

**DECISION REPORT**  
**WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53**  
**APPLICATION TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND STATEMENT OF**  
**PUBLIC RIGHTS OF WAY – DONHEAD ST ANDREW**

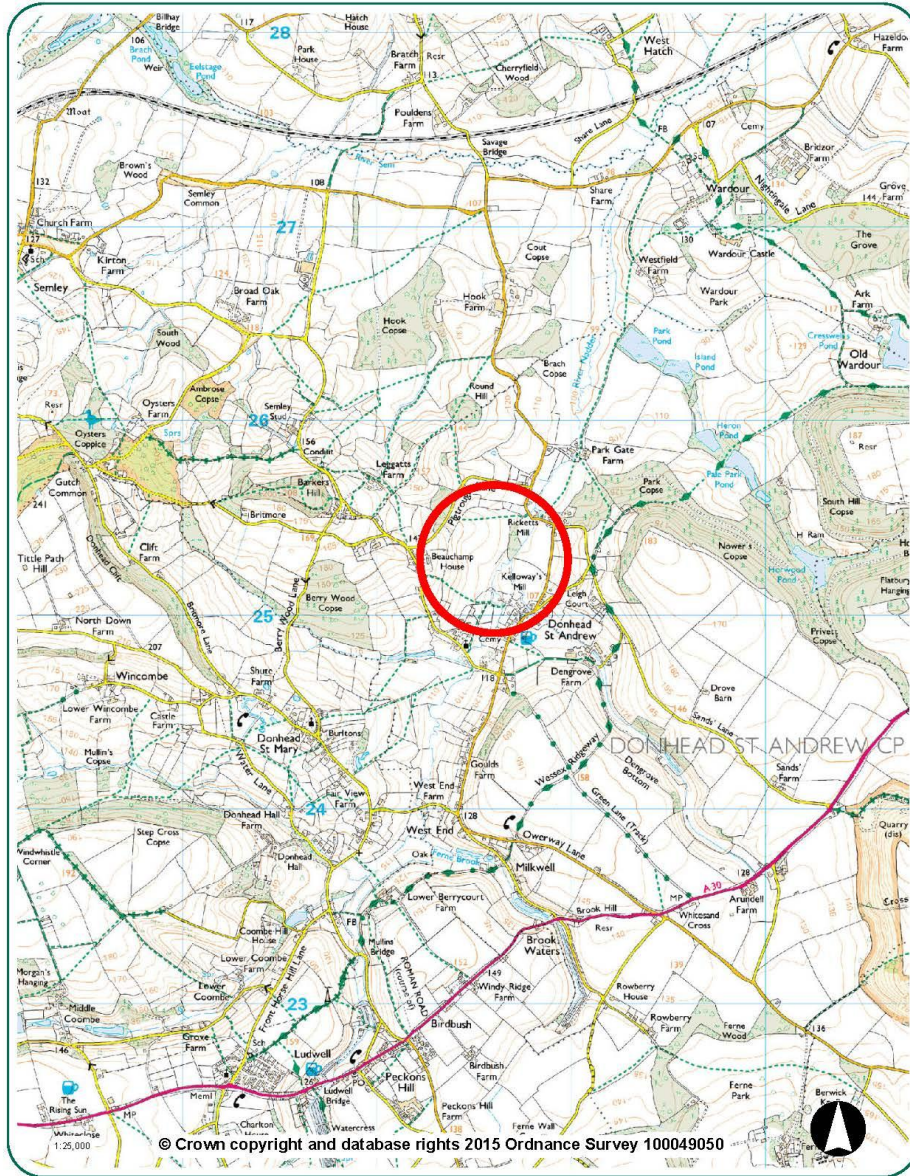
**1. Purpose of Report**

- 1.1. To determine an application made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the parish of Donhead St Andrew.

**2. Relevance to Council's Business Plan**

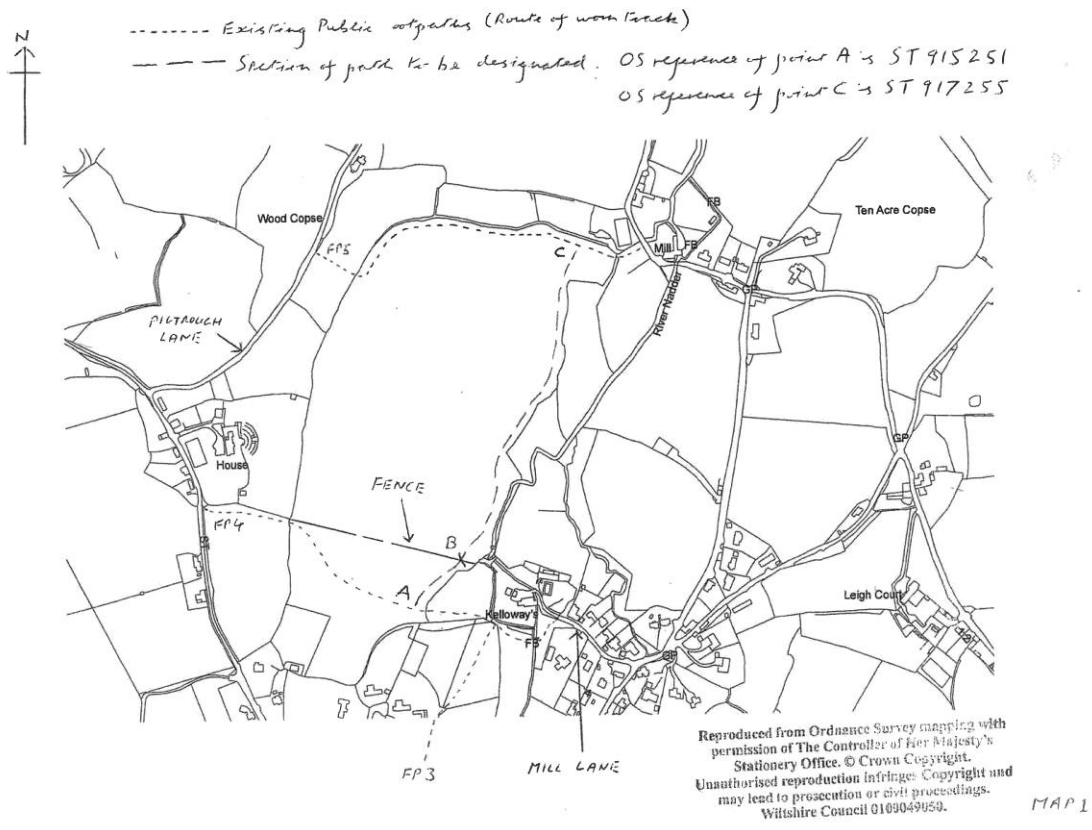
- 2.1. Working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

### 3. Location Plan



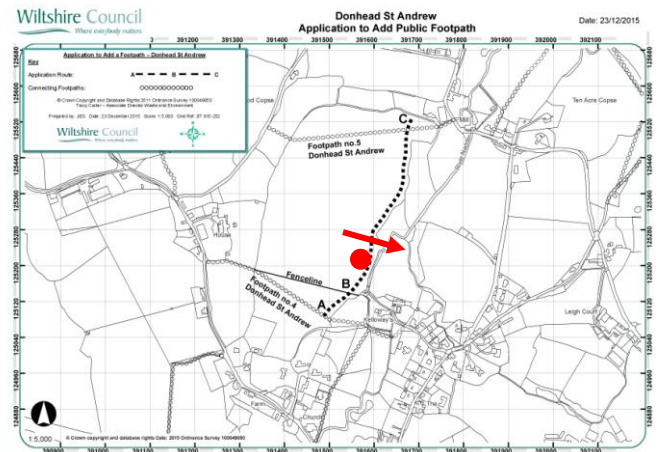
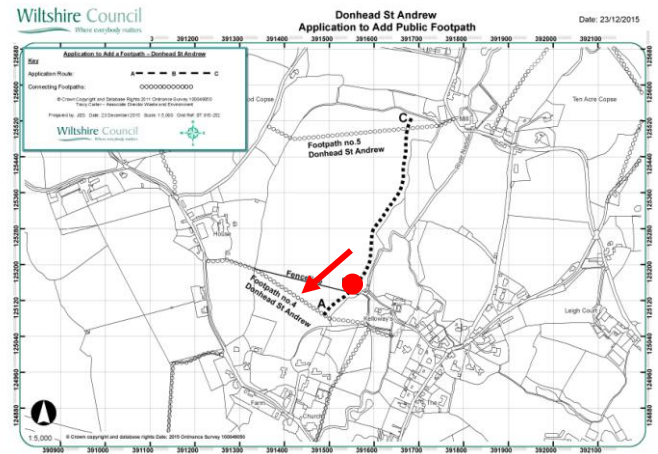
Decision Report: Wildlife and Countryside Act 1981 – Section 53  
Application to add a footpath to the Definitive Map and Statement of Public Rights of Way -  
Donhead St Andrew

#### 4. Claimed Footpath Route

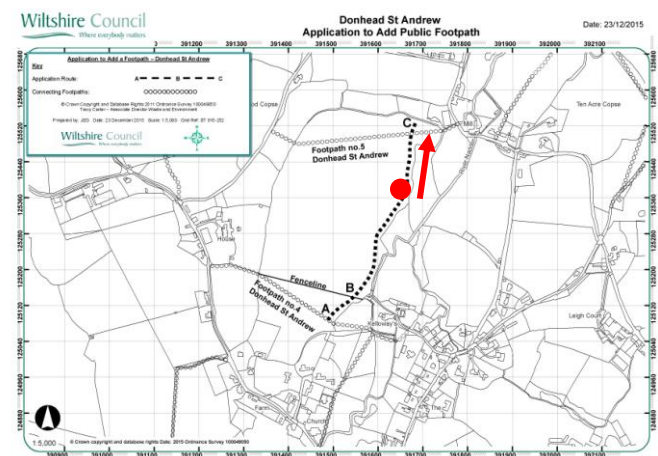
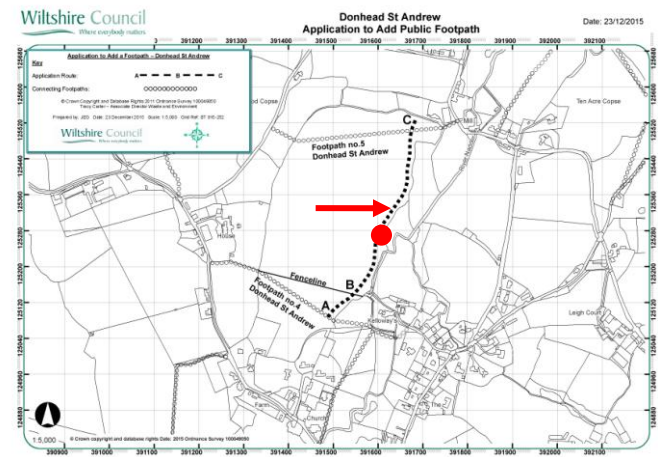
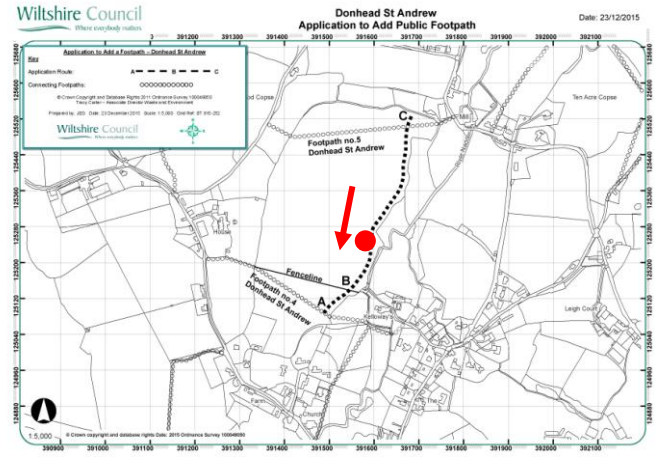


- 4.1. The application is made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way, in the parish of Donhead St Andrew, leading from point A, at its junction with Footpath no.4 Donhead St Andrew, in a generally north-easterly direction, through the fence line via a stile at point B and then continuing to point C, at its junction with Footpath no.5 Donhead St Andrew.

