

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 – IDMISTON (PORTON)

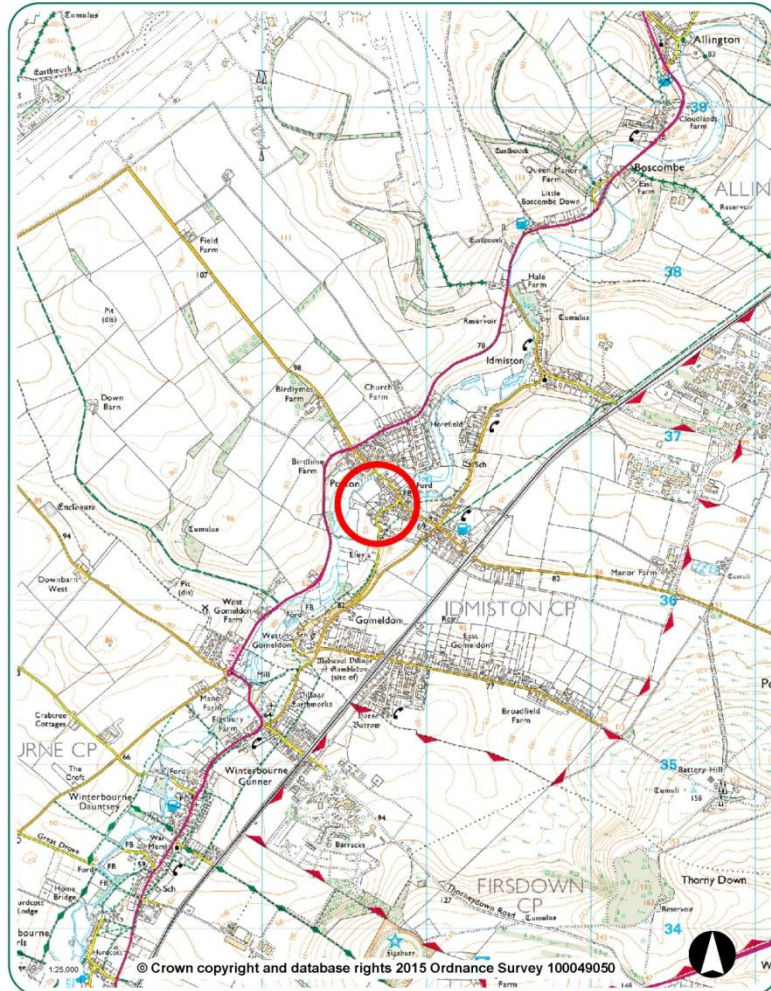
1. Purpose of Report

- 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 Idmiston, between Porton High Street and the recreation ground.

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.

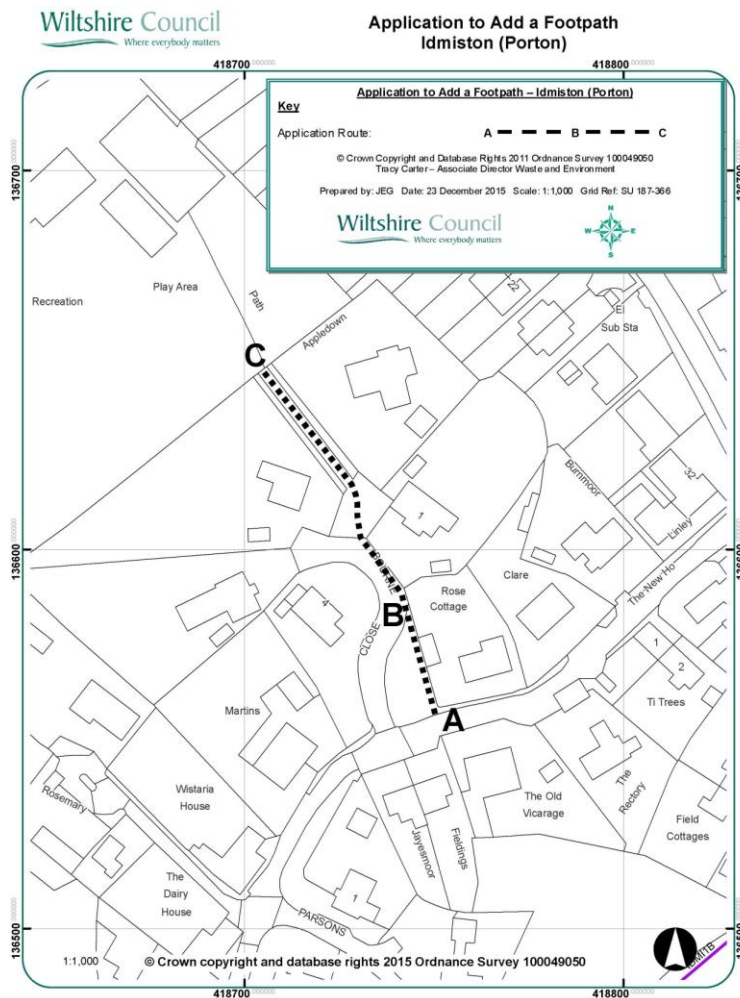
3. Location Plan



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Parish of Idmiston (Porton)

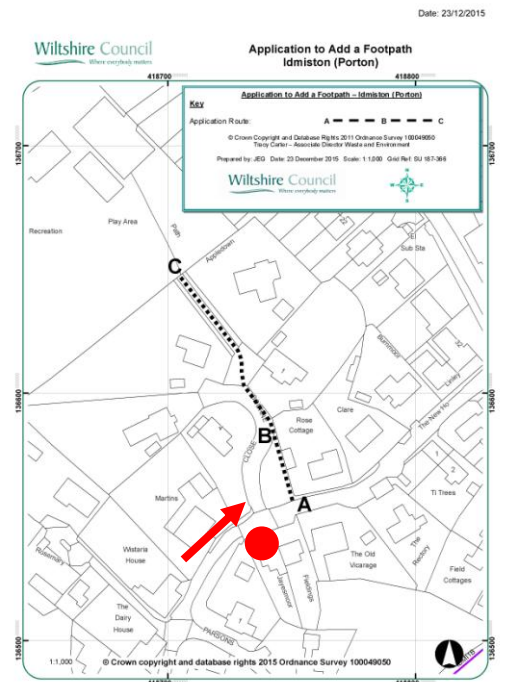
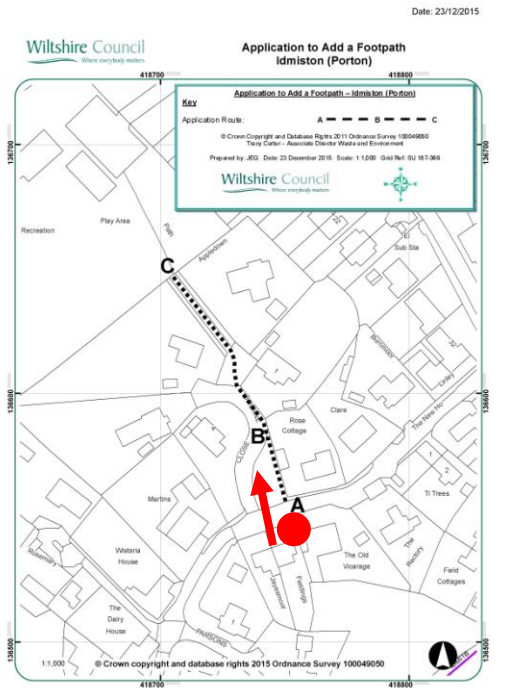
4. Claimed Footpath Route

Date: 23/12/2015

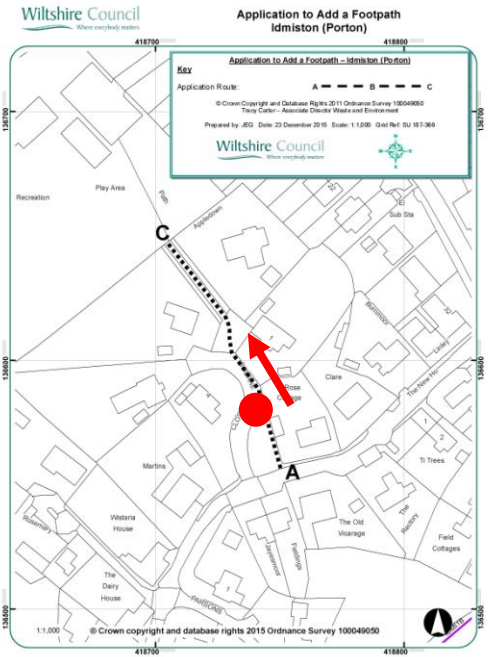
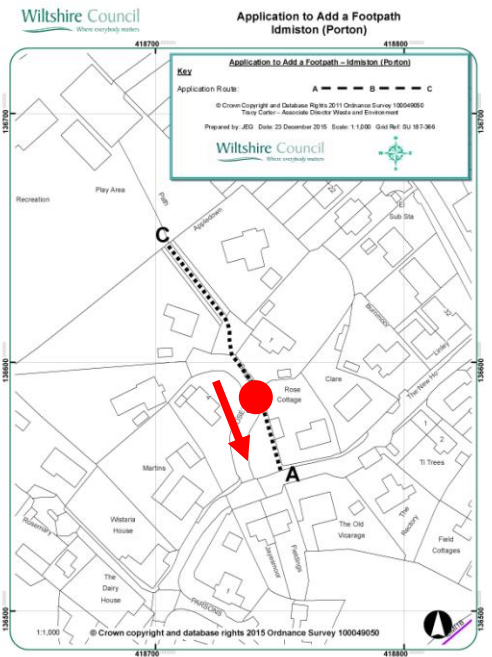


- 4.1. The application is made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the Parish of Idmiston, leading from Porton High Street in a generally north-north-westerly direction to the recreation ground.

