

**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 - MERE - THE SQUARE TO NORTH STREET**

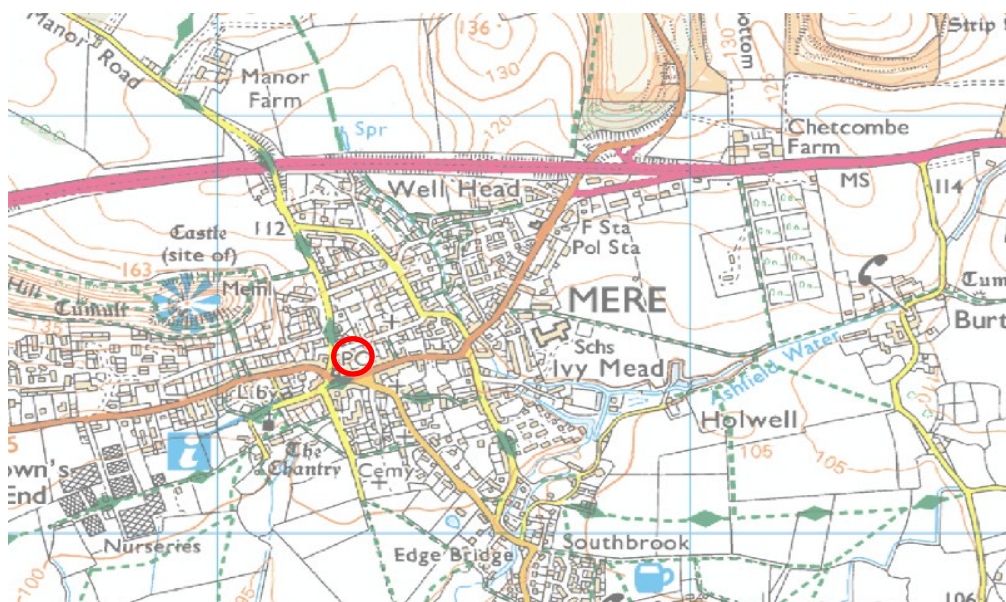
**1. Purpose of Report**

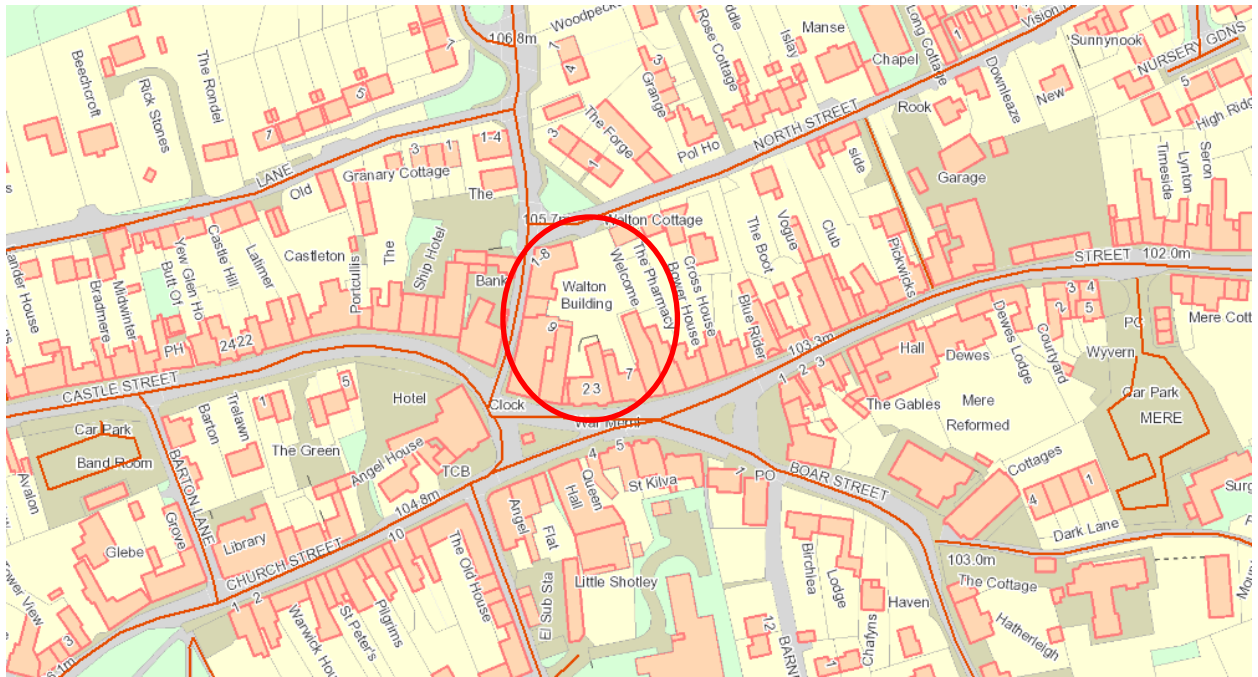
- 1.1. To determine an application, made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way, in the parish of Mere. The claimed route leads from The Square, Mere in a northerly direction from the public footway through an archway to and across a private car park to North Street, Mere.

**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**





3.1. 2014 Aerial Photos of area.





4. **Claimed Footpath Route**



- 4.1. The application is made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way in the parish of Mere leading from point A, at its junction with North Street, Mere leading south through a private car park and through an archway and metal gates to The Square, Mere. The route A to B is approximately 57 metres in length.

## 5. Photographs

Photos taken on 12th June 2018 of the claimed route.

In the below photos the red arrow on the aerial photo shows the position and direction of the photo on the left.

### 5.1.



5.2.



5.3.



5.4.



5.5.



5.6.



5.7.



5.8.



5.9.





5.10.



## 6. Registered Landowners

6.1. The two owners of the land affected by the application are:

The Walton Building Management Company Limited of Flat 6, The Walton Building, North Street, Mere, Wiltshire, BA12 6HU.

Lipscombe Developments Limited of The Boardroom, The Square, Mere, Warminster, Wiltshire, BA12 6DL.

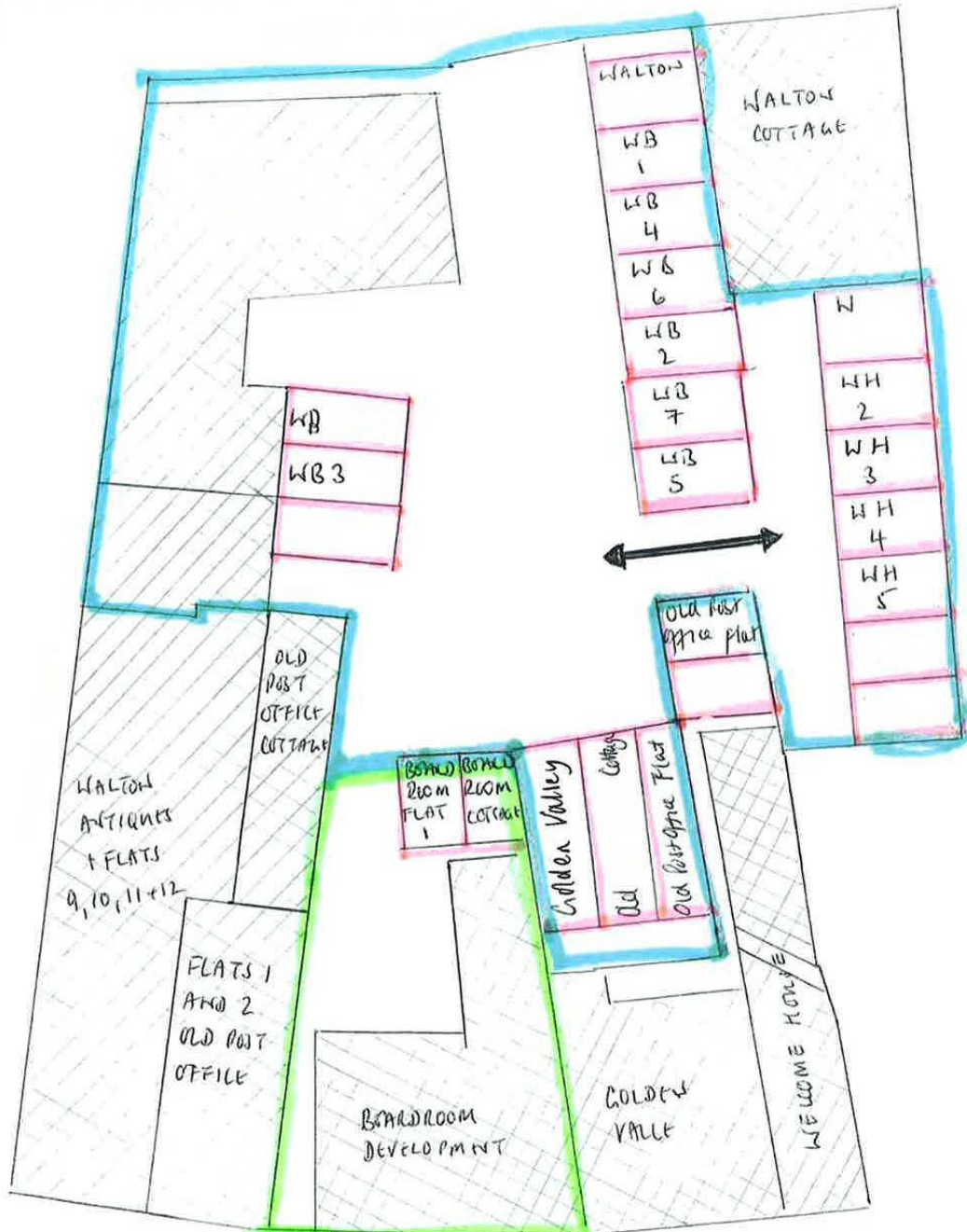
The two landowners have been contacted through the following contacts;

The Walton Building Management Company- c/o Saffron Reilly-Stitt, Gilyard Scarth Lettings, The Old Coffee Tavern, Salisbury Street, Mere, BA12 6HA.

