

WILDLIFE AND COUNTRYSIDE ACT 1981 Section 53

DECISION REPORT

**APPLICATION FOR AN ORDER TO ADD A BYWAY OPEN TO ALL TRAFFIC
TO THE DEFINITIVE MAP AND STATEMENT AT CODFORD ST MARY**

NB All documents (including user evidence forms, responses to consultations and correspondence) are available to be viewed at the Council's offices at Ascot Court, Aintree Avenue, White Horse Business Park, Trowbridge; please contact Sally Madgwick on 01225 713392.

1.0 Application

Application number: 2016/01

Application date: 29 January 2016

Applicant: The Codford Residents Group
c/o Codford Parish Council
3 Woolhouse Gardens
Codford
BA13 0PS

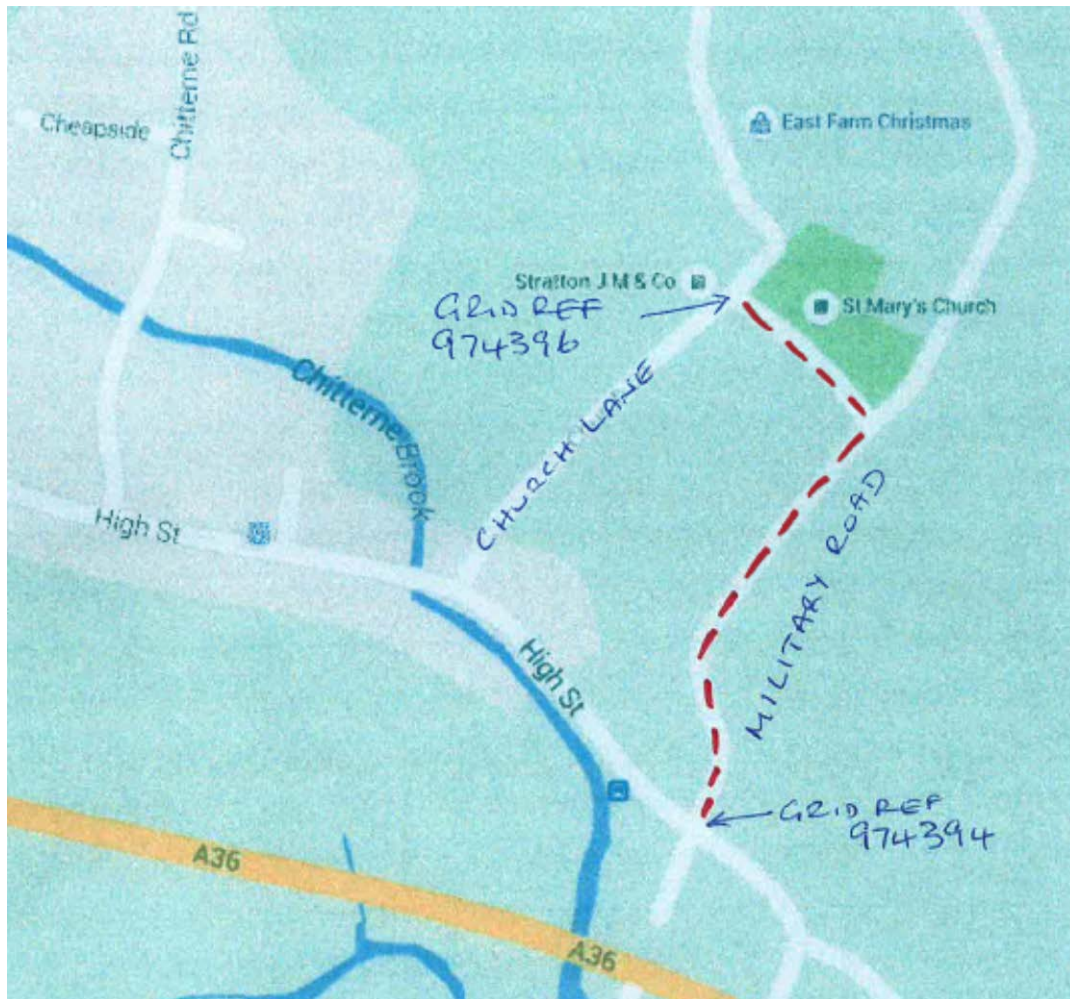
Application to: Add the roadway as a byway open to all traffic from the turning off the Codford High Street/Salisbury Road with the Military Road at Grid Ref 974394 running north to the junction with the road in front of St Marys Church and then on to its junction with Church Lane at Grid Ref 974396. The continuation of the Military Road into East Farm is not part of this submission.

Width: Up to 6 metres

Sch. 14 compliance: Notice of Application for Modification Order (Form 1)
Certificate of Service of Notice of Application (Form 3) served on Mr J Stratton, East Codford Farm, Codford, BA12 0PJ
Plan at scale approx. 1:5000 showing claimed routes in red
Covering letter, newspaper cutting relating to East Farm Christmas Shop and a photograph showing the junction of the Military Road with High Street/ Salisbury Road
14 User Evidence Forms (UEFs) **Summary at Appendix A**

Basis of application: That public rights for mechanically propelled vehicles (MPVs) subsist over the routes and should be added to the definitive map

1.1 Extract from application map: claimed route shown as red pecked lines



2.0 Legal empowerment

2.1 The Wildlife and Countryside Act 1981 (c.69) s.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 the events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.*

The event referred to in subsection 2 above relevant to this case is either:

(3)(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or a restricted byway;

or

(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 over 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.

3.0 Compliance of the application

3.1 Section 53 (5) of the Wildlife and Countryside Act 1981 (WCA81) allows:

(5) 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.

Schedule 14 to this Act states:

Form of applications

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.

Schedule 14 (2) requires that notice is served on owners and occupiers of any land to which the application relates.

3.2 This application comprised the below and is considered to be compliant with the legislation.

Notice of Application for Modification Order (Form 1)

Certificate of Service of Notice of Application (Form 3) served on J Stratton, East Farm, Codford.

Plan at scale c.1:5000 showing claimed route in red

14 User evidence forms

4.0 Land ownership details

The land is owned by J M Stratton and Co., East Codford Farm, Codford, BA12 0PJ

According to their own submission the owners first came to East Farm in 1914 and are a farming partnership. The farm was run by Mr Michael Stratton from 1946, but since 1991 it has been run by his son Josh Stratton.

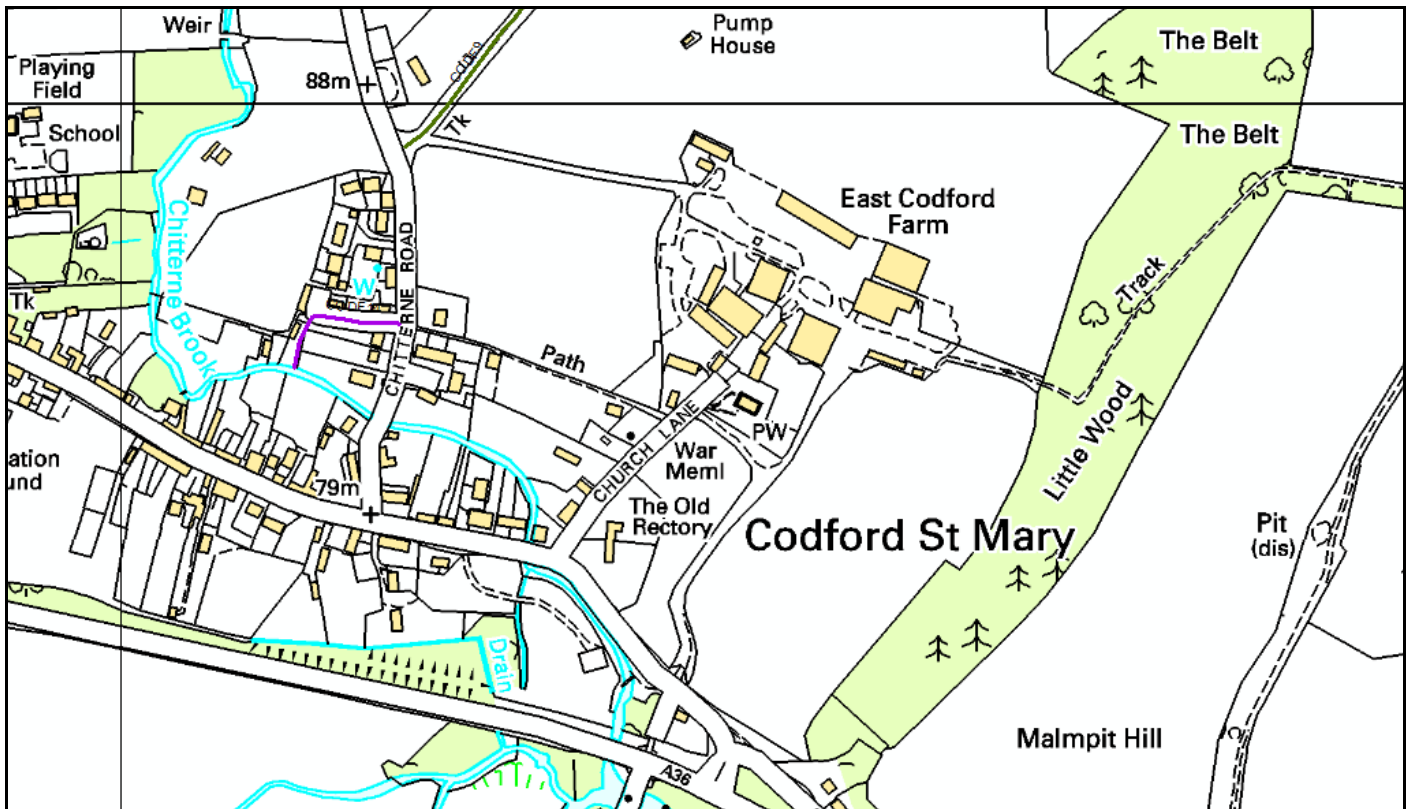
5.0 Description of route

The claimed route is a tarmac roadway leading from Church Lane in an east south easterly direction past St Marys Church to its junction with the tarmac roadway leading to East

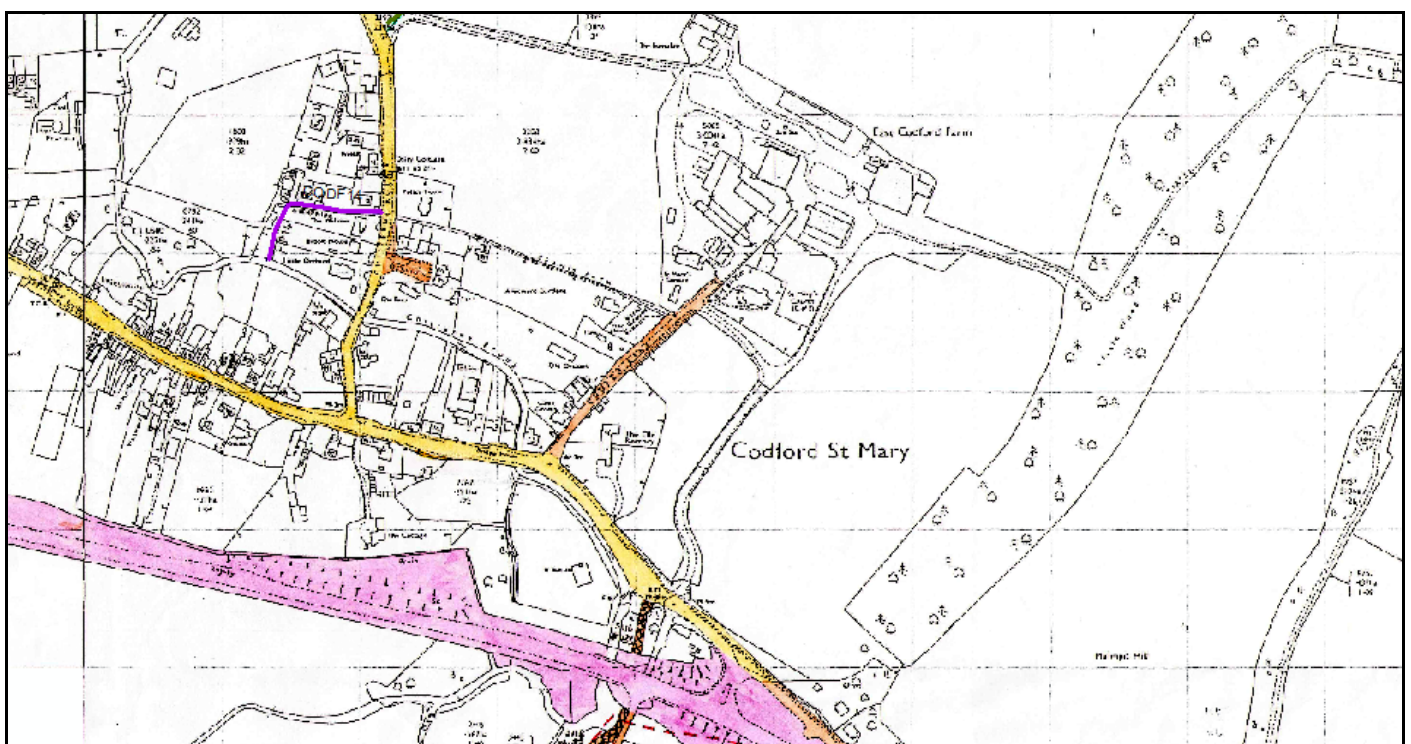
Farm. The claimed route then leads south south west over a tarmac roadway to join High Street, formerly the main road to Salisbury.