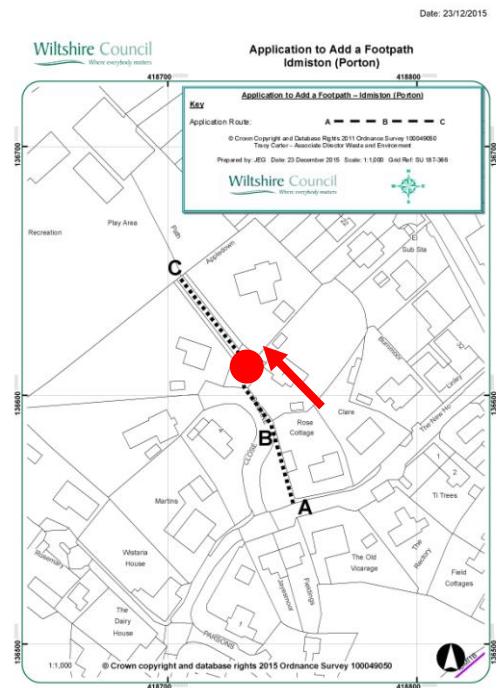
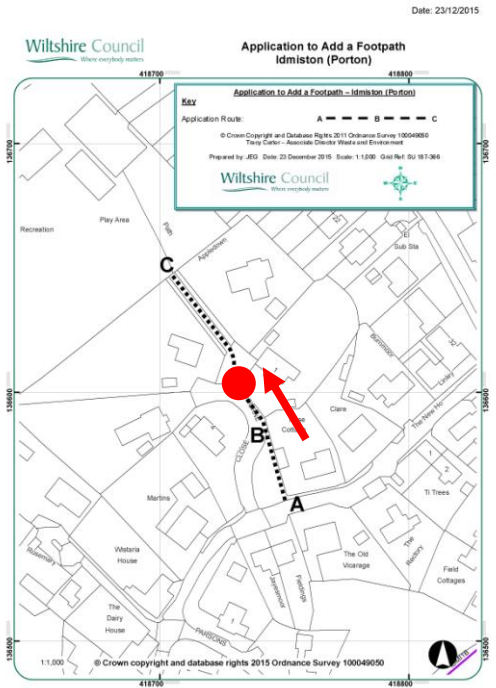
5. Photographs



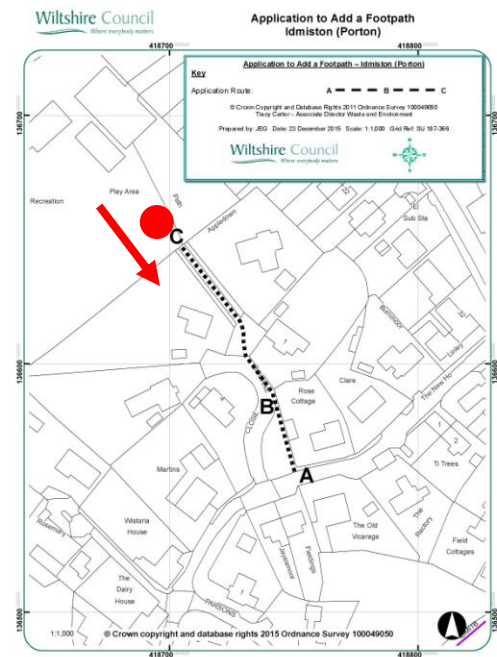
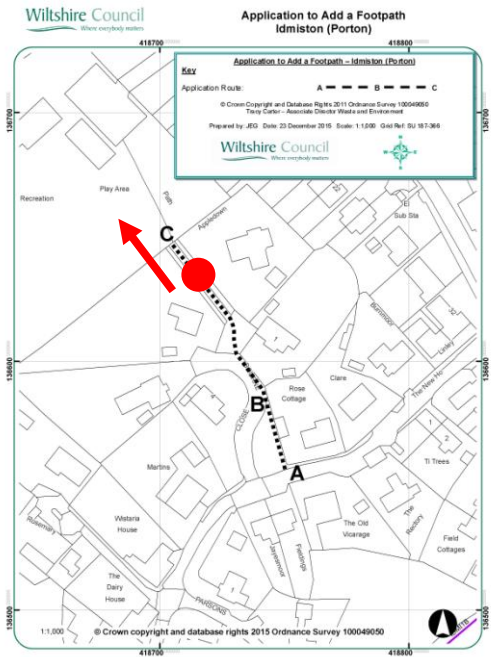
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6. Registered Landowners

Mr A Jones
159 East Gomeldon Road
Gomeldon
Salisbury
Wiltshire
SP4 6NB

Mr and Mrs W Maher
1 Bourne Close
Porton
Salisbury
Wiltshire
SP4 0LL

Dr's G & A Appleyard
1A Bourne Close
Porton
Salisbury
Wiltshire
SP4 0LL

Lt Col & Mrs A Lee
2 Bourne Close
Porton
Salisbury
Wiltshire
SP4 0LL

Mrs J Hoddinott
3 Bourne Close
Porton
Salisbury
Wiltshire
SP4 0LL

Mr & Mrs R Bray
4 Bourne Close
Porton
Salisbury
Wiltshire
SP4 0LL

7. Background

- 7.1. Wiltshire Council are in receipt of an application made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the parish of Idmiston (Porton), leading in a generally north-north-westerly direction from Porton High Street, alongside Rose Cottage and through Bourne Close to the recreation ground (an area of

land owned by Porton Parish Council and to which the public are allowed full access during its opening hours). The application is dated 3rd November 2015 and is made by Mrs V Creswell on behalf of Porton Neighbourhood Plan Group, on the grounds that public footpath rights can be reasonably alleged to subsist over the claimed route on the balance of probabilities, based on user 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 1:1,500 highlighting the claimed route and 2 completed user evidence forms. A further 25 user evidence forms were submitted following the application date.

- 7.2. The claimed route is located in the village of Porton, in the parish of Idmiston, (which lies to the north-east of Salisbury and the south-west of Amesbury) and forms a link between the High Street and the recreation ground. From its junction with the High Street the claimed route leads generally north-north-west, over a grassed area in the private ownership of Mr A Jones, for approximately 30m and then through Bourne Close, a private road with a made up surface with no footway and which is in multiple ownership, for approximately 46m. The last 38m of the route to the recreation ground, leads between the gardens of the properties 1A and 2 Bourne Close, having a total width of approximately 6 metres between the hedges and fences of the gardens and a central surfaced area which has a total width of approximately 3.15m with curb stones. There are concrete bollards erected at the southern end of this section to prevent vehicular access to the recreation ground, (there is an alternative vehicular access to the recreation ground off Winterslow Road. A litter bin is also provided at this point).
- 7.3. The claimed route terminates at the double gates of the recreation ground. The gates have public notices from Idmiston Parish Council who own the land requesting that members of the public clean up after their dogs and setting out other prohibitions on the land. One of the notices states that: “*Access and use*

of this playing field shall not be permitted during the hours of darkness or when the gates are locked by the parish council.” The Parish Council have confirmed to Wiltshire Council that whilst they own and maintain the land, giving full public access, they employ a gatekeeper to lock and unlock the field each day so that it is open from around 8:30am until just before dark, which was found necessary to prevent vandalism and antisocial behaviour during the late evenings.

