

**WILDLIFE AND COUNTRYSIDE ACT 1981 S.53**

**DECISION REPORT**

**APPLICATION FOR AN ORDER TO ADD A FOOTPATH LINKING WOODROW ROAD, MURRAY WALK AND RIVERSIDE DRIVE, MELKSHAM TO THE DEFINITIVE MAP AND STATEMENT**

**NB** All documents (including user evidence forms, responses to consultations and correspondence) are available to be viewed at the Council's offices, weekdays from 0900 to 1700, at County Hall, Trowbridge, BA14 8JN; please contact Sally Madgwick on 01225 713392

**1.0 Application**

**Application number:** 2017/04

**Application date:** 24 October 2017

**Applicant:** Mr Trevor McMaster  
159a Woodrow Road  
Forest  
Melksham  
SN12 7RQ

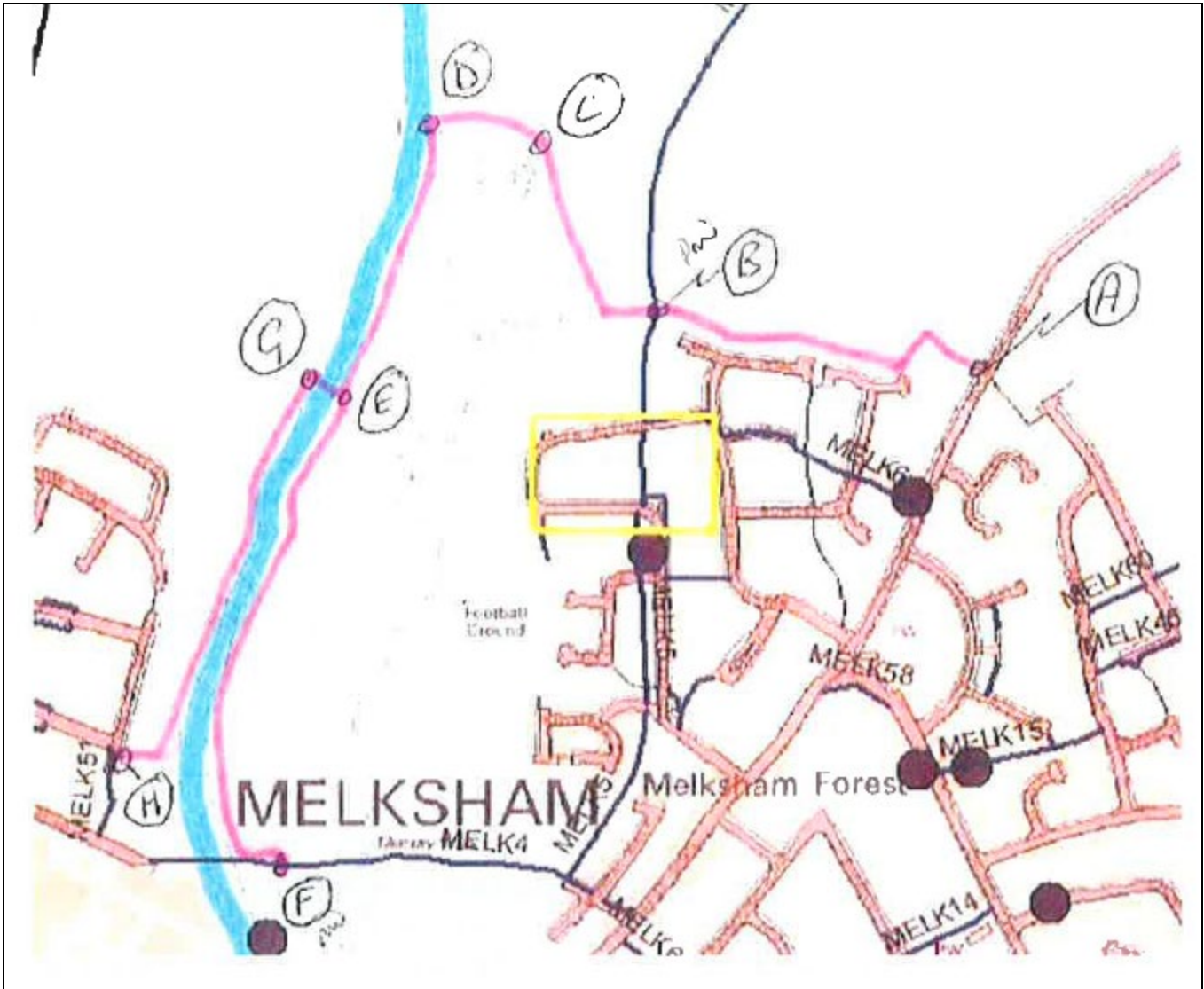
**Application to:** Add the footpath from Woodrow Road to Murray Walk  
Add the footpath from the above route to Riverside Drive

