

**WILDLIFE AND COUNTRYSIDE ACT 1981 Section 53**

**DECISION REPORT**

**APPLICATION FOR AN ORDER TO MODIFY THE DEFINITIVE MAP AND STATEMENT BY ADDING A BRIDLEWAY LINKING DURNFORD 4 WITH DURNFORD 10 AND UPGRADING A SECTION OF DURNFORD 8 TO BRIDLEWAY**

**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:** 2015/07

**Application date:** 24 August 2015

**Applicant:** Nicholas Gallop  
Woodrow Cottage  
Great Durnford  
SP4 6AZ

**Application to:** Add a bridleway leading from Durnford 4 near New Buildings, going North to join Durnford 8 which it uses for a short distance, and then continues north to join Durnford 10

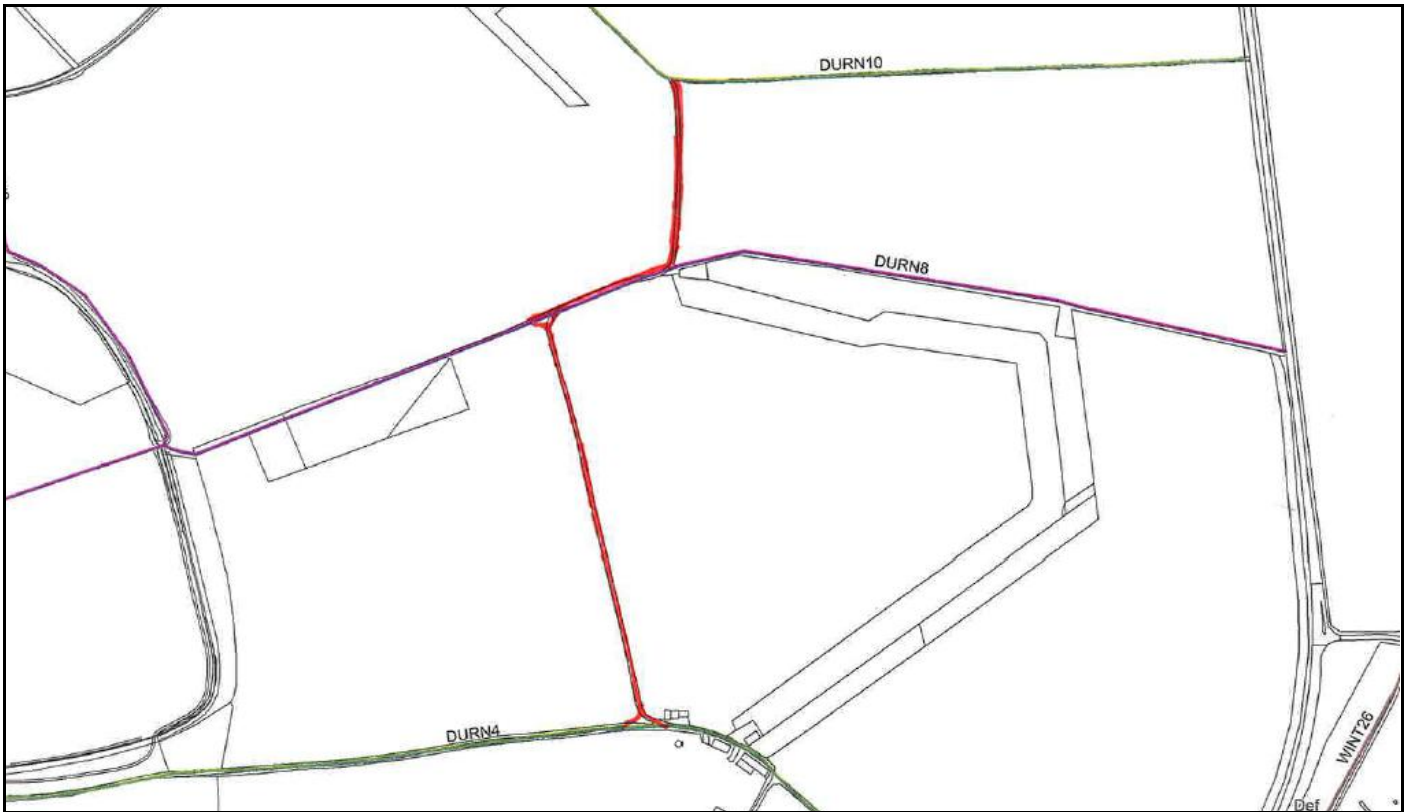
**Width:** 4 metres

**Sch. 14 compliance:** Notice of Application for Modification Order (Form 1)  
Certificate of Service of Notice of Application (Form 3) served on Matt Gentle, Durnford Estate Manager  
Guy Rasch, Heale House, Middle Woodford  
Stephen Langdon, White Cottage, Salterton  
Plan at scale approx. 1:6000 showing claimed routes in red  
Aerial photographs showing tracks on the ground  
32 user evidence forms showing use of the route

**Basis of application:** That public bridleway rights subsist over the routes and should be added to the definitive map

**NB** This is one of four applications for DMMOs in Durnford relying on user evidence. 32 forms were adduced in total and all 32 claimed use of some or all of the claimed bridleway. See **Appendix A** for summary.

## 1.1 Extract from application map: Claimed route shown in red



## 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 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.*

And/or

*(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description;*

### **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  
Durnford Estate, Guy Rasch, Stephen Langdon  
Plan at scale c.1:6000 showing claimed route in red  
32 User evidence forms

### **4.0 Land ownership details**

4.1 The land over which the claimed route lies forms part of the Great Durnford Estate (around 1700 acres).

4.2 In the 20<sup>th</sup> century the land was owned by Lord Tryon being sold at the end of the century to Miles D'Arcy Irvine being registered to a number of Property Companies, namely Julian Properties Corporation, Hobson Properties SA, The Langtry International Trust Company Limited and Langtry Trust Corporation, Woodhouse Properties Inc and Great Durnford Properties.

4.3 The Estate was offered for sale again in 2013 and is now owned by Mr and Mrs R Turner. Mr and Mrs Turner are represented in the matter of this application for a DMMO by Rhoda Barnett, Countryside Access Consultant. All correspondence for Mr and Mr Turner is directed to Matt Gentle, Durnford Estate Manager, 3 The Drive, Great Durnford, Salisbury, SP4 6BA.

4.4 The land over which the claimed route leads is farmed by Heale Farms, Heale House, Middle Woodford, Salisbury, SP4 6NT and land to the east of the path linking Durnford 8 with Durnford 10 is farmed by R W Edwards and Son, Court Farm, Lower Woodford, Salisbury, SP4 6NQ.

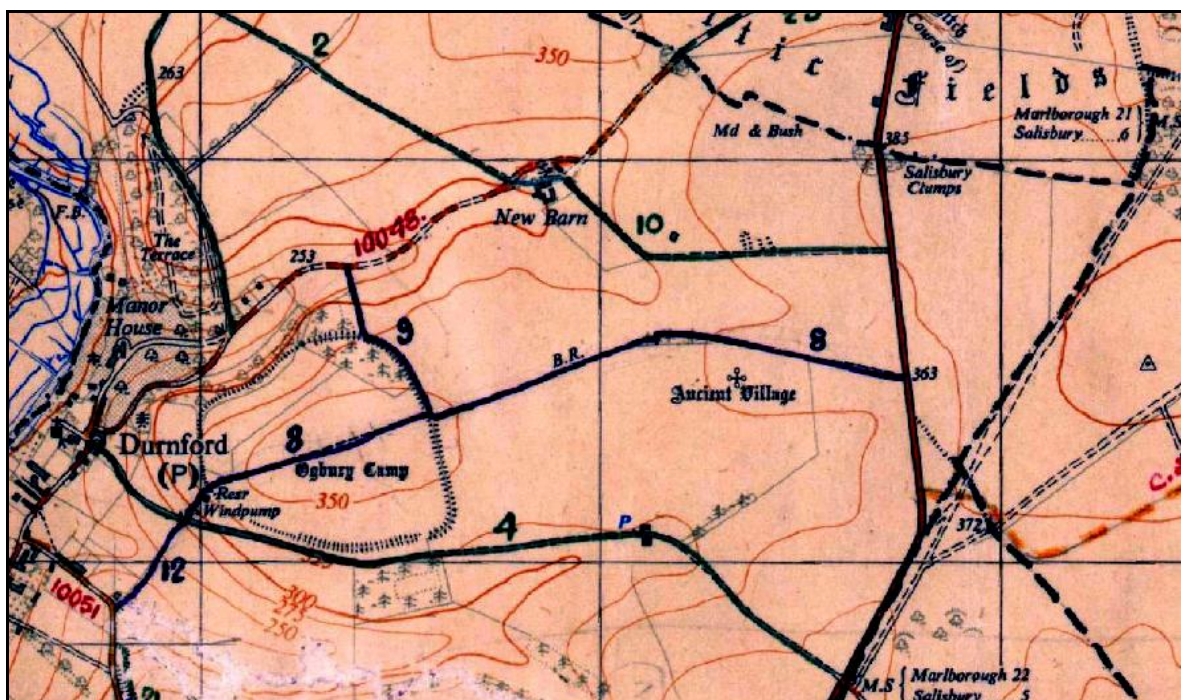
## 5.0 Description of route

5.1 The southern end of the claimed route is accessed from Bridleway Durnford 4 just west of New Buildings. The claimed route follows a well defined vehicular track leading alongside open arable land to its junction with footpath Durnford 8. This path at this point is wide and well used by farm vehicles. The claimed route leads along this footpath for approximately 140 metres (again a well used vehicular track) before leading north along another vehicular track between open arable land before joining bridleway Durnford 10. Small deviations in the route are shown at either end of the southern leg (links 4 to 8) where it is clear that access has been obtained slightly differently by vehicles depending from which direction they was travelling (see application map at 1.1 and aerial photographs at 6.2 & 6.3).