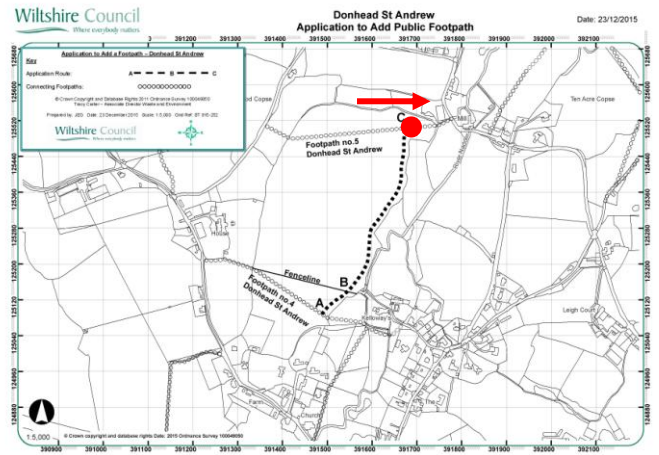
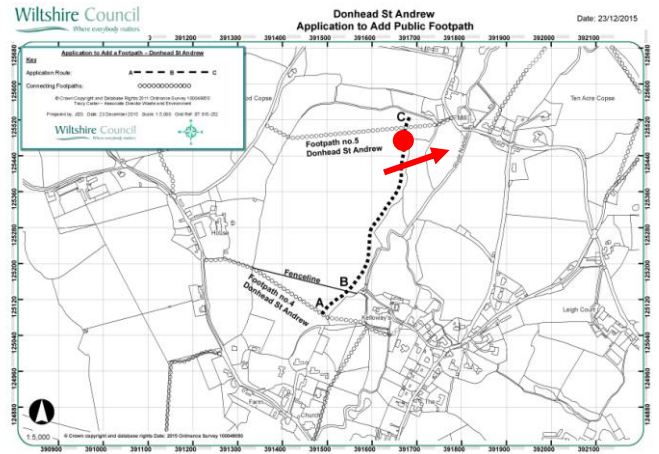
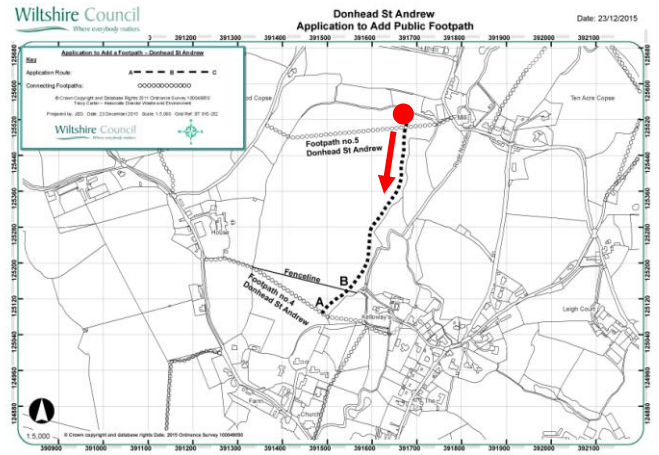
## 5. Photographs



Decision Report: Wildlife and Countryside Act 1981 – Section 53  
 Application to add a footpath to the Definitive Map and Statement of Public Rights of Way -  
 Donhead St Andrew



Decision Report: Wildlife and Countryside Act 1981 – Section 53  
 Application to add a footpath to the Definitive Map and Statement of Public Rights of Way -  
 Donhead St Andrew



Decision Report: Wildlife and Countryside Act 1981 – Section 53  
 Application to add a footpath to the Definitive Map and Statement of Public Rights of Way -  
 Donhead St Andrew

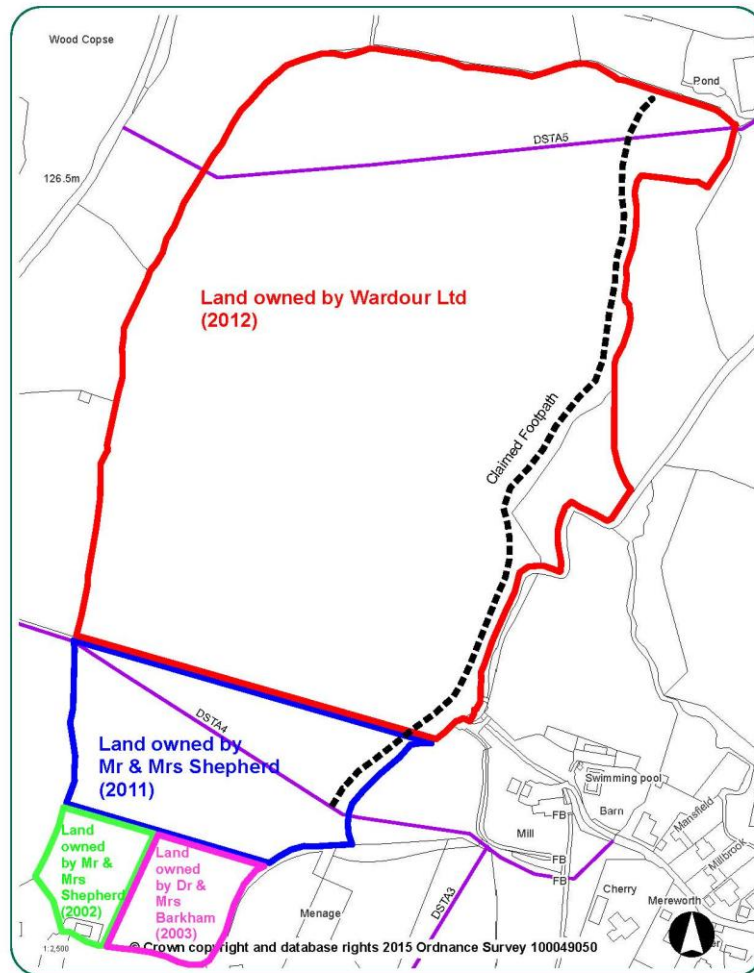
## 6. Registered Landowners

6.1. Mr Marcus Shepherd	Wardour Limited
Hillside House	C/O Mr and Mrs Shaw
Barkers Hill	Beauchamp House
Donhead St Andrew	Donhead St Andrew
Shaftesbury	Shaftesbury
Dorset SP7 9EB	Dorset SP7 9LB

Tenant:

Mrs Margaret Pitman  
Wheelwrights  
Sans Lane  
Donhead St Andrew  
Shaftesbury  
Dorset SP7 9EJ

- 6.2. Mrs Anne Shaw has completed a landowner evidence form dated 10<sup>th</sup> October 2015 on behalf of herself and her husband, duly authorised for and on behalf of Wardour Ltd. She confirms that they have owned Beauchamp House (adjacent to the field over which the claimed the route passes), since January 1993 and the northern section of the affected land since 22<sup>nd</sup> May 2012. She also confirms that the whole of the larger field (known as Mansfield), was previously owned by Mrs Francis Pitman; Mr David Pitman and Mr Gerald Pitman, purchased by them between 1982 and 1984 and being transferred to Mrs Margaret Pitman in June 2011. An area of land in the south-west corner of the field was sold to Mr and Mrs Shepherd in 2002 and in July 2011, Mr and Mrs Shepherd purchased the middle section of the field, south of the present fence line. The south-east corner of the field is now owned by Dr and Mrs Barkham and is not affected by this claim, (please see plan below).



*(Plan showing present land ownership)*

- 6.3. Mr and Mrs Shepherd erected a fence at the boundary of their land in March 2012 and Wardour Ltd purchased the remainder of the field (north of the fence line), on 22<sup>nd</sup> May 2012. The Wardour Ltd land was then leased back to Mrs Margaret Pitman for 5 years on a farm business tenancy.



## 7. **Background**

- 7.1. Wiltshire Council is in receipt of an application made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way, in the parish of Donhead St Andrew. The application is dated 15<sup>th</sup> May 2015 and is made by Donhead St Andrew Parish Council on the grounds that public footpath rights can be reasonably alleged to subsist, or subsist on the balance of probabilities, over the claimed route, based on user evidence and some documentary evidence and should be recorded within the definitive map and statement of public rights of way, as such. The application form (which consists of forms 1 and 3) is accompanied by a plan drawn at a scale of approximately 1:5,000 showing the claimed route; Ordnance Survey 25 inch map extract dated 1901 and 33 completed user evidence forms with maps attached.
- 7.2. The claimed route is located in the parish of Donhead St Andrew which lies between Shaftesbury (Dorset) to the west and Salisbury to the east. The claimed route crosses a field known as Mansfield, to the east of Beauchamp House and forms a link between two recorded footpaths and between two former mills, (Kelloways Mill and a mill formerly known as Ricketts Mill). The claimed route leads generally north-east, following the eastern field boundary, from its junction with Footpath no.4 Donhead St Andrew, through the fence line via a stile and then continuing to its junction with Footpath no.5. The surface of the route is laid to grass.
- 7.3. Wiltshire Council undertook an initial consultation regarding the proposals on 8<sup>th</sup> September 2015. The objections and representations received are summarised at **Appendix 1**, (please note that the responses are available to be viewed in full with the Rights of Way and Countryside Team, Unit 9 Ascot Court, Trowbridge, Wiltshire, BA14 8JN).

## 8. Main Considerations for the Council

8.1. The definitive map and statement of public rights of way are conclusive evidence as to the particulars contained therein, but this is without prejudice to any question whether the public had at that date any right of way other than that right. Wiltshire Council is the Surveying Authority for the County of Wiltshire, (excluding the Borough of Swindon), responsible for the preparation and continuous review of the definitive map and statement of public rights of way.

8.2. In this case the Wildlife and Countryside Act 1981 Section 53(2)(b) applies:

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

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.”*

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

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

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

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

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

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

*“Form of applications*

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

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

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

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

8.7. The application to add a right of way to the definitive map and statement of public rights of way in the parish of Donhead St Andrew, has been correctly made in the prescribed form, being accompanied by a map drawn at a scale of 1:5,000; printed extract from the 1901 25 inch Ordnance Survey map and 33 witness evidence forms.

8.8. Section 31 (as amended) of the Highways Act 1980, refers to the dedication of a way as a highway under statute, 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 a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*
- (4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.*
- (5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a*

*contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.*

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

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

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

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

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

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

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

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

*the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.*

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

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

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

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

*“Evidence of dedication of a way as highway*

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

## 9. Documentary Evidence

- 9.1. As part of Wiltshire Council's investigations, Officers have examined documentary evidence, including the provenance and purpose of the documents to draw conclusions regarding the existence of public rights over the claimed route. Please see list of historical evidence and conclusions in full, attached at **Appendix 2** to this report.
- 9.2. A route corresponding with the location of the northern section of the claimed path is recorded on three maps examined by the Surveying Authority, i.e. the Ordnance Survey (OS) map dated 1896 and drawn at a scale of 1 mile to 6 inches; 1901 OS map drawn at a scale of 1 mile to 25 inches and the 1910 Finance Act map which uses the OS 1901 25 inch map as its base. Ordnance Survey maps are topographical in nature, i.e. they record only what was visible on the ground to the surveyor at the time of survey.
- 9.3. These maps record a route leading between Ricketts Mill to the north and Kelloways Mill to the south, directly linking the two mills, between Footpath no.5 Donhead St Andrew and the former route of Footpath no.4, (which was diverted south of its original line in 1997). The route shown on the maps is on a slightly different line to the claimed path, i.e. the claimed route is closer to the field boundary. The maps do not record the route leading south of Kelloways Mill to its modern day connection to Footpath no.4 (i.e. following the diversion of Footpath no.4). The route is recorded by double broken lines which suggest that the path was open to the field on both sides, the 1901 map shows the route braced as part of the field and labelled "*F.P.*".
- 9.4. The route is not recorded on the 1925 OS 25 inch map, which suggests that at some point between the 1901 map and the 1925 edition, the route was no longer visible on the ground, suggesting that it went out of use. The 1901 and the 1925 maps are based upon the same survey of 1884-1885, the 1925 map being revised in 1924, the exclusion of the claimed route being a physical change to the 1901 map. In evidence, the landowner Mrs Shaw states that "*Mention is made in some Witness Statements*

to the OS Map of 1901...which shows a track between Rickett's Mill and Kelloways Mill. The two Mills were in common ownership at that time and the track was not shown on the OS maps after 1901 (on the 1925 OS Map Kelloway's Mill is shown as disused) suggesting that there was no evidence of any footpath after the mill was closed..." Having considered the documentary evidence available, Officers would agree that this is an entirely plausible explanation for the omission of the claimed route on OS maps after 1901.