**Width:** At least 2 metres

**Application comprises:** Notice of application dated 21 August 2017  
Map of approx. 1:5000 scale showing claimed route in pink  
10 user evidence forms plus 4 (25 October 2017) plus 4 (25 June 2018) plus 3 (03 July 2018) TOTAL = 18  
Certification of service of notice of application 24 October 2018  
Notice served on: Wiltshire Council, Gareth Powell, Tim Farthing  
W D Guley & Sons, the owner/occupier of 2 fields/areas (by site notices).

**Basis of application:** That public rights on foot have been acquired over the claimed routes based on use by the public.

1.1 Extract from application map:



2.0 Legal empowerment

2.1 The Wildlife and Countryside Act 1981 (c.69) s.53 (2)(b) applies:

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

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

The event referred to in subsection 2 above relevant to this case is either:

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

or

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

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

2.2 The council must consider all available evidence and this may relate to a dedication at common law or by statute law. Historical evidence may be considered by virtue of Section 32 of The Highways Act 1980 (below):

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

2.3 No historical documentary evidence has been adduced or found for the existence of this path.

### **3.0 Compliance of the application**

3.1 Section 53 (5) of the Wildlife and Countryside Act 1981 (WCA81) allows:

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

Schedule 14 to this Act states:

#### *Form of applications*

*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.*

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.*

3.2 The application is considered to be compliant with Schedule 14 to the 1981 Act.

#### **4.0 Land ownership details**

The land is owned and occupied by the following:

**Land shown coloured blue** (Woodrow Road to stream):

Owner: Susan Gray, Holbrook Dairy Farm, Berryfield, Melksham, SN12 6EH

Occupier: W D Guley & Sons, Boundary Farm, 620 Berryfield Lane, Melksham, SN12 6EF

**Land shown coloured purple** (small section to River Avon):

Owner: Wiltshire Council

Occupier: Gareth Powell, 1 Forest Farm, Woodrow Road, Forest, Melksham, SN12 7RE

**Land shown coloured green** (eastern river bank section):

Owner: Cooper Tire & Rubber Company Europe Ltd, c/o TLT, One Redcliff Street, Bristol, BS1 6TP