Lipscombe Developments Limited – Mr Andrew Lipscombe (Joint managing director) , Lower Langham Barn, Langham Lane, Gillingham, Dorset, SP8 5NT.

6.2. The below map shows the areas of ownership of the land in question.

The land owned by The Walton building Management Company edged in blue and the land owned by Lipscombe Developments edged in green. Various other parking and other space ownership through tenant and leasing agreements are edged in red but the two landownership areas that are affected by the footpath claim are clearly edged in blue and green.



## **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 Mere. The claimed route leads from The Square, Mere leading in a northerly direction for approximately 57 metres to North Street, Mere. The application is dated 24<sup>th</sup> April 2018 and is made by Graham Sams of 22 White Road, Mere, BA12 6EZ on the grounds that public footpath rights can be reasonably alleged to subsist or subsist over the land, on the balance of probabilities, based on user evidence and should be recorded within the definitive map and statement of public rights of way. It is noted Cllr George Jeans has been the main point of contact for the application not Mr Sams whose name the application is made under.
- 7.2. The applicant, had served formal notice on one of the landowners, Mr Richard Lipscombe of Lipscombe Building Contractors, Lower Langham, Langham Lane, Gillingham, SP8 5NT using the "Form of Notice of Application for Modification Order as set out in regulation 8(3) Schedule 7 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 SI 1993 No 12. The Walton Building Management Company did not have formal notice served to them by the applicant but have since been consulted. The application came with a map showing the claimed route and was accompanied by a number of user evidence forms and statements from supporters.

## **8. Initial Consultation**

Wiltshire Council undertook an initial consultation regarding the proposal on 23<sup>rd</sup> May 2018. User groups, Mere Town Council, landowners, the Council member for area, and neighbouring properties were consulted. The consultation letter had an end date of 6<sup>th</sup> July for comments and replies. It soon became apparent not all tenants and residents of the surrounding flats and businesses had been consulted and as such further letters were sent consulting as many people in the area as feasible.

- 8.1. Replies were received from the following people, the replies can be seen in full at appendix 1 to this report.

- Mere Town Council – in support
- Mr Lipscombe (Landowner) – objecting
- The Walton Building Management Company (Landowner) - objecting
- Mr and Mrs D’Silva (local resident) – in support
- Mrs Moody (local resident) – in support
- Mrs Ackerman (local resident) - objecting
- Mr Morris (local resident representing Welcome House residents) - objecting
- Jo Oliver and Simon Richards (local residents) - objecting
- Ms Main (local resident) - objecting
- Mr May (local resident) - objecting
- Mr Holder (local shop owner) – provided evidence
- Mr Crump - objecting

Further investigations were undertaken and evidence has been received from Mr Finan (previous landowner), Mrs Young and Mr Squires. All responses and evidence will be considered later in the report.

## 9. **Main Considerations for the Council**

- 9.1. The definitive map and statement of public rights of way are conclusive evidence as to the particulars contained therein, however 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. The Surveying Authority is the body responsible for the preparation and continuous review of the definitive map and statement of public rights of way. The Wildlife and Countryside Act 1981 Section 53(2)(b) applies:

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

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*

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

9.2. 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.”*

9.3. 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.”*

9.4. 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 states that “A definitive map shall be on a scale of not less than 1/25,000.”

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*

(2) *If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description ‘owner’ or ‘occupier’ of the land (describing it) and by affixing it to some conspicuous object or objects on the land.*

(3) *When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.*

(4) *Every notice or certificate under this paragraph shall be in the prescribed form.*

9.5. 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 1<sup>st</sup> January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

*(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.*

*(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.*

*(6) An owner of land may at any time deposit with the appropriate council-*  
*(a) a map of the land on a scale of not less than 6 inches to 1 mile and*

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

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

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

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

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



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

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

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

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

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

*“Evidence of dedication of a way as highway*

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

*made or compiled, and the custody in which it has been kept and from which it is produced.”*

## 10. Documentary Evidence

10.1. Ordnance Survey (OS) maps covering the area have been viewed at The Wiltshire and Swindon History Centre in Chippenham to ascertain if any historical evidence could be found of a public right existing over the claimed route. The earliest map viewed was the Inclosure award which can be seen below.

1821 Inclosure Award for Mere



The area of the claimed path between The Square and North Street can be seen on the above Inclosure award and at that time the area can be seen as being split into a at least two narrower plots of land compared to the current modern layout. There is no public road or path recorded at the location of the claimed footpaths location.

## 10.2 OS Map 1887 1:2500

(The red lines drawn on the map appear to be a later addition)



## 10.3. OS Map 1901 1:2500



## 10.4 OS Map 1925 1:2500



## 10.5. OS Map 1942 1:2500



10.6. In the maps above it can be seen that no recorded footpath or any other path was recorded on any of the OS maps dating back to 1887. It should be noted from 1888, OS maps carried

a disclaimer that the representation of a track or way on the map was not evidence of a public right of way.

10.7. The preliminary step to creating the definitive map of public rights of way as a result of the National Parks and Countryside Access (NPACA) act 1949 was for each parish to submit a map to the county council marking the public rights of way which they believed existed in their parish. The parish claim map submitted by Mere Council can be seen below.

10.8. Mere Parish Claim map- surveyed 1951



10.9. Looking at the parish claim map and the historic OS maps it can be seen that the claimed route subject to this application has not been claimed as a public right of way in the past.

10.10. The 1952 Mere and Tisbury Rural District Council Definitive Map does not record the route as a public right of way.

10.11. In summary, no evidence has been found that the claimed route has been recorded as a public footpath or a path of any kind in the various documents examined.

## 11. Twenty Year Use

11.1. Section 31 of The Highways Act 1980 states: ( see paragraph 9.5 of this report for section 31 in full)

*“(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.*

11.2. The period of 20 years is taken as 20 years counted back from the date that the way was first called into question. There are possibilities for a number of 20 year periods in this application depending on what event is deemed to have brought the way into question. The application was applied for in 2017 after the reported locking of metal gates at The Square end of the claimed route which stopped people from being able to use the route. If this event is deemed to be the calling into question of the route then the 20 year period of consideration would be 1997-2017. There is evidence which will be discussed later in this report which could demonstrate that the way was brought into question at an earlier date and as such the relevant period to be considered could be earlier. Unless stated otherwise the relevant period being considered in this report is 1997-2017.

## **12. User Evidence Forms**

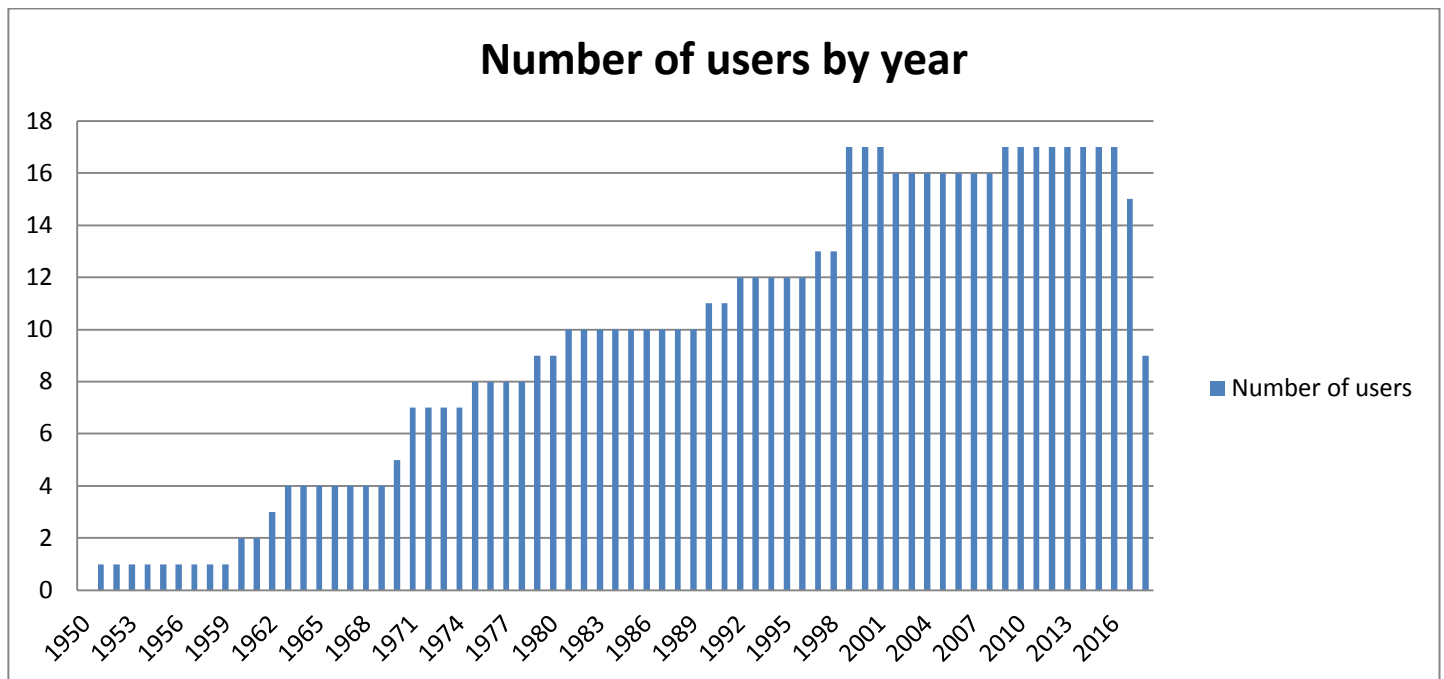
As part of the application, a total of 24 witness forms have been submitted as evidence (one user has submitted two forms). The use of the way claimed by the 23 individual forms covers the period 1940s-2017.