- 9.5. Whilst OS maps can provide useful supporting evidence of public rights of way, they cannot be relied upon alone to indicate the public status of a route shown. The Planning Inspectorate publication "*Wildlife and Countryside Act 1981 Definitive Map Orders: Consistency Guidelines*", when considering the evidential weight of OS mapping, quotes Cooke J in *Norfolk County Council v Mason* [2004], who observed that "*Throughout its long history the OS has had a reputation of accuracy and excellence ... It has one major, self-imposed, limitation; it portrays physical features, but it expresses no opinion of public or private rights...*" OS mapping evidence should therefore be carefully considered alongside other documentary evidence and in this case, Officers have viewed no other documentary evidence which would support the existence of the claimed route as a public right of way. The Finance Act map, shows a route as per the 1901 OS base map, drawn at a scale of 25 inches to 1 mile, however there is no additional evidence within the Finance Act documents to support public rights over this route, i.e. the route is not excluded from the shading of plot no.24, it is braced as part of the field and there are no deductions for rights of way recorded over plot no.24. On the balance of probabilities Officers must conclude that the documentary evidence as a whole does not support the existence of public footpath rights over the claimed route.
- 9.6. This does not mean that public rights over the claimed route do not exist and we must now consider the available user evidence in this case.



## 10. User Evidence

- 10.1. Section 31 of the Highways Act 1980 provides for the dedication of a way as highway under statute, presumed where a way over land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. The way is deemed to be dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it as such.

### **Bringing into question**

- 10.2. In order to demonstrate a relevant 20 year user period, as referred to under Section 31 of the Highways Act 1980, there must be a date upon which the use of the path by the public was first brought into question.
- 10.3. In the case of R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA [2007], Lord Hoffman endorses Denning L J's interpretation of bringing into question contained in the case of Fairey v Southampton County Council [1956], and quotes him as follows:

*"I think that in order for the right of the public to have been "brought into question", the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that it may be appraised of the challenge and have reasonable opportunity of meeting it. The landowner can challenge their right, for instance by putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice; the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way; or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way. But whatever the public do, whether they oppose the landowner's action or not, their right is "brought into question" as soon as the landowner puts up a notice or in*

*some way makes it clear to the public that he is challenging their right to use the way.”*

10.4. In Godmanchester, Lord Hoffman says of Denning L J's interpretation:

*“As a statement of what amounts to bringing the right into question, it has always been treated as authoritative and was applied by the inspectors and the Court of Appeal in these cases.”*

10.5. In the Donhead St Andrew case, 20 of the 33 witnesses stopped using the claimed route in 2014. Additionally Mrs Louise Saunders' use of the route ended in 2013 or 2014 and Mr and Mrs York stopped using the path regularly in 2012 and ceased use altogether in 2014. The evidence suggests that in late 2014 / early 2015, temporary closure notices appeared on the claimed route when a large sinkhole appeared close to the path, although 8 of the witnesses appear to have continued using the route up until the date of the claim in 2015.

10.6. Officers also note that some witnesses refer to a fence being installed across the path, with a stile (and dog latch as evidenced by Mr and Mrs Barkham and Miss Saint and which can be seen in the photograph included at 5). Mrs Clark; Mrs Collyer and Miss Maxwell-Arnot refer to changing their route because of the stile being put in a new location and not on the route formerly used. Mrs Collyer and Miss Maxwell-Arnot confirm that the stile was inserted much closer to the eastern boundary of the field, Miss Maxwell-Arnot suggests *“in a swampy part”* of the field. Mrs Saunders and Mr York make reference to being restricted by the new stile and Mrs Saunders confirms that where the public were forced to cross the fence at just one pinch-point, it became rather muddy. Mr York confirms that the route became a single track path at the stile, where it had been wide enough for two people to walk side by side.

10.7. Mrs Shaw on behalf of Wardour Ltd, confirms that the fence was erected in March 2012, prior to Wardour Ltd's purchase of the northern section of the field in May 2012. This concurs with the user evidence which suggests that the fence and stile

were added in around 2012/2013. In R v SSETR ex parte Dorset County Council 1999, Dyson J's interpretation of the Fairey judgement is that:

*“Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as highway.”*

Also in Applegarth v Secretary of State for the Environment Transport and the Regions, 2001 High Court judgement, Mr Justice Munby states:

*“It will be noted that section 31(2) [Highways Act 1980] places no limit at all on the circumstances in which the public's rights may “otherwise”, that is, otherwise than by an owner's notice under section 31(3), be brought into question. Whilst as Mr Bedford accepts, the words must be read in their context (a context which includes the remainder of section 31(2)), there is, in my judgment, absolutely no warrant for construing these very wide words - “or otherwise” – as meaning anything other than what they say or, in particular, as being limited to acts or things done by the owner. Whether someone has “brought into question” the “right of the public to use the way” is, as it seems to me, a question of fact and degree in every case...”*

- 10.8. In a telephone conversation with Miss Maxwell Arnot (7<sup>th</sup> July 2016), she confirms that the installation of the stile, moved the route traditionally used further towards the river perhaps 3-4 ft, the route was now much straighter and had never been so close the boundary. Given the accuracy of the definitive map it is considered that the relocation of the stile 3-4 ft to the east is de-minimus for the purposes of recording a route on the definitive map. Therefore, Officers consider that the fencing of the claimed route, with the inclusion of a stile and dog latch, to the east of the used route as a slight deviation, does not bring the publics' use of the route into question. In fact in this case the erection of the stile had the opposite effect of bringing the publics' right to use the way in question, particularly where provision is made for users with dogs. In his evidence Mr John Graham confirms that after the stile was erected, the number of users increased. Mr and Mrs Collyer confirm that when the Mansfield was

divided by a fence, a stile was incorporated into the fence "...allowing us to continue to use the path between DSTA4 and DSTA5..." It would appear that users did not consider this action by the landowner as a challenge to their right to use the path; they were not prevented from using the path and the evidence shows that they continued to use the route after 2012, (please see witness evidence chart at 10.15).

- 10.9. Mrs Shaw, in her landowner evidence, has provided a copy of a permissive footpath sign which was erected on the claimed route over the Wardour Ltd land in Autumn 2012 and January 2013, which stated "*The footpath shown in blue on the plan below is a permissive footpath only. Please note that this path may be closed on some days. It is not intended that this path should be dedicated as a public right of way. Please keep to the route shown on the plan.*" This notice clearly shows the "permissive footpath" and was erected close to the stile added by Mr Shepherd earlier in 2012 and at the northern end of the claimed route, where it begins to follow the field boundary leading south at the edge of the woodland. Permissive path waymarkers were also placed on the stile on Footpath no.5 where it exits the Mansfield at the north-east corner of the field and on the stile erected by Mr Shepherd in the new fence line. Mrs Shaw has provided photographic evidence of these notices and waymarkers on site.
- 10.10. These notices and waymarkers were erected only upon the land in the ownership of Wardour Ltd and not on the section of the claimed route in the southern part of the field owned by Mr and Mrs Shepherd. Whilst the map attached to the notices records the whole of the claimed route, including that section of the route on Mr and Mrs Shepherd's land, it is not considered that Mr and Mrs Shaw would be entitled to grant a permissive route over Mr and Mrs Shepherd's land, however public user after the notices were erected was not qualifying user "as of right" over the whole of the claimed path as users of the route leading from the south, i.e. from Footpath 4 could continue no further "as of right" on the claimed route once they passed the fence. The termination point of the southern section of the path at the fence line is not a place of popular resort which the public would legitimately wish to reach using a cul-de-sac route (by which they would have to return using the same route which they

had already used), unless they continued northwards on the permissive route to link with another public highway, i.e. Footpath no.5.

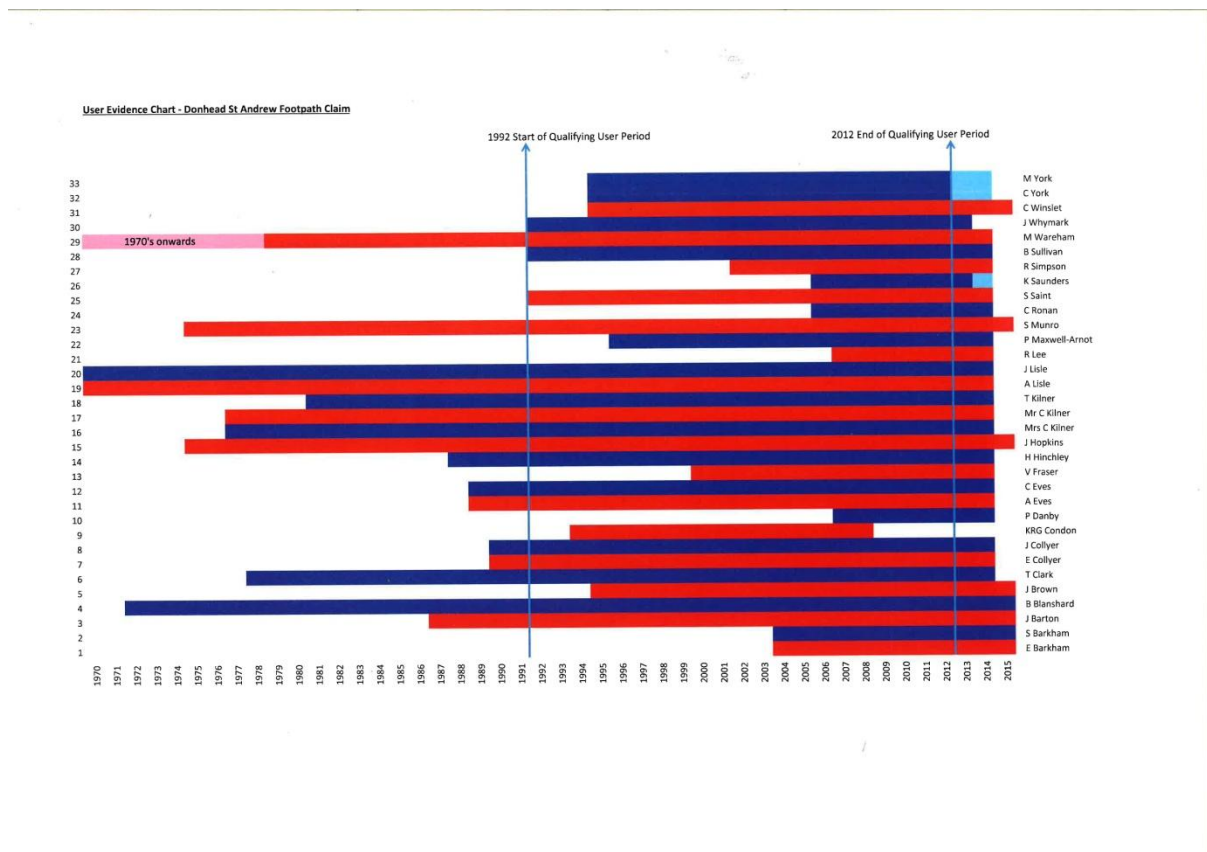
- 10.11. The permissive path notices and waymarkers erected on site, had the effect of bringing to the public's attention that it was not the intention of the landowners to dedicate the route as a public footpath and that their use of the path following the erection of the signs, was only with the permission of the landowners and as such after that date public user was not "as of right". Therefore, public use after Autumn 2012 is not qualifying user, even where 32 of the witnesses continued to use the route after 2012.
- 10.12. Additionally on 8<sup>th</sup> August 2012, Mrs Shaw on behalf of Wardour Ltd, deposited with Wiltshire Council a statement and map under Section 31(6) of the Highways Act 1980, including that part of the Mansfield in Wardour Ltd's ownership, followed by a statutory declaration under the same legislation, dated 14<sup>th</sup> August 2012. Under Section 31(6) of the 1980 Act, it is possible for landowners to deposit such statements and declarations with accompanying maps, with the Authority to the effect that no additional ways over the land shown on the map, (other than any specifically indicated in the declaration), have been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration. They 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. The claimed route is not shown on this map. The deposition of the plan and statement appear to pre-date the erection of the permissive path notices in Autumn 2012 and January 2013 and therefore the deposit under Section 31(6) of the Highways Act 1980, serves to end public use of the use "as of right" on the whole of the claimed route.
- 10.13. Mrs Shaw has also submitted a CA16 form for deposits under Section 31(6) of the Highways Act 1980 and Section 15A(1) of the Commons Act 2006, dated 22<sup>nd</sup> July 2015. This has the same effect as the deposit made under Section 31(6) of the Highways Act 1980 in 2012 and also from that date (2015), forms an interruption in

use of the land by the inhabitants of any locality or neighbourhood within a locality, for lawful sports and pastimes, therefore protecting the landowner against town and village green claims over the land in question.

10.14. In conclusion, the relevant public user period over the whole of the claimed route should be calculated from 8<sup>th</sup> August 2012, when a statutory declaration and map were deposited with Wiltshire Council under Section 31(6) of the Highways Act 1980. The user period in question is therefore 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012.

## Twenty Year User

10.15. Please see chart below which shows the level of user outlined within the 33 witness evidence forms:



10.16. For the period of user in question, i.e. 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012, of the 33 user evidence forms submitted, all witnesses have used the route during this time period and 19 have used the route for the full 20 year period.

