APPENDIX 2

DECISION REPORT

APPLICATION FOR AN ORDER UNDER SECTION 53(2) OF THE WILDLIFE AND COUNTRYSIDE ACT 1981 TO ADD A FOOTPATH FROM TOP GREEN URCHFONT TO URCHFONT RECREATION GROUND/PLAYING FIELD

1. Purpose of the report

1.1 To consider an application made by Urchfont Parish Council on the 31 January 2014 for an order under section 53(2) of the Wildlife and Countryside Act 1981 to modify the definitive map and statement by adding a footpath from Top Green, Urchfont to the Urchfont Recreation Ground/Playing field via Urchfont Primary School with a width of 1.5 to 2 metres. The plan submitted with the original application did not accurately reflect the position for the path being claimed so a revised plan was submitted in September 2014. The application is attached at Appendix 1.

2. Background

2.1 On the 31 January 2014 the Clerk to Urchfont Parish Council wrote a letter stating:

'As you are aware, Urchfont Parish Council agreed to coordinate and submit the above application and witness statements on behalf of the residents of Urchfont following the sale of Urchfont Manor grounds and the resulting access difficulties to Urchfont Playing Field. The access difficulties and safety issues were highlighted in a Parish Council survey of all Urchfont households in September last year, the results of which were shared with Wiltshire Council (Stephen Morgan). Further discussion in the Parish identified the potential for this claim which has been widely publicised via Parish Council minutes, Parish Magazine (Redhorn News) and on the Parish website.

I now enclose the following for your consideration:

- *Completed Form 1*
- *Completed Form 3*
- *27 completed Witness statements (originals)'*

The application is attached at Appendix 1 to this report and a summary of the witness evidence statements is attached at Appendix 2.

3. Main considerations for the Council

3.1 Wiltshire Council is the Surveying Authority for the county of Wiltshire excluding the Borough of Swindon. Surveying Authorities are responsible for preparing and the constant review of definitive maps and statements of public rights of way. Section 53(2) (b) of the wildlife and Countryside Act 1981 states:

As regards every 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 appears 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.

3.2 The event referred to in Section 53(2)(b) which is relevant to this application which is based upon evidence of public use of the claimed path is section 53(3)(b):

'The expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway.'

3.3 Dedication of rights of way to the public can arise under statute law, section 31 of the Highways Act 1980 and under common law. Under section 31, dedication of a route as a public highway is presumed after public use, as of right and without interruption, for 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period runs retrospectively from the date of bringing into question. The main issues to be considered in relation to section 31 are therefore:

- When the status of the claimed route was called into question;
- The extent and nature of the claimed use;
- Whether there is any evidence of a lack of intention to dedicate a public right of way.

Section 31 of the Highways Act 1980 states:

'(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 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 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 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 twenty years from the date of deposit

(ii) within twenty 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.'

3.4 The council must consider all available evidence relating to the application. Historical evidence may be considered by virtue of section 32 of the Highways Act 1980:

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

3.5 The application did not bring any historical evidence to the council's attention and officers have not discovered any. There is no evidence of express dedication by the landowners over which the route crosses consequently the application must rely on use by the public 'as of right'. Section 31(1) requires that a period of 20 years of use 'as of right' must be satisfied for the claimed route to be deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

'When the right to use the way was brought into question'

3.6 The Planning Inspectorates Definitive Map Order Consistency Guidelines state:

'5.4 House of Lords in R (on the application of Godmanchester and Drain) v Secretary of State for the Environment Food and Rural Affairs [2007] ('Godmanchester') is the most recent case addressing the meaning of section 31(2) Highways Act 1980 endorsing earlier judgements in regard to what act or acts constitute 'bringing into question.'

5.5 In R v Secretary of State for the Environment Food and Rural Affairs ex parte Dorset County Council 1999 Dyson J was not satisfied that a landowner's letter to the Department of the Environment passed to the County Council but not communicated to the users, satisfied the spirit of section 31(2). The test to be applied is that enunciated by Denning LJ in Fairey v

Southampton County Council 1956. Dyson J's interpretation of that judgment 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 a highway.'

5.6 The 'bringing into question' does not have to arise from the action of the owner of the land or on their behalf. In Applegarth v Secretary of State for Environment, Transport and the Regions [2001] EWHC 487, the owner of a property whose access was via a track claimed to be a bridleway, challenged the public use although he did not own the track. Munby J stated: *'Whether someone or something has 'brought into question' the 'right of the public to use the way' is...a question of fact and degree in every case.'* Thus any action which raises the issue would seem to be sufficient. However, where there is no identifiable event which has brought into question the use or way, section 31 subsections 7A and 7B of the Highways act 1980 (as amended by section 69 of the Natural Environment and Rural Communities Act 2006) provides that the date of an application or a modification order under the Wildlife and Countryside Act 1981 section 53 can be used as the date at which use was brought into question.'