5.2 The route formed an accessible link in the bridleway network in this area (allowing users to avoid the A345) until 2015 when gates were erected across it and locked. Signage was also erected at this time ("Private Property No Public Right of Way").

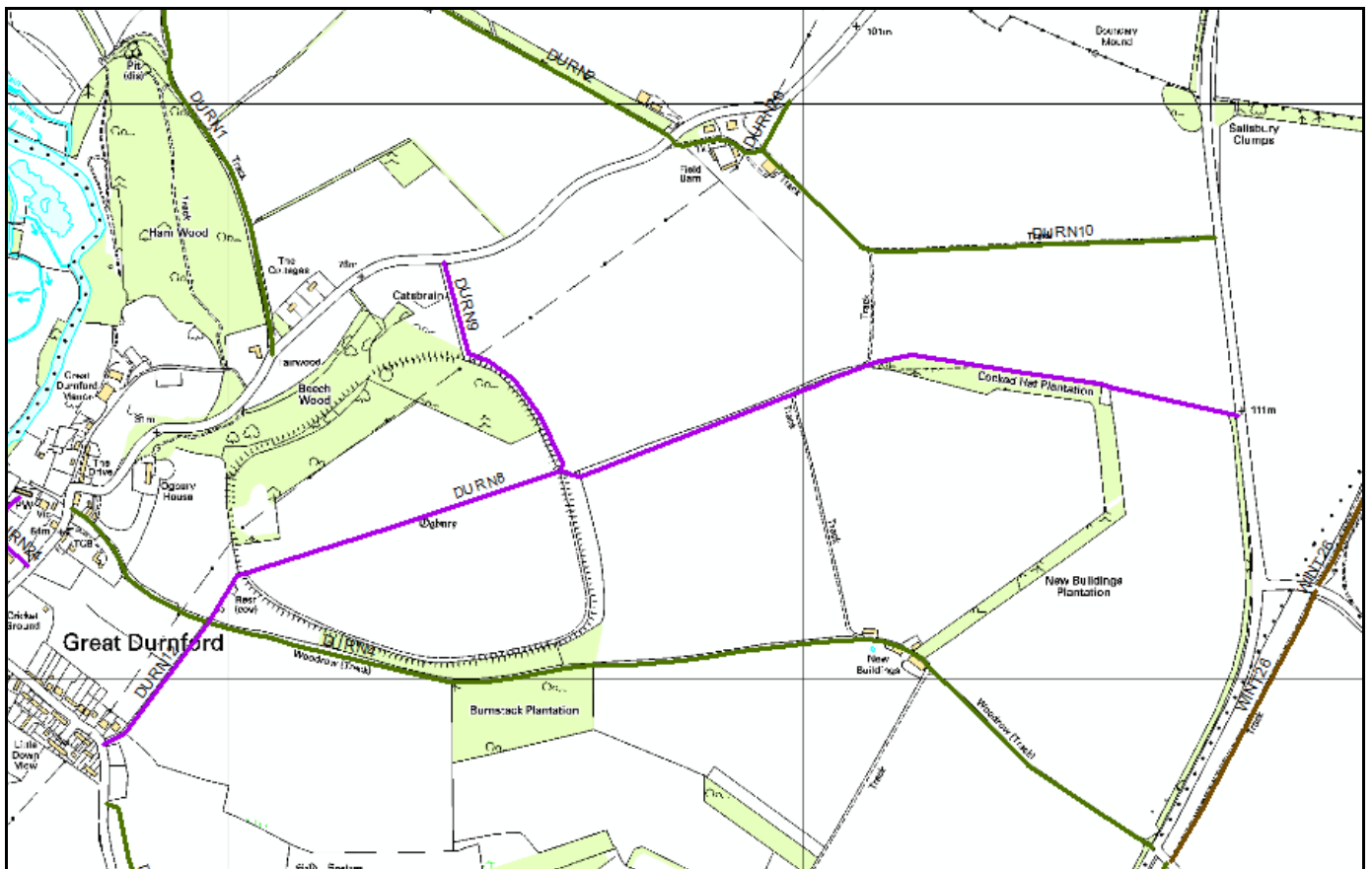
## 6.0 Current Records – Definitive Map and aerial photographs

The Amesbury Rural District Council Area definitive map and statement dated 1952 shows Durnford 4 (Woodrow) in green as a bridleway (this is the subject of an Order made on 15 March 2016 to upgrade it to a restricted byway based on historical evidence), Durnford 10 in green as a bridleway and Durnford 8 in purple as a footpath.



|          |    |  |  |
|----------|----|--|--|
| Durnford | 4  | <u>BRIDLEWAY</u> . From road U/C 10048 at Durnford Church leading south-east, east and south-east to the Salisbury - Amesbury road, A.345. Approximate length 2158 m. Width 3 m.   | relevant date<br>29th June 1993                              |
| Durnford | 8  | <u>FOOTPATH</u> . From path No.4, 320 m south-east of road U/C 10048, leading north-east through Ogbury Camp and east-south-east to the Salisbury - Amesbury road, A.345. Approximate length 1920 m. Width 1 m.  | relevant date<br>29th June 1993<br>Part subject to ploughing |
| Durnford | 10 | <u>BRIDLEWAY</u> . From road southern end of Bridleway 2 at New Barn with a width of 4 metres leading east then south east to join Bridleway 23. The path continues with a width of 3 metres leading south east then east to the Salisbury-Amesbury road, A.345. Approximate length 1025 metres. Width 3-4 metres. | relevant date<br>25th September 1996                         |

6.1 Other than a small diversion of Durnford 10 at New Barn in 1996 the routes have remained unchanged in the definitive map since 1952 (notwithstanding the March 2016 Order upgrading Durnford 4). An extract from the working copy is shown below:



6.2 Aerial photograph 2001 with rights of way overlaid: purple = footpath green = bridleway



6.3 Aerial photograph 2006 with rights of way overlaid: purple = footpath green = bridleway



6.4 Aerial photograph 2014





## 7.0 Site visit 24 September 2015



Junction of claimed route with Durnford 8



Claimed route leads to left, Durnford 8 continues straight on





Claimed route towards Durnford 10



Durnford 10 at junction with claimed route looking towards New Barn



Durnford 10 in opposite direction leading east to A345 – from claimed route junction

## 8.0 Context of application and historical evidence *Notes taken from Victoria County History Vol 15 (1993)*

- 8.1 Durnford is a civil parish in the Woodford Valley bounded by the River Avon in the west and the A345 in the east. Today, Durnford includes the settlements of Great Durnford, Netton, Salterton and Little Durnford. Prior to 1885, Normanton, a settlement on the west bank of the Avon formed a part of Durnford but was transferred to Wilsford in 1885. In 1986 a small part of Durnford was transferred to Woodford and land at Laverstock was added.
- 8.2 The population of Durnford was 553 in 1861 falling to 380 by 1891. In 2011 the population was 368.
- 8.3 The demesne lands of Great Durnford manor appear to have lain in severalty south and east of Ogbury Camp. There were three open fields (in 1412 there was East (later called Woodrow), Middle and North, all of about 100 acres. Additionally there was a cow down and a sheep down, possibly including Ogbury Camp and Catsbrain Hill. This land was inclosed by Private Act dated 1793.
- 8.4 The right of way now recorded as Durnford 4 (Woodrow) appears to have been in existence since at least 1675 and was awarded to the public as a Public Carriage Road and Driftway at the Inclosure of Durnford North End tything and formed a route linking the village centre of Great Durnford with the road linking Salisbury and Marlborough. The rights of way Durnford 8 and 10 do not appear to have been historically significant at that time.

## Historical Documents

- 8.5 Regardless of the application being based on recent evidence of use the council must consider all available evidence relating to a route and this may relate to a dedication at common law or by statute law at some time in the past. Historical evidence may be considered by virtue of Section 32 of The Highways Act 1980 (below):

*A court or tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication if any, took place, shall take into*

*consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.*

## 8.6 Inclosure

Between 1545 and 1880 the old system of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners sought to improve the productivity of their land. The process of inclosure began by agreement between the parties concerned, although locally powerful landowners may have had significant influence on the outcome. By the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The process was further refined at the beginning of the nineteenth century with the passing of two main general acts, bringing together the most commonly used clauses and applying these to each local act unless otherwise stated.

8.7 Land at Durnford Northend was enclosed by a private act made in 1793 entitled “An Act for dividing and allotting Certain open and Common Fields, Downs and other Commonable Lands and Grounds in the Parish of Durnford in the County of Wilts”. 33 George III, C.43 (The National Archive HL/PO/PB/1/1793/33G3n139). The award viewed is held by Wiltshire and Swindon History Centre Catalogue reference EA36