12.1. When considering the relevant 20 year period of 1997-2017 in this case, of the 23 users, 15 claim to have used the route for the whole 20 year period of 1997-2017. However 2 of these users have stated they had permission to use the route which would mean their use was by right not as of right and so cannot be considered under this legislation. Another user has clarified she does now remember solid wooden gates on the route but does not remember going through them or using the route as a whole but this was many years ago and due to ill health does not wish to be contacted about this in future. Removing these 3 users for the aforementioned reasons we are left with 12 users claiming to have used the route as of right for the whole 20 year period. These 12 claim to have used the route on a frequent basis, with 7 of them claiming use on a daily basis, 3 on a weekly basis and 2 using the route rarely perhaps once every few months (originally in their forms they claimed weekly usage but after clarification they now claim their use of the route to be rarely, perhaps every few months). 5 users claim to have used the route for 10+ years in the period 1997-2017 on a daily or

weekly basis, and a further 2 users claim to have used the route for a period of less than 10 years during the period 1997-2017 on a varied frequency. One user failed to fill out the years of use claimed, attempts have been made to clarify this by letters but to date no response has been received so this user cannot be considered.

In total with 2 users having permission, one having clarified she did not use the route as a whole and does not wish to be contacted further due to ill health and one user not filling out their years of use we have 19 user forms filled out who are claiming use as of right covering a 20+ year period.

12.2. Below is a chart showing the number of individual users who claimed use in each year. (The two users who answered yes to being given permission to use the route and the 1 user who does not wish to be contacted further and upon further investigation did not use the route as a whole are not included in the chart below.



For the 20 year period (1997-2017) it can be seen that between 13 and 17 individual users are using the path each year, with the claimed use increasing in the late 1990s. This could be due to the increase in population of the town or that persons using the routes further back in time have either passed on or moved away from the area. Consistent use, albeit by fairly low numbers for a town with a population of 2,961 in 2011, can be seen going back to the

1970s. The earliest claimed use dates back to the 1950s although this and many other points are disputed by other accounts given which will be discussed later in this report.

- 12.3. There is no statutory minimum level of users required for the presumption of dedication. The quality of the evidence i.e its honesty, accuracy, credibility, and consistency are of much greater importance than the number of users.

In *R (Lewis) v Redcar and Cleveland Borough Council* UKSK 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:

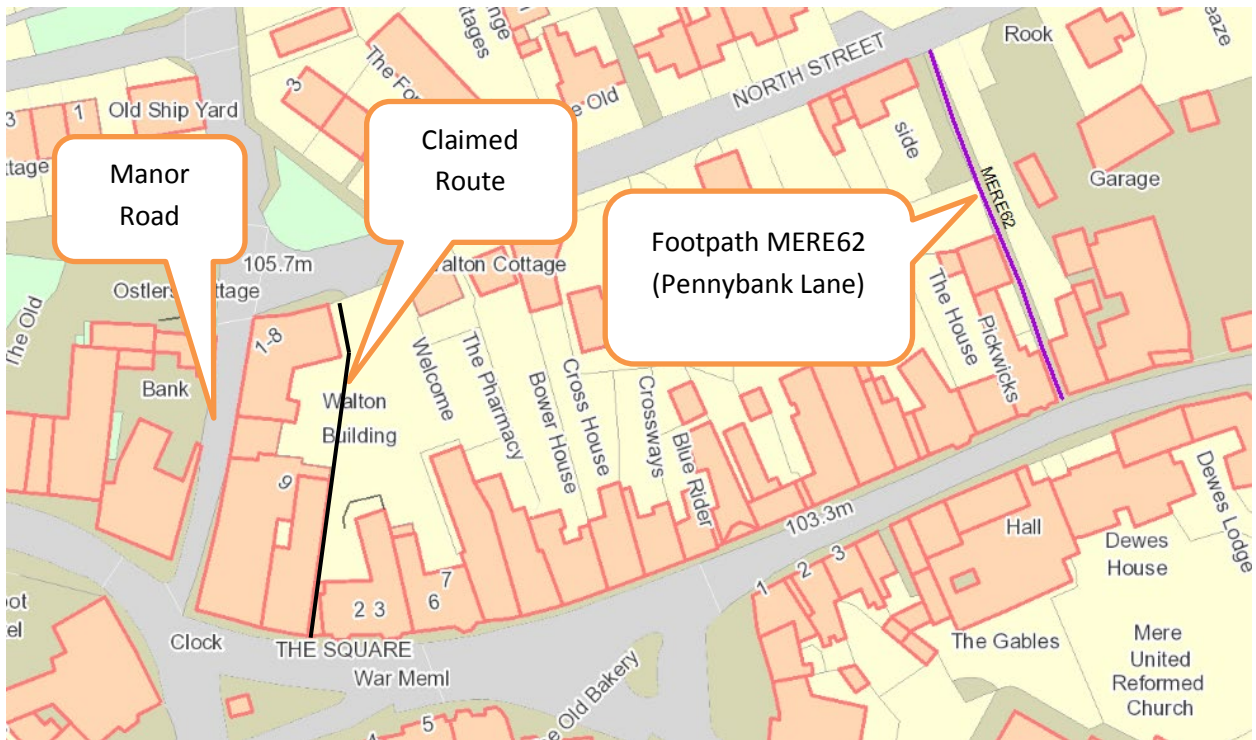
*“...no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term...the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted, and ought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

- 12.4. What must be considered is the level of user, in this case 19 users using the route as of right over some or the whole of the 20 year period (97-17). The use of the path can be seen to be increasing in recent years (see chart at 12.2). It should be noted the population of Mere has increased in recent years, with a recorded population of 2,085 in 1971 and 2,961 in 2011 ( figures taken from [history.wiltshire.gov.uk](http://history.wiltshire.gov.uk)). We must consider whether or not this claimed use is sufficient to make the landowners aware that a public right was being asserted against them. The level of claimed use would indicate the owners/ occupiers of the land would have been aware of the path being used if present. However the path is a route to the back of shops and through a private car park to flats which the residents would have access to, so the urban nature of the route would mean seeing people on the path or in the vicinity of the path would not be unusual to any owner or occupier. The claimed path would be a natural route / shortcut to use from the centre of Mere , at The Square and through to North Street to residents who live in that area of Mere going to and from the town so from that perspective it would not be unreasonable to presume people would attempt to use the route if possible.



The use however is disputed by landowners from different time periods and the accessibility of the route is the main point of dispute which will be explored in detail.

12.5. The 23 people who filled out witness forms had an opportunity to give extra comments or observations at the end of the form. Many of the users have stated in various communications that the claimed path is a safer route to use than the alternative via Manor Road which is to the west of the claimed route and can be used to traverse between North Street and The Square. This section of road does not have a pavement and is a narrow section of road making it dangerous for pedestrians to use. As such if the claimed route is not available the closest alternative is Manor Road which is not particularly safe for pedestrians. There is a public footpath MERE62 (Pennybank Lane) approximately 100m to the east of the claimed route which also links North Street and The Square/ Salisbury Street, some of the users claim this route is too narrow to use in a wheelchair. See map below showing locations of Manor Road, the claimed route and Pennybank Lane, also a photo of Manor Road looking south towards The Square, Mere.



The above photo does demonstrate that Manor Road is not particularly safe for pedestrians. The point raised by users regarding this alternative may be valid; however the safety of alternatives is not something which can be considered under the legislation. This application can only consider the route claimed as a public right of way and if the use has been as of right and meets the tests set out in s.31 of the Highways Act and s.53 of The Wildlife and Countryside Act 1981.