- 7.4. Wiltshire Council undertook an initial consultation regarding the proposals on 29th December 2015. The objections and representations received are summarised at **Appendix 1**, (please note that all correspondence is 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. Section 56 of the Wildlife and Countryside Act 1981 states that the definitive map and statement of public rights of way shall be conclusive evidence of 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. The Wildlife and Countryside Act 1981 section 53(2)(b) applies:

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

(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.”

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.*”

8.6. The application to add a right of way to the definitive map and statement of public rights of way in the Parish of Idmiston (Porton), has been correctly made in the prescribed form, being accompanied by a map drawn at a scale of 1:1,500 and 2 completed witness evidence forms (plus an additional 25 witness evidence forms submitted after the application date).

8.7. Section 31 (as amended) of the Highways Act 1980, refers to the dedication of a way as a highway, presumed after public use for 20 years:

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

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to

use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

- (3) *Where the owner of the land over which any such way as aforesaid passes –*
- (a) *has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*
- (b) *has maintained the notice after the 1st January 1934, or any later date on which it was erected,*

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

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

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

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

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

(i) within ten years from the date of deposit

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

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

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

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

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

- 8.8. Section 32 of the Highways Act 1980, states that the authority should consider a range of historical documents and their provenance in relation to the claim:

“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 claimed route. Please see list of historical evidence and conclusions attached at **Appendix 2** to this report.

- 9.2. The tithe award map 1841; Map of the Common Fields and Village of Porton c.1845 and Bonakers Farm Sale Particulars 1866, suggest a route corresponding with the location of the claimed route, off Porton High Street. The 1845 Map of the Common Fields and Village of Porton shows this route gated from the High Street. These maps do not record a continuation of the route past the Manor Farm buildings, on the claimed route or indeed any other route. This can be seen particularly on the 1845 Map of the Common Fields and Village of Porton, where there are gates off the High Street into the Manor Farm yard and then a second gate into what appears to be another part of the yard or a separate field. There are then gates to the south-east and south-west of this yard / field. The gates to the south-east simply lead back into the first yard and the gate to the south-west leads into the field beyond to the west, but there is no path continuation recorded through the field and no gate is provided in the north-west of the Manor Farm complex to access the claimed route.
- 9.3. When looking at these documents alongside other historical documents, it seems that the route which they record leading off the High Street is more likely to be a private route leading into the Manor Farm buildings complex, (which is now mostly demolished and Bourne Close built on the site), with no connection to other public highways. The Porton Inclosure Award (1850), does not record the claimed route either on the map or within the award document itself as a new public highway to be set out, or as an ancient public highway to be retained, (the Commissioners did have the power to set out public footways). Additionally the historic Ordnance Survey maps, which are topographical in nature and accurately record features visible to the surveyor on the ground at the time of survey, do not record a footpath at this location.
- 9.4. 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. The application is accompanied by 27 witness evidence forms with maps attached. Landowner evidence forms have also been submitted by Mr A Jones (owner of the green area adjacent to the High Street); Dr's Patricia and Geoffrey Appleyard (1A Bourne Close); Mr Wayne Maher (1 Bourne Close) and Mr Raymond Bray (4 Bourne Close).
- 10.2. Section 31 of the Highways Act 1980 deals with the dedication of a way as a highway, 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 have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Bringing into question

- 10.3. In order to demonstrate a 20 year public user period, there must be a date upon which the use of the path by the public was brought into question.
- 10.4. In the case of R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA and R (on the application of Drain) (Appellant) v SSEFRA [2007], Lord Hoffman endorses Denning L J's interpretation of bringing into question as contained in 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."

10.5. 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."

10.6. In the Idmiston case, 19 of the 27 witnesses make reference to the erection of fencing around the green area off the High Street. They refer to their use of the path ending when it was obstructed by the fencing or note the fencing as an obstruction to the claimed route. The following references to the date of obstruction of the route are made:

User	Date of Obstruction
1	Last used 2005. Now there is a metal builders fence obstructing the route (witness evidence form dated 18/11/15).
2	Since March 2015 there has been a fence obstructing the way.
4	Used until late March 2015 after which it was obstructed by fencing between points A and B (please see plan at 4). The section of the route across the grass was blocked by fencing on 30 March 2015 (between points A and B).

	No obstructions until 30 March 2015 when the section from A to B was completely blocked by the erection of temporary fencing.
8	Last used early 2015 before it was fenced off. A fence has been erected during 2015.
10	Last used March 2015. Metal fencing was erected on 30 th March 2015 obstructing the path.
11	Last used March 2015. No obstructions of the route until temporary metal fencing appeared in March 2015.
12	Last used Spring 2014 before it was fenced. Fencing has been up since late spring 2014. I don't understand why the fencing has gone up, stopping access.
14	In recent months a wire fence has been erected which stops any entry to the path (witness evidence form dated 20/11/15).
16	Used until 2015, last used earlier this year before it was fenced off (witness evidence form dated 03/11/15). This land until recently was not fenced off and was open for public use.
17	Used until about April 2015 when a fence was erected. Unable to recall exact day when last used but approximately April 2015. Currently obstructed by metal fence (witness evidence form dated 28/11/15). Told by the owner of the land that it was private and he did not want the public to walk on his land on the day / morning that he was putting up his metal fence in April 2015.
19	Used until 2015 when it was closed off, last used summer 2015.
20	Last used 2015. A fence has been recently erected (witness evidence form dated 22/11/2015).
21	Last used 2013. Fence created round the circular green. High Street fence erected around the green in 2013.
22	Used until present day, until it was fenced off. Not sure of last use but probably Easter 2015. No obstruction of the route until earlier this year (2015), when it was totally fenced off (witness evidence form dated 25/11/15).

23	Used until the present day, last used April / May (witness evidence form dated 25/11/15). No obstructions of the route until the grass area was recently fenced.
24	Last used Spring 2015. The route obstructed only in recent months by Harras fencing (witness evidence form dated 11/12/15).
25	Last used February 2015. Obstructed only by the fencing erected at the corner of Bourne Close in March 2015.
26	Last used October 2015. Route obstructed recently (March 30 2015), by moveable, temporary fencing.
27	Last used 2015. Route not obstructed until 2015 when the owner ceased mowing the grass and erected metal temporary fencing, as he is trying to get planning permission on the small area of grass.

10.7. The landowner of the grassed area, Mr A Jones, confirms that he fenced in the whole plot in 2015 and this is supported by 16 witnesses who appear to support a date around spring 2015 and 3 witnesses are able to give a specific date of 30th March 2015. This fencing prevented the public from using the claimed route in full and serves to bring the public right to use the way into question, therefore the 20 year user period should be calculated retrospectively from the date of the obstruction on 30th March 2015 and the user period in question is 30th March 1995 – 30th March 2015.

10.8. Within the completed landowner evidence forms received by Wiltshire Council, the landowners do not make reference to any previous action which would bring the right of the public into question at an earlier date:

- 1) Mr Jones, as owner of the green area of land for the last 12 years, does not believe the way to be public and has held this belief for over 35 years. He has not seen members of the public using the way and

would expect members of the public to ask permission before using the land as it is private land. He has not deposited a plan and statement with Wiltshire Council under Section 31(6) of the Highways Act 1980, to indicate his non-intention to dedicate the land as a highway. He has never turned back or stopped anyone from using the way, or told anyone using the way that it was not public, as he has not seen members of the public using the claimed route. If he had been aware of people walking on the land, he would have asked them to stop doing so. There has often been dog fouling of the land caused by dog owners allowing their dogs loose on the land whilst walking in Bourne Close or the High Street. He has on occasion asked people not to do this and has also asked people who have parked cars without permission on the land to remove their vehicles. He has never erected notices or signs stating that the way was not public as this was not necessary and there have never been any stiles or gates over the land. He has now obstructed the claimed route (A-B), as shown on the plan attached at 4, by fencing this plot of land.

- 2) Dr's Patricia and Geoffrey Appleyard of 1A Bourne Close ("Appledown"), have owned their property and with it joint ownership of the private road in Bourne Close, for 11 years and 10 months. They have made the following comments and observations regarding the claimed path. They do believe the claimed route to be a public footpath. Dr Patricia Appleyard has held this view since 2004 (i.e. since moving to Bourne Close) and Dr Geoffrey Appleyard has held this view since 1989 when he moved back to Porton. They have observed many members of the public walking to and from the recreation ground, walking dogs etc. on a daily basis since living at "Appledown", such that they assumed that the route was a right of way. They have never asked anyone to seek permission before using the way and have not deposited with Wiltshire Council a plan and statement under Section

31(6) of the Highways Act 1980. They have never turned back or stopped anyone using the way and have never told anyone using the way that it was not public. They have never erected notices or signs stating that the way was not public and there has only ever been a gate at point C into the recreation ground (see plan at 4), with no stiles on the route. They have never obstructed the way themselves but they note that the section of path A-B (see plan at 4), was in regular use until it was obstructed by fencing in late March 2015. Mr A Jones purchased the grass area in 2004, at which time he lived opposite in Jayesmoor and could not have failed to be aware that members of the public were using the claimed route, both before and after he acquired it. He made no attempts to stop them and voiced no objections to the use, the only concern he expressed was that some people had parked vehicles on the land without his permission. Prior to 2004 this part of the land was owned by Mr Pike, who previously lived at "Appledown". Neither Mr Pike nor the first owners of "Appledown" made any attempt to fence the land to prevent access.