Occupier: Tim Farthing, Riverside House, Beanacre, Melksham, SN12 7QB

**Land shown coloured orange** (north western river bank section):

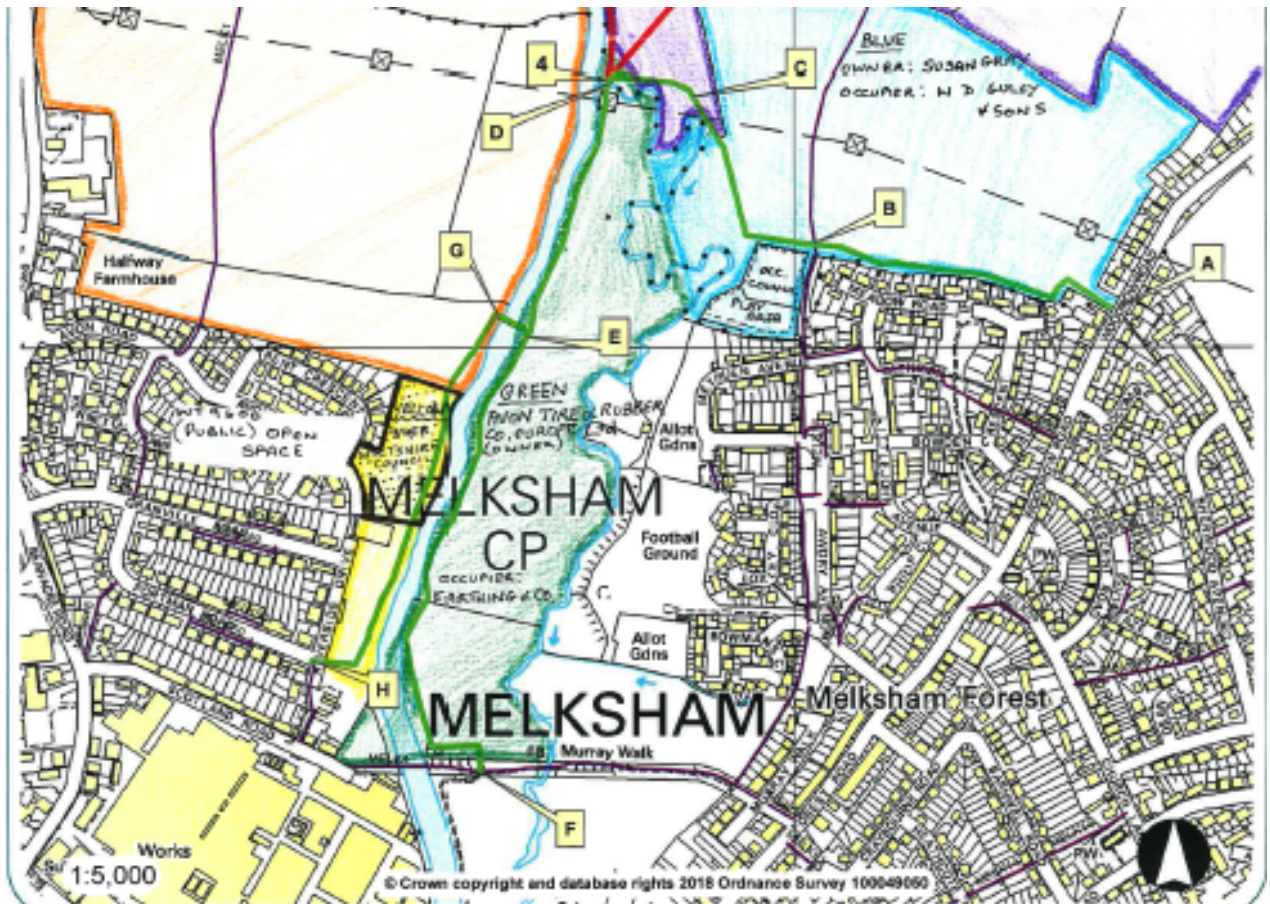
Owner and Occupier: Farthing and Co, Halfway House Farm, Beanacre, Melksham, SN12 7QA

**Land shown coloured yellow** (Riverside Drive section):

Owner: Wiltshire Council

Occupier: Part subject to a covenant to maintain as public open space (black edged area). Part maintained as public open space by Wiltshire Council.





**NB A copy of this plan is appended at [Appendix 1](#)**

The claimed route is shown on this plan as a solid green line leading from point A on Woodrow Road to points B, C and D (at the River Avon), then leading alongside the river to point E where the route divides, the eastern bank leads through to point F on footpath no 4, Murray Walk. The other spur leads across the bridge and along the western river bank to point H on Riverside Drive.