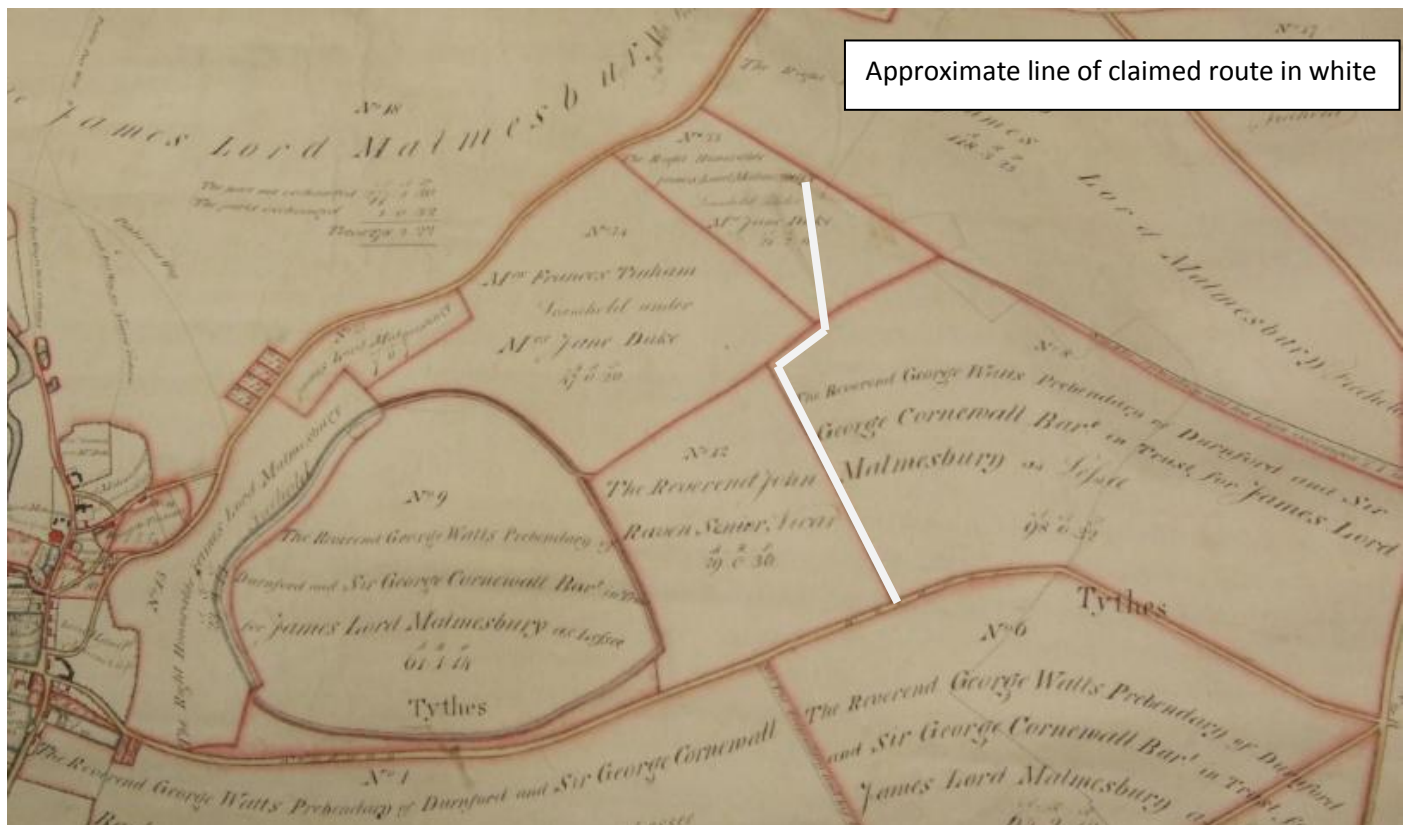
8.8 The award is dated 1794 and has a map dated 1793 attached. The map is entitled “*A Map of the North End Tything and Manor of Hungerford Durnford in the County of Wilts as divided and allotted 1793*”. It is drawn to the scale of 6 chains to one inch.

8.9 The map has a key:

*“The boundaries of the Allotments of the several Proprietors are coloured Red; Those of the Old Inclosures exchanged, Blue; the Roads, Brown; The Houses Deep Red; and the Outbuildings Black: The Numbers in the several Allotments and exchanged Premises, refer to the Numbers in the Margin of the Award.”*

8.10 The claimed route is not shown on the map or mentioned in the award. The line of the claimed route appears to run along the boundary of newly created fields No12 (The Reverend John Raven Senior) and No 8 (The Reverend George Watts Prebendary of Durnford and Sir George Cornwall Baronet in trust for James Lord Malmesbury) along another allotment boundary (which appears to have later become footpath Durnford 8) to cross allotment No 33 to join another allotment boundary the line of which corresponds to Bridleway Durnford 10.

### 8.11 Extract from Award map:



8.12 The only other large scale map of Durnford relating to the period before 1850 is the tithe Map. However, this does not cover the North End tything (as tithes here were commuted at inclosure).

### 8.13 Ordnance Survey 1:2500 Maps

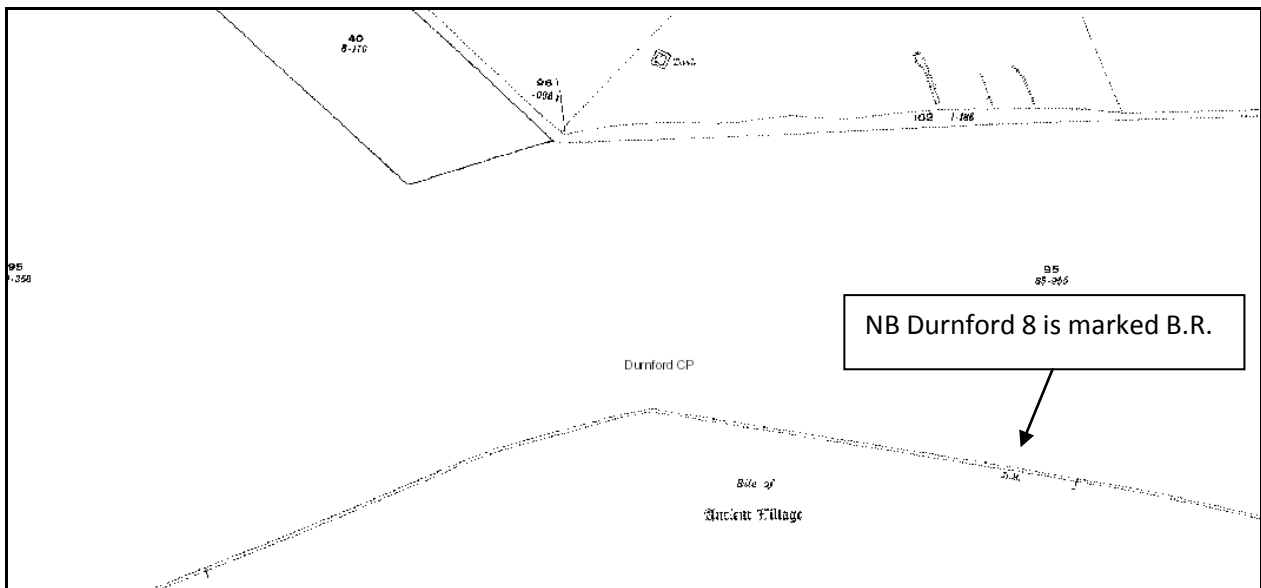
The 1:2500 scale was introduced in 1853-4 and by 1896 it covered the whole of what were considered the cultivated parts of Britain. Sheets 60.7 and 60.8 cover the applicant route. J B Harley, historian of the Ordnance Survey, records that “the maps delineate the landscape with great detail and accuracy. 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”.

8.14 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.”

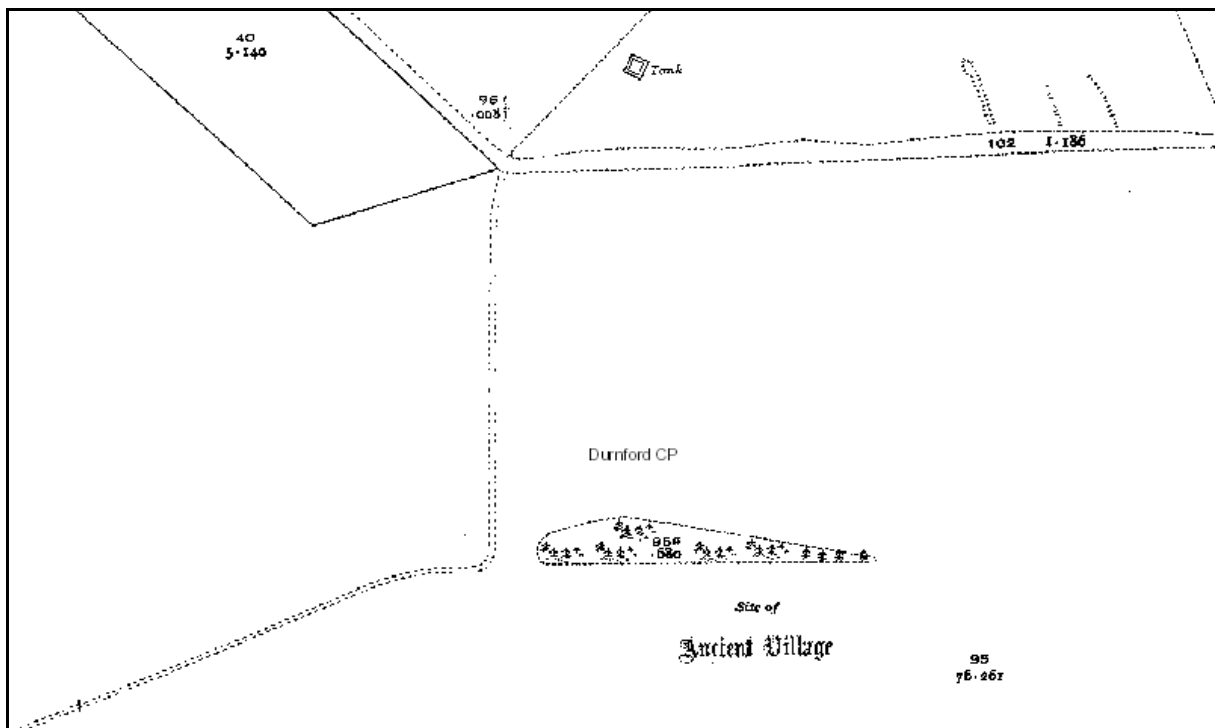
8.15 Ordnance Survey maps from 1888, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.

- 8.16 The claimed route, as a physical feature does not appear on Editions from 1877 to 1924 inclusive. The northern leg of the route linking Durnford 8 and 10 appears as an unfenced track on an Edition published in 1939 and its appearance coincides with the disappearance of the continuation east of the path that is now Durnford 8 (shown from 1877 onwards):.