- 3) Mr Wayne Maher of 1 Bourne Close states that he has owned the property for 8 years and he believes the status of the way to be private. He has only ever seen, on the odd occasion, a child running across the land, it is very boggy on the grass area. He has never required people to ask permission before using the way and he has not deposited with Wiltshire Council a plan and statement under Section 31(6) of the Highways Act 1980. He has never turned back or stopped people from using the way and he has never told anyone using the path that the way was not public. There have never been stiles or gates on the route and he has never obstructed the way. Mrs Laura Maher confirms that living next door to the green, the public rarely walk across it, particularly in winter as there is no footpath and it is muddy. Occasionally in the warmer months they would see a child or a dog

take a short cut across the green but this would only happen if the landowner had cut the grass. Most other members of the public would walk along Bourne Close.

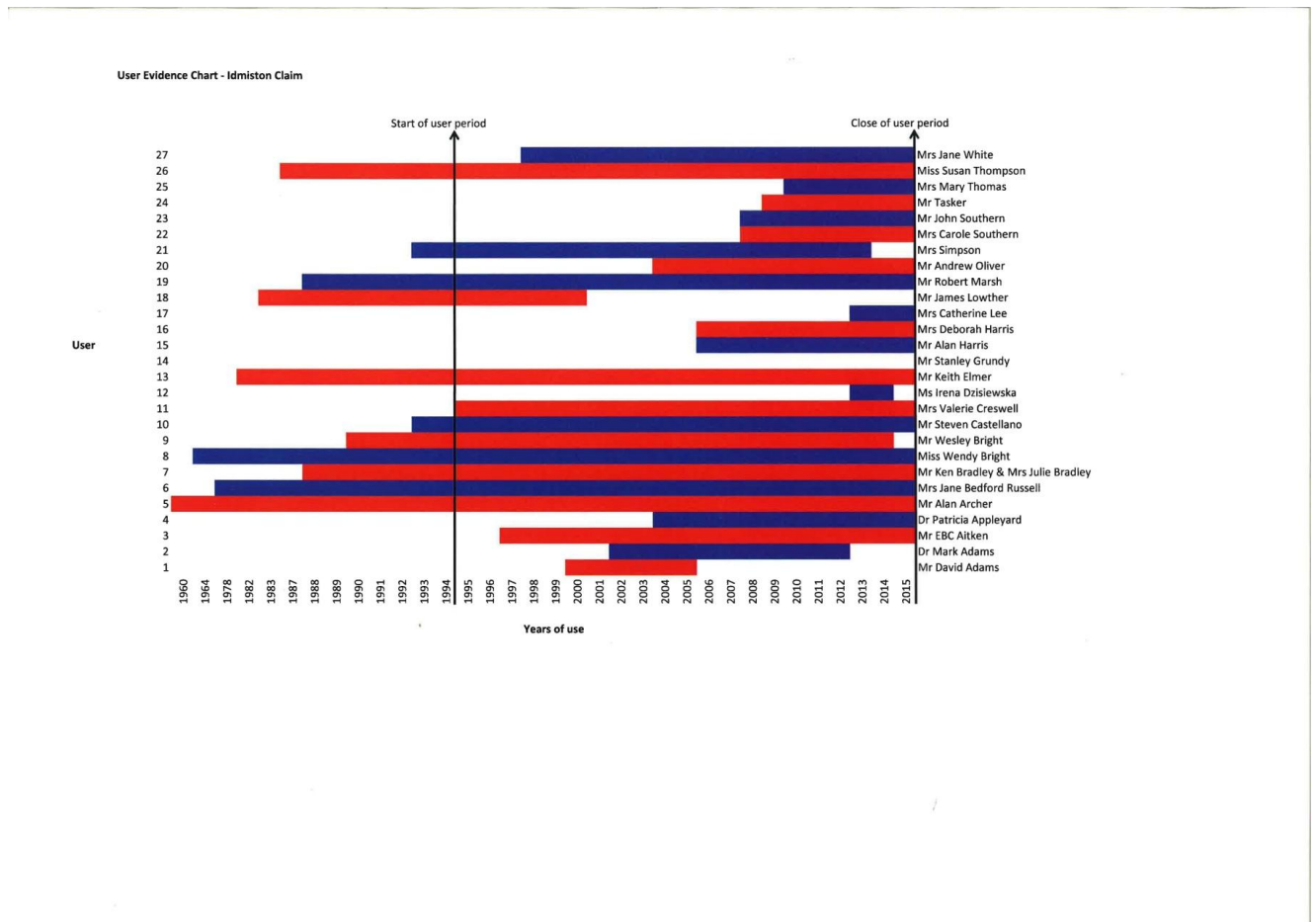
- 4) Mr Raymond Bray of 4 Bourne Close, confirms that he has owned the property for 18 years and the claimed route has been used daily over that time. He has never required people to ask permission before using the way and has not deposited with Wiltshire Council a plan and statement under Section 31 (6) of the Highways Act 1980. There have never been any gates or stiles on the way.
- 5) Mr Pike, the previous landowner of the green area, has written to confirm that he owned the green area of land and the adjacent property, "Appledown", from July 1998 to March 2004. At no time during his ownership was there a footpath across the land and neither did he give permission for the public to walk across the land. He sold the land to Mr Jones.
- 6) Although we do not have personal testimony from Mr Ray Stockton, whom Officers believe owned the green area of land and "Appledown" prior to Mr Pike, i.e. before July 1998, Mr James Lowther who has completed a user evidence form for his period of user dating from 1983 to 2000, recalls that when the land was owned by Mr Stockton, he knew people used the claimed route and was quite happy about it.

10.9. In addition, none of the witnesses make any reference to previous challenge; prohibitory notice, or obstruction sufficient to bring the public's right to use the way into question, until the fencing was erected around the green area adjacent to the High Street in 2015.

10.10. The erection of the fencing has triggered the application to add a footpath to the definitive map and statement of public rights of way. The public have not acquiesced in the closure of the path, which, according to Denning L.J's words in the Fairey case, leads us to believe that the witnesses consider that they do have a public right of way over the land.

Twenty Year User

10.11. Please see chart below which shows the dates and level of user outlined within the 27 witness evidence forms:



10.12. For the period of user in question, i.e. 30th March 1995 – 30th March 2015, of the 27 user evidence forms submitted, (Mr and Mrs Bradley have completed a witness evidence form jointly and are counted as one), 26 witnesses have

used the route during this time period and 9 witnesses have used the route for the full period of 20 years.

10.13. In addition to their own use, witnesses refer to their use of the route with others and seeing others using the route:

User	Used with others	Others seen
1	With children.	All the time until it was partly fenced.
2	No information provided.	Many people, often children and teenagers using it as a safe footpath to recreation ground in Bourne Close, daily use.
3	No information provided.	Yes – walking and some young cyclists.
4	No information provided.	Frequently saw other people walking the path.
5	Recreation and walking with grandchildren.	Saw others walking with dogs.
6	No information provided.	Yes.
7	Form completed jointly.	Fellow walkers and those exercising their dogs.
8	Used as a child, possibly with family/friends?	Dog walkers, people going to playing fields.
9	Recreation with grandson.	Others walking.
10	No information provided.	Many people use the path daily for walking.
11	Taking firstly my children and now my grandchildren to the play park in the recreation ground.	Very frequently, I could see the path from my house.
12	No information provided.	Families and people with dogs, on foot.
13	No information provided.	Many times – usually walkers but sometimes with children with bikes / trikes.
14	No information provided.	Many, many times, the path is invaluable as a way for people with children going to/from the playground (the alternative being the road). It has been an accepted route during my time living in Porton (24 years).
15	No information provided.	Many other dog walkers and children travelling to park and school.
16	Taking our dog for a walk or going to recreation ground with children.	Other dog walkers.
17	No information provided.	Yes walking.
18	Recreation with my two boys, friend.	Often, dog walking.