## 5.0 Images of the route taken 18 April 2018

### Gate at Point F (from Murray Walk MELK4)





**Field edge route after gate at F**



**Riverside route towards point E**



**Riverside route towards point E**





### Bridge between points E and G



### Riverside route towards point D



### Stream crossing and blockage at point D





**Point A – junction with Woodrow Road**



**From point A looking west**



**Field edge route from point A to point B**





**Kissing gate on Footpath MELW66 where it crosses the claimed route at point B**



**Field edge route from point B towards point C**



**Route close to point C (recently obstructed at this point)**





**Bridge at point E looking across River Avon to point G**



**Route from point G on field edge, beside river**



**Sign at junction of field**

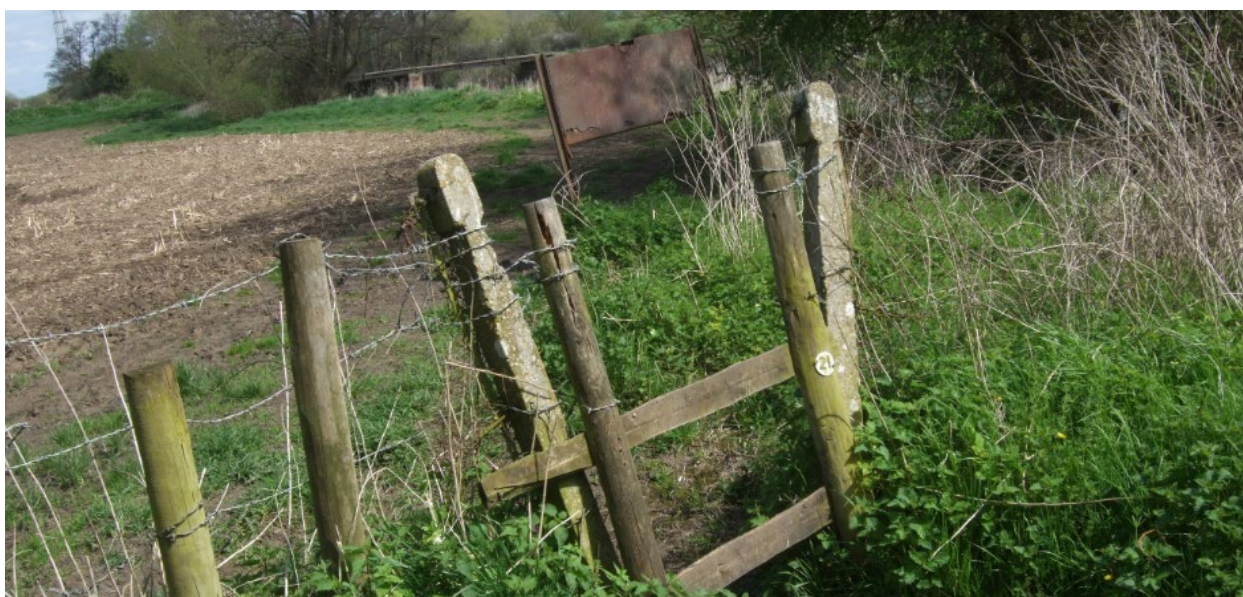




**Close up of sign**



**Stile south west of sign in fenceline (between G and H)**





**Route continues from stile towards public open space area**



**Route continues through public open space area**



**Route continues through area managed as public open space**





**Junction of claimed route with footpath Melksham 51 at Riverside Drive (looking south west)**



**6.0 Aerial photographs**

**2001 (purple lines show existing recorded rights of way network)**





2006 (purple lines show existing recorded rights of way network)



2014





It is noted that aerial photographs show a large number of worn paths in the area of the claimed route, some coincident with the claimed route but others leading across fields.

For example in 2006, at point D:



And leading from point F:





**2006:**



**2014:**



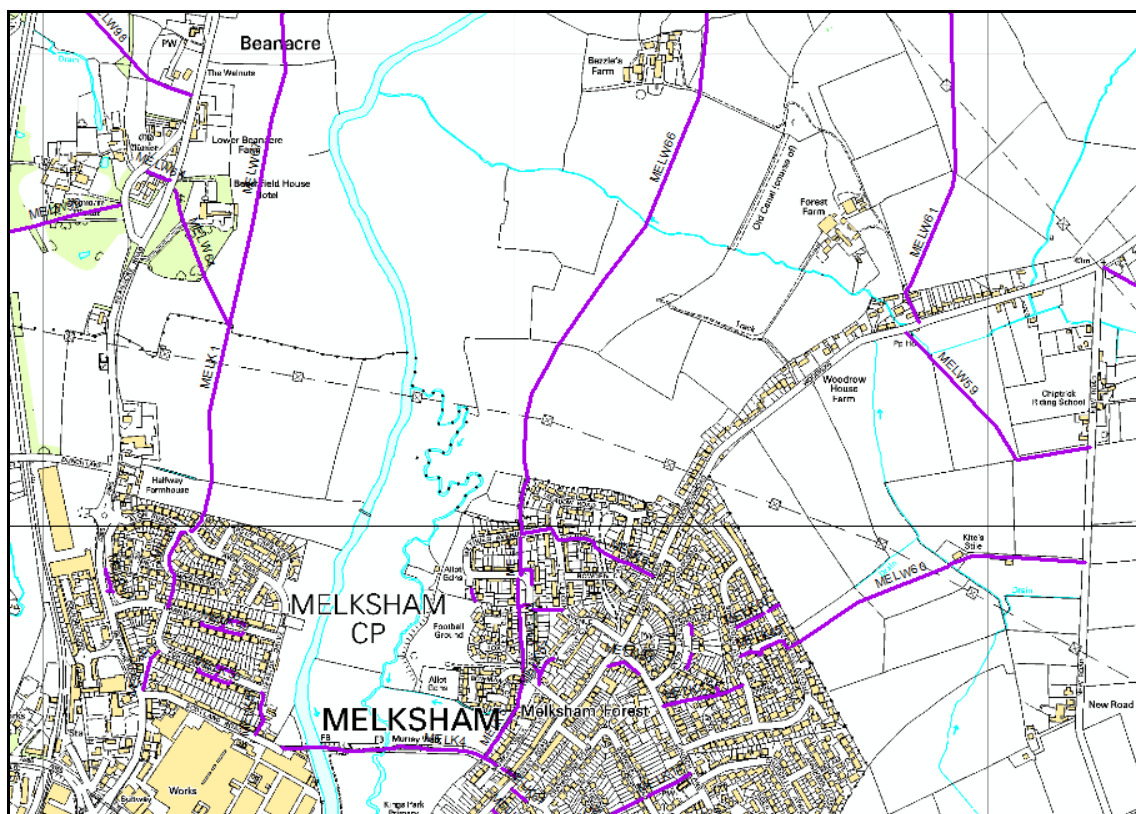
## **7.0 Current Records – Definitive Map, Highway Record and aerial photographs**