**1924**



**1939**



- 8.17 The next dated map available for viewing (c.1970s) shows the claimed route in its entirety as an unfenced track.





## 9.0 Consultation

9.1 On 2nd October 2015 Wiltshire Council carried out an initial consultation into the four applications received to record paths based on user evidence. The letter stated:

***“Wildlife and Countryside Act 1981 s.53***

***Applications for Orders to record public footpaths and a bridleway in Great Durnford to the definitive map and statement***

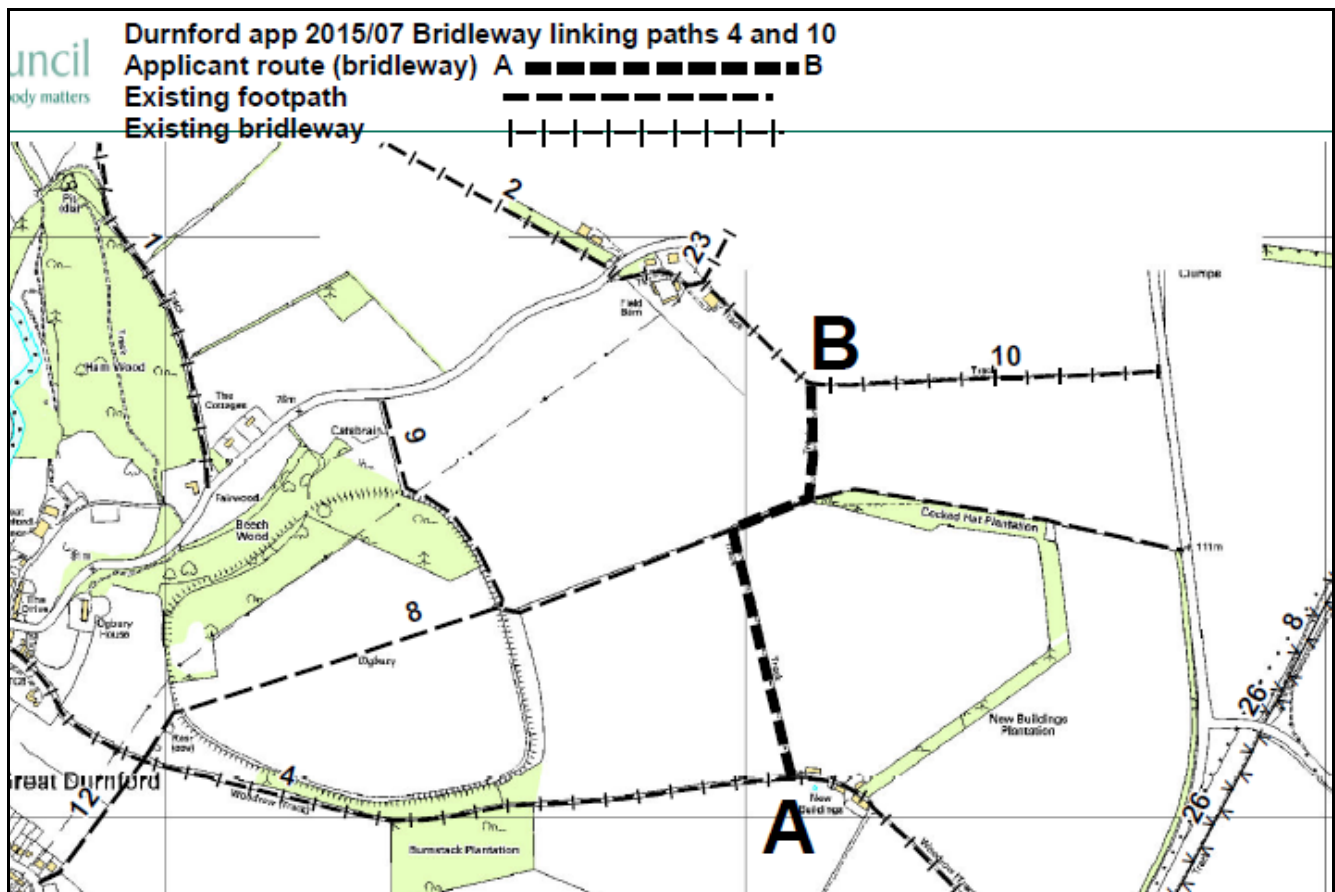
*Wiltshire Council has received applications for Orders to record public footpaths and a bridleway in Great Durnford to the definitive map and statement. The applications are based on evidence of use and are supported by evidence given by 26 users. A plan is enclosed showing all four application routes and the reference number they have been given. Additionally individual plans of the routes are also enclosed.*

*The Council must now investigate all relevant available evidence and invites any further evidence, either in support of, or in objection to these applications. Evidence relating to any signs, obstructions, statutory deposits, challenges or permissions is especially invited as are any photographs that can be dated showing the routes, any signs and so forth.*

*I would be grateful to receive responses by Friday 20<sup>th</sup> November 2015.”*

NB A further 6 user evidence forms were submitted after the 2<sup>nd</sup> October.

9.2 Officers included a map showing the claimed route which was derived from the original application plan (it being on a clearer base map). The splays at A and the junction with Durnford 8 are not shown.



9.3 The consultation period was extended until the 31<sup>st</sup> December 2015 and then again to the 29<sup>th</sup> February 2016 at the request of the landowner.

9.4 The following were consulted:

|  |  |
|--|--|
| The Auto Cycle Union                   | Commons Open Spaces and Footpaths Society    |
| Wiltshire Bridleways Association       | Cycling Touring Club                         |
| British Horse Society                  | Durnford Parish Council                      |
| Wiltshire Councillor M Hewitt          | British Horse Society Wiltshire              |
| Byways and Bridleways Trust            | British Driving Society                      |
| Wiltshire Council Rights of Way Warden | The Ramblers Wiltshire                       |
| The Ramblers South Wiltshire           | Trail Riders Fellowship                      |
| N Gallop (applicant and witness)       | G Rasch (landowner and tenant)               |
| Stephen Langdon (tenant)               | Durnford Estate (landowner)                  |
| F Patterson (witness)                  | J Stringer (witness)                         |
| M Hazzard (witness)                    | E Ward (witness)                             |
| J Blanshard Ward (witness)             | J Gallop (witness)                           |
| F Curtis (witness)                     | J Jones (witness)                            |
| L Trehwitt (witness)                   | M Snell (witness)                            |
| J Rasch (witness)                      | N Blackwood (witness)                        |
| J Blackwood (witness)                  | J C Blackwood (witness)                      |
| N Pownall (witness)                    | L Pownall (witness)                          |
| A Wells (witness)                      | Mr J Wells (witness)                         |
| A Watson Wells (witness)               | Mrs J Wells (witness)                        |
| L March (witness)                      | T March (witness)                            |
| J March (witness)                      | S March (witness)                            |
| G Gallop (witness)                     | Great Durnford Properties (former landowner) |
| Julian Properties (former landowner)   | Woodhouse Properties (former landowner)      |

## 10 Consultation Responses

*NB Responses related to all or any of the 4 applicant routes.*

### 10.1 Anthony Wells 11.10.15

*“Further to your letter of 2 October 2015, I have pleasure in confirming*

- I have lived at North Farm House (junction of paths 2, 23 and 10) for over 20 years.*
- From this property immediately bordering bridleway 10 I have observed a steady flow of principally walkers but also horseback riders and some cyclists passing at the bottom of my garden. Since they do not return, I am sure that they use all or some of the 'applicant route' marked A-B on the plan enclosed with your letter.*
- I have used the same applicant route myself to walk my dogs for over 20 years, on average 2-3 times/week and regularly met other users - principally walkers but also horseback riders and some cyclists.*
- I have used this route during the Durnford Estate ownership of Lord Tryon, Mr d'Arcy Irvine and until recently Mr Ross Turner. During this time the estate has been 'policed' by a number of gamekeepers and I have never encountered any sign or word of restriction on my use of the route, until 'No public right of way' signs were erected earlier this year.*

- *I regret that I do not have any evidence to support this other than the statements of those users which have already been supplied to you.*

## 10.2 **Graham Bennett, British Horse Society 18.10.15**

*"I would refer to the recent DMMO submitted in respect of the above. I would confirm that we will, in our capacity as ABO's for the BHS, be taking forward the interests of the BHS on this one and would be grateful if you could arrange to place us on the consultation list and list for general circulation of information.*

*I understand that a s31(6) HA Map and Statement has been deposited for this estate which affects the DMMO. I should be grateful if you could email each of:*

1. *The relevant map and statement*
2. *Evidence of the display by WC of the resulting Notices and copies of the Notices in question following receipt by WC of the application under s31(6) from the Durnford Estate, with confirmation that no objections were received following the resulting display of notices or full details of any objections/representations received with details of any subsequent action taken;*
3. *A copy of the Statutory Declaration first made following submission of the Map and Statement, together with a copy of any subsequent Statutory Declaration that has been submitted as contemplated by s31(6). I have asked for this latter element because, at this stage I do not know when the first statutory Declaration was submitted."*

Officer's note: The s.31(6) deposits made in respect of this land pre-date the statutory requirement to display notices of them. As a result paragraph 2 of Mr Bennett's request is not relevant.