### 13. Objections

- 13.1. As part of the consultation process the landowners were consulted. The two landowners affected are Lipscombe Builders Limited and The Walton Building Management Company Limited.
- 13.2. Both landowners objected to the path being recorded as public right of way. Their responses can be seen at Appendix A.
- 13.3. The Walton Building Management Company submitted a landowner evidence form as part of their response and in that form it can be seen they were aware of people using the route but have taken no action to stop people using it. No signs were erected to inform people the way is not a dedicated public right of way and no barrier of any kind has been erected to stop people from using the route. No challenge or permissions have been communicated by the owner of the land either. They do state there were gates at point B, which is not in their ownership, but they were unaware if the gates were locked or not. The Walton Building Management Company do object to the right of way and state “prior to the gates being locked there had been low level vandalism and noise issues”. Alternative routes from North Street to The Square via the road or Pennybank Lane are well established and authorised routes”. Both issues of vandalism/ noise levels and alternative routes cannot be considered under the legislation applicable to this application. No points raised in The Walton Building Management Company’s submission would defeat an application made under s.53 of the Wildlife and Countryside Act 1981 to record a public right of way, if the evidence was sufficient to satisfy s.31 of The Highways Act 1981, over land in their ownership.
- 13.3. Mr Andrew Lipscombe of Lipscombe Developments Ltd submitted a response, comprising of a letter, photos and a landowner evidence form. Mr Lipscombe objects to the way being recorded as a right of way. The main points raised in the letter in objection are there are alternatives to using the claimed route, the land when purchased did not show a public right of way but has private rights over it, the route leads over what is now a private courtyard area for residents of the flats, the gates have been locked at various points in time, including during his ownership, the way has been blocked at other times during construction work, signs were erected on the route stating it was private and when the gates are unlocked the covered area of the path can be a target for vandals.

Points of objection must be considered against the legal tests applicable to this application.

The facts there are alternatives (see 12.5.) cannot be taken into consideration. There may be

private rights over the land for residents of the flats , any individuals who have this private right could not be considered to have used the route as of right but would be using the path by permission and could not be considered as a user as of right. However the existence of private rights does not exclude any individual who is not privileged with these private rights from claiming their use of the route as of right and it is the evidence as of right presented to the council which is being considered. The privacy of the residents and potential intrusion of this can be sympathised with, however it is not a consideration under the legislation. The same applies the vandalism and nuisance potential if the way is recorded as a right of way.

#### 14. Gates

The gates are a main point of consideration and conflict in the evidence given. The locking or non-locking of the gates, the existence of the large wooden gates and if the gates were open, barred or locked is in conflict.

14.1. Mr Lipscombe claims the metal gates were locked at various times to his knowledge. He claims that upon purchasing the property from Mr Finan, he remembers the gates being unlocked by Mr Finan at that time, the gates being referred to are the metal gates that can be seen in the photo at 5.1. See below photos provided by Mr Lipscombe showing the view of the archway and gates from The Square looking north and the second photo looking south towards the gates from the courtyard area.

14.2.



14.3.



14.4 Mr Lipscombe also claims the large wooden gates which were situated behind the metal gates- see above photo showing the large wooden gates,- were bolted shut and that Mr Finan also locked and bolted the gates during his ownership ( see 14.5. re Mr Finan). It is also stated that during the two year construction period after purchase (approx. 2007-09), turning the building into flats, the gates were locked on and off throughout that period.

14.5. Mr Finan was contacted and a meeting was arranged for 7<sup>th</sup> September 2018 to discuss his knowledge of the path as a previous owner of the land affected. Mr Finan owned the land from 2004-2007 and during his three year ownership he is adamant he locked the metal gates and braced the large wooden gates most if not all of time and therefore there was no way for the public to use the route. Mr Finan stated the padlock on the gates was removed 3 times from the metal gates by persons unknown and was replaced. He also states he denied permission when asked if the route could be used and turned people away from using the route. (See Appendix 2 to this report for Mr. Finans' form)

14.6. Mr Finan gave the contact details for a Mrs Young who he believed may have more knowledge of the path in question. A letter was sent to Mrs Young and she replied on 25<sup>th</sup>

September ( see appendix 2 ), in her letter she states her family lived in flat 3 of the Walton Building , which abuts the claimed route from ... until 1989. She states the footpath in question was not a passage and there was a garden at the rear of the property which was converted to a car park in the 1970s as it is now. Mrs Young also states there were two wooden gates one behind the iron ones (presumably the ones still in place in Mr Lipscombes photos at 14.3.) and one at the end of the yard to maintain privacy. If these gates were in place and the car park was a private garden/courtyard area the route would not have been passable to the public. Mrs Young also states she has seen a chain around the iron gates since her family gave up the lease of the flat in 2000 from Mr Clifford who owned the building for years, but did not attempt to get through as she has no need to.

Efforts have been made to trace Mr Clifford but these have been unsuccessful, it is understood he has since passed and contact with the family has been lost in Mere.

14.7. Mr Sam Squires was contacted in relation to his knowledge of the route, as it came to officers' attention he leased or owned a shop immediately adjacent to the archway. Mr Squires was contacted by telephone on 21/01/19 and 06/03/2019 in those conversations he was unsure of the exact dates he had the shop adjacent to the archway but believed it to be approximately 1979-1985 in the first conversation (it is noted these dates differ from the notes Cllr George Jeans has from a conversation he had with Mr Squires which state Mr Squires was there until 1991) .During the second conversation it was put to Mr Squires other people believe he locked the gate until 1991 to which he said it was possible but he could not be certain of the years off the top of his head. During the conversations Mr Squires stated the claimed route was not a thoroughfare and the metal gates were locked from Saturday evening to Monday morning and the wooden gates would have also been braced, which would have prevented anybody from opening them from the southern side. He particularly remembered locking the gates during the Christmas period during the day to stop stock being stolen that was stored out the back. He also stated in earlier years it was private gardens and nobody walked through. He was aware of the odd person using it during the daytime but this was stopped at night , Saturday evening through to Monday morning, over the Christmas period and various other times during the daytime.

Mr Squires was unsure of some of the dates but said he submitted paperwork in relation to the case to Cllr Jeans. These papers have been asked for but Cllr Jeans can only find a note his wife made saying Mr Squires locked the gates at night, the last time being in 1991.

14.8. Mr Holder contacted Wiltshire Council as owner of the Brainwave shop and the building behind it (which abuts the claimed route) in July 2018, see email below.

Dear Mr Harlow.

Further to my telephone message yesterday, I am the owner of the Brainwave Shop and the building behind it in Mere, Wiltshire, BA12 6DL.

I live in Scotland and, as such, am not quite up to date with local matters in Mere. I gather that there has been a consultation process regarding an application to make a private walkway through our properties into a public right of way.

I gather that one requirement for the creation of a public right of way is that it should have been in unencumbered use for the last 20 years. In fact, it has come to my attention that this has been claimed in a "dossier" of information.

This is absolutely not the case. I bought the property, which was then a disused warehouse, along the West side of the walkway in 2007. I then spent some 4 years renovating it. During this time the passageway was often locked for safety reasons and was also closed off by large wooden doors with an old fashioned system of brackets and wood brace. This effectively barred entry from the road side at nights.

I also put a laminated sign on the iron gates informing that it was private property and entry was restricted. This was in place for at least a year, before it was anonymously removed.

During the period when Lipscombe Builders were renovating the Boardroom property, on the other side of the walkway, the iron gates were usually locked.

The conclusion of this is that for a period of some 5 years, entry was locked for a good proportion of the time.

I look forward to your comments.

Best regards  
Andrew Holder

Mr Holder was contacted and the process explained, on the 1<sup>st</sup> August Mr Holder sent the following email and photo.

Good morning Craig,

Thank you for ringing the other day, it was a very informative conversation.

I have trawled through all my back up disks and have found one photo of the rear entrance, by my property. I have put the date on it. I remember it well because it was just after I had bought the

property in August 2007 and the rendering had just been done, although the temperature had plummeted and I was worried about the mortar setting!

You can see the wooden doors, which were usually barred at night by putting a stout piece of wood across the brackets.

This was before any of the alterations were started by Lipscombe builders next door.

I'm afraid I could not find any photos of the Private Property sign I put on the front gate.

Best regards

Andrew Holder



14.

14.9. Various images of the gates in question have been produced. It was pointed out by Cllr Jeans the google street view image shows the iron gates from The Square. At the time of writing this report the image at that location shown on google street views shows one of the



metal gates open with ply board seen in the archway, it would appear the development of the flats is still underway as sale signs for the flats are above the archway. The image is dated October 2011. In this image the one gate being open and ply board led against either wall in the archway would allow passage but not the wide passage some have stated they require or have used if in a wheelchair or with a pushchair, it is possible to see through the archway but due to the lack of light it is unclear if the wooden gates are present- if they are present they are open which may be expected as it is clear construction work is in progress.