### **Definitive Map and Statement**

No part of the claimed route is recorded in the definitive map and statement. Parts A to B to C to D lie within the parish of Melksham Without and parts D to E to F to G to H are within the town of Melksham. These areas are covered by two definitive maps and statements (Bradford and Melksham Rural District Council Area and Melksham Urban



District) and neither include any part of the claimed routes. The working copy of the definitive map for the area is as below (footpaths = purple lines):



## 8.0 Context of application

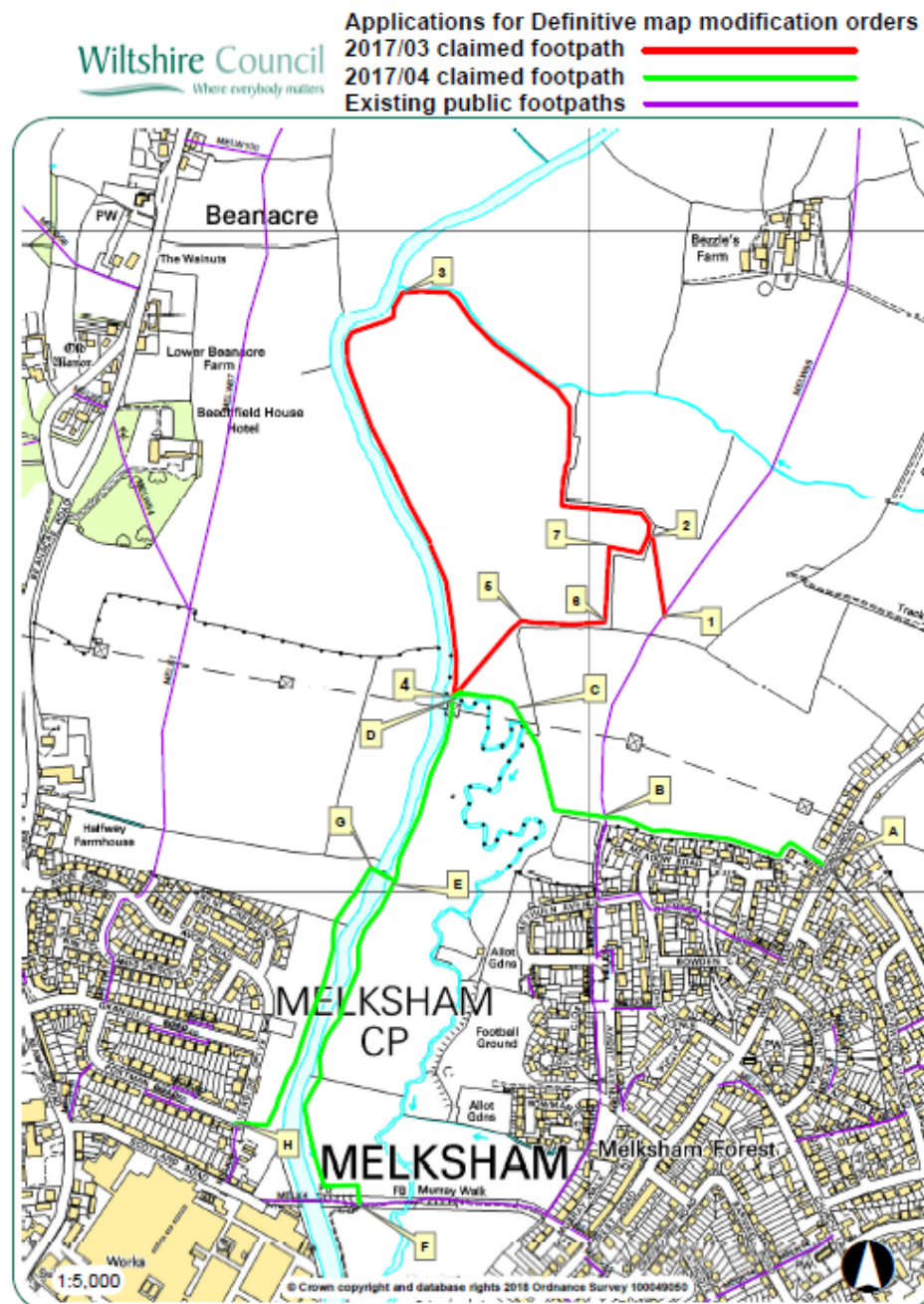
The claimed routes lead over farmland to the east of the River Avon and over farmland and public open space land (owned and managed by Wiltshire Council) on the western side of the river. Historically the land appears to have been farmland; there was residential settlement to the east at Melksham Forest recorded in the late 1800s but very little to the west, an area dominated by a rubber factory since around 1900. The factory was formerly the Avon Rubber Factory, now Cooper Tires. The Cooper Tire and Rubber Company own some of the land over which the claimed route leads.

