman [redacted]

Wiltshire Council

Eastern Area Planning Committee

22 March 2018

WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL PARISH OF PEWSEY PATH NO. 82 AND PATH NO. 82A AND THE PARISH OF MILTON LILBOURNE PATH NO. 34 AND PATH NO. 34A DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017

Purpose of Report

1. To:

   (i) Consider four objections to The Wiltshire Council Parish of Pewsey Path No. 82 and 82A and the Parish of Milton Lilbourne Path No. 34 and 34A Definitive Map and Statement Modification Order 2017 made under Section 53 of the Wildlife and Countryside Act 1981;

   (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs **(SoSEFRA**) with a recommendation from Wiltshire Council that the Order be confirmed without modification.

Relevance to the Council's Business Plan

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

Background

3. On 12 April 2017 Wiltshire Council received an application from Pewsey East Walkers, for an Order to record public footpaths over land south of Kepnal in the parishes of Pewsey and Milton Lilbourne. The claimed routes lead from footpath PEWS37 in an easterly direction to bridleway PEWS38 where the route splits in two, one spur leading east on the northern side of a stream before crossing back over the stream and continuing east to bridleway MLIL18. The other spur leads east from bridleway PEWS38 on the southern side of the stream following the stream south easterly to its junction with bridleway MLIL18. (Please see claimed route at page 3 of Decision Report at **Appendix 1**). The total length of claimed footpath is approximately 1,537 metres in length.

4. The application adduced evidence from 44 people who completed User Evidence Forms (UEFs) detailing their use on foot of the application route in part or in full for varying lengths of time dating from 1952 to 2017. A further two User evidence forms were submitted at a later date taking the total to 46.

5. For public rights to have been acquired under statute law (see **Appendix 1** paragraph 9.5– Highways Act 1980 Section 31) it is necessary for the use to have been uninterrupted for a period of at least 20 years in a manner that is 'as of right', that is, without force, without secrecy and without permission. This would give rise to a 'presumption of dedication'.

6. A presumption of dedication may be defeated in a number of ways, including the erection and maintenance of signage indicating that there is no intention to dedicate public rights, effective challenges to use, the closure of the claimed route (for example a closure for one day every year may be effective), the granting of permission or by depositing a number of documents with the Council as prescribed by Section 31(5) and (6) of the Highways Act 1980 (see **Appendix 1** paragraph 9.5).

7. Wiltshire Council has a duty to consider all relevant available evidence and officers conducted an initial four week consultation on the application commencing in June 2017. The consultation letter was sent to all interested parties, including landowners, parish councils, user groups, the local member and other interested individuals.

8. All of the evidence and responses were duly considered in the Council's Decision Report appended here at **Appendix 1 (**Section 8). Applying the legal test contained within Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 and Section 31 of the Highways Act 1980 (see **Appendix 1** paragraph 9.1 and 9.5), the application formed a reasonable allegation that a public right subsisted. An Order was made to record the path as a footpath in the definitive map and statement.

9. The Order was duly advertised and attracted four objections. A copy of the Order is appended here at **Appendix 2.**

10. Where objections are received to a Definitive Map Modification Order Wiltshire Council may not confirm or abandon the Order and must forward it to SoSEFRA for determination. However, it must first consider the representations and objections to the Order and make a recommendation to SoSEFRA regarding the determination of the Order.

11. It is important that only the evidence adduced or discovered is considered and it is noted that matters relating to desirability, the environment, need, privacy concerns or health and safety are not to be considered for the application of Section 53 of the Wildlife and Countryside Act 1981.

Main Considerations for the Council

12. 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 under continuous review.

13. 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 definitive 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."

14. Under Section 31(1) of the Highways Act 1980 *"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 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."*

15. Evidence is the key and therefore objections to the making of the Order must, to be valid, challenge the evidence available to the Surveying Authority. The Authority is not able to take into account other considerations, such as the suitability of the way for use by the public, the proximity of any other paths or facilities, environmental impacts and any need or desire for the claimed route.

16. **Objections:**

(1) J M Strong and Partners (landowner)
(2) Mr Alexander Newbigging (landowner)
(3) Mrs Sarah Ingram Hill (landowner)
(4) Pewsey Parish Council- Objection now withdrawn - please see letter dated 5 February 2018 at **Appendix 6.**

It should be noted the objections received from JM Strong and Partners, Mr Newbigging and Mrs Ingram Hill came via Bricketts LLP who have been instructed to represent all three parties and their objections are covered in the one letter.

These objections can be seen in full at **Appendix 3.**

Comments on the objections

17. **J M Strong and Partners, Mr Newbigging and Mrs Ingram Hill**

The three landowners affected by this application state in their objection: [**Appendix 3(i)]**

"The evidence of use relied upon in making the Order, particularly use prior to 2007, is not consistent with the objectors knowledge and experience of the use of this land. The objectors do not accept that there has been sufficient use as of right to represent use by the public". "The order route follows 6 meter wide field margins that were first created in 2007 when the land was entered into an Entry Level Stewardship Scheme. Prior to this the land was cultivated up to the field edge, leaving no strip which could have been used as a footpath, and there was no evidence of

any such use. Such use as there may have been of the Order route has only taken place since 2007 when the 6 metre grass strips were in place."

A total of 46 user evidence forms have been submitted claiming use of the way on a regular basis with many people claiming daily or weekly use. Of the 46 users 33 have claimed use dating back before the year 2007 which shows 72% of the users claim to have used the path before 2007 when the objectors say the route was not used. The use of the order route may have increased with the creation of the 6 metre wide strips but the submitted user evidence forms clearly claim significant use before this date. The claimed use shows a consistent use of the route by the public for the relevant 20 year period of 1996-2016.

This point was further explored as it forms a substantial part of the landowners' objection to the order. A letter was sent on 19 December to all 33 users who claimed use of the order route before 2007 to recall any details of their use before 2007 and any change in the nature of the land they may have noticed around that date and how that may have affected their use (letter attached at **Appendix 5**). At the time of writing this report eleven responses have been forthcoming and are attached at **Appendix 5[1-11].**

"*The order route is subject to significant seasonal flooding which is often sufficient to render the route impassable due to the depth of water and ground conditions"*

The ground may flood during certain periods of heavy rain but this would not act as a period of interruption for the use of the route in terms of acquiring a right under Section 31 of the Highways Act. Section 31 states "...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". Flooding or other natural events are not actions taken by the owner or tenant of the land and so do not demonstrate an intention to not dedicate the way. It would also not be unreasonable to assume any walkers of the route would deviate around the flooding or avoid using it during any period of temporary flooding which would again not constitute an interruption of use.

"In response to such public use as there was after 2007 the landowners or their representatives challenged users on the Order route and signs were placed on the route stating that the land is private and denying the existence of any public right of way. Although the signs were repeatedly removed and or damaged, they were reinstated a number of times. By these means any subsequent use of the route was rendered not as of right and furthermore the landowner sufficiently demonstrated a lack of intention to dedicate"

The issue of signage and challenges on the route have been discussed at paragraph 14 of the decision report at **Appendix 1**. There is some submitted evidence in the form of signed statements that signs were erected on the route informing the public not to use the field margins in 2008 but these were repeatedly torn down and eventually they gave up and did not replace them. None of the submitted 44 user forms considered at that time state they saw any signs of that nature on the order routes. We do not have the precise wording of any notices which may have been on the order routes. There is a conflict of

evidence on the issue of signs and challenges and without any incontrovertible evidence it was appropriate to make an order to record the routes as public rights of way. A public inquiry can give the chance for cross-examination on the points raised.

18. Ms Emma Kingston submitted late correspondence in a letter dated 29 January 2018 on behalf of Mr Newbigging detailing works carried out on the claimed route in 2013. It is claimed before this work was carried out the route would not have been accessible to anybody on foot, this is clearly in conflict with the user evidence submitted, a public inquiry can explore this point further (p**lease see letter at Appendix 6)**.

19. A submission of support was received at the Order making stage from Milton Lilbourne Parish Council which can be seen at **Appendix 4**. Milton Lilbourne Parish Council also expressed its support of the Order at the consultation phase as did the Wiltshire Rambler representative for the area **(see paragraph 8 of Appendix 1).**

20. The Council cannot take into account the number of objections but must consider the evidence contained within those objections against the evidence contained within the representations of support and the evidence already before the Council, as outlined within the Decision Report attached at **Appendix 1.** There will inevitably be points of conflict within the evidence of objectors and that of the supporters. For this reason, the Order has been made on a reasonable allegation that a right of way for the public on foot subsists, which is a lower test than the balance of probabilities (see **Appendix 1**- paragraph 28.2). Where there is no incontrovertible evidence against this, it is in the public interest for a local authority to support the Order.

21. 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 map 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, 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 will 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."

22. 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."

23. 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."

24. Even in a case with only limited supporting evidence and a large number of objections, Owen J held that an Order would seem appropriate. When this case law is applied to this case, where there are 46 completed UEFs, it suggests that the making of a definitive map modification order is appropriate.

25. In such a case concerning the balancing test to be applied to the evidence, the authority is correct in making the Order on the grounds that it is reasonable to allege that a right of way for the public on foot subsists. Where the objectors have not submitted incontrovertible evidence to defeat that reasonable allegation, the committee should recommend to SoSEFRA that the Order be confirmed without modification. The only way to properly determine the Order is to see the witnesses at a public inquiry where they may give evidence in chief and their evidence may be tested through the process of cross-examination to establish whether, on the balance of probabilities, the public right has been acquired.

Overview and Scrutiny Engagement

26. 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.

Safeguarding Considerations

27. Considerations relating to safeguarding anyone affected by the making of the 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

28. Any public health implications arising from the making 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

29. In the event this Order is forwarded to SoSEFRA there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 33 to 35 of this report.

Environmental and Climate Change Impact of the Proposal

30. Any environmental or climate change considerations arising from the making 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

31. Matters relating to the equalities impact of the proposal are not relevant considerations in Section 53 of the Wildlife and Countryside Act 1981.

Risk Assessment

32. 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 pursue its duty it is liable to complaints being submitted through the Council's complaints procedure, potentially leading to complaints to the Ombudsman. Ultimately, a request for judicial review could be made with significant costs against the Council where it is found to have acted unlawfully.

Financial Implications

33. The making and determination of Orders under the Wildlife and Countryside Act 1981 is a statutory duty for Wiltshire Council for which financial provision has been made.

34. Where there are outstanding objections to the making of the Order it must be determined by the Secretary of State. The outcome of the Order will then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500. A one day public inquiry could cost between £1,500 and £3,000 if Wiltshire Council continues to support the making of the Order (i.e. where legal representation is required by the Council) and around £300 to £500 where Wiltshire Council no longer supports the making of the Order (i.e. where no legal representation is required by the Council and the case is presented by the applicant).

35. Where the Council objects to the Order, the Order must still be forwarded to the SoSEFRA for determination. As in the case of a supported Order, the possible processes and costs range from £200 to £3,000 as detailed at paragraph 34 above.

Legal Implications

36. Where the Council does not support the Order, clear reasons for this must be given and must relate to the evidence available. The applicant may seek judicial review of the Council's decision if he sees it as incorrect or unjust by them. The cost for this may be up to £50,000.

Options Considered

37. Members should now consider the objections received and the evidence as a whole in order to determine whether or not we continue to support the making of the Order. The making of the Order has been objected to, therefore the Order must now be submitted to the SoSEFRA for determination and members of the committee may determine the recommendation (which should be based upon the evidence) to be attached to the Order when it is forwarded to the SoSEFRA as follows:

    (i) The Order be confirmed without modification.

    (ii) The Order be confirmed with modification.

    (iii) The Order should not be confirmed.

Reason for Proposal

38. Unless the objections and representations are withdrawn the Order must be forwarded to the SoSEFRA for determination.

39. It is considered that nothing in the objectors' submissions demonstrates sufficiently that there was no intention to dedicate a public right of way and that any attempt at communicating any lack of intention did not reach the relevant audience. This is demonstrated by the evidence that all 46 user evidence forms indicate they were unaware of a declared non-intention. Neither did the owners/tenants satisfy any statutory process of demonstrating a negative intention to dedicate the land, i.e. a valid deposit, plan, statement and subsequent statutory declaration under Section 31(6) of the Highways Act 1980, or a notice under Section 31(5) informing the relevant authority such notices have been torn down (see Section 16 of the Decision Report, **Appendix 1**).

40. The testimony of users of the path has been questioned by the objectors who claim that use of the order route cannot have occurred prior to 2007 and that signs were erected on the path in 2008 to inform the public not to use the route. Where this evidence is conflicted it may be tested, along with all other evidence at a public inquiry. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton [1994] 68 P&CR 402* Owen J "*In a case where the evidence of 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."*

41. In making this Order officers considered that a right of way is reasonably alleged to subsist over the Order Route. It is considered that no further evidence has been adduced since making the Order, and it being advertised to a wider audience, and shows that, on the balance of probabilities, a public right has been acquired. The testing of witnesses will be key to the final decision in this case but the Council's duty remains with supporting the Order based on the evidence it has before it.

Proposal

42. That "The Wiltshire Council Parish of Pewsey Path No. 82 and 82A and the Parish of Milton Lilbourne Path No. 34 and 34A Definitive Map and Statement Modification Order 2017" is forwarded to the SoSEFRA with the recommendation that it is confirmed as made.

Tracy Carter
Director – Waste and Environment

Report Author:
Craig Harlow
Acting Rights of Way Officer – Definitive Map

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

User Evidence Forms

(The above-mentioned documents are available to be viewed at the offices of Rights of Way and Countryside, Wiltshire Council, Unit 9, Ascot Court, Trowbridge.)

Appendices:

Appendix 1 - Decision Report
Appendix A and B to Decision Report – consultation responses from landowners
Appendix 2 - "The Wiltshire Council Parish of Pewsey Path No.82 and Path No.82A and the Parish of Milton Lilbourne Path No.34 and Path No.34A Definitive Map and Statement Modification Order 2017"
Appendix 3 - Objections to the Order
Appendix 4 - Supporting Statement
Appendix 5 – Letter sent to user pre 2007 and responses **(Appendix 5[1-11])**
Appendix 6 – Late Correspondence

DECISION REPORT
WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53
APPLICATION TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY – PEWSEY- MILTON LILBOURNE

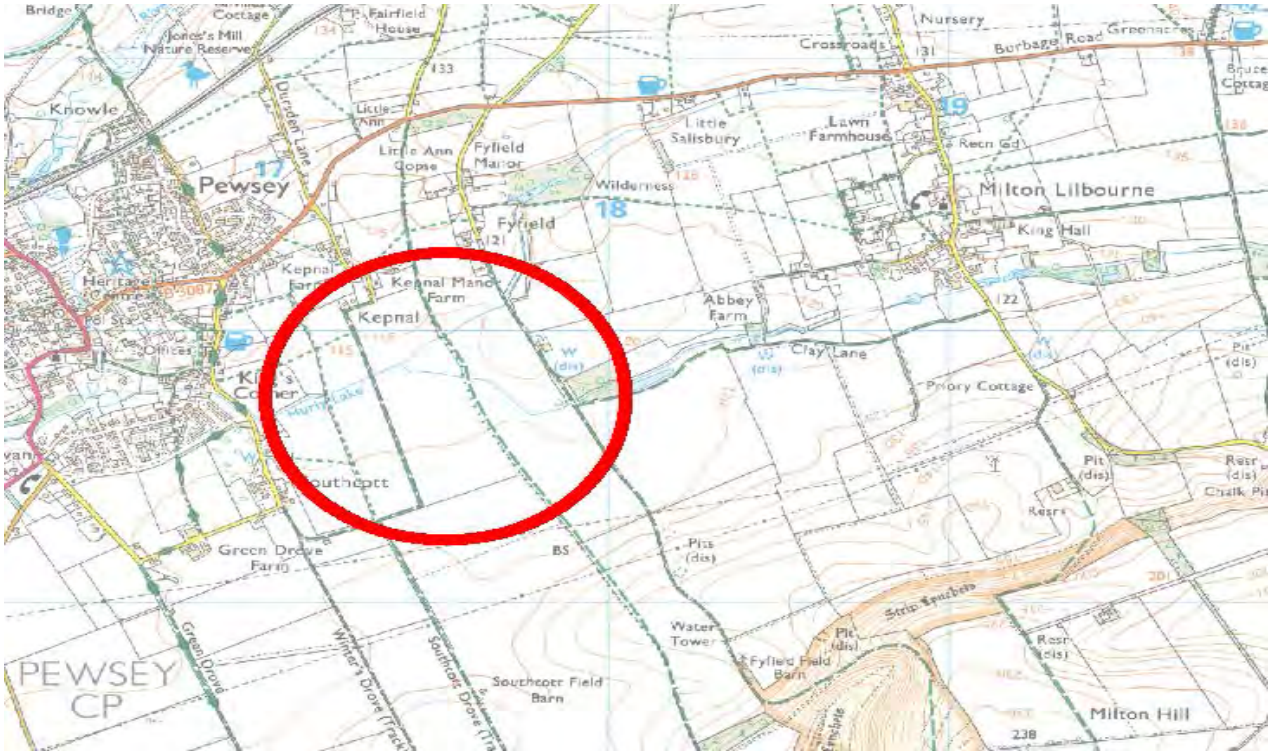
1. Purpose of Report

1.1. To determine an application, made under Section 53 of the Wildlife and Countryside Act 1981, to add footpaths to the definitive map and statement of public rights of way, in the Parishes of Pewsey and Milton Lilbourne. The claimed routes lead from footpath PEWS37 in an easterly direction to bridleway PEWS 38 where the route splits in two, one spur leading east on the northern side of a stream before crossing back over the stream and continuing east to bridleway MLIL18. The other spur leads east from bridleway PEWS38 on the southern side of the stream following the stream south easterly to its junction with bridleway MLIL18.

2. Relevance to Council's Business Plan

2.1. 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.

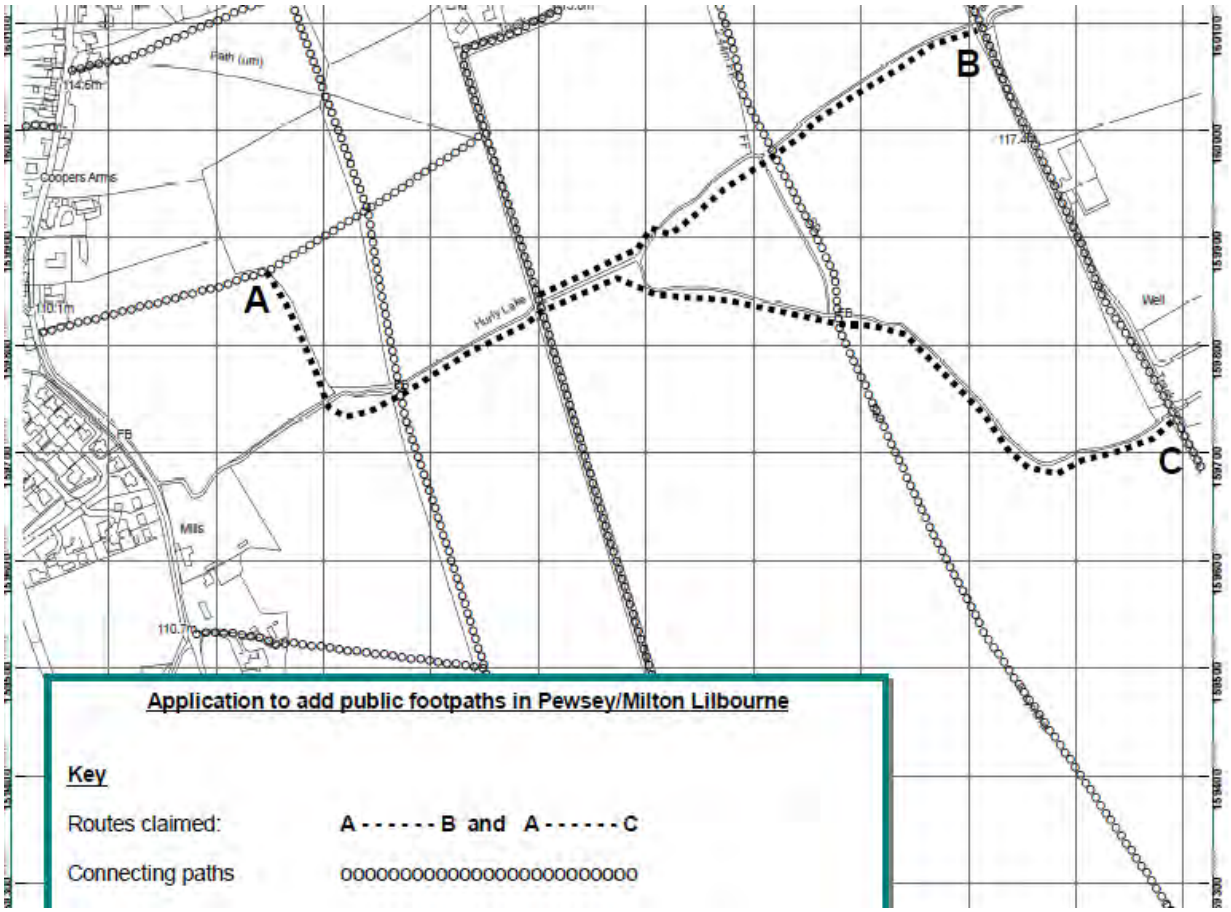
3. Location



3.1 The claimed routes are south east of the village of Pewsey and just south of the small hamlet of Kepnal. Following the route of Hurly Lake stream the claimed routes cross over into the parish of Milton Lilbourne, with the village of Milton Lilbourne further to the east along the B3087.

3.2 2014 Aerial Photo of area with public rights of way marked – footpaths denoted by purple lines and bridleways by green lines.

4. Claimed Footpath Routes

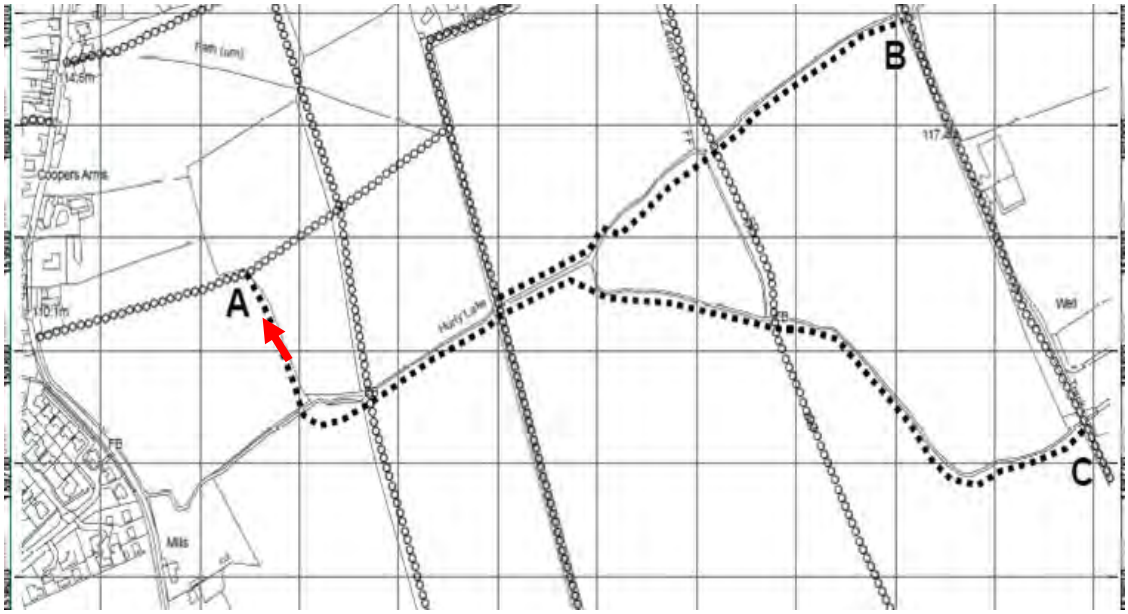


4.1. The application is made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the parishes of Pewsey and Milton Lilbourne, leading from point A, at its junction with footpath Pewsey 37 leading south and the turning east to meet bridleway Pewsey 38. The route then splits in two, one leading on the north side of Hurly Lake (which is a stream) and continuing east to its junction with bridleway Milton Lilbourne at point B. The other leads from Pewsey 38 on the south side of Hurly Lake, continuing in a south easterly direction to its junction with bridleway Milton Lilbourne 18 at point C. Route A to C is approximately 1,050 metres long. Route A – B is approximately 880 metres long.

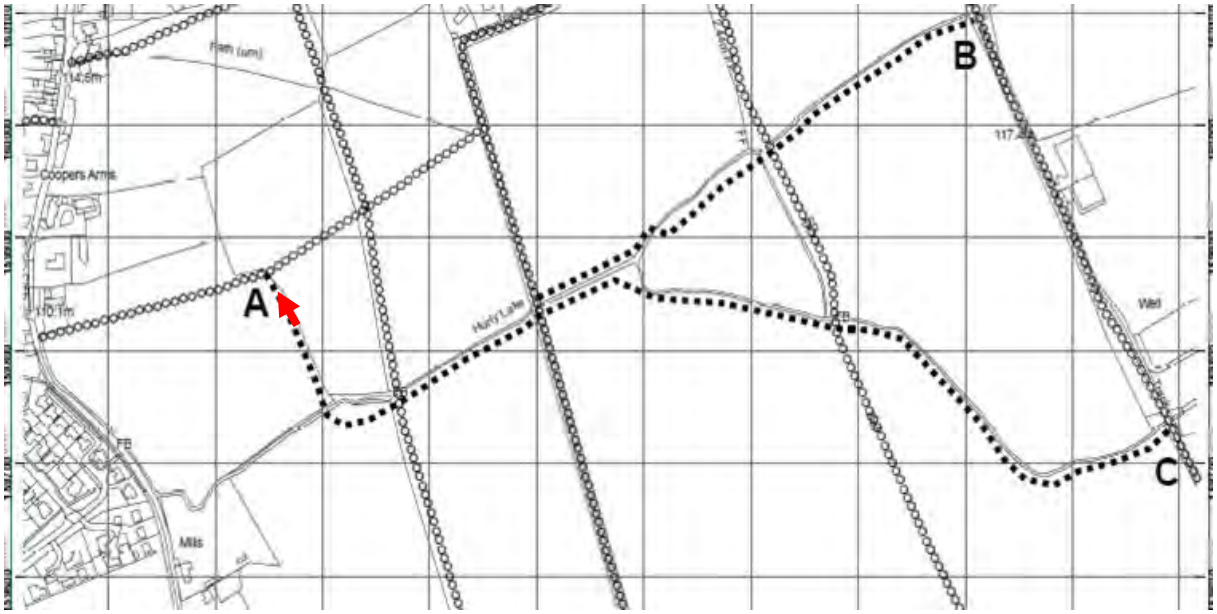
5. Photographs

Photos taken on 5th June 2017 of the claimed route.

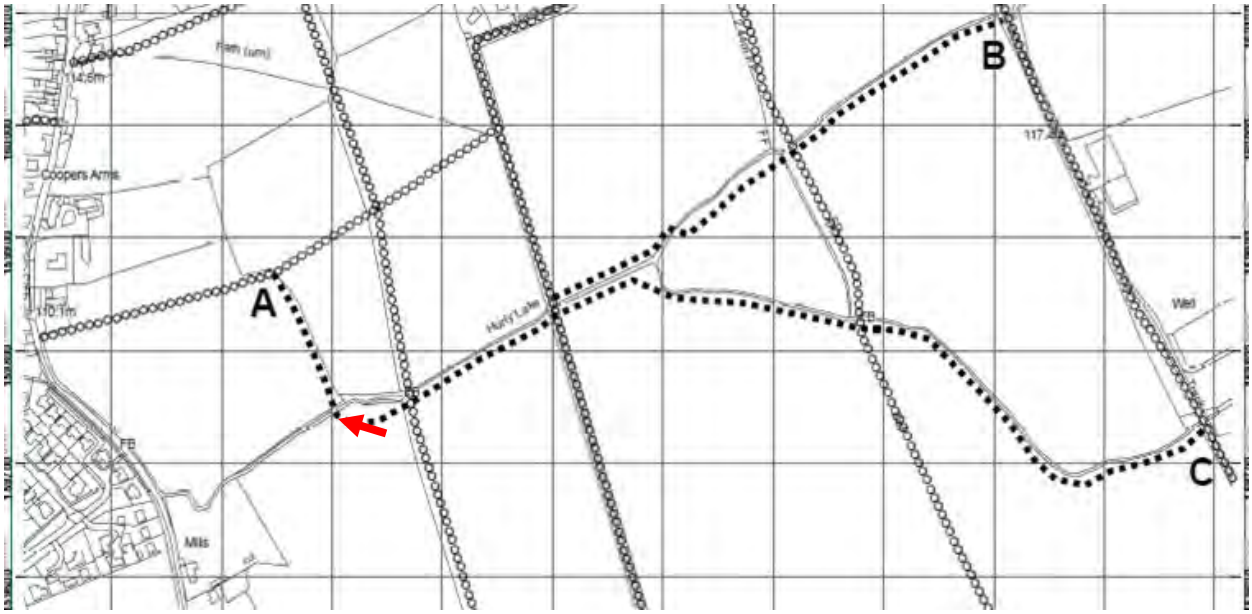
5.1



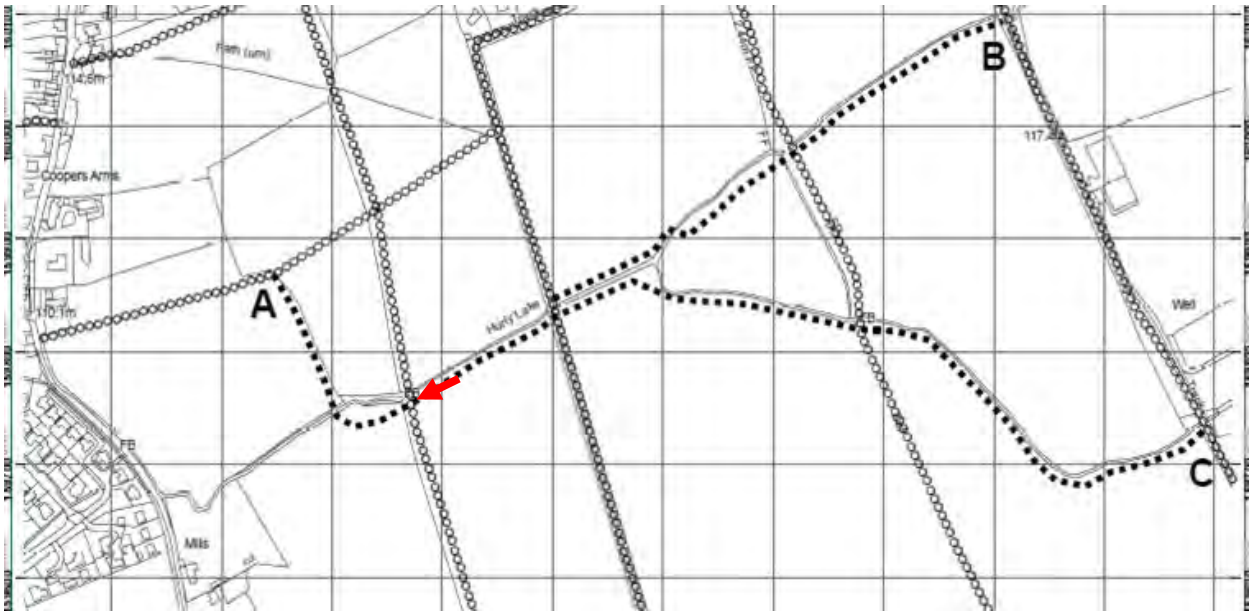
5.2



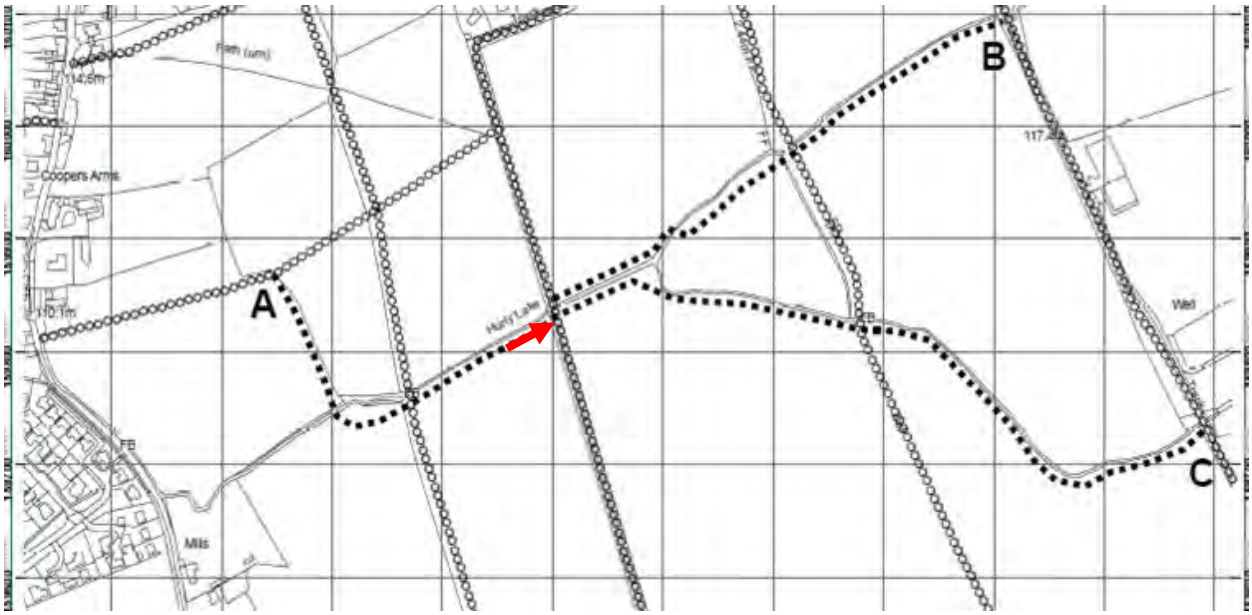
5.3



5.4



5.5



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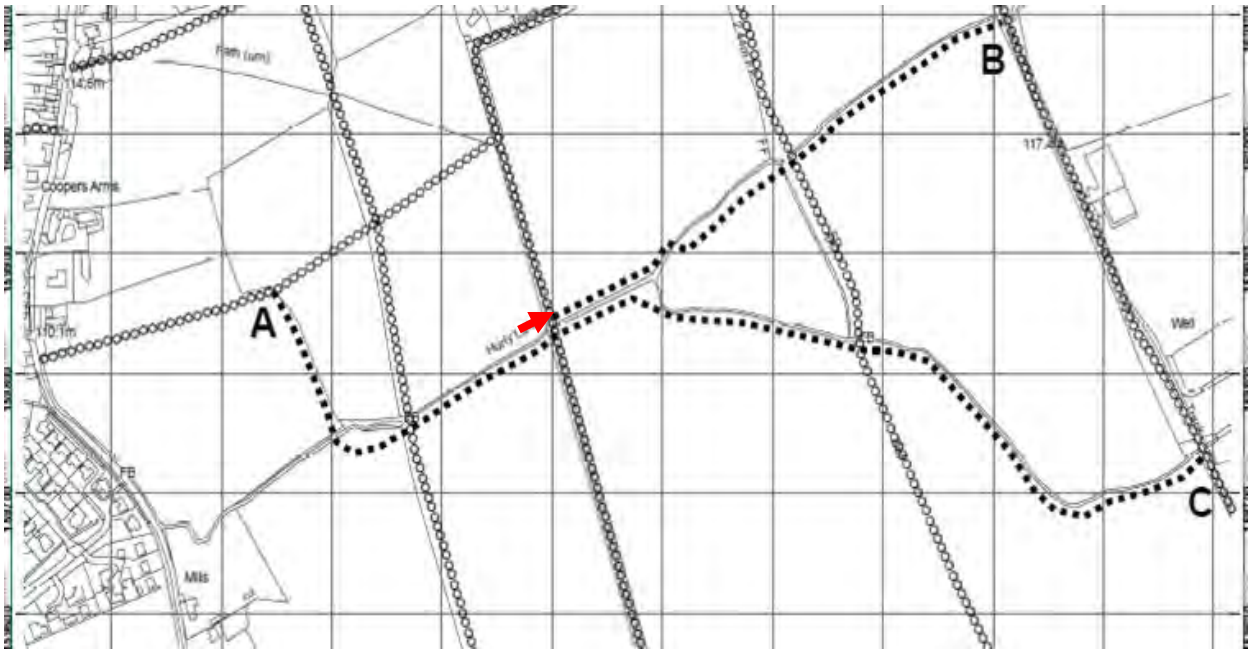

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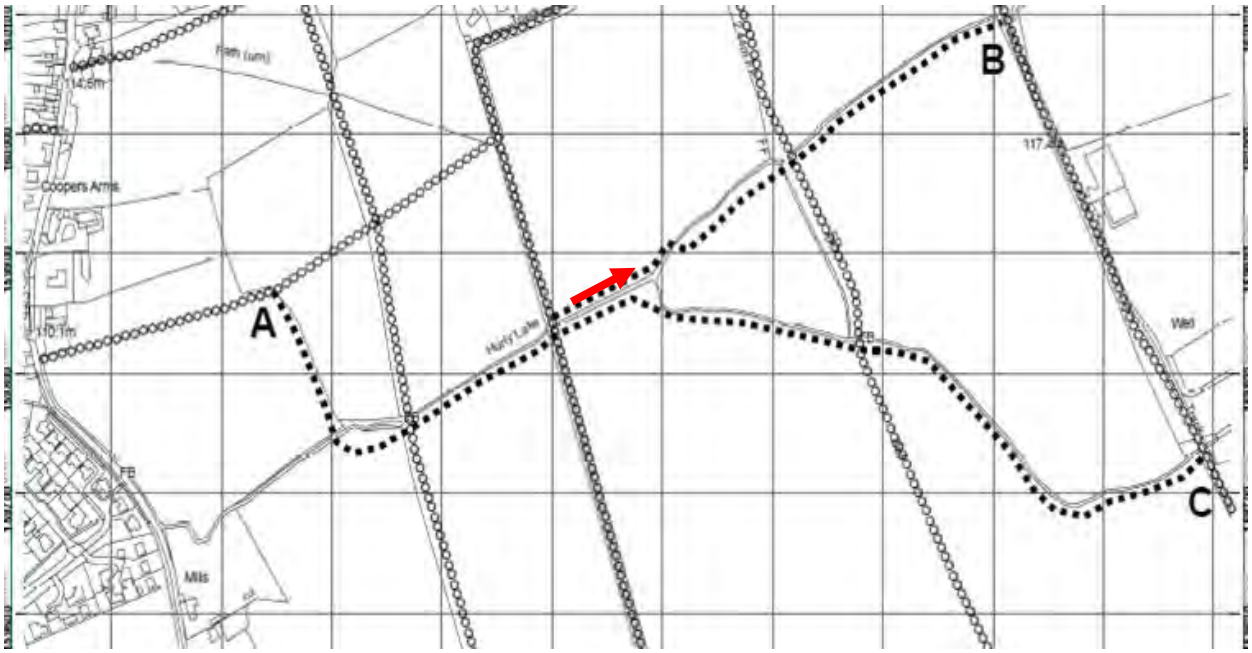
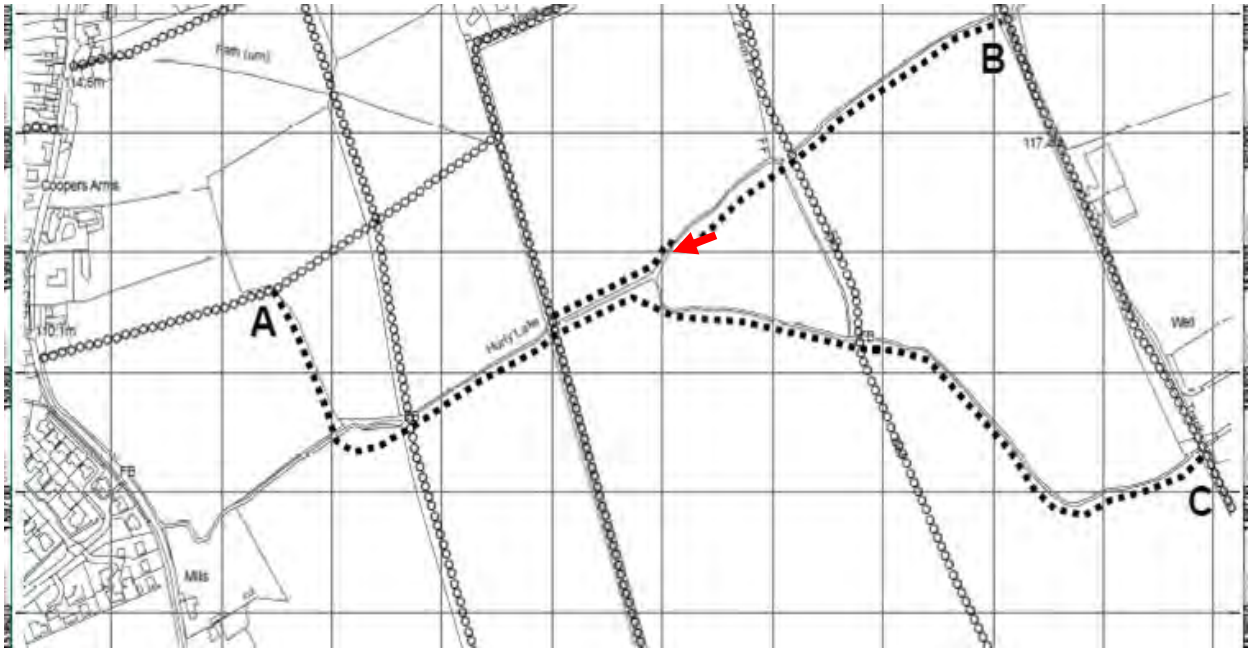


5.8



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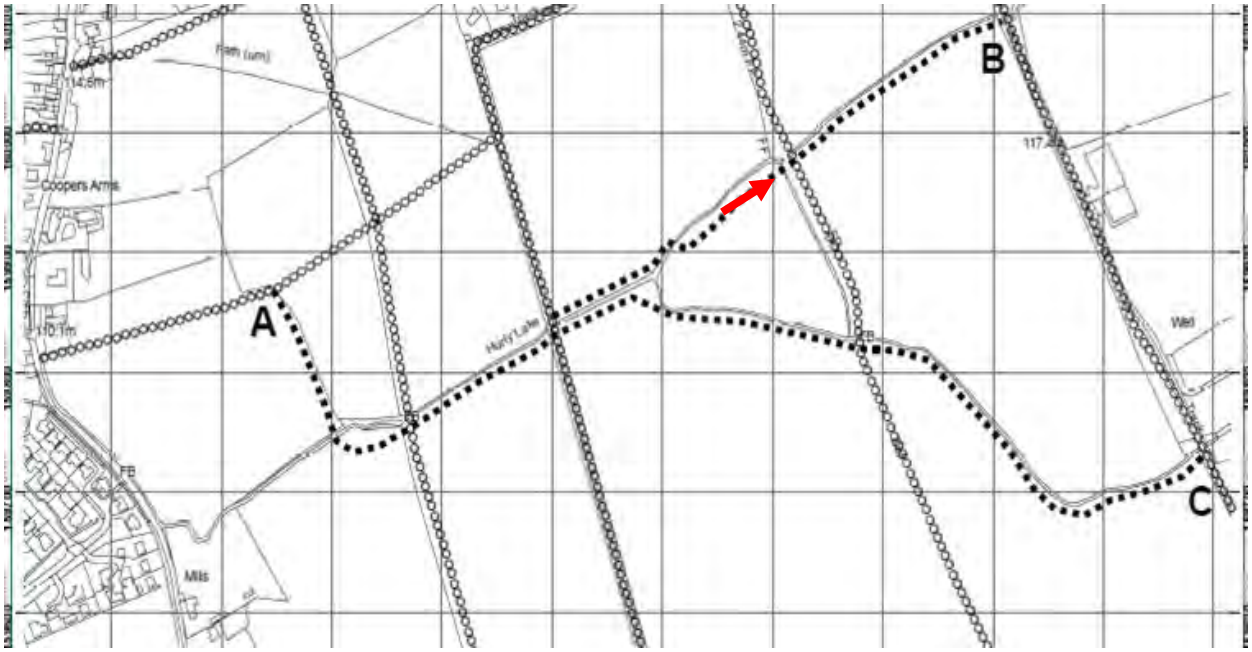
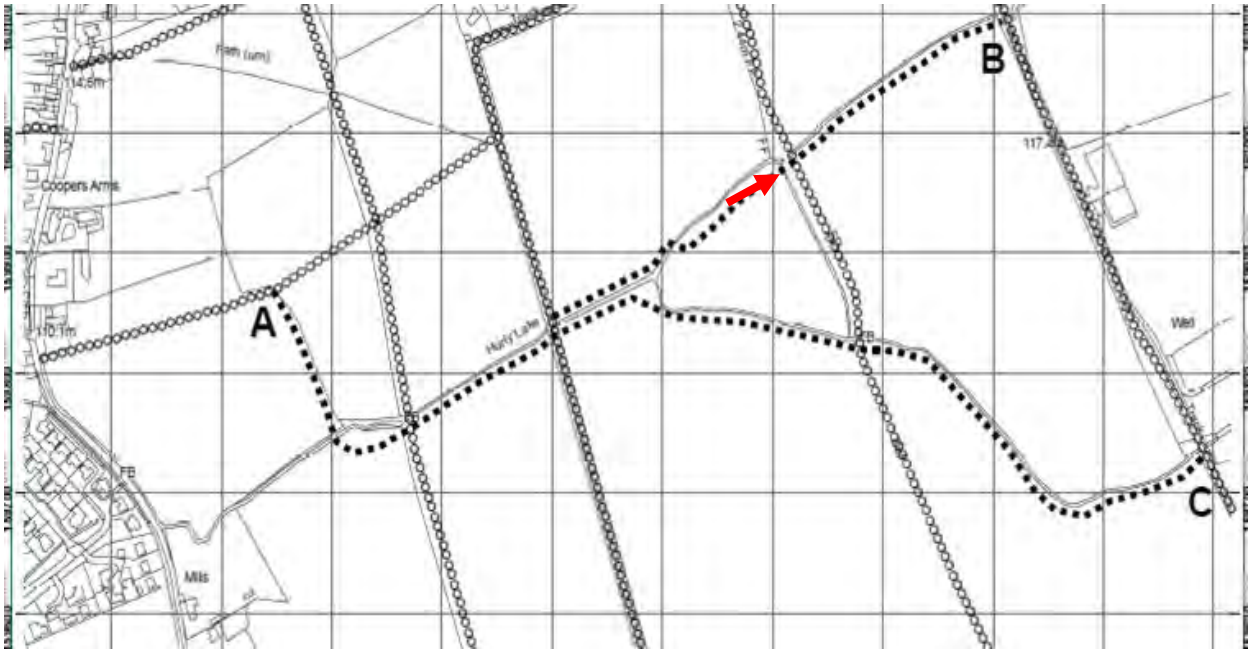
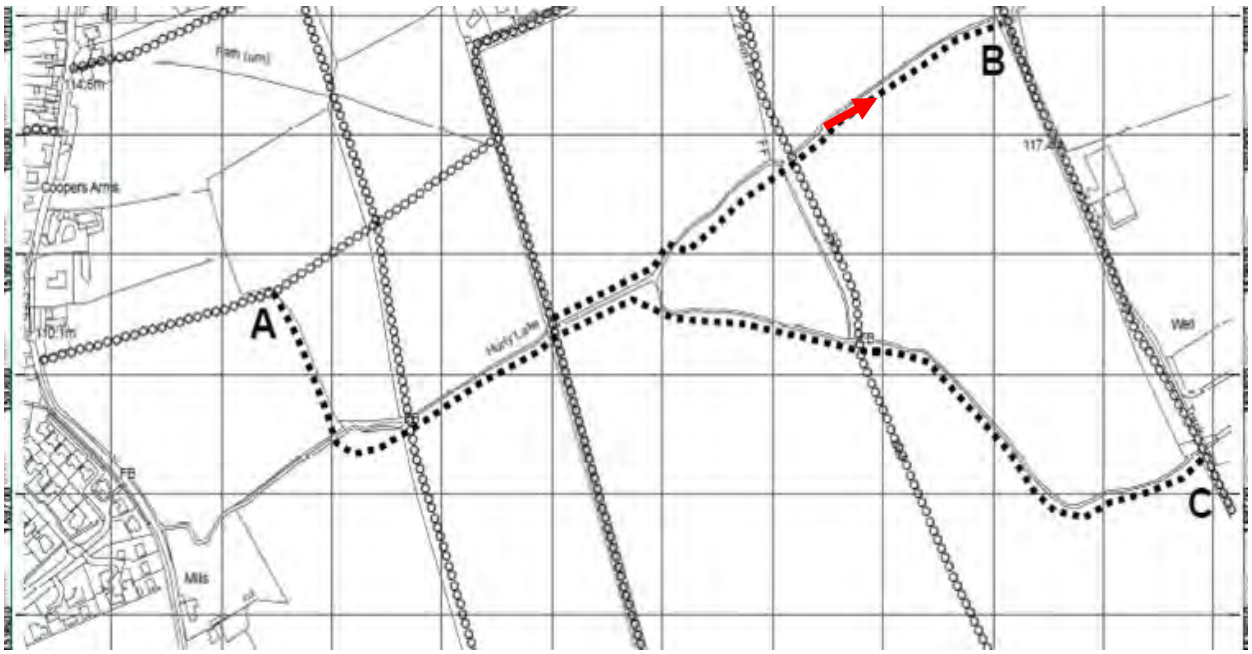