6.0 Current Records – Definitive Map, Highway Record and aerial photographs

6.1 The claimed route is not recorded in the definitive map and statement. Purple lines = footpaths, green lines = bridleways, red lines = restricted byways and brown lines = byway open to all traffic. Extract from the working copy:



6.2 The claimed route is not recorded in Wiltshire Council's Highway Record. Coloured routes are highways maintainable at public expense:



6.2 Aerial photograph 2001



6.3 Aerial photograph 2006



6.4 Aerial photograph 2014



7.0 Site visit 24 September 2015





Claimed route past church



Claimed route past church



Claimed route south towards High Street/Salisbury Road



7.1 Signs

A number of signs were observed at the sides of the claimed route:

- i) Junction with High Street "East Codford Farm" "Private Road"
- ii) "Max Speed 15 MPH"
- iii) "Road closed to pedestrians. Access only for farm, Shoot, Offices & Christmas Shop".
- iv) "Owing to mess, litter and a number of near misses with vehicles, we have decided to close the farm roads to pedestrians and dog walkers. Sorry."
- v) "No Overnight Parking. Stationnement Interdit de Nuit, Vietato Parcheggio di Notte, Parkowanie Zabronione w Nocny".
- vi) "Dead End No Access for East Farm Christmas" This sign is on the length past the church.
- vii) "Access for Church & Church Yard only No access to farm yard or farm road. No dog walkers. Sorry."

8.0 Context of application

Notes from WWW.Wiltshire.gov.uk/community and consultation response from Romy Wyeth.

- 8.1 Codford is a civil parish comprising the two manors of Codford St Peter and Codford St Mary and the manor of Ashton Gifford. The village is situated along the old Salisbury to Warminster turnpike road though the village section was by-passed in 1990.
- 8.2 Although the area is undoubtedly one of ancient settlement (the name Codford possibly deriving from the Anglo Saxon – the fording place of Codda) and a number of roads and rights of way cross the parish linking it with Chitterne in the north and Stockton and Sherrington in the south.
- 8.3 Codford has a largely agricultural tradition based on sheep and corn, mainly barley. There was also a wool trade served by fulling mills along the River Wylye and the building from which a large wool sorting business was run is in use today as The Woolstore Theatre.
- 8.4 If there was little that was remarkable about Codford as a rural Wiltshire Parish in early times, its 20th Century history sets it apart from most other places in the County.
- 8.5 During the First World war, the Army used Codford as a training camp and remount centre with hundreds of troops passing through on their way to the front. In addition there was also an influx of Australian and New Zealand soldiers (known as ANZACs). The whole area outside the immediate village was covered with wooden army huts in a number of camps.
- 8.6 The railway came to Codford in 1857 as a stop on the Salisbury to Warminster line and a station was built at Ashton Gifford to serve the village. Military railway lines were added to the line during the First World War and acted as a branch line supplying the various camps to the north and north east of Codford. At Chitterne Road, north of the New Road junction, the line divided with one spur heading north to camps 9, 10 and 11 and another south to camps 5, 6 and 7 near St Mary's Church. Camps 5, 6 and 7 surrounded the church on three sides and Camp no. 5 lay immediately to the east of the claimed route. This area was well served by the railway in the period 1914 to 1918 (the lines appear to have been lifted sometime before 1923) and there is no evidence that a road was needed, or built, in this area. The route south of the Church is recorded on post war maps (1923 revision) as a road but whether this was built as a road or was in fact a road built on the redundant track bed is not known.
- 8.7 The Second World War saw much the same sort of use made of the village with its proximity to Salisbury Plain as a training area and its railway connection being clear attractions for the military. Many of the troops were Americans. During this period the area around the claimed route was the site of the 6th Guard's Armoured Brigade Officers' Mess and the 2nd Battalion Welsh Guards. With the railway being long gone from this area it was necessary to construct roads and the claimed route, known locally as the Military Road, dates from this period, possibly 1944.

9.0 Consultation

9.1 An initial consultation was carried out from 17 February 2016 to the end of March 2016.

“Wildlife and Countryside Act 1981 s.53

Application to add a byway open to all traffic to the definitive map and statement at Codford St Mary

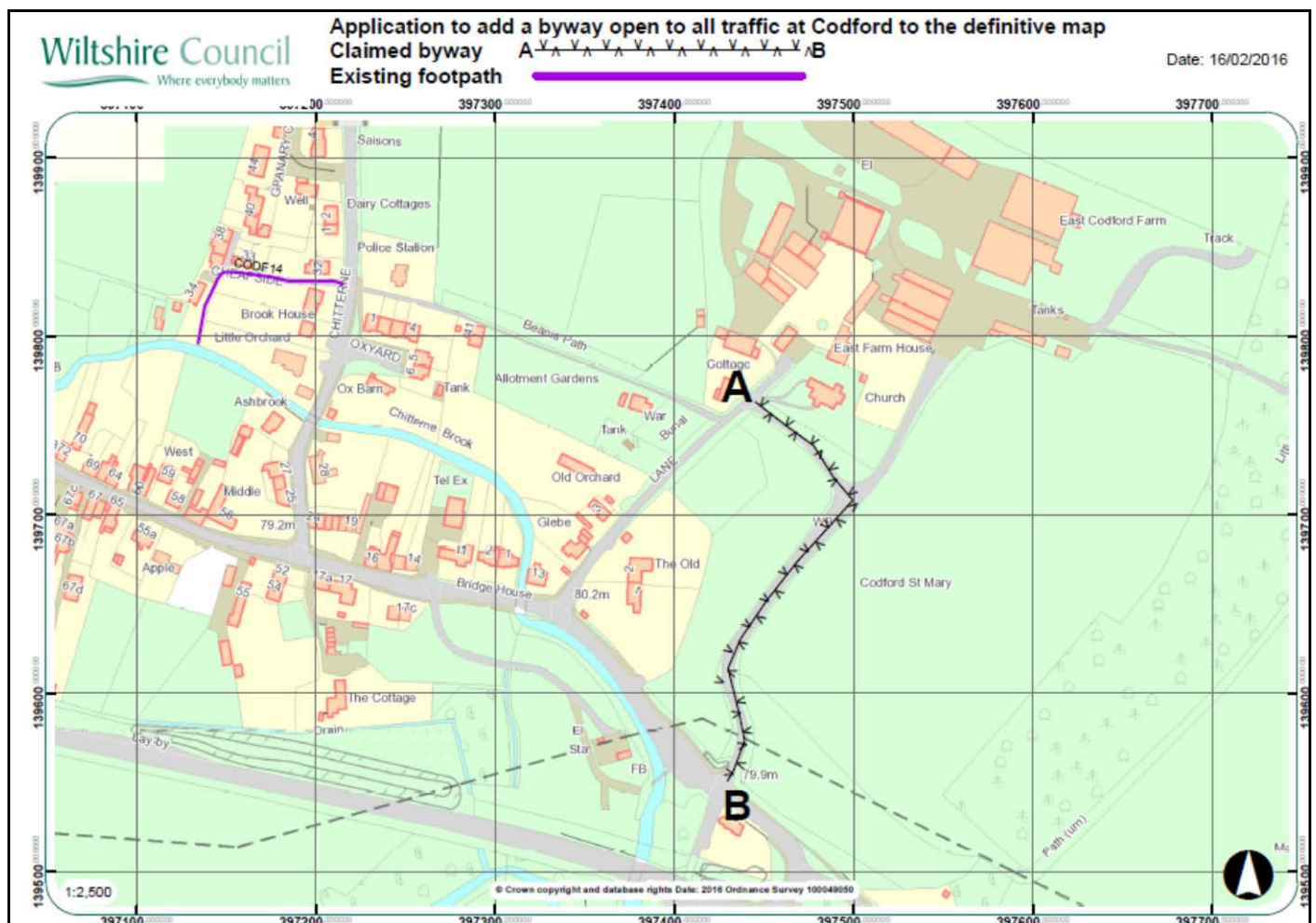
Wiltshire Council has received an application for an order to record a byway open to all traffic in the definitive map and statement. The claimed route leads from St Mary’s Church, Codford generally east south east along the surfaced road to the T junction where generally south south west to its junction with Codford High Street/ Salisbury Road. The route is shown on the attached map.

The application is supported by evidence from 14 members of the public dating back to 1946 in one instance. The route is known locally as ‘the military road’.

The Council must now determine this application and has a duty to consider all relevant evidence available to it. I would therefore be grateful to receive further evidence relating to this route from all parties.

Please respond to me in writing or by e.mail by the 31st March 2016 but if you have any queries relating to the process please don’t hesitate to contact me.”

9.2 The map shown below was also circulated:



9.3 The following were consulted:

The Auto Cycle Union	Commons Open Spaces and Footpaths
Wiltshire Bridleways Association	Wiltshire Cycling Touring Club
British Horse Society	Codford Parish Council
Wiltshire Councillor C Newbury	Wiltshire British Horse Society
Byways and Bridleways Trust	British Driving Society
Wiltshire Council Rights of Way Warden	The Ramblers
The Ramblers Wiltshire	Trail Riders Fellowship
Codford Residents Groups	Mr J Stratton
Mr J Cheal Mogers Drewitt LLP	Mr L French
Mr J Abel	Col (retd) N G Quarelle
Mrs E Abel	Mr D Chetwode Belchamber
Mrs D Shaw	Mr B Nicholls
Mr D Hastings Neville	Mrs E Richardson-Aitken
Mr D Cautley Shaw	Mrs M H Belchamber
Sir William W Mahon Bt	Mr R Richardson Aitken
The Revd A Morley	Diocese of Salisbury

10 Consultation Responses

10.1 Mr B Riley, Trail Riders Fellowship 20 February 2016

"I am rather disappointed to find that I have no information relating to the application to add a BOAT at Codford St Mary. The route seems to have originated in the 20th century and the claim will probably rely on local knowledge.

There is a slight possibility that it could be one of the routes mentioned in the Parish Council minutes, so I have attached my index. As you probably know Warminster RDC minute books went up in smoke."

"Codford St Mary Parish Meeting Minutes 1894 – 1933 (WRO 2635/1)

14th April 1925 Proposed that letter be written to the County Council asking them to demain and close the old road leading from Main Road to the station and to take over and maintain Military Road. Letter to be written to the County Council asking them to support Chitterne Parish Council's request to the Ministry of Transport towards a grant to secure the portion of new military road now owned by the Eccliaistical Commissioners at Codford."

10.2 Mr D Belchamber 24 February 2016

"The Military Road, Codford St Mary

Thank you for your letter of 17 February, requesting any further evidence in support of the above application. I have pleasure in attaching a photograph of the farm on Sunday 18 December 2015. My wife and I walked round the whole of the Military Road (from Chitterne Road to Salisbury Road) on that day and took photographs of the activity on the farm.

Dozens of people were visiting the farm shop that opens for about two months before Christmas; at one stage we counted something like 60 cars parked on the farm.

In the course of putting in our applications for the Military Road to be designated as a public right of way on the definitive map, we have been helped by books of local history and also local historians, though we have not carried out any detailed research into them. The following details might help the background picture and, if you feel that some further research into any specific bit of evidence might help the Council in their deliberations, please let me know.

Church Lane: *until about WW1, Church Lane was the sole access to St Mary's Church and to the then farmyard.*

Interconnecting Road from Church Lane to the Military Road:

A local historian told me that the fields between St Mary's Church and the Old Rectory used to belong to the Church. If correct, it would therefore follow that the interconnecting road had at one time also belonged to the Church. It is not known when the fields were conveyed to the farm owner nor whether this conveyance included the road or not.

This section of road must have been built some time after WW1, certainly before the second section of the Military Road was built.