19	First used walking with my 2 children to the recreation centre.	Walking to and from the park area.
20	Walking my two children to the recreation ground.	Regularly.
21	No information provided.	Dog walkers.
22	To village shop, via playpark with grandchildren as part of a circular route.	Occasionally other people, some dogs, all walking.
23	My wife and I first used it in 2008 when finding our way round the village after we moved here. Now used with grandchildren from playpark to shops and then home.	Sometimes, all walking, some with dogs.
24	No information provided.	Yes, also walking.
25	No information provided.	Yes – walking, cycling, playing.
26	No information provided.	Yes, walking.
27	No information provided.	Yes, walking.

10.14. 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 Cleveland Borough Council* UKSC 11 (03 March 2010), a Town and Village Green registration case, Lord Walker refers to Mr Laurence QC, who:

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

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

“...no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term...the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement

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

10.15. All of the witnesses are resident of Porton, however use wholly or largely by local people may be sufficient to show use by the public. The Planning Inspectorate’s Definitive Map Orders: 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 the local residents ever use a particular road or bridge.”

10.16. Officers conclude that there is sufficient evidence to support, on the balance of probabilities, public user for a period of 20 years or more without interruption and that this level of user during the relevant 20 year period of 30th March 1995 – 30th March 2015, was sufficient to bring home to the landowners that a right for the public was being asserted against them.

As of Right

10.17. In order to establish a right of way, public use must be “as of right”, i.e. without force, without secrecy and without permission. In conclusion, Officers are satisfied that public use of the claimed route has been “as of right”, as follows:

Without force

10.18. 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.

10.19. From the witness evidence provided in the Idmiston case, it would appear that users did not use force to enter the land over which the claimed route passes. It is the Officers opinion that users would not have been required to use force to enter the land as there are no barriers to access (prior to the erection of the fencing in 2015). Mrs Creswell states that young people are now beginning to vandalise and climb over sections of the fencing, but Officers consider that this is not related to use of the claimed route to pass and repass and that this is occurring outside the user period in question, i.e. after the erection of the fencing and the obstruction of the path, which brought public use of the route into question on 30th March 2015.

10.20. 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 user 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 contexts 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.”

10.21. In the Idmiston case there is no evidence before the Council that prohibitory notices, have ever been erected on the claimed route and the public have not been prevented from using the way, or otherwise challenged whilst using the way, prior to the obstruction of the route by fencing in 2015 and therefore use is not deemed contentious.

Without secrecy

10.22. It would appear that witnesses used the route in an open manner and witnesses consider that the landowner was aware of use:

User	Do you believe the owner or occupier was aware of the public using the way
1	Because he told me and he lived opposite and would have known that people were using it.
2	The current owner used to live in a property on the High Street which directly overlooked the way in question, so will have seen the public using the way daily.
3	Yes, the path is/was clearly visible. It must have been obvious to any owner, as indeed it was to the general public, that a footpath had been created by general usage across the grass area.
4	Yes, in respect of the section A-B (the green area) the owner used to live at Jayesmoor opposite the piece of grass and must have been aware that people were using it. As a resident of Bourne Close (and an affected landowner), I have been aware of the public using the path ever since I moved to our property.
5	Yes, used extensively to my knowledge for the last 55 years.
6	Yes.
7	Yes, it would have been obvious to the owner due to the line of sight that the public were using this path.
8	Yes, he used to live opposite in Jayesmoor directly overlooking the land.
9	Yes, he lived in the house opposite the land for many years.
10	Yes, because the owner lived in Jayesmoor which is opposite the path and was witness to a steady stream of people using the path on a daily basis.
11	Yes, the owner lived in Jayesmoor just across the High Street. There is full visibility from there. Additionally trees were planted to mark the millennium, he has removed them without planning permission.
12	I don't know but I also don't understand why the fencing has gone up stopping access.

13	Yes – used by locals for decades.
14	Yes, the mere presence of a well worn path for many years makes me believe that the owner would have had to be either blind or to have not cared about the use of the path. As the grass was cut fairly regularly by the owner, he must, one presumes, have not been at all worried about the path, certainly for the past 24 years. This area of grass including the path, was looked upon as being our village green and was much appreciated as a pleasant change from the built up area of the village. The fencing has changed the entire outlook.
15	Yes, there is a clearly visible path made through flattened grass, obviously made by frequent use.
16	Yes, clearly visible path, trodden down grass, made by the public walking over the area.
17	Yes, he used to live in a house opposite this land and I assume would have noticed the public using the route.
18	Yes, he bought it as an investment and offered it to myself and others, he had no uses for it other than its future sales value.
19	Do not know.
20	Local knowledge and regular usage of the pathway.
21	Yes.
22	I assumed this was common land with no owner as there were no indications that it was owned.
23	Yes, because I assumed the grass area belonged to the Council.
24	Yes, custom and practise for many years.
25	Yes, no signs erected to state otherwise, I was never approached or stopped; nor witnessed anyone else being so. The right of way was not inhibited.
26	Yes, he lived within sight.
27	Yes, he used to live opposite the area at Jayesmoor, so would have seen people walk across. He has always cut the grass until recently.

10.23. The land ownership in this case is split between the grass area and the private road of Bourne Close. The grassed area is owned by Mr A Jones, now residing in Gomeldon and the private road is owned by the 5 property owners in Bourne Close. Dr Appleyard and Mrs Catherine Lee who are part owners of

Bourne Close, have also completed witness evidence forms in support of the application. Dr Appleyard has marked the whole of the claimed route on the map and confirms that as a landowner she was aware of public use and has been since she moved to the property. She also considers that the owner of the grass area would have been aware of public use as he used to live opposite the land. Mrs Lee has completed the evidence form map with only the claimed route over the grassed area, excluding Bourne Close. She makes no reference to her own knowledge of use of the area of Bourne Close, but states that she believes the owner of the grassed area to be aware of public use as he lived in a house opposite this land and assumes he would have noticed the public using the route.

10.24. The landowner evidence provided by Mr A Jones, the present owner of the green, who has owned the land for 12 years, states that he does not believe the route to be public. He has never seen members of the public using the route and has therefore not been in a position to tell path users that the path was not public and it was not necessary to erect notices stating that the way was not public. He notes that there is often dog fouling of the land, caused by dog owners letting their dogs loose on the land whilst walking in Bourne Close or the High Street. He has on occasion asked them not to do this. He has also asked people who have parked their cars on the land without his permission to remove their vehicles, (this is supported by the evidence of Dr Patricia Appleyard who states that *"The only concern he expressed to us was that some people occasionally parked vehicles on it without permission."*) Mr Jones confirms that if he had been aware of anyone walking on the land, he would have asked them to stop doing so.

10.25. The previous owner of the green area, Mr Geoffrey Pike, who owned the land from July 1998 to March 2004 confirms that at no point during his ownership, was there a footpath across the land. However, in his witness evidence form Mr James Lowther, who used the route between 1983 and 2000, confirms that

when the land was owned by Mr Ray Stockton, he knew that people used the claimed route and was quite happy about it, (Officers believe Mr Stockton to be the previous owner of the green area and “Appledown”, prior to Mr Pike’s ownership which began in 1998. It appears that Mr Stockton’s ownership of the land covers the first part of the relevant user period). Dr Patricia Appleyard confirms in her evidence that Mr Pike and the previous owners of “Appledown” and the grassed area, did not make any attempt to fence the land to prevent access.

10.26. Mr Maher of 1 Bourne Close, has owned the land for 8 years, he considers the land to be private and has only ever seen a child run across on the odd occasion, it is very boggy on the grass. Mrs Maher (1 Bourne Close) confirms that living next door to the green area, the public rarely walk across it, particularly in the winter months as it is muddy. Occasionally in the warmer months they would see a child or dog take a short cut across the green, but this would only happen if the landowner had cut the grass. Most other members of the public would walk along the Bourne Close road.

10.27. Turning to the landowner evidence and their knowledge of public user of the route over Bourne Close, Dr’s Patricia and Geoffrey Appelyard of 1A Bourne Close, “Appledown”, have owned the land for 11 years and 10 months. They believe the route to be a public footpath and they have observed many members of the public walking to and from the recreation ground on a daily basis, such that they assumed that the route was a right of way. Mr Bray of 4 Bourne Close has owned the land for 18 years, he does not state whether or not he considers the path to be public, but he has observed members of the public using the way on a daily basis over 18 years.

10.28. Additionally, in evidence Mr Richard and Mrs Gillian Green confirm that on no occasion have they seen people walking over the land A-B (please see plan at 4), and there was no sign of any footpath or regular walking over the land.