10.17. In addition to their own use, witnesses refer to seeing others using the route:

User	Others seen	User	Others seen
1	Yes - walking	18	Yes – walking
2	Yes - walking	19	Yes – walking
3	Yes – walking	20	Yes, others were walking
4	Sometimes - walking	21	Yes – walking
5	Walker	22	Yes, always walking
6	Yes – walking / running	23	Yes – walking
7	Yes, often and always walking	24	Yes – also walking
8	Yes, frequently and always walking	25	Yes – walking
9	Yes, walking – individuals, groups of Ramblers	26	Yes, lots of other walkers
10	Yes – walking	27	Yes – walking
11	Yes – walking	28	Yes, also walking
12	Yes – walking	29	Yes – walking
13	Yes many people walking	30	Yes – walking
14	Other walkers	31	Yes, often – always walking
15	Not on this occasion	32	Yes – regular dog walkers
16	Yes – lots of others walking. In fact we all used to walk the whole circuit of the field.	33	Yes – always walking, often with dogs
17	Yes – walking		

10.18. Additionally, within the letters received at the initial consultation, Mr Tom Kilner; Mr and Mrs Barkham and Mr Wareham refer to their use of the path with family members.

10.19. There is no statutory minimum level of user required to raise the presumption of dedication. The quality of the evidence, i.e. its honesty, accuracy, credibility and

consistency, is of much greater importance than the number of witnesses. In *R (Lewis) v Redcar and Clevedon Borough Council* UKSC 11 (3<sup>rd</sup> March 2010), a Town and Village Green registration case, Lord Walker refers to Mr Laurence QC, who:

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

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

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

10.20. Mrs Shaw confirms that she and her husband have owned Beauchamp House adjacent to the Mansfield since 1993. The field and the claimed footpath can be seen from Beauchamp House and Mrs Shaw confirms in her landowner evidence form that she was aware of use by the public, adding that from 1993, use of the path was virtually non-existent, rising to occasional use in 2003 and increasing to several times per day in 2015, the relevant user period in this case being 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012.

10.21. Mr David Pitman and his family owned the land from approximately 1982-84 onwards until Mr and Mrs Shepherd and Wardour Ltd took ownership of the land in 2011 and 2012 respectively. In his statutory declaration Mr David Pitman confirms that in the first 20 years or so of their ownership of the field, there was hardly any public use, however in about 2003 public use generally began to increase noticeably. Therefore, if the public have really been using the field other than the public footpaths, it will only have been in the last 12 years or so that they have done so. In their statutory



declarations, Mr Hugh Graham; Mr John Graham; Mrs Claire MacDonald; Mrs Margaret Pitman; Mr Christopher Long and Mrs Janet Long, agree that public use of the claimed route began between 2002 and 2005, therefore public user of only 12 years or so can be shown. Mrs Margaret Pitman also confirms that during her husband's ownership of the land she did not see others using the claimed route and she herself did not use the route. When she owned the land for a short period in 2011-12, she only ever saw the odd dog walker. In conversation with Mrs Margaret Pitman, she confirms that she may not have seen users during her family's or her own period of ownership, as they may have used the path at different times to her own use of the land, perhaps early in the morning.

10.22. The witness evidence chart (see 10.15) does show a greater concentration of use from around 2004 onwards, but from the witness evidence provided, there is still a significant amount of use at the start of the user period in question, i.e. from 1992.

10.23. In further evidence Mr Tom Kilner confirms that he was born in the village in 1981 and lived there until 2000 and now frequently visits. During those 34 years he has frequently walked the path along with many other dog walkers and ramblers. Mr and Mrs C Kilner confirm that they have used the path fairly frequently since they moved to Pigtrough Lane in 1977, at which time the path was well known and well used. They are supporting the claim based on the historical mapping evidence and their own experience of using the path for more than 35 years. Mr Roy Powell confirms that he used the claimed path as early as 1953 as a child to walk to school from Pigtrough Lane every day and on Sundays to go to church. Mr Richard Lee who has lived in the parish for over 31 years and knows the village and the surrounding area well, submits that it is very probable that this route has been used by the public for over 100 years, given the 1900 OS mapping. Mr and Mrs C Eves have used the claimed route as a footpath for over 26 years. Mr Wareham confirms that as a child living in the area they would often walk from the church along the path to visit friends at Thorn House. His mother is now 70 and attended school and the church as did her brother and sisters and recalls using the path many times.

10.24. The frequency of user suggests a well used route:

User	Frequency of use	User	Frequency of use
1	Daily	18	Monthly
2	3-4 times per week	19	Twice a year
3	Daily	20	3-4 times per year
4	24-30 times a year	21	5-6 times a week
5	Weekly in summer	22	About twice a week
6	1978-1996 – 2-3 times weekly, 1996-2014 – 4 times per year	23	6 times a year
7	Approx 1-2 times a month	24	Daily
8	Variable often weekly in summer, much less in winter	25	2/3 times per week
9	Fortnightly	26	About 5 times a week
10	Weekly	27	Daily
11	Up to 5 times a week	28	5-8 times per year
12	1989-2000 once a month, 2000-2014 1 to 5 times a week	29	2-3 times a week
13	Once a week until mud by stile became impossible	30	4-5 times a year
14	Daily until August 2013, approx weekly after that	31	30-40 times a year
15	Twice a week	32	In nice weather almost daily
16	Certainly once or twice a week	33	4/5 times weekly but not in winter – certain areas too muddy
17	About 10 times a year		

10.25. A number of users continued to use the route after 2012, but it appears that use after that date was not qualifying user “as of right”, where the new landowner Mrs Shaw had lodged with Wiltshire Council (on behalf of Wardour Ltd) a map and statement under Section 31(6) of the Highways Act 1980, indicating their non-intention to dedicate the route as a public highway (8<sup>th</sup> August 2012), followed up by the erection of “permissive path” notices and waymarkers later that year.

10.26. 26 of the 33 witnesses are residents of Donhead St Andrew, however use wholly or largely by local people may be sufficient to show use by the public. The Planning Inspectorate Consistency Guidelines make reference to R v Southampton (Inhabitants) 1887, in which Coleridge L J stated that:

*“user by the public must not be taken in its widest sense...for it is common knowledge that in many cases only local residents ever use a particular road or bridge.”*

10.27. The landowner has provided a great deal of evidence, including statutory declarations, to the effect that the public have only used the route since the early 2000's and Officers would agree, looking at the witness evidence chart (please see 10.15), that there is a concentration of use around this time, however there is also a large amount of public user evidence before this date. On balance, Officers consider that it is more likely than not that the public have been using the route for a full period of 20 years, up until 8<sup>th</sup> August 2012.

### **As of Right**

10.28. In order to establish a public right of way, public use must be “as of right”, i.e. without force, without secrecy and without permission.

### **Without force**

10.29. Use by force could include the breaking of locks, cutting of wire or passing over, through and around an intentional blockage such as a gate.

10.30. In the Donhead St Andrew case, there is no evidence before the Surveying Authority to suggest that public use of the claimed route, was by force. Officers consider that it was necessary for the public to use force to enter the land, where there was free access to the claimed route from the existing public highways, Footpath no.4 and

Footpath no.5 Donhead St Andrew and there is no evidence of obstructions on the route.

10.31. Use by force does not include only physical force, but may also apply where use is deemed contentious, for example by erecting prohibitory signs or notices in relation to the use in question. In the Supreme Court Judgement R (on the application of Lewis) (Appellant) v Redcar and Cleveland Borough Council and Another (Respondents) (2010), Lord Rodger commented that:

*“The opposite of “peaceable” user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is “vi” only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant context vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner has told him not to do it. In those circumstances what he did was done vi.”*

10.32. In the Donhead St Andrew case, there is no evidence that prohibitory notices were erected prior to those erected in 2014, closing the footpath over the land in the ownership of Wardour Ltd, however this was outside the relevant user period of 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012. Public use does not appear to have been contentious and therefore use is not by force, (the permissive path notices erected in 2012 allowed the public to continue using the route but with the permission of the landowner and they were, in any case, erected outside the relevant user period).

### **Without secrecy**

10.33. It would appear that witnesses used the route in an open manner, without secrecy and in a manner in which a person rightfully entitled to do so would do:

User	Do you believe the owner or occupier was aware of the public using the way
1	Yes, it was a well worn path with local people using it every day which the current owners

	would have been aware of before acquiring the field.
2	Yes, because there are people walking it daily, there is a well worn track, a stile is provided together with a dog slot and recently notices have appeared saying that it is now closed.
3	Yes, because Mrs Shaw saw people on the path and the wear on the ground.
4	Yes.
5	Yes.
6	Yes, well used – we frequently met two or more other users / groups of users. Probably visible from Beauchamp House.
7	Yes, the previous owners farmed the land and often saw me walking the path. The present owners can see the path from their house and must know the path was well used.
8	Yes, the field changed ownership a couple of years ago, the previous owner which farmed the land regularly saw people walking across the field.
9	Yes, because it was a well known footpath and many people in the village used it.
10	Yes, because any search should have picked up that this is a public footpath.
11	Yes, they agreed to a stile being erected between their land and that owned by M Shepherd.
12	Yes, they had erected signs at (b) and (c) referring to the footpath as a permissive path.
13	I assume yes as they bought the house knowing there were rights of way round the field that had always been used by the village.
14	Yes, on several occasions I stood in my paddock with Mr G Pitman watching people using the path.
15	Yes, because there is a clear worn path which has been used during the 40 years I have lived in the village.
16	Yes, all through the years we have lived here, the route has been used frequently and publicly by many people in the village. The field is visible from all around, so the owner would have seen them using it.
17	Yes, this is a well known footpath being part of the route linking Mill Lane and Footpaths 3 and 4 to Footpath 5 and Pigtrough Lane.
18	Yes, because the public have used it for my entire lifetime and the stiles were always maintained.
19	Yes, well used footpath over many years.
20	Yes, a frequently used footpath for very many years.
21	Yes, the owner occasionally visits the area and will probably have seen people using it.
22	Yes, Gerald Pitman who owned the land when I moved to the village allowed everyone to

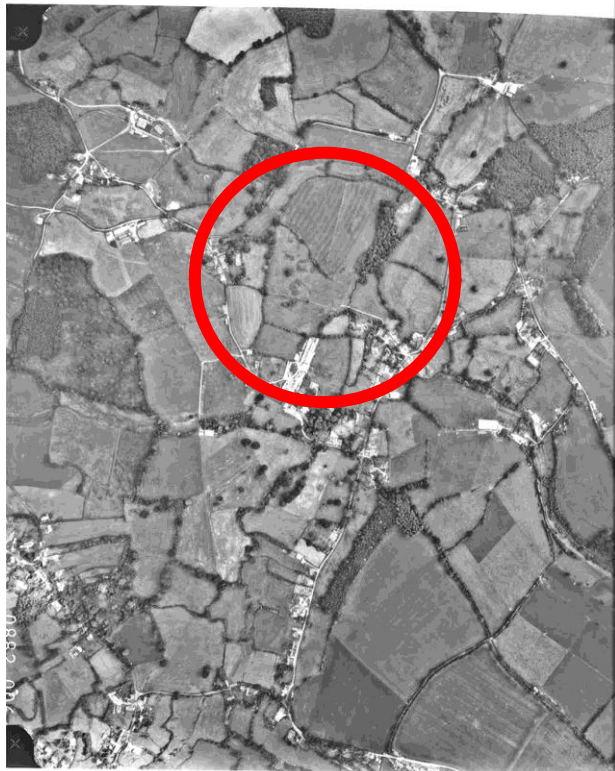
	walk in this field both at the top near Beauchamp House and the bottom from Donhead Mill to Kelloways Mill.
23	Yes, clear worn path and people walking on it regularly.
24	Yes, the footpath had been used by residents of Donhead St Andrew for many years.
25	Yes, when a new fence was constructed, a stile was put in with dog shutter. Use of the footpath continued as normal.
26	Don't know, I would be surprised if they were unaware of it as it was so regularly used, but they are not in residence very often I understand.
27	Yes, clear line of sight by owner to footpath.
28	Yes, we were visible to anybody in residence.
29	Yes, frequent use by walkers.
30	Yes, before the present owner. People frequently observed to be walking it.
31	Yes, it is such a popular (although not over used) route for recreation (including owl watching) and dog walking, it is inconceivable that the owner didn't know.
32	Yes, could be seen from house or by their gardener.
33	Yes, at the meetings mentioned at 11 above we were told that the owner was aware and that walkers were not keeping exactly to the prescribed path.

10.34. 32 of the 33 witnesses believe that the landowners were aware of use of the path.