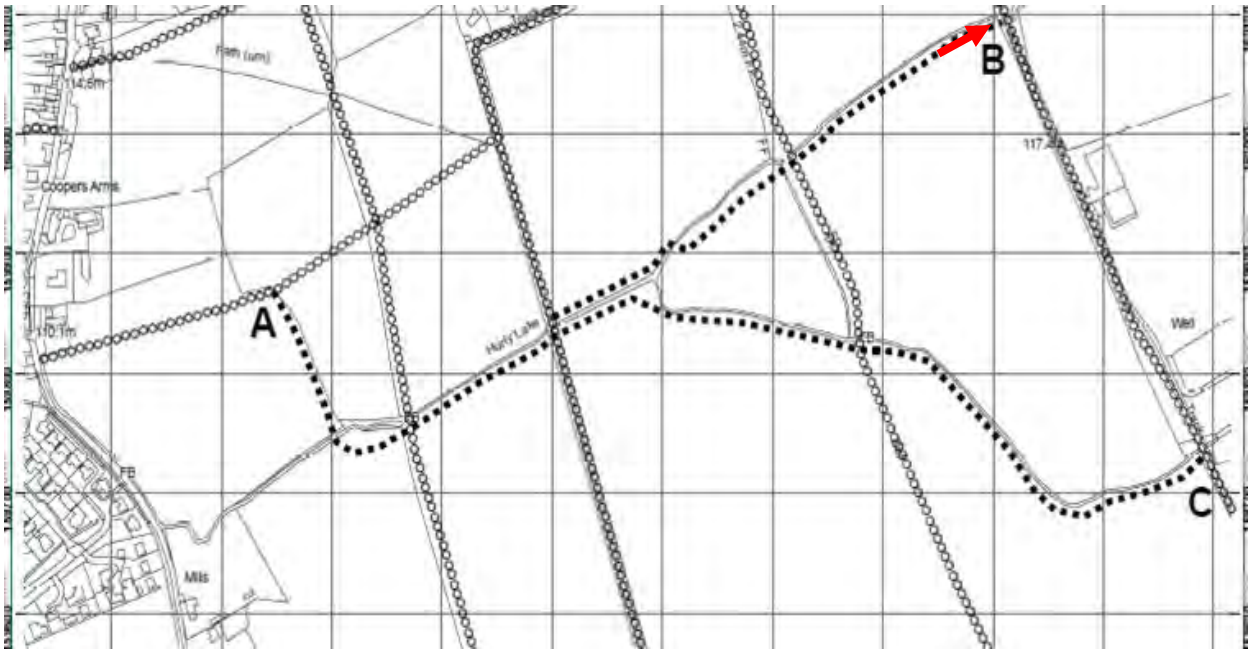
5.10


Path (um)
114.6m
Coopers Arms
110.1m
A
B
C
Holly Lane
FB
Mills
Well

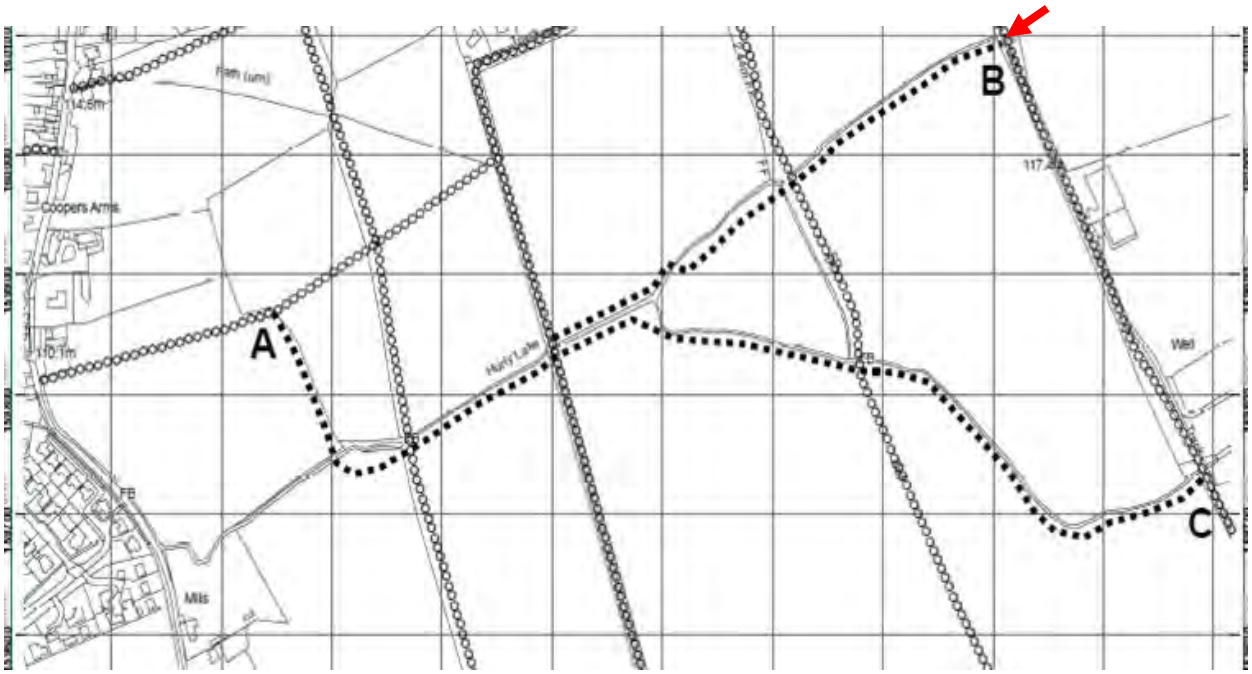
5.11



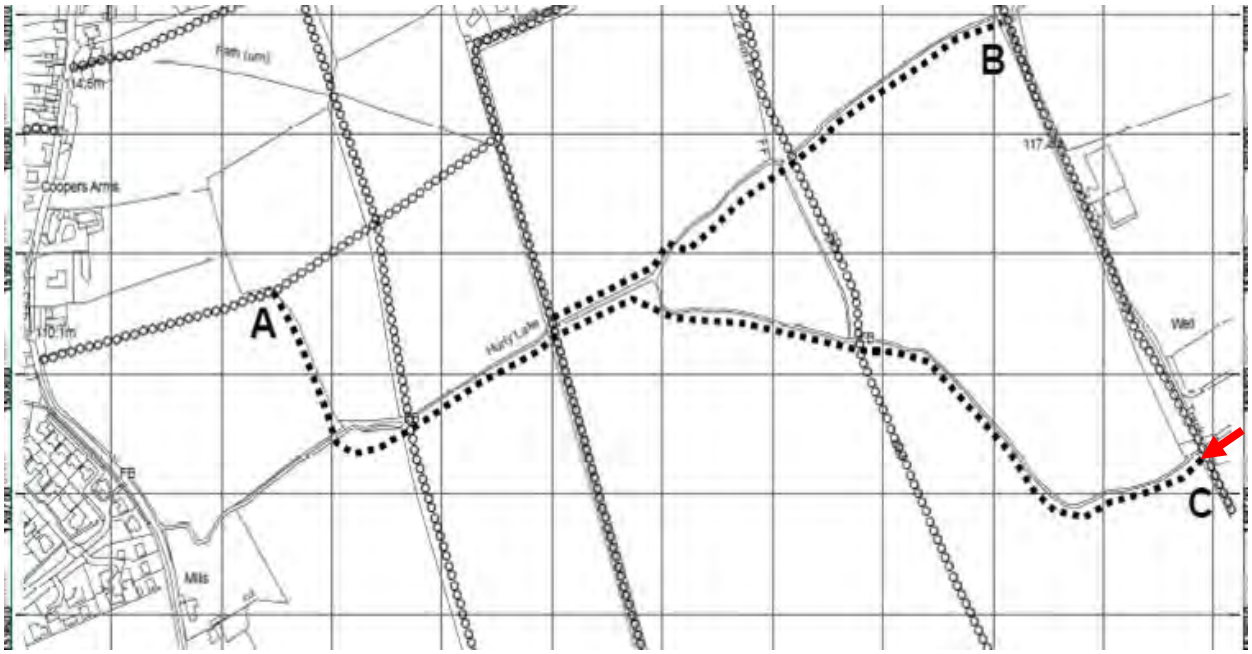
5.11



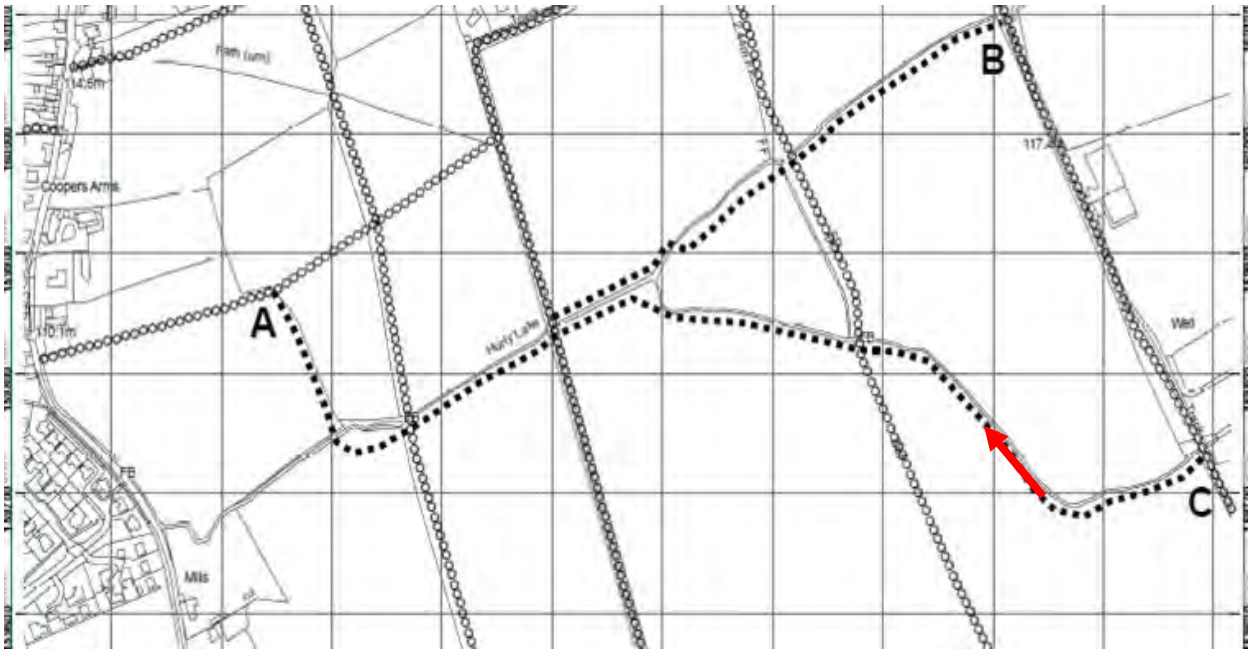
5.12



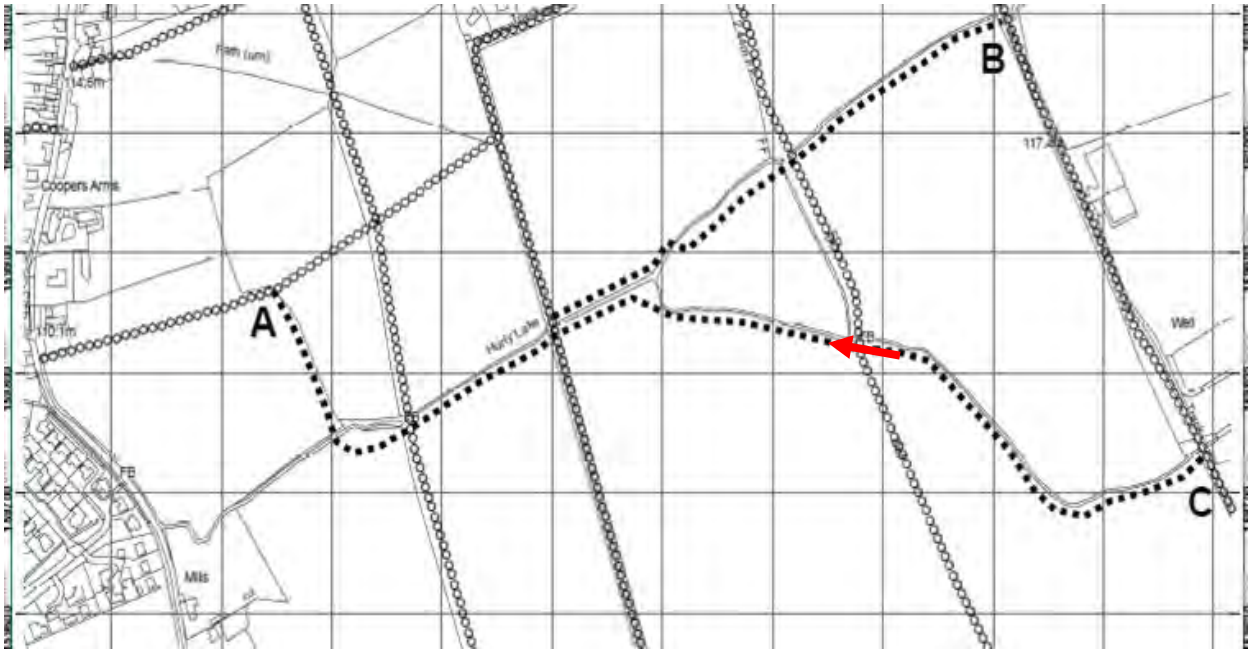
5.13



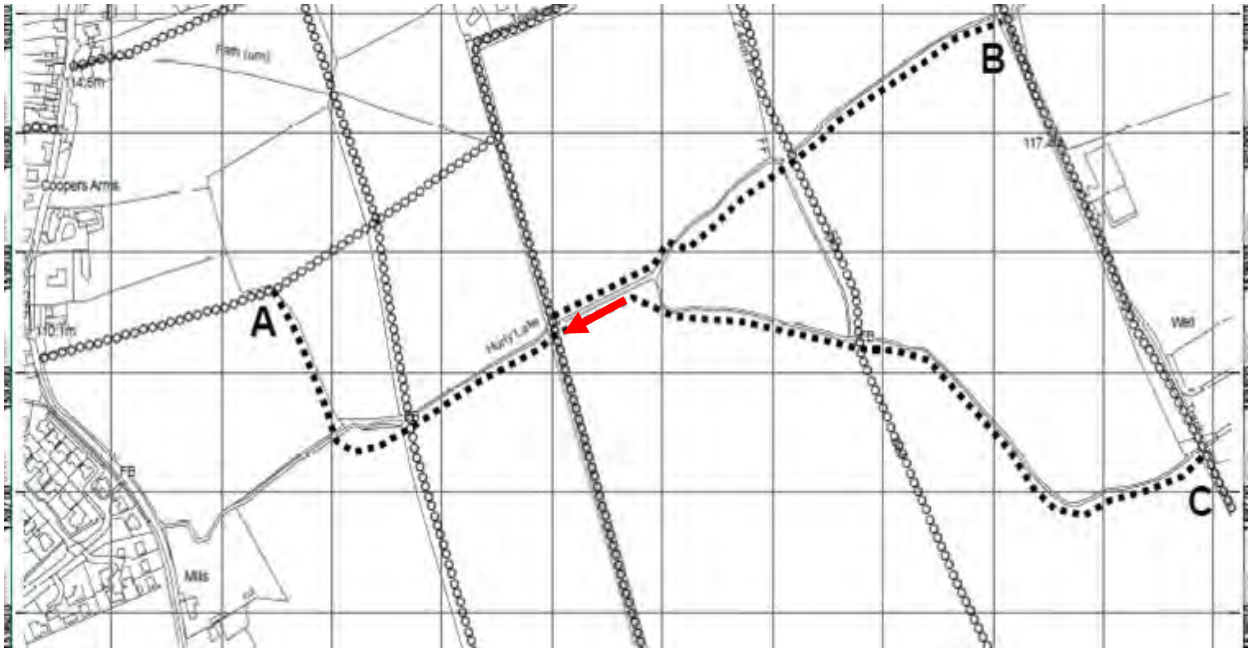
5.14



5.15



5.16



6. Registered Landowners

6.1. The three owners of the land affected by the application are:

Mrs Sarah Ingram Hill of Southcott House, Pewsey, Wiltshire, SN9 5JF- land hatched in blue

Mrs Rachel Kim Laughton of Green Drove House, Green Drove, Pewsey, Wiltshire, SN9 5JD- land hatched in green

Mr Alexander Newbigging c/o Fyfield Manor, Pewsey, Wiltshire, SN9 5JS- land hatched in red

James and Josephine Del Mar of Mills Farm. Southcott, Pewsey, Wiltshire, SN9 5JF- land hatched in orange were believed to have been directly affected by this application. Mr Del Mar has since stated his landownership only reaches up to the culvert entering the field(which is owned by Ms Laughton) and as such the claimed footpath does not actually enter his ownership.

6.2. The application was made in the name of Pewsey East Walkers. The contact is Mr George Haddock of 8 St. Johns Close , Pewsey. Pewsey East Walkers have served notice on the landowners J.M Strong and Partners of Green Drove House , Pewsey, Ingram Holdings Ltd of Southcott House, Pewsey, D.K Newbigging of Fyfield Manor, Pewsey and Francis and Gaye Brook of Conygre Farm, Easton Royal who they state are the land tenants of D.K Newbigging. James and Josephine Del Mar did not have notice served upon them but have since been consulted on the application. Mr Del Mar has since informed officers he does not believe the claimed route is over his land as the entrance to the field which the claimed route traverses is owned by Mrs Laughton.

7. Background

7.1. Wiltshire Council are in receipt 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, in the parishes of Pewsey and Milton Lilbourne. The claimed routes lead from footpath PEWS37 in an easterly direction to bridleway PEWS 38 where the route splits in two, one spur leading east on the northern side of a stream before crossing back over the stream and continuing east to bridleway MLIL18. The other spur leads east from bridleway PEWS38 on the southern side of the stream following the stream south easterly to its junction with bridleway MLIL18.The application is dated 12th April 2017 and is made by Pewsey East Walkers c/o of 8 Manor St Johns Close, Pewsey, Wiltshire, SN9 5BJ on the grounds that public footpath rights can be reasonably alleged to subsist or subsist over the land, on the balance of probabilities, based on user evidence and should be recorded within the definitive map and statement of public rights of way.

7.2. The application forms comply with the regulations set out in regulation 8(3) Schedule 7 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 SI 1993 No 12 and are accompanied by a plan drawn at a scale of 1:6000 highlighting the claimed route, 44 completed user evidence forms and supporting evidence.

8. Initial Consultation

Wiltshire Council undertook an initial consultation regarding the proposal on 7th June 2017. User groups, Pewsey Parish Council, Milton Lilbourne Parish Council, landowners, the Council member for area, neighbouring properties and all interested parties were consulted as part of this process. The following replies were received.

8.1. Pewsey Parish Council replied by email as follows:

"Dear Craig,

Your ref CH/PEWS/2017/02

Firstly, you should know that the walkers concerned wanted Pewsey Parish Council to put this application in on their behalf.

Two of the walkers attended the Full Council meeting on 14th March 2017 to put their case, but the Councillors voted, by a substantial majority, not to support them, believing that there was a good network of footpaths available in Pewsey already (copy of minutes attached item 3/13).

Prior to the Council meeting, we had brokered a meeting with one of the landowners and the walkers. The landowner made an offer to accommodate the walkers which we believed to be very fair and reasonable, and we are disappointed that it has proved unacceptable to them.

Yours sincerely

Alison Kent
Clerk to Pewsey Parish Council"

The minutes referred to are below. The relevant section has been extracted from the full minutes.

PEWSEY PARISH COUNCIL
MINUTES OF A MEETING OF THE **FULL COUNCIL** HELD IN THE PARISH OFFICE, BOUVERIE HALL, PEWSEY ON 14th MARCH 2017 at 7.00pm
PRESENT: Cllr Haskell (Chairman), Cllr Fleming, Cllrs Mrs Dalrymple, Ann Hogg, Mrs Hughes, Mrs Hunt, Mrs Stevens, Cllrs Carder, Coppard, Eyles, Ford, Giles, Hagan, Kimber, Smith and Stevens.
IN ATTENDANCE: Alison Kent (Clerk), Mr Haddock and members of the public.
3/1 APOLOGIES: Cllr Kerry Pycroft, Cllrs Deck and Sharpe.
3/2 DECLARATION OF INTEREST: Cllr Ford on item 8 c).
3/13 FOOTPATHS: Cllr Haskell had reported the missing sign on FP39 and the bridge crossing on FP36. On 20th February, he, Cllr Deck and Eyles had met with local walkers and one of the landowners relating to a well-used route. The subsequent letter and map from the landowner had been circulated to all members along with the email correspondence between Mr Haddock and Rights of Way. Although already presented at the last Environment Committee, Mr Haddock explained the walkers' case showing the application route marked in red. Nearly all definitive paths and bridleways in this area go north-south. This well walked route goes w-e, making it an important connecting route and as a circular route. He stated that it had always been one of the most used routes on the eastern side of Pewsey. New landowners had erected barriers since September 2016 on routes previously walked by many people without restrictions. It was important to realise that they were not seeking to create a new route, it was considered an ancient route possibly used for centuries.
At the informal meeting with one of the landowners (there are four) the issue of ground nesting birds on nature strips at the field edges was cited. Vehicle tracks had been witnessed. He felt that the Rights of Way officer seemed pretty clear that the route could be turned into a defined route, especially if evidence provided of use for more than 20 years. The application was a dry legal process. If the Parish Council made the application then the process would be depersonalised. The effort made to reach a compromise was appreciated but the outcome not suitable. Over 40 people have completed the user evidence document and were also prepared to attend any public meeting or enquiry.
Cllr Haskell said that the informal meeting was held to be fair and equitable. Cllr Giles said that the proposed route was not a registered footpath. The walkers were claiming it was a right of way created by historic usage, the landowners claiming that it is historic trespass. He felt that it was for the walkers to put together and present their case, not obligatory for the Parish Council to make the application. It was worth remembering the support that local landowners had given to various causes in Pewsey over many years which should be taken into consideration.

Cllr Mrs Hunt asked why the walkers insisted on adding a further route which was not a footpath when there was a perfectly accessible, legal route nearby. She had also noted the signs had been vandalised. Cllr Fleming accepted that the compromise only covered a quarter of the proposed route. With the opinion expressed by Rights of Way the application was likely to proceed whether the Parish Council liked it or not. He asked where the duty of the Parish Council lay, with the walkers or the landowners. Cllr Eyles agreed with the comments made by Cllr Giles. Cllr Ford could not agree with spending any money on the process. Cllr Stevens honestly believed that this route had not been used that often and suggested the application should be made by the local rambler group rather than the Parish Council.
Cllr Giles proposed that the Parish Council do not lead an application for the registration of this route as an official Right of Way, seconded Cllr Ford, 15 for, 1 against.

8.2. Milton Lilbourne Parish Council replied by email on 4th July :

Craig

Please be advised we as the Parish Council fully support the introduction (or re-introduction) of the said paths and opening of the countryside, but can offer no additional evidence in support currently

Kind Regards

ROBERT JONES Clerk
Milton Lilbourne Parish Council

A further email was received later that day :

Dear Craig

Please note in addition that Milton Lilbourne Parish Council in particular support route C as it is a well-used link between Clay Lane (ML1) bridleway and the recently re-opened bridleway 18A, which runs along our western boundary.

Yours sincerely

David Fall
(Vice Chairman MLPC)

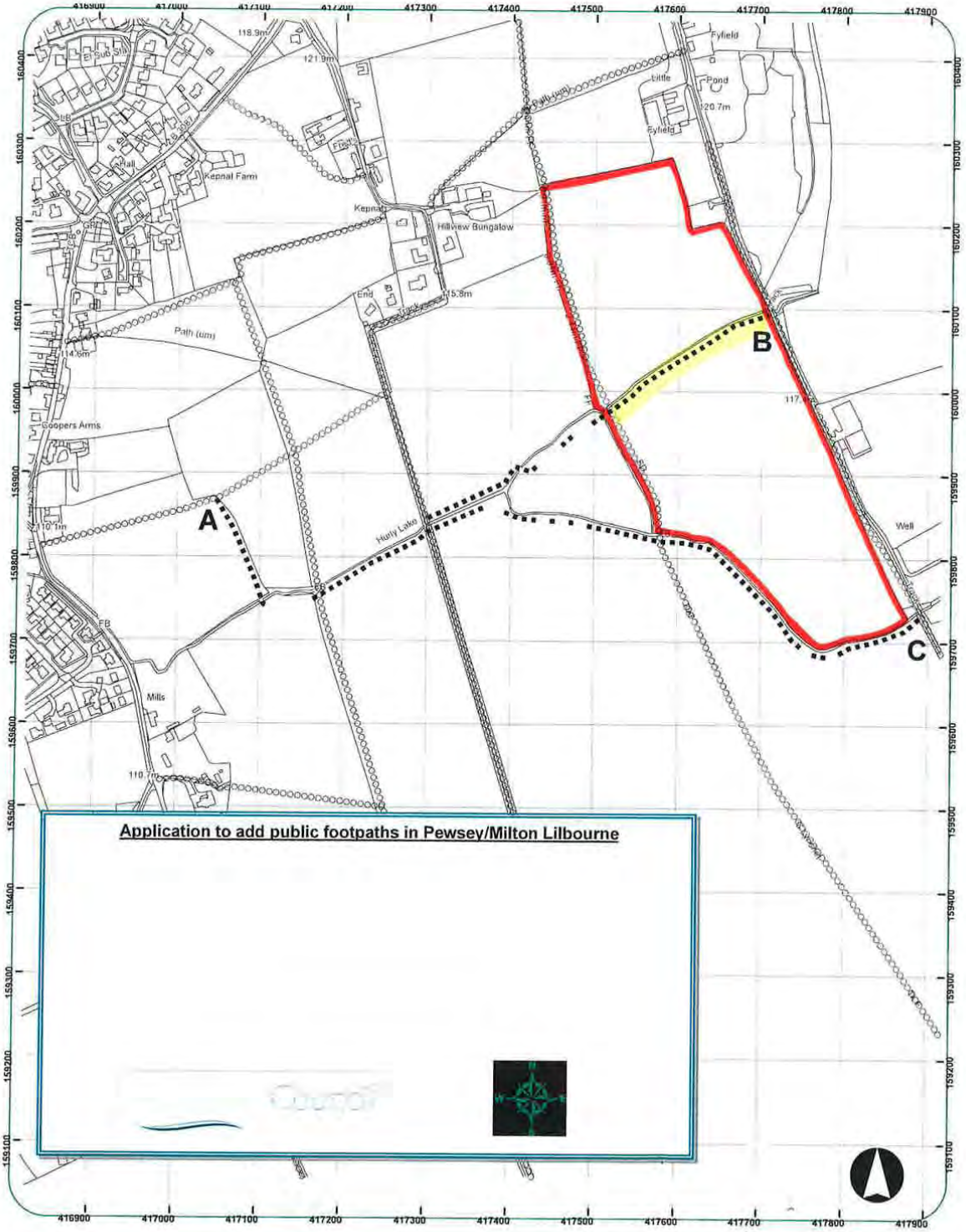
8.3 Emma Kingston representing Alexander Newbigging responded;

I am writing in response to your letter dated 7th June 2017 on behalf of Alexander Newbigging, the freehold owner of land at Fyfield, as shown edged red on the attached plan. Part of the claimed route A-B affects my client's land (as highlighted yellow).

Although my client has only owned this land since September 2016, the Newbigging family have lived in Fyfield and indeed have owned the land immediately to the north for over thirty years. During this time, it has not been apparent that frequent use has been made of this path, and it is evident from the physical state of the ground that frequent use has not been made – see photo attached (taken 15 May 2017).

My client objects to this application on the basis that he does not believe that there has been sufficient use of the section over his land to justify the claim. Is the evidence that has been submitted by the claimed users available for us to view?

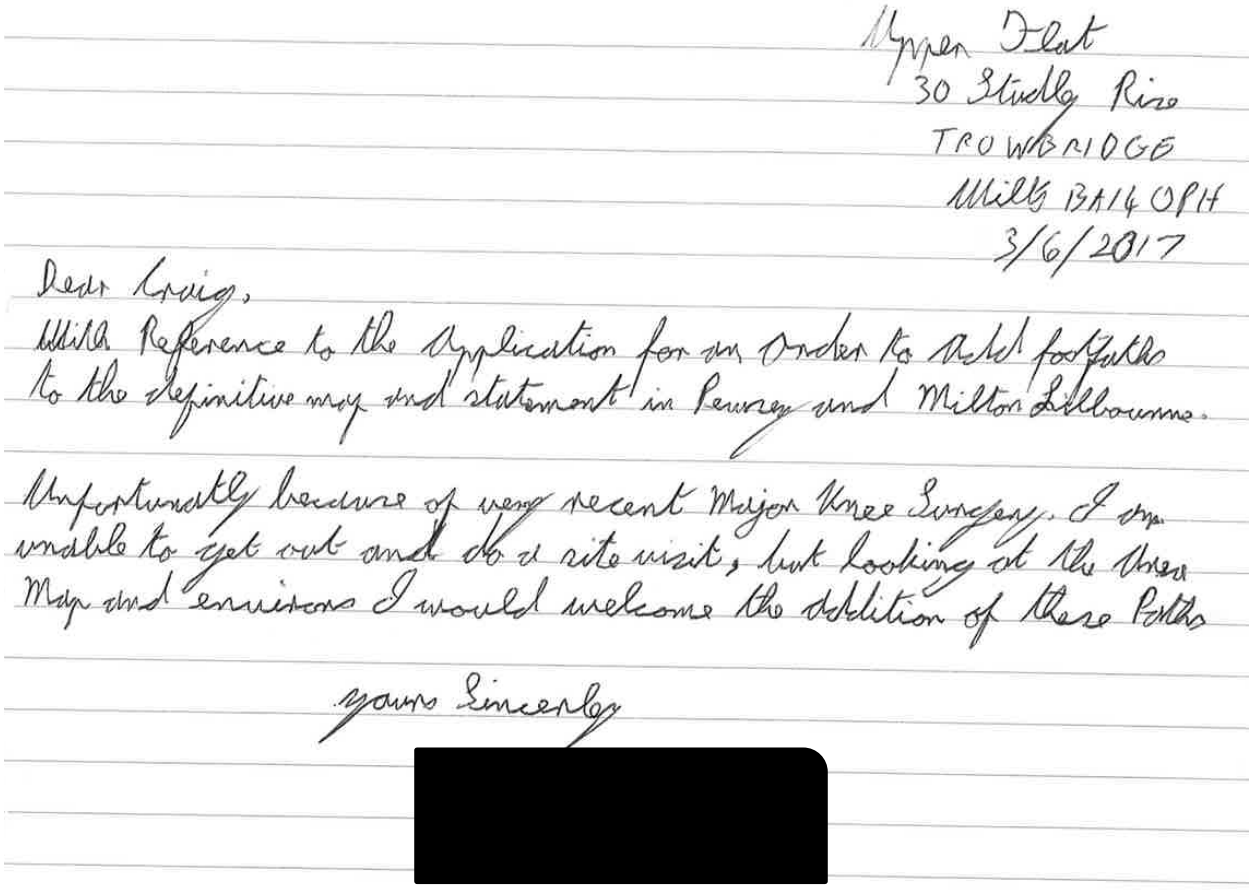
I look forward to hearing from you further.


Application to add public footpaths in Pewsey/Milton Lilbourne
A
B
C
Kepnal Farm
Hillview Bungalow
Coopers Arms
Hurly Lake
Mills
Fyfield
Pond
Well
Path (um)
118.9m
121.9m
120.7m
114.6m
110.1m
110.7m
115.8m

8.4. Maggie Roberts of Meadowcroft, Kepnal, Pewsey responded;

As you are aware, there is only one footpath mapped between Kepnal and Fyfield. As far as the parish boundary, this has been impassable for 3-4 weeks due to the oilseed rape tangling....on the east side of the parish boundary, the footpath has been sprayed and kept clear.
This enforces the need to keep the streamside paths open, as they always have been, and to allow people to move around independently without the use of cars.
Regards, Maggie Roberts, Meadowcroft, Kepnal Sent from my Huawei Mobile

8.5 Geoffrey Parsons the Wiltshire Ramblers representative for the area responded;



Upper Flat
30 Studley Rise
TROWBRIDGE
Wilts BA14 0PH
3/6/2017

Dear Craig,
With Reference to the Application for an Order to Add footpaths to the definitive map and statement in Pewsey and Milton Lilbourne.

Unfortunately because of very recent Major Knee Surgery. I am unable to get out and do a site visit, but looking at the area Map and environs I would welcome the addition of these Paths

yours Sincerely

[redacted]

8.6 Ms (Rachel) Kim Laughton and Ms Sarah Ingram Hill , both landowners, responded with landowner evidence forms and supporting evidence. These can be seen at appendix A and B of this report.

9. Main Considerations for the Council

9.1. The definitive map and statement of public rights of way are conclusive evidence as to the particulars contained therein, however this is without prejudice to any question whether the public had at that date any right of way other than that right. Wiltshire Council is the Surveying Authority for the County of Wiltshire, excluding the Borough of Swindon. The Surveying Authority is the body responsible for the preparation and continuous review of the definitive map and statement of public rights of way. The Wildlife and Countryside Act 1981 Section 53(2)(b) applies:

"As regards every definitive map and statement the Surveying Authority shall-

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that 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 these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event."

9.2. The event referred to in subsection 2 (as above) relevant to this case is:

"(3) (c) 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."

9.3. Section 53 (5) of the Act allows any person to apply for a definitive map modification order under subsection 2 (above), as follows:

"Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

9.4. Schedule 14 of the Wildlife and Countryside Act, states:

"*Form of applications*

1. An application shall be made in the prescribed form and shall be accompanied by:

(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and

(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application."

The prescribed scale is included within the *"Statutory Instruments 1993 No.12 Rights of Way – The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993"*, which states that *"A definitive map shall be on a scale of not less than 1/25,000."*

2. (1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates

(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description ''owner' or 'occupier' of the land (describing it) and by affixing it to some conspicuous object or objects on the land.

(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

(4) Every notice or certificate under this paragraph shall be in the prescribed form.

9.5. Section 31 (as amended) of the Highways Act 1980, refers to the dedication of a way as a highway, presumed after public use for 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 the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(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 land as a highway if the existence of a highway would be incompatible with those purposes."

9.6. Section 32 of the Highways Act 1980, states that the authority may consider a range of historical documents and their provenance:

"Evidence of dedication of a way as highway

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

10. Documentary Evidence

10.1. Ordnance Survey (OS) maps covering the area have been viewed using the National Library of Scotland website http://maps.nls.uk to ascertain if any historical evidence could be found of a public right existing over the claimed route.

10.2 OS Map 1886/7 Scale of 1:2500

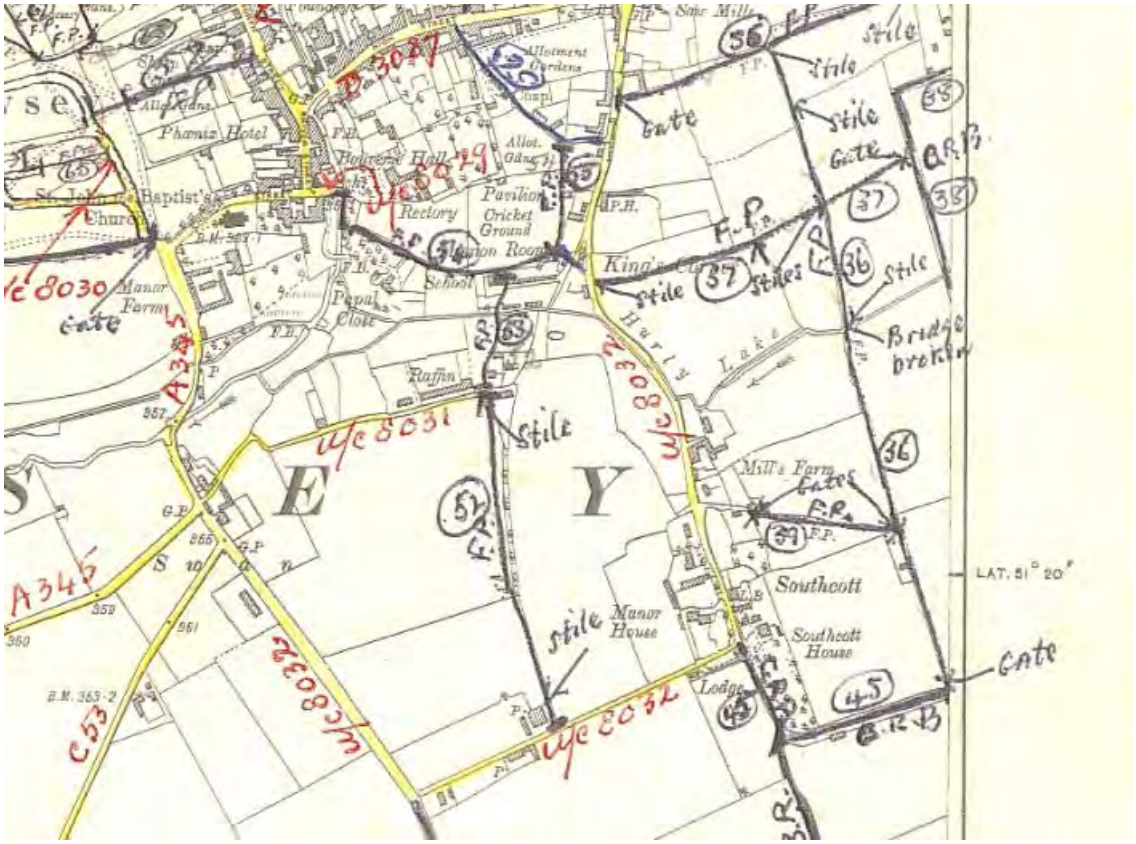
10.3 OS Map 1900 scale of 1:2500

10.4 OS Map 1936/9 scale 1:2500

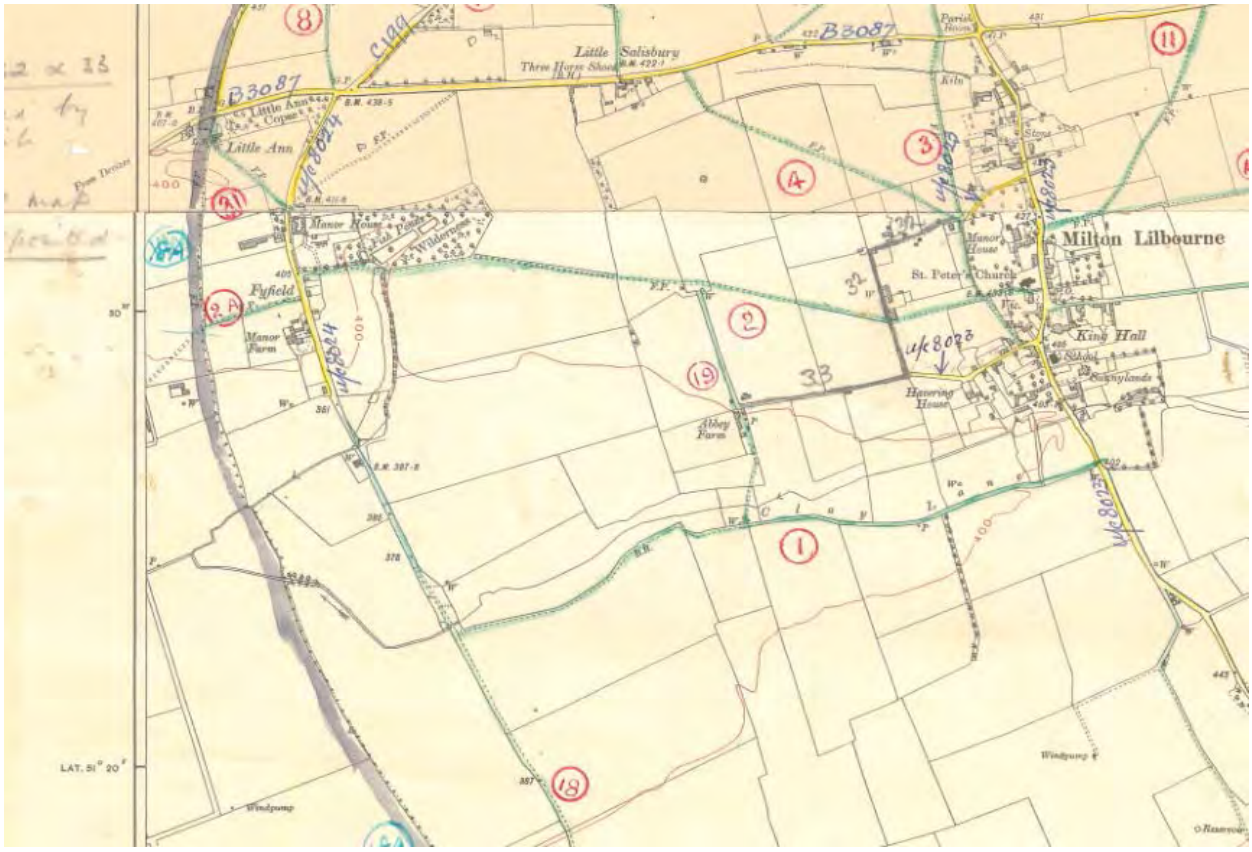
10.5. In the maps above it can be seen that no recorded footpath or any other path was recorded on any of the OS maps dating back to 1886. It should be noted from 1888, OS maps carried a disclaimer that the representation of a track or way on the map was not evidence of a public right of way.

10.6. The preliminary step to creating the definitive map of public rights of way as a result of the National Parks and Countryside Access (NPACA) act 1949 was for each parish to submit a map to the county council marking the public rights of way which they believed existed in their parish. The parish claim map and statements, submitted by Pewsey and Milton Lilbourne Parish Councils can be seen below.