The Military Road:

The Military Road was constructed in two parts: the first part (from Chitterne Road to the Farmyard) was constructed in WW1 and does not form part of our current submission.

The second part was constructed in 1943 or 1944; this runs from the Farmyard to Codford High Street/Salisbury Road, so our submission covers about two-thirds of the length of this section.

Beanis Path: *this provides access to the Anzac War Graves but it is not shown as a public right of way on the map (despite having a Council name sign at one end), although it has been used by the public for several centuries. This does not form part of our submission."*

10.3 Mr R Richardson – Aitken 22 February 2016

"Thank you for your letter dated 17 February in which you asked for further evidence to support the case for the 'military road' at Codford St Mary to be declared a byway open to all traffic. I have lived in Church Lane which runs parallel to the military road for twenty nine years, considerably longer than the landowner.

The information that has been provided by various people seems to admirably state the case for retention of the road as formally annotated byway. The recent informal closure by the landowner has caused sadness and irritation to the people of the village but I think it may help Wiltshire Council to make its decision if some further information is provided.

The positioning of the notices by the landowner coincided with the installation of a swimming pool in the garden of East Farm House. Large hedges and walls were erected to protect the privacy of the occupants of the property and road closure notices were erected. The reasons given were:

Dog fouling on the road

Near misses by vehicles on the military road

Walkers feeding horses in the paddock beside the road

Protecting the privacy is perfectly natural and is to be applauded but closing the road is not.

I wrote to the landowner on 22 May explaining that I would continue to use the roads and paths as I had been in the habit of doing for almost thirty years (a copy of my letter is attached). Some months later Mr Stratton (the landowner) stopped me and asked me what was going on as he had heard about the moves being made to change the status of the military road. He told me that he had not received my letter. I personally delivered an additional copy to him on the same day. He went on to say that he felt he deserved the support of all the people of Codford as he is a major employer in the village and is a generous donor to the church and to the Village Hall. He finished by telling me that he was perfectly entitled to close Beanis Path and that he was minded to do that. I responded by saying that such an action would be petulant and spiteful. Our conversation ended.

I understand that it is possible that the landowner will claim that the principal reason he wishes to close the military road is that modern agricultural vehicles are very large and there is little room for vehicles to pass and an accident might occur. Admirable care for the safety of road users one might say. Contrarily, however, the largest vehicles to use the road are six axled articulated lorries that use the road to collect grain from the barns at East farm and this traffic is particularly heavy in November and December. During these two months one, or possibly several, buildings at East Farm are converted into a type of Christmas bazaar which is advertised throughout the county and even wider afield. The result is an exceptionally large number of motor cars using the military road en route for East Farm Christmas; for so it is called.

It may be thought that the number of village people who have taken an interest in this byway question is quite small and this is true. However, there are many people who have felt strongly about this subject but feel unable to voice their support because they either live in tied houses owned by J M Stratton Ltd, are employed by that company or receive financial help from the company as in the case of the Village Hall staff and committee. This pressure is assumed if not actual.

The most important reason for the byway to be opened to all traffic is the access to St Mary's Church. In recent times two major funerals were held at the church and permission was sought to use the road for hearses and funereal traffic, this was refused. The Commonwealth War Graves Cemetery is adjacent to the church and this is a major place of pilgrimage particularly for visitors from New Zealand and Australia. Each year on Anzac Day a commemorative service is attended by large numbers and is held at the cemetery. In 2015 Mr Stratton ordered that no vehicles were to be parked in Church Lane as someone might need to use the road with a horse box. Clearly he has no right to make road closures in this way be he did it.

J M Stratton and Co is a very large industrial farming concern and taking measures such as this closure is of little consequence to it, however it has a very considerable effect on the people who have used this road for business, worship and pleasure probably since the end of the first world war.

I feel most strongly that the military road and the church road should revert to its former condition when it was freely used by all forms of transport. If you feel I can offer any further help in this matter please do not hesitate to contact me."

Letter dated 22 May 2015 and handed to Mr Josh Stratton by Mr Richardson-Aitken:

"I am sorry that I find it necessary to write to you in this way, however, I have concluded that the closure of the roads and paths on your land has become so inconvenient that I must act.

With effect from the 22nd June I intend to walk on the routes I had become accustomed to during the twenty nine years I have lived here and when both your father and you farmed the land.

Under the Highways Act 1980 Section 31 I claim the right to use the roads and paths as a right and I do this as I have had uninterrupted use for a period in excess of twenty years and I do it as a member of the public at large.

I undertake not to allow any dog under my control to foul those paths and roads: further, I will not damage any property or disturb any livestock on your land."

10.4 **Bridget Lorimer, Church Warden** 04.03.16

"Your letter to the Diocese of Salisbury dated 21st February 2016 has been forward to me to answer as Churchwarden to St Mary's church.

To my knowledge there are no private rights of access for the church, but the owners of the land have always allowed church goers to use the road to the south of the church. To the north it is graveyard abutting the farm house. We have never been refused access to this road, marked A to C on my attached map, and Mr Stratton has offered to draw up legal documents to say that we will always have use of this road for church services.

In the past we have been allowed to use the road from the Salisbury Road to the farm yard (C to B) for extra parking if needed, but as the size and volume of farm vehicles has increased in the past years it has been unsafe to have cars parked there, I have seen grain lorries use the road at 7.30 am and they are small compared to some of the tractors and other farm vehicles, Mr Stratton asked us if we could refrain from using this road which we have duly done. We have access from Church Lane where people can park as well as in front of the church.

I hope this is of some use and if there is anything else I can do to help please let me know. I would just like to add that since putting up the notices asking people not to walk their dogs round the roads, four years ago, the graveyard and grass on the A to C patch of road has been a lot cleaner with lack of dog pooh!"



10.5 **Revd Alison Morley** 09.03.16

“Further to your letter of 21st February 2016, I am not aware of any private rights of access for St Mary’s Church but Mr Stratton, the landowner, has always allowed those going to the church to use the road south of the church. He has offered to make this use permanent by drawing up a legal document.

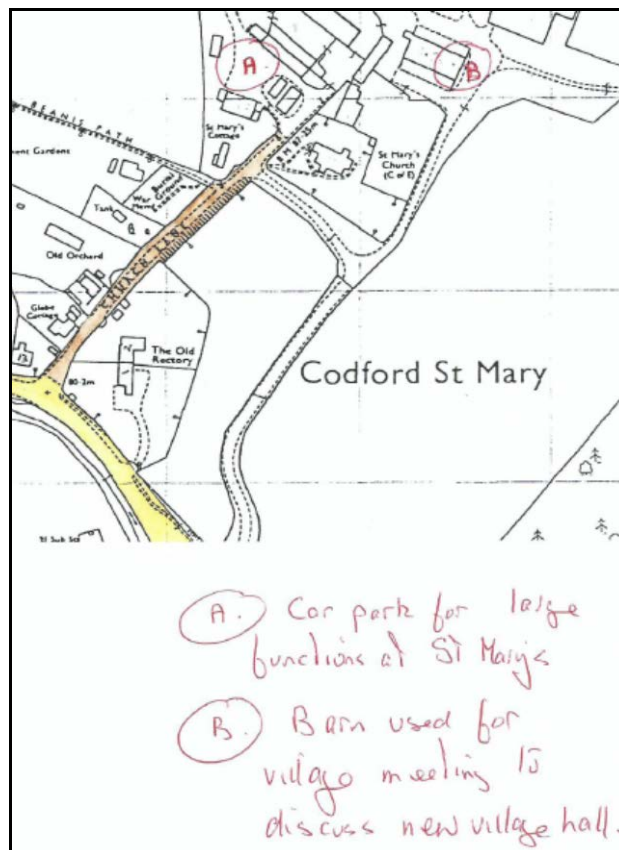
We also used to use the road from the farm yard to the Salisbury Road for extra parking when needed but because of the size of today’s farm vehicles Mr Stratton asked us not to park there anymore, as it wasn’t safe, so we don’t.”

10.6 **Hastings Neville** 20.03.16

“I refer to your letter SM/2016/01 dated 17 February 2016, my telephone conversation and exchange of emails. I would like to submit further evidence associated with this application to help illustrate why I (and indeed others) are confused as to the landowners relatively recent stance over access surrounding St Mary’s Church and in particular what is known as the Military Rd.

1. *In 1990 our daughter got married at St Mary’s. With the landowner’s consent it was common practice to use part of his farmyard (see A on attached map) for car parking for such events and there was no restriction as to which access road could be used. At some stage this consent ceased. I cannot recall the exact date but to the best of my belief it was around the time he moved to East Farm House.*

2. *In the early 1990s, during the process of building a new village hall it was necessary to hold several ‘village’ meetings to discuss the various aspects. The landowner kindly offered one of his large barns (see B on attached map) for a particularly large meeting. There were no restrictions as to which road attendees could use.”*



SUBMISSION

Re: Byway claim at East Farm, Codford

Wiltshire Council reference SM/2016/01

1. This Submission is lodged by Mogers Drewett Solicitors (Wells office) on behalf of J M Stratton & Co, the owners of East Farm, Codford ("the Owners").

2. The Owners **OBJECT** to the claim on the following grounds:

The Claim

3. The claim is based on alleged public use, supported by evidence from 14 local people (six individuals and four couples).

4. It is difficult to see any merit in the claim. It is said to be a byway claim, despite the NERC extinguishment provisions, and in any case adduces no evidence of public vehicular use as of right. Nor is any evidence adduced of bridleway use. Use on foot has been either in connection with visiting the church and/or has been insufficient to amount to use by the public as of right, and goes back only to 1985 at the earliest, which is less than 20 years before the first of the two deposits lodged under the Highways Act (2003 and 2011).

5. It is disingenuous to suggest that public user evidence goes back as far as 1946. That date came from the form of Mr N J Quarrelle, who suggests that the local British Legion have used the route on Armistice and ANZAC Day since 1946, for forming up and marching, but he does not state that he himself has exercised that use. He wasn't born until 1948.

6. The evidence put forward is principally of those visiting the church. There is misunderstanding of the nature of public use as opposed to private use, or church use; and of the nature of a byway. The great majority of witnesses admit to "Private Road" signs and other signs. Several witnesses admit to being challenged. One admits to having been given permission.

7. Mrs Lorimer the church warden has by her letter dated 4th March 2016 made it plain that the church access has been principally by permission.

8. It is therefore difficult to argue that a public right of way of any type subsists on the claimed route or is reasonably alleged to subsist.

The Farm and the Route

9. The Owners first came to East Farm in 1914. They are a farming partnership. The farm was run by Mr Michael Stratton from 1946, but since 1991 it has been run by his son Josh Stratton, who will give a detailed witness statement in due course.

10. For the time being, the summary in this Submission will have to suffice to demonstrate the background information and the evidence which can be given by the Owners.

11. The Applicants have described the claimed route as the Military Road or Army Road, though that is not the name by which the route has ever been known. It is normally known as the farm road, and has never been a public right of way.

12. The farm road was first put in during World War II, for access to the military camps which were installed on East Farm, especially in the last two years of World War II. Use and access will have been strictly controlled and restricted, especially in the period leading up to the Normandy invasion in 1944. The last thing the farm road would have become was a public right of way.

13. The claim is not for the whole of the farm road but only as far as St Mary's Church; it then branches across in front of the church to join Church Lane, which is a public highway.

14. This factor helps underline that the main use with vehicles alleged by the Applicants' witnesses has been for church purposes.

15. Many vehicles do continue up the farm road, but they are farm vehicles, and those visiting the business units, of each of which there are many.

16. Thus it is true that there is much vehicular traffic on the farm road, but none of it is exercising a public right.

17. Ordnance Survey maps show that prior to World War II the route did not exist.

18. The bulk of the use for church visiting has been via Church Lane. Likewise, visiting the ANZAC cemetery, which is on the west side of Church Lane.

19. Witnesses have referred to the forming-up and marching on occasions such as Armistice Day and ANZAC Day. The forming-up position is on the south-west corner of the churchyard, where the flagpole is. The principal means of access thereto has always been Church Lane, which is a public highway. The owners are doubtful as to whether any significant amount of use on those occasions has been via the claimed route, but they assert that any such evidence that there has been has been essentially permissive, and certainly cannot and does not give rise to a public right of way.

20. Until 1998, the bulk of the farm traffic used Church Lane. It is important to bear in mind that it is only in the last 18 years or so that the farm buildings have had their current layout and size. Before then, the "nerve-centre" of the farm was on the west side of the farmhouse and was approached via Church Lane.

21. That farm traffic on Church Lane was greatly increased by the business, operated from a building on the west side of the farmhouse, of West County Fine Foods. They had a large number of vans, many of which were up and down Church Lane several times a day, making about 80 van-journeys daily. In addition, Church Lane was used by heavy refrigeration lorries, as well of course as by farm vehicles.