- 8.1 The areas of Melksham on the western side of the river and Melksham Forest on the eastern side were bisected by the Wilts and Berks Canal. The route of the canal (now disused and largely lost in this area) is defined by the tow path which survives as Melksham footpath no 5 and Melksham Without footpath no 66.
- 8.2 Historic Ordnance Survey maps record some footpaths (F.P.) in the area but none coincident with the claimed paths.
- 8.3 In the period after the Second World War period significant amounts of houses were built on either side of the river increasing the population in the area considerably. There appears to be no historic documentary evidence to support that the claimed routes were dedicated as public footpaths and the application relies wholly on the evidence of more recent use.



## 9.0 Consultation

Wiltshire Council has received two applications for DMMOs in this area. It has received the one being considered here (Woodrow Road to Murray Walk and across the river to Riverside Drive - 2017/04 'the green route') and another to record a footpath around fields to the north of those affected by 2017/04 ('the red route'). Owing to the possibility of confusion officers decided to produce a consultation plan showing both applications and to consult on both applications (2017/03 and 2017/04) at the same time. The evidence for both is distinct and each application may succeed or fail independent of the other, hence individual decision reports will be produced. The plan used for the consultation was as follows:



Copies of the original application plan were also circulated.



9.1 The following letter was also sent to consultees:

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

***Applications for orders to record public footpaths at Melksham in the definitive map and statement***

*Wiltshire Council has received two applications for definitive map modification orders to record public footpaths over land near to the River Avon at Melksham. Please find enclosed copies of the maps accompanying the applications and an overview map produced for clarity showing both routes (application 2017/03 in red and application 2017/04 in green).*

*Both applications adduce evidence of public use of the routes on foot for a variety of periods of time ranging from 1979 to 2017. A total of 14 people claim to have walked the red route, or parts of (2017/03) and 12 to have walked the green route (2017/04). All users claim to have walked the paths without force, permission or secrecy ('as of right') and to have seen others on the routes.*

*If it is established that it is reasonably alleged that a public right has been acquired then Wiltshire Council must make and advertise an order to record the route. Firstly though, Wiltshire Council has a duty to investigate all available relevant evidence and accordingly I would be very grateful if you have any evidence relating to these applications that you forward it to me by Friday June 22<sup>nd</sup> 2018.*

*Evidence in support may include dated photographs, further recollections or additional user evidence forms and evidence in objection may include details of land use, challenges, locked gates, signs, and any other actions taken to deter use or anything else that may be considered relevant.*

*Redacted copies of user evidence forms are available by request to owners or occupiers of the land.*

*If you have any queries relating to these applications please do not hesitate to contact me.*

9.2 Consultees were as follows:

All people who had submitted user evidence forms

The Auto Cycle Union

Open Spaces Society

British Driving Society

British Horse Society (Wiltshire and National)

Byways and Bridleways Trust

Cycling Touring Club

Trail Riders Fellowship

Wiltshire Council Senior Rights of Way Warden

Melksham Town Council

Melksham Without Parish Council

Wiltshire Councillor Melksham Without North

Wiltshire Councillor Melksham North

Wiltshire Bridleways Association

The Ramblers (Wiltshire)

Wiltshire Council as landowner

W D Guley & Sons

Mr T Farthing

Mr G Powell

Ms S Gray



Mr D Corsellis  
TLT LLP acting for Cooper Tyre and Rubber Company Europe Ltd  
Mr T McMaster (applicant 2017/04)  
Mrs S Carter (applicant 2017/03)