10.7. Pewsey Parish Claim map- surveyed 1950-1951

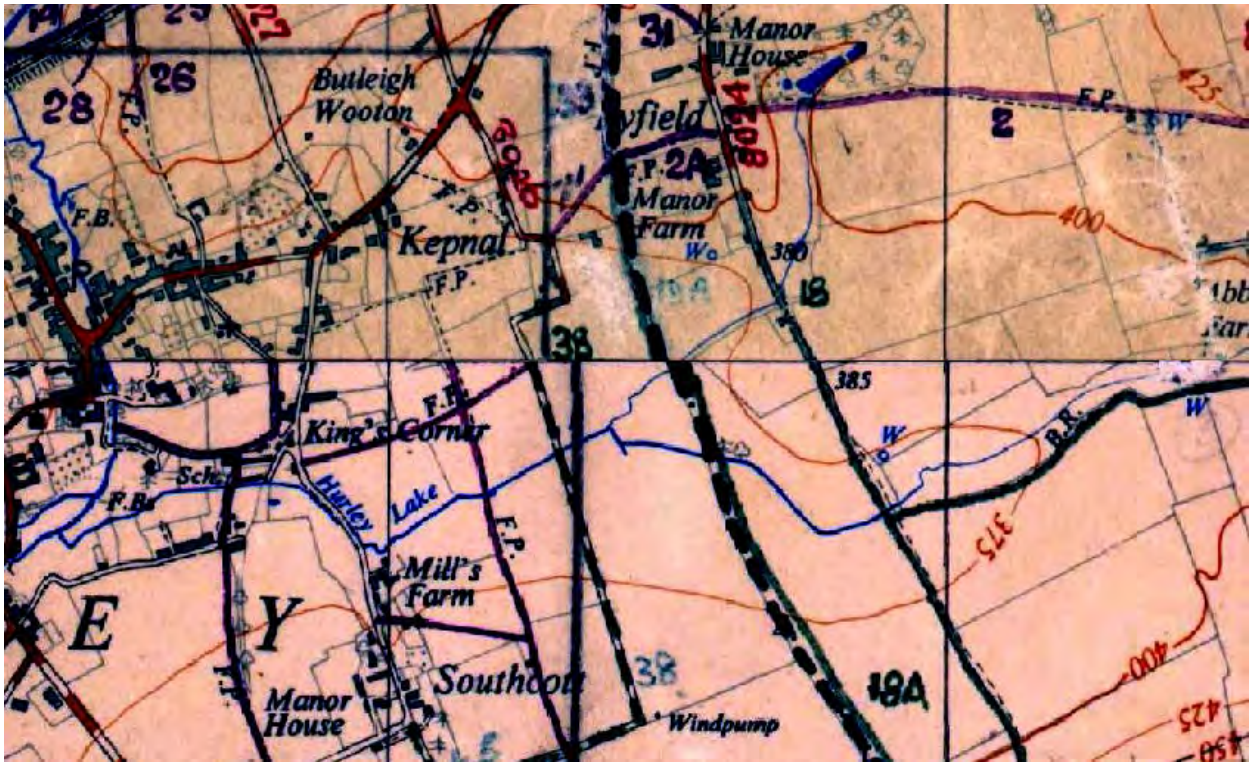


10.8. Milton Lilbourne Parish Claim Map- surveyed 1951



10.9. Looking at the parish claim maps and the historic OS maps it can be seen that the claimed route subject to this application has not been claimed as a public right of way in the past.

10.10. The 1952 Pewsey Rural District Council Definitive Map does not record the route as a public right of way.



10.11. In summary, no evidence has been found that the claimed route has been recorded as a public footpath or a path of any kind in the various documents examined.

11. Twenty Year Use

11.1. Section 31 of The Highways Act 1980 states: (see paragraph 9.7 of this report for section 31 in full)

> *"(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.*

11.2. The period of 20 years is taken as 20 years counted back from the date that the way was first called into question. In this case it is deemed the way was brought into question when the current owners of the land erected signs and barriers across the claimed routes in Autumn of 2016. Different months have been quoted when these barriers were erected, but all of them state at some time between September and December 2016. Therefore the relevant 20 year period for this case is 1996-2016.

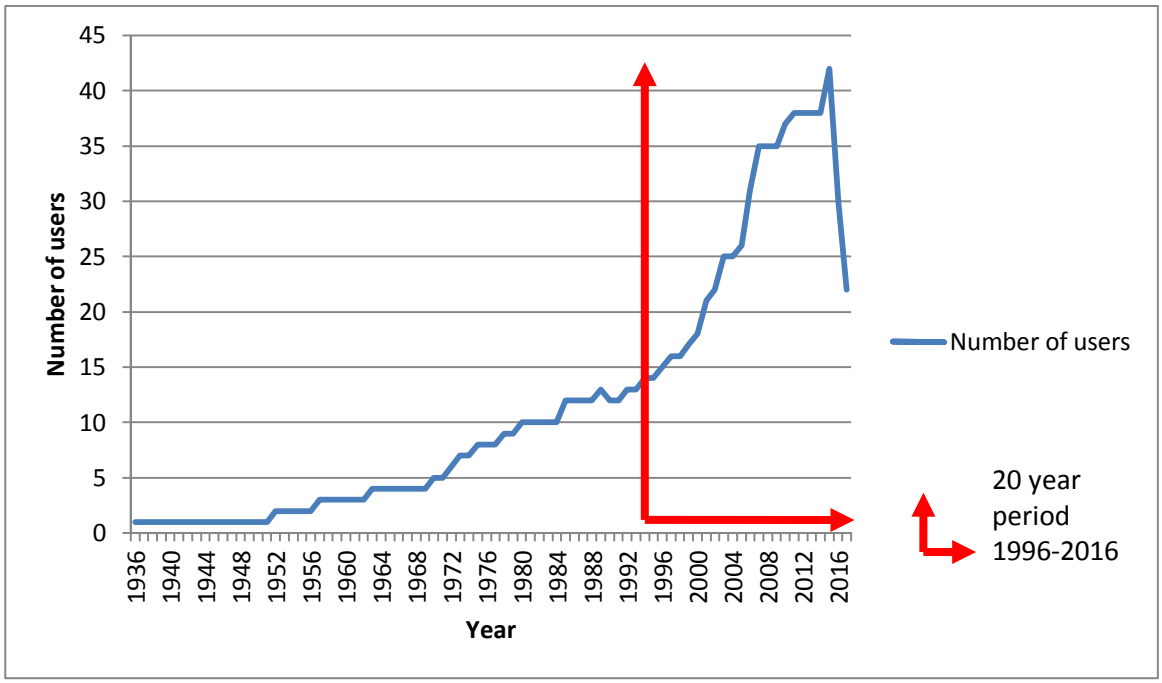
12. User Evidence Forms

As part of the application, a total of 44 witness forms were submitted as evidence. The use of the way claimed by these 44 users covers the period 1952-2017.

12.1. When considering the relevant 20 year period of 1996-2016 in this case, of the 44 users, 12 claim to have used the route for the whole 20 year period of 1996-2016 on a frequent basis , some claiming to have used it daily or three / four times a week. A further 18 users have claimed 10+ years of use between 1996-2016 and 13 have claimed less than 10 years use in the 20 year period considered. This takes the total number of individual users in the 20 year period to 43. The one other completed user form declared they were unsure at what date their use started, however they do state *" I retired 12 years ago and have used the " footpath" / field edge often during this time- occasionally prior to this"* so it can be ascertained from this statement his use has been at least 11 years of the relevant 20 year period. 1 user has also declared their family owned some of the land and so their use at that time, of that part of the route is likely to have been by right and must be discounted.

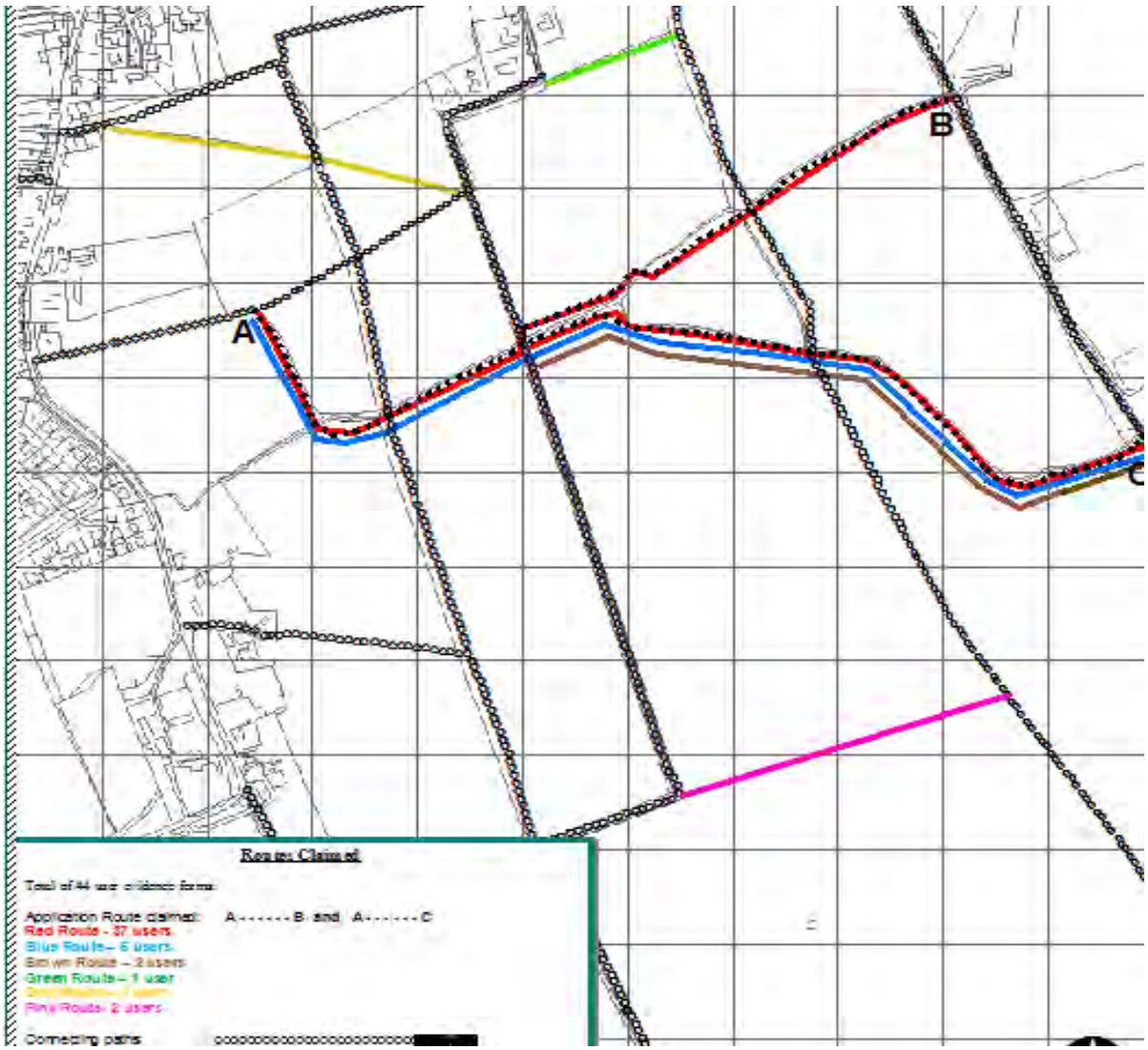
12.2. Below is a chart showing the number of individual users who claimed use in each year from 1930s-2017.

Chart showing usage of way



For the relevant 20 year period (1996-2016) it can be seen that between 15 and 42 individual users are using the path each year, with the claimed use increasing in the 2000s. This could be due to the increase in population of the village or that persons using the routes further back in time have either passed on or moved away from the area. Consistent use can be seen from the 1970s onwards. The earliest claimed use dates back to the 1930s although it should be noted this individual's family owned some of the land at that time and so their use could be by right at that time. The first use as of right can be seen to be from 1952. It should also be noted this chart does not delineate between the slightly different uses claimed of the routes walked; only recording any use of any part of the claimed route.

12.3. It should be noted that not all user forms claimed the entire route. This is demonstrated on the map below.



12.4. It can be seen that of the 44 user evidence forms submitted 37 of the users claim to have walked the entirety of the application route, the other 7 claiming to have used part of the route (blue and brown route). Three other small spurs of path are claimed in very small numbers (green, gold and pink routes). It is deemed that the user evidence submitted for these spurs are not sufficient to warrant further discussion or consideration for the purpose of this report.

12.5. There is no statutory minimum level of users required for the presumption of dedication. The quality of the evidence i.e its honesty, accuracy, credibility, and consistency are of much greater importance than the number of users.

In R (Lewis) v Redcar and Cleveland Borough Council UKSK 11 (03 March 2010), a Town and Village Green registration case, Lord Walker refers to Mr Laurence QC, who:

"…relied on a general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him…"

Lord Walker goes on to quote Lindley L J in the case of Hollins v Verney [1884] giving the judgement of the Court of Appeal:

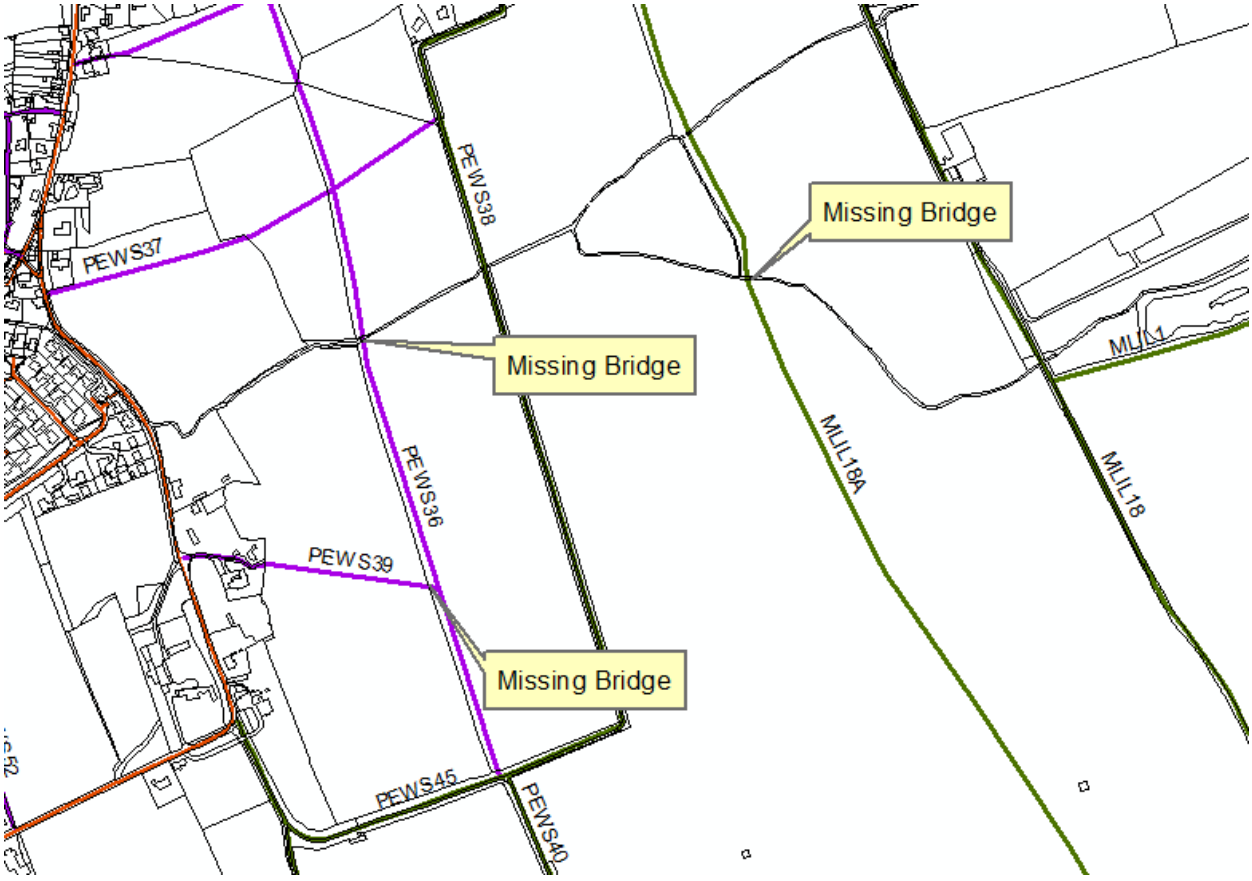
"…no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term…the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted, and ought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

12.6. What must be considered is the level of user, i.e. 44 users whose claimed use is on the whole consistent. The 20 year period which must be considered, 1996-2016, all 44 users claim some use in the 20 year period. The use of the path can be seen to be increasing in recent years (see chart at 12.2). It should be noted the population of Pewsey has increased significantly in recent years, with a recorded population of 2,647 in 1971 and 3,634 in 2011. We must consider whether or not this claimed use is sufficient to make the landowners aware that a public right was being asserted against them? The level of claimed use and clear public feeling and knowledge of this route would indicate the owners/ occupiers of the land would have been aware of the path being used if present. The fact that people were using the claimed path is not disputed by the owners of the land from 2007 onwards, the nature of the use is disputed, and these points will be discussed later in the report.

12.7. The 44 people who filled out witness forms had an opportunity to give extra comments or observations at the end of the form. A number of people took the opportunity to fill out this section. Many of the users state the claimed route offers a circular route linking with other existing rights of way which run predominantly north/south up to Pewsey Hill with few if any linking paths east/west. The addition of the claimed route would offer a circular route without the requirement to scale Pewsey Hill, however the need or want of a route is not a consideration under Section 53 of the Wildlife and Countryside Act 1981. One user has included aerial photography of the area dating back to the 1940s, these images can be

viewed at www.getmapping.com, and claims these images show evidence of the routes being used as a path. I do not consider these images to be clear evidence of use of the route as a public footpath as they are not clear and the lines that are visible may have been caused by farm vehicles or private use of some other kind. The images will not be relied upon for evidence.

12.8. Some users have stated they have used the western section of the application route as the existing rights of way PEWS36 and 39 have been unavailable until recent years as a bridge has been missing on both paths. Also MLIL18A has not been available due to a missing bridge until recently. See map below.



The bridge accessing PEWS36 and 39 were replaced/ installed by Wiltshire Council in July 2015, the bridle bridge on Milton Lilbourne 18A was installed by Wiltshire Council in February 2017. Wiltshire Councils rights of way department carried out a parish survey of Pewsey in May 2011 and found that neither right of way PEWS36 nor 39 had bridges, and it was noted on the inspection report that bridges were required at these locations. Milton

Lilbourne was similarly inspected in January 2013 and it was noted that at the location of the newly installed bridle bridge was a sleeper bridge which was not adequate for a bridleway but may have allowed for foot traffic, albeit not in a satisfactory manner. It is not known at what date previous bridges either collapsed or existed at all in the case of PEWS39 and MLIL18A. It can be seen in the case of PEWS36 on the 1950/51 Pewsey Parish claim map (see 10.6) the parish surveyor marked at the location of the bridge in question "bridge broken" but no records of any repair or replacement have been found up until the survey in 2011 and subsequent replacement installed in July 2015. It is also not known when or if MLIL18A had an appropriate bridle bridge before the installation by Wiltshire Council of a new bridge in February 2017. Records have been found dating back to 2007 that only a sleeper bridge was in place on this route. The lack of bridges on these routes could be seen to have had an effect on the available routes to the public and may have contributed to the public walking on routes other than the legally recorded public rights of way. However it is clear this is not the sole reason the application route was walked , with many users stating they walked the application route for access to the countryside and following the stream in general and forming circular walks.

12.9. There is some evidence of bridle way use of the route, i.e. on bicycle or horseback. 2 users of the 44 have claimed use on pedal cycle, one of which was monthly and 1 of which daily. With such limited user evidence claiming use of bicycle or horse the application will be considered as an application to record a public footpath with rights on foot only.

13. Objections

13.1. As part of the consultation process the landowners were consulted. The three landowners affected are Mrs Kim Laughton, Mr Alexander Newbigging and Mrs Sarah Ingram Hill.

13.2. Mrs Laughton and Mrs Ingram Hill required longer than the initial consultation date to submit their evidence and statements and was duly received by Wiltshire Council in August and September 2017 in the form of Landowner Evidence Forms, supporting documents and statements (see appendix A and B). Mr Newbigging who is represented by Emma Kingston of Carter Jonas has objected to the application in principle (see 8.3) and has confirmed he has no further evidence to submit and is aware of the evidence Mrs Laughton has submitted.

13.3. Pewsey Parish Council responded to the initial consultation (see 8.1) stating they voted against making this application on behalf of the walkers by a large majority of 15 to 1. The parish state the reasons for not supporting this application is that there are adequate

footpaths in the area already and that a reasonable offer was made by the landowners to accommodate the walkers wishes. Conversely Milton Lilbourne Parish Council wrote in support of the application (see 8.2). Neither Parish Council offered any evidence. The case must be judged on the evidence available, the want or need for the claimed route is not a consideration applicable to section 31 of the Highways Act (see 9.7).

14. Signs and Notices

14.1. The evidence provided by Mrs Laughton and Mrs Ingram Hill both include statements from Mr Mike Hooper who farmed the land in question between 2001 and 2016 when the land was sold. In his signed statement Mr Hooper states there was no evidence of use of the path before 2007, as the fields were ploughed and cropped to their margins, when the land was put into an Entry Level Stewardship scheme one of which the requirements was for a 6 metre wide environmental strips to be put along the edges of the fields. These 6 metre strips which are mapped in the evidence provided (see appendix A) do match the claimed path. Mr Hooper says use of the route only began when these 6 metre wide strips were introduced for the stewardship scheme and he and his staff asked people numerous times to not walk on these environmental strips as the farm could be penalised for allowing walkers on these strips as they are specifically for wildlife.

14.2. Mr Hooper goes on to say that at the quarterly meeting held on the 14th May 2008 between himself , the previous landowner and his farm management company it was agreed to place signs on the 6m margins stating no footpath as a matter of urgency, the signs being 12" x 8" in size, a copy of the minutes of the meeting and a map showing locations of where the signs were erected can be seen in appendix A. Looking at the minutes provided of the meeting under the heading "*ENTRY LEVEL SCHEME"* it states " *MH was still to erect the signs on the 6m margins. This would be done as a matter of urgency"* The minutes do not state the wording or nature of the signs to be erected.

14.3. I have emailed Mr Hooper and asked if he had any photographs of the signs at that time or if he remembered the wording of the signs, Mr Hooper responded *"Dear Mr Harlow . I did have photographs of the signs but unfortunately they have been long since deleted which is a shame. I assume you meant wording in your email and as such to the best of my recollection it read: Please keep off, these are environmental stewardship margins not to be walked on. The wording may not be completely correct but it was to that effect. I know that we erected them not long after they were established and had them pulled up and thrown into the ditches almost immediately. We re erected them only to have it done again!."* . Mr Hoopers signed statement is backed up by a signed statement from Mr Tony Blanchard who has been employed by Mike Hooper since 2005

(see appendix A). Mr Blanchard states he helped Mr Hooper erect signs in spring 2008 notifying walkers that they were not to walk on environmental strips as these were not footpaths. Mr Hooper and Mr Blanchard both state the signs were torn down and thrown in the ditch, were retrieved and reinstated only to be torn down again and eventually they gave up as the signs were lost.

14.4. The evidence provided by Mr Hooper and Mr Blanchard is at odds with the evidence provided by the 44 user evidence forms. A specific question is asked in the UEF which says *"Have you ever seen any signs or notices suggesting whether or not the application is a public right of way?(for example "Private", "Keep Out", No Right Of Way "Trespassers will be prosecuted").* None of the 44 people who completed user evidence forms answered this question stating they saw any signage on the routes prior to the new landowners erecting signage in late 2016. 36 of the UEFs claimed use of the route covers the year 2008 when Mr Hooper and Mr Blanchard state they erected signage. This leaves 2 signed statements saying they erected signage in 2008 informing the public not to walk on the route and 36 signed statements saying they walked the route during 2008 and saw no such signage. The signs could have been erected and torn down before any of the 36 users who have submitted user evidence saw the signs, however with the contradictory evidence it is not possible to draw firm conclusions.

14.5. A statement was also submitted by Mr Robert Hodgson who was employed by Mike Hooper and worked on the land in question from 2013-2016. Mr Hodgson states he approached people throughout the time he worked on the land who were walking on the field margins and asked them to keep off and keep to official footpaths. He also describes an incident in which a man and his dog would not move out of the way in order for Mr Hodgson to continue ploughing the field, after repeatedly asking the man to move he did. None of the user forms describe an incident before 2016 in which they were challenged and indeed it is possible none of them were challenged and the individuals that were challenged have not submitted any evidence. A conflict of evidence is apparent on the matter of users of the path being challenged.

14.6. The intention or lack of intention to dedicate a path a public right of way is addressed in section 31 of the Highways Act specifically addressing erecting notices or signs in the following sections

> *(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 the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(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.

14.7. As can be seen it is the landowner's responsibility to maintain any such notice and where it is torn down to give notice to the appropriate council that the way is not dedicated as highway. Wiltshire Council have no record of any such notice in relation to any such notices that were torn down. As discussed earlier photographic evidence that Mr Hooper may have of the signage was requested but unfortunately he does not have any and we do not have the exact wording of the signs that are claimed were displayed. If it were considered that the signs erected in 2008 were sufficient to show a lack of intention to dedicate this would lead the path to be called into question in 2008 and the 20 year relevant period to be considered could be taken as 1988-2008, which in itself may have adequate user evidence with over 10 users claiming use dating back to 1988, but this will not be explored further at this point.

15. As of right

15.1. Section 31(1) of the 1980 Highways Act requires that the use by the public must have been as of right without interruption for a full period of 20 years.

The term 'as of right' is considered to mean without force (*nec vi*), without secrecy (*nec clam*) and without permission (*nec precario*).

Without Force

15.2. None of the 44 users has declared in their form they used any force to access the path. The only barriers that have been mentioned in any form are ditches and barbed wire fences which were erected in late 2016 by the new landowners which led the path to be called into question. This is supported by the evidence supplied by the landowners who erected barriers in 2016 but there is no recollection of any physical barrier in previous years.

Without Secrecy

15.3. The use of the path is questioned by the landowners, who claim the path was not used before 2007 when 6 metre wide strips were implemented for the stewardship scheme as the route was ploughed and cultivated to the edge of the fields. However the actual use of the path from 2007 onwards is not questioned by Ms Laughton and Ms Ingram Hill, however Mr Newbigging in his letter of objection states " *the Newbigging family have lived in Fyfield and indeed have owned the land immedialtely north for over thirty years. During this time, it has not been apparent that frequent use has been made of this path, and it is evident from the physical state of the ground that frequent use has not been made- see photo (taken May 2017)"* **(see 8.3).** This photo does not give clear evidence of a lack of use of this section of the claimed route and in any case is taken in May 2017 months after barriers were erected in late 2016 to stop or at least limit the use of the route in which time clear signs of use may have overgrown or faded. It does not seem that the use of the way before or after 2007 was in secrecy.

Without Permission

15.4. Of the 44 user evidence forms none have said they had permission to use the route. However one of the users, Charlene Twisk, owned some of the land previously and so her use of the land during that period would have been by permission as her family owned the land. Ms Laughton claims in her submission Gill Cooke, who submitted a user evidence form, also had permission to use the land through her familys ownership of the land. These two users' evidence could be investigated further as to ascertain when their family ownership

ceased but even if we excluded these two users that leaves 42 users who had no permission to use the route. The landowners do not claim to have given permission to anyone to use the route.

16. Landowner's intention

16.1. Under Section 31 of the Highways Act 1980, there is a presumption of dedication after uninterrupted public use of a route for a period of 20 years or more in a manner that is "as of right", unless during that period, there can be demonstrated there was no intention on the landowner's part to dedicate the land as a highway during that period. Intention to dedicate was discussed in the Godmanchester case, R (on the application of Godmanchester Town Council (Apellants) v. Secretary of State for the Environment , Food and Rural Affairs (Respondent) and one other action R (on the application of Drain) (Appellant) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and other action [2007] UKHL 28, which is considered the leading authority in this matter. In his leading judgement Lord Hoffman approved the words of Denning LJ in the Fairey case, 1956: seen at paragraph 20 of the Godmanchester case:

"…in order for there to be "sufficient evidence there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the public who use the path…that he had no intention to dedicate. He must in Lord Blackburn's words, take steps to disabuse these persons of any belief that there was a public right…"

16.2. In the same case, Lord Neuberger of Abbotsbury went further on this point in paragraph 83 of the case:

"…the cogent and clear analysis of Denning LJ in Fairey v Southampton County Council [1956] 2 QB at 458, quoted by Lord Hoffman, clearly indicated that the intention referred to in the proviso to section1(1) of the 1932 Act was intended to be a communicated intention. That analysis was accepted and recorded in textbooks and it was followed and applied in cases identified by Lord Hoffman by High Court Judges and by the Court of Appeal for the subsequent forty years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section (1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1980 Act."

Lord Hoffman went on the say at paragraph 32:

"I think that upon the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way would reasonably have understood the owner's intention to be. The test is…objective: not what the owner subjectively intended not what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to "disabuse" [him] of the notion that the way was a public highway."

16.3. On 27th July 2017 Mrs Sarah Ingram Hill made a deposit under s.31(6) Highways Act 1980 and section 15A (1) of the Commons Act 2006 declaring the public rights of way over the land in her ownership that is affected by this application and that no other ways have been dedicated as highways over her property. Similarly Mrs Kim Laughton also made a deposit on 27th July 2017 under s.31(6) Highways Act 1980 and section 15A (1) of the Commons Act 2006 declaring the public rights of way over the land in her ownership that is affected by this application and no other ways have been dedicated as highways over her property. These deposits are available to be viewed online at http://php.wiltshire.gov.uk/row/sect31deposits/deposit_search.php . A duly made deposit under s.31(6) HA80 is, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

16.4. The deposits and declarations made on this land only protects its status from the date of the deposit, in this case 27th July 2017 and as such does not demonstrate the landowners lack of intention to dedicate this route before that date. The 20 year period of use claimed by users from 1996-2016 is not affected by these deposits.

17. Width and Route

17.1. The route claimed by the users in the main follows the same two routes – see 12.3 of this report. It is disputed by the landowners that parts of this route was used before 2007 as the fields were ploughed to the edge and made into 6m wide strips in 2007. It is clear a 6 metre wide strip would be more attractive to walkers than a ploughed field, but it would not be impossible for walkers to use the edge of a ploughed / cultivated field. 36 of the users claim to have used the path before the year 2007 and there is no mention of the change in nature of the route being a factor in their use of the route in any manner.

17.2. Below is aerial photography of the area showing the fields in question.

2001 aerial photo.

It can be seen in the 2001 aerial photo the route has been cultivated close to the edge of the stream.

17.3.

2005/06 aerial photo.

Again in 2005/06 the field are cultivated close to the edge of the stream.

17.4. 2014 aerial photo.

In the 2014 aerial photo it can be seen strips have been left along the edge of the fields in question as per the landowners' statements of a 6m strip being left for the stewardship scheme.

17.5. It does raise questions that none of the users mention or refer to the change in nature of the routes in 2007 which there is evidence did take place. As stated earlier in the report it is not improbable people can walk along the edge of cultivated fields but with such a change in the width and land management of a stream side path for it not be mentioned in any of the user evidence forms does leave this a point to examine further under possible future cross examination.

17.6. The width of the path claimed in the user evidence forms vary from statements such as " 1m" , "width for two people", " 2-10ft", "minimum 3.5m", "10m wide" to "variable" amongst other measurements. The nature of the path on the ground would certainly be narrower to the eye at the western end of the path going south from PEWS37 as it follows the edge of a field which is often cultivated. Whereas, as has been discussed, the path east of PEWS38 following the stream follows 6 metre wide strips left by the landowner which were created in 2007. This does not mean the whole 6 metres would have been used as the path and further to that point before 2007 there were not 6m strips left but none of the users make reference to this in relation to the width of the path or in any manner. Neither do many of the user evidence forms make a distinction between different sections of the path when stating the width of the path but it would not be reasonable to assume a statement of 6 metres would be applicable to the whole path or that the behaviour of a reasonable walker would lead them

over a 6 metre wide area. It is the officers' conclusion that the width of the path if recorded would be 2 metres.

18. Common Law Dedication

18.1. Section 5 of the Planning Inspectorate's Definitive Map Orders: Consistency Guidelines suggest that even where a claim meets the tests under Section 31 of the Highways Act 1980 for dedication under statute law, there should be consideration of the matter at common law.

Dedication at common law may be considered where a way has been used by the public for less than 20 years. Where the origin of a highway is not known, its status at common law depends on the inference that the way was in fact dedicated at some point in the past.

A highway can be created at common law by a landowner dedicating the land to the public for use as a highway, either expressly, or in the absence of evidence of actual express dedication by landowners, through implied dedication, for example making no objection to overt public use of the way. It also relies upon the public showing their acceptance of the route by using the way. Whilst the principles of dedication and acceptance remain the same in both statute and common law, there is a significant difference in the burden of proof, i.e. at common law the burden of proving the owners' intentions remains with the applicant. Whilst it is acknowledged that dedication of the route as a public highway may have taken place at common law at some time in the past, it is recognised that in practice evidence of such dedication is difficult to obtain and it is then more usual to apply Section 31 of the Highways Act 1980.

18.2. Relatively few highways can be shown to have been expressly dedicated. In this case I do not believe the landowners actions have expressly dedicated the way as a highway. It could be argued the previous landowners' lack of objection to use of the path by not taking any action to express their intention not to dedicate way as a highway could lead to there being a case at common law. However this will not be relied upon for this case and section 31 of the Highways Act 1980 will be applied.

19. Conclusion

19.1. This application to add a footpath to the definitive map and statement in the parishes of Pewsey and Milton Lilbourne has attracted a lot of local interest with 44 users submitting evidence via user forms claiming to have used the path during various periods over the last 20 years and beyond. The land was sold in 2016 and the new landowners, of whom there are three who are directly affected, blocked the application route in the knowledge it was not a recorded public right of way on the definitive map, thus prompting the local population to submit an application to Wiltshire Council to record the path as a public footpath.

19.2. The main weight of evidence in support of the application comes in the form of the 44 user forms. Having examined these forms there is clear and consistent use of the way claimed dating back decades and a large amount of use claimed in the 20 year period considered under section 31 of the Highways Act. The previous landowner before the change of ownership in 2016 may not have been on site to see the use of the application route but it would seem unlikely they were completely unaware of the use claimed and no direct action was taken until 2008 to erect signs on the route to inform the public it was not a public right of way.

19.3. A key argument raised by the landowner and supported by witness statements state the way was not used until 2007 when 6 metre wide strips were left uncultivated around the edge of the fields which unwittingly encouraged the use of the way. This is in contrast to the evidence submitted by the 44 users of whom a high proportion claim use of the way before and during 2007. Aerial photography does support the statement that the routes were cultivated to the edge of the fields before 2007 but this does not mean the route cannot have been used by the public at all. In such a matter where this is no conclusive evidence to ascertain the facts the fairest outcome is for the witnesses on either side to be cross examined on their evidence.

19.4. Statements from the farm workers were submitted claiming to have erected signs on the application route in 2008 and this is supported by the minutes of a meeting, although these minutes do not state the purpose or wording of the signs to be erected. The signs were then torn down and eventually the workers gave up re-erecting them. None of the 44 user forms claim to have seen any signs pre- dating the signs and barriers erected in 2016 which gave the impression the way was not dedicated as a public right of way. Again there is a clear

conflict in the evidence submitted and with no incontrovertible evidence either way the fairest outcome is for the witnesses on either side to be cross examined on their evidence.

19.5. 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 map 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, 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 will 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."

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."

19.3. Having considered all this evidence, officers conclude that it can be reasonably alleged that a right for the public on foot subsists over the land in question and that there is no incontrovertible evidence that such a right does not exist. Making an order to record the route as a public footpath on the definitive map and statement allows for objections and if

appropriate a public inquiry at which the witnesses can be cross examined by an independent inspector appointed by the Secretary of State.

20. Overview and Scrutiny Engagement

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.

21. Safeguarding Considerations

Considerations relating to the safeguarding of 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.

22. Public Health Implications

Considerations relating to the public health implications 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.

23. Environmental Impact of the Proposal

Considerations relating to the environmental 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.

24. Equalities Impact of the Proposal

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.

25. Risk Assessment

Considerations relating to the health and safety implications 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.

26. Financial Implications

26.1. The determination of definitive map modification order applications and modifying the definitive map and statement of public rights of way accordingly, is a statutory duty for the Council, therefore the costs of processing such orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.

26.2. Where no definitive map modification order is made, the costs to the Council in processing the definitive map modification order application are minimal.

26.3. Where a definitive map modification order is made and objections received which are not withdrawn, the order falls to be determined by the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA). An Independent Inspector appointed on behalf of the SoSEFRA will determine the order by written representations, local hearing or local public inquiry, which have a financial implication for the Council. If the case is determined by written representations the financial implication for the Council is negligible, however where a local hearing is held, the costs to the Council are estimated at £200 - £500 and a public inquiry could cost between £1500 - £3000, if Wiltshire Council supports the order (where legal representation is required by the Council) and around £200-£500 if it does not support the order (i.e. where no legal representation is required by the Council as the case is presented by the applicant). Any decision taken by SoSEFRA is liable to challenge in the High Court, the council would bear no financial burden at this stage as the decision has been made by the SoSEFRA.

27. Legal Considerations

Where the Surveying Authority determines to refuse to make an order, the applicant may lodge an appeal with the SoSEFRA, who will consider the evidence and may direct the Council to make an order.

If an order is made and objections are received, the procedure is as detailed above in paragraph 26.3.

28. Options Considered

To:

(i) Refuse to make a definitive map modification order, under Section 53 of the Wildlife and Countryside Act 1981, where it is considered that there is insufficient evidence that a right of way for the public on foot subsists or is reasonably alleged to subsist, on the balance of probabilities, or

(ii) Where there is sufficient evidence that a right for the public on foot subsists or is reasonably alleged to subsist, on the balance of probabilities, the authority is required to make a definitive map modification order to add a footpath to the definitive map and statement of public rights of way, under Section 53 of the Wildlife and Countryside Act 1981.

28.1. Section 53(3)(b) requires that on the balance of probability a presumption is raised that the public have enjoyed a public right of way over the land for a set period of time. Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. This section allows for the consideration of common law and the inclusion of historical evidence and is the more commonly used section.

28.2 In considering the evidence under section 53(3)(c)(i) there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw(1994) 68P & CR 402 (Bagshaw):*

Test A: Does a right of way subsist on the balance of probabilities? This requires the authority to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed paths is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the authority should find that a public right of way has been reasonably alleged.

To confirm the Order, a stronger test needs to be applied; that is, essentially that contained within Test A. In *Todd and Bradley v SoSEFRA [2004] EWHC 1450 (Admin).* Evans-Lombe J

found that the appropriate test for confirmation is the normal civil burden of proof that such a way subsists on the balance of probabilities.

Test B is the weaker test and only requires that on the balance of probabilities it is reasonably alleged that public rights subsist. This allegation may only be defeated at the order making stage by incontrovertible evidence.

29. Reasons for Proposal

It is considered that there is sufficient evidence to meet test B as described in the above paragraph 28.2 that a public right on foot exists over the route in the parishes of Pewsey and Milton Lilbourne subject of this application. The user evidence supplied demonstrates 20 years of uninterrupted use of the route in the relevant period. The issues of use and signage are disputed by the owners of the land, with the lack of conclusive evidence in favour of either side on these subjects the council can only conclude it can be reasonably alleged that rights exist over this land, if the landowner objects to this decision using the evidence already considered or any other reasons this case would then have to be brought to a public inquiry where an inspector would have the opportunity to cross examine the evidence submitted by all parties. At this stage officers believe test B has been met as there is no incontrovertible evidence.

30. Recommendation

That Wiltshire Council makes a definitive map modification order to record a public footpath over the route in the parishes of Pewsey and Milton Lilbourne subject to this application.

Craig Harlow
Rights of Way Officer
24 October 2017

APPENDIX 1A

Witness Statement

Full Name: Mike Hooper

Address: [redacted]

4ND

Tel No (Day): [redacted]

Tel no (Eve): [redacted]

Email address: [redacted]

Path Details:
Parish: Pewsey

Claimed Status of Way: Private land - not a public right of way.

Description of Path: See map. Council's Ref: CH/PEWS/2017/02

Background
I have been a farmer based in West Lavington for 30 years and have acted for other landowners as a contract farmer for 20 years.

Together with my staff we farmed all the land affected by this footpath application for the previous owner (Mr Paul Pelham / Barset Farms) from October 2001 until September 2016, when the land was sold to the four new owners. I no longer farm the land or have any connection to it.

Cultivation History of the Land
When I took over the land back in 2001 all of the fields had been, and continued to be, ploughed right to the edges. There were no margins and I did not see people walking on the field edges. There was also no evidence of walking such as flattened grass or wearing of a path. This was true of all of the field margins along the two routes sought from A to B and A to C.

Footpath PEWS37 runs west to east from the Southcott road across the middle of the field behind the Coopers inn pub and this has always been heavily used. However, when I first took on the land, walkers crossed into the next field to the west, thereby continuing along the official footpath (PEWS37) until joining footpath PEWS38, which runs north to south. They generally did not join PEWS36 because for much of the time there was no bridge where PEWS36 crosses the stream and the ground is muddy due to poaching by cattle and flooding. Walkers completed a circular walk by return to the road at Southcott via PEWS45. I have marked this in orange on the attached map (Map 1). Anyone walking on the fields would have been asked by myself or my staff not to do so and to stick to the footpath as a matter of course. This has and remains my standard practice for all land that I farm.

However, in 2007 the land was put into an Entry Level Stewardship (ELS) scheme. One requirement of this scheme was for 6m environmental strips to be put in along the edges of

fields. These are shown on Map 2 (attached) and you will note that they essentially match the footpath application.

Prior to the creation of the environmental strips, the field edges concerned were not walked as the fields were ploughed and cultivated right to the edge. However, once grass strips were introduced in 2007, people started walking on them. I and my staff asked people on numerous occasions not to walk on the environmental strips. As farmers we can be penalised by the Rural Payments Agency (RPA) if these strips are walked on because they are specifically designed to encourage wildlife. We therefore went to some effort to stop people from doing so.

The walking on the environmental strips was discussed at the quarterly meeting held on 14th May 2008 between myself, the previous landowner and his farm management company (Ray Gasson & Associates). I am enclosing a copy of the minutes of this meeting which show that it was agreed at the landowner's request that we erect signs on the 6m margins stating no footpath as a matter of urgency. The signs 12" X 8" in size

I put up signs in the places marked with an "S" in a circle on the map enclosed (Map 2). I did this with one of my staff, Tony Blanchard, who has also confirmed this in his own statement.

Shortly after the signs were erected, they were taken up and thrown into the ditches. We retrieved the signs and re-installed them on a number of occasions but eventually ceased to do so as we were unable to find them.

Myself and my staff continued to ask people not to walk on the fields and to stick to the official footpaths. In one incident, in around 2012, Robert Hodgson, a member of my staff, had to repeatedly ask a man with his dog to move out of his way so that he could plough the remaining part of the field. The man remained in the way despite repeated asking to move, eventually he moved and Robert was able to finish.

Flooding

Not only were the fields ploughed right to the edges prior to entry into the ELS scheme, which meant that there was no margin for walking, but also parts of the proposed routes are subject to significant seasonal flooding (please see Map 3) which was sufficient to make the routes impassable due to the depth of water and ground conditions. Walkers therefore stuck to the official footpaths which were not ploughed or subject to flooding.

However, since 2007, the introduction of the environmental strips has provided a 6 metre grass margin which has also improved ground conditions (as the strips are not ploughed) which has made the route theoretically passable with wellies.

I confirm that the above is a true statement:

Signature: [redacted]

Name: M. Hodgson

Date: 10/08/17

Evidence Form: (Rachel) Kim Laughton

Map 2

Witness Statement

Full Name: Tony Blanchard

Address: [redacted]

Tel No (Day): [redacted]

Tel no (Eve): .....

Email address: [redacted]

Path Details:
Parish: Pewsey

Claimed Status of Way: Private land - not a public right of way.

Description of Path: See map. Council's Ref: CH/PEWS/2017/02

Background
I have been employed by Mike Hooper of Cornbury Farm Contracting Ltd ("Cornbury") since 2005

As part of this employment I have worked on the land affected by this footpath application.

I can confirm that I helped Mike Hooper erect signs explaining that they were environmental margins and not footpaths 12 X 8 in size in the spring of 2008 notifying walkers that they were not to walk on the environmental strips as these were not footpaths. I also confirm that these signs were pulled up and thrown into the ditch. We retrieved the signs and reinstated them but they kept being removed until eventually we gave up as the signs were lost.

Throughout the period from 2005 to 2016 whilst I worked for Mike Hooper on this land, I approached people I saw walking on the field margins that were not footpaths and asked them to keep off the field margins and to keep to the official footpaths. We did not approach people every time but consistently enough for our views to be well known. Sometimes we would be working at the opposite end of the field so by the time we got to the walkers or followed them it took too much time. We were ignored by some of the walkers that we challenged so started to challenge them less as it was a waste of time.

Signature: [redacted]

Name: T. Blanchard.

Date: 10/5/17

Witness Statement

Full Name: Robert Hodgson

Address: [redacted]

Tel No (Day): [redacted]

Tel no (Eve): .....

Email address: [redacted]

Path Details:
Parish: Pewsey

Claimed Status of Way: Private land - not a public right of way.

Description of Path: See map. Council's Ref: CH/PEWS/2017/02

Background
I have been employed by Mike Hooper of Cornbury Farm Contracting Ltd ("Cornbury") since 2013.

As part of this employment I have worked on the land affected by this footpath application.

Throughout the period from 2013 to 2016 whilst I worked for Mike Hooper on this land, I approached people I saw walking on the field margins that were not footpaths and asked them to keep off the field margins and to keep to the official footpaths.

In about 2013 I also had a specific incident where one man with his dog would not move out of the way in order to allow me to finish ploughing the field. I repeatedly asked him to move. In the end he moved.