14.10. Images of Mere can be found on [www.francisfrith.com](http://www.francisfrith.com) which show the centre of Mere and the archway / gates in question. The earliest image found is dated 1955 and clearly shows metal gates on the entrance to the archway that are open. Another image dated 1955 shows iron gates on the entrance to the archway and they are closed.

An image dated from 1965 shows the archway (from an oblique angle) and it can be seen there are no iron gates on the entrance at all, or at least not in the same location as before. A second image dated 1965 taken closer to the archway confirms there were no iron gates at the entrance, however on both 1965 images it is not possible to see more than a metre or so down the archway due to the angle of the image.

14.11. Mrs Reynolds as part of her user evidence form also attached an image from a postcard dated 1971 showing The Square, Mere and in the image the archway is visible from an angle with no iron gates on the entrance way. Again it is not possible to look down the archway from the image.

It is not possible in the images from the 1950s or 60s or the postcard Mrs Reynolds says is dated 1971 to see if the wooden gates are in place behind the metal gates due to the angle of the images.

14.12. Cllr Jeans submitted a DVD which is a video of a march through the town of Mere dated 11.July 2004. In this video at 1 minute 47 seconds in, it is possible as the procession passes to see the archway from The Square and the iron gates are present and open at that time. Unfortunately later in the video as the procession is marching back past the archway the video skips past the location of the archway so it is not possible to see the situation at that time. It is not possible during the pass by of the archway on the video to see down the archway and see if the wooden gates are present.

14.13. The user evidence forms submitted offer a clear account of the gates from their perspective. Of all the forms submitted only one of the forms – from the lead applicant Mr Sams- stated

they had any knowledge of locked gates at any time until the recent events in 2017 which led to this application. It should be noted Mr Sams submitted one form dated 2/11/17 and one dated 23/10/18. In the earlier form Mr Sams states when asked “Have there ever been any of the following on the application route?” in response to section b referring to gates , “Last locked or chained Christmas time prior 1989 information given by Mrs Jean Young, also Sam Squires, Wincanton chained gate usually at night to when he left March 1991”. In response to the same question on the form dated 23/10/18 Mr Sams states “Iron gates have never been locked until now”. It is repeated in the earlier form at question 11 which asks “Did any of the above prevent you from using the application route? When Mr Sams answers “As said prior 1989 locked at Christmas also upto March 1991 locked at times by Sam Squires as above”. Some clarification is given at question 22 asking for any further information in the early form where it is stated “I and my family aware from statement of Jean Young prior to 1989 was closed at Christmas however we have never seen or found gates locked usually never closed. Since 1989 my family and I have never seen closed or locked. May have been pushed together on occasion but never locked except at night on occasion 1989 to March 1991 as stated before. We know upto mid 1990s other obstacles in the way but not locked.” In the later form at the same question this information is not repeated but answered saying the route has been used by his family and the alternative is unsafe. The dates of use in Mr Sams forms also differ in the first form where it is stated he used the route “definitely from 1991 and also I believe previously to 2017 when locked. The later form states 1960 to present time until they’ve been locked”.

Clarification was sought by phone on 13/02/2019. During that conversation Mr Sams clarified his use of the route has been mainly since 1991 but he did use the route previously back to the 1970s with his wife. The obstacles he referred to in his original form in the mid-1990s were wooden gates and post vans parked in the vicinity. The wooden gates could be walked through via a smaller inset door if closed. In reference to the locking of the gates Mr Sams clarified Mr Squires did lock the gates “on and off” until 1991 but possibly earlier years as well, he could not be sure of dates. He was also aware Mrs Young’s husband locked the gates in this period (late 1980-90s) also.

14.14. There is a clear conflict of evidence on the issue of locked or braced gates. The current landowner Mr Lipscombe states the gates were locked or route blocked at various times between 2007 and 2010. The previous owner Mr Finan states he locked the gates consistently between 2004-2007. Mr Holder from 2007-2011 states the gates were often locked while he was doing work on the alleyway and provided a photo showing the large wooden gates in place which he says were often braced at night so could not have been

opened from the south side. Mr Squires has been quoted as saying he locked the gates at night from 1989-1991, however on the phone to officers he stated he did this from 1979-mid 80s and also did so at times during the day to protect stock. Mrs Young is quoted by Mr Sams as saying the gates were locked at Christmas time prior to 1989. Mrs Young was contacted by letter and phone for clarification on her knowledge of the route. She stated on the phone that the area behind the building was a private area and not a car park until sometime in the 1970s. The gates were always in place and the wooden gates were barred at times, especially if the family went away on holiday. Mr Sams first form states knowledge that the gates were locked at Christmas time prior to 1989 and by Mr Squires at night up until 1991, the dates and times Mr Squires locked the gates is not clear but it appears to have occurred between 1979 and 1991, the fact he did lock the gates at night is in agreement between Mr Sams the lead applicant and Mr Squires. This body of evidence stating the gates were locked or braced is in contrast to the majority of user forms which gave no knowledge of large wooden gates at all and no knowledge of locked gates until 2017.

14.15. In face of this conflict a letter was sent to all users who submitted a user form, see below, to seek clarification on the issue of gates and the route not being available for the public prior to time the car park was built in the 1970s. The letter was sent on 22<sup>nd</sup> January 2018.

*Dear*

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

**Application for an Order to add a footpath to the definitive map and statement at The Square, Mere**

*I am writing to you in reference to the user evidence form you have filled out and submitted in regards to the footpath claim in Mere linking The Square and North Street.*

*As part of the council's investigation into this application, evidence has come to our attention that contradicts your own given evidence.*

*It is our duty to investigate all evidence and get to the truth of the matter to the best of our ability before making a decision to make an order to record a public footpath or not.*

*The evidence which has come to our attention states the route was blocked , at various times, by either locked metal gates or braced large wooden gates at The Street end of the path by the road, the locking/bracing of the gates being consistent at night and at times during the day. The years in which it has been claimed the gates were locked or braced at different times cover the periods 1979-1985 and 2003-2010. It has also come to our attention the nature of the path / alley changed significantly in the 1970s and before this period it was private gardens and would not have been useable by the public.*

*I would appreciate your response to the above statements in relation to your given evidence; do you have any knowledge of the route being blocked by gates of any kind? Did you ever come across locked or braced gates when trying to use the route? If you used the path before the mid/early 1970s what are your memories of the nature/ route of the path used, did it look similar to now or has it significantly changed? Or if you have any further information you feel would be helpful in addition to the evidence or statement you have already provided I would be pleased to receive this.*

*If the council do make an order to record a public footpath it is likely it will result in a public inquiry where the success of any order would be reliant on your evidence being cross-examined by an inspector appointed by The Planning Inspectorate and/ or a barrister appointed by objectors.*

*Please reply to this letter with your comments as soon as possible and in any case by the 8<sup>th</sup> February 2019. I have enclosed a pre-paid envelope for your use and alternatively my contact details are below on which I can be contacted by email or phone to discuss the above.*

*Enclosed: Map of the area for any annotation you may wish to make.*

*Yours*

*Craig Harlow*

*Rights of Way Officer*

*Direct line: 01249 468568*

*Email: [craig.harlow@wiltshire.gov.uk](mailto:craig.harlow@wiltshire.gov.uk)*

14.16. In response to this letter which was sent to everyone who filled out user forms and people who filled out the initial petition statements.

A total of 10 letters or email responses were received and a further 4 phonecalls were received in relation to the letter. Letter responses can be seen at appendix 3. Phonecalls were received from Judy Hingley, Shirley Reynolds, Michael Durkee and Leonard Hardcastle. The responses from Judy Hingley, Mr Durkee and Mr Hardcastle it is assumed also apply to their spouses or children but this was not confirmed, ie Simon Hingley, Vanessa Hardcastle, Margaret Durkee.

Responses to the letter that clarified any issues or changed their initial statements are;

- Shirley Reynolds – confirmed she did not remember wooden gates and does not remember going through them and as such did not use the whole route claimed. She does not wish to be contacted any further due to ill health.
- Michael Durkee – clarified his use was not weekly as stated in his form but was every few months/ rarely since their children have not been in a pushchair which is for the last 30+ years. He has no memory of locked or wooden gates in place at all. Also if they were not using the route they may not have noticed if the gate was locked.
- Judy Ann Hingley – clarified she would not use the route if she could see the gates were closed from North Street as she would not be able to open them so did not go down to them so could not be sure if they were locked or just closed. Also would not use the route if bad weather as her husband would need to be there as she is in a wheelchair. She still believes her use of the route would be 2/3 times a week as stated in her form.

- Pat and Jenny Seward- They did not submit a user evidence form but did fill out the initial complaint forms which Cllr Jeans received after the locking of the gates. In their response to the letter they have stated “we can only refer to the period after 1979-1985 and from memory there was only a very short time when the gate was padlocked with a chain but was removed after protest”. It is unclear the precise dates they are referring to when the gate was padlocked and chained but the assertion is this is after 1985 so could be the late 80s/90s when Mr Squires or Mr Finan may have locked the gates.

The other responses stated they either had no memory of locked gate or wooden gates or did not mention them in their response. A number of the responses did reaffirm the desire to be able to walk the route as the nearest alternative is unsafe.