22. It is the case that up until the 1990s there was some farm use of the farm road but that was principally by combines, which were becoming so wide that they had to use the farm road.

23. By the late 1990s, the vehicular use of Church Lane had become so great that the owners strategically shifted their main farm buildings over to the east side, to be served by the farm road. The purpose of doing this was to enhance the safety for all users, and the quiet enjoyment of Church Lane. This was a great improvement for those villagers abutting Church Lane. Thus it was that the amount of vehicular traffic on the farm road increased radically from the late 1990s.

24. In addition, the farm business units grew significantly about the same time, meaning a large increase in all vehicular traffic on the farm road.

25. BUT all of that use constitutes private farm use and/or use by invitation and permission, and cannot and does not constitute public vehicular use as of right.

Signs, fencing, and gate

26. Mr M Read, the former farm manager, who was employed on the farm all his working life (since age 15 which was nearly 60 years ago) will give a witness statement setting out his clear recollection of these points. In particular, he will confirm the existence of

- the private road signs at the south end of the farm road;
- the fencing at both ends of the farm road;
- and the gateway at the road entrance into the farm road.

27. As to the signs, he will say that the iron signs at either side of the gateway at the south end of the farm road, both of which read "PRIVATE ROAD", have been in place continuously since the 1970s. They are the same ones that are still there now. They are of exactly the same type and format as two other sets of signs, all of them installed at about the same time in the 1970s. The other two are at the farm entrance on the west side of the farm and also at the entrance to the dairy. Thus anyone seeking to enter the farm road from the south over the last 35-40 years will have been left in no doubt that it is a private road.

28. As to the fencing, up until the mid 1970s the south end of the farm road was fenced off. Every time a combine went in or out of that gateway it was necessary to move the fencing aside. The fencing was secured at both sides, and in the middle of the road, by fence posts being anchored in a concrete base. It is likely that the removal of that fencing coincided with the installation of the private road signs in the 1970s.

29. As to the gate, in addition to the fencing at the south end of the farm road there was also a gate, which was kept shut from time to time.

Deposits

30. The Owners have lodged two deposits under the Highways Act. The first was in 2003, the second in 2011. Both are registered on your website. The effect of these two deposits has been to negate any intention to dedicate any public right of way since 2003, and that effect continues to date. Thus, any user evidence will have to cover the 20 years prior to 2003, namely 1983-2003. The earliest walking use which is attested to by the witnesses started in 1985. Even then, any alleged use would have to have been use as of right.

31. In view of the challenges which several witnesses have mentioned, and the private road signs in place since the 1970s, and other signs, and the permissions granted, it is asserted by the owners that the claim based on public use of any type must fail, because no, or no sufficient, evidence of public use as of right for 20 years has yet been adduced.

NERC Act 2006

32. Because of the extinguishment provisions of NERC, it is asserted that, even if byway rights had potentially come into being by long use by the public with vehicles as of right, which is specifically not the case, those rights were extinguished in 2006.

33. None of the NERC exceptions appears to apply in this case. Conceivably s67(2)(d) may require some attention, but should then be dismissed: although the construction of the farm road during World War II may have been dealt with under statutory provision, such as the Military Lands Act or the Defence Act, and will have been intended for use by mechanically propelled vehicles, it would surely and expressly have been restricted to military use only, and subjected to heavy restriction, and in no way was it intended to be a public right of way.

34. In these circumstances, the extinguishment provisions of NERC must now mean that the byway claim must fail.

35. There is no evidence of bridleway use; no horses have used it other than of a private nature, by invitation of the Owners; as for cycle use, the Owners are not aware of anybody having cycled the claimed route (it is the case that one of the 14 witnesses mentions the word cycling, but certainly the public as a whole have not been cycling on this route as of right).

36. Even if the highway authority may consider recommending a footpath designation, based upon the local witness evidence of having walked the route, that cannot lawfully be justified either, in view of the steps taken by the owners to negate public access as of right, and to negate any intention to dedicate, and in view of the challenges, permissions, signs, fencing, gating, and deposits, coupled with a complete lack of evidence of any pedestrian use for the whole of the 20 years prior to 2003.

Conclusion

37. In all these circumstances it is asserted strongly that Wiltshire Council as highway authority could/should not regard this claim as having merit. There is no proper basis for saying that a public right of way of any type is reasonably alleged to subsist. The claim should be rejected unconditionally.

DATED this 22nd day of March 2016.

10.8 R Richardson-Aitken 21 March 2016

"You will, perhaps, recall that I wrote to you on 22 February in response to your letter dated 17 February concerning the 'military road' in Codford St Mary. This morning while walking the 'military road' I was reminded of another anomaly in the attitude of the landowner in question.

Some years ago a company called West Country Fine Foods was established at East farm.. This organisation carried out business as a food distribution centre. Very large vehicles, many from Continental Europe, delivered bulk food supplies to a large warehouse where it was broken down into smaller loads and delivered all over the west of England. In addition a small but very popular farm shop operated from the same site. The majority of the vehicles visiting the firm and the shop used 'the military road'. The road was well marked as being the route to the company premises. Indeed signs (in several languages) informing drivers that overnight parking is forbidden at the site are still in place along the road.

My daughter was married in St Mary's Church in 2007. At that time the landowner was extremely helpful with regards to car parking which took place in Church Lane, the 'military road' and the church front road which took place much with his blessing.

It is sad that the disagreement over the 'military road' has caused a rift among neighbours. I am aware that the landowner is a generous financial supporter of village amenities and it

would be most unfortunate were he to withdraw his support if this case was lost by him. He has also threatened to close Beanis Path and this would be most regrettable. It is very much hoped that he will act in an honourable way.”

10.9 Romy Wyeth 21.03.16

“I am Romy Wyeth and I have lived in the Old Police Station, Codford St Mary, near Warminster since October 1973. I am a historian and I write and publish books on local history. My husband is a retired policeman and our house (marked on the attached map as Police Station) is situated adjacent to Beanis Path which gives access to the Commonwealth War Graves Cemetery and to St Mary’s Church. I served on Codford Parish Council for 35 years and its Chairman for 16.

I recently learned that a submission has been made to Wiltshire County Council for the creation of a Byway Open to All Traffic to the road immediately in front of St Mary’s Church and what is locally called the Military Road which runs from that road to join the Salisbury Road, the extension of the village High Street.

The landowner, Mr J Stratton, has recently had signs erected prohibiting use of those two roads to pedestrians and vehicular access to and egress from the church along Military Road.

Having lived in close proximity to the site in question for 42 years I know that these two roads have been used by villagers, including myself and visitors not only to access the church but also for recreational purposes since the Second World War when the military occupied that area.

As a local historian, I sometimes take groups of up to 25 persons on walking tours of Codford. The groups park their cars in the lay by near the Lodge Gate House at the bottom of Military Road and we then take a circular route around the village taking particular account of the military sites. During both World wars there were military camps alongside Military Road, in WW1 it was where Camp No 5 (also known as Institute Camp) was and part of the Codford Camp railway ran into it.

During WW2 this was the site of the 6th Guard’s Armoured Brigade Officers Mess and the 2nd Battalion Welsh Guards Camp where Rex Whistler painted many of his best known works such as the Colonel Blimp series. Rex’s Officer’s Mess Tent, Codford St Mary Wiltshire c 1942 depicts the area in question. Undoubtedly the road beside the church would have begun to be in use from 1914 because the soldiers would not have walked out of the camp by the Lodge and then walked up Church Lane when they attended services. From the Military Road to St Mary’s Church then on to the Commonwealth [ANZAC] War Grave Cemetery, a place of pilgrimage to visitors especially those from Australia and New Zealand. I would then take the group down Church Lane, through the village down Chitterne Road and then along Beanis Path.

I have never once been prevented or dissuaded from using that route, nor have I ever felt the need to ask permission. From the time I came to Codford people have used the military road and the path beside the church as part of a walking circuit without any problem from traffic or the land owner. When weddings, funerals, christenings or special services such as the ANZAC Day service on 25th April the congregation has been able to park without hindrance for the short period they are either in church or in the cemetery. As, to my

knowledge, this has been an established custom for decades, I consider the Landowner's recent action in prohibiting such access to the public to be unreasonable.

I am aware that the Military Road is used by many visitors to the East Farm Christmas event, behind St Mary's Church, which has run from mid-October to Christmas for the last six years. This actively encourages many more vehicles to use the military road with advertisements in all the papers and on road signs.

I fully endorse the application for the granting of Byways Open to all traffic status and would be prepared to attend a public inquiry if required."

10.10 Maurice Cole 23.03.16

" Statement in relation to the application to grant byways open to all traffic status in the area of St Mary's Church in Codford

I am Maurice Cole and I was born in Codford in 1927. I have lived in the village all my life except for when I did my military service from 1945 to 1947 and for a short period of about 18 months when I lived in Heytesbury in 1974/75.

I served on the Codford Parish Council for about ten years and am very familiar with the roads and tracks in and around the village. I am surprised to see that the landowner in East farm, Mr J Stratton, has had signs erected which appear to prohibit parking and access to the road directly south of St Mary's Church and to what is called (within the village) the Military Road which runs from the church southwards to join the old A36 in parallel to Church Lane.

I have used these two roads all my adult life in my car(s) to attend Christening, wedding and funeral services at St Mary's Church since the Army left the camps in that area shortly after the Second World War and my subsequent demobilisation.

I will continue to exercise the "prescriptive rights" I feel I have established over the last seven decades and I resent the landowner's moves to prevent me, and other villagers, from having well-established access to St Mary's Church. I would be happy to explain my position if called to attend any public inquiry."

10.11 R Richardson-Aitken 04.04.16

"I imagine that you are becoming thoroughly bored by receiving letters from me on the above subject so please excuse this further piece. I have had sight of the letter written by Mogers Drewett the lawyers acting for the landowner. There is an imbalance in this case since the landowner is a large commercial concern well able to afford the fees of a legal firm whilst I am not in a position to do the same. However, I believe that it is important to seek out the truth and let it be known.

The letter from Mogers Drewett has several inconsistencies, no doubt the result of ignorance of the case rather than a desire to mislead the decision makers. If I may I should like to draw these to your attention:

In paragraph 1 it is stated that the road in question is called Farm Road a name which I have not heard during the thirty years that I have lived here. In my experience the route has always been called the military road. This in itself is not important but truth is important.

On paragraph 5 it is stated that Mr Quarelle's evidence is in some way irrelevant since he was not born until 1948. The date of birth of someone has no part in this dispute. Mr Cheal was not born until even later but his evidence is included. I was born in 1940 but that does not make my evidence more or less relevant than Cheal's or Quarelle's.

In paragraph 12 it is stated that 'access will have been strictly controlled, especially in the period leading up to the Normandy invasion in 1944. The last thing the farm road would have become was a right of way.' This is very subjective statement. We have no proof either way, to suggest that only military vehicles would use the road is nonsense. Every military establishment requires logistic support and this is partially provided by civilian contractors. In addition it may be of interest to note that prior to D Day (6th June 1944) all units stationed in Codford were moved away from Codford for specialist training before proceeding to their Concentration Areas for the seaborne assault.

In paragraph 19 it is stated that the forming up place for the ANZAC Parade is the flag pole to the south west of the church. This is not so, the forming up place for the Parade was at the point in Church Lane where it joins the Salisbury Road. On that day Church Lane is kept clear of vehicles so that those marching have an unimpeded route up to the Commonwealth War Graves site. In order to achieve this free access vehicles are parked along the 'military road' which allows less mobile veterans to walk but a short distance to the service. Strangely, in 2015 the landowner took it upon himself to order motor vehicles and invalid carriages not to park in Church Lane as a member of this family intended to drive a horse-box down the lane. Clearly the landowner had no right to do so and it resulted in some of the less able attenders to miss the service but out of courtesy his wishes were met.

In paragraphs 20, 21 and 23 the impression is given that farm traffic was directed away from Church Lane onto the 'military road' to increase the enjoyment of the people living in Church Lane. This is somewhat disingenuous; one suspects that the real reason was that the landowner, who lives at East Farm had converted a former yard into a major ornamental garden feature; closing the north end of Church Lane protected his garden which was further secured by two electronically powered gates. It was the landowner who benefited from the change not the residents of Church Lane. The claim that the owner shifted their main farm building over to the east side is very questionable. A visit to the site will show that to the east side of the farm there is a farm office, a tractor shed and two storage tanks. To the west are the main vehicle workshops, a large grain storage barn, the large barn used as a Christmas bazaar and commercial property used as offices.