## **10.0 Consultation responses relevant to 2017/04**

### **10.1 Melksham Town Council 24 May 2018**

*“Members discussed your correspondence regarding applications being made for definitive map modification orders on two routes in Melksham.*

*Members initial thoughts were that there are many miles of PRow's in and around Melksham and that these should be used to their potential, rather than seeking to create more. They did however go on to raise the following points:*

- Consideration should be given to any SHLAA sites in these locations and the impact the formalisation of these footpaths could have on future potential development.*
- It was asked if approaches had been made by these applicants to landowners to seek permissive footpath rights; to allow access over their land without dedicating a right of way?*
- There was a general will amongst councillors present to preserve the riverside setting and the route in Green would definitely support this view, however they were mindful that landowners may not be quite so open to this suggestion.*

*I appreciate the comments above are not evidence to support or object to these applications, but purely observations.”*

### **10.2 Mr and Mrs Weare 29 May 2018**

*“Further to your letter of 04 May please find enclosed various photographs clearly showing the worn paths along the River Avon and around the fields locally known as “Forty Acres”. I have dozens of photos out there if you require more.*

*When I moved to Scotland Road in the late 1990's I asked my neighbours where I could walk my dog and was told there was a footpath along both sides of the river bank, over the hatches and into Forty Acres which then took you all the way out to Lacock. Sure enough there was a clear path through the park at the end of Scotland Road, over a stile, along the river, over the “black bridge” (G) down towards the “Hatches” (D) and over another stile (4) around 40 acres which also joined up with the existing Purple Footpath MELW66 on your map. I would alternate my route often starting my walk at F where there is another stile just past the F on your map. In more recent years I have also walked from D to B to A, but not as frequently and I do not have any photos of that part (somewhat less attractive).*

*I have also assumed there to be rights of way and was surprised when I recently found they were not. They have always been well walked, well worn paths with lots of walkers, dog walkers, ramblers and even jogger using them. The stiles have always been there, although some of them have become dilapidated in the intervening period. There is another stile at the half way point on your map between 3 & 2 in the corner where the red*



*path meets the brook. I never had any reason not to walk these paths and there has always been a great feeling of friendship and community in these fields, meeting with people we mostly knew by their dogs names, chatting about our dogs and enjoying the wildlife and amazing flora and fauna. We have made many friends over the years purely due to walking along these paths (we end got to know their real names!!).*

*I can confidently say these paths are used by hundreds of people, many of them daily. In Scotland Road alone I can think of at least 10 households that use these paths daily and that is only the ones that walk at similar times to us. We share our good times and bad times on these walks, I have shared many tears out there over the sad losses of our various dogs over the past 20 years and the introduction of new dogs.*

*I truly hope these paths can be designated for future generations to enjoy as we have done – we now walk out there with our grandchildren who have learned their love of nature from seeing the deer, rabbits, swans, geese etc. And their love of foraging from the delicious blackberries, hedgerow berries, sloes, elderflowers, elderberries, damsons, apples and wild hops which we have picked.*

*Many of the rights of way around us are being destroyed/becoming unusable, including MELW66, MELK1 and MELK67 on your maps, by the farmers that use those fields. MELW66 has been particularly badly effected by deep ploughing and harsh removal of hedgerows and meadow willows where the brook with the blue arrow meets the purple footpath – going from 1 towards Bezzles Farm. There is a large kissing gate there, as there is at B and just before 1. But, this had become almost unreachable particularly for older members of the community. This route in particular was a very popular walk.”*



2003 showing  
the stile at D(4)  
at the hatches &  
the path going  
up into 40 Acres





2003  
Path from F to E



2006 from  
E to D(4) looking  
towards D(4)



2007  
Near F  
going towards  
E



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

***Application for definitive map modification orders to record public footpaths over land at Melksham***

*Further to your letter dated 4 May 2018, we are instructed by Cooper Tire & Rubber Company Europe Limited which is the freehold owner of land registered at HM Land Registry under title number WT160753 which is shown edged red on the attached title plan. As such we do not believe that the claimed footpath 2017/03 falls within our client's title.*

*With regard to claimed footpath 2017/04, none of the part of the claimed footpath between points A and D, or G and H fall within our client's title and approximately the northern half of the claimed footpath between points E and D also does not fall within our client's title.*