Signature: [redacted]

Name: ROBERT ALAN HODGSON

Date: 10-5-2017

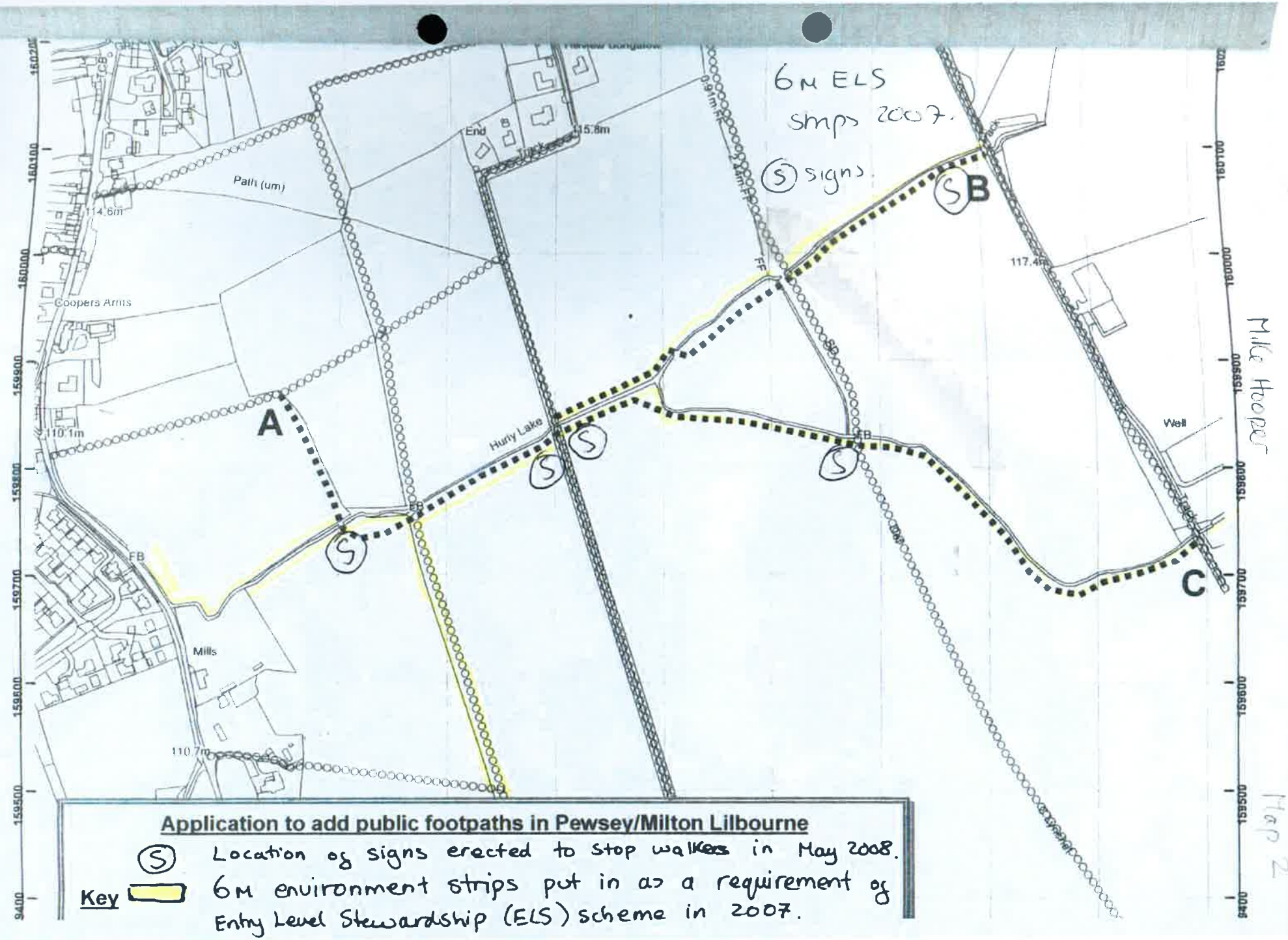
Mike Hooper

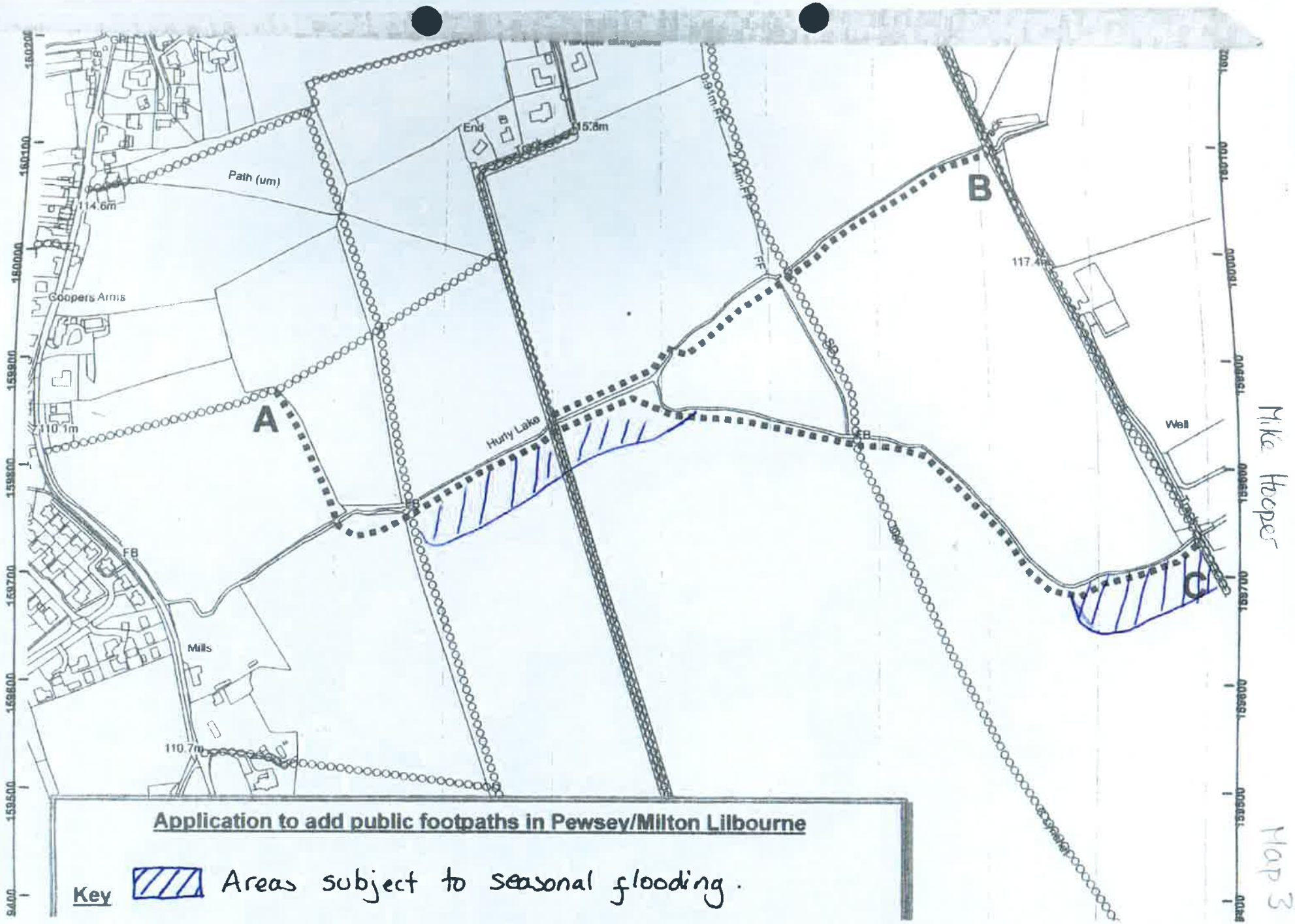
Map 1

Wiltshire Council
Where everybody matters

E14 1181 Plan D

Shows main route used by walkers.
(X) Where PEWS36 crosses the stream


6M ELS
smps 2007.
(S) signs.
Mike Hooper
Map 2
A
B
C
Coopers Arms
Path (um)
Hurly Lake
Mills
Well
114.6m
110.1m
110.7m
115.8m
117.4m
FB
End
Application to add public footpaths in Pewsey/Milton Lilbourne
(S) Location of signs erected to stop walkers in May 2008.
Key
6M environment strips put in as a requirement of Entry Level Stewardship (ELS) scheme in 2007.



Mike Hooper

Map 3

R G A 2001 | Scale: 1:7500 | Printed: 06 December 2006

Farmade
Amais


ELS
R G A 2001
Scale 1:7500
Printed: 12 February 2015
Farmcote
Amais
ELS 2011 APP
1 sided hedge main
2 sided hedge & dit
Field Corner Manage
Low input grassland
1 sided hedge& ditch
2 sided Hedge Main
In field Trees
Very Low input grass
2 sided Ditch Main
6m margins
In field trees grass

RAY GASSON & ASSOCIATES
FARM MANAGEMENT AND CONSULTANCY SERVICES

MIDDLE HILL, HOOK NORTON, BANBURY,
OXFORDSHIRE. OX15 5PL
TELEPHONE: 01608 737888 FACSIMILE: 01608 737778
e-mail: rga@gassonassociates.com Website: www.gassonassociates.com

Our Reference: EW/FMG62

14 May 2008

Mr M Hooper

[redacted]

Dear Mike

Barset Farms

I enclose a copy of the minutes of our meeting held at Manningford Bohune on Wednesday 9 April 2008.

Yours sincerely

[redacted]

Emma Watson
Direct Dial: 01608 738024
email: emma@gassonassociates.com

BARSET FARMS

MINUTES of the meeting held at Manor Farm House, Manningford Bohune on Wednesday 9 April 2008.

Present: Mr P N D Pelham, Mrs V G Pelham, C Reid, J Clark, M Hooper, and E Watson

1 2008 HARVEST CROPPING

a Winter Wheat (163.31 hectares): Crops were progressing well. Grass weed control had been applied. The T_0 fungicide would be applied shortly, but disease levels were currently low.

b Winter Oilseed Rape (67.10 hectares): The majority of the small plants had survived the winter and the crop was progressing well. Blacklands was much more advanced and would require a growth regulator.

c Winter Oats (40.01 hectares): Spring growth was yet to commence. The first nitrogen dressing had been applied. Broadleaved weed control was still to be applied.

d Linseed (55.46 hectares): Varieties were Abacus and Bilton. Poultry muck was being applied on the day of the meeting and the ground would be cultivated and drilled once this was complete.

e Cross Compliance: The Soil Protection Review had been updated.

f ACCS: The inspection had been passed.

3 ENTRY LEVEL SCHEME

MH was still to erect the signs on the 6m margins. This would be done as a matter of urgency.

The 6m margin next to the bridleway in Woodbridge would be ploughed out and the ELS agreement adjusted accordingly.

4 DOWNLAND AND OTHER GRASSLAND

MH would apply the annual fertiliser dressing as soon as conditions allowed.

5 AGRICULTURAL WASTE REGULATIONS

6 GRAIN STORE

Bodmans had secured the old grainstore doors.

Fishlock & Dyer had been unable to repair the sensor lights. CR would investigate the feasibility of fitting a timer switch instead.

7 OTHER BUILDINGS

It was agreed that the internal roof to the chemical store would be felted to ensure that the rain which leaked through the barn roof did not damage the plywood. Work would also be carried out to bring the electrics up to standard. The automatic heaters were currently working, but would be monitored.

A quote from Wiltshire Waste to remove the old grain drier at no cost would be accepted.

8 BRIDGE TO BLACKLANDS

9 SHOOT

Hare coursers had been sited around Field Barn and Gordon had chased them from the premises. MH would help PP position old tree trunks in any gaps in the roadside hedge to ensure they could not easily gain access to the land.

10 ROADS, HEDGES, DITCHES AND GATES

MH would carry out remedial works to the Field Barn track as conditions allowed. MH would liaise with CR regarding stone requirements.

11 SECURITY

12 FINANCE

a 2007 Harvest: EW circulated an updated outturn statement.

Variable costs were unchanged from the previous quarter.

Profit share was likely to be approximately £93,000 better than budget.

MH would invoice PNDP for the remainder of the contract charge.

There was approximately 1 load of wheat remaining to be moved.

b 2008 Harvest: EW circulated an updated outturn statement. Seed costs were currently under budget but there would be further expenditure of approximately £2,500 on Linseed seed. Fertiliser costs were slightly over budget. Spray costs were under budget but there was significant further expenditure to come.

c Grain Sales: EW circulated an updated schedule of 2008 commitments.

d Contract Farming Agreement: In response to the recent changes in agricultural returns, the terms of the contract were discussed with a view to amending the agreement from 1 October 2008. An initial budget for the 2009 harvest was circulated. It was noted that costs were increasing significantly, especially fertiliser and diesel. A proposal was tabled which would increase MH's contract charge to £90/ac, and profit over £50/ac would be split 50:50 rather than 70:30. MH would discuss the proposal with the family before commenting.

15 DATE OF NEXT MEETING

This was arranged for Tuesday 1 July at 2.30 pm.

EW/FMG62
5 May 2008

Ray Gasson & Associates
Middle Hill
Hook Norton
Banbury
OX15 5PL
email: rga@gassonassociates.com

Wiltshire Council
Where everybody matters

LANDOWNER EVIDENCE FORM

The object of this enquiry is to establish whether a Public Right of Way exists. It is important that you answer all the questions accurately and as fully as possible. This is of special importance as the information given may be examined at a Public Inquiry or Hearing.

FULL NAME (Rachel) Kim Laughton

ADDRESS [redacted]

Tel no (day) [redacted]

e.mail address [redacted]

PATH DETAILS:

Parish Pewsey Parish, Wiltshire

Claimed Status of Way No public right of way. Applicant is claiming a footpath which we dispute.

Description of Path (also see attached map)

From: Southcott **To:** Kepnal

1. **The route of the way is shown on the accompanying plan.**

   Does the route cross or adjoin your land? YES

   If no, no further questions need to be answered.

   If yes, please indicate on the plan the position of your land and state the number of years it has been in your ownership *Since September 2016. Boundaries shown in red on attached map.*

2. **Do you believe this way to be public?**

   (a) If so, with what status *No. It is not a footpath and has been private cropped field.*

   (b) For how long have you held this belief?

I have lived in Pewsey for most of my life with only a few years spent living elsewhere. I am now 43. In my life time, this land has always been farmed and never suggested by signage as a footpath. I understand from the previous landowner and the previous contract farmer that they both challenged walkers on a number of occasions and asked them not to walk on the land and to use the public rights of way.

I have spoken to Mr Mike Hooper of Combury Farm Contracting Ltd, the farm contractor who farmed all the land covered by this footpath application from 2001 until 2016. Mr Hooper has told me categorically that people did not used to walk on the land when he first took it over in 2001. All of the fields concerned were ploughed to the edges (which can be seen on historic images via Google Earth), which would have made walking difficult, and as there were already numerous public rights of way available, which were much easier to walk on, people stuck to these.

For example, people did walk through the field behind the Coopers' Arms on PEWS37 at the westerly end of the proposed route but then continued eastwards on PEWS37 until it met PEWS36 or PEWS38. They

did not cut round the edge of the field behind the Coopers' Arms as the field and the next one they would come to were ploughed right to the edge.

However, in 2007 the land was entered into the government's Entry Level Stewardship (ELS) environmental scheme. This scheme enables the farmer / landowner to select land management options that will improve the environment and foster wildlife. One of the options selected was that of 6 metre environmental strips ("ELS strips") which were introduced along various field margins. Please see the attached map of where the 6m strips were located. These strips were "non-rotational" ie they were there all year and were there every year from 2007 through until 2016.

When the 6m ELS strips were introduced in 2007, some people started to walk on them and to walk their dogs on them as they appeared to be a nice footpath and were easy to walk on. This is why the proposed routes effectively follow the strips. The former owner and farm contractors challenged walkers and asked them not to walk on the strips and to use the public rights of way.

Despite being asked not to walk on the strips, some people ignored this and continued to do so. The landowner did not wish the land to be used as a footpath and asked his contract farmer to erect signs stating that it was not a footpath. At a meeting this request was repeated (please see attached Minutes of the meeting between held on 9 April 2008 repeating the request to put up the signs).

Shortly after this meeting Mike Hooper, the contract farmer, together with one of his staff members, erected signs at several points along the disputed route (please see attached map showing where these signs were located) stating that it was not a footpath. Mike Hooper and two of his staff are happy to confirm this. The signs were repeatedly pulled up and interfered with and eventually Mike Hooper and his staff gave up reinstating them. They did, however, continue to challenge walkers and ask them to stick to the public rights of way.

ELS environmental strips are grass margins which are created for wildlife, including to encourage ground nesting birds such as grey partridge and other wildlife such as brown hare and harvest mice. Clearly people walking along these, particularly with dogs, causes major disturbance and defeat what the farmer, and DEFRA, are trying to achieve.

Farmers participating in environmental stewardship schemes receive a payment as long as the requirements are achieved. Farms are inspected by DEFRA to ensure compliance and payment deduction or penalties are incurred where conditions are breached. Damage to ELS strips from walkers and dogs, such as compaction, trampling or "poaching", would be picked up in an inspection and can cause a reclaim of the grant and a penalty. This is another reason why farmers and landowners do not wish the public to walk on ELS strips and why they often put up signs to this effect.

I note that some of those who have completed user evidence forms suggest that the claimed routes are long established tracks which have been used by the public for many years. We have reviewed the relevant OS mapping from the late nineteenth century to recent times and can find no representation of a route of any kind on the claimed alignments. I have also looked at various aerial mapping online, and prior to 2007, I can see no evidence of these routes being used as a footpath. I suggest this should cast doubt upon the credibility of any suggestion that these are long established and well used paths.

I note that user evidence forms have been submitted by Charlene Twisk and Gill Cooke. My understanding is that the Cooke family bought Southcott Manor Farm in 1933 which included some of the land over which the routes pass. In different land transactions, pieces of land were then sold off by the Cooke family during the 1960s and 1970s. I believe Charlene Twisk to be a daughter of the Cooke family who owned some of this land and Gill Cooke was married to Mr Cooke's son. Their use should therefore not be regarded as representative of use by the general public.

In summary, prior to 2007 the route was not being walked on as the fields were ploughed right to the edges, making walking difficult hence walkers remained on the numerous available public rights of way.

Any walkers who were encountered by the former landowner or contract farmworkers, were challenged and asked to use the public rights of way.

In 2007, 6 metre environmental strips were introduced along various field margins and problems were experienced with people starting to walk along the HLS strips despite being asked not to. The landowner and contract farming team continued to challenge walkers who they came across and ask them to use the public rights of way. In 2008 signs stating that it was not a footpath were erected at various locations along the proposed route. These signs were repeatedly removed and damaged and eventually the contract farmers gave up reinstating them but continued to tell people verbally to stick to the public rights of way.

9. **Have there, to your knowledge, ever been on the way any stiles or gates?**

a. If yes, state whether the gate or gates were ever locked. A wire "Wiltshire gate" was installed at the entrances to our fields to the East of PEWS38 (at the same location as the 2016 signs shown on the attached map).

b. Show their position on the accompanying plan. Please see attached map

10. **Have you ever obstructed the way?**

a. If yes, state where, how and when. Please see answer to question (9).

We have placed wire gates across the field entrances to the East of PEWS38.

11. **Can you give any further information?** Please continue on a separate sheet of paper if needed.

Please find attached the following:

- map marked "Evidence Form: (Rachel) Kim Laughton
- submissions from Mike Hooper of Combury Contract Farming Ltd
- submission from two employees of Combury Contract Farming Ltd
- plan showing location of 6 metre environmental strips.
- Minutes of a meeting held on 9th April 2008.

DECLARATION

I hereby certify that, to the best of my knowledge and belief, the information that I have given is true.

Signed... [redacted] ..... Date: ...11th August..... 2017

Please return this form and any accompanying map to:

Rights of Way and Countryside Section, Waste and Environment, Wiltshire Council

County Hall, Trowbridge, BA14 8JN

APPENDIX 1B

Response to Public right of Way Application List of enclosures

Landowners form
Evidence Statement from Mike Hooper who contract farmed the land between 2001 and 2016.
Evidence statement from Mike Hoopers employees
Attached map showing position of environment strips as a requirement for Entry Level Stewardship (ELS) Scheme in 2007 and and position of signs that were erected in September 2016 and Wiltshire gate.
Photograph of sign and the sign in the ditch after it had been pulled up.
Map showing fields in S Ingram Hill's ownership
Except from a letter from Withy King in response to queries during due diligence regarding footpaths.
Map showing the fields in my ownership.

Response to Application Forms

I have responded to Mr Haddock's application which is the lead submission from which the others follow on.
I have also commented on Ms Twisks application
I have made brief comments on Margaret Forbes, David and Kirstin Warry Philippa Gilliam and Janice Oakman's applications.
I believe response to the other applications is covered by these comments

Addition to land owner's form

I have responded to the applications. People feel that they are being excluded and cannot see that walking over private land that does not contain livestock cannot be causing any damage. Unfortunately this view is mistaken. The Farm has been part of an Environmental Stewardship scheme since 2007. To the uninformed eye it appears that the fields have large margins that have been left fallow and therefore no harm occur from the public walking them and exercising their dogs. This is obviously not so. The farmer leaves these areas for nesting birds and other wild life. If used as a dog walk in the nesting season the results could be damaging. It is also possible that the farmer loses the right to be in the Scheme.
This is addressed in Mike Hoopers signed statement (Mike Hooper of Cornbury Farm Contracting Ltd)

Many of the applications state that there have been no "Private" signs before September 2016. This is not correct. Please see Mike Hoopers statement. On all occasions that they have been erected they have been torn down by walkers. (see attached photo). This shows that the walkers that have done this have been aware that they are on private ground and not a public footpath.

`I believe that Mrs Laughton has submitted minutes of a meeting of Ray Gasson Associates that makes a brief reference to the erection of the footpath signs by HLS on behalf of the previous landowner

I do not think that the aerial photography is helpful.

We are happy to support the existing footpaths that cross our land. Pews36 and Pews 39. We do, however, have members of the public abusing that access. We have on several occasions had whole families running through our barley crop off the footpath. I have also had a man with two dogs running through the crop in June 2017.

Many new houses have been built in Pewsey over recent years. This has led to a huge increase in dog walking. It is possible to make a circular dog walk without using the routes that have been applied for. I would therefore argue that the area is accessible, but should be restricted to the footpaths that are already designated.

Expensive new bridges have been installed on PEW36 and PEW39 to assist walkers to keep to the correct paths by the Council.

I purchased Southcott House 2003 and there was no obvious use of either footpath PEW36 or PEW39. This was because the fields were ploughed to the edges at this time and there was no bridge over the stream at Pew 36. The public walked around the bridleway from Winters Drove to Kepnal It was only after the SLS strips were introduced in 2007 that people started to walk down PEW 36 and then along Hurly Stream to the Kepnal track, but not directly across Coopers field. Pewsey 37 goes west/east to Pewsey 38. Pewsey 36 goes North/ South from Pewsey 35. There is and has always been a west/east path along Pewsey 37 to Pewsey 38. This has recently had new metal swing gates installed along the boundary fields which replaced the wooden stiles that were there previously. The crossing of the Hurly stream on Pewsey 36 has been improved greatly by the installation of a new bridge so that the path that interconnects at Pewsey 37 is now excellent. This means that the temporary walking down the side of Coopers Field is now unnecessary. There is no reason not to use the designated footpath.

The enclosed lawyers letter show the response to due diligence enquiries during the sale of the land. It give the reason that walkers started diverting from the designated footpath as they could not cross the ditch. This has now been resolved by the new bridge.

The Kepnal Farm was purchased and then split between 3 new owners. I believe that the evidence that has been provided by both myself, Kim Laughton and on behalf of the Alex Newbiggin will overlap and the evidence will apply to the whole farm before it was split.

Wiltshire Council
Where everybody matters

LANDOWNER EVIDENCE FORM

The object of this enquiry is to establish whether a Public Right of Way exists. It is important that you answer all the questions accurately and as fully as possible. This is of special importance as the information given may be examined at a Public Inquiry or Hearing.

FULL NAME SARAH PAM INGRAM HILL

ADDRESS [redacted]

Tel no (day)

e.mail addre

PATH DETAILS:

Parish DEVIZES

Claimed Status of Way FOOTPATH

Description of Path (also see attached map)

From: HURLETT LANE STREAM BY **To:** PEW36 TO PEW38

1. **The route of the way is shown on the accompanying plan.**

   Does the route cross or adjoin your land? **YES / ~~NO~~**

   If no, no further questions need to be answered.

   If yes, please indicate on the plan the position of your land and state the number of years it has been in your ownership SINCE 2016 ~~or tenancy~~

2. **Do you believe this way to be public?**

   (a) If so, with what status No

   (b) For how long have you held this belief? SINCE 2003

3. **Have you seen, or been aware of, members of the public using this way?**

   (a) If so, please state the period, regularity and nature of such use ONLY SINCE 2007

4. **Have you ever required people to ask permission before using the way?**

   If so, please give details No

5. **Have you deposited a Section 31 (Highways Act 1980) plan and statement? YES / ~~NO~~**

HLD/PEW/2017/10

If so, please give details and dates Submitted June 2017 1st part accepted by Wiltshire Council 24th August 2017.

6. **Have you, or someone on your behalf, ever turned back or stopped anyone from using the way?**

If yes, please give details and appropriate dates In Sept 2016 by James Strong's farm manager at the time

7. **Have you, or someone on your behalf, ever told anyone using the way it was not public?**

If yes, please give details and appropriate dates As above

8. **Have you ever erected notices or signs stating that the way was not public?**

a. If yes, please give details and approximate dates Yes (see map)
They were thrown in the ditch several times. They have stopped since the application to the Council.

b. State whether these notices were ever defaced or destroyed and whether they were replaced.

c. Show their position on the accompanying plan

9. **Have there, to your knowledge, ever been on the way any stiles or gates?** (YES) / NO

a. If yes, state whether the gate or gates were ever locked Installed Sept 2016 + locked.

b. Show their position on the accompanying plan

10. **Have you ever obstructed the way?**

a. If yes, state where, how and when See map with position of locked Wiltshire Gate.

11. **Can you give any further information?** Please continue on a separate sheet of paper if needed.

See attached.

DECLARATION

I hereby certify that, to the best of my knowledge and belief, the information that I have given is true.

Signed: [redacted] Date: 28/8/17

Please return [redacted] ying map to:

Rights of Way and Countryside Section,

Waste and Environment

Wiltshire Council

County Hall

Trowbridge

BA14 8JN

Witness Statement

Full Name: Mike Hooper

Address: [redacted]

4ND

Tel No (Day):

Tel no (Eve):

Email address:

Path Details:

Parish: Pewsey

Claimed Status of Way: Private land - not a public right of way.

Description of Path: See map. Council's Ref: CH/PEWS/2017/02

Background

I have been a farmer based in West Lavington for 30 years and have acted for other landowners as a contract farmer for 20 years.

Together with my staff we farmed all the land affected by this footpath application for the previous owner (Mr Paul Pelham / Barset Farms) from October 2001 until September 2016, when the land was sold to the four new owners. I no longer farm the land or have any connection to it.

Cultivation History of the Land

When I took over the land back in 2001 all of the fields had been, and continued to be, ploughed right to the edges. There were no margins and I did not see people walking on the field edges. There was also no evidence of walking such as flattened grass or wearing of a path. This was true of all of the field margins along the two routes sought from A to B and A to C.

Footpath PEWS37 runs west to east from the Southcott road across the middle of the field behind the Coopers Inn pub and this has always been heavily used. However, when I first took on the land, walkers crossed into the next field to the west, thereby continuing along the official footpath (PEWS37) until joining footpath PEWS38, which runs north to south. They generally did not join PEWS36 because for much of the time there was no bridge where PEWS36 crosses the stream and the ground is muddy due to poaching by cattle and flooding. Walkers completed a circular walk by return to the road at Southcott via PEWS45. I have marked this in orange on the attached map (Map 1). Anyone walking on the fields would have been asked by myself or my staff not to do so and to stick to the footpath as a matter of course. This has and remains my standard practice for all land that I farm.

However, in 2007 the land was put into an Entry Level Stewardship (ELS) scheme. One requirement of this scheme was for 6m environmental strips to be put in along the edges of

P.T.O.

fields. These are shown on Map 2 (attached) and you will note that they essentially match the footpath application.

Prior to the creation of the environmental strips, the field edges concerned were not walked as the fields were ploughed and cultivated right to the edge. However, once grass strips were introduced in 2007, people started walking on them. I and my staff asked people on numerous occasions not to walk on the environmental strips. As farmers we can be penalised by the Rural Payments Agency (RPA) if these strips are walked on because they are specifically designed to encourage wildlife. We therefore went to some effort to stop people from doing so.

The walking on the environmental strips was discussed at the quarterly meeting held on 14th May 2008 between myself, the previous landowner and his farm management company (Ray Gasson & Associates). I am enclosing a copy of the minutes of this meeting which show that it was agreed at the landowner's request that we erect signs on the 6m margins stating no footpath as a matter of urgency. The signs 12" X 8" in size.

I put up signs in the places marked with an "S" in a circle on the map enclosed (Map 2). I did this with one of my staff, Tony Blanchard, who has also confirmed this in his own statement.

Shortly after the signs were erected, they were taken up and thrown into the ditches. We retrieved the signs and re-installed them on a number of occasions but eventually ceased to do so as we were unable to find them.

Myself and my staff continued to ask people not to walk on the fields and to stick to the official footpaths. In one incident, in around 2012, Robert Hodgson, a member of my staff, had to repeatedly ask a man with his dog to move out of his way so that he could plough the remaining part of the field. The man remained in the way despite repeated asking to move, eventually he moved and Robert was able to finish.

Flooding

Not only were the fields ploughed right to the edges prior to entry into the ELS scheme, which meant that there was no margin for walking, but also parts of the proposed routes are subject to significant seasonal flooding (please see Map 3) which was sufficient to make the routes impassable due to the depth of water and ground conditions. Walkers therefore stuck to the official footpaths which were not ploughed or subject to flooding.

However, since 2007, the introduction of the environmental strips has provided a 6 metre grass margin which has also improved ground conditions (as the strips are not ploughed) which has made the route theoretically passable with wellies.

I confirm that the above is a true statement:

Signature: [redacted]

Name: M. Hodgson

Date: 10/08/17

Witness Statement

Full Name: Robert Hodgson

Address: [redacted]

Tel No (Day):

Tel no (Eve):

Email address:

Path Details:
Parish: Pewsey

Claimed Status of Way: Private land - not a public right of way.

Description of Path: See map. Council's Ref: CH/PEWS/2017/02

Background
I have been employed by Mike Hooper of Cornbury Farm Contracting Ltd ("Cornbury") since 2013

As part of this employment I have worked on the land affected by this footpath application.

Throughout the period from 2013 to 2016 whilst I worked for Mike Hooper on this land, I approached people I saw walking on the field margins that were not footpaths and asked them to keep off the field margins and to keep to the official footpaths.

In about 2013 I also had a specific incident where one man with his dog would not move out of the way in order to allow me to finish ploughing the field. I repeatedly asked him to move. In the end he moved.

Witness Statement

Full Name: Tony Blanchard

Address: [redacted]

Tel No (Day):

Tel no (Eve):

Email address:

Path Details:
Parish: Pewsey

Claimed Status of Way: Private land - not a public right of way.

Description of Path: See map. Council's Ref: CH/PEWS/2017/02

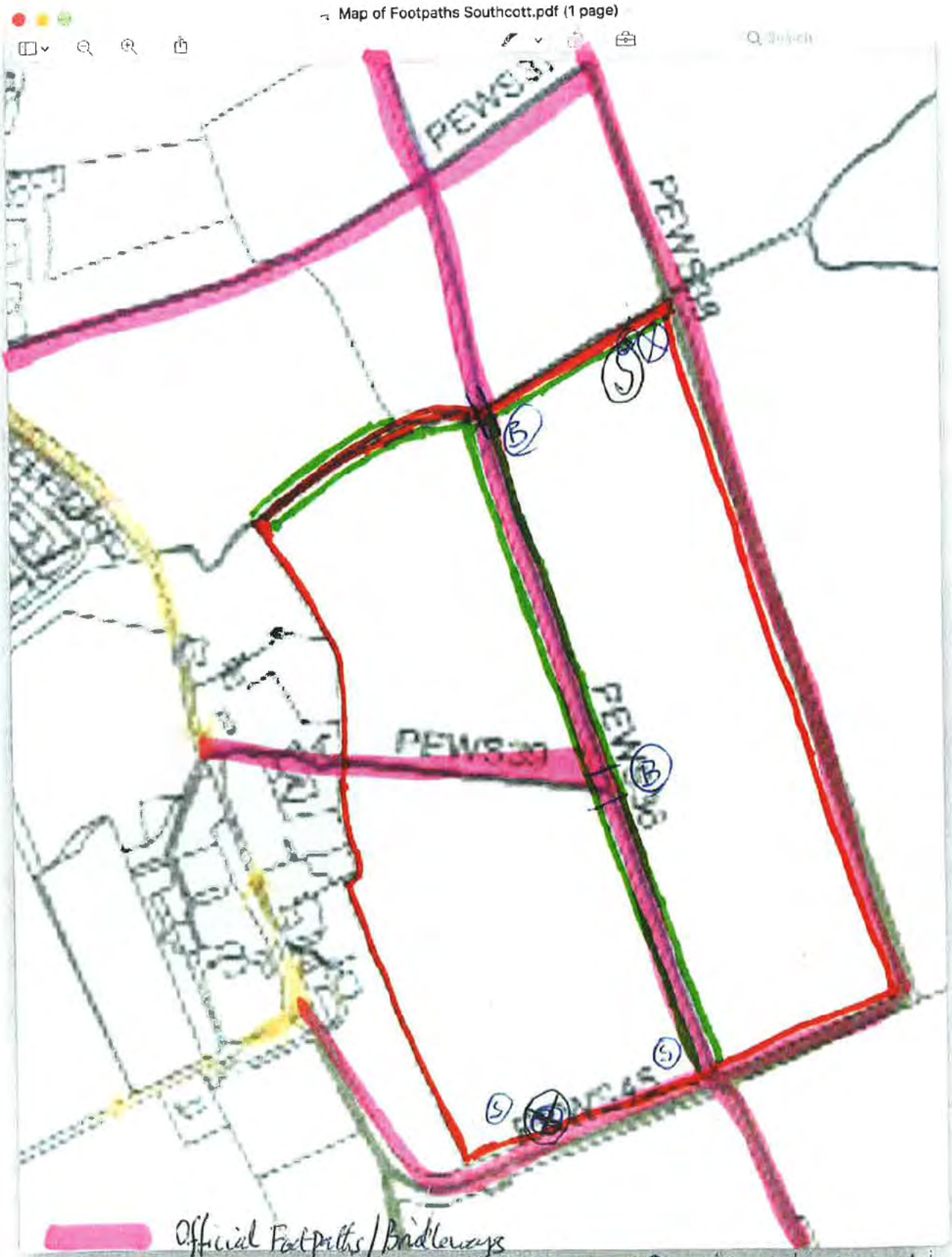
Background
I have been employed by Mike Hooper of Cornbury Farm Contracting Ltd ("Cornbury") since 2005

As part of this employment I have worked on the land affected by this footpath application.

I can confirm that I helped Mike Hooper erect signs explaining that they were environmental margins and not footpaths 12 X 8 in size in the spring of 2008 notifying walkers that they were not to walk on the environmental strips as these were not footpaths. I also confirm that these signs were pulled up and thrown into the ditch. We retrieved the signs and reinstated them but they kept being removed until eventually we gave up as the signs were lost.

Throughout the period from 2001 to 2016 whilst I worked for Mike Hooper on this land, I approached people I saw walking on the field margins that were not footpaths and asked them to keep off the field margins and to keep to the official footpaths. We did not approach people every time but consistently enough for our views to be well known. Sometimes we would be working at the opposite end of the field so by the time we got to the walkers or followed them it took too much time. We were ignored by some of the walkers that we challenged so started to challenge them less as it was a waste of time.

Map of Footpaths Southcott.pdf (1 page)



Official Footpaths / Bridleways

Boundary of Land owned by SPLT

(S) Signs erected Sept/Oct 2016

(B) New bridges installed Oct 2015

(X) Wired Wiltshire gate

ELS Scheme

nvironmental Stewardship claim form (2015)

Natural England
Customer Services, PO Box 530, Worcester, WR5 2WZ
Telephone: 0300 060 1115
Email: cs.worcester@naturalengland.org.uk
Website: www.gov.uk/government/organisations/natural-england

Your claim form (all pages, including this page) and any applicable supporting documents must be returned to and received by the Natural England office above on or before 15th May 2015.

If you do not return a valid claim form by the above date the following penalties will be applied, unless force majeure or other exceptional circumstances apply:

- If we receive your claim after 15th May 2015 but on or before 9th June 2015 we will apply a penalty of 1% of your payment for this claim year for each working day that your claim is late.
- If we receive your claim after 9th June 2015 we will withhold all of your payment for this claim year.

If we do not receive any applicable supporting documents required for your claim we will withhold all of your payment for this claim year until they are received.

If you want confirmation that your claim has been received, please tick this box ☑

DO NOT DETACH THE SLIP BELOW

ENVIRONMENTAL STEWARDSHIP CLAIM FORM ACKNOWLEDGEMENT

Claim reference AG00372800/2015 - Main

Your claim form was received by Natural England on the date shown below. This acknowledgement only provides proof that your form has been received by Natural England.

Mrs Emma Watson
Gasson Associates
Middle Hill
Hook Norton
Banbury OX15 5PL

Date stamp (for NE use)

Environmental Stewardship claim form (2015)

Please complete this form by hand, using block letters and black ink throughout and ensuring any alterations are initialled by you - do not use correcting fluid.

Please ensure that you complete all relevant sections of this form, including any applicable tick boxes, and that you sign and date it. **Failure to do so may reduce your payment as the form may need to be returned to you for completion which could result in you not meeting the claim deadlines referred to on page 1 of this form.**

If you require more space for any section please continue on a separate sheet, ensuring that you add the claim reference and sign and date each sheet.

Scheme	**Entry Level Stewardship**
Agreement Holder's Name	**Barset Farms**
Agreement Title	**Barset Farms**
Agreement Reference/Claim Year	**AG00372800/2015**
Period covered by claim	**1st January 2015 to 31st December 2015**
Vendor Number	**344816**

If any of the information above is incorrect, please ensure that you contact Natural England as soon as possible, using the telephone number shown on page 1, as we may need to send you a new claim form.

DO NOT WRITE ANYTHING BELOW THIS LINE

This space is intentionally left blank for the reverse of the acknowledgement slip
DO NOT WRITE ANYTHING HERE

ENTRY LEVEL STEWARDSHIP SCHEME

Exact from a letter from.
Angus Williams of Witty Kyj.
regarding Due diligence questions.
Dated. 17th Feb. 2016

4. With regard to the public footpath, the enquiries raised said that there was a footpath crossing east to west, which I suspect could well be the footpath affecting the land that you have agreed to purchase and the sellers have said that they have not experienced any problems with the right of way, but have limited knowledge as to how much it is used. They have also said on the basis they do not live on site, they do not know if people are venturing off the rights of way. You, yourself, have some knowledge of this and we have discussed it and you are comfortable that that has really only been happening for two or three years, due to field margins etc.

   The sellers went on to say that they become aware of the diversion along the ditch, which will be your northern boundary last February that people had used the grass track on the south side of the ditch, which of course we discussed on site. The sellers have said that this was a result of people not being able to transverse the ditch on the Pewsey 3936 footpath. They were diverted around the headland of the field to link to Pewsey 36. The foot bridge was installed by the local authority last summer.

The sellers have said that they are not aware of any applications or anticipated applications to dedicate this as a new public route. Apparently, there have only been complaints about reinstating the foot bridge, which is now in place.

[redacted]

6. We are advised that walkers using footpath Pewsey 39 walked the headland along the ditch from the corner where the land adjoins James Del Marr's property up to point B (where the right of way across Kim's land will join your land). They say this was only done when the public could not cross the ditch and that the local authority, as we have mentioned before, installed a new bridge during last summer.

[redacted]

7. [redacted]

8. [redacted]

I look forward to hearing from you.

Yours sincerely

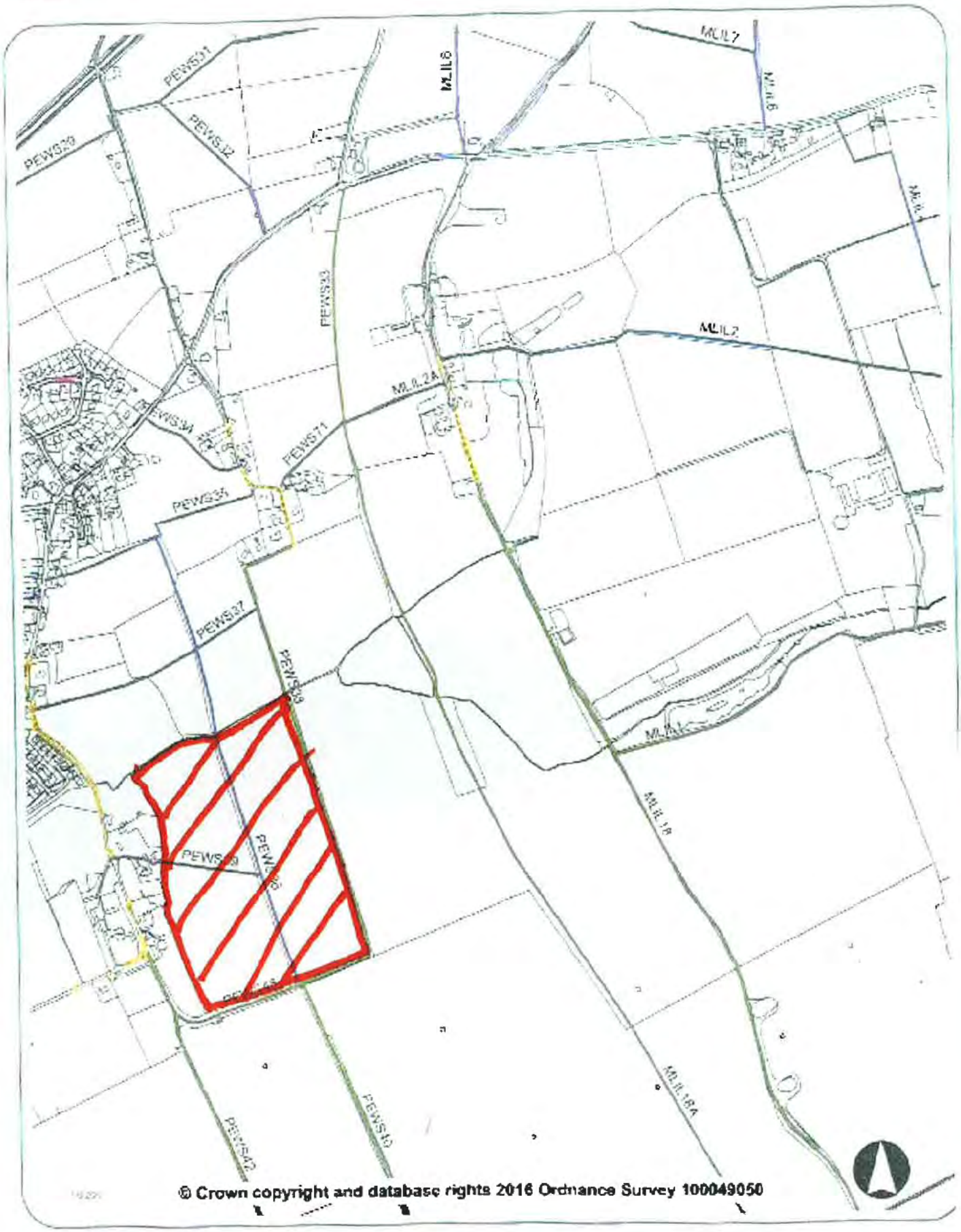
[redacted]

Angus Williams
Partner

{W2041051-1}

Wiltshire

E2015 05641 Highways Plan
19.1.2016



LAND OWNED BY MRS S. BURRATT HILL

Response to Public Right of Way User Evidence Statements

I comment on Mr Haddock's application as this is the lead submission and some others. Where there is no additional information I have not commented

5. The field boundaries were this width after the farm signed up for the SLR scheme in 2007. These headlands were left then to allow the wildlife to flourish. The Farmer would have been penalised if it was found that the public were using these headlands as footpaths.

9 It is incorrect that there have not been any signs before 2016. (See Mike Hooper's statement). He also states that the signs were torn up as happened when they were erected in 2016. (see attached photo)

Mr Haddock states that dog walkers have increased greatly over the last few years. This is correct and has been the result of the increase in houses that have been built in Pewsey.

18 Mr Haddock states that the routes have been used for at least 80 years. This is hearsay and therefore not reliable evidence.

20 It is incorrect to say the application route has been used as a connection route between villages. This would have been on the existing and recognised footpaths.

Ms Twisk
7b States that locked gates have proliferated over the last few years, although she does not state where.
She states that Mr Haddock has been told he was on private property in September 2016. He denies ever having been told.

Margaret Roberts

18 (3) Knows that these paths are not on the map as footpaths.

David and ~Kirstin Warry

17 Mrs Warry states that she is an expert on reading Aerial photography. As the routes identified have been used for the movement of farm machinery I think this must be difficult. The farm track that runds across Lake field and Southcott Field has been used to access Cooper's field with farm machinery in recent years.

Philippa Gilliam
13 says that she is aware the paths applied for are not on the current OS map as designated footpaths

Janice Oakman
13 States that Pat Beresford had told her that the applied for paths were not public footpaths. If they had been walked as "ancient rights" they would be on the OS map as definitive footpaths.

1/3/17.

Showing sign pulled up and thrown in the ditch.

27/2/17.

Photograph of Private Land Sign

APPENDIX 2

WILDLIFE AND COUNTRYSIDE ACT 1981

THE DEFINITIVE MAP AND STATEMENT FOR THE PEWSEY RURAL DISTRICT COUNCIL AREA DATED 1952

THE WILTSHIRE COUNCIL PARISH OF PEWSEY PATH NO.82 AND PATH NO.82A AND THE PARISH OF MILTON LILBOURNE PATH NO.34 AND PATH NO. 34A DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017

This Order is made by Wiltshire Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the Pewsey Rural District Council Area definitive map and statement dated 1952 require modification in consequence of the occurrence of an event specified in section 53(3)(c)(i) of the Act, namely 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.