3.7 I have looked at the evidence before the council concerning any acts that may have challenged the public right to use the claimed route. I have considered the erection of any notices and signs inconsistent with the way having been dedicated as highway, any verbal challenges to use or physical obstructions such as a gate specifically locked to prevent access by the public and any deposits made under section 31(6) of the Highways Act 1980.

3.8 Wiltshire Council and the Salisbury Diocesan Board of Education own the land over which the claimed route crosses. No deposit by either institution is recorded in the council's section 31(6) of the Highways Act 1980 Register and I have no record of a deposit ever having been made.

3.9 From information provided by the school seeking to refute the application and from the witnesses who support it, it would appear as if use of the route was brought into question by the installation of a mechanical locking system in October 2011 on a gate across the section of path between the Top Green and the school. I say this because:

a) In a statement dated April 2014 the Governors of the school stated:

> *'Before the mechanical locking system was fitted, on the instruction of Wiltshire Council Health and Safety Officer, the gate was bolted from the school side once all children were in school. Unfortunately as this*

could easily be unbolted by parents leaving the site and as it was not in view of the school office, it could be left open for periods of time. Under these circumstances, anyone who walked through the school site to access the playing field did not have the permission of the school to do so.....This gate has always been bolted from the school side during school hours. Originally, as evidenced by the letter from Mrs I Bailey and statement from the present Chair of Governors, Joan Bartlett, the gate was padlocked after school hours and during the holidays. At a later date, as a concession to the villagers to enable them to access the Parish play equipment and the playing field by a short cut (rather than the longer route down Blackboard Lane), the gate was left unlocked <u>*out of school hours*</u>. We have no record of when this was but probably when there was a change of Head teacher in the mid-1990s.

It is acknowledged there may have been times during the day the gate on the path between the Top Green and the school was fastened shut, but the only evidence of it having been locked before October 2011 has been given by Joan Bartlett, Chair of the Governors. Mrs Bartlett's evidence is in direct conflict with twenty one of the witnesses who had used the path at varying times during the week and at weekends during the period 1969 to 2013 who stated the gate was not locked before 2011. For example in a letter dated the 3 October 2014 Mrs S A Gidding stated:

'*My eldest Son attended this new school built in the playing fields from 1978 until he left in 1983. There was no gate at either end of the path at that time and no signs.*

My younger two children attended the school between the years of 1992 and 2001 and I believe that the gates were erected at the school during this time. I never knew these gates to be closed or locked at any time. They were certainly never closed or locked during the frequent times I accessed the playing fields during or outside of school hours. I frequently visited the school during school hours to assist with swimming lessons, reading, crafts and I was also a part time lunch supervisor. Again the gates were never closed or locked during those times.

Most parents would also frequently use the path during and outside of school hours to access the playing fields with younger pre school children with no problems at all.'

It is noted in the Governor's meeting of the 20 January 1998 a crime prevention officer had advised a second bolt be fitted to the back door at the school but there is no indication of the location of the back door, whether the bolt was installed or if the door was then ever locked. A bolt is not a lock. A school safety check on the 29 November 2004 revealed a dangerous hasp on

a gate on the path to the Green with an action to remove the same. It is not possible to ascertain from this piece of information whether the hasp was operable at that time and therefore it might not have been possible to lock the gate, certainly if the hasp were removed the gate would not have been able to have been locked unless a new hasp or locking mechanism was installed.

b) Again in the Governors response to the application in April 2014 it is stated:

> '*There are notices on the gate and at the end of the school path onto The Green that there is no access during the school day. As evidence in Mrs J Holton's letter there are notices on the Playing Field.'*

In a note dated 20 March 2014 from Mrs Jackie Holton (Head of Urchfont school from 2002 to 2009) to Mrs Barlett, Mrs Holton stated:

'There was a gate between the footpath and the school throughout my time at Urchfont. There was a bolt on this gate and a sign that stated that the gate should be kept shut at all times. The bolt was on the school side of the gate. There was a sign on the school playground stating that this was school property and as such, was not open to the general public. I cannot recall the exact wording of the signs.'