In paragraph 35 the letter states that the Owners are not aware of anybody having cycled the claimed route. This can only be because the Owners have not lived nearby for long enough. My wife and I regularly used the military road on bicycles and my children were regular cyclists over this route. Further, there is an annual charity event held in September. Participants raise money by visiting as many churches in the Salisbury Diocese as possible, at each church they present their forms for signature and given some refreshment. The great majority of those taking part are cyclists and they certainly use the 'circuit' (Salisbury Road, military road and Church Lane).

It is folly to suggest that someone in my position, having lived for thirty years in an area and used the road (and other routes on the farm) throughout that time, would approach the landowner when he, the landowner, took over from his father to seek permission to do

something that I had been doing for six years or so particularly since the landowner lived elsewhere. I wrote to the landowner stating my intention to continue to use the military road only after the small notices were erected very recently.

The somewhat patronising nature of the letter from Mogers Drewett is much to be regretted. Quite contrary to Mogers Drewett contention that the claim has no merit there is a very proper basis for inclusion of the military road as a right of way. Constant and regular usage of the route is well known and has been very much appreciated.

I apologise for the great length of this letter but I feel most strongly the military road at Codford has provided a splendid place to enjoy the countryside and to take exercise. I am saddened that the landowner has taken steps that he has to rob the community of this much loved facility. The cordial, if somewhat distant, relationship between the landowner and the community will be gravely damaged.”

10.12 D Richardson- Aitken 11.04.16

“I am a police officer and I now live in Chilcompton. From 1986 to 2008 I lived in Church Lane, Codford. As a boy I knew Mr Michael Stratton and saw him often when my friends and I played on all the land close to my home, much of this was East Farm land.

We regularly rode our bicycles around the various farm roads and tracks and this included Military Road that runs parallel to Church Lane. Before the village bypass road was built we were encouraged to use the military Road and forbidden to ride on the A36 (now Salisbury Road).

I understand that an application has been made to make the Military Road a Byway open to All traffic. I strongly support this application as it will allow free access to the church and parking where necessary for special occasions such as ANZAC Day, funerals and weddings.

I have seen a letter that indicates that the landowner is not aware that cyclists have used the Military Road. I am surprised to learn this as I and many of my friends used it regularly.”

10.13 Tabitha Butcher 06.04.16

“I have lived in Codford for twenty two years and my daughters were born and brought up here. My home is on the corner of High Street and Church Lane and is, therefore, close to the Military Road.

Throughout the duration of my life in Codford my family and I have used the road which runs parallel to Church Lane, which I know as the Military Road as a normal part of the traffic arrangements of the village. I have walked with my dogs, driven my car and taught my children to ride their bicycles and ponies along the road.

I have continued to walk around Church Lane, Church Road, Military Road and Salisbury Road despite signs that have been erected in the last few months.

I am strongly in favour of the application which seeks to grant the title Byway Open to all traffic to the Military Road.”

THE CODFORD RESIDENTS' GROUP

**Response to the Submission, dated 22 March 2016,
Lodged by Messrs Mogers Drewett, Solicitors**

The Military Road

There is no dispute between the two parties that the Military/Farm road is the Owner's private property. Our case resides in demonstrating that, by regular public use of that road over a period of more than twenty years without express permission, a right of way has been created by prescription.

A private road can also be a right of way, as is proved by Stockton Park, the road from Giggan Street to Stockton House (please see photos attached) on the other side of the River Wylfe, which also belongs to the owner.

Ignoring the frequent irrelevancies in the Solicitors' submission, we would comment as follows:

Para 3 - Update: the Solicitors' submission is dated 22 March 2016, since when we have received some further evidence. We have now received:

- 14 completed forms
- 2 written statements (Romy Wyeth and Maurice Cole)
- 2 completed application forms, which were later withdrawn for understandable reasons.

Additionally, one person has been given permission by the Owner to do exactly what we are now claiming as of right.

Codford St Mary is one half of a small village and a number of people, while supporting our Group's initiative, did not wish to reveal that support, because they are tenants or employees of the Landowner or do business with him.

Para 4 – Update and Corrections:

- We do not believe that the Natural Environment and Rural Communities Act 2006 extinguishes our prescriptive rights over the Military Road.
- Maurice Cole has now testified to having used his prescriptive right to drive along the Military Road regularly over the years ever since about 1947.
- Romy Wyeth has similarly used the Military Road ever since she moved to the village in October 1973. From about 1985, she led tours of up to 25 tourists around the route. She has also testified that: "... regardless, the part of the road to the south of the church has been in use, both walking and driving, I am sure since before we arrived in 1973."
- Nic Nichols testifies to having cycled and run round the whole of the Military Road ever since he arrived in the village in 2000. He frequently came across the owner, he was on good terms with him and was never told not to cycle or run on that road.

Para 5 – Correction:

Ignoring the final egregious comment about Mr Quarrelle, what Mr Quarrelle was testifying to is the undoubted fact that the British Legion has used the Military Road since 1946 for marching and parking cars.

Para 6 – Correction: The evidence is not ‘principally of those using the church.’ The evidence is principally about those people who have used the Military Road largely for recreational purposes. Apart from the testimonies quoted in Para 4 above, there was also a group of ladies who used to walk dogs regularly along the whole of the Military Road (which, we can understand, might not please the Owner) but they do not wish to be identified. Please see the final para of Para 3 above.

Para 7 – Correction & Request:

- It is Miss, Ms or Bridget Lorimer, not Mrs.
- Bridget Lorimer has long experience of St Mary’s Church, so the testimony contained in her letter of 4 March 2016 is particularly valuable.

She states: “We have never been refused access to the road, marked A to C on my attached map.”

And also: “In the past we have been allowed to use the road from the Salisbury Road to the Farm yard (C to B) for extra parking if needed.”

It is clear that a harmonious relationship between the Landowner and the Church used to exist which this Group would like to see restored.

Para 11 – Correction:

The road in question may well be called the Farm road on the farm but in the village it is the Military Road.

Para 12 – Correction:

The Military Road was constructed in two parts - by the military and for the military - so, at that time, it was clearly not intended for general (including farm) usage. We believe that the first (or northern part from Chitterne Road to the Farmyard) was constructed in or soon after WW1. The second (or southern part from the Farmyard down to Salisbury Road) was constructed in 1943 or 1944 to facilitate access to the military camps.

Paras 13 & 14 – Correction:

Clearly the use of the interconnecting road between Church Lane and the Military Road is largely for church use but it is impossible to state categorically that it has been the main use, because a number of people have testified to driving, walking, running or cycling along that route for purely recreational purposes (e.g. R Richardson-Aitken and Nic Nichols have been frequent recent users).

What must be contested is the Owner’s intention to stop vehicles that have parked outside the church on the interconnecting road from then turning right to drive out to Salisbury Road. Hearses would have great difficulty in trying to do a U-turn, especially when other cars are still parked there.

Para 19 – Correction:

The statement about the Armistice Day Parade and the Anzac Parade is incorrect; R Richardson-Aitken says: “The forming up place for the Parade was at the point in Church Lane where it joins Salisbury Road.....Vehicles are parked along the ‘Military Road’ which allows less mobile veterans to walk but a short distance to the service.”

He also stated: “Strangely, in 2015 the landowner took it upon himself to order motor vehicles and invalid carriages not to park in Church Lane as a member of his family intended to drive a horse-box down the lane.”

The Solicitors confirm in Paras 13 & 19 that Church Lane 'is a public highway.'

Para 27 – Correction:

There is no dispute about the existence of signs reading PRIVATE ROAD, nor that they were erected in the 1970s but those facts become irrelevant, if a public right of way has indeed been created by prescription over a private road, as we firmly believe to be the case here.

We have enclosed recent images of a similar road belonging to the same Landowner just to the south of the River Wylye. They show a Wilts C.C. footpath sign directing walkers along a signed private road.

Although the Estate Plan of 2003, mentioned in Para 30 contains at least three glaring errors, it is correctly coloured yellow to denote a public right of way. It is our contention that this is what should now happen to the section of the Military Road that is covered by our claim, which is for a byway open to all traffic.

Para 30 – Corrections:

The Solicitors' Submission refers to two deposits by the Owners. We challenge the first, dated 28 March 2003, on the grounds that it is grossly inaccurate in three respects:

- The Anzac Cemetery was created by deed of gift in 1916 or 1917 and has its own title deed (WT275129). However the Landowner has shown this to lie within his estate.
- St Mary's Church, whose written history dates back to 1282, is also shown as belonging to the Landowner; it, too, has its own title deed (WT275129).
- Finally, as the Owner's Solicitors have conceded in their paras 13 and 19, Church Lane is a public highway.
However, the Owner's Estate Plan clearly shows that he is claiming roughly half of Church Lane as belonging to his estate.
- The second deposit, dated 27 January 2011, is similarly flawed, with the same mistakes being repeated from the 2003 deposit, although the colourings have been changed.

Such carelessness makes one wonder whether any credence can be given to either deposit.

Para 35 – Correction:

R Richardson-Aitken writes: "The (Solicitors' letter) states that the Owners are not aware of anybody having cycled the claimed route. This can only be because the Owners have not lived nearby for long enough. My wife and I have regularly used the military road on bicycles and my children were regular cyclists over this route. Further, there is an annual charity event held in September. Participants raise money by visiting as many churches in the Salisbury Diocese as possible, at each church they present their forms for signature and are given some refreshment. The great majority of those taking part are cyclists and they certainly use the circuit (Salisbury Road, military road and Church Lane).

It is folly to suggest that someone in my position, having lived for thirty years in an area and used the road (and other routes on the farm) throughout that time, would approach the landowner when he, the landowner, took over from his father to seek permission to do something that I had been doing for six years or so particularly since the landowner lived elsewhere. I wrote to the landowner stating my intention to continue to use the military road only after the small notices were erected very recently."

Nic Nichols also testified to cycling regularly round the route and having met the landowner on many occasions while doing so.

Conclusion: We firmly believe that the Council should now uphold our claim that a public right of way has been created by prescription, for a byway open to all traffic, over the route described.

11.0 Historical Mapping and Records

In determining this application the Council must consider all relevant evidence available to it and this includes historical documents and plans. It is able to do this under Section 32 of the Highways Act 1980:

32. Evidence of dedication of way as highway

A court or other tribunal, before determining whether a way 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 circumstance, 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.

Although it is known that the claimed route 'Military Road' was constructed in the 20th century it is important to look at earlier documents to determine whether there was a pre-existing route at the site.

11.1 Inclosure Award Codford St Mary 1844 Wiltshire and Swindon History Centre Cat. Ref. EA164

The enclosure of the open fields and common grazing happened relatively late in Codford St Mary. Arising out of Acts of Parliament, evidence of routes created by this process carries high evidential weight. Extract from Award plan:



11.2 The Inclosure award does not show any route leading south of the Church.

11.3 Tithe map and Award – Codford St Mary – Map 1839 Award 1840

Arising out of the Tithe Apportionment Act of 1836 records relating to the apportionment of tithe payments (where the requirement to pay tithes in kind on productive land was commuted to rent charges and payments) can be good sources of evidence for the pattern of the landscape of the parish and of the existence of any roads or tracks that may have been excluded from productivity and hence charges payable.

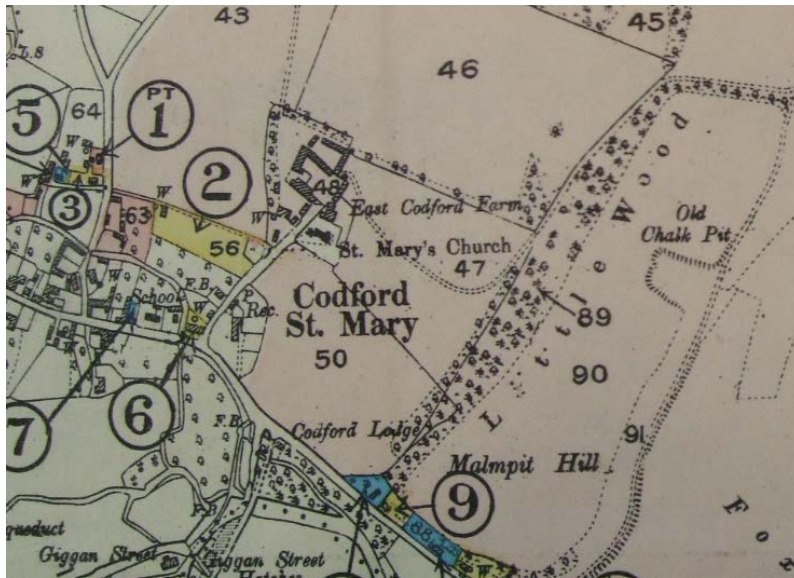
11.4 The tithe map for Codford St Mary shows roads coloured sienna and paths and tracks as pecked lines. The map is drawn at the scale of 6 chains to one inch and also shows rivers, dwellings, outhouses and vegetation types as well as parcel numbers referable to the apportionment document.