The witnesses claim that there is a well worn path and that the route can be seen from the landowners' residence (Beauchamp House). Mrs Shaw in her evidence appears to have been aware of public use in the relevant user period 1992 – 2012, albeit virtually non-existent until 2003. Witnesses claim that the provision of a stile in the new fencing erected in 2012, suggests that the landowners were aware of use. Mr Michael York confirms that as a Parish Councillor he was involved in meetings dated 10<sup>th</sup> December 2014 with the landowners' Solicitor and 31<sup>st</sup> January 2015 with the Landowner; the Chair of the Parish Council and the Clerk, to facilitate the opening of the now closed permissive path. At these meetings they were told that the owner was aware of the use and that walkers were not keeping exactly to the prescribed path, (however this is outside the relevant user period of 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012).

10.35. The objectors claim that there is no evidence of public use of the path on the ground. Mrs Shaw suggests that if a path had been apparent on the ground, one would expect it to remain on OS maps after 1901 and to be claimed under the 1949 National Parks and Access to the Countryside Act and included within the definitive map and statement of public rights of way. She viewed aerial photographs of the area from the 1990's, in March 2012, which did not show any evidence of a trodden path along the eastern edge of the field at that time. Mr David Pitman; Mr John Barton; Mr Hugh Graham; Mr John Graham; Mrs Claire MacDonald; Mrs Margaret Pitman; Mr Christopher Long and Mrs Janet Long, in evidence, acknowledge the existence of Footpath no's 4 and 5 Donhead St Andrew, as recorded on the definitive map of public rights of way, but claim that there was no other obvious or trodden footpath at the eastern edge of the land when they first knew the land. The objectors seem to concur that there was no physical evidence of the footpath on the ground, until they first noticed the public using the route in around 2002-5.

10.36. Aerial photographs examined by Officers, dated 1982; 1991; 2001 and 2005/06 (two of them within the relevant user period) are inconclusive as they do not appear to record a well worn footpath route at the eastern edge of the Mansfield:



Aerial photograph 1982



Aerial photograph 1991

Decision Report: Wildlife and Countryside Act 1981 – Section 53  
Application to add a footpath to the Definitive Map and Statement of Public Rights of Way -  
Donhead St Andrew





10.37. None of the users claim to have been challenged whilst using the path until recently. Mr and Mrs Collyer state with reference to the diversion of Footpath no.4 in 1996/97: *“...At no point, either before or after the changes that occurred to path DSTA4 in 1996/97, were we challenged with regard to our use of this path...”* Mr and Mrs Barkham were approached in autumn 2014 by a man claiming to be the brother of the owner of the field, who told them that the footpath was closed due to a sinkhole; Mr Barton was recently told by Mrs Shaw that the way was not public (evidence form dated 2015); Miss Maxwell-Arnot advises that only after the permissive path was introduced did she hear of people being stopped when they closed the path due to subsidence and Miss Whymark was never told it was not public until recently when the present owner told the Parish Council that it was not public. Additionally, one of the witnesses makes reference to the permissive path signs being a challenge to their use and 3 witnesses refer to the path closure signs forming a challenge to their use.

10.38. In the statutory declaration provided by Mr David Pitman, he states that *“We told people who asked where the public footpaths were...”*, however there is no further evidence that the Pitman’s challenged users and no specific incidents of challenge are referred to, i.e. times and dates; how individuals were using the land at the time of challenge and the individuals involved.

10.39. In the Sunningwell case, Lord Hoffman states that the use must have been open and in a manner that a person rightfully entitled to do so would have used it, that is not with secrecy. He observes that Lord Blackburn in discussing the dedication of a highway in Mann v Brodie [1885]:

*“...is concerning himself, as the English theory required with how the matter would have appeared to the owner of the land. The user by the public must have been, as Parke B said in relation to private rights of way in Bright v Walker 1 CM and R211, 219, ‘openly and in a matter that a person rightfully entitled would have used it.’ The presumption arises, as Fry J said of prescription generally in Dalton v Angus and Co App Cass 770, 773, from acquiescence.”*

10.40. Such use would allow the landowner the opportunity to challenge the use, should they wish to do so. The witness evidence suggests that on the balance of probabilities, the past and present landowners were aware of use of the route by the public. Mrs Shaw has challenged the public user immediately upon taking ownership of the land in 2012, by erecting permissive path signs, granting permission to certain individuals and to other individuals on behalf of the village and by depositing with Wiltshire Council a statement and plan under Section 31(6) of the Highways Act 1980. However, it would appear that the previous landowners and the present owners of land over which the southern section of the route passes, have not undertaken any actions to challenge public user. On the evidence before the Council it would appear that any challenge to public use of the path was recent in date and outside the relevant user period of 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012.

### **Without permission**

10.41. Use “as of right” was discussed in the Town / Village Green Registration case of R (on the application of Barkas) v North Yorkshire County Council and Another, Supreme Court, 21<sup>st</sup> May 2014. The leading judgement was given by Lord Neuberger, who sets out the legal meaning of the expression “as of right”:

*“...the legal meaning of the expression “as of right” is, somewhat counterintuitively, almost the converse of “of right” or “by right”. Thus, if a person uses privately owned land “of right” or “by right”, the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is “as of right”, it is without the permission of the landowner, and therefore is not “of right” or “by right”, but is actually carried on as if it were by right – hence “as of right”.”*

10.42. Therefore, where use is “as of right” and the public do not have permission to use the land, it follows that all rights of way claims will begin with a period of trespass against the landowner. As Lord Neuberger states in the Barkas case, the mere inaction of the landowner with knowledge of the use of the land does not amount to permission and the use is still trespass:

*“...the fact that the landowner knows that a trespasser is on the land and does nothing about it does not alter the legal status of the trespasser. As Fry J explained, acquiescence in the trespass, which in this area of law simply means passive tolerance as is explained in Gale, (or, in the language of land covenants, suffering), does not stop it being trespass. This point was well made by Dillon LJ in Mills v Silver [1991] Ch 271, 279-280, where he pointed out that “there cannot be [a] principle of law” that “no prescriptive right can be acquired if the user...has been tolerated without objection by the servient owner” as it would be “fundamentally inconsistent with the whole notion of acquisition of rights by prescription.” Accordingly, as he added at p 281, “mere acquiescence in or tolerance of the user...cannot prevent the user being user as of right for the purposes of prescription.”*

10.43. None of the witnesses were employees or tenants of the landowner at the time of their use, nor were they related to the owners or occupiers of the land, therefore they cannot be said to have implied permission for the purposes of their employment or through family. The majority of users claim to be using the way without permission.

<b>User</b>	<b>Have you ever worked for or been tenant of any owner / occupier of the land crossed by the way at the time you were using it</b>	<b>Are you related to any past or present owner / occupier of land crossed by the claimed way</b>	<b>Have you ever been given permission to use the way, if so by whom and when</b>
1	No	No	Not by the present owner but the previous farmer Gerald Pitman told us it was a footpath
2	No	N/A	Not by the present owner but the previous farmer G Pitman told us that it was a footpath when we arrived in the village in 2004
3	No	No	Yes, by Mrs Shaw
4	No		No
5	No	N/A	No

6	No	No	No. We used to do a large circle all around this central field and no restrictions were ever placed on this until the last couple of years when it was confirmed (via signs) that the western edge of the field (by Beauchamp House) was not to be used
7	No	No	No – not until a sign was put up by the new owners of the field. This stated it was a permissive path
8	No	No	No
9	No	No	No
10	No	N/A	No, never
11	No	No	No
12	No	No	No
13	No	No	No, assumed there was no problem
14	No		No
15	No	N/A	No
16	No	No	No
17	No	No	No
18	No	N/A	No, always took presence of stiles and obviously well worn path as permission
19	No	No	No
20	No	No	No
21	No	N/A	No
22	No	No	Only passively. I encountered the previous owner Gerald Pitman when he was on his tractor and I was walking with my dogs, he did not make any objection
23	No	N/A	No
24	No	No	No

25	No	N/A	No, as it has always been considered a public right of way and my and other usage of it, as far as I am aware, was not queried before
26	No	No	I always understood it was a regularly used village footpath and met many other walkers using it
27	No	No	No
28	No	No	No
29	No	No	No
30	No	No	No
31	No	No	
32	No	No	No
33	No	No	No, prior to 2012 assumed I had right of way

10.44. The users and the landowner make reference to permissive path signs being erected on site in 2012. This action by the landowner would bring to an end the period of user “as of right” and clearly demonstrates to all users of the path that their use is at the discretion of the landowner and with permission which may be withdrawn at any time. Additionally, the action of depositing of a plan and statement under Section 31(6) of the Highways Act 1980, with Wiltshire Council on 8<sup>th</sup> August 2012, further demonstrates the landowner’s non-intention to dedicate the path as a public right of way.

10.45. Whilst the permissive path notices served to bring home to all path users that their use was no longer “as of right”, in 2012 (albeit after the landowner had lodged with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980, on 8<sup>th</sup> August 2012), there is evidence that individuals also approached Mrs Shaw in 2012, to request permission to continue using the route. In Mr Barton’s statutory declaration he states that he and his family were granted permission to use the route in a letter from Mrs Shaw dated 17<sup>th</sup> July 2012 (a copy of which has been supplied by Mrs Shaw in her evidence) and at the same time, Mr and Mrs Lee sought

permission from Mrs Shaw to use the claimed route on behalf of the village (a copy of this letter has not been viewed by Wiltshire Council and the date of this permission being granted is not known). This permission was granted by Mrs Shaw and supporting evidence of these permissions being granted to both parties is given by Mrs Shaw; Mr Hugh Graham; Mr John Graham; Mrs Judy MacMillan and Mr Paul Farrant. Additionally, Mrs Shaw recalls that Mrs Barkham thanked her whilst attending a gardening opening on 21<sup>st</sup> June 2014, for allowing them to walk the path and asked if her husband could inspect the sinkhole which had opened up adjacent to the claimed route. Mrs Barkham does not refer to this permission in her witness evidence form, but in 2014 the path was already signed as permissive and it falls outside the relevant user period. Also Mr and Mrs Lee do not refer to the permission which they sought on behalf of the village, in their user evidence forms, however, the date of granting of this permission is not known and it may fall outside the relevant user period in this case of 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012.

10.46. The land was previously owned by the Pitman family. In his statutory declaration, Mr David Pitman confirms that *“When we purchased the Land one or two people asked us for permission to walk other than on the public footpaths (Mrs. Belinda Blanshard was one such person) and we granted that permission.”* Mrs Shaw, the present landowner also confirms that Mrs Belinda Blanshard requested permission to walk the field other than the public footpaths, in the early 1980's from Mr David Pitman, however this permission is not referred to in Mrs Blanshard's user evidence form.

10.47. Mr Pitman continues, *“I know my brother, Gerald Pitman who died in 2009, also gave permission to some villagers to walk other than on the public footpaths”*. Mrs Margaret Pitman supports this in her statutory declaration, in which she states *“I understand that from time to time Gerald gave some villagers permission to walk on the land other than on the public footpaths.”* However, no further details of these instances are given for example did this permission refer to the claimed route or just the land in general and to whom was this permission given. Mr David Pitman also states that *“...we always led everybody to believe that it was at our discretion if they walked anywhere else on the field other than the footpaths.”*, but there is no further

evidence given of how this permission was conveyed to members of the public at large and there is no evidence of notices being erected on site to make this clear to the public.

10.48. Mr and Mrs Barkham claim that on purchasing their house and the adjoining paddock in 2003, they approached Mr Gerald Pitman regarding walking through the field on what was a well used path between A, B and C (please see plan at 4). Mr Pitman advised them that it was ok to do so, as it was a public footpath and they were free to walk it.

10.49. In his statutory declaration, Mr Barton confirms that when he moved to Kelloways Mill in 1987, he was aware of the existence of Footpath 4 and 5, but did not recall a trodden path at the eastern edge of the field. At that time he requested permission from Mr Pitman to walk the claimed route and they agreed that it was not a public right of way. Mr Barton again sought permission from the new landowner Mrs Shaw to use the route in 2012.

10.50. Therefore, Mr John Barton and Mrs Belinda Blanshards witness evidence, cannot be considered as use “as of right” as they sought and were granted permission to use the claimed route during the relevant user period in question. However, even when this evidence is removed, there is still a substantial amount of evidence that the public used the route without permission, on the balance, during the relevant user period.

### **The Claimed Route**

10.51. Users claim that the route in question historically formed a vital public highway link, within the village and even to neighbouring parishes:

- Mr and Mrs Kilner used the route from their home in Pigtrough Lane to visit neighbours in the village; attend events at the old school and church and leading onwards to Donhead St Mary. This section of path is the only section linking the south and west footpath network to the network of the north and east.