Mrs Holton has confirmed that during the period she was Head at the school the gate was not locked. A sign requesting a gate should be kept shut across part of the claimed route can only be intended to be directed at members of the public passing through it. Similarly a sign indicating the school playground was not open to the public could have been only necessary because members of the public had the physical ability to enter on to it from the claimed footpath which ran alongside. Signs with this wording were not understood by the witnesses in support of the application to mean that they could not use the claimed path to the village recreation field and tennis court. The signs were not explicit enough, they could have said 'no public right of way' but they did not do so. The signs did not challenge the public right to use the claimed route.

c) There is no evidence of users of the claimed route being directly challenged in person whilst using the way.

Whether there was 20 years public use from 1991 to 2011

3.10 The Planning Inspectorate's Definitive Map Order Consistency Guidelines state:

‘5.12 There appears to be no legal interpretation of the term ‘the public’ as used in section 31. The dictionary definition is ‘the people as a whole, or the community in general’. Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the community. However, Coleridge LJ (as he was then) in R v Southampton (Inhabitants) 1887 said 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.’

5.13 Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local community. It is unlikely that use confined to members of a single family and their friends would be sufficient to represent ‘the public’.

5.14 It was held in Poole v Huskinson (1843) that ‘there may be a dedication to the public for a limited purpose... but there cannot be a dedication to a limited part of the public.’

5.15 There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was used by ‘the public’ and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)

5.16 Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (Davis v Whitby (1974)). However, use of a way by trades-people, postmen, estate workers, etc., generally cannot be taken to establish public rights.

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

‘If twenty witnesses had merely repeated the statements made by six old men who gave evidence, that would not have strengthened the respondents’ case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence.’

5.18 Arguably, therefore, the evidence contained in a few forms may be as cogent – or more cogent – evidence than that in many. R v Secretary of State for Environment, Transport and the regions (ex parte Dorset) [1999] accepted that, although the evidence within 5 user evidence forms was truthful, it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.'

3.11 The Parish Council submitted 27 evidence forms completed by a cross section of the local community who have given evidence of use of the path from the Top Green to the village playing field since 1969 to 2013. The use given describes use of the path on all days of the week and both at times when the school was open and times when it had been closed. All witnesses claim to have used the same route and a number of witnesses, for example Mrs Giddings say they saw other residents using the path. It is noted the present path to the school from the Top Green does not appear as a feature on Ordnance Survey maps prior to the construction of the school in 1974.

Whether there is or has been use 'as of right' and uninterrupted?

3.12 The Planning Inspectorate's Definitive Map Orders Consistency Guidelines state:

'5.21 Use 'as of right' must be without force, secrecy or permission ('nec vi, nec clam, nec precario'). It was once thought that users had to have an honest belief that there was a public right. In R v Oxfordshire County Council ex parte Sunningwell Parish Council [1999] 3 All ER 385 [Sunningwell] it was held that there is no requirement to prove any such belief. However, if a user admits to private knowledge that no rights exists, it may have a bearing on the intention of the owner not to dedicate.

5.22 Force would include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate.

5.23 In Sunningwell, 1999, Lord Hoffman said that section 1 of the Rights of Way Act 1932 was an echo of the Prescription Act 1832, with the purpose of assimilating the law of public rights of way to that of private rights of way. Lord Hoffman goes on to say that the issue of dedication of a highway was how the public using the way would have appeared to the landowner. The use must have been open and in a manner that a person rightfully entitled would have used it, that is not with secrecy. This would allow the landowner the opportunity to challenge the use, should he wish.

5.24 If there is express permission to use a route then the use is not 'as of right'. The issue of implied permission, or toleration by the landowner, is more difficult. In the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Lord Hoffman, Sunningwell 1999, held that

toleration by the landowner of use of a way is not inconsistent with user as of right. In R (Beresford) v Sunderland County Council [2003], Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Lord Scott stated in the Beresford case

'I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e., toleration or acquiescence, is consistent with the use being 'as of right.'

5.25 Permission may be implied from the conduct of a landowner in the absence of express words. Lord Bingham, in Beresford stated that

'...a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, record, that the inhabitants' use of the land is pursuant to his permission.'

But encouragement to use a way may not equate with permission; As Lord Rodger put it,

'the mere fact that a landowner encourages an activity on his land does not indicate...that it takes place only by virtue of his revocable permission.'

In the same case, Lords Bingham and Walker gave some examples of conduct that might amount to permission, but the correct inference to be drawn will depend on any evidence of overt and contemporaneous acts that is presented.'