11.5 No route in the area of the claimed route is shown but is noted that nearby 'Beanis Path' is shown.



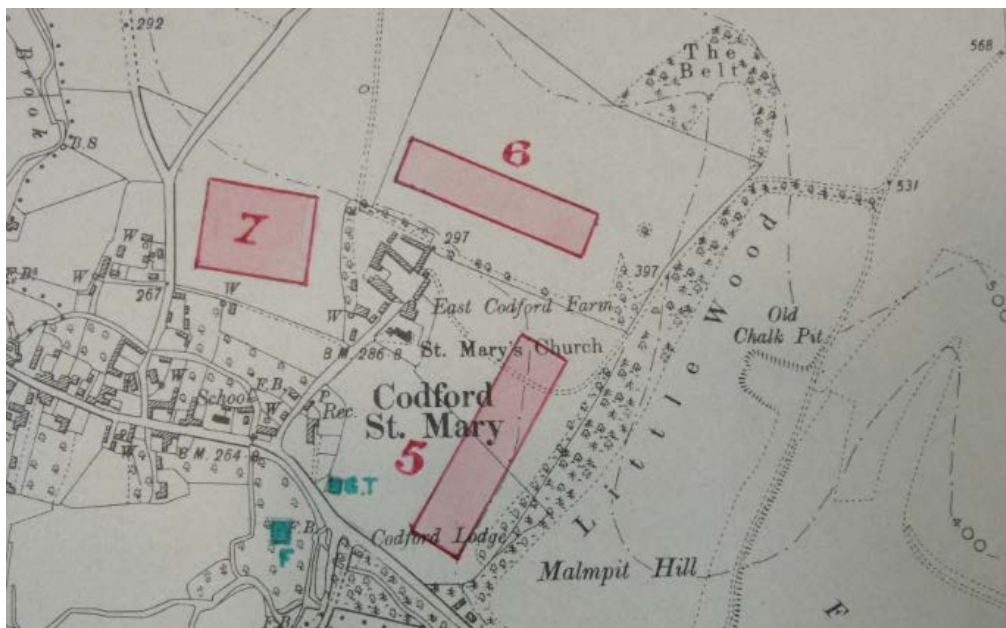
11.6 Sales Particulars East Codford Farm 1919 WSHC Cat. Ref. 628/48/11

East Codford Farm, comprising 1310 acres, was offered for sale by the Right Revd Lord Bishop of Coventry on October 7th 1919. The map accompanying the sales particulars shows all of the land covered by the claimed route coloured pink as part of Lot 1 and numbered 50 – 'pasture'.



- 11.7 The property is described as being “intersected by hard occupation roads and that “The Military are temporarily in occupation of Enclosures Nos 25, 43, 46, 47 and 50”.
- 11.8 The underlying mapping (it is based on an 1899 revision of Ordnance Survey mapping) pre-dates the First World War and the military installations (including the camp railway, the buildings and the roads) are not shown.
- 11.9 **Warminster Rural District Council OS maps showing Military Camps WSHC Cat. Ref. G12/700/1PC**

Although the development of the Military infrastructure at the time of the First World War was not recorded by the Ordnance Survey in its large scale mapping revisions (which occurred in 1899 and 1923) a series of maps have been preserved in the Rural District Council archive which show the positions of the camps. The camps were plotted from a plan supplied by Lieut Bruce RAMC by Clarence C Hancock, the District Surveyor, Warminster RDC on 20th May 1915.



- 11.10 It can be seen that Camp no. 5 was to the east of the claimed route but no roads have been drawn onto the map. It is therefore not possible to establish from these maps whether any part of the claimed route dates from the First World War period.

11.11 **NB** In Codford Wool and War in Wiltshire by John Chandler Map 21 shows the line of the Codford Camp Railway as a spur leading from the west, between camps 6 and 7, arcing round to the west of camp 5 before joining Church Road to the south of St Mary's Church. If this is an accurate representation the part of the claimed route that leads south of the Church was railway line at this time.

11.12 **Wiltshire County Council Roads and Bridges Committee Minutes WSHC Cat. Ref. F1/100/6/9**

After 1929 Wiltshire County Council took over the maintenance liability for rural roads from the Rural District Councils. The minute books of the Roads & Bridges Committee contain a number of references to 'military roads' being considered for public maintenance. No route mentioned is identifiable as being the claimed route but the following extract is illustrative of the process and demonstrates that the public were able to use the 'military roads' during wartime.

"1930

442. Dedication of New Road. On considering the question of the standard of repair in respect of private or newly constructed roads which the County Council may be asked to take over as County Roads, Resolved : That no general standard be prescribed, but that the County Surveyor be instructed to bring up a suitable specification in each case for the Committee's consideration.

443. Parish of Codford St peter. On reading a letter dated 4th August, 1930, from the Chairman of Codford St Peter Parish Meeting, as follows:

At an Assembly of the Codford St peter Parish Meeting on April 3rd 1930, I was instructed to inform the County Council of its opinion :

That since the road commonly known as "Brewery Lane" and the "Green Road" (which leads from the George Hotel, Codford St Peter to the Chitterne bye-pass road) was used as a public road during the War and has been so used ever since, it is desirable that it should be taken over by the County Council."

"The owner of the adjoining property of whom I am one, are willing that this road should be taken over, and they feel that since the public make considerable use of this road and have now probably acquired a right of way over it the road should be under the control of the Council.

I should be much obliged if you would kindly communicate this matter to the Committee in charge of Roads and Communications and I may add that should the Committee wish to send a deputation here to investigate I should be pleased to meet them."

11.14 In 1950 (F1/100/6/16) the County Council tried to adopt another section of Military road at Stockton House but this was refused by the landowner, Mr Stratton.

11.15 **Ordnance Survey Mapping 1:2500 County Series 1884 - 1924**

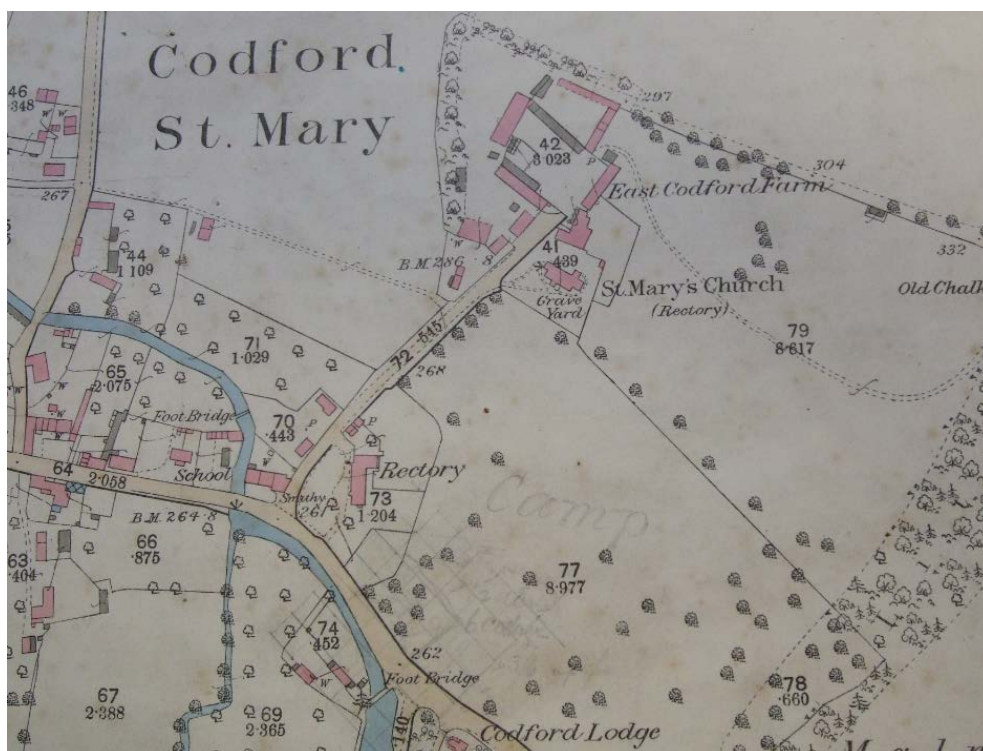
The 1:2500 scale was introduced in 1853-4 and by 1896 it covered the whole of what were considered the cultivated parts of Britain. Sheet 58.4 covers the applicant route. J B Harley, historian of the Ordnance Survey, records that "the maps delineate the landscape with great detail and accuracy. In fact practically all the significant man made features to be

found on the ground are depicted. Many phenomena make their debut on the printed map and as a topographical record the series transcends all previous maps. Every road...., field...., stream and building are shown; non-agricultural land is distinguished...quarries, sand, gravel and clay pits are depicted separately; all administrative boundaries..are shown;...hundreds of minor place names...appear on the map for the first time. Where appropriate, all topographical features are shown to scale. The series is thus a standard topographical authority”.

- 11.16 Richard Oliver in his book “Ordnance Survey Maps a complete guide for historians” recognises that surveying errors (and paper distortion during printing) cannot be ruled out, particularly where detail is sparse, but in practice such errors are likely to be very hard to demonstrate, because of a general paucity of suitable sources rivalling or bettering the OS in planimetric accuracy and completeness of depiction.”
- 11.17 Ordnance Survey maps from 1888, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.
- 11.18 It was the practice of the OS to allocate parcel numbers to distinct pieces of land and measure them. These are numbered and recorded on the map as acreages. Where applicable parcels were ‘braced’ with adjoining parcels – for example a pond in a field may be braced with the adjoining land or a track across a field may be braced in with the surrounding land and measured with that. However, some features “*are always separately numbered and measured irrespective of their size. They include railways in rural areas (in built up areas they may form part of ‘Town area’), all public roads, whether fenced or unfenced and foreshore and tidal water....*” (From Ordnance Survey Maps a descriptive manual by J B Harley published by the Ordnance Survey 1975).

11.19 First Edition 1886

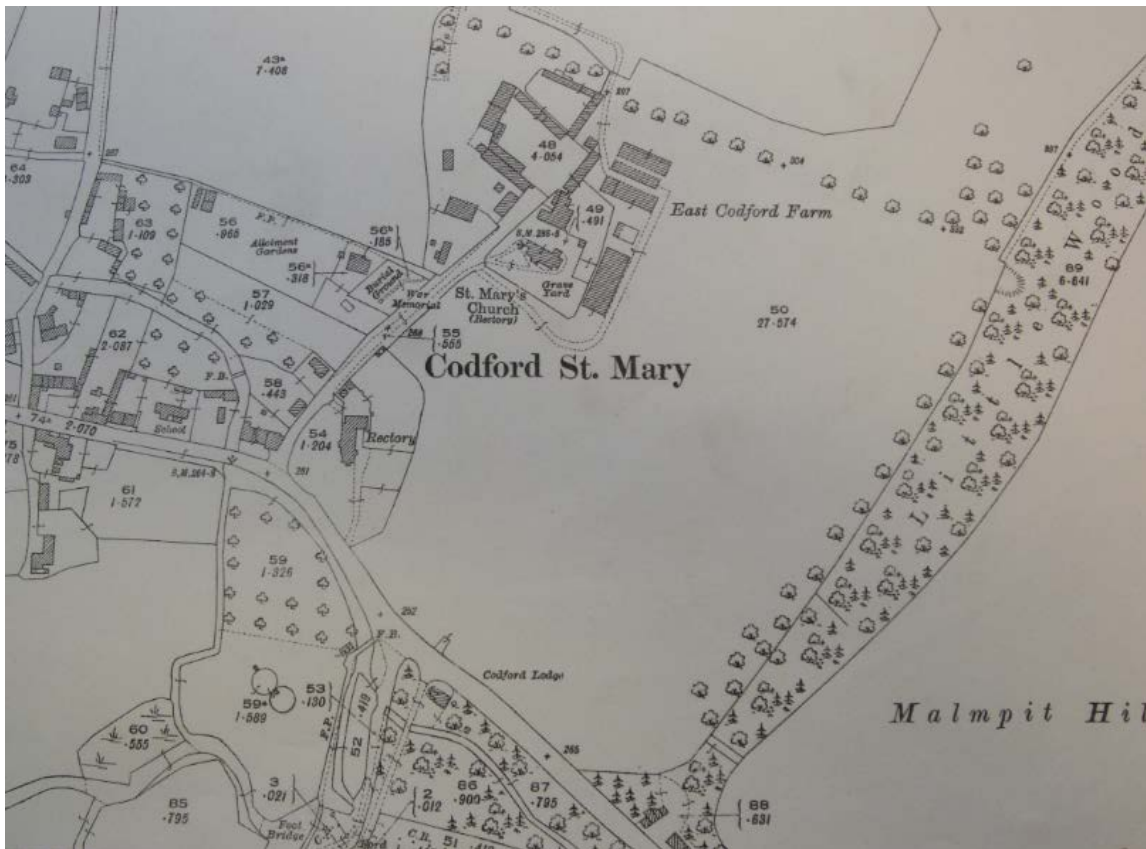
The claimed route is not shown. The copy held at WSHC has the word ‘camp’ and some buildings drawn on in pencil.