The letter did help to clarify the nature of some users use of the route, however there was no clear clarification of the conflict of evidence which still stands.

14.17. In summary the gates are a major point of conflict that needs to be resolved for an outcome ultimately to be reached. The given evidence currently contains 5 owners or tenants of property in the vicinity of the route stating the gates were locked or braced at some point in time, ranging from the earliest date of 1970s from Mrs Young through to various times in the 1980s, 1990s and 2000s. This is in contrast to almost all users (other than Mr Sams original form and now Mrs Reynolds who did not use the whole route) who claim to not have seen any lock on the gates or encountered braced large wooden gates and their use has not been impeded at any time before 2017. Some users have clarified they may not have seen a lock on the gate if there was one when they were not using it. This could particularly apply if the gates were locked at night or at the weekend by Mr Squires during his time on site and Mr Lipscombe and Mr Holder during their renovation work. Although no users (other than Mrs Reynolds and Mr Sams after clarification) remembered wooden gates behind the metal gates that could have been braced we can be sure they were in existence as the photographs from Mr Holder and Mr Lipscombe confirm this, although we do not know when they were installed or removed since. We do not have any physical evidence other than photos dated in the period 2007 that these wooden gates existed but Mr Finan states they were in existence from 2004-2007 and Mrs Young has confirmed there were wooden gates (unsure if these are the same gates as in the photograph) during the time she lived there in the 1970/80s. We also lack any physical evidence that the metal gates were locked from photographs or letters, we do have various photos of the metal gates in place either open or closed, from this we can conclude the gates were in place from at least the 1950s, but do appear to not be in place in photos from the 1960s but reappeared sometime after. Looking

at the photos the gates now in place do appear to be the same gates from the 1950s or at least very similar. We can also conclude from the physical evidence and the given evidence the gates were sometimes open and at times closed. Whether the gates being closed stopped anybody using the route is not clear, the metal gates could reasonably be opened if not locked, but if the wooden gates were braced they could not reasonably have been opened from either direction as even if approaching from the north and removing the presumably heavy brace any user could not have gone through the gates and replaced the brace and clearly it would not have been possible at all if approaching from the south.

Given the hugely conflicting given evidence by users of the route and others and lack of physical evidence to clarify the locking or bracing of gates (the physical evidence does confirm the large wooden gates were in existence in 2007) it is not easily possible to conclude on the balance of probabilities if the route was blocked by locked or braced gates at any time from the 1970s through to the late 2000s.

## 15. Alternate relevant periods

15.1. As has been seen above there is given evidence the gates were locked at times from the 1970s onwards. If it could be concluded the gates were locked and barred the public from using the route this would be an interruption to the public's use as of right of the route. This would mean the relevant 20 year period would need to be reconsidered. For example if Mr Lipscombe and Mr Holders accounts of the gates being locked and the route being blocked at various times due to construction were to be taken as the calling into question of the route then the 20 year period to consider public use as of right would be 1987-2007. Mr Squires account (backed by Mr Sams form) of locking the gates at night and at other times could also lead to a different 20 year period. It is unclear the exact years claimed this happened but Mr Squires on the phone stated 1979-mid 80s so this 20 year period would be 1959-1979, even Mr Sams recollection of 1989-1991 for Mr Squires locking the gate would give a 20 year period of 1969-1989. Mrs Youngs account of wooden gates being locked at times in the 1970s would lead to an even earlier 20 year period of 1950s-1970s. If these dates were the 20 year relevant period under consideration it would majorly affect the case as the number of users during any given period would be significantly less than the 20 year period of 1997-2017.

The earliest of these 20 year periods 1950s-1970s ( no exact year given in the 1970s) would only have 1 user claiming to have used the path as far back as the 1950s, with a further 3 users claiming some use in the 1960s. This amount of use is unlikely to represent the 'public'

using the route and meet the legal tests of section 31 of the Highways Act 1980 and the application would likely fail.

Mr Squires locking the gates in 1979 would lead to a period of 1959-1979 again very few users claim use in the 1960s and a claim on the given evidence for that period would likely fail. As the possible 20 year periods progress , the level of use does increase but is still significantly less than the 1997-2017 period.

As no physical evidence has been produced to be certain of these interruptions to use and did not prompt an application ,as the locking of the gates in 2017 has, the period this report is considering is still 1997-2017, however it is acknowledged the periods mentioned above could be relevant if further evidence comes forward or if an inspector at a possible public inquiry deems appropriate.

## **16. Signs and Notices**

16.1. The intention or lack of intention to dedicate a path a public right of way is addressed in section 31 of the Highways Act specifically addressing erecting notices or signs in the following sections

- (2) *The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*
- (3) *Where the owner of the land over which any such way as aforesaid passes –*
- (a) *has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*
- (b) *has maintained the notice after the 1<sup>st</sup> January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*
- (4) *In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.*

- (5) *Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.*

16.2. In this case there is a conflict of evidence concerning signs or notices on the route. Mr Lipscombe states in his evidence that “*Once complete, we left the gates unlocked but fixed PRIVATE signs to the gates and the fence to the rear. These were torn down (repeatedly) and in less than a week of putting them up. There is also a permanent private sign at the entrance to the Walton building car park for all to see.*”

Mr Holder also states he erected sign on the iron gates. “*I also put a laminated sign on the iron gates informing that it was private property and entry was restricted. This was in place for at least a year, before it was anonymously removed.*”

None of the users claim to have seen any kind of notice or sign on the route.

As can be seen above at 16.1 its is the landowners responsibility to maintain any sign or notice and if one is torn down section 31(5) does allow any landowner to inform the council such a notice or sign has been torn down. There is no record of this being reported to the council at this location.

16.3. The sign Mr Lipscombe refers to at the entrance to the car park can be seen in the below photo. (photos taken June 2018)





16.4. It can be seen the sign states “PRIVATE CAR PARK (RESIDENTS ONLY)”. The location of the sign can be seen in the second photo in reference to entering the site. If using the claimed route the sign is not obvious to anybody on foot as it is not in their direct eyeline and is somewhat lost in the vegetation on the other side of the car par. The wording of the sign if read by anybody using the route on foot does not make it absolutely clear it is designed to

stop or inform anybody they should not use the route as a footpath, or the landowner does not wish to dedicate the way as a public right of way. Many if not the majority of rights of way are over private land and this sign appears to informing people this a private car park and that only residents may park their cars here. It is not clear there is no right to walk through on the route claimed on the opposite side of the car park.

Given the location and wording of the sign it is not believed this sign would form an interruption of use or inform the public of the landowners intention regarding use of the route claimed on foot.

## 17. As of right

17.1. Section 31(1) of the 1980 Highways Act requires that the use by the public must have been as of right without interruption for a full period of 20 years.

The term 'as of right' is considered to mean without force (*nec vi*), without secrecy (*nec clam*) and without permission (*nec precario*).

### **Without Force**

17.2. None of the users has declared in their form they used any force to access the path. The only barriers that have been mentioned in any form are the gates. None of the users claim to have used the route by breaking a padlock or damaging any barriers to use the route. Mr Finan does claim he padlocked the gates and the padlock was removed 3 times but it is not known by whom. There appears to be no force used in the claimed use of the route by the users who have submitted evidence.

### **Without Secrecy**

17.3. There is no claim of secrecy involved with the use of the route. The landowners themselves may or may not have been on site at various times throughout the 20 year period and therefore able to see the use but various tenants and others will have seen the use. The use of the route, in the urban environment it sits, has not been carried out in secrecy and the landowner's would likely have been aware of its use.

### **Without Permission**

17.4. Of the 23/24 user evidence forms, two have said they had permission to use the route. Susan Fricker and John Fricker both stated they had permission to use the route dating from the 1970s. Their statements are not clear as they both state they "think" they had permission

from Waltons to use the route. Mr Fricker states “during A303 build was given permission. I believe a committee was formed”. Neither have responded to the letter sent to clarify use.

## 18. Landowner’s intention

18.1. Under Section 31 of the Highways Act 1980, there is a presumption of dedication after uninterrupted public use of a route for a period of 20 years or more in a manner that is “as of right”, unless during that period, there can be demonstrated there was no intention on the landowner’s part to dedicate the land as a highway during that period. Intention to dedicate was discussed in the Godmanchester case, R ( on the application of Godmanchester Town Council (Appellants) v. Secretary of State for the Environment , Food and Rural Affairs ( Respondent) and one other action R (on the application of Drain) ( Appellant) v. Secretary of State for the Environment, Food and Rural Affairs ( Respondent) and other action [2007] UKHL 28, which is considered the leading authority in this matter. In his leading judgement Lord Hoffman approved the words of Denning LJ in the Fairey case, 1956: seen at paragraph 20 of the Godmanchester case:

*“...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...”*

18.2. In the same case, Lord Neuberger of Abbotsbury went further on this point in paragraph 83 of the case:

*“...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 1932 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.”*

Lord Hoffman went on the say at paragraph 32:

*“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.”*

18.3. A deposit can be made under s.31(6) Highways Act 1980 and section 15A (1) of the Commons Act 2006 declaring the public rights of way over the land in a person’s ownership and that no other ways have been dedicated as highways over that property. No record of such deposits have been found affecting the land in question in Mere. These deposits are available to be viewed online at [http://php.wiltshire.gov.uk/row/sect31deposits/deposit\\_search.php](http://php.wiltshire.gov.uk/row/sect31deposits/deposit_search.php) . A duly made deposit under s.31(6) HA80 is, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

## **19. Width and Route**

19.1. The route claimed by the users is consistent, with all users claiming the route from The Square through to North Street as seen at 4 of this report. Some users maps submitted as part of their user evidence forms were not clear and these users have been asked to clarify the route they are claiming. All users except one have now clarified the route they are claiming.