The authority have consulted with every local authority whose area includes the land to which the order relates. The Wiltshire Council hereby order that:

1. For the purposes of this order the relevant date is 2nd November 2017.

2. The Pewsey Rural District Council Area definitive map and statement dated 1952 shall be modified as described in Part I and Part II of the Schedule and shown on the map attached to the Order.

3. This Order shall take effect on the date it is confirmed and may be cited as the Wiltshire Council Parish of Pewsey Path no.82 and Path no.82A and the Parish of Milton Lilbourne Path no.34 and Path no.34A Definitive Map and Statement Modification Order 2017.

THE COMMON SEAL OF }
THE WILTSHIRE COUNCIL }
was hereunto affixed this }
7th of November 2017 }
in the presence of:

Paul M Tuns

Senior Solicitor

85557

SCHEDULE

PART I

Modification of Definitive Map

Description of path or way to be added

That length of footpath as shown by a broken black line with short intervals on the attached plan, leading from point A at OS Grid Reference SU 1704-5986, at its junction with PEWS37, leading in a southerly direction for approximately 140 metres where the path crosses over a culvert and leads in an easterly direction following the field edge for approximately 215 metres to PEWS38. The path then splits either side of Hurly Lake stream. The spur on the northern side of Hurly Lake leads in east north easterly direction for approximately 125 metres to SU 1740-5990 where it crosses over Hurly Lake via a culvert and continues in an east north easterly direction to its junction with MLIL18 at point E at SU 1770-6009. At point C at SU 1730-5983 the southern spur of the path follows the stream in a south easterly direction for approximately 675 metres to point F and its junction with MLIL 18 at SU 1789-5972.

PART II

Modification of Definitive Statement

Variation of particulars of path or way

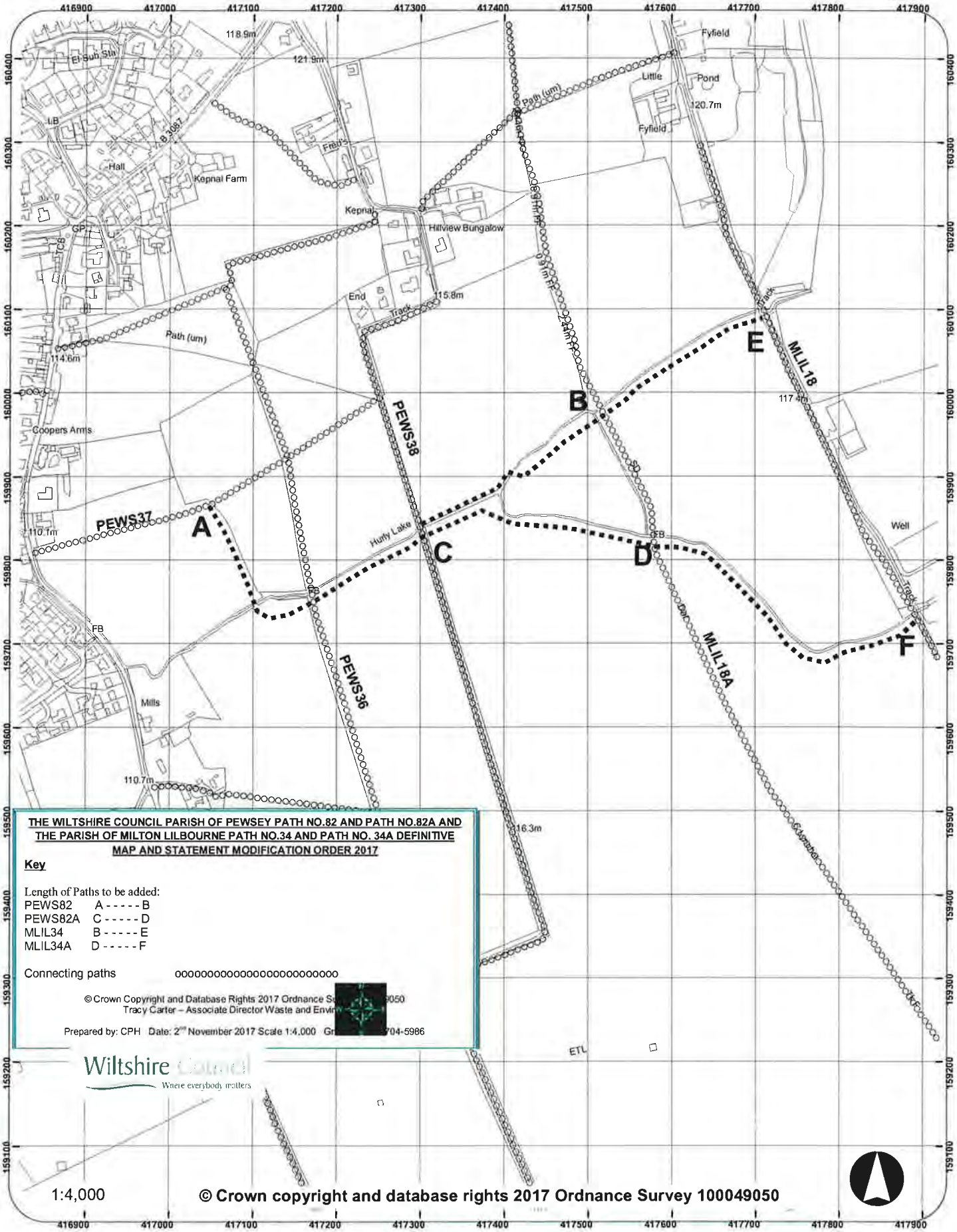
Parish	Path No.	Modified Statement to read:-	Modified under Section 53(3) as specified
Pewsey	82	From OS Grid Reference SU 1704-5986 at its junction with footpath PEWS37, leading in an southerly direction for approximately 140 metres where the path crosses over a culvert and leads in an east-north-easterly direction following the field edge for approximately 215 metres to its junction with PEWS 38. The Path then continues on the north side of Hurly Lake stream in an east-north-easterly direction before crossing over Hurly Lake stream via a culvert at SU 1740-5990 and then continuing to the Milton Lilbourne parish boundary at SU 1751-5996. Approximate Length 633 metres. Width 2 metres	53(3)(c)(i)

Pewsey	82A	From OS Grid Reference SU 1730-5983 leading in a south- easterly direction following the south side of Hurly Lake stream to the Milton Lilbourne parish boundary at SU 1757-5982. Approximate length 297 metres. Width 2 metres.	53(3)(c)(i)
Milton Lilbourne	34	From OS Grid Reference SU 1751-5996 leading in an east-north-easterly direction following the field boundary to its junction with MLIL18 at SU 1770-6009. Approximate length 232 metres. Width 2 metres.	53(3)(c)(i)
Milton Lilbourne	34A	From OS Grid Reference SU 1757-5982 leading in a south easterly direction following the southern side of the stream to its junction with MLIL18 at SU 1789-5972. Approximate length 375 metres. Width 2 metres.	53(3)(c)(i)

Wiltshire Council
Where everybody matters

Date: 31/10/2017

THE WILTSHIRE COUNCIL
PARISH OF PEWSEY PATH NO.82 AND PATH NO.82A
AND THE PARISH OF MILTON LILBOURNE PATH NO.34 AND PATH NO. 34A
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017



THE WILTSHIRE COUNCIL PARISH OF PEWSEY PATH NO.82 AND PATH NO.82A AND THE PARISH OF MILTON LILBOURNE PATH NO.34 AND PATH NO. 34A DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017

Key

Length of Paths to be added:

PEWS82	A - - - - - B
PEWS82A	C - - - - - D
MLIL34	B - - - - - E
MLIL34A	D - - - - - F

Connecting paths oooooooooooooooooooooooooo

Tracy Carter – Associate Director Waste and Envir

Prepared by: CPH Date: 2nd November 2017 Scale 1:4,000 Gr 704-5986

Wiltshire Council
Where everybody matters

1:4,000

APPENDIX 3i

Birketts

Our Ref: NF/AES/320565.0001
Your Ref: CH 2017/02
Date: 15 December 2017

Birketts LLP
24-26 Museum Street
Ipswich
Suffolk IP1 1HZ

T: +44 (0)1473 232300
F: +44 (0)1473 230524
DX: 3206 Ipswich
E: mail@birketts.co.uk

www.birketts.co.uk

Wiltshire Council
Rights of Way and Countryside Team
Unit 9
Ascot Court
White Horse Business Park
TROWBRIDGE BA14 0XA

By email to: craig.harlow@wiltshire.gov.uk and post

Dear Sirs

Wildlife and Countryside Act 1981 s.53
The Wiltshire Council parish of Pewsey path No. 82 and 82A and the parish of Milton Lilbourne path No. 34 and 34A Definitive Map and Statement Modification Order 2017

We are instructed by J M Strong and Partners of Green Drove House, Green Drove, Pewsey, Wiltshire SN9 5JD, Mr Alexander Newbigging c/o Fyfield Manor, Fyfield, Pewsey, Wiltshire SN9 5JS and Mrs Sarah Ingram Hill of Southcott House, Southcott, Pewsey, Wiltshire SN9 5JF the owners of the land affected by the above Order. Please accept this letter as an objection on behalf of our clients to confirmation of the Order. The grounds for objection include, but are not limited to:-

1. The evidence of use relied upon in making the Order, particularly claimed use prior to 2007, is not consistent with the objectors knowledge and experience of the use of this land. The objectors do not accept that there has been sufficient use as of right to represent use by the public. The credibility of the user evidence should be tested by cross-examination.

2. The Order route follows 6 meter wide field margins that were first created in 2007 when the land was entered into an Entry Level Stewardship scheme. Prior to this the land was cultivated up to the field edge, leaving no strip which could have been used as a footpath, and there was no evidence of any such use.

3. Such use as there may have been of the Order route has only taken place since 2007 when the 6 meter grass margins were in place. Accordingly any such use has been for an insufficient period to give rise to a statutory presumption of dedication, or to an inference of dedication at common law.

4. The Order route is subject to significant seasonal flooding which is often sufficient to render the route impassable due to the depth of water and ground conditions.

5. In response to such public use as there was after 2007 the landowners or their representatives challenged users on the Order route and signs were placed on the route stating that the land is private and denying the existence of any public right of way. Although the signs were repeatedly removed and or damaged, they were reinstated a number of times. By these means any subsequent use of the route was rendered not as of right and furthermore the landowner sufficiently demonstrated a lack of intention to dedicate.

Please acknowledge safe receipt of this objection.

Yours faithfully

[redacted]

Birketts LLP

Direct Line: [redacted]
Direct e-mail:

APPENDIX 3ii

PEWSEY PARISH COUNCIL

Mr C. Harlow
Rights of Way Officer
Waste and Environment
Wiltshire Council
Unit 9 Ascot Court
White Horse Business Park
Trowbridge
BA14 0XA

17th November 2017

Dear Mr Harlow,

Reference: CH/2017/02
Pewsey FP82/82A and Milton Lilbourne FP34/34A definitive map and statement modification order 2017.

Thank you for your letter dated 9th November regarding the modification order detailed above. You will have already received the Parish Council's objection to the proposal as detailed in the email of 6th July 2017 and there is nothing further to add.

Could you please clarify the next steps and also advise whether the Parish Council objection counts as one or per member?

Yours sincerely

Alison Kent
Clerk to Pewsey Parish Council

Parish Office, Bouverie Hall, Goddard Road, Pewsey, Wiltshire, SN9 5EQ
Phone: 01672 562014 email: the.clerk@pewsey-pc.gov.uk

APPENDIX 4

www.miltonlilbourne.org.uk

Saffron Cottage,
Milton Lilbourne,
Near Pewsey,
Wiltshire,
SN9 5LQ.

Telephone: 01672 562348
E-mail : dafyddfall@gmail.com

Craig Harlow Esq.,
Rights of Way Officer,
Rights of Way and Countryside, Waste & Environment,
Wiltshire Council,
Unit 9,
Ascot Park,
White House Business Park,
Trowbridge,
BA14 OXA.

Your reference : 2017/02

Dear Mr.Harlow

DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER PEWSEY AND MILTON LILBOURNE PARISHES 2017/02

Milton Lilbourne Parish Council warmly supports the proposal to designate the new footpaths outlined in Definitive Map and Statement Modification Order 2017/02 dated 9 November 2017. The proposed footpaths are well-walked and provide useful east–west links between bridleways 18 and 18A running roughly north–south in the parish of Milton Lilbourne.

Please let me know if you need any further information.

Yours sincerely,

[redacted]

David Fall
Vice-Chairman
Milton Lilbourne Parish Council

APPENDIX 5

19th December 2017

Rights of Way & Countryside Team
Waste and Environment
Wiltshire Council
Unit 9
Ascot Court
White Horse Business Park
Trowbridge
BA14 0XA

«Name»
«Address_1»
«Address_2»
«Address_3»
«Address_4»
«Address_5»
«Address_6»

Your ref:
Our ref: CH 2017/02

Dear «Salutation»

Wildlife and Countryside Act 1981 – Section 53
The Wiltshire Council parish of Pewsey path No.82 and 82A and the parish of Milton Lilbourne path No.34 and 34A definitive map and statement modification order 2017.

The above order made on the 7th November 2017, has attracted 2 objections to date.

One of these objections, which is from the owners of the land affected by the order route, states the order route was not used before 2007 when these routes were made into 6 metre wide strips for an environmental stewardship scheme and use by the public before the creation of these strips did not happen.

I have noted in your submitted user evidence form you have claimed use of the order route before 2007.

Please could you reply to this letter stating any details of your use before 2007 you recall, in particular any difference in the nature of the surface or appearance of the order route before and after 2007 you may have noticed and how any change in the nature of the land affected your use of the order route. I have included a copy of the order plan which you may wish to use to annotate any observations you make.

This information will be of great help going forward in the process.

Many Thanks

Yours «Close»

Craig Harlow
Rights of Way Officer
Direct line: 01249 468568
Email: craig.harlow@wiltshire.gov.uk

Enc. Order plan

APPENDIX 5(1)

IVAN PAGE-RATCLIFF

[redacted]

[redacted]

23 December 2017

Your Ref: CH2017/02
By email and Post

Mr Craig Harlow
Rights of Way Officer
Wiltshire Council
White Horse Business Park
Trowbridge BA14 OXA

Dear Mr Harlow

I respond to your letter dated 19th December 2017 and enclosed plan for which I thank you.

In your second paragraph the statement that the order route WAS NOT USED before 2007 and use by the public before the creation of the 6 metre strips DID NOT HAPPEN. These statements are incorrect.

In the summer of 2006 I recall that my wife and I walked daily along the paths - points C and E and C and F (hatched red on the map) and more occasionally along the route A to C (hatched green on the map). We have a small well behaved dog which accompanies us and which is normally on a lead. On our walks we usually encountered a maximum of 3-4 other walkers, so the "traffic" was light. Few walkers used the "order" routes as they did/do not attract visitors from out of the immediate area.

It is true that there was much more width after the 6 metre strips were cut for the Environmental Scheme but prior to this there were defined paths, maybe some 3-4 feet in width which we observed.

I hope this information will be of be of help to you.

Yours sincerely

[redacted]

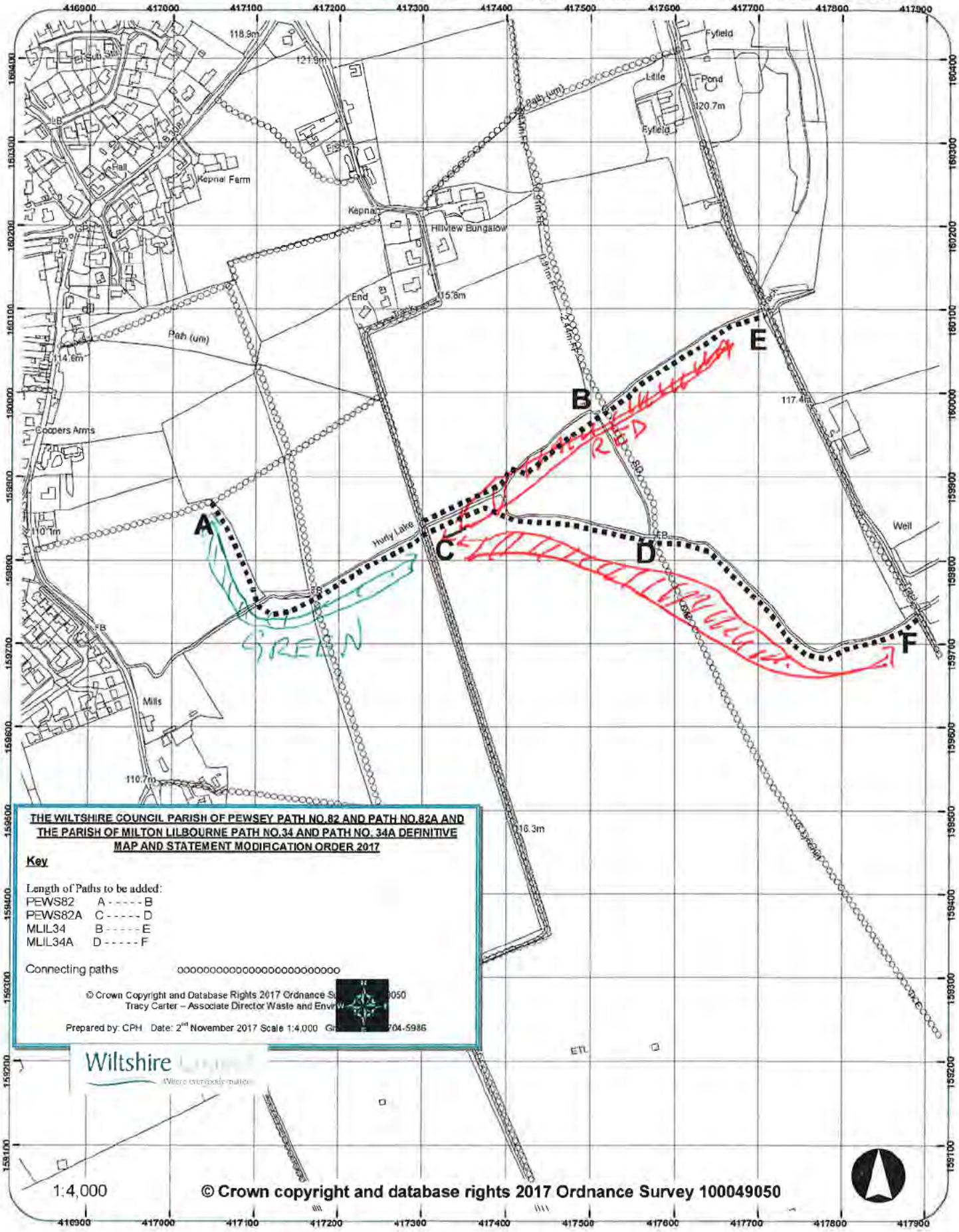
IVAN PAGE-RATCLIFF **SALLY PAGE-RATCLIFF**

FROM IVAN PAGE-RATCLIFF · F.A.O MR C. HARLOW

Wiltshire Council
Where everybody matters

Date: 31/10/2017

THE WILTSHIRE COUNCIL
PARISH OF PEWSEY PATH NO.82 AND PATH NO.82A
AND THE PARISH OF MILTON LILBOURNE PATH NO.34 AND PATH NO. 34A
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017



THE WILTSHIRE COUNCIL PARISH OF PEWSEY PATH NO.82 AND PATH NO.82A AND THE PARISH OF MILTON LILBOURNE PATH NO.34 AND PATH NO. 34A DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017

Key

Length of Paths to be added:

PEWS82	A - - - - - B
PEWS82A	C - - - - - D
MLIL34	B - - - - - E
MLIL34A	D - - - - - F

Connecting paths oooooooooooooooooooooooooo

Tracy Carter – Associate Director Waste and Envir

Prepared by: CPH Date: 2nd November 2017 Scale 1:4,000 Gr 704-5986

Wiltshire Council
Where everybody matters

1:4,000

[redacted]

Wiltshire Council
Rights of Way & Countryside Team
County Hall **your ref: CH 2017/02**
Bythesea Road
Trowbridge
BA14 8JN

4 Jan 2017

Attention of Craig Harlow

Pewsey paths 82 & 82A and Milton Lilbourne paths 34 & 34A

Thank you for your letter of 19 December.

Like most walkers I do not keep a written or photographic record of the majority of my walks and I can confirm I have none relating to the above paths. What I can say with certainty is that I have regularly walked these paths since we moved to Wootton Rivers nearly 25 years ago. I have never been challenged nor indeed have the routes been obstructed until recently when fencing and notices have barred my way.

The paths above are part of a particularly favourite walk from Wootton Rivers to Milton Lilbourne then across towards Fyfield Manor (either MLIL1 or 2), along the lane/bridleway (MLIL18) to pick up the paths at E or F on your map following them through to Pewsey. I have probably undertaken this walk on average four times a year over the last 25 years. Sometimes I have used the above paths from Pewsey car park as a circular route.

The pattern of leaving a wider strip at the edge of fields mentioned in your letter has become common in recent years but previously I walked the above paths at the curtilage of the fields. I have no record of when these changes occurred and indeed there have always been physical differences depending on the time of year.

The essential point is that I have walked the above paths without challenge prior to 2007 going back 25 years. If you want to discuss this matter please give me a call.

Yours sincerely

David Parry

APPENDIX 5(3)

Harlow, Craig

From: [redacted]
Sent: 06 January 2018 17:45
To: Harlow, Craig
Subject: Pewsey East Walkers

Follow Up Flag: Follow up
Flag Status: Flagged

Thankyou for your recent letter and I am pleased to be able to repeat in the strongest possible way that my husband, who died 18 years ago and I regularly walked along the streamside paths in Kepnal from the time of our moving here in December 1975.
Weekend walking, when the children were old enough, would have been east of Kepnal...summer evenings were the C A route.
I particularly remember one summer probably 1993 or 1994, when my youngest had learned to ride a bike but could not go out onto the main road. We would go down the drove and turn right at C, then right,up to A, lift the bike over the stile to go back across the field.
I remember walking the same route with my brother visiting from South Africa Christmas 1993.
Regarding flooding and muddy patches....we always wore wellies and could ferry the children over any that were too deep. That's country living and why we love Kepnal.
Sincerely,
Maggie Roberts
Sent from my Huawei Mobile

APPENDIX 5(4)

Harlow, Craig

From: [redacted]

Sent: 08 January 2018 09:46
To: Harlow, Craig
Cc: Lesley Bradshaw; Bernadette Haddock
Subject: Pewsey footpath No.82 and 82A... Reference CH 2017/02
Attachments: B1 southcott footpath bridge.JPG; C1 Footpath off Southcott ploughed.JPG; Footpath map Pewsey.jpg

Follow Up Flag: Follow up
Flag Status: Flagged

To Craig Harlow

Rights of Way Officer

Dear Mr Harlow

Thank you for your letter of the 19th December.

You have asked specifically for my memory of the surface of the route prior to 2007. It's important to understand the condition of footpaths in the Pewsey area.

As a walker, my assessment of the paths in and around Pewsey was, until recently, that they are particularly badly signed and maintained. Only in the last 2 years have stiles been replaced by gates with very limited signage erected.

- Reference the attached annotated map, path A1 to B1 is regularly ploughed (Photo C1) and only until recently has a bridge been erected at B1 to bridge the ditch (photo B1). Walking this path from Southcott, previously meant reaching an impasse at B1 and having to follow the ditch north or south on the farmer's field which we now know to be private land.

- The footpath D1 to E1 likewise is ploughed each year. The rise of the land on this field makes it difficult to see a marker at the end of the path and I have known in some years that several winding paths have been formed across the field.

- The footpath sign at A1, as you well know, has, on several occasions, been removed so that walkers new to the area cannot find the start of the path from Southcott Road. The sign has now been missing for over a year. I have recently discovered that the round plastic footpath signs on the new bridge at B1 have also been prised off.

- The path F1 to G1 to H1 is walked by many people every day. There are gates now installed at these points and it would seem strange to conclude that the well-trod path between them is not in fact a public footpath, but that's where everyone walks and have done for as long as I can recall.

- The bridge at J1 has only recently been erected. People walking North on the main track, upon reaching the stream were forced to turn left to point A or right to point C on your map. At point C the path naturally leads onto point D.

So, to your question. The state or the path prior to 2007 and the implementation of the wider strip, was the same as all other walked paths; sometimes it was ploughed and rough, sometimes flattened. I cannot recall a time when this did not look like a walked path. Of course, the land is never ploughed exactly up to the hedge, the roots would be damaged, so there is always some unploughed land to walk.

Interestingly, across the opposite end of the field containing the path C to D, I have marked it K1, there is another natural line that could be walked. The fence here until recently was in poor repair and the field easily accessed, but it has not been and as far as I can remember has never been used as a route. The point is, that people do not wander the Pewsey area aimlessly with no regard for a farmer's land. In the absence of signage, they keep to routes that show clear signs of being regularly walked.

I have more photographs of the various routes showing the condition of the land if you would find them useful.

I trust this helps your understanding.

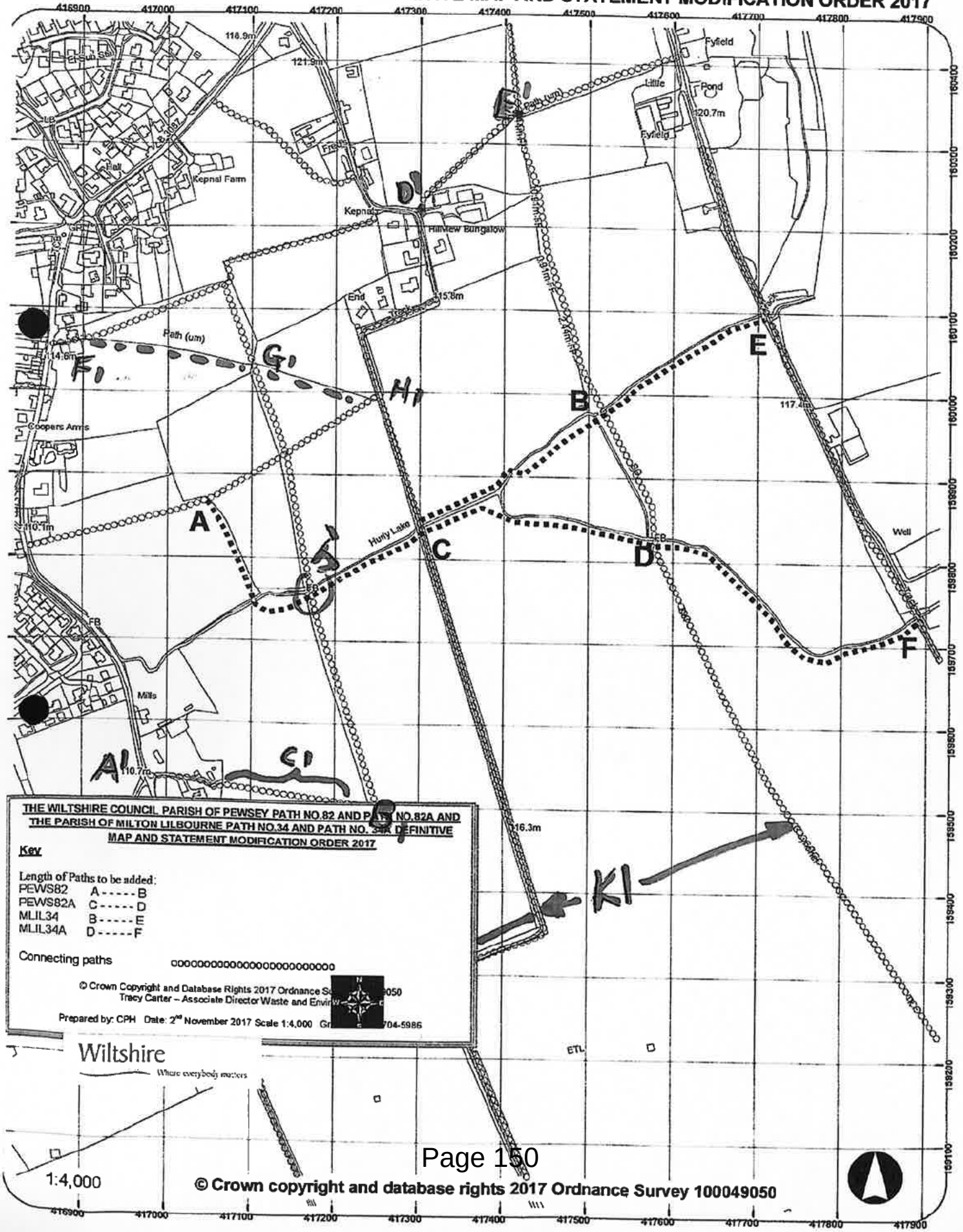
Yours sincerely

Bernard Bradshaw

Wiltshire
Where everybody matters

Date: 31/10/2017

THE WILTSHIRE COUNCIL
PARISH OF PEWSEY PATH NO.82 AND PATH NO.82A
AND THE PARISH OF MILTON LILBOURNE PATH NO.34 AND PATH NO. 34A
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017



Harlow, Craig

From: [redacted]
Sent: 08 January 2018 17:50
To: Harlow, Craig
Subject: Rights of way - Kepnal

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Craig,

It's recently come to my attention that several rights of way crossing Kepnal, in Pewsey are marked for closure.

It's also been brought to my attention that landowners claim that the paths were not walked prior to 2007. This is an outright lie - I spent the vast majority of my childhood walking these paths with friends and family, and have many fond memories walking along (and occasionally in!) the steam.

I'm now nearly 30 which, if my maths is correct, means I can state with some certainty that these paths were walked, frequently, from 1988 to at least 2006 when I left for university. I also have friends who can attest the same thing.

If you have any questions, or wish to hear the same from others please do not hesitate to get in contact.

Best regards,

Michael Roberts

APPENDIX 5(6)

[redacted]

Jan 6th 2018

Dear Mr Harlow,

I am writing in response to your letter concerning paths No 82 and 82A in Pewsey parish and paths No 34 and 34A in Milton Lilbourne parish dated Dec 19th.

Prior to 2007 most footpaths in this area either followed a field boundary or crossed a field between two stiles located on opposite sides of a field. These paths could be ploughed, planted across, flooded or easily walked depending on the season and the management of the land by the farmer. As far as I was aware, farmers are not obliged to keep footpaths as grass for the benefit of walkers. However, walkers are supposed to follow the country code by sticking to the permitted paths as best as they can i.e. by following closely to the field edges or walking in a straight line between two stiles unless directed to do otherwise by an appropriate sign.

I have always respected these codes of conduct and as a law- abiding person would never trespass on to land that was clearly signed to be out of bounds.

I have to say that having lived here for 40 years I don't recall seeing any such signs until very recently and was quite surprised to find that paths I have enjoyed using in the past were in fact not permitted.

Confusion has arisen due to the fact that until very recently very few footpath signs existed in the area in question and footbridges were not in place e.g. between points A and C on your map.

Because of this, and due to the fact that if you were attempting to follow a path it was often impossible to find, or indeed blocked, people took the only option open to them and followed in the footsteps of others by finding an alternative route. These routes still followed field boundaries and seemed to logically connect one path to another.

Until now, the farmers seem to have had no objection to this and so it was assumed that these paths were able to be used legitimately.

I have no proof of this but can only offer an assurance that I am giving my honest account in this matter.

I feel deeply saddened that the land owners have taken such a hostile stance over this and can only hope that a compromise can be reached to resolve this happily for all concerned.

Yours sincerely,

Lesley Bradshaw

Wiltshire Council
Rights of Way & Countryside Team
County Hall
Bythesea Road
Trowbridge
BA14 8JN

your ref: CH 2017/02

4 Jan 2017

Attention of Craig Harlow

Dear Mr Harlow,

Pewsey paths 82 & 82A and Milton Lilbourne paths 34 & 34A

In response to your letter of 19 December, I write with the following further information and clarification.

I can confirm that whilst I may not be able to supply photographic proof, as one often does not take a camera on a regular local walk, I have indeed been walking the paths described since my earliest memories, going back some 44 years (I am now approaching 50 and have always walked in the local area.) The route was, and is, a regular round walk. I can also confirm with absolute certainty that I have never been challenged or the routes been obstructed until very recently, when the fencing and notices appeared.

As a child growing up in Pewsey, we walked these paths as a family. Later, as a teenager, and then as an adult, I made regular walks across the paths, either on my own or in the company of friends. The path was always adequately wide for two persons, never ploughed right up to the stream edge. In sustained periods of wet weather, wellie boots may have been required, as the far end of the path towards the Fyfield end became a little water logged, but it was never inaccessible. In periods of freezing weather, the ice formed on the edge of the field and provided great fun, as we skated up and down the frozen giant puddle. This enjoyment continued with my own children, now 18 and 16 years old, whom I regularly walked with from a very early age, both in baby slings and then on their own two feet.

The salient points are that the path was a well-known and used path going back, based on my own use, about 44 years on a regular basis, without hindrance from either challenge or obstruction. The path may have been narrower in the past than it now is but was always walkable by at least a couple of people abreast. It is only very recently that the fencing and barriers have appeared – surely if this was to protect wildlife, these fences would have been put in place at the time of widening field edge, it being a well-walked route. It is a natural direction to walk in to form a round route and I have never seen it abused, littered or crops disrespected.

I would be happy to speak with you further if there is any more information I can provide to clarify the points made.

Yours sincerely

Lara Jepson

Harlow, Craig

From: [redacted]
Sent: 07 January 2018 13:08
To: Harlow, Craig
Subject: Right of way
[redacted] [redacted]

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr Harlow,

I lived at 8 Ball Road and a child and until early adulthood, I now own 5 Ball Road. From the age of 10 years old, which was in 1978 I remember walking our family dog along the path to the lake at Fyfield. At the time there was constant use of this footpath, by dog walkers, ramblers and also families and horse riders heading to the bridle way to the Hill.

I also used to go bird watching with friends along the river path, looking at river birds and also on the lake at Fyfield, and walking up the hill to Milton Lilbourne and then through Everleigh ashes and back down Pewsey hill past the white horse. These were all footpaths commonly frequented by many people.

This footpath has definitely been in full use since the late seventies, before then I am too young to remember.

I hope this helps but please do not hesitate to contact me if you require further information.

Best regards
Christopher Hames
[redacted]

Harlow, Craig

From: [redacted]
Sent: 08 January 2018 17:46
To: Harlow, Craig
Subject: Pewsey paths 82 and 82A and Milton paths 34 and 34A

Follow Up Flag: Follow up
Flag Status: Flagged

REF CH 2017/02

Dear Mr Harlow,
In response to your letter I have emailed all " the walkers" and hope a number have responded to you directly about their use of the route prior to 2007.
I offer my recollections of "the route" as follows:-
We moved to Pewsey in 1973, and used various parts of the route for family walks at weekends and during school holidays. We were never confronted by any farm workers and although the fields were largely ploughed never to the edges there was still room to walk.
I retired in 1995 and have walked these routes much more frequently since that – often on a daily basis, particularly from 2010. The widening of the strips certainly made walking easier and more enjoyable and I have never been aware of any problems caused by walkers using these. Furthermore the occasional flooding,(ground water), in some areas has not prevented me from using the route.

Your sincerely,
George and Bernadette Haddock

Sent from Mail for Windows 10

Harlow, Craig

From: [redacted]
Sent: 07 January 2018 17:03
To: Harlow, Craig
Subject: Kepnal footpaths your Ref: CH 2017/02

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr Harlow,

Thank you for your letter dated 19 Dec 2017. I apologise for my tardy reply, Christmas rather intervened.

I first walked the routes in question in 1996. I retired from the RAF in March of that year, but with terminal leave etc I had set up my business(dog grooming) in Nov 1995. Mrs Pat Beresford was one of my first customers and we struck up a friendship based on our love if dogs and walking. Pat was once the footpaths member of Pewsey Parish Council, and she showed me just about every walk in the parish. One of our very first walks, if not the first, was what you have labelled C to F on the map you enclosed with your letter. I remember it so well, because one of her Yorkies shot off after a bird and disappeared from our sight, and she was distraught saying that he would fall in the "lake" (more of a large pond actually, and if I'm reading your map correctly it is at the point marked D) and drown. I ran ahead, hard going because it's quite rough ground, to discover a perfectly safe - if filthy- little dog. My own dogs at that time were the ones to dive into the pond, as my attention span is not long, especially when admiring the beautiful views in that area.

When walking the route you label C to E (again, if I am reading your map correctly) we not infrequently met a lady who used that path to walk to Pewsey on Tuesdays to do her shopping (there was a market in Pewsey on Tuesday then) and got the bus back. I particularly remember this because she said every time we saw her that she walked in, because getting the bus there and back would necessitate having to kill 3 hours in Pewsey before the next bus back, and she didn't have enough life left to keep wasting that much time. She seemed old at the time, but was probably the same age I am now, and like me, very fit and active.

The claim that these routes were un-walkable before the creation of the 6 foot set-aside in 2007 is ridiculous. I could take you on innumerable routes in, around ,even across fields where there is no set aside, but have been, and still are, walked for years. The vegetation on the paths in question was usually cut down in the autumn, and the paths were re-trodden by animals and humans again within weeks. Yes, they often flooded in the January/February period, and were very popular with the local children as a safe area to skate on when frozen! I saw children skating there on many occasions. In 2003, once when I was walking by the stream from A to C on your map (en route from Pewsey to visit Miss Beresford in Kepnal bungalow) I lost my lower denture in the vegetation along the side of the path (actually there were two paths running side by side because they hadn't cleared right up to the edge that year - a common occurrence- hence another parallel path had developed too). I walked up and down that path for over an hour searching for them, then my husband came back with me in the afternoon and we searched for over 2 hours. The area was rough and overgrown either side of the path, and despite searching repeatedly for many months, we never found them.

As for signs regarding permission to walk (or otherwise), until last year, 2016, I never saw any signs to the negative. There used to be signs saying "Permitted Access" in several places, though I couldn't pinpoint them. However, in the hope that it helps, I have attached a photo of the book of local walks that Pat Beresford co-wrote mentioning some of these signs in the area.

I hope this helps. If I can be be of any further help in this matter, I would be happy to do so.

Walk 4 -

Kepnal, Fyfield Down, Pewsey Hill, Winter's Drove
2½ - 3 hours

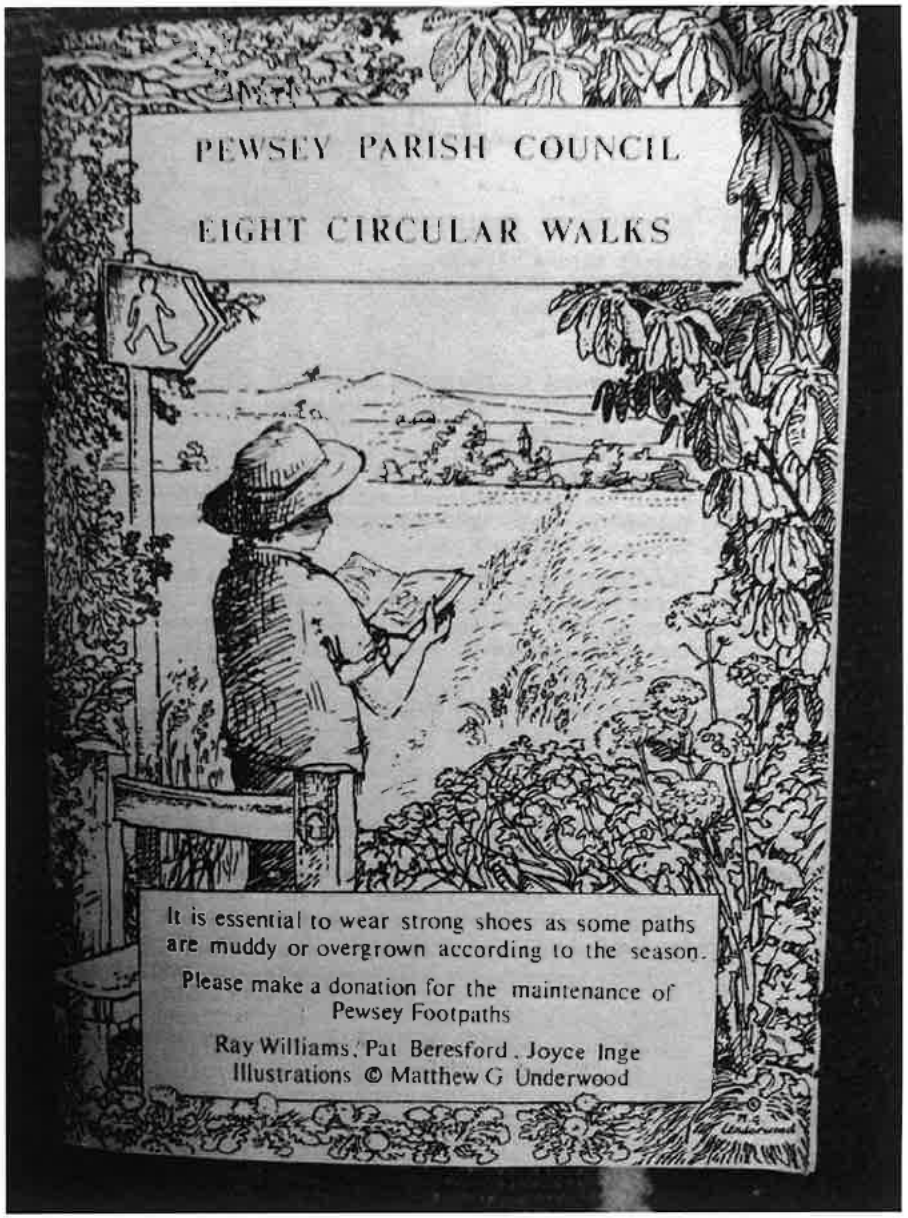
1. From the High Street Car Park go left and along River Street. At the old Infants' School turn left over the River Avon and follow the path through the Grove and round two sides of the Recreation Ground. Near the Play Area turn right into Ball Road and the footpath to Kepnal and Milton Lilbourne is signposted on the right Follow the path across two fields to Kepnal.

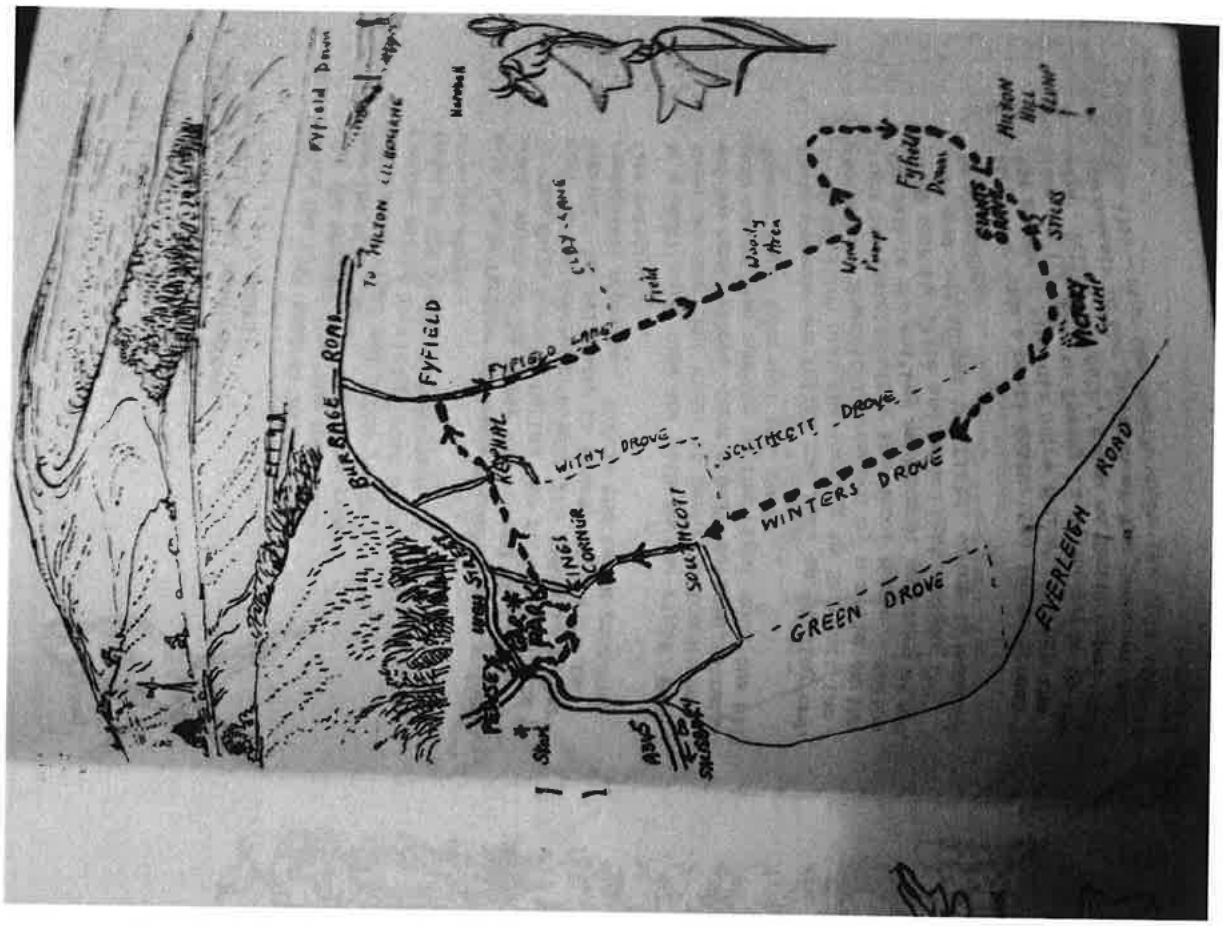
2. At the Kepnal lane go right a few yards. The footpath sign and the stile are on the left. The path runs across three fields to Fyfield. At Fyfield lane turn right and walk to the foot of the hill. The bridleway runs along the edge of a field and then through a wooded area which can be overgrown in the summer.