## 10.3 **Stephen Langdon 14.10.15**

*"I am writing in reply to your letter of 02/10/2015 concerning the application to record public footpaths in Great Durnford.*

*Applicant 2015/06 – Mill Race Path is wholly contained in a Meadow of permanent pasture, on which I have been renting the Grazing rights since 1995, from both of the previous owners. This means that I have had cattle in the Meadow from May to September each year, except this year when it was cut for hay.*

*My understanding has always been that there is no Public Right of Way in the Meadow. Point A on the Plan is the entrance to the Meadow, but there has never in that time been a proper gate until this year. The gap has always been closed with two wooden rails, nailed to the posts and with two strands of barbed wire also attached to the posts.*

*The fence between point C and A is a post and rail fence with additional barbed wire, but for at least the last ten years, and possibly longer (except for this year), I have erected an electric fence parallel to the permanent fence, as the occupant of the Mill was concerned that cattle may break the rails and enter his garden. This was an additional barrier to anyone trying to access the Meadow.*

*I am able to state that in all the time I have been Renting the Grazing, I have not met a single person using the proposed footpath, and no person has complained either verbally or in writing, that I am obstructing a right of way.*

*There is still a stile at point C. this was made to give the Fishermen access to the River Bank, but they still had to cross my electric fence to do so.”*

#### **10.4 Julia Wells 15.11.16**

*“Thank you for your letter of 2nd October regarding footpath and bridleways in Great Durnford. I have already filled out forms on this subject but would just like to reiterate that I and my family have been walking and riding horses on the track A to B of Durnford app2015/07 bridleway linking paths 4 and 10 for 20 years and until a few months ago there have never been any signs or obstructions stopping us being there and nor have the game keepers and previous owners of the land ever asked us not to walk there even though they have seen us on the track many times.*

*These are very short tracks linking established bridleways and as there is activity on the established bridleways it is hard to see any good reason why these links should be closed.”*

#### **10.5 Durnford Parish Council 17.11.16**

*“Wildlife and Countryside Act 1981 s.53 with reference to footpaths/bridleway in Great Durnford*

*I refer to your letter of 2 October 2015 re the dispute over footpaths in the parish of Great Durnford.*

*To the best of the Council’s knowledge, all the identified footpaths and bridleway have never been statutory or permissive rights of way. Former landowners have, on occasion, permitted walkers to cross their land. The last two landowners, however, have challenged walkers pointing out they were on private ground.*

*We have no evidence to put forward in this dispute other than verbal submissions by former employees of Great Durnford Estate, who state that none of the queried routes were ever footpaths.*

*The Great Durnford Parish Council are therefore unable to support the application for Orders to record public footpaths and a bridleway in Great Durnford to the definitive map and statement.”*

#### **10.6 David Southey 26.11.15**

*“I have a few comments to be put forward to the Wiltshire Council on the claimed footpaths. As I understand a footpath runs from point A to point B not just to join 2 existing footpaths to make a circuit to walk a dog or bridleway to exercise a horse.*

*All the claimed footpaths & bridleways shown have never been a right of way.*

*Just because the former landowner has given permission for people to cross their land does not mean it is a right to carry on using the path as a right of way.*

*I know that people using these crossings have been challenged by the last 2 landowners & told that they are on private property.*

*Path 21 jubilee hill to cricket ground is a dogwalk link from 2 existing paths.*

*Millrace path goes nowhere just a loop that dog walkers have used.*

*Cricket ground to path 4 is just a link used by walker as a short cut.*

*Bridleway linking paths 4 & 10 this has always been a farm track for farm vehicles to transit around the farm.”*

## 10.7 The Great Durnford Estate 03.03.16

### **“BACKGROUND**

1 On 24 August 2015, Nicholas Gallop made four applications to Wiltshire Council for modification orders to be made to add public footpaths and bridleways to the definitive map and statement of public rights of way, and to upgrade a section of a definitive footpath to a bridleway. These routes run over land owned by Mr and Mrs Turner ("the Landowners") which forms part of The Great Durnford Estate; they are shown on the map in Appendix 1, prepared by the Council, with the reference numbers given to them by the Council. In this report, they will be referred to as the "claimed routes".

2 Notice of the making of the applications was served by the applicant on the Great Durnford Estate Manager as the representative of the Landowners, as a result of which the Landowners began their own investigation into the evidence for the existence of the alleged public rights. The purpose of this report is to (a) make legal submissions that the applicant is not able to rely section 31(1) of the Highways Act 1980, as the proviso to that section is satisfied in favour of the Landowners, and (b) without prejudice to the legal submissions, to present an assessment of this evidence to the Council.

3 The Council has a duty under s53 Wildlife and Countryside Act 1981 (the 1981 Act) to investigate the evidence provided with the applications, and that subsequently discovered by the Council, in order to determine if the rights alleged in the applications exist. If it is decided by the Council that the alleged rights do exist, then it must make one or more modification orders to add these rights to the definitive map and statement.

### **LEGAL CONSIDERATIONS**

4 The evidence supplied by the applicant is solely evidence of use of the claimed routes. It is understood that the Council will be investigating the existence of historical documentary evidence, and the Landowners reserve the right to comment on the findings in due course. However, since it is not currently known if any relevant historical documentary evidence will be found, in this report, in the context of s53 of the 1981 Act, only the requirements of s31 Highways Act 1980 (the 1980 Act), and of common law, which govern the assessment of user evidence, will be considered.

5 The applicant will be relying on s31(1) of the 1980 Act:

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

6 But, that sub-section raises the following questions:

(a) *is the way of such a character that use of it by the public could not give rise at common law to any presumption of dedication?*

(b) *has the way been actually enjoyed by the public as of right and without interruption for a full period of 20 years?*

(c) *is there sufficient evidence that there was no intention during that 20-year period to dedicate the way as a highway?*

7 *Representations are made later in this report in relation to the first two questions. The third question is considered first because the landowners have made deposits and declarations under s31(6) of the 1980 Act, and will rely on these as the sufficient evidence that there was no intention during the 20-year period to dedicate the routes the subject of the application as public highways.*

8 *In relation to the proper meaning of the words in s31(1) “there is sufficient evidence that there was no intention ... to dedicate ...”, the leading decision is that of the House of Lords in R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28, [2008] 1 AC 221. Lord Hoffmann said (para 32):*

*“... ‘intention’ means what the relevant audience, namely users of the way, would reasonably have understood the landowner’s intention to be”.*

*Lord Hoffmann then said (para 33):*

*“[section 31(1)] requires ‘sufficient evidence’ that there was no such intention [to dedicate]. 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 ... the objective acts must be perceptible by the relevant audience”.*

9 *In the same case Lord Hope said (para 57) that:*

*“[the landowner] must take steps to disabuse the public of the belief that the way has been dedicated to public use. ... the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso”.*

10 *Lord Scott, also in the same case, said (para 68) that:*

*“Evidence ‘sufficient’ to displace the statutory deemed conclusion of dedication should at least establish a positive intention”.*

11 *The Landowners say that there is sufficient evidence here that satisfies the tests of proof of contrary intention set out above. s31(6) of the 1980 Act provides a procedure by which a landowner may express his contrary intention to dedicate, as expressly recognised in the Godmanchester case, but as s31 and the decision in the Godmanchester case make clear, there are other, objective, ways of manifesting an intention not to dedicate provided the landowner’s intention is put, in some way, to the notice of the public.*

12 *s31(5) also provides that where an owner of land has displayed a notice indicating an intention not to dedicate a way as a highway, but it is subsequently torn down or defaced, then “a notice given by the owner of the land to the appropriate council that the way is not dedicated as a 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 a highway”.*

13 *s31(6) makes provision for the deposit of maps and statements indicating what ways (if any) over land the landowner admits to have been dedicated as highway, and statutory declarations made by the owner to the effect that no additional way over the delineated land has been dedicated as a highway 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”.*

14 These provisions were considered by Lord Hoffmann in the Godmanchester case as confirmation that notices, maps, statements and statutory declarations, whether under s31(5) or (6) are capable of constituting evidence that a landowner is not intending to dedicate ways. He said (para 34):

*“A well advised defender of rights of way, such as the Ramblers Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner’s intention can come to their attention or not”.*

15 It is also clear, that the steps that a landowner may take to negative the intention to dedicate are not limited to the procedures in s31(5) and (6). In the Godmanchester case, Lord Hope said (para 54):

*“... if there is a challenge, the right of the public to use the way will be taken to have been brought into question as soon as the landowner seeks in the ways the statute mentions to negative the intention to dedicate. The same will be true of other acts, or of some other course of conduct, by which the landowner seeks to exclude the public. The steps which the statute mentions are not to be taken as exhaustive of those that may be taken for this purpose: see the words ‘or otherwise’ at the end of section 31(2). Whatever he does, time will have begun to run against the landowner from the beginning of the period of 20 years calculated backwards from the first such act or from the start of that course of conduct”.*

16 Any of the documents mentioned above, in relation to deposits under section 31(6) of the 1980 Act, sent to the local highway authority would be retained, and members of the public would be permitted to inspect them: see per Lord Neuberger in Godmanchester at para 79. Since the 1 October 2007, local authorities have had a duty to keep a register of documents received under s31(6) of the 1980 Act and to allow public inspection at all reasonable hours: see s 31A of the 1980 Act.

17 It is clear from the opinion of Lord Hope, mentioned above, that the necessary expression of intention not to dedicate is sufficient to end a 20-year period. Lord Hoffman in Godmanchester at para 37 stated in relation to the act of bringing the public’s right to use a route into question: *“I do not say that all acts which count as negating an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under s31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged”* (para 37). These comments were *obiter dicta*, but have been given weight by Inspectors at inquiries (e.g. Order Decision FPS/Q1770/7/80).