However, they have seen other people, who like themselves were walking on the road through Bourne Close, probably preferring this route, as they do, for the safety of the smooth surface of the road and the fact that they do not have to avoid dog fouling on the land. Mr Roly Grimshaw confirms that he and his wife are regular walkers and they have never seen anyone use the route A-B. Access round the land into the cul-de-sac of Bourne Close is so easy, with minimal traffic. There has never been a footpath here and indeed most people would not wish to venture over the land where dogs have made a mess. Mr W G Baker confirms that he has lived in Gomeldon for over 40 years and has never known this to be a footpath, this is private property and he has never seen anybody walk across the land. Mr P Jay confirms that he has lived in the village for 70 years, there has never been a footpath between A and B. He has never seen people walking between A and B in all the time he has lived in the village. Mr T C Lodge had some involvement in the design of the dwellings in Bourne Close and does not believe that there was ever a “bona fide” right of way. Certainly residents took a shortcut across the grass instead of using the nearby roadway and used the area as a dog fouling spot. To his certain knowledge there was never a way marker or finger post indicating a “public footway”.

10.29. The evidence is contradictory as to whether or not landowners were aware of use and of course there are factors which could affect this, such as where the landowners’ live; their view of the route in question and the amount of time spent at their property/on the land. For example, Dr Patricia Appleyard confirms that *“We can see much of the footpath from ‘Appledown’ and can confirm that it is well-used by members of the public.”*, whereas an absentee landowner may not be in a position to observe such use, particularly in the Idmiston case where it is confirmed that the gate to the recreation ground at point C (please see plan at 4), where the path terminates, is locked during the hours of darkness. Officers would therefore expect the claimed route to

receive most of its use during daylight hours as a link between the High Street and the recreation ground.

10.30. Mr Jones, present owner of the green area, currently lives in Gomeldon and it would be understandable that an absent landowner may not have observed and be aware of public use. However, 23 of the 27 witnesses refer to Mr Jones' previous residence at a property known as "Jayesmoor", located on the High Street, directly opposite the land in question and from which his land could be seen. The witnesses suggest that at the start of his period of ownership, Mr Jones would have been aware of public user.

10.31. When looking at the user evidence chart at 10.11. it can be seen that 17 of the witnesses were using the route at the start of Mr Jones' ownership in 2003/04. As well as their own use of the way, witnesses also refer to seeing others using the claimed route, (please see table at 10.13), which amounts to a substantial level of user.

10.32. Taking into account the frequency of user, it also suggests a level of user sufficient to make landowners aware of use:

User	Frequency of user
1	Not stated.
2	Weekly.
3	Probably once a month.
4	Several times a week until 2014, then daily.
5	3-4 times a month.
6	Once a week.
7	Used regularly as one of our walks around the village.
8	Several times a year.
9	4 times per year.
10	Weekly.

11	2-3 times per week.
12	Weekly.
13	20-30 times a year.
14	N/A – route not used.
15	Daily.
16	Daily.
17	2 – 3 times a week depending on time of year, footwear and whether grass wet or dry.
18	Weekend and evenings.
19	About 20 times per year.
20	Monthly (at least) when the children were younger.
21	Daily.
22	5 or 6 times a year with visiting grandchildren.
23	About 6/7 times per year.
24	Once or twice a month.
25	Daily.
26	10-20 times per year.
27	About twice a year as the normal route from home to the playground takes us along the road of Bourne Close (which is not a highway and not a public footpath).

10.33. A photograph has been provided with the application, taken by Mr Castellano who lives at The Fieldings, High Street, in approximately 1993, (outside the user period in question). The property “Fieldings” is adjacent to “Jayesmoor” and the photograph gives an idea of the view of the land which Mr Jones would have had from his property:



View of the green area taken from “Fieldings” – approx 1993 (pre-1995)

10.34. It is also claimed that the photograph shows a well trodden path across the land, which would have been obvious to the landowners and Officers agree that there appears to be a track over the land, as shown highlighted on the photograph.

10.35. Witnesses have also submitted an aerial photograph with the application, taken in 1980, which it is claimed shows a well trodden path and which would make public user obvious to the landowners.



Aerial view of the area, August 1980

10.36. Officers would agree that this photograph appears to show a track over the green area, leading adjacent to the boundary of Rose Cottage, as highlighted above. However, Mr Jones has submitted that the photograph shows a variation in the grass, with clumps of grass near Rose Cottage and smoother

grass over the remainder of the site. Mr Jones also claims that this rougher grass and variation in soil levels is also shown in the “Fieldings” photograph taken in approximately 1993, although he suggests that in this photograph much of the area is obscured in the shade. Mr Jones has submitted a Google image of the area taken in 2009, which he claims also shows the unevenness of the ground and the variation in the grass near the wall, rather than indicating a path. When the same area in this photograph is viewed from different angles (a further 4 Google images dated 2009, viewing the area from different angles are submitted with Mr Jones’ evidence), he claims that the photographs do not show a footpath but do reveal compaction and tyre marks due to vehicles driving over the land. He also submits a Google aerial view of the area (2001) and a recent photograph taken by the estate agent selling “Jayesmoor”, the house opposite the plot of land. Mr Jones suggests that if the footfall was as suggested by the respondents, there would be a clear and worn footpath in evidence on the estate agents photograph. Officers have concluded that the Google images and estate agents photograph do not show a well trodden path over the green area.

10.37. Officers have examined aerial photographs held by Wiltshire Council, taken in 2005/06 and 2014, within the relevant user period of 30th March 1995 – 30th March 2015 (please see below). There is no worn track visible on the 2005/06 photograph and the area in question is in part obscured in shade. The 2014 photograph appears to show a very straight feature across the land (as highlighted below), but it is not clear whether this is a track created by path users. It is located further west on the land than the claimed route and is very straight, as if it were created by a mower or vehicle. Overall the photographic evidence of a well trodden track is inconclusive in this case and cannot be relied upon to support the existence of public rights.



Aerial photographs held by Wiltshire Council - 2005/06 and 2014

10.38. In conclusion, as Lord Hoffman states in the Sunningwell case, the use must have been open and in a manner that a person rightfully entitled would have used it, that is not with secrecy. He observes that Lord Blackburn, in discussing the dedication of 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 manner 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.*”*

10.39. Overall, Officers consider on the balance of probabilities that if members of the public had used the claimed route, at the levels and frequency suggested by the evidence, it is likely that the landowners would have been aware of use and had opportunity to challenge this use, had they wished to do so.

Without permission

10.40. 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, 21st 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 out as if it were by right – hence “as of right.”

10.41. 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. The point was well made by Dillon L J in Mills v Silver [1991] Ch 271, 279-280, where he pointed out that “there cannot be [a] principle of law” that “no prescriptive rights 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.”

10.42. 2 of the witnesses are joint owners of the private road in Bourne Close over which the claimed route passes (Dr Appleyard and Mrs Lee), whilst this gives them a private right over Bourne Close, it does not give them a right over the area of land which they do not own, i.e. the grassed area. It would appear that none of the witnesses sought or were granted permission to use the land, nor were they related to, or tenants of any of the landowners, (excluding Dr Appleyard and Mrs Lee whose use of Bourne Close only, as landowners, is not qualifying user):

User	Have you ever worked for or been tenant of any owner/occupier of land crossed by the way at the time you were using it	Are you related to any past or present owner or occupier of land crossed by the claimed way	Have you ever been given permission to use the way, if so by whom and when
1	No.	No.	No, did not know it was needed.
2	No.	No.	No.
3	No.	No.	No – never.
4	No.	Not in respect of the grassed area.	No.

		My husband and I as joint owners of "Appledown" have a shared interest in the private road Bourne Close, with other residents.	
5	No.	No information provided.	No, always assumed it was a public footpath.
6	No.	No.	No.
7	No – not at any time.	No relationship with any past or present owner.	No, we have always assumed that it was a public right of way.
8	No.	No.	No.
9	No.	No.	No.
10	No.	No.	No.
11	No.	No.	No.
12	No.	No.	No.
13	No.	N/A.	No, never necessary.
14	No.	No.	No.
15	No.	No.	No.
16	No.	No.	No.
17	No.	No.	No.
18	No.	No.	When the land was owned by Ray Stockton he knew people used the footpath and was quite happy about it.
19	No.	No.	No.
20	No.	No.	No.
21	No.	No.	This has always been treated as common land by villagers and there have been no

			objections.
22	No.	No.	No.
23	No.	No.	No.
24	No.	No.	No.
25	No.	No.	No.
26	No.	No.	No.
27	No.	No.	No.