3. Go past the wind pump and up the hill. The path turns north east and climbs Fyfield Down. Then it curves round to the right to the Giant's Grave.

4. Walk along on the near side of the fence (where there are "Permitted Access" signs) to the two stiles on the parish boundary. Continue along the path by the side of the fence to the group of trees known as "Victory Clump". Walk past the Clump and look for Alfred Cook's memorial stone. The views from here over Pewsey Vale are superb.

5. From here go down the track to the stile at the top of Winter's Drove. Go down Winter's Drove, taking the left fork at the bottom. Go under Cuckoo Bridge. At the tarmac lane go right through Southcott to King's Corner and back via the Grove to the car




FYFIELD
BURRAGE ROAD
WITHY DROVE
SOUTHCOTT DROVE
WINTERS DROVE
GREEN DROVE
EVERLEIGH ROAD
SOUTHCOTT

Harlow, Craig

From: [redacted]
Sent: 07 January 2018 13:07
To: Harlow, Craig
Subject: Rights of Way & Countryside Team. FAO Craig Harlow.Rights of Way Officer

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr. Harlow, I am writing with Regard to use of land affected by the order route.that states that the order route was not used prior to 2007. This is totally untrue. I and my family walked these fields from the late 70's and early 80's,we have continued to do so,walking dogs and bird watching up until the fences were erected. We walked along the edges of fields that were in use. We walked to Milton Lilbourne, and back. We also walked up to the Milton hill,and Pewsey white horse hill.
With Regards, [redacted]
Sent from Mail for Windows 10

PEWSEY PARISH COUNCIL

Mr C. Harlow
Rights of Way Officer, Wiltshire Council
Unit 9 Ascot Court
White Horse Business Park
Trowbridge
BA14 0XA

5th February 2018

Dear Mr Harlow,

Your ref: CH/2017/02

Pewsey Parish Council wishes to clarify its exact position on the application for a modification order, due to local confusion.

Pewsey Parish Council does not object to the Pewsey East Walkers Group making an application to modify the footpaths, as detailed in their application, as it is their prerogative to do so.

The minutes of the Full Council dated 14th March 2017 are extant. The Council's email of 6th July 2017 and letter of 17th November 2017 should be disregarded as they do not correctly represent the Council's present stance on this matter. I apologise for presenting the incorrect wording and sincerely hope that it has not caused you any inconvenience.

Please inform all interested parties of the Parish Council's clarification.

Yours sincerely

[redacted]

Alison Kent
Clerk to Pewsey Parish Council

Parish Office, Bouverie Hall, Goddard Road, Pewsey, Wiltshire, SN9 5EQ
Phone: 01672 562014 email: the.clerk@pewsey-pc.gov.uk

Carter Jonas

Ailesbury Court
3rd Floor
High Street
Marlborough
SN8 1AA
T: 01672 519710
F: 01672 514051

Your ref:
Our ref: ELK/16092

Rights of Way & Countryside Team
Wiltshire Council
Unit 9, Ascot Court
White Horse Business Park
Trowbridge
BA14 0XA

FAO Craig Harlow

29 January 2018

Dear Sirs

Wildlife and Countryside Act 1981 s.53

The Wiltshire Council parish of Pewsey path No. 82 and 82A and the parish of Milton Lilbourne path No. 34 and 34A Definitive Map and Statement Modification Order 2017

Further to the submission of an objection to the above, made by Birketts on 15th December 2017, please find enclosed a signed letter from Brennans of Wiltshire which I am submitting to you as evidence on behalf of Alexander Newbigging, being one of the landowner/objectors. This information casts doubt on the credibility of some of the user evidence provided in support of the original Application.

Please would you acknowledge receipt.

Yours faithfully

[redacted]

Emma Kingston MRICS FAAV
Associate

[redacted]

Brennans of Wiltshire

Harepath Farm, Pewsey Road, Burbage, Marlborough, Wiltshire SN8 3BT
Tel: 01672 810380 Fax: 01672 811157 E-Mail: brennansofwiltshire@gmail.com
Web: brennansofwiltshire.co.uk

Wiltshire Council
Rights of Way & Countryside Team
Unit 9, Ascot Court
White Horse Business Park
Trowbridge BA14 0XA

Date: 23 January 2018

To whom it may concern

LAND AT KEPNAL – DAVID ALEXANDER NEWBIGGING

In connection with the Order to add footpaths to the definitive map in Pewsey & Milton Lilbourne and in particular path No. MLIL 34, Mr Newbigging has asked me to confirm the details of work undertaken by me in June 2013 under instructions from Paul Pelham of Barsett Farms Limited, the then owner of the land shown edged red on the plan attached.

I confirm that at the point marked with a thick blue line and the letter E on the plan, I removed a stretch of about 6m of hedge and ditch and constructed an access-way for farm machinery including a piped culvert. Prior to this work, there were no gaps and access could not be gained to the field at this point.

This work was part of a wider scheme of groundworks completed by me at the same time, and a copy of my invoice for the work is attached.

[redacted]

Brennans of Wiltshire

Chris Brennan Limited -~ T/A Brennans of Wiltshire
Registration No: 7146052

Brennans of Wiltshire

Harepath Farm, Pewsey Road, Burbage, Marlborough, Wiltshire SN8 3BT
Tel: 01672 810380 Fax: 01672 811157 E-Mail: brennansofwiltshire@gmail.com
Web: brennansofwiltshire.co.uk

Barsett Farms Limited
Manor Farm House
Manningford Bohune
Pewsey
Wiltshire
SN9 6BY

COPY

Sales Invoice: 102
Date: 2nd July 2013
Quotation Ref: CB/NB/5632
Order Number: Carol

Ref: Culvert @ Kepnal

Works now completed as per our above quotation reference
For the sum of £7,422.00 + VAT

To carry out ditching work ~ 1 day
For the sum of £300.00 + VAT

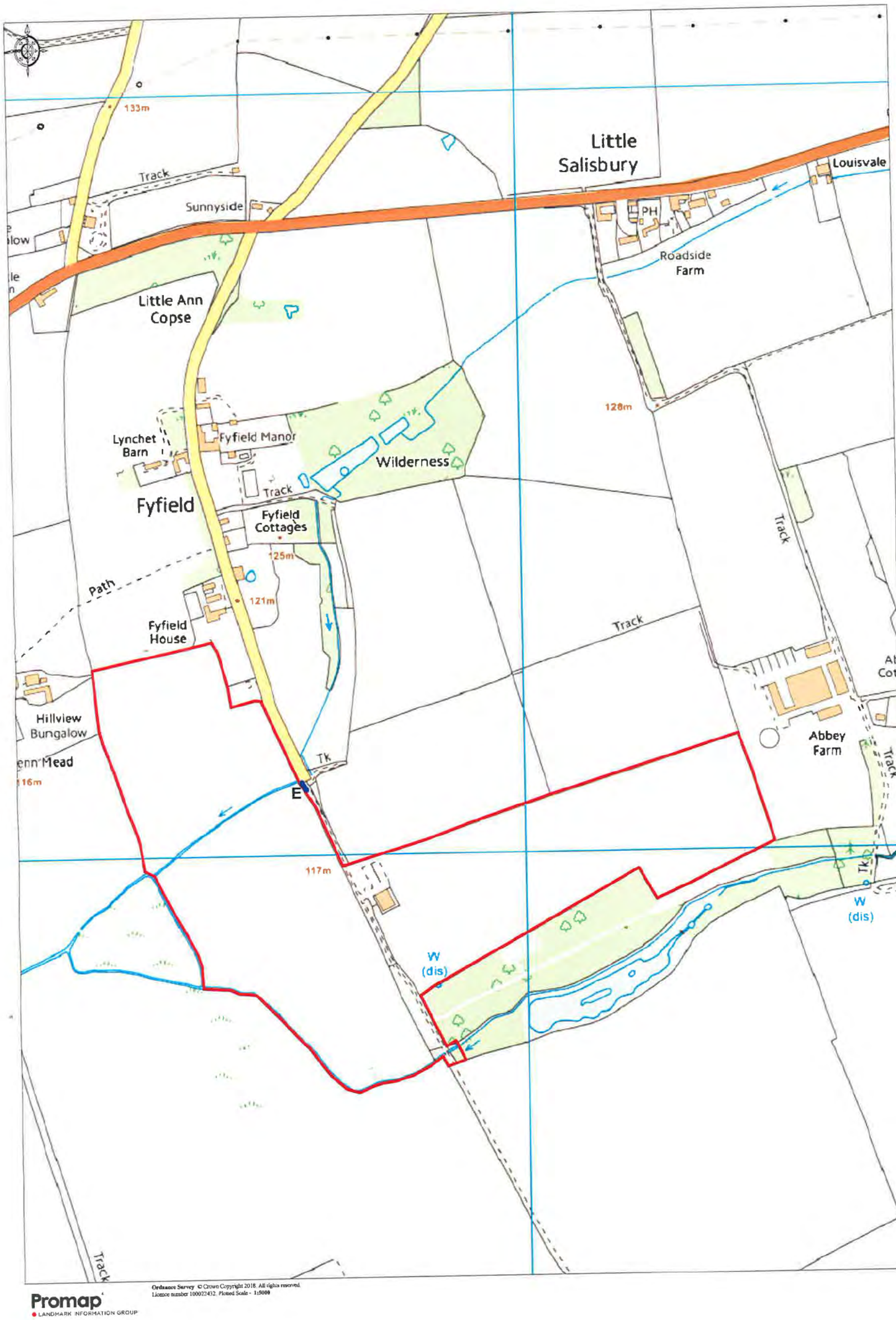
Sub Total	7,722.00
VAT @ 20%	1,544.40
TOTAL	9,266.40

Payment Term: Strictly 14 Days from Invoice

Interest will be charged on all overdue Sales Invoices @ 1.5% per month

[redacted]

VAT Registration No: 985 2777 60
UTR Registration Number: 15357 11875


133m
Track
Sunnyside
Little
Salisbury
Louisvale
PH
Roadside
Farm
Little Ann
Copse
Lynchet
Barn
Fyfield Manor
Wilderness
128m
Track
Fyfield
Fyfield
Cottages
125m
Path
121m
Fyfield
House
Track
Hillview
Bungalow
Abbey
Farm
Track
TK
E
117m
W
(dis)
W
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Track
Ordnance Survey © Crown Copyright 2018. All rights reserved.
Licence number 100022432. Plotted Scale - 1:5000
Promap
LANDMARK INFORMATION GROUP

Wiltshire Council

Eastern Area Planning Committee

22 March 2018

COMMONS ACT 2006 – SECTION 15(1) AND (2) APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN – THE PLAY AREA IN MORRIS ROAD/COLLEGE FIELDS IN THE BARTON PARK/COLLEGE FIELDS RESIDENTIAL AREA, MARLBOROUGH

Purpose of Report

1. To:

   (i) Consider a report and recommendation, dated 2 March 2018, made by Mr William Webster of 3 Paper Buildings, appointed by Wiltshire Council as an independent inspector to preside over a non-statutory public inquiry to consider an application made under Sections 15(1) and (2) of the Commons Act 2006 to register land at Barton Park, Marlborough as a town or village green.

   (ii) Recommend that Wiltshire Council accepts the inspector's recommendation in rejecting the application for the reasons set out in the report dated 23 February 2018.

Relevance to Council's Business Plan

2. Working with the local community to maintain an up-to-date register of town and village greens to make Wiltshire an even better place to live, work and visit.

Background

3. On 18 May 2015 Mr I Mellor, resident of Barton Park, Marlborough, applied to Wiltshire Council as commons registration authority ('CRA') to register the play area in Morris Road/College Fields, Barton Park as a town or village green under Sections 15(1) and 15(2) of the Commons Act 2006. The application land is shown edged red on the plan appended at **Appendix 1**.

4. The applicant land is owned by Wiltshire Council and adjoining land to the north-west is owned by Marlborough College. Further to the statutory notice of the application both parties objected to the application to register the land as a town or village green.

5. Wiltshire Council, in its role as CRA, must determine the application in a manner that is fair and reasonable to all parties and accordingly, at a meeting held on 5 January 2017, Wiltshire Council's Eastern Area Planning Committee resolved that an inspector should be appointed to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough. A copy of the Committee report is appended at **Appendix 2.**

Main Considerations for the Council

6. The inquiry was held on 9 and 10 January 2018. Following the consideration of the documents and the hearing of evidence given in chief and in cross-examination, the inspector's report contains a recommendation to Wiltshire Council which is set out below.

> *"It is my recommendation to the registration authority that the application to register should be rejected as the public had a statutory right to use the land for LSP which, as a matter of law, precludes the registration of the application land as a TVG.*
>
> *Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be "the reasons set out in the inspector's report dated 23 February 2018".*
>
> **NB** LSP = Lawful Sports and Pastimes. TVG = Town or Village Green.

7. Wiltshire Council is the commons registration authority and has a statutory duty to determine the application. The burden of proof lies on the applicant for registration of a new green. All the elements required to establish a new green must be properly and strictly demonstrated. The standard of proof is the civil standard of proof on the balance of probabilities that 'a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes over the land for a period of at least 20 years and that use is continuing at the time of application'. The council, as CRA, has no investigative duty in relation to village green applications which would require it to find evidence or reformulate the applicant's case. The CRA is entitled to deal with the application and the evidence as presented by the parties (the applicant and landowner and any parties objecting to the application). There are currently no regulations in force which set out a process by which a CRA should determine applications of this type.

8. Section 15(2) of the Commons Act 2006 enables any person to apply to register land as a TVG in a case where:

> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years*
>
> *(b) they continue to do so at the time of the application*.

9. The elements of the qualifying principles may be broken down to give a list of conditions which must, on the balance of probability, be met to enable registration of the land to occur. These are as follows:

Where

(i) a significant number…
(ii) …of the inhabitants of any locality…
(iii) …or of any neighbourhood within a locality…
(iv) …have indulged as of right…
(v) …in lawful sports and pastimes…

(vi) …on the land…
(vii) …for at least 20 years…
(viii) they continue to do so at the time of the application.

10. It is a matter of fact that no party disputed that a significant number of the inhabitants of Barton Park, Marlborough had indulged in lawful sports and pastimes on the land for a period exceeding 20years. The only matter that is disputed in this case is whether or not that use had been in a manner that was 'as of right'. The inspector was able to affirm this in the early stages of the inquiry which enabled the inquiry to proceed with the presentation and consideration of only those matters that related to whether the use had been 'as of right' or 'by right'.

11. Officers of the council agree that this was the correct approach with this case and that the only matter of dispute is whether the use had been 'as of right' or 'by right'.

12. <u>As of Right</u>

Use that is 'as of right' is use that is without force, secrecy or permission (from the Latin *nec vi, nec clam, nec precario*). Again there is no dispute about elements of satisfying this condition and it is not suggested that use has been by force (perhaps by causing damage to fencing or in defiance of signs) or in secret (use of the land has been frequent and visible) by any party; however, it is considered by the objectors that use has been an activity permitted by a statutory provision enacted by the landowner by virtue of the manner in which the land was held.

13. <u>By Right</u>

Use that is 'by right' is use that is carried out by statutory right, permitted or actively allowed in some other way on the land. This may be by way of signage, by by-laws, by agreements or it may be by way of implication or by virtue of statutory powers held by the landowner and applied to the land. The objectors to this application consider that use of the land has been by right for the relevant period 1995 to 2015 and for a short period of time before that.

14. The core issue in determining this application is whether the public use has been 'by right' within the meaning of the decision of the Supreme Court in *R (Barkas) v North Yorkshire County Council [2015] AC 195*.

15. It has been established in *Barkas* that where land is held by a local authority for statutory purposes which allow it to be used by the public for recreation then public use is 'by right' and hence cannot be qualifying for the purposes of registration of the land as a TVG.

16. It is therefore necessary in this case to closely consider the manner in which Wiltshire Council (and its predecessors Wiltshire County Council and Kennet District Council) acquired, held and managed the land.

17. The inspector's Summary Report and Report appended at **Appendices 3 and 4** respectively, deal with these considerations in detail (paragraph 48 onwards). It is clear that there was a desire to develop land for residential use at Barton Park from the 1970s through the 1980s and early 1990s. The second objector (Marlborough College) identified 15 planning applications affecting land in this area in these years though concludes that the development came forward in two phases, Barton Park west and Barton Park east. The applicant land lies within Barton Park east.

18. It was considered (and not contested) that a number of early permissions were not implemented due to changes in land ownership and that it was not until outline planning permission reference K/86/0020 was approved containing Condition 5 referring back to a Section 52 of the Town and Country Planning Act 1971 Agreement dated 10 February 1983 that anything directly relevant to the TVG applicant land is relied upon (see inspector's report Appendix 4 paras 53-56).

19. The 1983 agreement refers to proposed open space areas coincident with some, but not all, of the TVG applicant land and the 1986 planning permission refers to the provision of open spaces to be provided concurrently with the phases of development in accordance with the 1983 agreement. The outline permission K/86/00020 was taken forward through the approval of the Master Plan 779/4 (submitted on behalf of Miller Homes) upon which 4.5 acres of Public Open Space were clearly identified. These 4.5 acres of Public Open Space are broadly coincident with the TVG applicant land and also closely coincident with the land transferred by Miller Group Ltd to Kennet District Council in 1993.

20. The 1993 transfer to Kennet District Council is an important document insofar as it is the first record of the acquisition of the TVG applicant land by a local authority. The land transferred is clearly marked as "Open Space" in three places in the same parcel and the transfer provides as follows:

    2. The property is transferred together with the right of way in common with all others entitled to the like rights with or without vehicles over and along all estate roads (until such estate roads are adopted as public highways) constructed on the land comprised in the remainder of title number WT67901 for the purpose only of obtaining access to and maintaining as <u>amenity open space</u> the land hereby transferred.

    The emphasis is not in the original document. The 1993 Transfer is appended at **Appendix 5**.

21. The Inspector considers at paragraph 51 of his report at **Appendix 4** that on the face of it the transfer plainly transfers the land to Kennet District Council to be held as public open space and he considers that there is no scope for ambiguity. Accordingly, there is no requirement for him to consider extrinsic evidence which points to some other holding purpose.

22. However, at paragraph 52 of his report he goes on to state that even if he did go beyond the terms of the 1993 Transfer the outcome would be the same, being entirely consistent with the planning history of the TVG applicant land.

23. Since 1993 the land has been regularly maintained by the local authority in a way which enables it to be used as public open space. No explanation has been offered as to why a local authority would maintain land in this way if it had not been regarded as public open space. A presumption of regularity must apply.

24. The land was maintained by Wiltshire Council between 2009 and 2013 but between June 2013 and September 2016 maintenance was carried out by Balfour Beatty Living Places (as part of a contract with Wiltshire Council) and from September 2016 onwards by another contractor known as *id verde* who continue to maintain the land (grass is cut monthly between March and October/November).

25. There appears to be no doubt that the land has been held and maintained by a local authority since 1993, and, for the whole of the 20 years qualifying period for the purposes of Section15 of the Commons Act 2006. However, for *Barkas* to apply the committee must consider what statutory power the local authority held the land under.

26. There is no direct evidence as to what powers were used to acquire the land and no council minutes have been found that record this. Given the clear purpose of the land as open space or open amenity space throughout much of the area's planning history it is not consistent that it was acquired by the local authority for planning purposes and the most likely powers are undoubtedly those found within Section164 of the Public Health Act 1875, Section 9/10 of the Open Spaces Act 1906 or under Section19 of the Local Government (Miscellaneous Provisions) Act 1976. The term 'open space' is referred to in the Town and Country Planning Act 1990 at Section 336(1) and defined as including *land laid out as a public garden, or used for the purposes of public recreation.*

27. The applicant pointed out in their submissions to the inquiry that Wiltshire Council has never properly designated the land as *public* open space (it was transferred as *amenity* open space), has never erected signs or notices, provided play equipment or devised a play and sports strategy and that the land has been excluded from a programme of planned transfers of local public open spaces to the town council.

28. The inspector, at paragraph 104 of his report at **Appendix 4**, considers the statutory holding powers of Kennet District Council and concludes that they were in a position to lawfully acquire the applicant land for use as recreational open space and to hold it for that purpose. No evidence has been identified that it could have been held for any other purpose and it was certainly used and managed for these recreational purposes by the local authority after 1993.

29. The inspector has found that the application land was always intended to comprise the major part of the public open space provision for the development of Barton Park east and that it has consistently been maintained and used in this way. Accordingly, officers agree with the inspector that the local inhabitants had a statutory entitlement to use the TVG applicant land for recreation and that in these circumstances use was 'by right' and not 'as of right' and is thereby not a qualifying use within the meaning of Section 15 of the Commons Act 2006.

Overview and Scrutiny Engagement

30. The determination of Town and Village Green applications is governed by statutory regulations, relevant case law and non-statutory guidance.

Safeguarding Implications

31. There are no safeguarding implications arising from this report.

Public Health Implications

32. There are no public health implications arising from this report.

Corporate Procurement Implications

33. The procurement implications of processing the application are dealt with under the Financial Implications section below.

Equalities Impact of the Proposal

34. There are no equalities impacts arising from the proposal.

Environmental and Climate Change Considerations

35. There are no known environmental and climate change considerations arising from this report.

Risk Assessment

36. The financial and legal risks are set out in the Financial Implications and Legal Implications sections in paragraphs 37 to 47 below.

Financial Implications

37. There is no mechanism by which a CRA may charge the applicant for processing an application to register land as a town or village green and all the costs for holding a non-statutory public inquiry were borne by the council. There is no budgetary provision for such non-statutory processes.

38. The financial implications associated with the risk of judicial review are considered in the following paragraphs.

Legal Implications

39. Where the CRA decides not to register the land as a town or village green, the only right of appeal open to the applicant is through judicial review proceedings and challenging the lawfulness of the decision in the High Court. The court's permission to bring proceedings is required and the application must be made within three months of the date of the decision to determine the village green application.

40. If the land is successfully registered as a town or village green, the landowner could potentially challenge the Registration Authority's decision under Section 14(1)(b) of the Commons Registration Act 1965 (the 1965 Act), which allows the High Court to amend the register only if it can be shown that the registration ought not to have been made and that it is just to rectify the register. The overall effect is that the registration of the land is deemed to have been made under Section 13 of the 1965 Act and there is a preserved right under Section 14 to apply to the court to rectify the registration of the town or village green without limit of time. The landowner is also able to seek a judicial review of the CRA's decision to register their land as a town or village green.

41. Where the Registration Authority decides not to register the land as a town or village green, there is no right of appeal for the applicant, although the decision of the council may be challenged through judicial review, for which the permission of the court is required and the application must be made within three months of the date of the decision of the council. A landowner could also use judicial review proceedings to challenge the council's decision to register their land as a town or village green.

42. Judicial review proceedings are a complex area of administrative law where as previously stated every aspect of the law and facts relevant to the decision (in this case the relevant statute is the Commons Act 2006 together with village green case law) and the decision making process would be subject to detailed analysis by the High Court. Due to the complexity of such cases the legal costs can quickly escalate. If the judicial review proceedings are not successfully defended, the Aarhus convention (concerning the legal costs for environmental cases) does limit the costs liability so far as the council as CRA is concerned (if the case is lost) to £35,000; however, the CRA would also be required to meet its own legal costs to defend the case (which would be a broadly similar sum if not more depending on the issues that may arise during the proceedings) in addition to the applicant's costs. The applicant's potential maximum costs liability if their case is unsuccessful is £5,000.

43. The issue of 'pre-determination' or approaching decision with a 'closed mind' (or having already made up their mind on the application before considering the evidence and/or inspector's recommendation and making the decision) is a serious allegation and one that a CRA must avoid. There is a potential reputational issue for a Commons Registration Authority if after a legal challenge a court was to make a finding that 'pre-determination' took place before a committee made a formal decision to determine an application to register land as a town or village green.

44. The committee should note that the Growth and Infrastructure Act 2013 amended the Commons Act 2006 to:

    (i) reduce the period within which a town or village green application can be made (after the requisite 20 years of recreational use "as of right" has ceased) from two years to one year;

    (ii) allow landowners to deposit a map and statement to protect their land from registration as a town or village green, whilst allowing access to the land;

(iii) exclude the right to apply to register land as a town or village green under Section 15(1) of the 2006 Act where any of a number of specified events ('trigger events') occurs.

45. If the decision is quashed by the High Court either by consent or after a substantive hearing it will be sent back to the CRA to be re-made.

46. A recent High Court case has considered the procedural issues for determining an application to register land as a town or village green. In March 2016 the High Court considered an application by a parish council for judicial review of the decision of Cheshire East Borough Council concerning an application to record two verges as a town or village green (Somerford Parish Council v Cheshire East Borough Council & Anor [2016] EWHC 619). The application for judicial review was made on the following grounds:

(i) Cheshire East Borough Council breached the rule of natural justice by acting as its own judge.

(ii) Counsel instructed by the borough council was not independent.

(iii) There were procedural errors; counsel allowed the borough council to put in evidence out of time and the applicant was given no opportunity to respond to the late evidence.

(iv) The council should have held a public inquiry before making its recommendation.

47. The High Court rejected the first two arguments and held that a commons registration authority is entitled to determine a town and village green application providing it instructs independent legal counsel and secondly, legal counsel is deemed to be independent. The High Court held that it was procedurally unfair for the applicant not to have been given a chance to respond to the evidence which was, itself, submitted out of time. In addition, the judge found that the dispute as to whether or not the grass verges were highway was serious enough to necessitate a public inquiry.

48. It is considered that in holding a non-statutory public inquiry and appointing an independent inspector experienced in this area of law Wiltshire Council has acted in a fair and reasonable manner to all parties.

Options Considered

49. Members of the Committee must consider the following possible decisions open to them:

(i) To register the applicant land as a town or village green.

(ii) To reject the application to register the land as a town or village green.

Reason for Proposal

50. Full submissions from the applicant and the two objectors have been made and duly considered by an expert in this area of law at a locally held public inquiry. The recommendation of the inspector is clear and officers agree that on the balance of probability the land was held and maintained by the local authority for the purpose of recreation and amenity. The local authority has lawful authority to hold land in this way and it is likely that it did so. Accordingly, use by the public was by way of statutory provision rather than a process with its roots in the law of trespass. Use of the land was therefore 'by right' and not 'as of right' and thereby does not satisfy the requirements of Section 15 of the Commons Act 2006.

Proposal

51. That the application to register the land should be rejected for the reasons set out in the inspector's report dated 2 March 2018 and appended to this report at **Appendix 4**.

TRACY CARTER
Director – Waste and Environment

Report Author
Sally Madgwick
Acting Definitive Map and Highway Records Team Leader

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

Commons Registration Authority (Wiltshire Council) Inquiry Documents (1 file)
Applicant's (Mr I Mellor) Inquiry Documents (2 files)
First Objector's (Wiltshire Council) Inquiry Documents (1 file)
Second Objector's (Marlborough College) Inquiry Documents (3 files)

NB These documents will be available for public viewing at:

Rights of Way and Countryside, Unit 9, Ascot Court, White Horse Business Park, Trowbridge, BA14 0XA

Appendices:

Appendix 1 Plan showing applicant land
Appendix 2 Report to the Eastern Area Planning Committee Jan 05 2017
Appendix 3 Executive Summary to Report of William Webster dated Feb 23 2018
Appendix 4 Report of William Webster dated Feb 23 2018
Appendix 5 Transfer of applicant land to Kennet District Council dated Aug 19 1993

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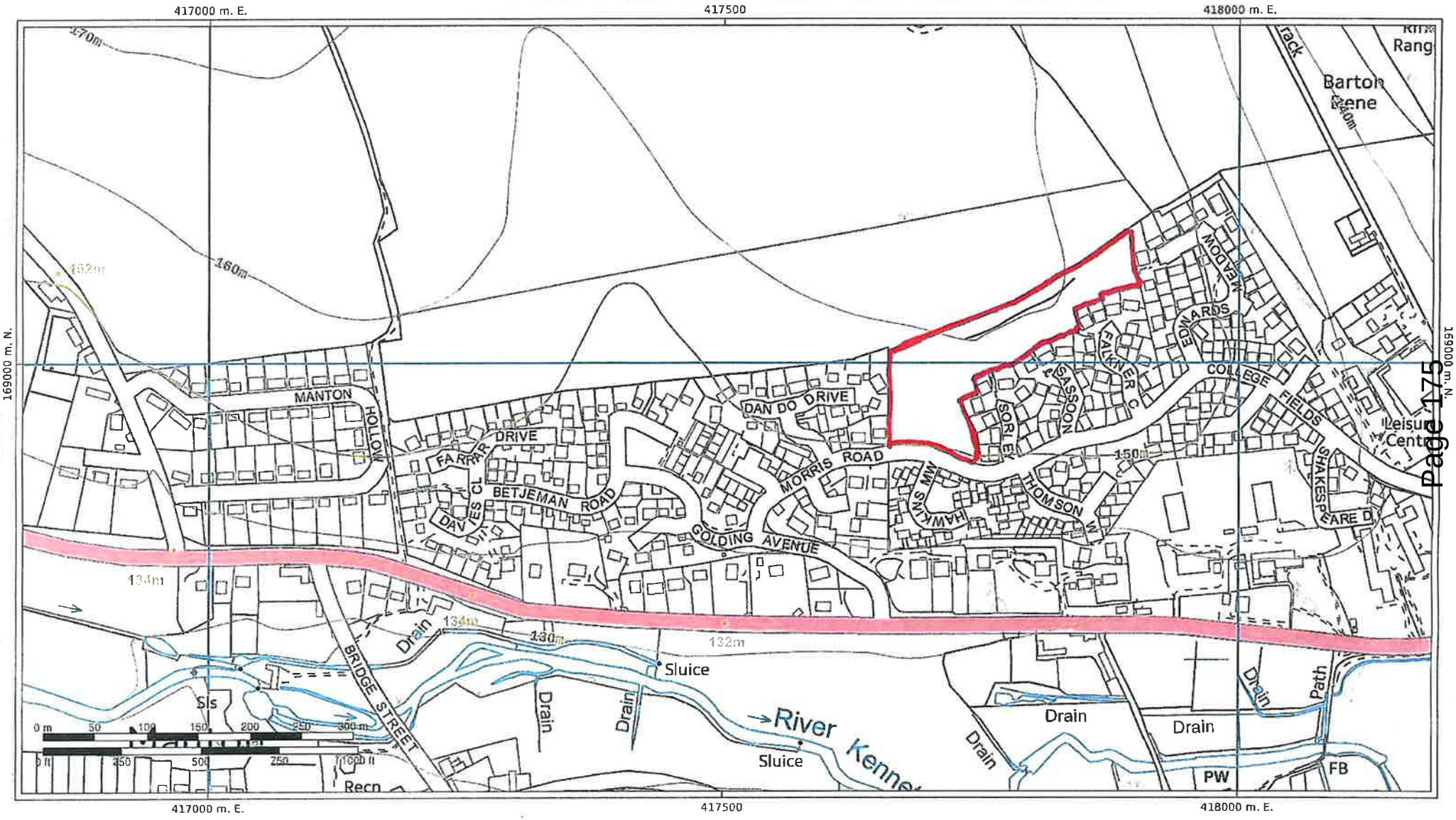
VILLAGE GREEN APPLICATION SITE.

APPENDIX 1



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Ground Scale 1:5,000

Approximate Mean Declination 1°7'46"

Annual Change 0°9'42"E

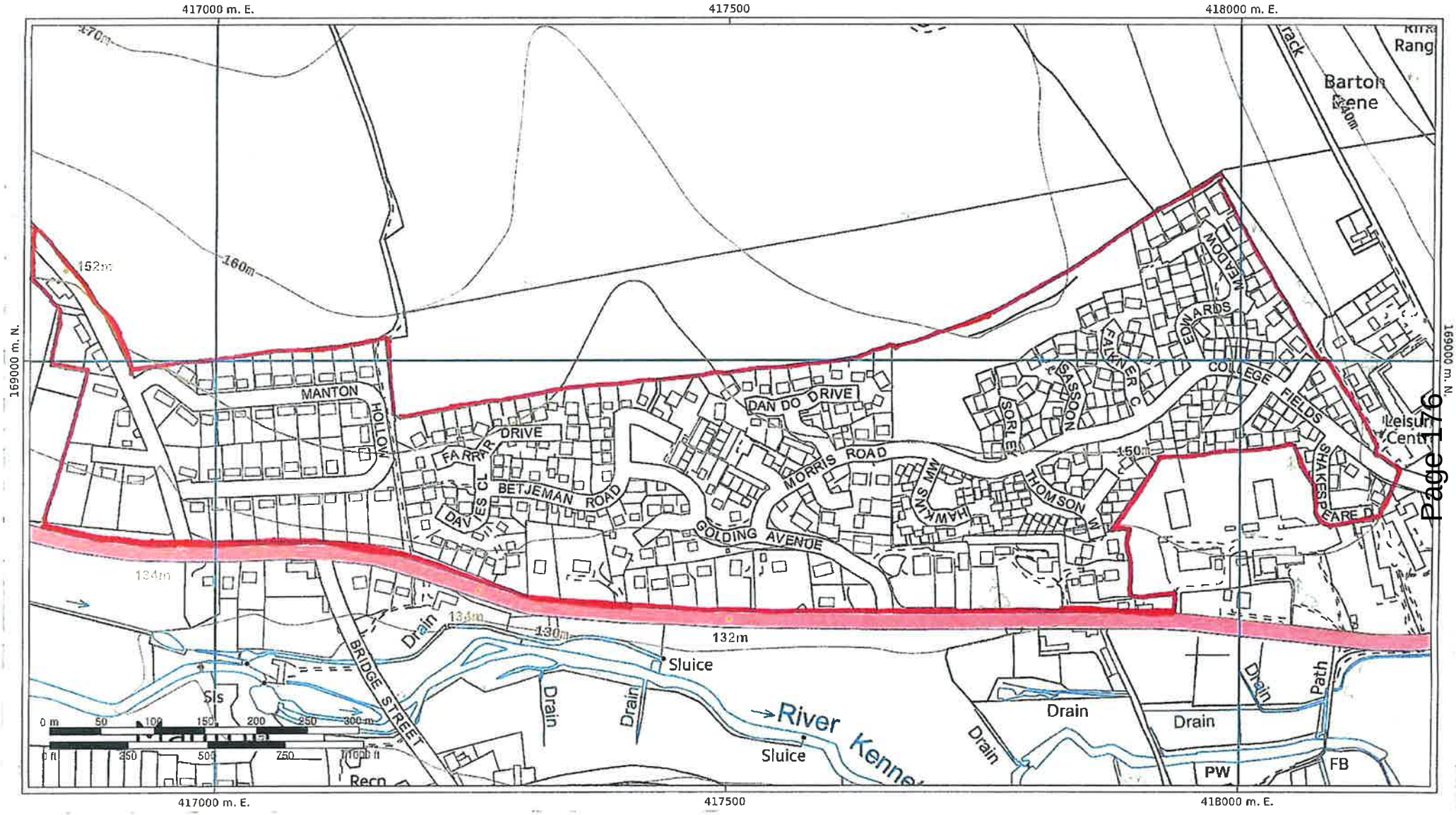
Graphic provides direction of Approximate Mean Declination for center of map

Date of Production: January 23rd, 2017

APPENDIX 1

SN8 1TP

PLAN OF NEIGHBOURHOOD.



Page 176

Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
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Date of Production: January 23rd, 2017

WILTSHIRE COUNCIL **AGENDA ITEM NO.**

EASTERN AREA PLANNING COMMITTEE

5 JANUARY 2017

COMMONS ACT 2006 – SECTION 15(1) AND (2) APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN – THE PLAY AREA IN MORRIS ROAD/COLLEGE FIELDS IN THE BARTON PARK/COLLEGE FIELDS RESIDENTIAL AREA, MARLBOROUGH

Purpose of Report

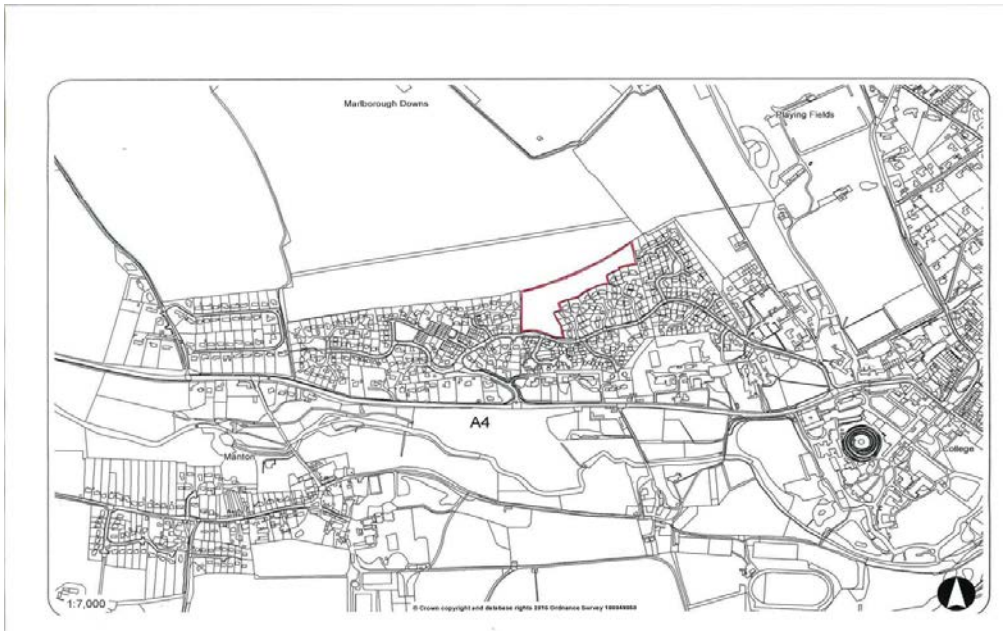
1. To seek approval to appoint an independent Inspector to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough.

Relevance to Council's Business Plan

2. Working with the local community to maintain an up-to-date register of town and village greens to make Wiltshire an even better place to live, work and visit.

Background

3. On 18 May 2015 Mr. I. Mellor, resident of Barton Park, applied to Wiltshire Council as commons registration authority ('CRA') to register the play area in Morris Road/College Fields, Barton Park as a town or village green under Sections 15(1) and 15(2) of the Commons Act 2006. The application land is shown edged red on the plan below:



4. The applicant stated on his application form that the land the application relates to was planned as open space with the housing development; it was transferred to Kennet District Council and has been used by the community for over 25 years. Nineteen statements concerning use of the land were submitted with the application in its support. Kennet District Council owned the land from 1993 and ownership was transferred to Wiltshire Council in 2009 when it became a unitary authority.

5. Receipt of the application was advertised in the Wiltshire Gazette and Herald on 30 July 2015 and on site. Two objections were received to the application, one from Wiltshire Council as land owner and the other from solicitors acting on behalf of Marlborough College. Ninety five representations on the application were received by the Council as a result of the public notice posting.

Main Considerations for the Council

6. Wiltshire Council is the commons registration authority and has a statutory duty to determine the application. The burden of proof lies on the applicant for registration of a new green. All the elements required to establish a new green must be properly and strictly proved. The standard of proof is the civil standard of proof on the balance of probabilities that 'a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes over the land for a period of at least 20 years and that use is continuing at the time of application'. The council, as CRA, has no investigative duty in relation to village green applications which would require it to find evidence or reformulate the applicant's case. The CRA is entitled to deal with the application and the evidence as presented by the parties (the applicant and landowner and any parties objecting to the application). There are currently no regulations in force which set out a process by which a CRA should determine applications of this type.

7. The application is disputed. Wiltshire Council, as landowner, objects to the application on the following grounds:

"1. The land has been the subject of a series of Planning Agreements under Section 52 of the Town and Country Planning Act 1971, culminating in an Agreement dated 10 February 1983 and a Supplemental Agreement dated 29 March 1985 between Kennet District Council (1) Marlborough College (2) and W E Chivers and Sons Limited (3) whereby Marlborough College agreed to convey to the Council not less than four and a half acres as an open space area which corresponds in location with the site of the application.

2. By Transfer dated 19 August 1993, the land was transferred to Kennet District Council.

3. From 1 April 2009 Wiltshire Council became unitary authority merging Wiltshire County Council with Kennet District Council and the other three District Councils.

4. The land is maintained by Wiltshire Council as a public open space under a current maintenance contract.

5. The application does not satisfy the use "as of right" requirement and the application should therefore fail."

8. Section 15 of the Commons Act 2006 provides that to register land as a town or village green it must be shown that:

> *A significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.*

9. The Supreme Court Judgement given on 21 May 2014 in R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents) is the leading authority on whether use has been "as of right", which satisfies the legal criterion for registration, or "by right", which does not. In the words of Lord Neuberger:

" 24…where the owner of the land is a local, or other public authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to them using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

10. Marlborough College objects to the application for the following reasons:

(i) Failure to demonstrate use by a significant number of inhabitants of the claimed locality.

(ii) Failure to demonstrate continuous use (by a significant number) for the whole of the claimed 20 year period.

(iii) Any claimed use of the claimed land by members of the public has been "by right" not "as of right".

11. There is a serious dispute regarding the factual evidence in this case, the application is of great local interest and Wiltshire Council owns the land which the applicant seeks to register as a town or village green. The council, as CRA, must determine the application in a manner fair to all the parties. This may be achieved by appointing an independent Inspector who would normally be a barrister who is an expert in village green law to either advise the council on how to proceed with determining the application or to hold a non-statutory public inquiry and produce a non statutory recommendation to the council for the council's consideration. In holding a public inquiry an independent Inspector considers the evidence and submissions and law relied upon by the Applicant and the Objectors and to report on these to the council with a recommendation as how to determine the Application. The Inspector's recommendation could then be considered by the Eastern Area Planning Committee. The Committee can either accept the Inspector's recommendations or if the Committee found the Inspector's recommendation

has significantly erred in law or in fact could reject the recommendation. However, if the Inspector's recommendation is rejected by Committee and there is no evidence of significant errors in law or fact in the recommendation there would be an increased risk of the Committee's decision being challenged in judicial review proceedings in the High Court.

12. The Committee's attention is also brought to the High Court decision in the case of Somerford Parish Council v Cheshire East Borough Council (1) and Richborough Estates (2) 2016 where the High Court quashed the local Borough Council's decision not to register land as a new town or village green on the basis of procedural error. The High Court's decision in the Somerford Parish Council case reinforces the Court's view that there is a need for commons registration authorities to hold a non-statutory public inquiry where there are sufficient disputes over evidence and/or factual issues.

13. Where a town or village green application is refused by a CRA the applicant can appeal that decision by way of judicial review to the High Court. Applications of this nature usually, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council and to avoid the serious financial costs of defending an action for judicial review it is imperative that the proper procedure is followed by the council in the decision making process.

Overview and Scrutiny Engagement

14. The determination of Town and Village Green applications is governed by statutory regulations, relevant case law and non-statutory guidance.

Safeguarding Implications

15. There are no safeguarding implications arising from this report.

Public Health Implications

16. There are no public health implications arising from this report.

Corporate Procurement Implications

17. The procurement implications of processing the application are dealt with under the Financial Implications section below.

Equalities Impact of the Proposal

18. There are no equalities impacts arising from the proposal.

Environmental and Climate Change Considerations

19. There are no known environmental and climate change considerations arising from this report.

Risk Assessment

20. The financial and legal risks are set out in the Financial Implications and Legal Implications sections in paragraphs 21 to 30 below.

Financial Implications

21. There is no mechanism by which a CRA may charge the applicant for processing an application to register land as a town or village green and all the costs for holding a non-statutory public inquiry are borne by the council. There is no budgetary provision for such non-statutory processes.

22. The estimated costs of holding a non-statutory public inquiry would include initial read and drafting directions and further directions if considered necessary, site visit, preparation for the inquiry and first day and refreshers (time spent on the inquiry in excess of the original time estimate for the inquiry) writing the report, expenses (capped at 45p per mile travel and hotel accommodation capped at £100 per night. The normal hourly rate is £110 per hour. Total inquiry costs will depend on how long the inquiry will need to sit but are estimated at this early stage to be in the region of £16,000 - £18,000.

Legal Implications

23. Where the CRA decides not to register the land as a town or village green, the only right of appeal open to the applicant is through judicial review proceedings and challenging the lawfulness of the decision in the High Court. The court's permission to bring proceedings is required and the application must be made within three months of the date of the decision to determine the village green application

24. The landowner is also able to seek a judicial review of the CRA's decision to register their land as a town or village green.

25. Judicial review proceedings are a complex area of administrative law where as previously stated every aspect of the law and facts relevant to the decision (in this case the relevant statute is the Commons Act 2006 together with village green case law) and the decision making process would be subject to detailed analysis by the High Court. Due to the complexity of such cases the legal costs can quickly escalate. If the judicial review proceedings are not successfully defended, the Aarhus convention (concerning the legal costs for environmental cases) does limit the costs liability so far as the council as CRA is concerned (if the case is lost) to £35,000; however, the CRA would also be required to meet its own legal costs to defend the case (which would be a broadly similar sum if not more depending on the issues that may arise during the proceedings) in addition to the applicant's costs. The applicant's potential maximum costs liability if their case is unsuccessful is £5,000.

26 The issue of 'pre-determination' or approaching decision with a 'closed mind' (or having already made up their mind on the application before considering the evidence and/or Inspector's recommendation and making the decision) is a serious allegation and one that a CRA must avoid. There is a potential reputational issue for a Commons Registration Authority if after a legal challenge a court was to make a finding that 'pre-determination' took place before a committee made a formal decision to determine an application to register land as a town or village green.

27. The Committee should note that the Growth and Infrastructure Act 2013 amended the Commons Act 2006 to:

(i) reduce the period within which a town or village green application can be made (after the requisite 20 years of recreational use "as of right" has ceased) from two years to one year;

(ii) allow landowners to deposit a map and statement to protect their land from registration as a town or village green, whilst allowing access to the land;

(iii) exclude the right to apply to register land as a town or village green under Section 15(1) of the 2006 Act where any of a number of specified events ('trigger events') occurs.