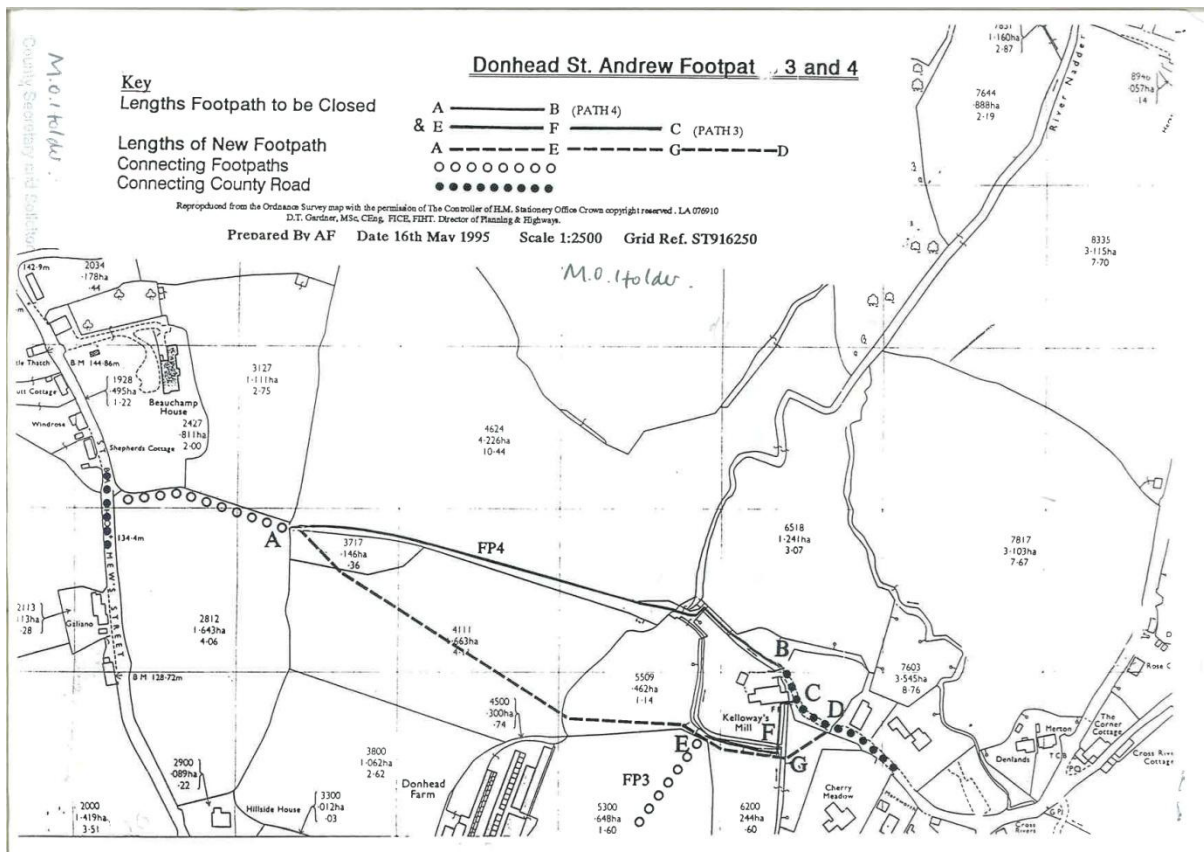


- Mr Roy Powell used the route as a child to walk to school from Pigtrough Lane every day and on Sundays to go to church. His grandparents used the same footpath to get to Donhead Church from Pigtrough Lane.
- Mr Richard Lee states that the claimed route forms part of the network of footpaths in the Parish and the surrounding area and joins the northern part of the parish around Donhead Mill (previously Ricketts Mill), to the centre, around the church and the old school and on towards Donhead St Mary. It is reasonable to assume that the footpath is the best and obvious route for people walking between their houses; place of work; farms; mills, smithy's etc. and also to get from the village school and church.
- Mr P Danby understands that historically the claimed route was, until the construction of New Road along with other interconnecting paths, the only means by which villagers were able to get around going back centuries. The section in question crucially linked the mill at the northern end with both the church and the school at the centre of Donhead St Andrew.
- Mr and Mrs Barkham consider the footpath to be a vital link between the north and south of the village and for parishioners from the north of the village to get to the church. The footpath allows access from the Donheads to Wardour Court: Castle and woods without walking along the road and further to Tisbury.
- Mr Wareham would often walk the claimed route from the church to visit friends at Thorn House, when living in the area as a child and his mother attended school and church as did her brother and sisters and she recalls using the path many times.
- Mrs Collyer walked from home in Barkers Hill to access village amenities.
- Mrs Condon walked the route from her former home Wood Cottage to the village hall; church and centre of the village, and visiting neighbours.
- Mrs Eves used the route from Mill Lane to access Pigtrough Lane and to visit friends.
- Mrs Hinchley from Mill Lane used the route to visit friends in Pigtrough Lane.
- Miss Maxwell-Arnot used the route from Sans Lane to the village; church and to visit friends.
- Miss Saint used the footpath in order to stay off the road as much as possible when dog walking between two other footpaths; visiting friends and to access the pub.
- Mrs Saunders used the route to get from one part of the village to another.
- Mr Simpson used the route from Mill Lane to go visiting and to go to Pigtrough Lane.

- Miss Whymark used the route from Pigtrough Lane to access the Church and St Bartholomews Street.

10.52. The application plan is included at 4, with the claimed route marked by a broken line between points A, B and C. The claimed route is shown linking the two recorded Footpaths 4 and 5 Donhead St Andrew, however it is noted that the application plan does not record Footpath no.5 in its correct position. It is shown at the northern field edge, in fact the definitive line of the path goes further south into the field. The claimed route is shown meeting with Footpath no.5 at the field edge path, however this junction would be further south in the field and there is no reason for path users to walk to the field edge where there is no connection with another public highway.

10.53. It should also be noted that the line of Footpath no.4 Donhead St Andrew, was diverted in 1996 by Salisbury District Council (confirmation of order 14<sup>th</sup> November 1996, the diversion route to be made available 21 days after confirmation. A definitive map modification order was made accordingly in 1997). The claimed route leads between Footpath no.5 and Footpath no.4 Donhead St Andrew, forming a link between these two routes.



*Modification order plan 1997. Footpath no.4 Donhead St Andrew was diverted from a line through the middle of the Mansfield to Kelloways Mill, to a new route further south through the field, in 1996.*

10.54. Prior to 1996 it is considered that the public would have walked to the connection with the existing public highway, Footpath no.4. There would be no reason to continue southwards to the present route of Footpath no.4 as the footpath did not exist on this line and there was no other connection with a public highway at this point. This is supported by the historic OS maps dated 1896 and 1901, which record a route only between the two mills (please see **Appendix 2**). Where the extension of the claimed route southwards has only been used by the public since the diversion in 1996/97, 20 year public user cannot be established over this part of the route.

10.55. It is possible that whilst the diversion of Footpath no.4 was formally recorded on the definitive map in 1997, the public may have already been walking the proposed

diversion route for a number of years prior to 1996/97, thereby demonstrating 20 year user of the southern section of the claimed route. Officers carried out a consultation amongst 19 users who claimed to use the path prior to 1996 and the Parish Council, to this effect:

*“From the evidence you have already very kindly provided, it would appear that you have used the claimed footpath route prior to 1996/97 and I would therefore be very grateful if you could provide me with any information regarding:*

*1) Your recollections of use of the claimed route prior to 1996/97.*

*2) Your recollections of use of Footpath no.4 Donhead St Andrew prior to 1996/97.*

*I am particularly interested to find out at what location you connected with Footpath no.4 prior to its formal diversion in 1996/97 and on what line you continued your journey, incorporating the claimed route and Footpath no.4. Perhaps you could mark on the attached map the route which you used prior to 1996/97 and return it to me.”*

10.56. 16 responses were received, which are outlined below:

<b>User</b>	<b>Pre 1996/97 route</b>
4	Former route of FP 4, joining claimed route north of Kelloways Mill, then leading north to FP 5. Walked this route since 1972.
5	Route marked alongside the present route of FP 4, the southern section of the claimed route is used (i.e. over land owned by Mr Shepherd). Walked former route of FP 4 in front of Kelloways Mill, over bridge and gate and then turned right along the bottom of the field (now the footpath in dispute) or left and up hill to Barkers Hill (leaving footpath just beside Beauchamp House). Always used the new footpath once it was redirected.
6	Former route of FP and then a route around the perimeter of the northern section of the field. Part of the southern extent of the claimed route is used, but then the route leads into the adjoining field directly alongside Kelloways Mill, to access FP 3.

	<p>Map completed from memory, may not be completely accurate.</p> <p>Routes marked are those historically used as a child, 1976 -1996, prior to Kelloways Mill diversion (approx 1985) and prior to FP 4 diversion.</p>
7 & 8	<p>Line marked A to B on the former route of FP 4, but this is not a straight line. The claimed route is marked by a broken line.</p> <p>At the time (1996/97) Mansfield was a single open field. A to B on the map is the former route of FP 4, but it was not possible to walk this route in a straight line due to the contours of the land and the presence of a number of gorse bushes. On reaching Kelloways Mill at point B the path ran directly past the front door of the Mill.</p> <p>When the access point to Mansfield was changed we continued to walk the path joining DSTA 5 to DSTA 4 but had to walk a little further in order to reach the new access point C.</p>
11 & 12	<p>Former route of FP 4 used.</p> <p>Prior to the footbridge over the river Nadder being built 1996/97 we followed the footpath from Mill Lane down the drive of Kelloways Mill and then between the front door of the mill and the Nadder. We continued with the Nadder on our right until going through a gate into Mansfield. The followed FP 4 in a westerly, direct route up the hill to the NE corner of the top field and would continue until reaching the route at Barkers Hill.</p> <p>To link to Footpath 5, we would turn right (once we crossed into Mansfield) and then would walk along the west side of the Nadder to begin with and then along the side of the wood.</p>
14	Former route of FP 4 marked on map, claimed route not recorded on this map.
15	Former route of FP 4 marked on map. The northern part of the claimed route is shown between FP 5 and the former route of FP 4.
16 & 17	<p>Former route of FP 4 marked A – B on map. The northern part of the claimed route is shown between FP 5 and the former route of FP 4.</p> <p>Since moving to Pigtrough Lane in 1977, we have used what are now known as FP's 5 and 4 and the footpath linking them fairly frequently, to visit neighbours in Mill Lane and to access FP 3. Prior to the diversion of FP 4, they followed a very similar rote to the 1901 OS map (please see <b>Appendix 2</b>).</p> <p>From point A the old path followed an easterly route towards Kelloways Mill approximately along the line of the new fence. At point B the path divided, one path leading north to FP 5 and other continuing east across the culvert for the mill leat and along the north front of Kelloways Mill to the junction of what is now FP 3 and Mill Lane.</p> <p>When FP 4 was diverted with a new bridge across the river and a new entry point at C to</p>