18 Lord Hoffmann in Godmanchester said (para 39) that:

*“The [submission of counsel that] the intention not to dedicate had to be continuously manifested ... I do not think that it can possibly be right. The proviso [in s31(1)] negatives the effect of the enjoyment of the right for the period during which there was no intention to dedicate. If that leaves less than 20 years of unrebutted enjoyment, the claim [to public rights of way] fails”.*

Lord Neuberger said (para 90) that:

*“It is conceivable that one day in 20 years would be enough in a particular case, and it even may be the case, I suppose, that it would be enough as a matter of principle ...”.*

19 s31(9) of the 1980 Act specifically preserved the possibility of dedication of public rights of way taking place at common law. The relevant requirements are the dedication of public rights by the landowner and acceptance by the public. Dedication may be express or implied; dedication is

*inferred where the acts of the landowner point to an intention to dedicate. Cogent evidence is needed of any such acts to discharge the burden of proof on those seeking to establish that the rights have been dedicated.*

## **LANDOWNER DEPOSITS AND DECLARATIONS MADE UNDER s31(6) OF THE 1980 ACT**

20 *Three sets of documents prepared under s31(6) of the 1980 Act were sent to the Council by owners of the land crossed by the claimed routes and adjacent land. These were:*

- *4 sets of maps and statements deposited by Julian Properties Corporation, Hobson Properties SA, the Langtry International Trust Company Limited and Langtry Trust Corporation, and Woodhouse Properties Inc; all acknowledged the existence of a number of definitive public rights of way across their respective landholdings and stated that no other ways had been dedicated as highways. Receipt of these documents was acknowledged in a letter dated 6 January 2005 by the Council's Senior Rights of Way Officer, and it was stated in the letter that the documents had been checked and were "in order". No maps and statements were deposited for the land crossed by claimed routes 2015/08 (northern part) and 2015/09*
- *4 statutory declarations made on 24 January 2005, declaring that no additional ways had been dedicated, relating to the maps and statements acknowledged by the Council on 6 January 2005, and giving the date of deposit of the maps and statements as 30 November 2004. No declarations were made for the land crossed by claimed routes 2015/08 (northern part) and 2015/09*
- *5 sets of maps and statements deposited by Julian Properties Corporation, Hobson Properties SA, the Langtry International Trust Company Limited and Langtry Trust Corporation, Great Durnford Properties, and Woodhouse Properties Inc dated 22 July 2010; all acknowledged the existence of a number of definitive public rights of way across their respective landholdings and stated that no other ways had been dedicated as highways. Receipt of these documents was acknowledged by the Council's Definitive Map Technical Support Officer on 11 August 2010, with confirmation that they were "correct". The register of s31(6) documents on the Council's web site includes copies of all these deposits. No subsequent statutory declarations were made. Maps and statements were deposited for all the land over which all the claimed routes run.*

*Copies of these documents are not appended to this report since the originals are in the possession of the Council.*

21 *Without prejudice to any claims that the statements and plans and statutory declarations meet the requirements of s31(6) of the 1980 Act or are otherwise effective, in the event that they are not, the legal position described in paragraphs 8 to 18 above must be recognised. In particular, the documents were unequivocally and positively inconsistent with an intention to dedicate; the submissions of the documents were objective acts, existing and perceptible outside the landowners' consciousness; and Lords Hoffman and Neuberger considered that the s31(6) documents were perceptible by the relevant audience i.e. the users, and were probably effective in bringing the right to use claimed routes into question. In addition, the Council specifically stated that the deposits of the maps and statements in both 2004 and 2010 were "in order" and "correct" and included the 2010 documents in its on-line register of such documents, open to inspection by the public. The 2004 and 2005 statements and plans and statutory declarations were also available for inspection at the Council's offices. The current Landowners and predecessors in title therefore very reasonably concluded that they were protected from public use of the claimed routes being evidence of dedication of public rights.*



*It can therefore be concluded that:*

- the right of the public to use the claimed routes was brought into question on 30 November 2004 (except for 2015/08 northern part and 2015/09) and on 22 July 2010 (all claimed routes), so two 20-year periods of use to be considered under s31 of the 1980 Act are 1984 to 2004 (except for 2015/08 northern part and 2015/09) and 1990 to 2010 (all claimed routes)*
- the landowners provided sufficient evidence of a lack of intention to dedicate new public rights starting on 20 November 2004 (except for 2015/08 northern part and 2015/09) and 22 July 2010 (all claimed routes).*

*22 The Landowners submit that the maps and statements deposited, as described above, were in compliance with, or substantially in compliance with, the requirements from time to time of s31(6) of the 1980 Act. Even if, which is not accepted, there was any infelicity in relation to any of the technical requirements of these deposits, in substance they constituted clear and incontrovertible evidence of the intention of the Landowner not to dedicate as public highways routes over the land concerned not otherwise identified on the maps; this position is fully supported by the decision of the House of Lords in the Godmanchester case.*

*23 The Landowners submit that the aforementioned deposits satisfy the proviso in s31(6), that there is sufficient evidence that there was no intention during the relevant 20-year period to dedicate the routes claimed by the applicant, and that the tests in the Godmanchester case were satisfied.*

*24 Further, and applying the decision in the Godmanchester case, on each occasion in 2004 and 2010, when documents were deposited with the local highway authority and entered into the register kept for the purpose, as the case may be, any rights sought to be claimed by the public were brought into question, and the 20-year period relied on by the applicant stopped running.*

*25 The Landowners say that the proviso in s31(1) of the 1980 Act is satisfied, and no rights of way as claimed by the Applicant can have arisen.*

#### **ASSESSMENT OF THE EVIDENCE FOR THE EXISTENCE OF PUBLIC RIGHTS OVER THE CLAIMED ROUTE 2015/07 (BRIDLEWAY LINKING BRIDLEWAYS 4 AND 10)**

*41 A copy of the map showing the location of this claimed route included in the application for a modification order, and a copy of the map showing the Council officer's interpretation of this route, are in Appendix 5. It should be noted that the depictions of the route on the two maps are not exactly the same: at the northern and southern ends of the section of the claimed route which joins Bridleway 4 and Footpath 8, the Council's map does not include the short forks shown on the applicant's map. Only a very few of the users included both these forks on their maps; generally the users indicated their use only of the more easterly forks, shown on the base map as continuations of the main double-fenced track. It is therefore sensible to consider use of the easterly forks only.*

*42 Photographs of the route taken on 19 November 2015 are included in Appendix 6. Notable comments are (lettered points as on the Council's map):*

- the gate at point A was locked (photo 1)*
- a prohibitory notice was displayed by the side of the track north of point A (photo 2)*
- there was a locked gate just south of the junction of the claimed route with Footpath 8 (photo 4), and there were prohibitory notices on the gate post and by the side of the track south of the gate (photo 5)*
- there were prohibitory notices on the track north of its junction with Footpath 8 (on the ground at the time, photo 8), and south of point B at the junction of the track with Bridleway 10 (photo 9).*

43 The claimed route is of such character that its use could give rise at common law to a presumption of dedication (s31(1)).

44 As discussed above in paragraph 24, the right of the public to use the claimed route was brought into question in 2004 and 2010, so two periods of use to be considered under s31 of the 1980 Act are 1984 to 2004 and 1990 to 2010.

45 The display in April 2015 of the prohibitory notices at various locations on the claimed route (see photos in Appendix 6), and the installation in June 2015 of the locked gates at point A (photo 1) and at the junction of the claimed route with Footpath 8 (photo 5), called the public's right to use the route into question. Another 20-year period of use to be considered is therefore 1995 to 2015.

46 On Boxing Day 2008 a group of five walkers on the claimed route was challenged by the then Landowner and then Estate gamekeeper; the walkers turned round and left the claimed route. This successful challenge was both a calling into question and an act showing to the users a lack of intention to dedicate the route for public use. Another 20-year period of use to be considered is therefore 1988 to 2008.

47 User evidence: the evidence provided by the applicant is assessed in the tables in Appendix 7. For each of the relevant 20-year periods, the numbers of users during those periods were:

#### **Walking:**

1984 to 2004: 2 for the whole of the period; 18 for part of the period - but for 3 years at the start of the this period, only 2 people, of whom one (no. 27) only used the route 6 times a year, and some of this use was on horseback

1988 to 2008: 3 for the whole of the period; 22 for part of the period - but for 2-3 years at the start of this period there were only 3 users (nos. 8, 12 and 27), with most of this use probably being on horseback

1990 to 2010: 5 for the whole of the period; 20 for part of the period

1995 to 2015: 13 for the whole of the period; 14 for part of the period

#### **Cycling:**

1984 to 2004: 1 for the whole of the period; 2 for part of the period

1988 to 2008: 1 for the whole of the period; 2 for part of the period

1990 to 2010: 1 for the whole of the period; 2 for part of the period

1995 to 2015: 3 for the whole of the period; 0 for part of the period

#### **Horse riding:**

1984 to 2004: 2 for the whole of the period; 3 for part of the period

1988 to 2008: 2 for the whole of the period; 3 for part of the period

1990 to 2010: 2 for the whole of the period; 3 for part of the period

1995 to 2015: 3 for the whole of the period; 4 for part of the period

It is disputed by the Landowners that this level of alleged use by the public had taken place, since the employees, tenants and leasees, and their workers, who were frequently near the claimed route, saw only occasional use of the route by members of the public on foot and horseback, and very rarely by cyclists.