28. If the decision is quashed by the High Court either by consent or after a substantive hearing it will be sent back to the CRA to be re-made.

29. A recent High Court case has considered the procedural issues for determining an application to register land as a town or village green. In March 2016 the High Court considered an application by a parish council for judicial review of the decision of Cheshire East Borough Council concerning an application to record two verges as a town or village green (Somerford Parish Council v Cheshire East Borough Council & Anor [2016] EWHC 619). The application for judicial review was made on the following grounds:

(i) Cheshire East Borough Council breached the rule of natural justice by acting as its own judge.

(ii) Counsel instructed by the Borough Council was not independent.

(iii) There were procedural errors; counsel allowed the Borough Council to put in evidence out of time and the applicant was given no opportunity to respond to the late evidence.

(iv) The Council should have held a public inquiry before making its recommendation.

30. The High Court rejected the first two arguments and held that a commons registration authority is entitled to determine a town and village green application providing it instructs independent legal counsel and secondly, legal counsel is deemed to be independent and any communications with that independent counsel would not be considered to be legally privileged. The High Court held that it was procedurally unfair for the applicant not to have been given a chance to respond to the evidence which was, itself, submitted out of time. In addition, the judge found that the dispute as to whether or not the grass verges were highway was serious enough to necessitate a public inquiry. The decision of the Borough Council was therefore quashed on grounds (iii) and (iv).

Options Considered

31. Members of the Committee must consider the following possible decisions open to them:

    (i) To appoint an independent Inspector to advise the council on how to proceed with determining the application.

    (ii) To appoint an independent Inspector to hold a non-statutory public inquiry and produce an advisory report with his or her findings and recommendations for the council's consideration as CRA.

Reasons for Proposal

32. There is a serious dispute regarding the evidence and the application is of great local interest. Wiltshire Council owns the land which the applicant seeks to register as a town or village green. In paragraphs 12 and 13 above the Committee's attention was brought to the High Court judgement in the case of Somerford Parish Council v Cheshire East Borough Council. The case was brought to the High Court on the basis of procedural error by the Borough Council. The case highlights a number of practical points for the Committee to note and consider regarding privilege, equity and the importance of public inquiries in determining an application to register land as a town or village green in disputed cases and where the land is owned by a local authority. The decision of the High Court also reinforces the findings in R (Whitmey) v Commons Commissioners and the need for commons registration authorities to hold a non-statutory public inquiry where there are sufficient disputes over factual issues.

33. Where the CRA decided not to register land as a town or village green there is no right of appeal to the council as CRA or for example to the Secretary of State as there is in relation to a planning application. The applicant's course for redress is by way of an application for judicial review made to the High Court. Applications of this nature usually, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council, and to avoid the serious financial costs of defending an action for judicial review, it is imperative that the council adopts the proper decision making process in dealing with this application.

Proposal

34. To seek approval to appoint an independent Inspector to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough.

TRACY CARTER
Associate Director – Waste and Environment

Report Author

Barbara Burke
Definitive Map and Highway Records Team Leader

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

None

Appendices:

None

WILTSHIRE COUNCIL

COMMONS ACT 2006

IN THE MATTER OF AN APPLICATION TO REGISTER LAND ON THE NORTH SIDE OF MORRIS ROAD / COLLEGE FIELDS, BARTON PARK, MARLBOROUGH AS A NEW TOWN OR VILLAGE GREEN

Application number: 2015/1

INSPECTOR'S REPORT

EXECUTIVE SUMMARY

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1. I was instructed by Wiltshire Council ('WC') to hold a public inquiry and thereafter to provide the commons registration authority ('CRA') with an advisory report in relation to an application made by a Mr Ian Mellor to register a 4.5 acre parcel of undeveloped land ('the application land') on the western outskirts of Marlborough as a new town or village green ('TVG'). The application land is outlined in red on the plan at Appendix 1.

2, The application to register is supported by a significant number of local inhabitants living within a neighbourhood whose area is also edged in red on the plan at Appendix 2.

3. The application is facing objections from (a) WC, in whom such land is vested, and (b) Marlborough College which owns arable farmland on the northern side of the application land. If the latter is registered as a TVG it would mean that it could not be developed which would be no trivial matter to Marlborough College as owner of the land upslope.

4. The application is made under section 15(2) of the Commons Act 2006. In order to justify registration the CRA have to be satisfied (in these circumstances) that a significant number of the inhabitants of any neighbourhood within a locality (which can be an electoral ward or the town of Marlborough) have indulged as of right in lawful sports and pastimes ('LSP') on the land for a period of at least 20 years.

5. Because the application to register has ample support within the local community the objectors had to concede that, with one exception, the elements necessary to justify registration had been made out by the applicant.

6. The exception involved the issue of whether public's use of the application land had been 'as of right' which, put shortly, requires use to be without force, secrecy or permission. If, for instance, use is by permission or by virtue of a statutory right (or publicly based licence) enabling members of the public to go onto the land and to use it for informal recreation, their use will have been 'by right' and non-qualifying for TVG purposes.

7. This question has been addressed recently in the Supreme Court in *R (Barkas) v North Yorkshire County Council* [2015] AC 195. As a result of the decision in *Barkas* it was accepted by the applicant and the objectors that there were, in substance, two questions which needed to be resolved in arriving at a decision on whether the application land would be registrable as a matter of law. The questions were: (a) under what power was the land held following its acquisition in 1993; and (b) did the purposes of acquisition carry with it an entitlement on the part of the public to use the land for recreation?

8. The answers to these questions required me to determine whether, in its acquisition of the land from developers in 1993, Kennet District Council ('Kennet') (from whose ownership the land passed to WC in 2009 on local government reorganisation within the county) would have utilised powers available to them which allowed them to acquire land for use as recreational open space, such as arises under the Public Health Act 1875, section 164, the Open Spaces Act 1906, section 9, or the Local Government (Miscellaneous Provisions) Act 1976, section 9 (the likeliest candidate of the

three being the 1906 Act under which, by section 10, such land is held on trust for the enjoyment of the public as open space).

9. As the land was specifically transferred to Kennet as ‘amenity open space’ I have taken the view that these words are more than sufficient to support a conclusion that the land was intended to be held by Kennet (in whose shoes WC now stands) as public open space. Indeed, if these words of description were not plain enough already, the plan accompanying the transfer to Kennet also contains the words ‘Open Space’ in three places within the outline of the land being transferred which can only sensibly be a reference to recreational open space.

10. This being the case it is, I think, obvious that, in acquiring such land for the purposes of recreation, Kennet will have acted pursuant to a suite of statutory powers which enabled it to acquire land for such purposes. On this footing, the application to register must fail as the public will have had a statutory right to use the land for LSP, a right which continues to this day.

11. Such a conclusion is also consistent with (a) the material planning history; and (b) by the way in which the land has been used (and used extensively) and also managed effectively as recreational open space since 1993 by Kennet and WC (for which purposes it had been laid out and prepared by the developer prior to the transfer to Kennet).

12. The planning history starts with the open space provision associated with the development of Barton Park. There were a series of approved planning applications in the 1970s and 1980s for the development which was brought forward in two phases, Barton Park West (which was developed first) and Barton Park East (whose development comprising some 57 houses commenced after June 1988 following approval of reserved matters) within whose curtilage the application land falls. The key permission is an outline planning permission issued in 1986 under the reference K/86/0020, in association with a section 52 planning agreement made in 1983.

13. At condition (b) of the outline permission there is a requirement to provide not less than five and a quarter acres of public open space to serve the proposed

residential development at Barton Park East. The outline permission is linked to the earlier section 52 agreement under which the developer was required to make provision for open spaces and amenity areas. Clauses (4) and (5) of the same agreement made provision for the capitalised cost of maintaining not less than four and a half acres of proposed open space shown within the area edged green on the accompanying plan. This is admittedly not the same shape as the application land but it would have been intended that the eventual open space provision would be identified through the approval of Master Plans at the stage of approval of reserved matters.

14. The 1986 outline permission was duly taken forward through the approval of a Master Plan 779/4 (later revised) upon which 4.5 acres of public open space mirrors the land transferred to Kennet. The Master Plan was approved as part of the reserved matters application for Phase 1 of the Barton Park East development and was again revised in the form of drawing 779/4 rev C in the context of an approval of reserved matters on 15/09/1988 (which concerned Phases 4 and 4a of the development). The third revision of the Master Plan also shows a 4.5 acre parcel of public open space which again corresponds to the land transferred to Kennet. There is also an officers' report on the reserved matters application K/12458/D for the Barton Park East development in which the development site is described by reference to the Master Plan approved for the different phases pursuant to the 1986 outline planning permission where we are told the houses would be grouped 'around 2 areas of open space to create 'village green' arrangements'. In due course, the areas allocated as public open space were laid out and transferred to Kennet.

15. It seems plain that the application land was always intended to comprise the major part of the public open provision for the development of Barton Park East (in line with the obligations on the developer arising from the planning history) and was transferred to Kennet to be held for such purposes.

16. It follows from all this that, following *Barkas*, the application land cannot, as a matter of law, be considered to have been used by local inhabitants 'as of right' but was in law used for LSP 'by right'. After 1993 the public enjoyed a statutory right to use the application land for recreation and such right is

continuing. In the circumstances, the use relied on by the applicant was not a qualifying use within the meaning of CA 2006, s.15.

17. The applicant (who is an experienced planning consultant) made a number of submissions which were, in my view, successfully rebutted by the arguments advanced by experienced counsel for the objectors.

18. It is then my recommendation to the CRA that the application to register should be rejected.

William Webster

3 Paper Buildings

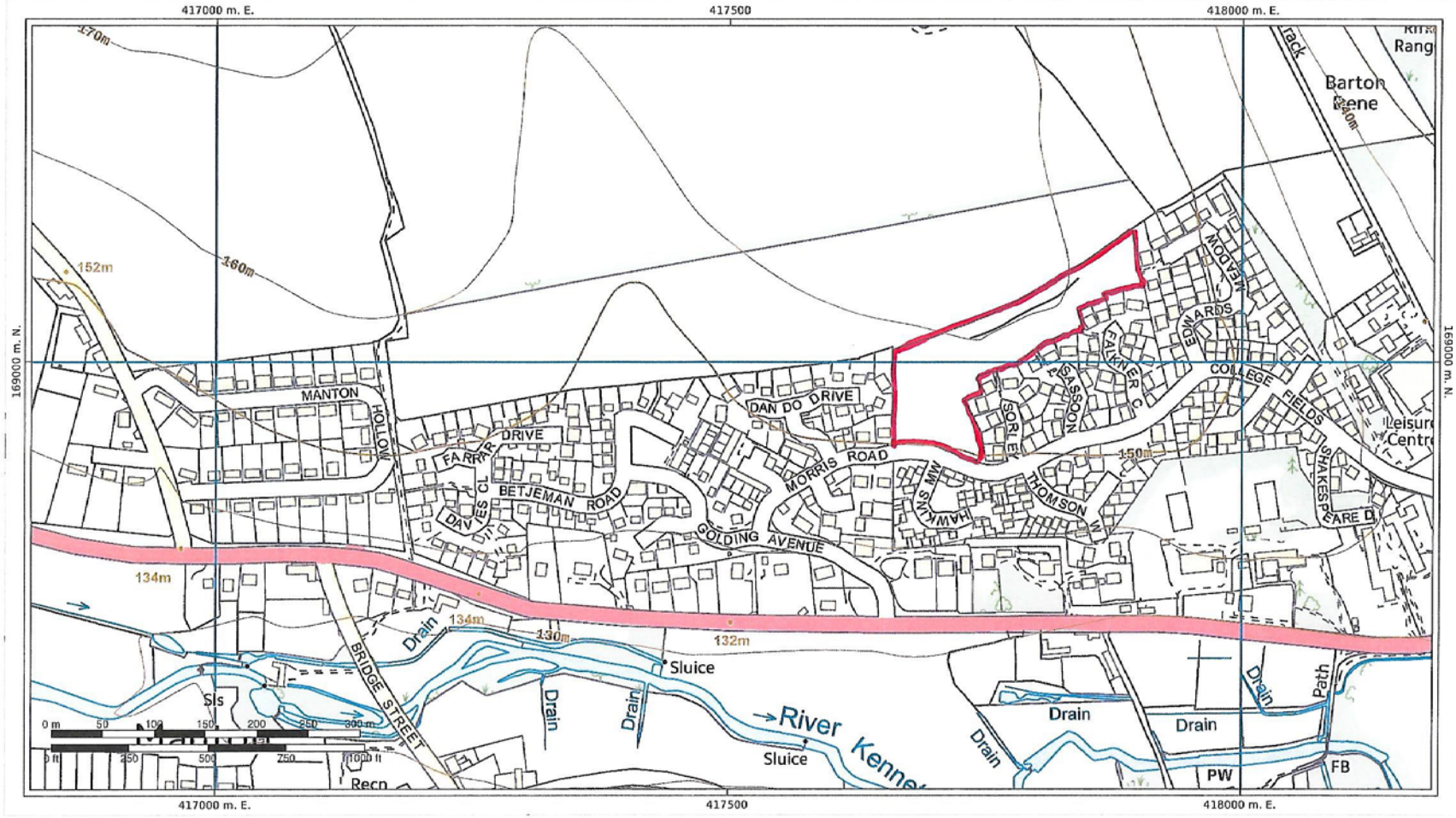
Temple

Inspector **2 March 2018**

APPENDIX 1

SN8 1TP

VILLAGE GREEN APPLICATION SITE.



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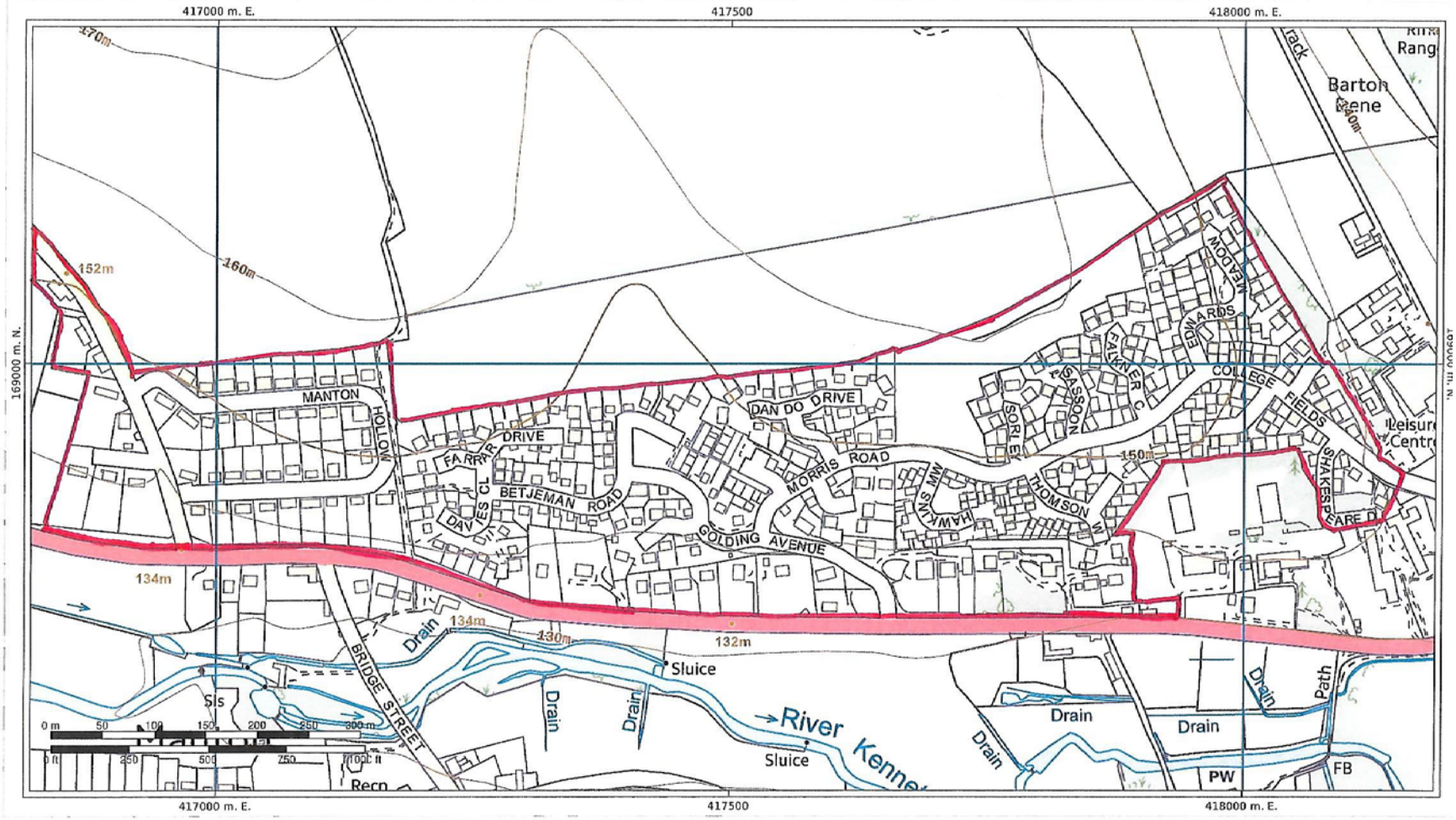
Graphic provides direction of Approximate Mean Declination for center of map

Date of Production: January 23rd, 2017

APPENDIX 2

SN8 1TP

PLAN OF NEIGHBOURHOOD.



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Date of Production: January 23rd, 2017

WILTSHIRE COUNCIL

COMMONS ACT 2006

IN THE MATTER OF AN APPLICATION TO REGISTER LAND ON THE NORTH SIDE OF MORRIS ROAD / COLLEGE FIELDS, BARTON PARK, MARLBOROUGH AS A NEW TOWN OR VILLAGE GREEN

Application number: 2015/1

INSPECTOR'S REPORT

Introduction

1. I am instructed by Wiltshire Council ('WC'), acting in their capacity as commons registration authority under Part 1 of the Commons Act 2006 ('CA 2006'), which is the responsible authority for determining applications to register land as a new town or village green ('TVG') under section 15 of that Act.

2. I have been instructed by WC to hold a non-statutory public inquiry to enquire into the facts behind the application and to apply the relevant law to those facts with the aim of providing WC with a report containing a recommendation on whether the application to register should be allowed or refused.

3. Accordingly, I gave directions for the holding of a public inquiry in Marlborough, including in relation to the disclosure and procedure of the inquiry, which was held over two days in Marlborough on 9-10 January 2018.

4. The participants at the inquiry were as follows: (a) the applicant for registration was Ian Mellor (who is an experienced planning consultant and

local resident) who acted in person (albeit with the assistance of a small team, notably a Mr Peter May, who was the only oral witness at the inquiry); (b) WC, acting as first objector and landowner (which has been the case since 1/04/2009 when it became the Unitary Authority for Wiltshire), which was represented by Jeremy Pike of counsel; and (c) Douglas Edwards QC, who acted for Marlborough College, as second objector, which is interested in the application land ('the application land' or 'the land' as the context permits – see location plan in Appendix 1) as owner of neighbouring land on its north-western boundary. I am indebted to these parties for their assistance and conscientious submissions. I am also grateful for the administrative support provided by Sarah Marshall and Sally Madgwick on behalf of the registration authority.

Legal framework

5. Section 15(2) of the CA 2006 enables any person to apply to register land as a TVG in a case where -

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they continue to do so at the time of the application.

6. One then has to look at the various elements of the statute all of which have to be made out in order to justify registration.

'a significant number'

7. 'Significant' does not mean considerable or substantial. What matters is that the number of people using the application land has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation rather than occasional use by individuals as trespassers (*R v Staffordshire CC, ex parte McAlpine Homes Ltd* [2002] EWHC 76 at [71] (Admin)).

'of the inhabitants of any locality'

8. The term 'locality' is taken to mean a single administrative district or an area within legally significant boundaries. In short, village green rights require to be asserted by reference to a particular locality and would include an electoral ward.

'or of any neighbourhood within a locality'

9. A neighbourhood is a more fluid concept. The expression 'neighbourhood within a locality' need not be a recognised administrative unit. A housing estate can be a neighbourhood (*McAlpine*) but the area must be capable of meaningful description in some way. It was said in *R (NHS Property Services Ltd) v Surrey County Council* [2016] 4 WLR 130 that the cohesion of a neighbourhood is essentially a matter of impression and is not something which can be assessed by using some recognised technique.

'have indulged as of right'

10. The traditional formulation of the requirement that user must be 'as of right' is that the user must be without force, secrecy or permission. The rationale behind 'as of right' is acquiescence. The landowner must be in a position to know that a right is being asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit the use.

11. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use had passed the threshold of being of sufficient quantity and suitable quality, to assess whether any of the vitiating elements of the tripartite test applied, judging the questions objectively from how the use would have appeared to the landowner. In short, the use must be to a sufficient extent since use which is:

    so trivial and sporadic as not to carry the outward appearance of user as of right

    should be ignored (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 375D-E).

12. The issue of 'force' does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Nothing of the kind arises in this instance, nor has the use in this case been by stealth as the owner would clearly have been aware of its use by the public.

13. 'Permission' can be express e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can also be implied but not by inaction (*R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at [5]).

14. It is not alleged in this instance that use of the land was by virtue of an implied licence on the basis of the way in which the land was managed over the years.

15. One turns to what has become the core issue on this application which is whether the public use has been 'by right' within the meaning of the decision of the Supreme Court in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 as, if it has, the public's user will not justify registration as it will not have been 'as of right'.

16. It has been established in *Barkas* that where land is held by a local authority for statutory purposes which allows it to be used by the public for recreation the public's use of the land will be 'by right' and not 'as of right' (meaning 'as if by right') and thus non-qualifying. *Barkas* involved the use of recreational open space under the Housing Acts[1] but the principle is applicable whenever

[1] The Housing Acts 1925, 1936, 1957 and 1985; the current position is that section 12(1) of the 1985 Act (and the earlier Housing Acts contained similar provisions) empowers a local authority to provide and maintain (with the consent of the Minister) in connection with housing accommodation provided by them, recreation grounds which, in the opinion of the Minister, would serve a beneficial purpose in connection with the requirements of the persons for whom such housing accommodation is provided. Section 13(1) (and the earlier housing legislation contained a similarly-worded provision) empowers a local authority to set out an open space on land acquired for housing purposes but without having to obtain ministerial consent. The absence of ministerial consent for the setting out of recreation grounds under the Housing Acts is unlikely to be fatal to the lawful use of such land for recreation in view of the principle that administrative acts are valid unless and until quashed by a court and if the time has passed for them to be challenged then they stand notwithstanding that the reasoning on which they are based may have been flawed (see *R (Noble Organisation) v Thanet District Council* [2005] EWCA Civ 782 at [42] Auld L.J). There is no authority holding that land held for the purposes of the Physical Training and Recreation Act 1937 and the Local Government (Miscellaneous Provisions) Act 1976 would not be registrable but, in light of *Barkas*, it seems highly likely that local inhabitants would also have a legal right to recreate on land acquired or appropriated onto the purposes of s.4(1) of the 1937

land is held for the purposes of a statutory right of public recreation. This arises in the case of land held under section 164 of the Public Health Act 1875[2] (public walks or pleasure grounds), or section 10 of the Open Spaces Act 1906[3] (open spaces – whether vested in the local authority or not).[4]

17. There is no authority holding that land held for the purposes of the Physical Training and Recreation Act 1937 and the Local Government (Miscellaneous Provisions) Act 1976 would not be registrable but, in light of *Barkas*, it seems likely that local inhabitants would also have a legal right to recreate on land acquired or appropriated onto the purposes of s.4(1) of the 1937 Act. I accept that I was disinclined to accept this at the inquiry but, having considered the matter, I consider it probable that land so held would be non-qualifying.

18. Section 4(1) of the 1937 Act authorised local authorities to:

acquire, lay out, provide with suitable buildings and otherwise equip, and maintain lands, whether situate within or without their area, for the purpose of gymnasiums, playing fields, holiday camps or camping sites, or for the purpose of centres for the use of clubs, societies or organisations having athletic, social or educational objects, and may use those lands and buildings themselves, either with or without a charge, for the use thereof or admission thereto,

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Act. The 1937 Act authorised local authorities to *"acquire, lay out, provide with suitable buildings and otherwise equip, and maintain lands … for the purpose of centres for the use of clubs … playing fields … or organisations having athletic, social or educational objects, and may manage those lands and buildings themselves … at a nominal or other rent to any person, club, society or organisation for use for any of the purposes aforesaid*". By s.19(5) of the 1976 Act, land held for the purposes of s.4 of the 1937 Act was to be held thereafter for the purposes of s.19 of the 1976 Act which enables an authority to provide indoor and outdoor recreational facilities to such persons whom the authority thought fit, either with or without a charge.

[2] *Hall v Beckenham Corporation* [1949] 1 KB 716, where it was held that the corporation was bound to admit any member of the public who wanted to enter the park during the hours that it was open; see also *Blake v Hendon Corporation* [1962] 1 QB 283, where it was held that once land had been acquired under the 1875 Act the public had a right of free and unrestricted use of the park.

[3] Section 9 permits local authorities to purchase and manage land for the purpose of it being used as public open space. Under section 10 open space under the Act is to be held and administered in trust to allow such land to be enjoyed by the public as an open space and for no other purpose. Land held for such purposes would not be registrable.

[4] In *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) the authority did not own the land but had managed and maintained it as if it were public open space for all to use. The court upheld the decision of the inspector that the land should not be registered. The view taken was that the land was most likely to have been managed and controlled either under sections 9 or 10 of the 1906 Act or section 164 of the 1875 Act. The court determined that it made no difference to the rights which the public had to use the land that the use arose by virtue of an arrangement between the landowner and the authority where the authority had itself no legal interest in the land. The view was taken that local inhabitants had been using the land "by right" in the sense of having permission to do so from the landowner pursuant to arrangements made between the landowner and the local authority securing the provision of land and its management as a piece of public open space.

or may let them, or any portion thereof, at a nominal or other rent to any person club, society or organisation for use for any of the purposes aforesaid …

19. By s.19(5) of the 1976 Act, land held for the purposes of s.4 of the 1937 Act was to be held thereafter for the purposes of s.19 of the 1976 Act which enables an authority to provide:

such recreational facilities as it thinks fit

20. In *Barkas* at [24] Lord Neuberger said this:

I agree with Lord Carnwath JSC that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land to public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of additional facts, it could be appropriate to infer that members of the public have been using the land 'as of right', simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to public use: it would be positively inconsistent with their allocation decision if they had done so.

Also at [46] he said this:

The field was, as I see it, 'appropriated', in the sense of allocated or designated, as public recreational space, in that it had been acquired, and was subsequently maintained, as recreation grounds with the consent of the relevant Minister, in accordance with section 80(1) of the 1936 Act: public recreation was the intended use of the Field from the inception.

At [66] Lord Carnwath also states:

Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights.

This was to be contrasted with *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 where, although the land was in public ownership,

it had not been laid out or identified in any way for public recreational use and indeed was largely inaccessible … (and where) .. *It was held that the facts justified the inference that the rights asserted were rights under the 1965 Act.*

21. The question then, arising from the decision in *Barkas*, is whether land has been lawfully allocated under statutory powers for public recreation? If it has then user will not have been 'as of right' as the public will already have an entitlement to use the land for recreation. *Barkas* accordingly makes it clear that the public use of recreational use of land pursuant to a statutory power to provide recreation land would be sufficient to entitle local inhabitants to use the land for that purpose so as to defeat a claim to that use being 'as of right'.

At [23] in *Barkas* Lord Neuberger said this:

Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct.

'in lawful sports and pastimes'

22. The expression 'lawful sports and pastimes' ('LSP') form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user 'as of right' (*Sunningwell* at p.356F-357E).

'on the land'

23. The expression 'on the land' does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period. The registration authority also retains a discretion to register part only of the application land if it is established that part, but not all, of the application land has become a new green (*Oxfordshire*).

' … for at least 20 years ..'

24. The relevant period in this case is 10/07/1995 – 10/07/2015 (date when application was acknowledged by the registration authority).

Procedural issues

25. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

26. In *Regina (Whitmey) v Commons Commissioners [2004] EWCA Civ 951* Waller L.J suggested at [62] that where there is a serious dispute, the procedure of:

> *conducting a non-statutory public inquiry through an independent expert* should be followed *almost invariably*.

However, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However, the registration authority must act impartially and fairly and with an open mind.

27. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space ('POS') of which there may be an acute shortage in the area.

28. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

29. The procedure in this instance is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

30. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not 'duly made', it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

31. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be

properly and strictly proved

(*R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p.111 per Pill LJ, and approved by Lord Bingham in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, at para 2).

Consequences of registration

32. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land.

33. Upon registration the land becomes subject to (a) s.12 of the Inclosure Act 1857, and (b) s.29 of the Commons Act 1876.

34. Under s.12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede

the use or enjoyment thereof as a place for exercise and recreation.

35. Under s.29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any

disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green.

36. Under both Acts development is therefore prevented and the land is effectively blighted.

Description of the application land and neighbourhood

37. I made an unaccompanied visit to the application land on the morning of the first day of the inquiry. The land is approximately 4.5 acres in size and comprises a south facing hillside within (as I understand it) the North Wessex Downs Area of Outstanding Natural Beauty ('AONB') on the western outskirts of Marlborough with views over the valley through which the River Kennet passes. On its northern side (beyond an ancient hedgerow), the land abuts arable farmland belonging to the second objector (there is a well-used access point through into the application land on its north-eastern corner from the adjoining field. To the east, there is a housing estate comprising four *cul de sacs* to which, in each case, there is a made up pedestrian path onto the land from the end of the various streets (namely Sorley Close, Sassoon Walk, Faulkner Close and Edwards Meadow). To the south, the land abuts Morris Road which links up with Golding Avenue which has an access onto the A4 (Bath Road).

38. A plan of the claimed neighbourhood will be found in Appendix 2. The relevant area comprises the streets of (running west to east) Manton Hollow, Farrar Drive, Davies Close, Betjeman Road, McNiece Drive, Golding Avenue, Hughes Close, Aubrey Close, Morris Road, Dando Drive, Tennyson Close, Hawkins Meadow, College Fields, Sorley Close, Thompson Way, Benson Close, Sassoon Walk, Faulkner Close, Edwards Meadow, Lynes View, Irving Way, Jeffries Close and Shakespeare Drive. With the addition of the dwellings fronting onto Bath Road, the claimed neighbourhood covers a sizable settlement and it was my firm impression that it comprised a distinctively cohesive area on the western side of Marlborough. A plan was produced on which the location of the applicant's witnesses were plotted and there is a clear spread across the claimed neighbourhood which was, as I understand it, largely, if not wholly, developed more than 20 years before the application was made. No point was taken about this at the inquiry

39. Anyone wanting to use land for recreation has unhindered access onto it via the four *cul de sacs* already mentioned and from Morris Road and, from the north, via the gap in the hedgerow at the north-eastern corner of the

application land. There is no fencing alongside the pavement running along Morris Road and, as a result, there is relatively easy access onto the grassy slope, particularly at its western end off the road, where the gradient is not especially great although it becomes steeper as one heads east approaching Sorley Close. There is little doubt, judging by the tracks on the ground and the relatively gentle slope on the western side that, other than via the *cul de sacs*, most walkers enter the application land at the south-west corner. I myself saw a number of dog-walkers do just this.

40. The application land is a grassed area with seven planted trees in a cluster close to Morris Road. A cluster of saplings has also been planted recently by a local group (known as 'the Marlborough Orchard Group') towards the upper end of the land. There are, however, no recreation facilities, nor any signs and it seems plain that the land is no more than a place to walk on, with or without dogs, although it is quite adequate for children to play games or to be taken for walks in push chairs as the grass is kept short. Even though I was on the land for less than an hour, I observed a number of dog-walkers, most of whom walked up the slope and through the gap in the north-east corner into the adjoining field where there are tracks around the perimeter.

41. The application land is maintained by the local authority as recreational open space and it has obviously been well managed over the years. From what I could judge, the whole of the land is available for recreation, although the bund at the top of the site, close to the hedgerow, is something of a curiosity. The evidence advanced by the applicant points to substantial use being made of the land for informal recreation and this is certain to have been the case over the years.

Core issues

42. It has become unnecessary to devote too much time to the evidence of user as, in the case of WC (as first objector), it was accepted by Mr Pike that, subject to the issue of 'as of right', qualifying use is otherwise made out. Mr Edwards, on behalf of the second objector, did not go quite as far as this on the first day of the inquiry (when he merely agreed that there was no need to

cross-examine the applicant's witnesses) although, in his written submissions, he conceded that neither objector

seeks the rejection of the application on the basis that the application land had not been used for LSP for a period of not less than 20 years, ending with the submission of the application, by a significant number of the inhabitants of a neighbourhood within a locality.

Nor has any exception been taken to the applicant's claimed neighbourhood where the evidential bar is, of course, a comparatively low one nowadays in light of the decision in *R (NHS Property Services Ltd) v Surrey County Council.*

43. It seems to me that it was wholly right and proper for this concession to be made by the objectors as the evidence advanced by the applicant in relation to the use of the land, and its sufficiency for TVG purposes for the requisite period, was unassailable.

44. I put it to the parties at the start of the inquiry that there were, in truth, two core issues for decision.

44.1 For what purpose was the application land held by Kennet District Council ('Kennet') following its transfer to that authority in 1993? As no one is suggesting that there was a later appropriation of the land, it follows that it is the original acquisition purpose which is of interest to the registration authority as the land would thereafter have been held for such purposes.

44.2 Did that acquisition purpose carry with it an entitlement on the part of local inhabitants to use the land for informal recreation? The question here is whether the original acquisition purpose gave rise in law to a public right, or a publicly based license, to use the land for the statutory purpose of public recreation? Whether this was the case will depend on whether the land is held as POS following the use by Kennet of enabling powers arising under any one or more of the following, namely the Public Health Act 1875, s.164, the Open Spaces Act 1906, ss.9/10, and the Local Government (Miscellaneous Provisions) Act 1976, s.19.

45. In light of the foregoing, I propose to consider the applicant's evidence on user, but not in the detail that I might have done had this been a contested

issue, as I have to satisfy myself that, with the exception of the 'as of right' issue, the elements necessary to justify registration of the land as a TVG are made out. I have, of course, already done this in relation to the claimed neighbourhood where I am amply satisfied from what I have seen that it is indeed a neighbourhood in law for the purposes of the CA 2006, s.15.

Applicants evidence of recreational use

46. A total of 186 completed evidence questionnaires were received (in the period February and March 2017) from 179 households. Mr May's analysis (A1/1) discloses that this is just under one-half of the 365 households within the claimed neighbourhood. Of those responding, 58 households have had the same occupants for more than 24 years whereas only 12 residents (or 7%) responding have lived within the claimed neighbourhood for less than 3 years. A total of 77 (or 43%) residents who responded have lived within the claimed neighbourhood for more than 20 years. In terms of the people using the land (as opposed to a household return), the number is approximately 240, virtually all of whom used the land after moving into the neighbourhood, with user commencing after 1985. In his analysis of the questionnaires, Mr May has deduced that 122 households make use of the land on a weekly basis (68%) with another 14 (or 14%) using the land more than once a month from which it follows that 147 households (or 82% of the households responding) use the land more than once a month. In terms of sufficiency and regularity of use, Mr May's analysis is more than adequate to justify registration. Not surprisingly, he reports that dog-walking is the most popular activity with 98 households using the land for this purpose. 103 households report that their children used the land with individual use covering a range of activities from birthday parties, sports to flying model helicopters.

47. I was extremely impressed with Mr May's analysis which was not challenged by the objectors and I accept his conclusions, albeit subject to the 'as of right' issue. In light of this evidence, drawn as it is from the completed questionnaires, it is Mr May's view, with which I agree, that sufficient recreational use has been made out for the requisite period by a sufficient number of persons living within the claimed neighbourhood.

'as of right'

48. The parties have gone to great lengths to assemble an historic record of the origins of the application land. Before turning to the submissions of the parties on this issue, I propose to deal with the relevant planning and conveyancing background as it is, I think, vital to any decision as to the basis on which the land was held by Kennet (to whom the land was initially transferred) and, thereafter, by WC (as the Unitary Authority for the area and as the successor of Kennet and three other district councils following administrative changes implemented with effect from 1/04/2009.

49. The starting point for both objectors was the transfer to Kennet on 19/08/1993 (OBJ/2 at 95). The transferor was The Miller Group Ltd which actually transferred two parcels of land to Kennet. The land shown edged red on Plan 1 is the application land on which, in three places within the same parcel, the words 'Open Space' appear. The land within Plan 2 is undeveloped amenity land in what is now Edwards Meadow between plot Nos.46-47 and which, judging from the up-to-date plan, is still in use as amenity open space.

50. The transfer to Kennet provides as follows:

> *2. The Property is transferred together with the right of way in common with all others entitled to the like rights with or without vehicles over and along all estate roads (until such estate roads are adopted as public highways) constructed on the land comprised in the remainder of title number WT67901 for the purpose only of obtaining access to and maintaining as amenity open space the land hereby transferred*

51. On the face of the transfer the land is plainly being transferred to Kennet to be held by that authority as POS. There is, as it seems to me, no scope for ambiguity here. The question begs, therefore, as to whether, in construing the transfer, it is even necessary for me to consider extrinsic evidence which points to some other holding purpose. As a general rule of construction, extrinsic evidence (i.e. evidence outside the deed) is not admissible to vary or contradict the terms of a deed unless it is necessary to do so because of ambiguity or uncertainty within the deed.

52. In this case I do not consider that I need to go beyond the terms of the deed but, even if I did, the outcome would be just the same and is entirely consistent with the planning history which shows very clearly that the application land had been earmarked as recreational open space to serve the adjoining development.

The material planning history preceding the 1993 transfer

53. I am indebted to Joanne Davis who is an experienced town planner who, on behalf of the second objector, and with the assistance of work carried out by others before she began her own work on this, has collated (not without difficulty) most, if not all, of the available planning documents in her evidence bundle. Mr Edwards helpfully summarised the contents of this file in his closing submissions.

54. It is clear from Ms Davis's work that the land formed part of the open space provision associated with the development of Barton Park. A series of planning applications were approved in the 1970s and 1980s for the development which was brought forward in two phases, Barton Park West (which was developed first) and Barton Park East (whose development comprising some 57 houses commenced sometime after June 1988 following approval of reserved matters) within whose curtilage the application land falls. I am told that a number of early permissions were never implemented due to changes of ownership. However, it is the view of Ms Davis that an outline planning permission under the reference K/86/0020, in association with a planning agreement dated 10/03/1983, are material to the planning history and this is confirmed by recent correspondence from WC's head of planning.

55. The outline permission K/86/0020 will be found at JD/14. It relates to the land edged red identified on the plan number 1160/SK/3 which is at JD/16 – see p.119 (this is Barton Park East). At condition (b) of the permission there is a need to provide not less than five and a quarter acres of POS to serve the proposed residential development at Barton Park East.[5] The outline

[5] The parties to that agreement were Kennet and Marlborough College. By operation of s.52(2) and s.33 of the Local Government (Miscellaneous Provisions) Act 1982 the terms of that agreement are enforceable against successors in title to Marlborough College.

permission expressly links this to the earlier section 52 agreement dated 10/02/1983 (JD/9) under which the developer was required to make provision for open spaces and amenity areas. Clauses (4) and (5) of the section 52 agreement make provision for the capitalised cost of maintaining not less than four and a half acres of proposed open space (shown within the area edged green on the accompanying plan which is not the same shape as the application land) which was intended to be transferred to Kennet before any development took place within the area of Barton Park East. It follows (as Mr Edwards rightly says) that, by virtue of permission K/86/0020, the delivery of not less than five and a quarter acres of POS was required as a condition for the delivery of the proposed residential development at Barton Park East.

56. The outline permission K/86/0020 was taken forward through the approval of the Master Plan 779/4 (JD/21) upon which 4.5 acres of POS (coinciding closely with the Plan 1 open space shown on the 1993 transfer to Kennet – see, for these purposes, JD/22 which is a helpful reconciliation showing the application land overlying the open space shown on the Master Plan Rev 779/4A) is clearly identified. The Master Plan was approved as part of the reserved matters application K/11113D (JD/19-22) for Phase 1 of the Barton Park East residential development (see also JD's statutory declaration at paras 43-44 and JD/26). The Master Plan was again revised in the form of drawing 779/4 rev C (JD/24) in the context of an approval of reserved matters on 15/09/1988 (JD/23 – under ref: K/12458/D) pursuant to the outline permission K/86/0020 and the residential development at Barton Park East (which concerned Phases 4 and 4a of the development – see JD statutory declaration at para/46). The third revision of the Master Plan (JD/24) also shows a 4.5 acre parcel of POS which in all material respects corresponds to the application land (see overlay at JD/25) and the Plan 1 land transferred to Kennet as 'amenity open space' in 1993. Mr Edwards also points out that there is correspondence (passing between officers of Kennet and the developers, Miller Homes) showing that the same 4.5 acre parcel (known as the 'main open space area') was required to be laid out to the satisfaction of Kennet prior to its transfer to Kennet in August 1993 (this correspondence was produced by Trevor Slack of WC's legal services at O1/68-93). This is

important material as it plainly identifies the intention to lay out and earmark the same 4.5 acre parcel as POS which was intended to be transferred (for no consideration) to Kennet pursuant to the s.52 agreement entered into in 1983 (it seems that Miller Homes would have planted the group of trees near the road and the bund at the top of the field is no doubt attributable to ground works at the laying out stage). Indeed, there is evidence that it was Kennet's policy to secure POS to meet the needs of new development (JD/35 and O1/14, para/3 – see exhibit/1 to witness statement of Trevor Slack for Kennet policy in requiring provision of open spaces and amenity areas in connection with residential development) which is, of course, consistent with the condition which is referred to by Mr Edwards as an unnumbered condition 5 in the 1986 outline planning permission (K/86/0020) and in accordance with the 1983 s.52 agreement.

57. Mr Edwards also helpfully pointed me to an officers' report on the reserved matters application K/12458/D for the Barton Park East development (JD/26) in which the development site is described by reference to the Master Plan approved for the different phases pursuant to planning permission K/86/0020 granted in 1986 where we are also told that the houses would be grouped

around 2 areas of open space to create 'village green' arrangements

(on which, I note, it was hoped the developers would be contributing play equipment).

58. In the result, the planning history shows that an area corresponding to the application land and to the parcel (in Plan 1) transferred to Kennet in 1993 as 'amenity open space' had been earmarked as 4.5 acres of POS (see reserved matters approval K/15205/D (JD/27-28) and overlay PO11 (JD/33, p.259), planning permission K/16165 (JD/29-30), the overlay PO12 (JD/33, p.260) and the JD statutory declaration at paras.48-51 for a description of these approvals and accompanying drawings). Moreover, there can, in my view, be no question that the land transferred to Kennet in 1993 is materially the same land as was earmarked as 4.5 acres of POS which was intended to be delivered as POS in the antecedent planning arrangements, following the grant of outline planning permission in 1986.

59. The applicant is certainly right when he says that the prospective open space identified on the plan attached to the 1983 s.52 agreement (JD/9) is not the same as that shown in the 1993 transfer. Nothing turns on this for the reason given by Mr Edwards, namely that it was always intended that the eventual open space provision would be identified in accordance with the implementation of the 1986 planning permission and, in particular, was to be identified through the approval of Master Plans. However, and as Mr Edwards rightly says, in approving the location of the eventual open space under the 1986 permission, Kennet could not have fettered its discretion by insisting that the open space was to be in the same position as that shown in the 1983 s.52 agreement. Consistently with this, the 1986 planning permission speaks of the

open space shown on plans to be submitted pursuant to condition 1 above shall be provided concurrently with each phase of the development in accordance with the Agreement of 10 February 1983 …'.

In other words, the condition is expressed as a future commitment.

The application land and its maintenance after August 1993

60. The land has always been regularly maintained by the local authority in a way which enables it to be used as POS. Mr Edwards also questions that if the land had not in fact been acquired and thereafter held as POS then on what legal footing or, rather, pursuant to what statutory holding power, would Kennet and WC have been incurring expenditure in the maintenance of this land. The principle of regularity would clearly be engaged here to trump any charge against these authorities founded upon the unlawful exercise of their public powers.

61. In his witness statement (O1/15, para/9) Mr Slack says that between 2009-13 WC maintained the application land in-house. Between June 2013-September 2016 maintenance was carried out under contract with BBLP and this contract was taken over by maintenance and landscaping contractors known as *id verdi* which continues to maintain the land. It seems that the grass is now cut monthly between March – October/November (O1/105). As I previously indicated, the application land has been well maintained and is a suitable location for informal recreation.

Submissions of the parties on *'as of right'*

The objectors

62. On behalf of the second objector, Mr Edwards submits that the application land was transferred to Kennet in August 1993 to be held as amenity open space. He goes on to say that, consistently with this purpose, Kennet must have taken the land pursuant to one of the express statutory powers which entitled it to acquire and hold land as POS for recreational purposes (see those powers identified in paras/16-17 any one or more of which, Mr Edwards says, could have been engaged in this instance by Kennet as an enabling power authorising the acquisition of the application land, and its later use, as POS).

63. Mr Edwards agreed in oral submissions that the purpose specified in the transfer is critical and that any divergence from the expressly stated purpose would have to engage the rules in relation to the admissibility of extrinsic evidence which can only be invoked in cases of ambiguity or uncertainty, neither of which, he says, would arise in this case as the deed is quite clear.

64. In any event, Mr Edwards says that the transfer of this land to Kennet as POS is entirely consistent with (a) the antecedent planning history (which I have already addressed at some length) which is consistent with the identification of the land as POS within the planning history of the residential development which later became Barton Park, as well as the obligations on the developer arising from that planning history, and (b) the way in which the land has been used (and used extensively) and managed by Kennet and its successor, WC, which has been as recreational open space serving the needs of the estates of Barton Park West and Barton Park East.