	<p>the field known locally as Mansfield, the route of FP 4 became established as the present more direct line C – A and the existing path linking it to 5 was extended to link points B and C.</p> <p>The effect of the diversion of FP 4 was to shorten the distance between point B and the point where the claimed footpath crosses the new fence line. Reference to the historic map shows that the stile is sited almost exactly on the historic mapped route of FP 4 from point A to the crossing point to Kelloways Mill near point B, indicating historical map evidence of the link between to location of the stile and the crossing point near B.</p>
18	<p>Full claimed route marked on the map, between FP 5 and the present route of FP 4.</p> <p>I have no memory of FP 4 being diverted in 1996, but used the claimed path prior to that. As I recall it went from the east end of FP 5, along the woods and river, over the stile into the Kelloways Mill field and then turned right onto FP 3. It certainly joined FP 3 (which has also changed course I believe after new houses were built on what used to be the Pig Farm), as I used to walk along it to youth club in the late 1980's, at Henrietta Barnett field centre, by the church, whilst I lived around the corner from the east entrance to FP 5.</p>
23	<p>Only the southern section of the claimed route is recorded, i.e. from Kelloways Mill to the present route of FP 4.</p> <p>I have lived in the area since 1974 and have used the footpath daily walking dogs. FP 4 connected to the bridge at Kelloways Mill (the large bridge over the river which went into the field and then the lane). Originally it went over a stile into Kelloways garden and followed their stream past the house and down the drive to the lane.</p>
25	<p>My personal usage of the path was post 1996/97. My original correspondence was on behalf of my father, who moved here in 1989 and has now sadly passed away and with him any knowledge of the old FP 4.</p>
28	<p>The claimed route is shown in full on the map.</p> <p>If we had walked down Butlers Hill, then along FP 3, past the church, at the end of FP 3 (its northern end) turn left along FP 4, after climbing over the stile we then followed a well trodden and clearly defined path until we picked up FP 5 which we then followed past our secondary parcel of land until we came out on the road adjacent to our house. The advantage of doing this was to avoid vehicular traffic along New Road.</p> <p>If we had walked through the village either from the A30 or one of our longer walks via Gutch Common and Donhead St Mary we turned off New Road into Mill Lane and then followed FP 4 as described above.</p> <p>When we were playing in our tennis court we frequently saw walkers, quite often with</p>

	dogs, following FP 5 past the court and coming out on the road by Thorn House. Some of the walkers had clearly come from Pigtrough Lane as they had been visible from our court. However some of them suddenly appeared and must have come from FP 4, probably having followed the route I have marked.
30	Former route of FP 4 marked on map. The northern part of the claimed route is shown between FP 5 and the former route of FP 4.
32 & 33	Former route of FP 4 marked on map. The northern part of the claimed route is shown between FP 5 and the former route of FP 4. Our best memories prior to 96/97 are that we entered the drive of Kelloways Mill, continued up the drive past the house on our left, through the garden to the field near where the present stile is in the new fence. We crossed the field straight to the old oak tree or turned right in a north-easterly direction to meet FP 5, i.e. along the claimed footpath. We think the old route of FP 4 roughly followed the line of the new fence, we think to its southern side.
Parish Council	Former route of FP 4 marked on map. The northern part of the claimed route is shown between FP 5 and the former route of FP 4. The route as remembered by Parish Councillors, this was a unanimous decision of those present at the time of the diversion.
Mr Roy Powell	FP 4 across the Mansfield is not shown to be a used route on the map. The northern section of the claimed route leading south from FP 5 to Kelloways Mill and then leading east directly to the north of Kelloways Mill is recorded (the former route of FP 4 at Kelloways Mill.) As children my brothers and I used the footpath as marked to travel to school from Pigtrough Lane. My Grandparents also used the same footpath to get to Donhead Church from Pigtrough Lane.

10.57. 11 of these witnesses refer to use of the former route of Footpath no.4 before 1996/97, therefore on the balance, it would appear that 20 years public user of the southern section of the route cannot be shown during the relevant user period of 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012. There is insufficient evidence of its public use and existence on its present definitive line prior to 1996/97. It is considered that prior to this date the northern section of the claimed route, linked Footpath no.5 to the former

route of Footpath no.4 which led east-west between Beauchamp House and Kelloways Mill.

10.58. 18 of the witnesses have used a different route to the claimed route, at the northern end, i.e. instead of continuing in a northerly direction to meet footpath 5 within the field, they have turned in a north-easterly direction to continue to the edge of the field, to junction with footpath no.5 at the field edge, near Ricketts Mill. This is supported by OS mapping dated 1896 (six inch map) and 1901 (25 inch map) which show a route leading to the north-east corner of the field (please see **Appendix 2**).

10.59. All witnesses have used the path through the field on more or less the same route, although there are some variations, i.e. some being closer to the field boundary and some being more central within the field, allowing for the inevitable inconsistencies in the drawing of the route by different individuals.

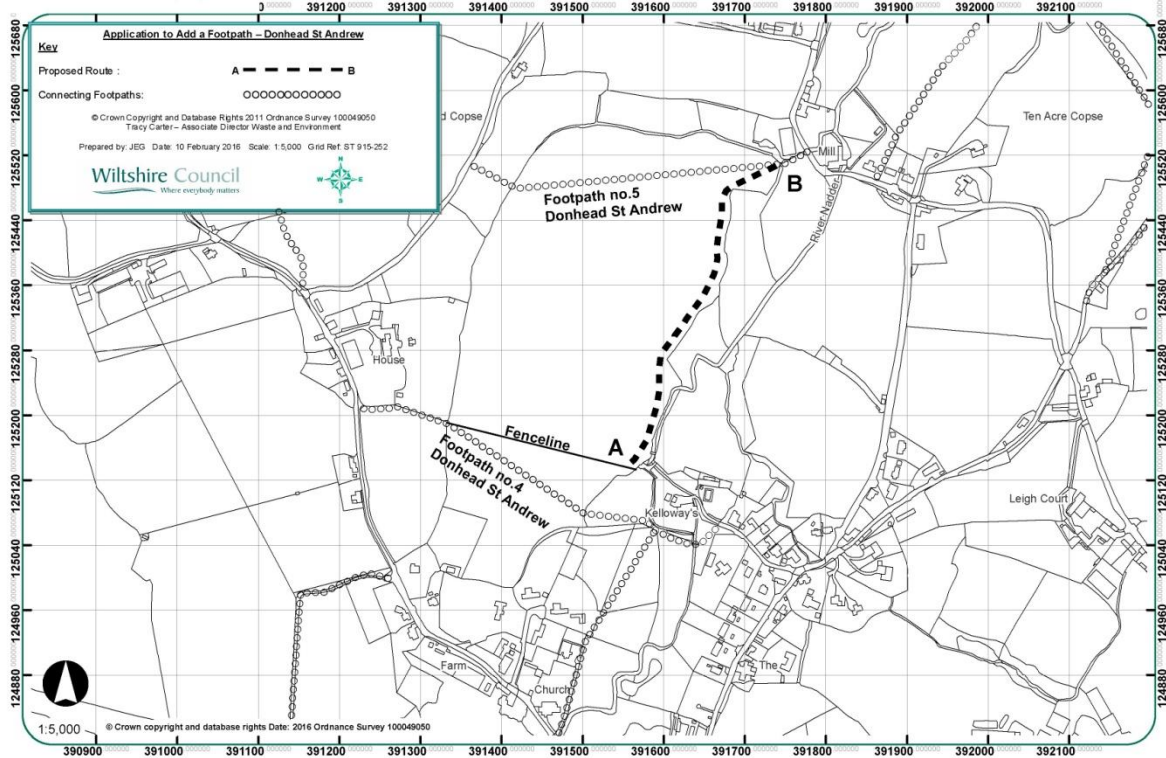
10.60. At the southern end, the majority of users have junctioned with Footpath no.4, however, one of the users continues south in the field, past Footpath no.4 (it is not clear where they were going after this as there are no linking public highways at their termination point) and one of the users continues south of Footpath no.4 and then continues east to the south of Kelloways Mill paddock. Additionally two of the users (Miss Ronan and Mr Winslet) terminate their route north of the fence line and do not enter the southern field. Their route terminates to the north-west of Kelloways Mill where the former route of Footpath no.4 would have junctioned with the claimed route and it is not clear where they were going after this as there are no longer any linking public highways at their termination point following the diversion of Footpath no. 4 Donhead St Andrew in 1996/97. Miss Ronan used the claimed route until 2014 and Mr Winslet used the route until 2015, so their use continued following the diversion of Footpath no.4.

10.61. In her evidence Mrs Shaw states that until the 1980's the land now owned by the Wardour Ltd was divided into several fields, as shown on the 1901 OS 25" map. Drainage was poor and the eastern edge of the field was waterlogged throughout the



autumn and winter. This is supported by Mrs Margaret Pitman in her statutory declaration, who states that when they bought the land *“It was then divided into several fields and was poorly drained.”* The 1982 aerial photograph (included at 10.36), shows that in 1982 the field was divided by hedges. Certainly the 1925 OS 25 inch map shows the field divisions (please see **Appendix 2**) and although witness claim use dating back to 1970, the majority of witnesses do not mention previous field boundaries and how these were negotiated. Only Mr Tom Kilner advises that there used to be a metal fence a long time ago, with a gate as he recalls and when the newer wooden fence was put in, a stile was placed where the path crossed it. From examining the historic OS mapping (please see **Appendix 2**), it would appear that there was previously a fence to the southern section of the field, on the approximate line of the present fence and Officers believe this to be the former fence which Mr Kilner refers to, with gate (Mr Kilner’s use spans 34 years). It is not clear when these boundaries were removed and although they appear on the 1982 aerial photograph, they appear to be removed by 1991 (as can be seen from the 1991 aerial photograph, see 10.36), at the start of the relevant user period. They do not appear to be present on the 2001 and 2005/06 aerial photographs, within the relevant user period (included at 10.36). It is likely that during the user period in question 1992-2012, the field boundaries had been removed and Mr and Mrs Shepherd sought to re-establish the field boundary to the north of their land in 2012.

- 10.62. Please find attached below, the proposed route to be added to the definitive map and statement of public rights of way, based upon the witness evidence before the Council and the diversion order on Footpath no.4 Donhead St Andrew which took place in 1996/97:



10.63. This creates a cul-de-sac footpath, as public user of 20 years cannot be shown on the southern section of the claimed route, following the diversion of Footpath no.4 Donhead St Andrew in 1996/97, i.e. this section of the route cannot be claimed under statute.

### Common Law Dedication

10.64. Section 5 of the Planning Inspectorate Definitive Map Orders: Consistency Guidelines, suggest that even where a claim meets the legal tests under Section 31(1) of the Highways Act 1980 for dedication under statute, there should be consideration of the matter at common law.

10.65. Dedication at common law does not rely upon a 20 year public user period and there is no defined minimum period of contentious user. Where the origin of a highway is

not known, its status at common law depends upon the inference that the way was in fact dedicated at some time in the past.

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

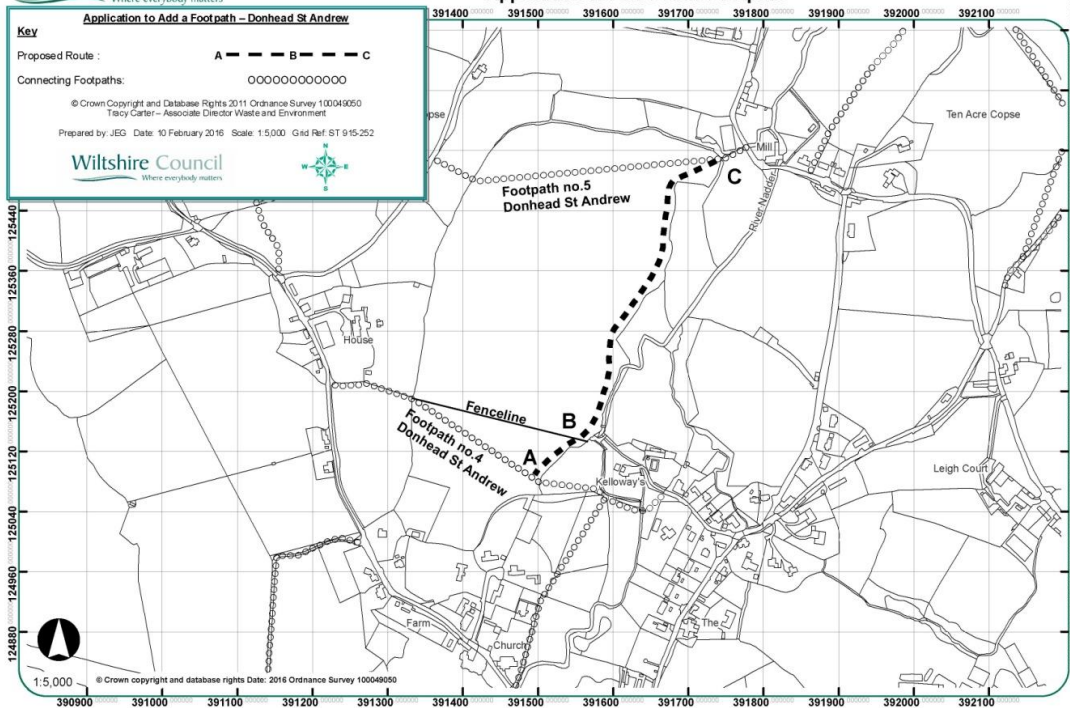
10.67. Relatively few highways can be shown to have been expressly dedicated and in the Donhead St Andrew case there is no evidence before the Surveying Authority that Wardour Ltd, or the Pitman family before them, have carried out any express act of dedication over the northern section of the claimed route. However, there is evidence that the previous landowners acquiesced in use of the claimed route by the public, before 2012, and evidence of the public acceptance of this route through user. Therefore if the claim under statute were to fail, it is possible to apply the principles of common law on the northern part of the claimed route.

10.68. On the southern section of the route, Mr and Mrs Shepherd installed a fence on the northern boundary of their land in March 2012, including a stile in the fence to allow public access with a dog latch. Whilst this action was de-minimis for the purposes of Section 31 of the Highways Act 1980, it could be taken as an act of implied dedication at common law (in the absence of any express dedication at common law). Although Wardour Ltd lodged with Wiltshire Council a plan and statement under Section 31(6) of the Highways Act 1980 to negative their intention to dedicate land in

their ownership as a public highway, on 8<sup>th</sup> August 2012, which brought into question the public right to use the whole of the claimed route, this action comes 5 – 6 months after the erection of the stile. The user evidence chart at 10.15 shows that 32 witnesses continued to use the claimed route before and after 2012 and this is considered sufficient to show acceptance by the public over the southern section of the route on Mr and Mrs Shepherds land, during that 5-6 month period. Mr John Graham confirms that the number of users increased following the erection of the stile and Mr and Mrs Collyer state that the stile was incorporated in the fence allowing them to continue to use the path between Footpath 4 and Footpath 5.