48 *It is possible that this amount of walking use, if it indeed took place, is sufficient to raise a presumption of dedication of public rights on foot during the two 20-year periods 1990 to 2010 and 1995 to 2015 over the sections of the claimed route which are not already recognised as public footpath. No presumptions of dedication arose during the 1984 to 2004 and 1988 to 2008 periods.*

49 *The amount of horse riding use, if it took place, is possibly sufficient to raise a presumption of dedication of public rights on horseback during the 1995 to 2015 period, over the whole of the claimed route, but not during the 1984 to 2004, 1988 to 2008, and 1990 to 2010 periods.*

50 *The amount of cycling use on its own is not sufficient to raise any presumption of dedication of public rights on bicycles (if it had, it could be possible for the route to be a public bridleway or a restricted byway, but in the event this does not need further consideration).*

51 *One user, no. 11, stated that she had used the route in a pony trap, but this use is insufficient to raise a presumption of dedication of public rights in non-motorised vehicles.*

52 *However, these possible presumptions of dedication of public rights during the 1990 to 2010 and 1995 to 2015 periods, if they arose, would be rebutted by the evidence of a lack of intention to dedicate new public rights provided on 20 November 2004 and 22 July 2010 by the s31(6) documents discussed above. They are also rebutted by the evidence of a lack of intention to dedicate new public rights provided on 26 December 2008 by the successful challenge to users.*

53 *Two tenancy agreements are also relevant:*

- *a tenancy relating to the section of the claimed route from Footpath 8 north to point B, dated 18 April 2008: this contained a clause requiring the tenant to "prevent any new footpaths or other encroachments or easements from being made in or acquired over any part of the Holding"*
- *a tenancy relating to the section of the claimed route from point A on Bridleway 4 north to Footpath 8, dated 12 July 2013: this contained clauses requiring the tenant to "not permit upon the Holding any campers or gypsies caravans picnicking parties sales advertising signs hoardings or any other non-agricultural use" and "not to assign underlet or part with possession or occupation of the Holding or any part thereof"*

*These agreements add weight to the rebuttal of the allegation that the public use could be evidence of dedication of public rights.*

54 *There have been no acts on the part of any landowner which point to an intention to dedicate public rights, so dedication at common law cannot have taken place.*

### *Conclusion*

55 (a) *It might be alleged that presumptions of dedication of public rights on foot arose during the 1990 to 2010 and 1995 to 2015 periods, and of public rights on horseback during the 1995 to 2015 period. No presumptions arose during the other periods because the amount of public use was insufficient.*

(b) *However, even if these presumptions did arise, which is denied, sufficient evidence of a lack of intention to dedicate public rights to rebut these presumptions has been provided by (i) the documents submitted under s13(6) of the 1980 Act, and (ii) the successful challenge on 26 December 2008.*

56 Therefore, on the balance of probabilities, no event has taken place which could lead to the making of a modification order under s53(3)(b) or s53(c)(ii) of the 1981 Act, and also no reasonable allegation that public rights subsist on the claimed route can be made, so no event has taken place which could lead to the making of a modification order under s53(3)(c)(i) of the 1981 Act. The application should therefore be refused.

## **11.0 Considerations**

### **11.1 Statutory Presumed Dedication – Highways Act 1980 Section 31**

In full 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 1<sup>st</sup> 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*).

## **11.2 The date when use was brought into question**

There appears to be three possible dates for the calling into question of this route (and hence the date before which twenty years use must be considered for the purposes of applying s.31(1) HA80.

- 11.3 **2004** Pursuant to s.31(6) HA80 the landowners (Julian Properties Corporation for the southern leg and part of Durnford 8 and Woodhouse Properties Inc. for the northern leg) deposited plans and statements with Wiltshire Council. In 2005 Statutory Declarations were made to accompany them.
- 2010** Pursuant to s.31(6) HA80 the landowners (Julian Properties Corporation for the southern leg and part of Durnford 8 and Woodhouse Properties Inc.) deposited a plan and statement with Wiltshire Council.
- 2015** New gates and signs saying “Private Property No Right of Way” were erected on the route.
- 2015** This application was made for an Order to record a public bridleway.
- 11.4 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.
- 11.5 However, the deposits at Durnford were not duly made and were not made in strict accordance to the Act. The Act requires that the maps of the land are on a scale of not less than 6 inches to 1 mile (1:10560) but the maps deposited were clearly at a smaller scale despite the fact that the map key claimed them to be 1:6000. Measurements show that they are actually at a scale of 1:12200. The error was repeated when the statutory declaration was made a year later.
- 11.6 Likewise in 2010, maps and statements were deposited with the Council but these maps were at an even smaller scale, the scale on the key had been blacked out by the applicant and they appear to be around 1:25000.
- 11.7 Officers of Wiltshire Council, in 2004, 2005 and 2010, failed to spot this and accepted the deposits as if they were Section 31(6) HA80 compliant. Accordingly the documents were held for public viewing with other s.31(6) deposits and additionally in 2007 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).
- 11.8 It is therefore 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 2004, 2005 or 2010.
- 11.9 Accordingly officers consider that the deposits should be considered to have the same effect as if they were duly made.
- 11.10 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.

- 11.11 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”.
- 11.12 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.”
- 11.13 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.”*
- 11.14 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).”*
- 11.15 It would therefore seem that The Durnford Estate made their deposits because they were a large estate wishing to protect themselves in relation to potential rights of way claims and that regardless of the strict compliance of the deposit, Wiltshire Council treated them exactly in the manner as for duly made deposits and that the public had access to them through routes laid down in the legislation.
- 11.16 The date for calling into question is hence taken as 2004 and the relevant period is 1984 to 2004.

## **12.0 Is there a route or path and did the public use it?**

### **12.1 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”.

- 12.2 The route is very clearly defined and is of such character that its use could give rise to a presumption of dedication.
- 12.3 Although it is noted that the applicant claimed small splays at either end of the southern leg – and that these splays at the Durnford 4 junction are noticeable on aerial photographs witnesses do not appear to have made this distinction and indeed may not have used these ‘short cuts’ over rougher ground defaulting to using the main track instead. Their use would also have been dependent on direction of travel.
- 12.4 In summary: the splays claimed are not supported by evidence of use, only the main track is.

### 12.3 Have the public used the route?

- 12.4 32 people have submitted evidence that they have used the claimed route, or parts of it during the period 1960 to 2015 and have known people who have used it before this time.
- 12.5 Evidence has been submitted of use by walkers, riders, cyclists and someone who drove a horse during this period.
- 12.6 Aerial photographs viewed online (but unable to be reproduced here for copyright reasons) see [http://www.ukaerialphotos.com/viewer.asp?X=413500&Y=138500&name=Great Durnford, Wiltshire&town=Great Durnford, Wiltshire&county=.](http://www.ukaerialphotos.com/viewer.asp?X=413500&Y=138500&name=Great Durnford, Wiltshire&town=Great Durnford, Wiltshire&county=) Show that the claimed route as a track and a distinct landscape feature from 1945 – 1950 onwards.
- 12.7 The application demonstrates that on the balance of probability the public have used the route.

### 13.0 Whether use was for the full period of 20 years

- 13.1 The relevant period 1984 to 2004 has been considered.
- 13.2 During this period a total of 27 people submitted evidence of use for all or part of the claimed route. Of these witnesses 4 people had used the route for the full 20 years. The landowner claims that witness number 2 was employed by and related to a tenant of the land until 1990. Although the UEF does not make this apparent if he was employed by the tenant during this period then his own evidence would be reduced from 20 to 14 years (though his longstanding evidence of seeing others would still stand). Additionally the landowner claims that witness number 10 had only used a part of the route. This is not the case as although her UEF map shows one part of the path in the text in her form she states that she had used the other part of the path (but appears reluctant to claim it because it is field edge). The remaining two, witnesses no 12 and 27 both walked and rode the claimed route for the full period.
- 13.3 20 of the 27 users report seeing other walkers and horse riders using the route between 1984 and 2004. 6 users report seeing cyclists using the route in that period.
- 13.4 8 people rode horses in the period 1984 and 2004 and 3 people rode bicycles during that period.
- 13.5 Census information for Durnford reveals that in 1981 the population was 372, in 1991 405 and in 2001 348. The claimed route is largely served by Great Durnford which although



the largest settlement in Durnford has a population lower than these figures for Durnford show.

- 13.6 The application demonstrates that use occurred during the period 1984 to 2004 though the landowner considers that there is an insufficiency of evidence to raise a presumption of dedication.
- 13.7 The Council is guided by the Planning Inspectorate's Consistency Guidelines (8<sup>th</sup> Revision July 2013 Section 5):

*"Sufficiency*

*There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by 'the 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.)"*

*"It was held in Mann v Brodie 1885 that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area."*

*"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. 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."***

- 13.8 Not only did 27 people use the route in the relevant period, 20 of them reported seeing others walking and riding. Of the four 20 year users all of them saw other walkers and riders during the full period.
- 13.9 Additionally horses leave hoof prints where the ground is soft and cycles leave tyre marks. Horse riders are high on the horizon and readily visible and all users bar 3 considered that the landowner was aware of their use; many had seen vehicles working the fields and had seen other people listed as gamekeeper, estate manager and owner.
- 13.10 In addition to the above, the claimed route forms an easily accessible and logical link in the network, especially for horse riders as it allows them to avoid the main road, adding credibility to the claims that people used the route as they say they did. It is credible that they did so.

13.11 Evidence has clearly been individually given and forms a consistent, cogent body of evidence from a small rural community stretching back a considerable length of time. It is an inevitable fact that the number of people who used the route over 30 years ago in a small community is going to be small but officers feel that on the balance of probability the evidence adduced, and the evidence of what they observed, would be sufficient to satisfy s.31 of the Highways Act 1980 and to raise the presumption of dedication.

#### **14.0 Whether use was interrupted**

14.1 Use was interrupted by the deposit made under s.31(6) HA80 in 2004.

14.2 If this interruption is subsequently found to be insufficient to negative the intention to dedicate then officers consider that the deposit made in 2010 would be insufficient for the same reasons. Use was therefore next interrupted in 2015 by the locking of the gates on the southern leg and the signage on both legs (though not on footpath Durnford 8).

#### **15.0 Whether use was as of right – without secrecy, force or permission**

##### **15.1 Secrecy**

Use has not been in secret. Use has been daily, weekly, monthly and less than monthly from 32 users with evidence of others having been seen (though it is not known whether these people have also submitted UEFs).

##### **15.5 Force**

No users report the need to use force and the way appears to have been open and accessible until being gated in 2015.

##### **15.6 Permission**

One user, witness no 25, reports being challenged once while on horseback and was then given permission to use the claimed route by a previous owner “a few years ago”. No other users claim to have had permission though the landowner raises the possibility of witness no. 2 using the route by implied permission (as an employee of the tenant) up to 1990.

#### **16.0 The intention of the landowners**

The intention of the landowners from 2004 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 statements, maps and statutory declarations made with Wiltshire Council who kept and displayed them in a manner consistent with the requirements of s.31(6) HA80.