10.43. The landowner evidence shows that none of the landowners have ever required people to ask permission before using the way, but as Mr Pike; Mr Jones and Mr Maher suggest, perhaps they were not aware of public use and saw no reason to grant permission. Mr Jones states that *“20 respondents cite that they have not been given permission to use the land. One says that a previous owner had known that people walk on it, but the owner he cites is 2 owners previous to me. Many appear to be unaware that it is private land.”* He also states it is private land, so he would expect anyone to ask permission before using the way. User “as of right” is without permission.

10.44. The evidence supports public use of the claimed route without permission.

The Claimed Route

10.45. The claimed route leads from the High Street, Porton, alongside Rose Cottage and then over the private road of Bourne Close, to the recreation ground. The claimed route terminates at the entrance to the recreation ground. The witnesses describe their own use of the claimed route as follows:

Witness	Route shown on map	Have you always followed the same route
1	As claimed, plus a spur at the southern end joining the claimed	Yes, because from my house we entered the path from a different

	route over the green from the property "Martins" to the west.	direction.
2	Only the section of the claimed route over the grassed area (i.e. A – B) is shown.	Yes, when accessing Bourne Close. I deviate from the way to provide direct access to my boundary wall and hedges for routine maintenance. For this purpose I usually access the way via an access gate in my boundary wall.
3	As claimed.	Probably yes.
4	As claimed.	Only changed route when the route on the grassed area was obstructed by fencing (30 th March 2015).
5	As claimed.	Yes.
6	As claimed.	Yes.
7	As claimed.	No – one of a number of walks we do depending on path conditions and for variation.
8	As claimed.	Yes.
9	As claimed.	Yes.
10	As claimed.	Yes.
11	As claimed.	Yes. Not willingly changed route, but when temporary fencing was erected, it was necessary to use the roadway in Bourne Close.
12	As claimed.	Yes, until the route was blocked. Since being blocked I walk around the area on the main road.
13	As claimed.	No, walked many different routes around the village.
14	As claimed.	Not used the route as my approach to the path is from the south and the

		entrance into Bourne Gardens (which I have used many times), is the more convenient way to reach the houses and playground, but I walk past the path virtually every day.
15	As claimed.	Yes.
16	As claimed.	Yes.
17	Only the southern section of the claimed route over the grassed area (A – B) is shown.	Yes same route across grass under certain conditions, i.e. depending on time of year; footwear worn and whether the grass was wet or dry. Otherwise I have used the tarmac route of Bourne Close.
18	As claimed.	Yes.
19	As claimed, plus extension of the route into the recreation ground with a spur leading west.	Yes.
20	As claimed.	Yes.
21	Two routes marked on map: a route in red around the Bourne Close road way from the High Street marked “Todays route” and the claimed route in blue (although slight deviation into front garden of no.1 Bourne Close), marked “The previous route before houses were built marked in blue. The previous route in fact is still used but has been wired off.”	Yes.
22	As claimed.	Yes, except used the longer, less safe roadway if the grass was long/wet or if the grandchildren were cycling.
23	As claimed.	Yes, if the grass was wet we would

		sometimes use the Bourne Close roadway.
24	As claimed.	Yes, route is unrestricted but desire line is clearly visible.
25	Route following the High Street from home and then wholly on the road section of Bourne Close to the recreation ground. The grass area is not used.	Yes.
26	Only the southern section of the claimed route across the grassed area (A – B), is shown.	Yes.
27	As claimed.	Yes, if going to or from the playground, friends house and to the shop or village centre. Not used if going to Bourne Close or the recreation ground, directly from Parsons Close. I use the road of Bourne Close although it is not a public right of way.

10.46. 13 of the witnesses have used the route as claimed and not altered this route, until the time of its obstruction in 2015, (Mr Marsh has used the claimed route including an extension into the recreation ground with a spur leading west). 3 witnesses have used the claimed route, but altered their route to use the road way of Bourne Close when the grass (on the area of green adjacent to the High Street), was long, wet or depending on where they were going. 3 users have used only the southern section of the route A-B, i.e. the grassed area, (please see plan at 4). One of these users is Mrs Lee who is part owner of the private road, Bourne Close and she would not be relying upon public rights to use that part of the claimed route over Bourne Close. Miss Thompson has used the southern section of the route (A – B) only to access Bourne Close for

the purposes of delivering publications. Officers consider that she would have used the private road of Bourne Close, but then gone in many different directions to deliver to the houses, rather than following the direct route of the claimed route to the recreation ground. Mr Mark Adams lives at Rose Cottage and appears to have used only the southern section of the route to access the other side of his boundary wall for the purposes of maintenance. Mr David Adams has used the whole route, but mainly uses the northern section of the claimed route (B - C) through Bourne Close as he lives to the west of Bourne Close and uses a spur over the green to the west of the claimed route, which meets the claimed route on the Bourne Close road and on which Mr Adams continues his journey. Mr Grundy has not used the claimed route at all but has marked on the map his proposal for a dedicated path, given his observations of the route.

10.47. Officers note that the termination point of the path at point C (see plan at 4), is the gate to the recreation ground, which is owned by the Parish Council and to which the public are allowed full access during its opening hours. The claimed footpath is a cul-de-sac path, i.e. it does not junction with another public highway and in order to use the path the public would need to return using the route which they had already used, however in this case the recreation ground, which has full public access, forms a place of popular resort which the public would legitimately wish to reach and 18 of the 27 witnesses state that they used the path to reach the recreation ground / playpark. The public may walk freely across the recreation ground, which itself links to another public highway, i.e. Winterslow Road. The notices on the gate at Bourne Close state that this access to the recreation ground is locked during the hours of darkness and opened again in the morning by 8:30am, which is confirmed by the parish council.

10.48. In the case of *Asgar Ali v Secretary of State for Environment, Food and Rural Affairs; Essex County Council and Frinton and Walton Town Council 2015*,

the High Court considered a case where a definitive map modification order was made, adding a public footpath to the definitive map and statement of public right of way in Essex, between 59 and 61 Connaught Avenue, Frinton-on Sea. The footpath ran along an alleyway between the two properties, with a door at the western end of the passage which had been present since the building was first constructed, with evidence provided that this door was on occasion closed and locked. In this case Rhodri Price Lewis QC, sitting as Deputy High Court Judge, examined the decision of the Inspector in this case and the effect of the locked door as an interruption to public user and the landowner's non-intention to dedicate the land as a public highway. The Inspector states *"I reach the conclusion that, even if the door had been locked on several occasions, this did not come to the attention of most users of the passageway and therefore did not bring into question the public's right to walk through."* Mr Price Lewis concludes that *"The evidence in all its forms "clearly demonstrated" to her (the Inspector) "regular use...without interruption throughout the twenty year period." It seems to me that she is finding on the totality of the evidence that any locking of the door at Christmas did not in fact interrupt the public's use of the alleyway."*

10.49. On the issue of landowner intention Mr Price Lewis concludes:

"In my judgement here the Inspector was deciding on the facts of this particular case that use of the path was for the purpose of getting to the local shops and businesses and so a locking of the door at Christmas when those shops and businesses were closed was not effective to provide "sufficient evidence" that there was no intention to dedicate because such acts on the part of the landowner would not be sufficiently overt to bring to the attention of the public who used the way that the landowner had no such intention."

10.50. Comparisons may be drawn in this case and the Idmiston case, in that although the gate to the recreation ground is locked during the hours of

darkness, there is sufficient evidence of long and regular public user, without interruption. Witnesses appear to be using the route to reach the recreation ground, which is only open during the hours of daylight, therefore it follows that the main use of the way would be during the hours of daylight and the locking of the gate at night would not be sufficient to bring home to users that their right was being challenged.

10.51. Additionally the gate to the recreation ground is not on the land in question and is not erected by the owners of the land over which the claimed route passes, therefore the locking of the gate is not sufficient evidence of the landowners' non-intention to dedicate a right of way over the claimed route. The Parish Council have confirmed that it was found necessary to lock the gate to prevent vandalism and anti-social behaviour taking place on the recreation ground, during the late evenings.

10.52. In this case there has been some confusion regarding the claimed route as the application plan appeared to show the claimed route leading across the front garden of the property no.1 Bourne Close, which has caused the residents of 1 Bourne Close some concern. However, the applicant has confirmed that it was not her intention to claim part of the route through the property no.1 Bourne Close, the claimed route is on the private road of Bourne Close and Officers consider that it would be physically impossible for members of the public to have used a route through the garden, as the property has a boundary wall and there is a large willow tree in the front garden. Also, on the balance of probabilities, the evidence does not support a route through the garden. 15 witnesses record a route entirely on the private road of Bourne Close on the evidence form maps, whilst 9 witnesses record a route through the garden on their maps, but the written description given by these witnesses does not make reference to the claimed route leading through the garden of 1 Bourne Close, in fact Mrs Simpson confirms that *“Within Bourne Close there are houses and gardens to the right and left”*, (of

the claimed route) and Mrs Southern confirms that the path runs *“From the playpark entrance...between garden fences, then directly across Bourne Close to the grassed area.”* The base map produced by Wiltshire Council shows the word *“Bourne”* written through the boundary of no.1 Bourne Close and Officers consider that this may have made it unclear where the boundary of the property was located and witnesses may have inadvertently shown a line within the boundary of this property. From their investigation of the available evidence, Officers are satisfied, on the balance of probabilities, that there is no right of way through the garden of the property 1 Bourne Close.