11.20 Second Edition Original Survey 1884 revised 1899



11.21 Edition of 1924 Survey 1884 revised 1923



The revision confirms the construction of part of the claimed route south of St Mary's Church. At this time the road linked Church Lane with new buildings to the east of East Codford Farm. The creation of this road seems to have altered the access through the farm

which had previously been north as a continuation of Church Lane. The line of the 'new' farm road coincides with the line of the former camp railway.

12.0 Considerations

12.1 Statutory Presumed Dedication – Highways Act 1980 Section 31

Section 31 of The Highways Act 1980 states:

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

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

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

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

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

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected the notice, in the absence of proof of any 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 of 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 have 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 or statutory purposes to dedicate a way over the land as a highway if the existence of a highway would be incompatible with those purposes.

NB The Growth and Infrastructure Act 2013 brought about alterations to s.31(6) extending the length of time that a deposit remains valid for from 10 years to 20 years.

Section 31(1) 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*).

12.2 **The date when use was brought into question**

There are a number of ways a right of way may be brought into question. These include the erection and maintenance of appropriately worded signs (that make it clear the landowner has no intention to dedicate, or perhaps that use is by a revocable permission), verbal challenges that are widely known about or experienced, an application made under Schedule 14 of the 1981 Act or any action under s.31 (5) or (6) of the Highways Act 1980. Wiltshire Council only holds records relating to s.31(6) related to this route. A duly made deposit under s.31(6) HA80 is, 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. It is therefore an incontrovertible calling into question - for that is the purpose of it.

12.3 Section 31(6) HA80 Deposits

Wiltshire Council has received two deposits under s.31(6) of the HA80 for the land affected by the current claim.

i) Deposit of Statement and Plan at the scale of 1:10000 submitted by Mr J Stratton on 01 April 2003. The area shown to be in Mr Stratton's ownership was incorrect in so far as it included areas he did not and does not own. For example Church Lane, St Mary's Church and churchyard and the Commonwealth War Graves cemetery. This was not identified at the time of receipt and the deposit and plan was accepted by Wiltshire Council and from 2007 onwards has been on the Council's online Register of Deposits filed under Codford.

No Statutory Declaration was made and the Deposit expired in 2013.

- 12.4 It is considered that the 2003 deposit was duly made. There is no requirement for Wiltshire Council to check deposits and in any event it could not know the extent of a person's land holding. Accordingly it is considered that Mr Stratton's deposit may take effect where he is the landowner (i.e. has the capacity to dedicate) but cannot take effect in other areas.
- 12.5 ii) Deposit of Statement, Declaration and Plan at the scale of 1:25000 submitted by Fowler Fortescue on behalf of Mr Stratton on 10 February 2011. Again, the area shown to be in Mr Stratton's ownership exceeds that which he does own (i.e. it includes Church Lane, the Church and the Cemetery) and the map is at a scale that is not permissible under the Regulations. This was not identified at the time of receipt and the deposit and plan were placed on the Council's online Register of Deposits filed under the incorrect parish (Stockton) without any cross referencing to Codford.
- 12.6 Officers of Wiltshire Council, in 2011, failed to spot the error of map scale or the extent of the landholding and accepted the deposit as if it was Section 31(6) HA80 compliant. Accordingly the documents were held for public viewing with other s.31(6) deposits and they were added to the Council's online Register of Deposits which is available on the Council's website (as required by Sch 6 para 4 Countryside and Rights of Way Act 2000). Unfortunately they were misfiled under the Parish of Stockton and could not be found using the website search facility. The paper copies available for public viewing were also misfiled.
- 12.7 Though it is a logical step to say that it is clear that the maps, although incorrectly scaled, were not misleading in any respect (had they have been unclear as a result of the scale it is considered likely that officers would have noticed in 2011) owing to them being misfiled they were not available to the public in the way they should have been and even a well informed member of the public, if searching for them, would not have been able to find them. Indeed Mogers Drewett, acting for Mr Stratton, knowing they had been made had to request the Council to search for them as they could not find them; it took the officers of the Council some time to locate them.
- 12.8 Accordingly officers consider that the 2011 deposit cannot be considered to have the same effect as if it were duly made as it was not observable to the relevant audience.
- 12.9 The cases of *R (on the application of Godmanchester Town Council)(Appellants) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent)* and *R (on the application of Drain)(Appellant) v. Secretary of State for the Environment, food and Rural*

affairs (Respondent) were considered in the House of Lords in 2007 [2007] UKHL 28 and form the leading authority in this matter – the main issue in both appeals being the nature of the evidence which will be sufficient to demonstrate that there was no intention to dedicate.

12.10 Lord Hoffman considers at paragraph 32 “...”*intention” means what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be”.*

12.11 And at paragraph 33 *“It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It require “sufficient evidence” that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner’s consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in Billson’s case) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.”*

12.12 Lord Neuberger at paragraph 79 considers the provisions of s.31(6) HA80:

First, the whole tenor of section 31, whether it is dealing with establishing presumed dedication (enjoyment as of right) or rebutting presumed dedication (without interruption and the provisions of subsections (3) to (6)) is directed towards observable actions from which presumptions may be made or rebutted. It is true that communications with the local authority under s. 31(5) and (6) are not with members of the public, but a local authority would be obliged to retain the documents there referred to, and to permit members of the public to inspect them.”

12.13 He further considers the purpose of s.31(6) at paragraph 91.

...As to section 31(6), it appears to be aimed primarily at large estates, and enables a landowner to protect himself, inter alia, in relation to potential rights of way which he may not even know are in the process of being acquired under section 31(1).”

12.14 Notwithstanding the failure of the 2011 deposit the deposit made in 2003 had the effect of calling the way into question. Although it expired in 2013 the only 20 year periods available for consideration pre-date 2003, hence the relevant period is taken to be 1983 to 2003.

12.15 **Signs and notices**

There are a number of notices and signs along this route. It is suggested that the oldest are the ones at the southern end of Military Road/Farm Road which say “East Codford Farm Private Road”. In their response to the consultation Mogers Drewett speculate that these have been in place since the 1970s when fencing that limited access at this junction was removed.

12.16 Mogers Drewett state that Church Lane was the main route for farm traffic and vehicles going to West County Fine Foods until the late 1990s when *“the vehicular use of Church Lane became so great that the owners strategically shifted their main farm buildings over to the east side, to be served by the farm road. The purpose of doing this was to enhance the safety for all users and the quiet enjoyment of Church Lane.In addition the farm*

business units grew significantly about the same time, meaning a large increase in all vehicular traffic on the farm road.”

- 12.17 It is therefore most likely that notices related to the prohibition of overnight parking and speed date from this period or the period when vehicular activity increased again as a result of the success of the Christmas Shop. The most recent notices are those closing the road to pedestrians and dog walkers and appear to be the ones referred to on UEFs and may have been the ones that Wiltshire Council received complaint of in 2012 and 2013.
- 12.18 It is considered that none of the signs and notices indicate that the owner of the land gave permission to use the routes or that he had no intention to dedicate the ways to the public. The signs saying “Private Road” are only visible when travelling the route in one direction and give insufficient information to anyone reading them to work out exactly what is their meaning. Roads that are privately owned or maintained may still carry public rights and the applicant, in their response dated 14 April 2016 quite correctly points this out and illustrates the point with a local example in Stockton (Stockton path no. 3) where signs of an identical style to those at Codford state “*Stockton Park Private Road*” and are sited opposite a sign indicating that the road is also a public footpath.
- 12.19 No signs have been erected that are considered sufficient to call into question the exercise of any public right before 2012.

12.15 The date for calling into question is therefore derived from the first Section 31(6) deposit and is hence taken as 2003 which means that the relevant 20 year period for the consideration of sec.31(1) HA 80 is 1983 to 2003.
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13.0 Is there a route or path and did the public use it?

13.1 Is there a route?

To satisfy section 31 (1) ‘a way of such a character’ the route must be definable. In *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 Lightman J said that the true meaning and effect of the exception of “*a way of such character that use of it by the public could not give rise at common law to any presumption of dedication*” is that “*the user must be as a right of passage over a more or less defined route and not a mere or indefinite passing over land*”.

- 13.2 The claimed route is a wide fenced route with a tarmac surface leading between grass verges. To establish the width of the claimed route an average of the widths given by witnesses has been taken. The mean is 4.7 metres.

13.2 Officers are satisfied that the claimed route is a well defined and accessible route.
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14.0 Have the public used the route?

- 14.1 The evidence adduced with this application details use of the claimed route by the public for recreation, by the public for access to the church, by the public accessing East Farm Christmas shop and by farm vehicles and by delivery drivers associated with East Farm. Only some of this use would be qualifying use for the purposes of S.31 HA80.
- 14.2 The Military Road or Farm Road only entered general use some time after its construction, considered to be around 1944. The length of road south of the Church predates this by

perhaps a maximum of 30 years but did not link back to the main road (A.36), instead leading north to East Codford Farm.

- 14.3 No evidence has been adduced for use of the older route in the period between the wars but it is more likely than not that during this time the route would have been of greater utility to the landowners than the public.
- 14.4 Again, there is no evidence for the history of Military Road or Farm Road in the period immediately after the Second World War (though it is known that there was still military occupation in Stockton in 1950) but again, it is more likely that the route would have been of greater utility to the landowners than the public at that time, accordingly, and again on the balance of probabilities, it is thought that use of the route for access to East Codford Farm itself would have been by licence or invitation of the landowner and could not be considered as being 'as of right'.
- 14.5 Public use of the route that is not at the invitation or licence of the landowner can be considered as being 'as of right' (notwithstanding other considerations) and hence officers have discounted only evidence relating to use of the route for the purposes of the farm (including farm vehicles and vehicles visiting the Christmas Shop).
- 14.6 Responses from the Church Warden and the Priest in Charge of St Mary's Church both state that they had permission from the landowner to use both the Military Road/Farm Road and the road south of the church for parking but that this permission has now been revoked in respect of the Military Road (though not for the road south of the church). It is not clear from their responses whether permission extended to using the claimed routes for access or merely for parking. In any event although some witnesses have used the claimed route for the purpose of visiting the church it is clear that they also used the route for other purposes (cycling, walking etc) and their evidence has been included.
- 14.7 It is clear, not least by the evidence of the landowner attempting to stop public use, that the public have used the claimed route.

15.0 Whether use was for the full period of 20 years

Section 31(1) HA80 specifically requires that use must have been for a period of at least 20 years. The relevant period here is considered to be from 1983 to 2003.

- 15.1 The application demonstrates use by the public throughout the relevant period with 3 users having known and used the claimed route for the whole period. They are witnesses 4, 17 and 18 and their use has been on foot in 2 cases and additionally with a vehicle in 1. 5 users have used the claimed route during this period for 15 to 18 years. In total 14 witnesses have used the path during this period.
- 15.2 The main use of the claimed route is on foot though 7 people also drove the route (for the purposes of attending church) during this period and 6 cycled along it. 1 person used it for riding a horse or pony.
- 15.3 It is noted that the landowner only sought to stop use of the routes by the public on foot (signs erected c.2012 and still in place) and accordingly officers consider that this must have been the main use of the route – if the level of other uses had been sufficiently high, if he were consistent in his approach, he would have sought to prevent these also since it

is illogical to seek to prevent access on foot only while allowing cycles, horses, cars and motor bikes.

15.4 The Planning Inspectorate's Consistency Guidelines state at 5.15 that there is *"no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should be by a sufficient number of people to show that it was use 'by public' and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence, etc)."*

15.5 At 5.20:

"In R (Lewis) v Redcar and Cleveland Borough Council UKSC 11 (03 March 2010) Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in Sunningwell that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In R (Powell and Irani) v SSEFRA [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in Lewis were not authority for an additional test beyond the tripartite 'as of right' test. The judgements in Lewis confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication arises from acquiescence in the use. Again in Redcar, in the Court of Appeal Dyson LJ refers to Hollins and Verney and the words of Lindley LJ.