16.1 The intention of Mr and Mrs Turner was made even more clear to all users of the path (and not just those who may have looked for s.31(6) HA80 deposits) in 2015 when locked gates and signs were erected.

16.2 The landowner claims that estate staff would always challenge users when they saw them though almost no witnesses record being challenged though do, on occasions refer to passing the time of day or acknowledgement. In the event that all parties have been truthful in their recollections, only a relatively high footfall could explain this.

- 16.3 There are two tenancy agreements which further support the landowner's lack of intention to dedicate public rights. Details have been provided by the current landowner:

*"A tenancy relating to the section of the claimed route from Footpath 8 north to point B, dated 18 April 2008: this contained a clause requiring the tenant to "prevent any new footpaths or other encroachments or easements from being made in or acquired over any part of the Holding."*

*"A tenancy relating to the section of the claimed route from point A on Bridleway 4 north to footpath 8, dated 12 July 2013: this contained clauses requiring the tenant to "not permit upon the Holding any campers or gypsies caravans picnicking parties sales advertising signs hoardings or other non-agricultural use" and "not to assign underlet or part with possession or occupation of the Holding or any part thereof."*

- 16.4 It is noted that the clauses in the tenancy agreements may not be taken into account as an event that called the public use into question. In considering the effect of such a clause in *R (Godmanchester and Drain) v SoSeFRA* [2007] UKHL 28 Lord Hoffman stated at para. 47:

*"I rather doubt whether, even on the principle applied by the Court of Appeal, the clause could be regarded as sufficient. The fact that landlord and tenant have signed a common form agreement containing such a clause says very little about their actual states of mind. But I think that it was wrong in principle to take the tenancy agreement into account, because it would not have been available to users of the right of way. The Yattendon decision must therefore be quashed."*

## **17.0 Subjective belief**

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."*

## **18.0 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 15 of this report.

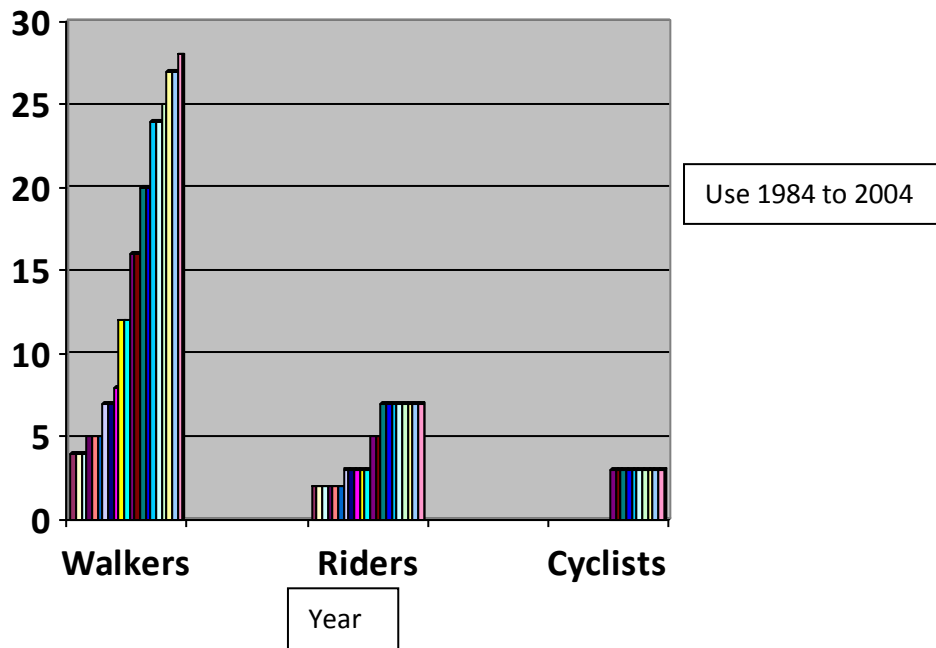
- 18.1 The common law test does not require a period of time to be satisfied (unlike the 20 years specified in s.31 Highways Act 1980) but use would be expected to be of such frequency so as for the owner of the land to be aware of the use and sufficiently used to demonstrate acceptance by the public.
- 18.2 It is clear that since 2004 there has been no act of dedication by the landowner though prior to 2004 the user evidence suggests that there had been acquiescence to public use of the path. The current landowner’s submission identifies challenges to use by estate staff but is non specific about dates beyond the successful challenge to 5 walkers on Boxing Day 2008.
- 18.3 Given the size of Great Durnford a considerable body of evidence of use of the claimed route has been adduced that no landowner would reasonably not have been aware of.
- 18.4 Witness number 1 states that she was shown the claimed route (between Durnford 8 and 10) by an elderly neighbour in 1999. He had called it “the back route to Amesbury” and had drawn a sketch. He had lived in the area all of his life and had walked the path since being a boy. This is supportive of a longstanding assertion by the public of a right.
- 18.5 Additionally it is noted that witness number 11 who has lived in the area since birth (1955) and who has used the path on horseback, walking and driving a pony trap recalls using it in the period 1960 to 1962, then intermittently and then regularly 2011 to 2015. Because of the term ‘intermittently’ in her evidence this witness does not appear in the statistics as it is not possible to say during which years she used it, however, her evidence is also supportive of a longstanding local use of the route.

## **19.0 Conclusions on the statutory test**

- 19.1 To re-cap, Section 31(1) of the Highways Act 1980 states:

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

- 19.2 The way is of such character as to be able to give rise to a presumption of dedication. Public use of the way was interrupted by deposits made with the Council and treated as if they were s.31(6) deposits in 2004 requiring that the public needed to demonstrate that they had used the way ‘as of right’ between the years 1984 and 2004.
- 19.3 There is no evidence of lack of intention to dedicate before the Council for the period 1984 to 2004. Use has been as of right. There is little or no evidence of challenge or permission during this period, in any event, even if estate staff had challenged users on occasion this does not seem to have come to the notice of the substantive body of people using the path. Profiles of use from UEFs are depicted below:



## 20.0 Conclusions on the common law test

It is clear that no dedication at common law has occurred since 2004 since the landowners intention not to dedicate has been clearly made out.

20.1 It is however necessary to consider the period before 2000 when the land was owned by Lord Tryon.

20.2 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 that 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...”*

20.3 It appears that in Durnford, during the time Lord Tryon owned the estate, that there was a greater tolerance to public access. 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.

20.4 It is a possibility that a right was acquired under common law for the period that Lord Tryon owned the land. There is no evidence of signage, deposits (deposits dating back to the 1932 Act have been checked), interruption or challenge for this period and use appears to have taken place alongside the activities of the landowner and his tenants, having the appearance of acquiescence to the public.

20.5 Whilst a dedication at common law remains a possibility, officers consider that the application of s.31 of the Highways Act 1980 is the correct approach for this application.

## **21.0 Legal and financial considerations and risk assessment**

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.

- 21.1 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.
- 21.2 If the Council 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.
- 21.3 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).
- 21.4 There is a risk attached to the Council's interpretation of the effect of the deposits made in 2004 and 2010. If they are subsequently found to have no effect, or perhaps only the 2010 deposit has an effect (owing to the additional requirement to make it available online) then it would be necessary to consider different relevant periods. However, there is a greater amount of evidence for any relevant period from the one considered (1984 – 2004) onwards.

## **22.0 Equality impact**

- 22.1 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.

## **23.0 Relationship to Council's business plan**

- 23.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981.

## **24.0 Safeguarding considerations**

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

## 25.0 Public Health Implications

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

## 26.0 Options to consider

- 26.1
- i) To make an order to record a bridleway under s.53(3)(c)(i) and (ii) of the Wildlife and Countryside Act 1981.
  - ii) To make an order to record a footpath under s.53(3)(c)(i) and (ii) of the Wildlife and Countryside Act 1981.
  - iii) Not make an order under s.53(3)(c)(i) and (ii) of the Wildlife and Countryside Act 1981 and to refuse the application.

## 27.0 Reasons for recommendation .

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. Section 53(3)(c)(ii) of the 1981 Act allows for the alteration of the description of a highway (i.e. the upgrading of a section of Durnford 8 to be recorded as a bridleway).

27.1 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.

27.2 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.

NB – The weaker test of ‘reasonably alleged’ may only apply for those parts of the claimed route affected by sec. 53(3)(c)(i) – that is the previously unrecorded parts. For an Order to be made under sec. 53(3)(c)(ii) to upgrade the section of Durnford 8 from footpath to bridleway the stronger test of ‘balance of probabilities’ must be applied. Only if an Order to record only the unrecorded sections as footpaths were to be made would it be correct to consider only the ‘reasonably alleged’ test.

27.3 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.

- 27.4 The deposited plan and statement made in 2004 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.
- 27.5 This being the case the 20 years period for the application of s.31(1) HA80 is 1984 to 2004 and it is considered that there is no incontrovertible evidence within this period.
- 27.6 The landowner considers that there is a paucity of evidence to support the making of an Order but officers consider that the UEFs form a consistent and cohesive body of evidence demonstrating use of the route by walkers and riders dating back to the 1960s and that in a rural setting like Great Durnford that the levels of use demonstrated and reported on are, on the balance of probabilities, sufficient to satisfy s.31(1) of the Highways Act 1980 on all parts of the claimed route.
- 27.7 The width of claimed route, from the mean of responses is 3.3 metres.

## **28.0 Recommendation**

**That Wiltshire Council makes an Order under s.53(3)(c)(i)(ii) & (iii) of the Wildlife and Countryside Act 1981 to record a public bridleway leading from Durnford 4 to Durnford 8 and from Durnford 8 to Durnford 10 with an upgrade to bridleway of the linking section of Durnford 8. In the event that no objections or representations are received that the Order should be confirmed.**

Sally Madgwick

Rights of Way Officer – definitive map

23 March 2016

**Appendix A** Summary of user evidence