19.2. The width of the route claimed varies on the forms submitted, however it is clear on the ground the width of the route if recorded would be physically limited to the width of the alleyway and gateway. The width of the gateway is 1.8 metres and the alleyway narrows to 1.5 metres before reaching the car park. The width of the paved path across the car park is 2.15 metres. When asked what the width of the route is the answers from the users varies with answers such as, “2 metres”, “width of shopping trolley or pushchair”, “6 ft”, “for two people to pass except by gate”, “5ft 7”, “wide enough to walk”, “170cm”. It is clear any recorded width would have to be restricted by the physical limitations and such it would be recommended to record the paths width according to the measurements taken on site.

## **20. Common Law Dedication**

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

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.

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 overt public use of the way. It also relies upon the public showing their acceptance of the route by using the way. Whilst the principles of dedication and acceptance remain the same in both statute and common law, there is a significant difference in the burden of proof, i.e. at common law the burden of proving the owners' intentions remains with the applicant. Whilst it is acknowledged that dedication of the route as a public highway may have taken place at common law at some time in the past, it is recognised that in practice evidence of such dedication is difficult to obtain and it is then more usual to apply Section 31 of the Highways Act 1980.

20.2. In this case I do not believe the landowners' actions have expressly dedicated the way as a highway. If the case goes to a public inquiry the inspector would have discretion to consider common law but at this time common law will not be relied upon for this case and section 31 of the Highways Act 1980 will be applied.

## **21. Conclusion**

21.1. This application to add a footpath to the definitive map and statement in the parish of Mere has attracted a fair amount of local interest with 23 users submitting evidence via user forms claiming to have used the path during various periods over the last 20 years and beyond. 19 support forms were also submitted as the pre cursor to the application and user evidence forms (a number of the support forms are in the same name as user evidence forms). The application route is in the centre of the town and provides a cut through from the town centre through an alleyway and across a private car park to the houses to the north. The gate on

the end of the alleyway was locked by a resident of the flats in 2017 and use was challenged at that point leading to this application to be made.

21.2. The main weight of evidence in support of the application comes in the form of the 23 user forms. Having examined these forms there is use of the way claimed dating back to the 1990s and earlier in smaller numbers. It is clear the users wish to use the route as the closest alternative can be dangerous, on a road with no pavement, this motivation and desire for the path to be recorded as a public right of way cannot be taken into consideration, only the tests set out in section 31 of the Highways Act 1980. Some of the users have clarified points in their user evidence forms after investigation. A small number of users state they either had permission to use the route, have now stated they did not use the route, remember gates being locked or say the gates were closed and may have been locked or have amended their frequency of use of the route.

21.3. The objectors' body of evidence comes in the form of statements stating the metal and or wooden gates were locked or blocked during various periods covering 2004-2010. There is also evidence to suggest the metal gates were locked at an earlier period sometime between 1979-1991 by Mr Squires, who claims to have locked the gates Saturday evening – Monday Morning, at night and at times during the day if stock was out the back. This is substantiated by the applicant Mr Sams who remembers Mr Squires locking the gate at night sometime in 1991 or earlier. Mrs Young also recalls the gate being chained at some time and stated the way would not have been useable by the public before the car park was constructed in the 1970s as her family lived next to the route and it was a private courtyard area for the properties and was blocked by wooden gates. Officers have no reason to not believe the statements from these individuals and it would seem reasonable the gates may have been locked during construction periods, at night and Sundays by the owners or tenants of the adjacent shops. However this is clearly in conflict with many users who claim use dating back to the 1960s and more regular use in the 1990s and 2000s. Most users do not recall any wooden gates that it is claimed by objectors were braced and have not stated they recall these gates after a letter was sent investigating the issues surrounding the gates; however we can be sure these gates were in place in 2007 from photos provided.

21.4. The case of *Ashgar Ali v Secretary of State for Environment, Food and Rural Affairs; Essex County Council and Frinton and Walton Town Council* 2015 deals with a case to quash an order made under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement for Essex. A main consideration of the case is similar to the Mere

application in dealing with the locking of gates between properties at weekends and public holidays. The order to record the path on the definitive map was made by an inspector at a public inquiry after the county council initially refused to make an order and were subsequently directed to do so by The Secretary of State. The order was objected to and a public inquiry was held to determine the order where it was confirmed, this decision was then appealed to the High Court. The main point for consideration was a door which was locked by owners of the adjacent properties on and off over a period of years over night and on public holidays and if the locking or closing of this door at those times was sufficient to communicate a lack of intention to dedicate the way by the landowners. Rhodri Price Lewis QC in his judgement at 20. 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*”. This may appear to be in conflict with the *Godmanchester* case where the common method of closing the way one day a year is recognised as sufficient evidence showing the landowner had no intention of dedicating the way as a right of way. At para 33 of the *Godmanchester* case Lord Hoffman states “*sufficient evidence*” there was no intention to dedicate involves “*objective acts (that) must be perceptible by the relevant audience*”. The inspector of the initial inquiry states “*In the case before me, the majority of path users walked the Order route in the daytime since their purpose was related to the shops and businesses ... The fact that the door was closed at times most were not there did little to convey to users that the owner was taking actions to challenge their right to use the passage; locking it would have done so had his taken place at times when people were generally using it*”. In *Lewis vs Thomas Evershed* MR acknowledged “ *I agree that a barring , and particularly a deliberate barring of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period*”. In his conclusion of the appeal Rhodri Price Lewis QC said “*a locking of the door at Christmas when those shops and business 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 being to the attention of the public who used the way that the landowner had no such intention*”, the appeal was dismissed. It should be noted that a planning document in that case labelling the way as a public right of way in the words of the inspector “*inevitably weakens the link between his actions and the landowner’s intentions*” and contributed the inspectors decision to make the order.

21.5. Applying the case and appeal above to the *Mere* case it can be seen that although the *Godmanchester* case laid out that closing a way for one day a year can be interpreted as an

act of non-intention to dedicate, and is a common belief, its sufficiency is key and can only be decided on a case to case basis. It can be accepted it is likely Mr Squires did lock the gate at some time between 1979 and 1991, clearly the earliest of these dates needs to be narrowed down to a more precise date if possible. Did Mr Squires locking of the gate at night, and from Saturday evening to Monday Morning and possibly over the Christmas period sufficiently demonstrate the way was not intended to be dedicated as a right of way and interrupt use? Mr Sams who is the applicant does remember this but no other users do. Their use could have been outside of the time the gate was locked and as such it would not have brought the non intention to dedicate to their attention. However in the Ashgar Ali case the door was only locked at Christmas and at night, in this case Mr Squires claims to have locked the gate every night, at Christmas, Saturday evening through to Monday Morning and at times during the day which would perhaps be conceived to be sufficient to be an act of non-intention to dedicate and have brought it to the attention of many users of the way. Mr Sams who is the applicant clearly desires the path to be recorded as a public right of way but does remember the way being locked by Mr Squires, it seems appropriate to weigh this evidence strongly as an applicant whose evidence does not support their desired outcome. The locking of the gate by Mr Finan and Mr Lipscombe and Mr Holder is not supported by any user evidence but that is not to say it should be dismissed. There is no reason not to believe their accounts and it seems reasonable the gate would have been locked or route blocked particularly during construction work when materials and building work would have been taking place in a narrow alleyway.