"...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...the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended."

15.6 Although the application does not adduce a large number of UEFs it is considered that they, and the additional responses given by many of the witnesses, provide a cogent and credible body of evidence relating to use of the route. All users record seeing other users. Additionally, it is noted that the actions of the landowner to prevent either the public acquiring rights (from 2003 onwards) or by considering that use was at such a level as to represent a nuisance to him that required stopping, suggests that the use was at a level that satisfied the requirements laid out in *Redcar* above.

15.7 There is a sufficiency of use on foot for the full relevant period. It is considered that taking into account the permissive element of use related to visiting the church that there is an insufficiency of other types of use for the full relevant period. If it were found that the Church did not have permission for access, or that a right had been acquired before permission was sought, then vehicular use may be of a sufficient level to be considered.

16.0 Whether use was interrupted

16.1 No physical interruptions to use have been recorded by any of the users. Mogers Drewett state that the south end of the farm road (Military Road) was fenced off up until the mid 1970s and that every time a combine went in or out of that gateway it was necessary to

move the fencing aside. There was also a gate here which was kept shut 'from time to time'. It is not clear why you have a gate and a fence.

16.2 This being the case it is likely that use of the claimed route including Military Road did not happen either at all, or with any great frequency, until the late 1970s. There is no record of any interruption of use of the road south of the Church.

16.3 While it is possible that the road was closed during the Foot and Mouth outbreak in 2001 this is considered to be a statutory interruption to use that it is not relevant to s.31(1).

16.3 There was no interruption to use in the period 1983 – 2003.

17.0 Whether use was as of right – without secrecy, force or permission

17.1 Secrecy

Use cannot be considered to be 'as of right' if it has been carried out in a covert manner or perhaps only in the hours of darkness.

17.2 Use of the claimed route has not been carried out in secret.

17.3 Force

Use cannot be considered to be 'as of right' if it has been carried out with the use of force. This may include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a locked gate.

17.4 Use of the claimed route has not been carried out with any force.

17.5 Permission

Use cannot be considered to be 'as of right' if it has been carried out with the permission of the landowner.

17.6 No users claim to have asked for permission. The Church claim to have had permission to park on the roads though are less clear about using them for through access to the church. Additionally the Council does not have any evidence of the specific terms of the permission relating to times and purposes. Permission sought or granted to assemble for, say, a procession is irrelevant to the acquisition of a public right to pass and re-pass.

17.7 The landowner does not claim to have granted the public permission to use the route though demonstrated that he believed there to be a revocable permission by the erection of notices stopping pedestrian use in c.2012. There is no evidence of any similar signs granting permission being in place before that time.

17.8 Notwithstanding that use of the claimed route with cars may have been by permission when related to Church visits there is no evidence of permission being sought or granted or implied for any other use.

18.0 The intention of the landowners and subjective belief

The intention of the landowners from 2003 onwards has clearly been that they have no intention to dedicate any rights of way over their land. They took reasonable steps to convey this to the public with a statement, map and statutory declaration made with Wiltshire Council who kept and displayed them in a manner consistent with the requirements of s.31(6) HA80. However, there is no evidence of any actions of the landowner before this time in trying to prevent the public acquiring rights and certainly no acts sufficiently overt to have been brought to the attention of people using the way. In his leading judgement in *Godmanchester* Lord Hoffman approved the obiter dicta of Denning LJ in *Fairey v Southampton City Council* [1956] who held “*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 people who use the path ... that he had no intention to dedicate.’*”

- 18.1 Additionally it does not matter what is in the mind of the user of the way or whether he believes it to be a public right of way or not; it is the nature of his actual use that is the consideration.

Lord Hoffman in *R v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] A.C. 335 at 356:

“In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored.”

- 18.2 What matters in these cases is whether the use satisfies s.31(1) of the Highways Act 1980 and not the belief of the parties involved.

19.0 The common law test

In the absence of evidence of actual express dedication by a landowner, proof of a past dedication is inevitably achieved by looking at the character and extent of use of the way using the principles of “*nec clam, nec vi and nec precario*” i.e. ‘as of right’ and as discussed at section 17 of this report.

- 19.1 The common law test does not require a period of time to be satisfied (unlike the 20 years specified in s.31 Highways Act 1980) but use would be expected to be of such frequency so as for the owner of the land to be aware of the use and to demonstrate acceptance by the public.
- 19.2 The Planning Inspectorate’s Consistency Guidelines consider common law dedication at 5.49 and state:

“In Nicholson Dyson J commented on an assertion that Jaques was authority for the view that the quality of user required to found an inferred dedication was different from that required to found a statutory dedication. To bring the statutory presumption into play it was not necessary that the user should have been so notorious as to give rise to the presumption necessary for common law purposes, that the owner must have been aware of it and acquiesced in it. Dyson J stated “The relevant criteria so far as the quality of the user is concerned are the same in both cases. The use must be open, uninterrupted and as of right. The notoriety of the use is relevant for common law purposes in the sense that the more notorious it is, the more readily will deduction be inferred if the other conditions are satisfied. But notoriety is also relevant for the purpose of the statute, since the more notorious it is, the more difficult it will be for the owner to show that there was no intention to dedicate.”

- 19.3 To consider the application of a dedication at common law having occurred at Codford it remains necessary to consider periods of time before 2003 when the landowner clearly indicated his lack of intention to dedicate.

20.0 Conclusions on the statutory test

The application adduces evidence of the sort of relatively low levels of use that would be expected in a small community like Codford St Mary. The application route lies at the eastern extremity of the village, the village as a whole (including Codford St Peter), during the relevant period, had a population of between 669 and 821 (1981 – 683, 1991 – 669, 2001 – 821) and it is therefore considered that in these circumstances there is a sufficiency of evidence; it being cogent and consistent.

- 20.1 The evidence of use of the routes for recreational purposes is considered to be as of right, that is without secrecy, permission and force and covers the period between 1983 and 2003. Evidence of use by vehicles for the purposes of the farm has been discounted as being by licence and invitation of the landowner.
- 20.2 Evidence of use of the claimed route for assembly and parking has also been discounted as it these are not activities that may lead to the recording of a public right of way. Additionally it is stated by the Church that they have permission to use the claimed route for parking (though use of the Military Road/ Farm Road has now been stopped).
- 20.3 The majority of the UEFs detail use on foot with some users having driven, cycled and one having used a horse or pony. Although these are all activities that may lead to the acquisition of a higher right it is doubted that they were conducted at a sufficiently high level to support the claim. In any event the landowner, when seeking to prevent all public use of the claimed route in 2012 directed his signs only at pedestrians and dog walkers.
- 20.4 It is therefore considered that there being no evidence of interruption to use or lack of intention to dedicate during the period 1983 to 2003, that the application forms at least a reasonable allegation that a public right of way on foot has been acquired over the claimed route.

21.0 Conclusions on the common law test

It is apparent that no dedication at common law has occurred since 2003 since the landowner's intention not to dedicate has been clearly made out.

21.1 Lord Hoffman highlighted the difficulties associated with identifying a qualifying act for a dedication at common law in paragraph 6 of *Godmanchester* [2007] UKHL 28:

“As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of the landowners over many years are more likely explanations...”

21.2 It appears that in the period leading up to 2003 that there was a greater tolerance to public access over the claimed route. However, for a right of way to be established at common law the use should be of such a level that it was clear a right was being asserted against the landowner. Since it is considered that the statutory test is met with regard to this application there is no need to consider whether a dedication at common law has occurred, however, in the event that the Council did have to look to common law it is likely that applicant would be asked whether there was any further evidence of use to adduce to demonstrate the greater notoriety of the use required for common law.

22.0 Natural Environment and Rural Communities Act 2006 (NERCA 2006)

Sections 66 and 67 of NERCA 2006 had the effect of preventing the acquisition of rights for the public with mechanically propelled vehicles (MPVs) by use post 2006 (section 66) and of extinguishing any existing rights for MPVs where they were not recorded in the definitive map and statement on the 2nd May 2006 (but subject to certain exemptions)(section 67).

22.1 It is an essential tenet of the application of NERCA 2006 section 67 that it only applies to a route that was a public highway carrying a right for the public with MPVs before the 2nd May 2006. Hence if a route carried a public MPV right before that date (regardless of whether it was unrecorded, or recorded incorrectly as a footpath, bridleway or restricted byway or even on the highway record or List of Streets) it is necessary to consider the effect of NERCA 2006. Where the public MPV right has been lost the highest status the route may have is that of restricted byway. Only if the route was a former vehicular route and one of the NERCA exemptions applies may the route be recorded as a route for the public with MPVs (for example as a byway open to all traffic).

22.2 Accordingly, for the Codford application to succeed and for an Order to be made and confirmed recording a byway open to all traffic in the definitive map and statement, the application would need to not only show on the balance of probabilities that the public had acquired a vehicular right before the 2nd May 2006 and that the right had survived the effects of Section 67 of NERCA 2006.

22.3 Since it is considered that the application fails to adduce sufficient evidence to make a reasonable allegation that a public vehicular right has been acquired it is not necessary to further consider the effects of s.67 of NERCA 2006.

23.0 Legal and financial considerations and risk assessment

23.1 Failure to progress this case to determination within a year of application may result in the applicant seeking a direction from the Secretary of State. As Wiltshire Council prioritises

user based applications it is likely that the Council would be directed to make a determination. At the date of drafting this report the Council is three months into this one year period.

- 23.2 If Wiltshire Council refuses to make an order the applicant may lodge an appeal with the Secretary of State who will consider the evidence and may direct the Council to make the order. If the Council is directed to make an Order it must do so. In the case of this application, the legal test for making an Order is weaker than the test to confirm it and there is a risk in deciding not to make an Order that the decision may be overturned by the Secretary of State at the appeal stage and that the Council is directed to make an Order.
- 23.3 If the Council makes an Order or is directed to make an Order, and when made and advertised it receives objections which are duly made it must be forwarded to the Secretary of State for determination. Through their agent, the Planning Inspectorate (PINS), the order may be determined by way of written representations (no additional cost to the Council), a local hearing (cost £200 to £500) or a public inquiry (cost £3500 - £5000 if Wiltshire Council supports the order; around £300 if it does not). The Council may support the Order, object to it or where directed to make it, may take a neutral stance.
- 23.4 If the Council makes an Order to record a footpath over the claimed route the applicant may either seek judicial review of the Council's decision or more likely, make an objection to the Order. It is also likely that the landowner would also object to a footpath order. In the event objections are received the Council gets another opportunity to examine and consider the evidence (plus any adduced with the objections) before the Order is sent to the Planning Inspectorate.
- 23.5 Statute is clear as to the Council's duty in this matter and financial provision has been made to pursue this duty. It is considered unlikely that judicial review would be sought by any party if the statute is adhered to. Costs arising from judicial review of the Council's processes or decision making can be high (in the region of £20,000 to £50,000).

24.0 Equality impact

- 24.1 Consideration of the Equality Act 2010 is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. If the path is recorded in the definitive map and statement it must be as used and accepted by the public though any further improvements to access could be pursued by negotiation with the landowner as appropriate.

25.0 Relationship to Council's business plan

- 25.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. However, Wiltshire Council is committed to 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.

26.0 Safeguarding considerations

- 26.1 Consideration of Safeguarding matters is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981.

27.0 Public Health Implications

27.1 Consideration of public health implications is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981.

28.0 Options to consider

- 28.1 i) To make an order under s.53(3)(b) or (c)(i) of the Wildlife and Countryside Act 1981 to record a footpath, bridleway, restricted byway or byway open to all traffic.
- ii) Not make an order under s.53(3)(b) or (c)(i) of the Wildlife and Countryside Act 1981 and to refuse the application.

29.0 Reasons for recommendation

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.

29.1 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.

29.2 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.

29.3 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. Incontrovertible evidence is that contained within s.31(3)(4)(5) and (6) of the Highways Act 1980.

29.4 The deposited plan and statement made in 2003 provides incontrovertible evidence of the landowner's lack of intention to dedicate additional rights of way to the public and calls into question the public's right.

29.5 This being the case the 20 years period for the application of s.31(1) HA80 is 1983 to 2003 and the application makes a reasonable allegation that public rights on foot have been acquired during this period there being no incontrovertible evidence to the contrary.

30.0 Recommendation

That Wiltshire Council makes an Order under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to record a public footpath over the claimed route and that the Order is confirmed if no objections or representations are received.

Sally Madgwick Rights of Way Officer – definitive map

16 March 2016

Appendix A Summary of user evidence