10.69. There is evidence that the adjoining landowner Mr Pitman was against the installation of a stile as evidenced by Mrs Shaw; Mr Hugh Graham and Mr Paul Farrant. Mr Farrant states that a stile was incorporated at the eastern edge of the fence to accommodate the walkers, although David Pitman, a previous owner of the land who was involved in constructing the fence, made it clear that the walkers had no right to walk that route. Mrs Shaw requested that the stile be removed in an e-mail to Mr Shepherd dated 15<sup>th</sup> October 2014.

10.70. Officers consider that a dedication at common law has taken place on the southern section of the route, between Footpath no.4 and the fence on the land owned by Mr and Mrs Shepherd and there is evidence of acceptance of the route by the public in the period of time before the route as a whole was brought into question by the actions of the adjoining landowner, Wardour Ltd, in lodging with Wiltshire Council a plan and statement under Section 31(6) of the Highways Act 1980. On the evidence before the Council, Officers consider that the following route should be added to the definitive map and statement of public rights of way:



## Width

10.71. In making an order to add a new footpath to the definitive map and statement of public rights of way, a width must be recorded within the definitive statement, based on evidence. The 1901 OS map (25 inches to 1 mile) records only part of the claimed route (i.e. within plot no.105), on a slightly different line, by double broken lines, standard OS symbols to record a route with no physical boundaries. The route is also braced as part of the field, therefore no conclusions regarding the width of the path can be drawn from the OS mapping (please see **Appendix 2**). It is important therefore to consider the witness evidence of the actual used width of the path. Witnesses have recorded the following path widths:

Witness	Width	Witness	Width
1	2-3m	18	Footpath through grassy field so roughly 0.5m
2	Approx 2m	19	2m
3	Approx 1m	20	Approx 2m
4	1-2m	21	1-2m. A fence and stile were erected about 100m from point A around 2013/14
5	2m	22	About ¾ m. A new fence was put in the middle when the land was sold to two people a new stile was installed when permissive path established
6	Usually a well worn path of approx 1m	23	Up to 3m
7	The path runs almost along the edge of an open field. A fence was placed across part of the path with a stile across	24	
8	It is a rough path probably about 2m	25	2m
9	2m	26	As long as I've know it there has been no "boundary" or fencing, it was just a walk around the perimeter, or one side of a field, joining another path
10	c.2m wide (a fence with stile erected 2013)	27	1-2m
11	1m	28	2m
12	0.5m	29	Footpath in open field 1.5m
13	1-2m	30	1m
14	No defined width, i.e. fences. Width commonly used is approx 1.5-2m	31	No more than 2m
15	Up to 3m	32	Was about 2m, narrower since new fence and stile put in. I could walk side by side with villagers.
16	1-2m	33	Variable but about 2m. Since new fence and stile almost a single track, previously 2 people could walk side by side.
17	About 2m		

10.72. Witnesses give varying path widths. Officers have therefore used an average from those users who have provided width figures (based on the maximum extent given), which gives an average width of 1.8 metres to be recorded as the definitive width of the footpath, if a definitive map modification order is made.

### **Landowner's Intention**

10.73. Under Section 31 of the Highways Act 1980, there is a presumption of dedication following public use of a route for a period of 20 years or more "as of right", unless during that period, there was in fact no intention on the landowners part to dedicate the land as a highway. Intention to dedicate was discussed in the Godmanchester case, which is considered to be the authoritative case on this matter. In his leading judgement Lord Hoffman approved the words of Denning LJ in the Fairey case, 1956:

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

10.74. In the same case, Lord Neuberger of Abbotsbury went further on this point:

*"...the cogent and clear analysis of Denning LJ in Fairey v Southampton County Council [1956] 2 QB at 458, quoted by Lord Hoffman, clearly indicated that the intention referred to in the proviso to section 1 (1) of the 1923 Act was intended to be a communicated intention. That analysis was accepted and recorded in textbooks and it was followed and applied in cases identified by Lord Hoffman by High Court Judges and by the Court of Appeal for the subsequent forty years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section (1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1981 Act."*

10.75. Lord Hoffman went on to say:

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

10.76. The land was previously owned by Mr David Pitman; Mr Gerald Pitman and Mrs Francis Pitman from 1982/84, being transferred to Mrs Margaret Pitman in June 2011. From the evidence available to the Council, it would appear that the Pitman partnership, took little action to deter the public from using the route. The witnesses suggest the Pitmans were aware of the path, but in fact acquiesced in its use and no witnesses report being challenged during the Pitman’s period of ownership. One user reports standing in her paddock with Mr Gerald Pitman, watching people using the path and two witnesses report that Mr Pitman told them that the route was a public footpath which they were free to walk when they came to the village in 2004, thereby acknowledging the existence of a path.

10.77. In his statutory declaration Mr David Pitman states that they always led everyone to believe that it was at the landowners’ discretion if they walked anywhere else on the field other than on the public footpaths and they told people who asked where the public footpaths were. They did grant permission to one or two people who asked permission to walk elsewhere on the land, other than on the public footpaths, (including Mrs Belinda Blanshard). Upon purchasing the land Mr John Barton requested permission from Mr Pitman to walk the claimed route. However, whilst some individuals appear to have requested permission, this does not convey the landowners intentions to the wider public and there is no evidence that the landowners non-intention to dedicate the route, was communicated to the public at large, e.g. through the erection of permissive path signs or prohibitory notices.



- 10.78. Mr and Mrs Shepherd who own the land over which the southern section of the route passes, appear to have taken no action to communicate to the public that it was not their intention to dedicate the land as a public highway and in fact included a stile with dog latch in the boundary fence erected in 2012, against the advice of the previous landowner.
- 10.79. On the northern section of the route, since Mr and Mrs Shaw's ownership of the land in May 2012, they have clearly communicated to the public their non-intention to dedicate this land as a public highway. It would appear that they were aware of the public use of the route upon purchasing the land and lodged with Wiltshire Council a map and statement under Section 31(6) of the Highways Act 1980, covering the area of land in question, on 8<sup>th</sup> August 2012, thereby negating the landowner's intention to dedicate further public rights of way over the land. This intention was communicated to the public at large by the erection of permissive path signage on the claimed route in Autumn 2012 and January 2013, making it clear to members of the public that use of the path was at the discretion of the landowners and could be withdrawn at any time. In 2014 temporary path closure notices were erected on site by Mr and Mrs Shaw, amid safety fears following the appearance of a sink hole on the land, close to the claimed footpath.
- 10.80. Whilst these do qualify as actions to negate a landowner's intention to dedicate the land as a public highway, it would appear that on the balance, a 20 year public user period, as of right and without interruption, had already been established prior to the deposit of a statement and plan under Section 31(6) of the Highways Act 1980 on 8<sup>th</sup> August 2012 and prior to Wardour Ltd's ownership of the land.

## **Conclusion**

- 10.81. Officers have very carefully considered the evidence submitted both in support of and opposing the application and concluded that there is sufficient evidence for it to be reasonably alleged that a right for the public on foot subsists over the land in question and therefore the only option open to Wiltshire Council as the Surveying

Authority is to make a definitive map modification order to amend the definitive map and statement of public rights of way accordingly.

**11. Overview and Scrutiny Engagement**

11.1. Not required.

**12. Safeguarding Considerations**

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

**13. Public Health Implications**

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

**14. Procurement Implications**

14.1. The determination of definitive map modification order applications and modifying the definitive map and statement accordingly, are statutory duties for the Council. The financial implications are discussed at 18.

**15. Environmental Impact of the Proposal**

15.1. Considerations relating to the environmental impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not

considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

**16. Equalities Impact**

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

**17. Risk Assessment**

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

**18. Financial Implications**

18.1. The determination of definitive map modification order applications and modifying the definitive map and statement of public rights of way accordingly, are statutory duties for the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.

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

18.3. Where a definitive map modification order is made and objections received, which are not withdrawn, the order falls to be determined by the Secretary of State. An Independent Inspector appointed on behalf of the Secretary of State will determine the order by written representations, local hearing or local public inquiry, which have a financial implication for the Council. If the case is determined by written

representations the financial implication for the Council is negligible, however where a local hearing is held, the costs to the Council are estimated at £200 – £300 and a public inquiry may cost between £1500 - £3000, if Wiltshire Council supports the order (i.e. where legal representation is required by the Council) and around £200 - £300 if it does not support the order (i.e. where no legal representation is required by the Council as the case is presented by the applicant).

- 18.4. In cases involving witness evidence, the case is usually determined by local public inquiry, where the evidence given by in chief by witnesses can be tested under cross examination.

## **19. Legal Considerations**

- 19.1. Where the Surveying Authority determines to refuse to make an order, the applicant may lodge and appeal with the Secretary of State, who will consider the evidence and may direct the Council to make an order.
- 19.2. If an order is made and objections are received, any determination of the order by the Secretary of State may be challenged in the High Court.

## **20. Options Considered**

20.1. To:

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

to add a footpath to the definitive map and statement of public rights of way, under Section 53 of the Wildlife and Countryside Act 1981.

## **21. Reasons for Proposal**

- 21.1. Under statute law, it is considered that there is sufficient evidence for it to be reasonably alleged that a right of way for the public on foot, subsists, over the northern section of the route through the Mansfield (i.e. over the land owned by Wardour Ltd), based on evidence of public user, as of right, over the claimed route for a period of 20 years or more.
- 21.2. Additionally there is insufficient evidence of the landowners' non-intention to dedicate the way during the relevant user period of 8<sup>th</sup> August 1992 – 8<sup>th</sup> August 2012. The new landowners on the northern section of the route (Wardour Ltd) have carried out acts to show their non-intention to dedicate the land as a public right of way, i.e. erecting permissive path signs in 2012 and 2013; granting permission to individuals in 2012; depositing with Wiltshire Council a statement and plan under Section 31(6) of the Highways Act 1980 on 8<sup>th</sup> August 2012; depositing with Wiltshire Council a statutory declaration under Section 31(6) of the Highways Act 1980 on 14<sup>th</sup> August 2016; depositing with Wiltshire Council a CA16 form for deposits under Section 31(6) of the Highways Act 1980 and Section 15A(1) of the Commons Act 2006 in 2015 and erecting temporary path closure notices in 2014, however the evidence as a whole points towards 20 years public user, as of right, being established prior to the public's use of the path first being brought into question by the deposition of the statement and plan under Section 31(6) of the Highways Act 1980, on 8<sup>th</sup> August 2012.
- 21.3. Mr David Pitman on behalf of the Pitman family as the previous landowners, makes clear in his evidence that it was not their intention to dedicate the route as a public highway, i.e. they granted permission to individuals and they always led everyone to believe that it was at the landowners discretion if they walked anywhere else on the field other than on the public footpaths, there is however insufficient evidence before the Council of any actions undertaken by the Pitman family as the previous

landowners, or by Mr and Mrs Shepherd as the present owners of the land over which the southern section of the route passes, to convey to the public at large their non-intention to dedicate the land as a public highway.

- 21.4. There is insufficient evidence of public user for a 20 year period over the southern section of the route (over the land owned by Mr and Mrs Shepherd). However, Officers consider that the installation of a stile and dog latch by Mr and Mrs Shepherd when the fence was erected at the boundary of their land in March 2012, constitutes an act of implied permission under common law. There is evidence that the public have accepted this route by continuing to use it before and after 2012, therefore it is considered that the southern section of the route has acquired a right for the public on foot, at common law.

## **22. Proposal**

- 22.1. That a definitive map modification order be made to add a right of way for the public on foot to the definitive map and statement of public rights of way in the parish of Donhead St Andrew, between Footpath no.4 and Footpath no.5 Donhead St Andrew, having a width of 1.8 metres, where it is reasonably alleged that a right for the public on foot subsists. Where an order is made on a reasonable allegation, it may not be confirmed until the more stringent test of the “balance of probabilities” is applied, i.e. it is more likely than not that a right for the public on foot exists. Therefore, where no objections to the making of the order are received, weight is added to the supporting evidence before the Council and it is recommended that the order be confirmed as an unopposed order, where no objections are received.

Janice Green

Rights of Way Officer, Wiltshire Council

Date of Report: 18<sup>th</sup> July 2016