10.53. Officers are satisfied that, on the balance of probabilities, the witness evidence as a whole, supports public user of the route as claimed.

Width

10.54. In making an order to add a new footpath to the definitive map of public rights of way, a width must be recorded within the definitive statement, based on evidence. There is no width recorded in documentary evidence as the claimed route is not recorded in documents examined by Wiltshire Council (please see **Appendix 2**). The northern part of the route which passes between the gardens of 1A Bourne Close (Appledown) and 2 Bourne Close, is enclosed between garden fences and hedges to the east and west. It is therefore possible to take a measurement of the width available for public use, of 3.15 metres between OS Grid Reference SU 1870-3664 and OS Grid Reference SU 1872-3661, to be recorded if a definitive map modification order is made.

10.55. There is no such enclosure on the southern part of the route which leads through Bourne Close and over the green area, therefore the recorded width on this part of the route must be based upon evidence of the actual used width of the path. Witnesses have recorded to following path widths:

Witness	Width	Witness	Width
1	1m width access as a path	15	Approx 80 – 100cms
2	Approx 1m	16	Path approx 1m wide
3	Probably less than 1m	17	Approx 1m
4	1m	18	1.5 – 2m
5	1 - 1.5m	19	About 1m
6	1m	20	Max width 4 – 5m
7	1 - 4.5m (variable)	21	Fence created around the circular green
8	1m	22	On a previously open piece of ground, a path wide enough to walk through
9	1m	23	My wife and I normally walk side by side
10	Approx 1m	24	Can't say specifically noticed – maybe 2m?
11	1m	25	1 – 1.5m
12	1m	26	1m
13	Would not take much notice of any changes – a walk was a walk	27	About 1m
14	Approx 3 – 4ft (0.91 – 1.22m)		

10.56. The witnesses have given varying path widths. Officers have therefore used an average width from those witnesses who provided width evidence (based on the maximum extent given), giving an average width of 1.46 metres to be recorded as a definitive width of the footpath over Bourne Close and the green area (i.e. between OS Grid Reference SU 1872-3661 and OS Grid Reference SU 1875-3655), if a definitive map modification order is made.

Landowners Intention

10.57. Under Section 31 of the Highways Act 1980, there is a presumption of dedication after public user 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 Blackburn’s words, take steps to disabuse these persons of any belief that there was a public right...”

10.58. 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 1980 Act.”*

10.59. 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.”

10.60. In the Idmiston case, none of the landowners claim to have carried out any overt acts to bring home to the public that their right to use the path was being challenged, until the fencing of the green area adjacent to the High Street in 2015, which serves to bring the public’s right to use the way, into question. Whilst Mr Jones, the present owner of the area of green, states that he has asked people not to allow their dogs loose to foul on the land whilst walking in Bourne Close and the High Street and he has challenged those who park on the land without permission, he makes no reference to challenging path users whilst on the land, claiming that he was not aware of use. Dr Appleyard in her evidence states that Mr Jones purchased the land in 2004, *“At this time he lived at Jayesmoor, one of the two semi-detached properties opposite and he cannot have failed to be aware that members of the public walked over it both before and after he acquired it. He made no attempt to stop them and voiced no objections to this use. The only concern he expressed to us was that some people occasionally parked vehicles on it without permission.”* In her evidence form Mrs Catherine Lee states that she spoke with the owner of the green area of land on the day on which he erected the fencing which obstructed the route and brought the public right to use the way into question, at which time he advised her that the land was private and that he did not want members of the public to walk on his land, however witnesses make no reference to cases of challenge prior to the obstruction of the route by fencing in 2015 and agree that landowners were aware of the use.

10.61. The witnesses and the landowners do not refer to notices being erected advising the public that the route was not public and the landowners have not completed and lodged with Wiltshire Council a statement with plan and subsequent statutory declarations under Section 31 (6) of the Highways Act

1980, to demonstrate the landowners non-intention to dedicate a public right of way.

10.62. It is concluded that the landowners' non-intention to dedicate the land as a highway has not been demonstrated.

Common Law Dedication

10.63. Section 5 of the Planning Inspectorates Definitive Map Orders: Consistency Guidelines suggest that even where a claim meets the tests under Section 3 of the Highways Act 1980 for dedication under statute law, there should be consideration of the matter at common law.

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

10.65. 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 evidence of such dedication is difficult to obtain and it is then appropriate to apply Section 31 of the Highways Act 1980.

10.66. Relatively few highways can be shown to have been expressly dedicated and in the Idmiston case, there is no evidence before the Surveying Authority that the landowners have carried out any express act of dedication over the claimed route. However, there is evidence that the landowners have acquiesced in the use of the claimed route by the public and evidence of public acceptance of this route through user evidence. If the claim under statute were to fail, it is possible to apply the principles of common law dedication in this case.

Conclusion

10.67. Having considered the evidence submitted in support of the claim and that submitted by landowners and objectors, Officers have concluded that there is sufficient evidence for it to be reasonably alleged that a right of way for the public on foot subsists over the land in question, on the balance of probabilities based on public user for a period of 20 years and insufficient evidence of the landowners' non-intention to dedicate a public right of way. 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 a definitive map modification order application and modifying the definitive map and statement of public rights of way 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 of the Proposal

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.

17.2. Wiltshire Council has a duty to keep the definitive map and statement of public rights of way under continuous review and therefore there is no risk associated with the Council pursuing this duty correctly. Evidence has been brought to the Council's attention that there is an error within the definitive map and statement which ought to be investigated and it would be unreasonable for the Council not to seek to address this fact. Where the Council fails to pursue its duty to determine the application (within 12 months of the application), the applicant may appeal to the Secretary of State who will impose a deadline upon the authority for determination of the application.

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, therefore the costs of processing such

orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.

- 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 - £500 and a public inquiry could cost between £1500 - £3000, if Wiltshire Council continues to support the order (i.e. where legal representation is required by the Council) and around £200 - £500 where the Council no longer supports the order (i.e. where no legal representation is required by the Council as the case is presented by the applicant).

19. Legal Considerations

- 19.1. Where the Surveying Authority determines to refuse to make an order, the applicant may lodge an appeal with the Secretary of State, who will consider the evidence and may direct the Council to make a definitive map modification 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 or is reasonably alleged to subsist, on the balance of probabilities, or
- (ii) Where there is sufficient evidence that a right for the public on foot subsists or is reasonably alleged to subsist, on the balance of probabilities, the 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. 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 on the balance of probabilities over land in the parish of Idmiston, leading from Porton High Street, through Bourne Close to the recreation ground, based on evidence of public user for a period of 20 years.

21.2. Additionally, there is insufficient evidence of the landowners' non-intention to dedicate the way as a public right of way, during the relevant user period of 30th March 1995 – 30th March 2015. Path users do not refer to any incident of challenge, prohibitory signage or obstruction, prior to the erection of the fencing around the green area in 2015, which serves to bring public user of

the claimed route into question and there is no evidence before the Council that the landowners in Bourne Close have taken any action to demonstrate their non-intention to dedicate the land as a public highway.

- 21.3. Whilst Mr Jones (owner of the green area) has confirmed that he has previously challenged those walking in the High Street and Bourne Close who allow their dogs to foul on the green area and those parking on the green area, without permission, there is no evidence before the Council that Mr Jones, or any previous owner of the green area, have taken any action to demonstrate their non-intention to dedicate the land as a public highway, prior to 2015.

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 Idmiston, leading from Porton High Street, in a generally north-north-westerly direction, through Bourne Close, to the recreation ground, having a width of 3.15 metres on that section between OS Grid Reference SU 1870-3664 and OS Grid Reference SU 1872-3661 and 1.46 metres on that section between OS Grid Reference SU 1872 – 3661 and OS Grid Reference SU 1875-3655 and if no objections are received, the order be confirmed by Wiltshire Council as an unopposed order.

Janice Green
Rights of Way Officer, Wiltshire Council
Date of Report: 22nd June 2016