3.13 The witnesses in support of the application have given clear evidence of daily regular use of the claimed route without force or permission. No evidence has come forward from the owners or occupiers of the land affected by the application of any breaking of locks or passing around an intentional blockage on the claimed route or interruption of use from October 1991 to October 2011, October 2011 being the date when a gate along the route was actually locked and the challenge to public use was brought to the attention of the users of the route. The school has granted permission from 2005 to date, to the organisers of the Urchfont Scarecrow Festival, use of the recreation field for parking which included access through the school grounds to the village green. The permission relates to a wider use of the school grounds than to use along a specific route and was clearly relating to the Scarecrow festival over the May Bank holiday weekend.

Evidence of the landowners intentions

3.14 The Planning Inspectorate's Definitive Map Orders Consistency Guidelines state:

‘5.26 Once use is established as of right and without interruption, the presumption of dedication arises. Section 31 provides for methods which show that during the period over which the presumption has arisen there was in fact no intention on the landowner’s part to dedicate the land as a highway. This would defeat a claim under the statute and is often referred to as ‘the proviso’.

5.27 Under section 31(3) a landowner may erect a notice inconsistent with the dedication of a highway, and if that notice is defaced or torn down, can give notice to the appropriate council under section 31(5). Under section 31(6), an owner of land may deposit a map and statement of admitted rights of way with ‘the appropriate council’. Provided the necessary declaration is made at twenty year intervals thereafter, the documents are (in the absence of evidence to the contrary) ‘sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways’. This is for the period between declarations, or between first deposit of the map and first declaration.

5.28 ‘Intention to dedicate’ was considered in R (on the Application of Godmanchester Town Council)(Appellants) v Secretary of State for Environment Food and Rural Affairs, which is the authoritative case dealing with the proviso to Highways Act 1980 section 31. In his leading judgment, Lord Hoffmann approved the obiter dicta of Denning LJ (as he then was) in Fairey v Southampton county Council [1956] who held ‘in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate’.

5.29 It is clear from Godmanchester that actions satisfying the proviso will usually, also bring the public right to use the way into question. It nevertheless remains the case that not every act which brings the rights of the public into question will necessarily satisfy the proviso.

5.30 Lord Hoffman held 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 nor 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’.

5.31 For a landowner to benefit from the proviso to section 31(1) there must be ‘sufficient evidence’ that there was no intention to dedicate. The evidence

must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way. Although section 31 subsections (3), (5) and (6) specify actions which will be regarded as 'sufficient evidence', they are not exhaustive; section 31(2) speaks of the right being brought into question by notice 'or otherwise'.

5.32 Godmanchester upheld the earlier decision of Sulivan J in Billson that the phrase 'during that period' found in section 31(1) did not mean that a lack of intention had to be demonstrated 'during the whole of that period'. The House of Lords did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient; what would be considered sufficient would depend upon the facts of a particular case.

5.33 However, if the period is very short, questions of whether it is sufficiently long ('de minimus') may arise, and would have to be resolved on the facts.

5.34 In the Court of Appeal case Lewis v Thomas 1949, Cohen LJ quoted with approval the judgment of MacKinnon J in Moser v Ambleside UDC 1925:

'It was said, very truly, in the passage of Parke, B in Poole v Huskinson (1843) that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner...himself – and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not here and without his knowledge.'

'The fact that the owner...locks the gates once a year...is, or may be, a periodic intimation...that he is not intending to dedicate a highway, but it must be an effective interruption;...if you have evidence of an interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or...if it is an attempted interruption by a tenant without the...authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication.'

5.35 However, in Rowley v Secretary of State for Transport, Local Government and the Regions and Shropshire County Council May 2002, Elias J held that the acquiescence of a tenant may bind the landowner on the issue of dedication. Also, in the absence of evidence to the contrary, there is no

automatic distinction to be drawn between the actions of a tenant acting in accordance with their rights over the property and that of the landowner in determining matters under section 31 of the Highways Act 1980.

'the conclusion...that there was no evidence that any turning back had in any event been authorised by the freeholder involved an error of law. A similar argument was advanced in Lewis v Thomas 1950 1 K.B 438 and rejected, the court apparently taking the view that if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that.'

5.36 In cases where a claimed right of way is in more than one ownership, and only one of the owners has demonstrated a lack of intention to dedicate it for public use, it should be considered whether it is possible that public rights have been acquired over sections of the way in other ownerships, even if this would result in cul de sac ways being recorded (R on application of the Ramblers Association and Secretary of State for Environment Food and Rural Affairs and interested parties 2008 (CO 2325/2008) this is not decided case law but a consent order where the Secretary of State submitted to judgment).