65. Mr Edwards submits that, following the decision in *Barkas*, the application land cannot, as a matter of law, be considered to have been used by local inhabitants for LSP after 1993 'as of right' but was in law used 'by right' (and he refers to the dicta in that case at paragraphs [20]-[26], [65]-[66] and [84-[85]).

66. Mr Edwards accepted my suggestion that there were two core issues in this case which needed to be resolved, namely:

(a) under what power was the land held following its acquisition in 1993, and

(b) did the purposes of acquisition carry with it an entitlement on the part of the public to use the land for recreation?

67. He also flagged up the fact that there was no evidence of any subsequent appropriation (or of any alternative statutory purpose) in this case. He is right about this. We are then addressing the purpose for which the land was transferred to Kennet in 1993 and the consequences that arise from this in village green law.

68. Mr Edwards submits that the application land was plainly transferred to Kennet as 'amenity open space' which, he says, would normally be understood to mean (that is, in the context of the transfer of an open and undeveloped parcel of land to a local authority for nil consideration) use for the purposes of recreational amenity (along with other land) in connection with a new planned residential estate (in this case, Barton Park East). Indeed, the land had already been laid out as POS prior to its transfer to Kennet, as previously explained. This being the case, Mr Edwards argues that Kennet must have been relying on its statutory powers (although none were expressed at the time although, having said that, there is no requirement in law for the transfer to have done so – indeed Mr Edwards is right when he says that transfers and conveyances to local authorities seldom identify expressly the statutory basis of acquisition) which entitled it to acquire, and thereafter hold, land for recreational purposes and the prime candidate for this, he says, would have been the Open Spaces Act 1906, s.9, not least as such land had been laid out by Miller Homes for these purpose before its transfer (namely pursuant to its obligations under planning permission K/86/0020 and the 1983 s.52 agreement).

69. In light of the above, Mr Edwards says that the expressed purpose as 'amenity open space' within the 1993 transfer was sufficient to support a

conclusion that the land was acquired by Kennet for recreational purposes and pursuant to a statutory power by which it was entitled to acquire land for such purposes. It follows that the public had a statutory entitlement to use the application land and that such right is continuing and that accordingly user was (as from 1993) 'as of right' and is thereby not a qualifying use within the meaning of CA 2006, s.15, following the decision in *Barkas*. On this footing, he submits, the application to register must fail as the public had a statutory right to use the land for LSP.

70. Mr Edwards also commented upon a matter that I had raised at the start of the inquiry in relation to the existence of any minute recording a resolution by Kennet to acquire the application land. No such minute has been found. He is also right when he says: (a) it is not uncommon, when there is what he describes as 'a self-standing' decision on the part of a local authority to acquire land, for this to be recorded in an express resolution; but that (b) the absence of any recorded decision is amply explained by the antecedent planning context and, as I am informed, by Kennet's own practice which was to secure the provision of POS for new developments by way of transfers under a s.52 agreement. In other words, the obligation to take a transfer of the land arose in consequence of Kennet's decision to grant planning permission K/86/0020, and the terms of that condition. This meant that there was no express resolution to acquire the land.

71. On behalf of WC, the first objector, Mr Pike's submissions mirror those of Mr Edwards. Put shortly, he submits that the application land was, after the transfer dated 19/08/1993, held by Kennet and thereafter WC for the purposes of public recreation from which it follows that such use would have been 'by right' and not 'as of right'. Mr Pike goes into the decision in *Barkas* at some length in order to make plain why use 'by right' cannot be qualifying use to justify registration.

72. Mr Pike has also analysed the witness statements with some care as he came across a number of the applicant's witnesses (including the applicant himself) who, in their various ways, say that they understood the land to have been laid out or otherwise set aside for use by residents of the Barton Park estate

and that public recreation had always been enjoyed thereon without fetter or restriction. There is no evidence, Mr Pike says, that any use has ever been contemplated or proposed on this land (i.e. since Kennet took ownership of it in 1993) other than its current use as 'open/amenity/recreation space' (para/21).

73. Mr Pike deals with the way in which the application land has been maintained by WC which is the responsibility of WC's Cabinet Assets Commmittee which holds and is responsible for council property. Until June 2013 all maintenance was undertaken in-house since when it has been the responsibility of contractors. As I have already indicated, the grass is cut regularly, no doubt more often in the growing season, and it is, I think, plain and obvious that a good deal of work has been invested in the maintenance of this land over the years in ensuring that it remains fit for public use. The cost of maintaining the land evidently comes from the budget of WC's Highways and Streetscene Department (and its predecessors). It is, therefore, plain that the land is not, as is claimed by the applicant, the responsibility of WC's Strategic Projects and Development officer or that of the department in question.

74. Mr Pike deals fully with the antecedent planning history prior to the transfer by The Miller Group Ltd to Kennet on 19/08/1993. In common with Mr Edwards, he submits that the very purpose of the acquisition is explicit from the terms of the transfer deed, namely:

The Property is transferred together with the right of way … for the purposes only of obtaining access to and maintaining as amenity open space the land hereby transferred

75. There is no direct evidence to show why the reference is to *amenity* open space as opposed to *public* open space although amenity green space is commonly found in residential areas. The term 'open space' in the Town and Country Planning Act 1990, s.336(1), is defined as including

land laid out as a public garden, or used for the purposes of public recreation.

I therefore take the expression 'amenity open space' in the 1993 transfer to mean accessible green space of public value located in and around housing which is available for sport and outdoor recreation by the local community. In

my view, there is no measurable difference in practice between the expression ‘amenity open space’ (as used in the 1993 transfer) or that of POS. They are two ways of saying the same thing, namely to describe land which is available for public recreation.

76. Mr Pike offers a menu of appropriate enabling powers which authorised the acquisition and holding of the application land for public recreation. These have already been addressed herein and it is incontrovertible that such powers were available to Kennet in 1993. Mr Pike rightly submits that there is no evidence that the application land was transferred to Kennet to be held for planning purposes or, for that matter, that it should be held in order that it might be preserved from development which might have an impact on the skyline, given the prominence of the site. Mr Pike goes as far as to say that it would be irrational, in light of the evidence, to suggest that the application land was not held as ‘amenity open space’. He says that the antecedent planning history is entirely consistent with such a conclusion in light of the requirement, arising from planning permissions and associated planning agreements, whereby provision had to be made for amenity open space within the Barton Park development.

77. Finally, Mr Pike submits that, in view of the contemporaneous documents and the clear terms of the 1993 transfer, it is unnecessary to rely on the presumption of regularity in order to reach a conclusion as to the statutory holding power. However, even if it was necessary to invoke the presumption, he submits that the result would be just the same as Kennet was in a position to lawfully acquire the land as recreational open space and to hold it for that purpose and there is no evidence to suggest that it was acquired for another purpose. As he puts it, the presumption must result in the conclusion that Kennet lawfully acquired the land and committed it to open space under relevant statutory powers which entitled it to do just that.

78. Mr Pike’s conclusions to my two core issues are as follows:

    (a) that after the 1993 transfer the application land was held by Kennet and then WC for use as POS or as recreation grounds within the meaning of the Public Health Act 1875, s.164, or the Open Spaces Act

1906, s.9/10, or under the Local Government (Miscellaneous Provisions) Act 1976, s.19, and

(b) that being so, the basis upon which Kennet and WC have respectively held the land since 1993 was such as to confer a public right to use it for recreation which is sufficient in law, following *Barkas*, to preclude its registration as a TVG.

The applicant

79. With the exception of 'as of right', I have read and considered the applicant's submissions on the ingredients of the definition of a TVG which should be met before land is registered as a TVG. I see no need to repeat them in this report in view of the fact that neither objector is seeking to oppose the application to register on the basis that the land had not been used for LSP for the requisite period ending with the submission of the application by a sufficient number of local inhabitants of a qualifying neighbourhood within a locality. I therefore turn to the applicant's submissions on 'as of right' which begin at para/21 of his written submissions.

80. The applicant relies on the absence of permission (either express or implied), on the absence of bye-laws regulating the use of the land, and the absence of an appropriation of the land onto purposes which would have engaged a public right of recreation. He cites *Barkas*, seeking to distinguish the facts of *Barkas* and the position in this case where he argues that as the land was transferred to Kennet as open space 'for planning reasons' under a planning agreement made under TCPA 1971, s.52, the reasoning in *Barkas* does not apply seeing as s.52 did not confer open space status on the land or imply a right of public usage.

81. The applicant submits that Kennet and WC have done nothing (other than grass-cutting and some recent tree-planting) to earmark or designate the application land as POS. It is not, for instance, called an open space or mentioned by name in any public record of local open spaces; nor are there any play or other facilities or made-up paths on the land nor, for that matter, any indicative signage (in contrast to other open spaces in the town which

have been funded by developer contributions or from other sources). The applicant also says that the recent tree planting on the land by the Marlborough Orchard Group has not restricted its use, nor is it consistent with the existence of public rights to use the land, whether by virtue of an inferred license or by statute. As this is not a case involving a claimed appropriation the decision in *Goodman* is, he says, not material. The applicant opines that the lack of care and enhancement by Kennet and WC (other than occasional grass cutting) demonstrates that the land has never been considered to be POS and is of no community value (para/98).

82. The applicant opines that there are sound planning and other grounds which make it unlikely that the application land was ever intended to become a dedicated place for public recreation and/or that such use could not have been 'by right'.

83. The applicant submits that the prominence of land on the south facing skyline (and the approved development is set below the skyline, no doubt so as not to be visible from key vantage points within the AONB) ensured that the local planning authority intended to preserve and protect the land from operational development or a material change of use (the applicant produced a decision from a recovered appeal dating back to 1980 in which the Secretary of State refused the developer's appeal for housing development on the land – the decision stressed the importance of the prominent south facing hillside within the landscape of the AONB (with no permitted development rights)). I understand the applicant to be saying that it was the importance of this that the land was kept in public ownership thereby ensuring that it could never be developed as opposed to any intention on Kennet's part that it should be made available as POS. The applicant submits that none of the foregoing planning objectives required the application land to be made available as POS and have in fact been achieved without the land being designated as POS.

84. The applicant submits that there have never been any planning applications for permission to change the use of the land (and a generic description of development as 'residential development' would not suffice for these purposes) to use as POS. He says that that this would have been necessary if

the land was to have been lawfully made available for such purposes. In other words, he is saying that LSP would not have been 'by right' as it would have been in breach of planning control – note, however, the limitation period for enforcement under TCPA 1990, s.171B(3) (10 years beginning with the date of breach). The applicant opines that neither a planning condition nor a s.52 agreement requiring land to be made available as POS operates to grant planning permission for such use. It seems to me to be open to doubt as to whether a change of use from arable agricultural to public open space would in fact be a material change of use even in the case of land within an AONB.

85. If, as the applicant, planning permission would have been necessary to permit the lawful use of the application land as POS then he argues that none of the permissions, planning conditions or planning agreements ever gave explicit consent for this which he says is important as POS may or may not form part of a planning application for development which includes residential development.

86. The applicant points to the lack of clarity in the early planning documents when it comes to the precise location and extent of the proposed open space and amenity areas (which is admittedly true in the case of the 1983 s.52 agreement at O2/80 and in the case of the earlier planning documents (permission and s.52 agreement) at A2/apps 3&4, which date back to the 1970s).

87. Finally, the applicant submits that the land has not even been properly designated or earmarked as *public* open space (which would have been required under the planning arrangements which antedated the 1993 transfer) seeing as the application land was in fact transferred as *amenity* open space. It follows, he says, that any conditionality attaching to the land under the antecedent planning arrangements was not properly discharged. It presumably follows from this that there can have been no use 'by right'. The point is also made that the entries in the Land Register are silent as to public rights although I might add that TVG rights only crystalise upon registration.

88. In light of the foregoing, it follows, the applicant argues, that even if the application land had been subject to a planning condition or an operative s.52

agreement which required it to be laid out and designated as POS, this never happened whilst the land was vested in Kennet between 1993-2009, which meant that during that period the true status of land was unclear or, as the applicant puts it at para/71, 'left in a drawer for a rainy day'. The position after 2009 is, he argues, no better and he says that WC have been unable to confirm the land's status to him despite requests for clarification (in fact he says that Kennet was fault in not ensuring that proper provision, in compliance with planning policy, was made for POS to serve the Barton Park East development). It follows that as the land had no status, public use cannot have been 'by right' seeing as it had not been designated as POS. As he puts it at para/81:

The intentions of the planning committee were never fulfilled and the condition never discharged.

What he says should have happened was that Kennet should have surveyed the land, designed a play and sports strategy and consulted the town council and the residents. It should then have sought planning permission for a change of use and implemented the works and adopted the land as POS and designated it in one or more of the registers of POS in the area. He says that none of this occurred.

89. The applicant is wrong when he says that the application land has been excluded from a programme of planned transfers of local public open spaces by WC to the town council. I was told at the inquiry that the only area of POS which has been transferred to the town council is Cooper's Meadow (including the public toilets).

90. In conclusion, in answer to the two questions posed by me at the start of the inquiry, the applicant says this:

(a) the land was never allocated for public recreation in the sense understood by *Barkas*; the land, although transferred to Kennet by reason of a planning permission and linked planning agreement, was never allocated for any specified purpose, let alone a purpose which allowed it to be used 'by right' for recreation. When, in his closing

submissions, I asked the applicant for what purpose the land was held if it was not held as POS, he said (as I understand his case) that it had no formal status other than as a TVG for which purposes it is now held by WC. He did, however, concede that the application land was originally intended to be POS yet he asserted that the 1993 transfer did not actually say this.

(b) Public use of the land has accordingly been 'as of right'; the land has simply been used by local inhabitants (for the requisite period) as it is there and available for use for LSP without complaint or restriction by the owner. It follows that such user will justify registration as a TVG on the conventional basis as all the necessary elements for this have been met.

Objectors' rebuttal

91. In their written submissions the objectors' counsel respond to a number of the applicant's submissions and it would be helpful, I think, if I reviewed these.

Second objector

92. Mr Edwards says that the applicant's observation that the land transferred in 1993 is not the same area of land which forms part of the 1983 s.52 agreement (O2/80) is correct. However, he goes on to say (in my view, rightly) that this is not unsurprising as the open space to be delivered pursuant to the 1986 outline planning permission was to be identified in accordance with the implementation of that permission and, in particular, was identified through the approval of Master Plans to which reference has already been made. Mr Edwards argues that in approving the actual location and form of open space pursuant to the 1986 outline permission Kennet could not have fettered its discretion by insisting that that open space be in the same location shown in the earlier 1983 s.52 agreement. Moreover, he says that condition 5 of the 1986 planning permission (K/86/0020) provides that the

> *open space shown on plans to be submitted pursuant to condition 1 above shall be provided concurrently with each phase of the development in accordance with the Agreement of 10 February 1983 … (emphasis added)*

Mr Edwards submits that, properly construed, condition 5 required, in substance, the delivery of the open space in accordance with the 1983 s.52 agreement. It did not prescribe that the precise location of that open space was to be in exact accordance with the 1983 agreement, not least since the condition is expressed in the future tense, namely that it is 'to be submitted'. I agree with this submission.

93. Mr Edwards also says that the application land was not, as the applicant claims, acquired by Kennet pursuant to s.52 of the TCPA 1971. Mr Edwards is, I think, right when he says that that submission reveals a fundamental misunderstanding as to the construction and purpose of s.52 which provides local authorities with no more than a power to enter into an agreement for the purposes of restricting or regulating the development or use of land. In other words, it is a section that does not empower an authority to acquire and hold land. The fact is that the 1983 s.52 agreement contained incidental and consequential provisions for the laying out of land, for its transfer to the planning authority and for commuted sums to be paid out for future maintenance, which meant (as I accept must have been the case) that the power for Kennet to accept a transfer of land as public open space could only be derived from the powers within the Acts of 1875, 1906 or 1976.

94. Kennet did not acquire the application land under powers enabling it to acquire land for planning purposes which, as Mr Edwards rightly says, are generally used where the intention is to bring forward land for development which was not the case here and, as he puts it, flies in the face of the planning history leading to the 1993 transfer which points towards the provision of POS.

95. The applicant says that the land was acquired, not as POS, but in order to limit its developability owing to its relationship to the wider AONB (in his oral submissions Mr Edwards referred to this as an example of 'unspoken planning policy'). The applicant's point is admittedly a difficult one under this head but Mr Edward's rebuttal, put shortly, is that it would be incompatible with the planning history which identified the application land from an early stage as POS intended to serve the new development at Barton Park East

rather than meeting any landscape or visual impact function. I accept this submission.

96. In response to the applicant's submission that the land was not in fact held by Kennet as POS, as evidenced by the documents behind A2/tabs 34, 35 and 36 (which allegedly show POS within the town), Mr Edwards rightly points out: (a) that the basis of selection of the 'community amenities and open spaces' identified in tab/34 is not disclosed; (b) that the Marlborough Town Council publication at tab/35 does identify the land at tab/35; and (c) the document at tab/36 is expressed as a draft and the applicant has produced only an extract of a much more extensive document (namely The Wiltshire Open Space and Play Area Study – see 1.1 at p.1); again, the basis of selection of land, and whether or not the application land is included, is not disclosed (for instance, the document contains no schedule which identifies what areas of, in particular, amenity green space have been included in the calculation of 'Existing Provision' set out in the table at paras.3.2, p.7).

97. Mr Edwards also submits that the applicant is wrong when he says that there is no planning permission for the use of the land as public open space. Mr Edwards must surely be right when he says that the 1986 outline grant for 'residential development' would have included ancillary development such as roads and open space which, in the case of the latter, was actually authorised by the 1986 permission at conditions 1/5. He also rightly says that the later planning history makes it plain that the provision of open space was fundamental to the delivery of housing on this site. In any event, Mr Edwards says (again, correctly in my view) that whether or not planning permission for use of the land as POS would have been required, or was not given (and he says it was), the point is no longer material anyway as such use had gone on for more than 10 years and thus had become a lawful use in planning terms.

First objector

98. Mr Pike submits that a number of the points relied on by the applicant are irrelevant when it comes to applying *Barkas*: he says

- there is no need for planning permission for POS use in order that such use may be ‘by right’;

- there is no requirement for such land to come within any particular definition of what constitutes ‘open space’ or ‘public open space’;

- there is no requirement for any restrictive covenant or other instrument or deed to exist which confers a right upon the public to use land for recreation;

- there is no requirement for land to be allocated or designated as open space in any plan or study or register; in other words, there was no duty on either Kennet or WC to publicise the fact that the land was held for these purposes – it makes no difference to the basis upon which the land is held.

99. Mr Pike joins with Mr Edwards in challenging the applicant’s assertion that s.52 of the TCPA 1971 would have been the relevant power of acquisition. Mr Pike says that Kennet must have been exercising the suite of powers previously discussed when they took a transfer of the application land and there is no evidence of any competing purpose.

Discussion

100. The applicant has, in my view, clearly made out his case that the application land has been sufficiently used for LSP during the requisite qualifying period by a significant number of local inhabitants within the claimed neighbourhood within a locality comprising either the local ward or the town of Marlborough. Very sensibly the objectors did not raise any issue on this which was, I think, hardly surprising in light of the number of evidence questionnaires (186) and their analysis by Mr May.

101. The contentions of the applicant’s witnesses are entirely consistent with the surrounding circumstances. The application land is unfenced and there has never been any signage forbidding entry. The land is also close to a sizable

settlement and I have no doubt that it is often used by local residents for informal recreation, mainly walking with or without dogs, as I witnessed for myself on my unaccompanied visit. The land is convenient not only for short walks around the perimeter but also for much longer walks on tracks on the neighbouring land to the north owned by the second objector (the gap in the hedgerow revealed considerable wear and is undoubtedly freely used by walkers, as I also observed on my own visit). The use relied on has obviously continued for a number of years, certainly in excess of 20 years prior to the date of application, and there has been no interruption in such use. On the balance of probabilities, and subject to 'as of right' with which I deal separately, I find that the applicant's evidence is more than adequate to justify registration. In summary under this head, the number of people using the application land was, in my view, sufficient to indicate that their use of the land signified that it is in general use by the local community for informal recreation for which purpose the land was, in my view, made available after 1993 by Kennet and, since 2009, by WC.

102. I am able to deal with 'as of right' relatively shortly. This is because I accept the submissions on this by the objectors in preference to those of the applicant.

103. I return to the two key questions which I posed at the start of the inquiry, namely:

(a) for what purpose was the application land held by Kennet and WC after 1993, and

(b) did that acquisition purpose carry with it an entitlement on the part of local inhabitants to use the land for informal recreation?

104. The question at para/103(a) involves a consideration of the statutory holding power. The objectors are, in my view, correct in their contention that because of a suite of powers[6] Kennet was in a position to lawfully acquire the application land for use as recreational open space and to hold it for that

[6] i.e. those arising under the Public Health Act 1875, s.164; Open Spaces Act 1906, ss.9/10; and the Local Government (Miscellaneous Provisions) Act 1976, s.19 (which enables an authority to provide such recreational facilities as it thinks fit).

purpose. There is certainly no evidence that it could have been held for any other purpose and it was certainly used and managed for these purposes by Kennet and WC after 1993.

105. It seems to me that the relevant acquisition purpose is plain and obvious from the 1993 transfer to Kennet wherein the property was expressly transferred:

for the purposes only of obtaining access to and maintaining as amenity open space the land hereby transferred

Indeed, the transfer plan describes the Plan 1 land as 'Open Space' in three places.

106. As indicated by me previously, the expression 'amenity open space' describes land which is intended to be available for public recreation and, as we know in this instance, the application land was specifically laid out and planted up for such purposes in order to serve as the main open space for the Barton Park East development. We can see this in the correspondence passing between officers of Kennet and the developers, Miller Homes, prior to the transfer in August 1993 (O1/68-93). As I indicated at the inquiry, it is a general rule when construing a deed that one only looks outside the document to gather its intended meaning where there is ambiguity or uncertainty. In my view, nothing of the kind arises here as the purpose of the transfer is, in my view, plain from the use of the words 'amenity open space'.

107. Even if it was permissible to look outside the transfer to determine for what purposes the application land was intended to be held by Kennet, it is quite obvious from the antecedent planning history that the application land had always been earmarked as intended recreational open space. Mr Edwards helpfully took the inquiry through the documents assembled by Joanne Davis which was of great value to the inquiry.

108. Mr Edwards correctly submitted that the transfer to Kennet of the land as POS was entirely consistent with the material planning history where one starts with the open space provision associated with the development of Barton Park. There were a series of approved planning applications in the 1970s and 1980s for the development which was brought forward in two phases, Barton

Park West (which was developed first) and Barton Park East (whose development comprising some 57 houses commenced after June 1988 following approval of reserved matters) within whose curtilage the application land falls. The key permission is an outline planning permission issued in 1986 under the reference K/86/0020, in association with a section 52 planning agreement made in 1983.

109. At condition (b) of the outline permission there is a requirement to provide not less than five and a quarter acres of POS to serve the proposed residential development at Barton Park East. The outline permission is linked to the earlier section 52 agreement under which the developer was required to make provision for open spaces and amenity areas. Clauses (4) and (5) of the same agreement made provision for the capitalised cost of maintaining not less than four and a half acres of proposed open space shown within the area edged green on the accompanying plan. This is admittedly not the same shape as the application land but I think Mr Edwards is clearly right when he says that it was always intended that the eventual open space provision would be identified through the approval of Master Plans at the stage of approval of reserved matters.

110. The 1986 outline permission was duly taken forward through the approval of a Master Plan 779/4 (later revised) upon which 4.5 acres of POS which mirrors the Plan 1 open space (namely the application land) shown on the 1993 transfer to Kennet. The Master Plan was approved as part of the reserved matters application for Phase 1 of the Barton Park East development and was again revised in the form of drawing 779/4 rev C in the context of an approval of reserved matters on 15/09/1988 (which concerned Phases 4 and 4a of the development). The third revision of the Master Plan also shows a 4.5 acre parcel of POS which corresponds to the application land and the Plan 1 land transferred to Kennet as ‘amenity open space’ in 1993. There is also an officers’ report on the reserved matters application K/12458/D for the Barton Park East development in which the development site is described by reference to the Master Plan approved for the different phases pursuant to the 1986 outline planning permission where we are also told the houses would be grouped around two areas of ‘open space to create ‘village green’

arrangements'. In due course, the areas allocated as POC were laid out and transferred to Kennet.

111. It seems plain that the application land was always intended to comprise the major part of the POS provision for the development of Barton Park East (in line with the obligations on the developer arising from the planning history) and was transferred to Kennet to be held for such purposes. Consistently with this, the same land has, ever since, been used extensively by local inhabitants of the estates of Barton Park West and Barton Park East as recreational open space and has been managed effectively by Kennet and WC in a way which has facilitated its use for such purposes.

112. It necessarily follows from all this that, following *Barkas*, the application land cannot, as a matter of law, be considered to have been used by local inhabitants for LSP after 1993 'as of right' but was in law used 'by right'. In the circumstances, the objectors are right to contend that Kennet must have been relying on its statutory powers which entitled it to acquire and hold land for recreational purposes (i.e. as 'amenity open space'). The prime candidate for this is (as Mr Edwards rightly says) would have been the Open Spaces Act 1906, s.9, not least as such land had been laid out by Miller Homes for these purpose before its transfer.

113. Accordingly, the objectors rightly contend, in my view, that local inhabitants had a statutory entitlement to use the application land for recreation[7] and that such right is continuing. In the circumstances, user was (as from 1993) 'by right' and is thereby not a qualifying use within the meaning of CA 2006, s.15, following the decision in *Barkas.*

Recommendation

114. It is my recommendation to the registration authority that the application to register should be <u>rejected</u> as the public had a statutory right to use the land for LSP which, as a matter of law, precludes the registration of the application land as a TVG.

[7] And land acquired under section 9 of the Open Spaces Act 1906 is required to be held subject to a recreational trust with a view to its enjoyment by the public as open space under section 10 of that Act.

115. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *'the reasons set out in the inspector's report dated 23 February 2018'.*

William Webster

3 Paper Buildings

Temple

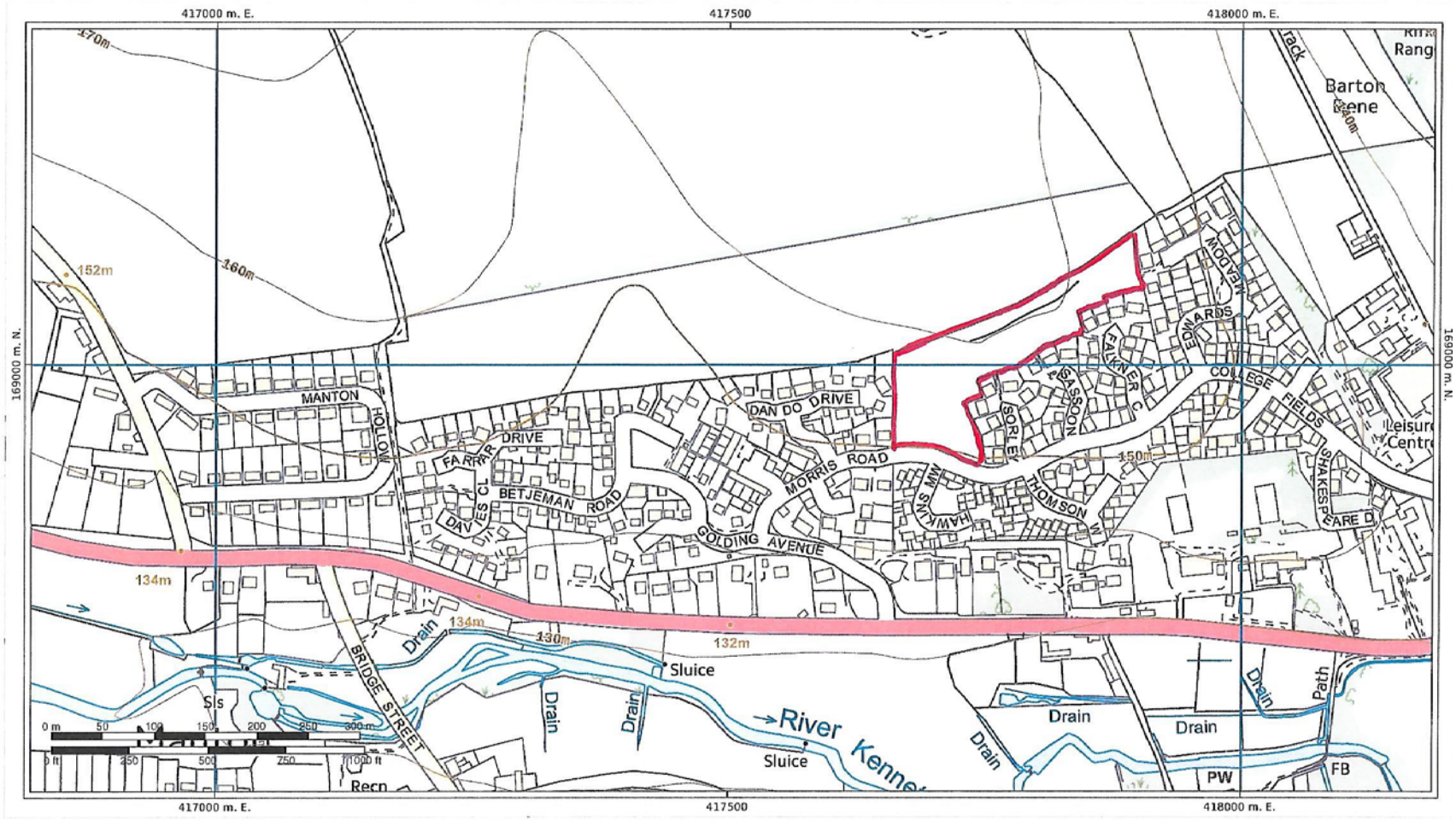
Inspector

2 March 2018

Appendix 1

SN8 1TP

VILLAGE GREEN APPLICATION SITE.



Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
Ground Scale 1:5,000

Approximate Mean Declination 1°7'46"

Annual Change 0°9'42"E

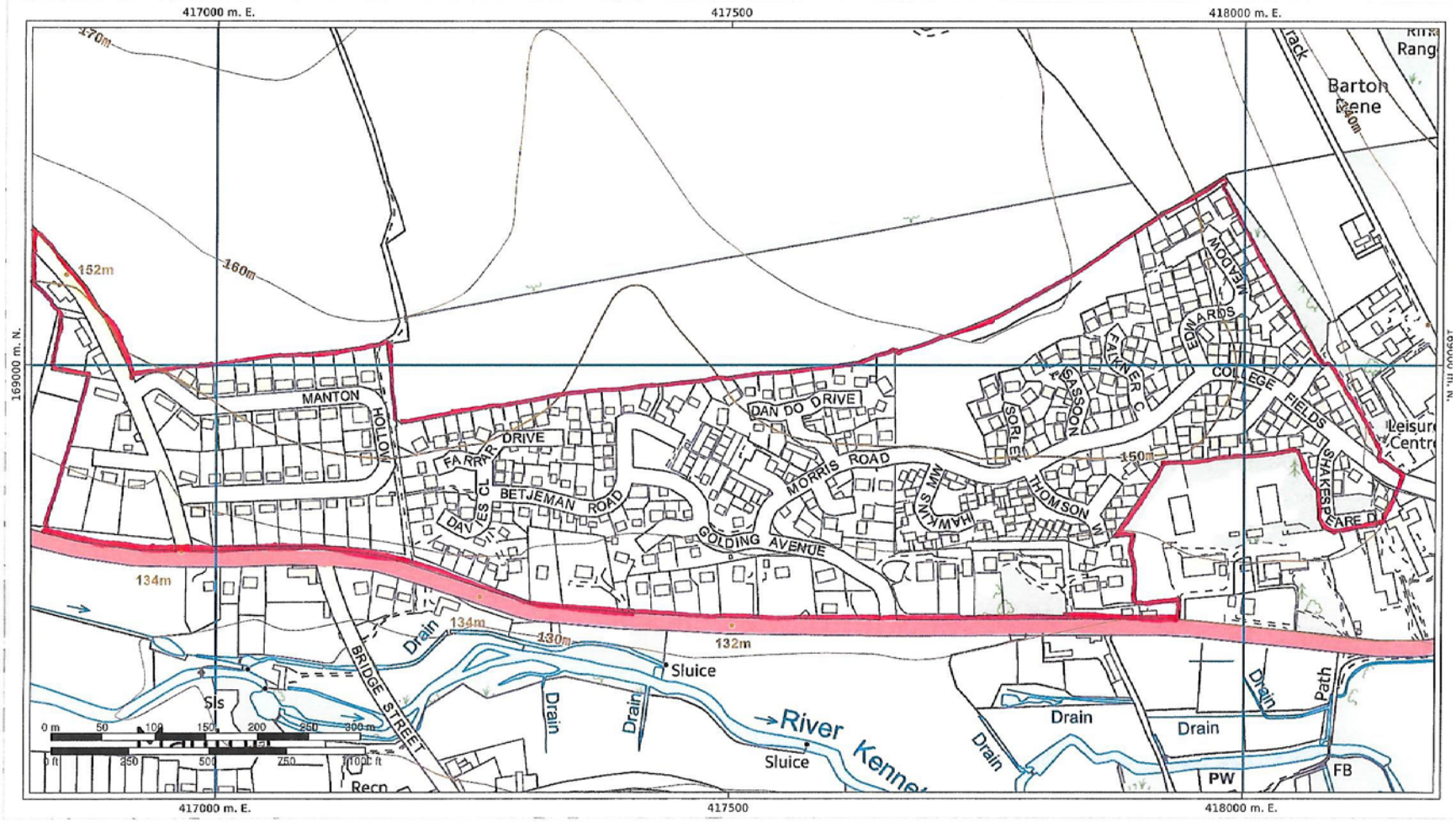
Graphic provides direction of Approximate Mean Declination for center of map

Date of Production: January 23rd, 2017

Appendix 2

SN8 1TP

PLAN OF NEIGHBOURHOOD.



Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
Ground Scale 1:5,000

Approximate Mean Declination 1°7'46"

Annual Change 0°9'42"E

Graphic provides direction of Approximate Mean Declination for center of map

Date of Production: January 23rd, 2017

APPENDIX 5

211/93

Form 43
Freehold or Leasehold
HM Land Registry

KENNET DISTRICT COUNCIL

Land Registration Acts, 1925 to 1986

IT IS HEREBY CERTIFIED THAT THIS IS A TRUE COPY

Signed M Y Boden 03/FEB/94

Designation District Secretary and Solicitor

Stamp pursuant to section 28 of the Finance Act, 1931, to be impressed here

When the transfer attracts Inland Revenue duty, the stamps should be impressed here before lodging the transfer for registration

**Use form 20 when restrictive covenants are not being created.*

TRANSFER OF PART IMPOSING FRESH RESTRICTIVE COVENANTS*

(Rule 135 Land Registration Rules 1925)

The title number allotted to the land transferred will on registration be officially entered opposite.

County and district (or London borough) WILTSHIRE : KENNET

Title number(s) WT67901

Property LAND ON THE NORTH SIDE OF BATH ROAD MARLBOROUGH

Date 19th August 1993

In consideration of ONE

(1) *Strike out if not required.*

pound~~s~~(£ 1.00) (1) *the receipt whereof is hereby acknowledged*

(2) *Insert in BLOCK LETTERS full name(s), postal address(es) and occupation(s) of the proprietor(s) of the land.*

(2) THE MILLER GROUP LIMITED of MILLER HOUSE 18 SOUTH GROATHILL AVENUE EDINBURGH EH4 2LW

(3) *If desired or otherwise as the case may be. (See rules 76 and 77).*

(hereinafter called "the Transferor(~~s~~)") (3) *as beneficial owner(s)* hereby transfer(s) to:

(4) *Insert in BLOCK LETTERS full name(s), postal address(es) and occupation(s) of transferee(s) for entry on the register.*

(5) *On a transfer to a Company registered under the Companies Acts insert here the Companies registration number if entry thereof on the register is desired.*

(4) THE DISTRICT COUNCIL OF KENNET of
BROWFORT
BATH ROAD
DEVIZES SN10 2AT

(hereinafter called "the Transferee(~~s~~)") (5) (Company registration ~~number~~)

(6) *See notes as to plan on page 4.*

the land shown and edged with red on the (~~s~~) plan bound up within and known as FIRSTLY the land edged red on Plan 1 attached hereto and SECONDLY the land edged red on Plan 2 attached hereto ("hereinafter called "the Property")

being part of the land comprised in the title above mentioned

(95)

[OVER

(7) *Or otherwise as the case may require e.g., on a single transfer "the remainder of the land comprised in the title above mentioned."*

(8) *Strike out words in italics if not required.*

1. The Transferee(s) hereby covenant(s) with the Transferor(s) so as to benefit (7) the remainder of ~~the land edged with~~ the land comprised in the above title ~~blue on the plan bound up within or any part or parts thereof~~ and so far as to bind the land hereby transferred (8) *into whosesoever hands the same may come but not so as to render the Transferee(s)* ~~personally liable in damages for any breach of any restrictive covenant after he/she/they shall have parted~~ to maintain the Property in accordance with the scheme of maintenance of the Council's Director of Technical Services for the time being in force ~~with all interest in the land hereby transferred as follows:~~

2. The Property is transferred together with the right of way in common with all others entitled to the like rights with or without vehicles over and along all estate roads (until such estate roads are adopted as public highways) constructed on the land comprised in the remainder of title number WT67901 for the purpose only of obtaining access to and maintaining as amenity open space the land hereby transferred

If this space is not sufficient, additional sheets may be used, providing they are securely sewn hereto: the execution and attestation should then be added at the end

(9) *On a transfer to a sole proprietor, delete this clause. On a transfer to joint proprietors, delete the inappropriate alternative.*

~~The transferees declare that the survivor of them (9) xxxxx give a valid receipt for capital~~ can cannot ~~money arising on a disposition of the land hereby transferred.~~

(10) *If a certificate of value for the purposes of the Stamp Act 1891 and amending Acts is not required, this paragraph should be deleted.*

(10) *It is hereby certified that the transaction hereby effected does not form part of a larger transaction or series of transactions in respect of which the amount or value or aggregate amount or value of the consideration exceeds* £ 60,000

(11) *For use when the transferor is a company or corporation. Strike out when not required.*

(11) *The common seal of*

THE MILLER GROUP LIMITED

was hereunto affixed in the presence of

(12) *Or other officers authorised by the articles of association, statute, charter, etc. (See footnote).*

(12) *Director*

(12) *Secretary* DIRECTOR

(13) *For use when the transferor(s) is/are individuals. Strike out when not required.*

The Common Seal of

(13) ~~Signed, sealed and delivered by the said~~

THE DISTRICT COUNCILOF KENNET

was hereunto affixed

in the presence of

~~Name~~ ..... ~~Signature~~ .....

~~Address~~ CHAIRMAN

.....

~~Occupation~~ DISTRICT SECRETARY and SOLICITOR

MIN No.	176 P+D C. 16.4.81
SEALED BY	PE

(13) Signed, sealed and delivered by the said

.....

.....

Seal

in the presence of

Name ..... Signature .....

Address .....

.....

Occupation .....

Bind the plan herein

97

Note: In the case of a company or corporation, unless the transfer has been executed in accordance with section 74 (1) of the Law of Property Act 1925, it should be accompanied by a certificate signed by the secretary or solicitor of the company or corporation that the transfer has been duly executed in accordance with the company's articles of association or the corporation's statute, charter, etc.

(14) *The Transferee(s) must execute this transfer in addition to the transferor(s).*

(14) Signed, sealed and delivered by the said

.....

.....

in the presence of

.....

Seal

Name ..... Signature .....

Address .....

.....

Occupation .....

(14) Signed, sealed and delivered by the said

.....

.....

in the presence of

.....

Seal

Name ..... Signature .....

Address .....

.....

Occupation .....

Notes as to transfers of part

1. Except as stated in note 4 below, a plan must be securely bound in the transfer in form 43. This plan, showing clearly the position and extent of the part transferred, should be drawn to a suitable scale, usually of not less than 1/2500. Where necessary, the part transferred should be related by means of figured dimensions to the physical features existing on the ground and shown by firm black lines on the official plan of the transferor's registered title: these may be, for example, road junctions or walls or fences.

2. The transfer plan must be signed by the transferor(s); if a company or corporation, its common seal should be impressed on the transfer plan and attested. The transfer plan must also be signed by the transferee(s) or his or their solicitor(s) (r. 79 of the Land Registration Rules 1925).

3. It will greatly facilitate the registration of the transfer if the preceding application in form 94B for an official search is supported by a plan identical with that intended to be bound in the transfer itself.

4. Neither the application in form 94B nor the transfer in form 43 need include a plan when the part transferred is already clearly defined by means of a colour or number reference on the official plan of the transferor's registered title. It is then permissible to define the part being transferred merely by referring in the form 94B or the form 43 to the colour or number shown on that official plan.

5. Transferors should urge their transferees:

   (*a*) to apply for an official search in form 94B not less than 3 or 4 days before the date arranged for the completion of the transfer; and

   (*b*) to register the transfer immediately after it has been completed, particularly when there are other pending transactions affecting the transferor's registered title.

6. The application (form A5) to register the transfer must be accompanied, not only by the original transfer, but also by a certified true copy of the transfer including the plan (r. 135 of the 1925 Rules).

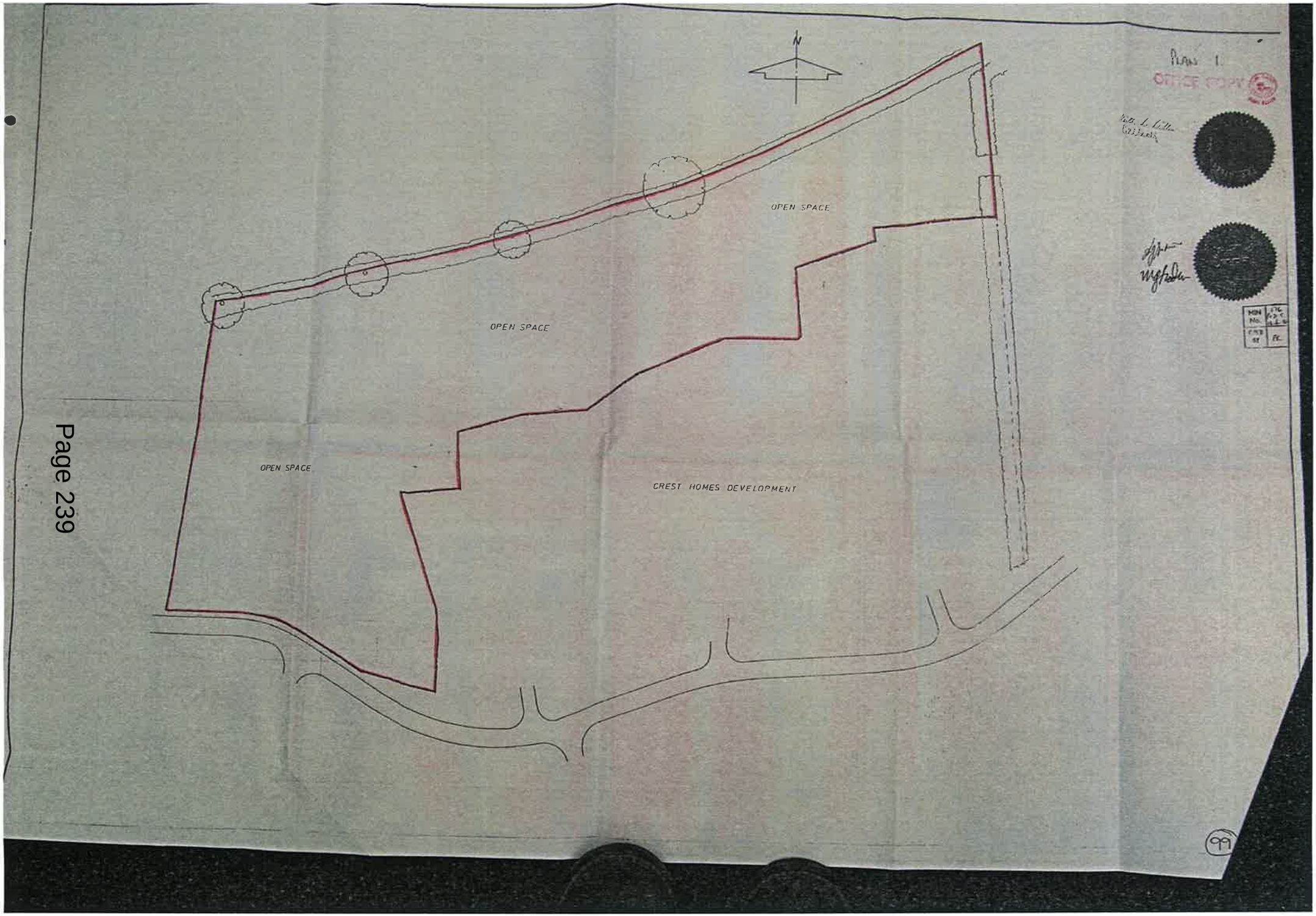
OYEZ The Solicitors' Law Stationery Society plc, 8 Paulton House, Shepherdess Walk, London N1 7LB

4 89 F864?

5061203

* * * *

(98)


N
OPEN SPACE
OPEN SPACE
OPEN SPACE
CREST HOMES DEVELOPMENT
Plan 1
OFFICE COPY

SHEET I.D. LEGAL PLAN | PLOT Nos. 40-46 & 69 | COLLEGE FIELDS, MARLBOROUGH, PHASE 2 | 16-4-91 : DATE

JOB I.D. 779/195 C | MILLER HOMES | DRAWN : BM

SCALE 1:500

Rev.A.	Postal Nos. added	6-2-92	
Rev.B.	PLOTS 63-66 added	30-3-92	
Rev.C.	PLOTS 60-62 added PLOT 63-66 boundary adjustment	8-7-92	

PLAN 2.

LEGEND

- Visibility Splay
- Vehicular + Pedestrian Access
- Pedestrian Access
- Boundary fence / wall
- PLOT No. 40
- Postal No. (1)
- Unfenced Boundary
- Gas Main
- Public Foul Sewer
- Public Surface Water Sewer