- 21.6. The case of *R v Secretary of State for the Environment, ex p. Bagshaw and Norton*, Queen's Bench Division (Owen J.): April 28, 1994, deals with the applications of both Mrs Norton and Mr Bagshaw, who had applied to their respective County Councils for Orders to add public rights of way to the definitive map and statements, based upon witness evidence of at least 20 years uninterrupted public user and where the Councils determined not to make Orders. On appeal, in both cases, the Secretary of State considered that the Councils should not be directed to make the Orders. At judicial review, Owen J allowed both applications; quashed the Secretary of State's decisions and held that:

*“(1) under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, the tests which the county council and the then Secretary of State needed to apply were whether the evidence produced by the claimant, together with all the other evidence available, showed that either (a) a right of way subsisted or (b) that it was reasonable to allege that a right of way subsisted. On test (a) it would be necessary to show that the right of way did subsist on the balance of probabilities. On test (b) it would be necessary to show that a reasonable person,*



*having considered all the relevant evidence available, could reasonably allege a right of way to subsist. Neither the claimant nor the court were to be the judge of that and the decision of the Secretary of State was final if he had asked himself the right question, subject to an allegation of Wednesbury unreasonableness. The evidence necessary to establish that a right of way is reasonably alleged to subsist is less than that needed to show that a right of way does subsist. The Secretary of State had erred in law in both cases as he could not show that test (b) had been satisfied.”*

Owen J also held that:

*“(2) In a case where the evidence from witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.”*

21.7. Having considered all this evidence and case law, officers conclude it is reasonable to accept either side of the case for the applicants or the objectors and supporting witnesses. The case for the objectors and supporting evidence states the way was not useable pre 1970s as the way was private courtyard not a car park and was blocked by braced gates at various times. The gates were then locked /braced by Mr Squires as tenant of the adjacent shop he says from 1979 until 1991, most if not every night, from Saturday evening through to Monday Morning and over the Christmas period when he would lock gates to protect the stock out the back. This is supported by the lead applicant for the case, Mr Sams, who confirmed he does remember Mr Squires locking the gates in 1991 and “possibly earlier”. Mr Finan, Mr Lipscombe and Mr Holder claim to have locked the gate at various times during the period 2004-2010. Mr Finan claims to have locked the gate consistently during 2004-2007. Mr Holder and Mr Lipscombe claimed to have locked the gate at various times from 2007-2010 during construction works in the vicinity. The locking of the gates during construction periods would seem a reasonable and likely event. We are also provided with a photo of the wooden gates in place in 2007. If the gates were locked dating back to 1979 on the regular basis Mr Squires claims this would be sufficient in officers’ minds to bring to the attention of the users of the way the lack of intention to dedicate. As such the relevant 20 year period would need to be 1959-1979; in this case there is insufficient user evidence over that period to claim the public were using the way as of right. However we have no

incontrovertible evidence any locking of the gates occurred and it is conflicted by the user evidence.

21.8. The supporters case is that the route has been used as of right from 1997-2017 with a total of 19 users (after investigation), of the initial 23 who filled out user forms claiming use of the route during this period as of right. The 4 users whose use was not as of right or their evidence was insufficient after investigation are Mr and Mrs Fricker whose use they say was by permission (although the extent of this permission is not clear), Mrs Reynolds who claimed use back to the 1940s but now remembers wooden gates and did not use the route as a whole and no longer wishes to be contacted due to ill health and Mr Guy who did not fill out his form stating the years he used the route and has not replied to attempts to contact him to clarify his use.

Of the 19 users as of right, 13 would be willing to attend a public inquiry if this case reached that stage for their given evidence to be examined and cross examined. Of those 13, the main applicant Mr Sams, has confirmed he remembers gates being locked by Mr Squires in 1991 or earlier. Mrs Sams has not responded to the letter ref gates so it has not been confirmed if she also remembers gates being locked. Mr Durkee confirmed his use of the route was not weekly as claimed in his initial form but would be more accurately described as “rarely in the last 30 years”, this may also apply to Mrs Durkee. Judy Ann Hingley confirmed she used the route in a wheelchair but if approaching from the north side and looked down towards the gates and they were closed she would not use the route as she would not be able to open them, she could not be sure if the gate was locked or just closed. The closing of the gate locked or not, would appear to have been an interruption to her use. The same is likely to apply to Mr Hingley as he pushed Mrs Hingley in her wheelchair. Mr Leonard Hardcastle amended his frequency to an average of fortnightly from weekly, again the same may apply to Vanessa Hardcastle as Mr Hardcastle states he used the route with his daughter who is in a wheelchair as it is a safer route and Vanessa would appear to be his daughter. Mr Taylor confirmed he has not used the route since 2001 but during 1979-85 he does not remember the gates being locked but they may have been at some time. Mrs Crockin who claims use from 1963 has not responded to requests to confirm her route as her map is only marked with a star and has not replied to the letter requesting information of gates sent to all users. Mrs Ingram, Mrs Marris, Mrs Adams and Mr Nelson who are willing to attend a potential inquiry maintain their use from 1990s, 2009, 1970 and 1981 until recent times, respectively, and do not recall gates locked or closed on the route. There is also the body of evidence from users who may not wish to attend a public inquiry but have submitted

statements and user evidence forms of their use. The evidence from supporters can be interpreted as inconsistent, with some users now remembering gates, gates being locked, not using the route, the frequency of use changing and some use being by permission and a number of users stating they would not attend a public inquiry. There are still a number of users claiming to have used the way for the last 20+ years or part of the last 20 years and saw no locked gates and their use of the route was not interrupted in anyway.

21.9. The test as set out in Norton and Bagshaw (see 21.6) at the order making stage, namely test B, can it be reasonably alleged that a right for the public on foot subsists, is difficult to defeat and is a much lower test than test A which must consider the balance of probabilities which an inspector would have to consider if a made order was objected to and the case was determined by The Secretary of State. The council at this stage must consider test B and if this is not defeated then it is appropriate for an order to be made.

21.10. Owen J states in his decision of the Bagshaw case referenced at 21.6 that *“Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry”*.

21.11. Taking the above into consideration and applying it to this case it is clear if we reject one side of the evidence it is reasonable to allege a right subsists over the route in question. There are inconsistencies in the user evidence and coupled with the contrary evidence given by witnesses officers have doubt if test A, that a right subsist on the balance of probabilities, can be met. However as stated it is test B that must be considered at this stage of the process and a number of witnesses maintain their evidence given and as there is no incontrovertible evidence given to defeat S.31 of the highways Act 1980, test B is met if rejecting one side of the evidence and as Owen J stated *“the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry”*. Accordingly officers conclude an order to record a footpath between The Square and North Street, Mere should be made. If objections are received to the making of that order it will be appropriate to hold a public inquiry where witnesses can be cross examined on their given evidence.

## **22. Overview and Scrutiny Engagement**

Overview and Scrutiny Engagement is not required in this case. The Council must follow the statutory process which is set out under Section 53 of the Wildlife and Countryside Act 1981.

## **23. Safeguarding Considerations**

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.

## **24. Public Health Implications**

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.

## **25. Environmental Impact of the Proposal**

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.

## **26. Equalities Impact of the Proposal**

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.

## **27. Risk Assessment**

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.

## **28. Financial Implications**

28.1. The determination of definitive map modification order applications and modifying the definitive map and statement of public rights of way accordingly, is a statutory duty 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.

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

28.3. 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 for Environment, Food and Rural Affairs (SoSEFRA). An Independent Inspector appointed on behalf of the SoSEFRA 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 supports the order (where legal representation is required by the Council) and around £200-£500 if it does not support the order (i.e. where no legal representation is required by the Council as the case is presented by the applicant). Any decision taken by SoSEFRA is liable to challenge in the High Court, the council would bear no financial burden at this stage as the decision has been made by the SoSEFRA.

## **29. Legal Considerations**

Where the Surveying Authority determines to refuse to make an order, the applicant may lodge an appeal with the SoSEFRA, who will consider the evidence and may direct the Council to make an order.

If an order is made and objections are received, the procedure is as detailed above in paragraph 28.3.

### 30. Options Considered

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 authority is required 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.

30.1. Section 53(3)(b) requires that on the balance of probability a presumption is raised that the public have enjoyed a public right of way over the land for a set period of time. Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. This section allows for the consideration of common law and the inclusion of historical evidence and is the more commonly used section.

30.2 In considering the evidence under section 53(3)(c)(i) there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw*(1994) 68P & CR 402 (*Bagshaw*):

Test A: Does a right of way subsist on the balance of probabilities? This requires the authority to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed paths is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the authority should find that a public right of way has been reasonably alleged.

To confirm the Order, a stronger test needs to be applied; that is, essentially that contained within Test A. In *Todd and Bradley v SoSEFRA [2004] EWHC 1450 (Admin)*. Evans-Lombe J

found that the appropriate test for confirmation is the normal civil burden of proof that such a way subsists on the balance of probabilities.

Test B is the weaker test and only requires that it is reasonably alleged that public rights subsist. This allegation may only be defeated at the order making stage by incontrovertible evidence.

### **31. Reasons for Proposal**

It is considered that there is sufficient evidence to meet test B as described in the above paragraph 21.11 that it can be reasonable alleged that public right on foot subsist over the route in Mere subject of this application. There is not sufficient incontrovertible evidence to reject test B which is accepted as a weak test but is the relevant test to be considered at this stage. There is significant contradictory and conflicting evidence in this case and applying the legal tests set out in case law it is appropriate to make a legal order to record the footpath and potentially in light of objections to a made order a public inquiry can be held where that evidence can be subject to cross examination. It will then be for an inspector appointed by The Secretary of State to determine on the balance of probabilities if public rights subsist. At this stage officers believe test B has been met as there is no incontrovertible evidence, whether test A is met and an order is capable of confirmation is not subject to this report.

### **32. Recommendation**

That Wiltshire Council makes a definitive map modification order to record a public footpath in Mere between The Square and North Street subject to this application.

Craig Harlow  
Rights of Way Officer  
14 March 2019