5.37 If there is no contradictory evidence in accordance with the proviso to section 31(1), deemed dedication is made out and the Order should be confirmed. This is so whether there is an owner who cannot provide sufficient evidence of lack of intention or whether there is no identified owner available to produce such evidence.'

3.15 In her letter dated the 3 October 2014 Mrs. S A Giddings stated:

'As to signs, I cannot recall any signs being erected in the pathway until around 2011. The only signs can remember being erected earlier than 2011 was asking the public not to use the school grounds. I seem to recall that this was erected to prevent youngsters playing on skateboards etc on the school playground as it was feared that they could cause some damage. I certainly do not recall any earlier signs 'prohibiting the unauthorised use of school grounds'.

3.16 None of the other witnesses refer to signs existing on the claimed route earlier than 2011. From the evidence before the council relating to the application, it would appear that any notices that may have been erected on the route of the claimed path did not bring it to the public's attention they had no right to use the path.

3.17 The minutes for the school Governors dated September 2002 refer to signs having been erected in the school alleyway and on the playground prohibiting the unauthorised use of school grounds. The exact wording of the signs isn't known but it is clear from the evidence provided by the witnesses that

whatever the wording did say, it was insufficiently clear to the users of the path that the owner of the land did not want the public to have a right to use it. The signs appear to have been taken by those who saw them as meaning use of the playground and school building was denied, not use of the claimed path. There was no reason users of the claimed path should believe the landowner (Wiltshire County Council) did not want to dedicate the route as a public path as the path lead to the community assets of the village play ground and tennis courts which Wiltshire County Council as owner of the land leased to the recreation field committee for public use.

3.18 No maps and statements have been deposited under section 31(6) of the Highways Act 1980 by the owners of the land over which the claimed path crosses.

3.19 None of the witnesses say they were expressly given permission to use the claimed footpath nor have they given any evidence of their use having been challenged by the owners of the land.

3.20 The owners of the land have not provided any evidence of challenges in person being made against members of the public using the claimed footpath.

Conclusion

4 Urchfont Parish Council have provided evidence of continuous public use of the claimed path since the path from the Green to the school was built in 1973/74 to the locking of the gate across the path in October 2011. None of the witnesses ever sought permission to use the path or were given permission to do so. Use of the path was not conducted in secrecy but done openly during all hours of the day, on all days of the week throughout the year. The use was uninterrupted by either direct verbal challenges to users from the owners of the land over which it crosses, other overt acts such as locked gates, or effective signage concerning the public right to use the path. No deposits relating to the land have been made under section 31(6) of the Highways Act 1980. The evidence before the council strongly points to the alleged right having been acquired on the balance of probabilities.

5. In their submission dated April 2014 concerning the application, The Governors to the school have expressed their vigorous opposition to the application to record the claimed path as a public right of way as they believe this would affect their ability to provide a secure boundary which would in turn compromise providing a safe environment for their pupils. Similarly Martin Kemp, Building Manager of the Salisbury Diocesan Board of Education also expressed his opposition to the application citing similar reasons in an e mail dated the 3 February 2015. Copies of both submissions are attached at Appendix 3. Whilst I note the concerns raised, security at the school is not a matter for the council's consideration in determining this application under

section 53 of the Wildlife and Countryside act 1981. The council is required to determine the application on the evidence before it measured against the criteria set out in paragraphs 3 – 3.20 in this report. If the path is added to the definitive map the council can work with the school and the Salisbury Diocese Board of Education to address these concerns by other means and with other legislation.

6. The courts have long recognised that, in certain circumstances, cul de sacs can be highway. In Roberts v Webster 1867 Widgery J concluded:

'The authorities clearly show that there is no rule of law which compels a conclusion that a country cul de sac can never be highway. The principle stated in the authorities is not a rule of law but one of common sense based on the fact that the public do not claim to use a path as of right unless there is some point in their doing so, and to walk down a country cul de sac merely for the privilege of walking back again is a pointless activity. However, if there is some kind of attraction at the far end which might cause the public to wish to use the road, it is clear that that may be sufficient to justify the conclusion that a public highway was created.'

The claimed path leads to and serves the public recreation ground, a place of popular resort.

7. An order to add a public path to the definitive map and statement may be made under section 53(3) (b) of the Wildlife and Countryside Act 1981 which states:

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

The legal test is 'the balance of probabilities'.

Recommendation

8. That an order be made under section 53(3)(b) of the Wildlife and Countryside Act 1981 to add a footpath from Top Green Urchfont to the Urchfont Recreation Ground/Playing Field with a width of 1.5 to 2 metres as shown on the plan appended to this report at Appendix 4.