*All of the land that is subject to the route of the claimed footpath 2017/04 within our client's title is subject of a farm business tenancy which dates back to 25 March 2005. Our client's tenant, Mr T J Farthing, has had possession of the land since that date without any break. A copy of that farm business tenancy as executed by Mr Farthing is attached and we would draw your attention to clause 4.6 which requires Mr Farthing to take reasonable steps to prevent acts of trespass and to prevent any new footpaths or other easements or rights of way from being acquired. Please also note that Schedule 4 identifies Mr Farthing as responsible for repairs to field gates and posts (100%) and field boundaries and walls (100%).*

*From the above in relation to those parts of the claimed footpath 2017/04 that fall within our client's title, we believe that it is clear that our client did not intend to either dedicate any footpath or right of way nor should its actions indicate that deemed dedication should apply. The farm business tenancy covers all bar the very early part of the claimed period of time that the route has been used. We have not seen the user evidence but would suspect that this early period is most likely to be the part of the claimed period for which there is little user evidence or certainly less. Bearing in mind that only 12 people have claimed to have used the claimed footpath during the claimed period, we do not believe that there would be sufficient evidence to show that the claimed footpath had been used for a twenty year period and if the claimant is relying on common law principles, we would suggest that there would not be sufficient evidence in relation to the earlier period to rely on user evidence.*

*We would be grateful if you could keep us advised of progress of these applications as these will have a material impact on the agricultural activities carried out by our client's tenant as regulated by the existing farm business tenancy should an order be made.”*

Clause 4.6 states:

*“The Tenant will take all reasonable steps to prevent acts of trespass on the Holding and to prevent any new footpaths or other easements or rights of way from being acquired over the Holding and will notify the Landlord in writing of any encroachments or repeated acts of trespass on the Holding.”*

#### 10.4 W. D. Guley and Sons 15 June 2018

*“We are writing to comment on the claim of a footpath being established over land belonging to Susan Gray and farmed by W. D. Guley and Sons.*

*Firstly we would like to point out that we are very disappointed that our neighbourly attitude has created this situation.*

*Prior to 2011 our business as mainly Dairy, the field concerned being used sometimes to grow Maize, and sometimes grass for forage or grazing.*

*Whilst we were in Dairy. The field gate on Woodrow road was locked, when we had animals present, with a sign indicating that there may be a bull present to deter trespassers. However, there is another access to this field along the old canal route and when walkers were sighted in the field we were not always aware how they may have accessed the field. On occasions we have challenged people about their presence in the field and pointed out that the only public right of way is along the old canal route. We are concerned that increased access will result in further harm being caused to our crops or animals. When we are in the area we do have to remind users to keep their dogs on leads to stop them wandering all over the field and not keeping to the designated public footpath route.*

*It is in our interest to have ‘eyes’ locally to report if any animal was in trouble and also to advise when youths were using the field as a racing track for motorbikes, worrying cattle and destroying crops which is likely to increase in the new footpath sections are approved. (We had to contact the police about this on several occasions, after locals brought this to our attention).*

*In the years since 2011, we have been doing beef and arable and there has not been a locked gate to the field as we have had arable crops present. The gateway was not wide enough for large combine harvesters and so was widened but left a gap. (To have fitted new gates in this circumstance would have simply been, we felt, confrontational to our friendly neighbours ‘eyes on the spot’)*

*For economic reasons we will shortly be reducing the arable and increasing our beef grazing herd. We will therefore need to re-instate the locked gate so that the field can be used in this way.*

*In the period since the field has been used for Arable, we would suggest that it is possible that the route A to B may have been used irregularly and without our agreement.*

*We would however argue that route B to C would have left evidence of crop damage if it had been used on a regular basis, which we have not seen. Anyone out walking with or without their dogs should respect our crop and keep to the designated footpath.*

#### **In conclusion**

*We would contend strongly that the identified routes have not been regularly walked.*

*There was a locked gate at Point A up until 2011. In our opinion there is little or no evidence of a route being in regular use past point B since the field has been used for arable crops.*



*We do not want this particular route to be established as a public right of way, as it will inhibit our free use of the field in the future in particular for beef grazing if greater access is given. Of particular concern are dog owners who allow their dogs to roam freely potentially causing distress to the stock.*

*We can understand that the walkers from the Woodrow Road side of the field would appreciate connectivity to the old path MELW66. It may be possible to establish a compromise route along the northern perimeter of the field if this is absolutely required. However we would wish the route to be well fenced to prevent dogs from accessing the field and harassing the beef stock.”*

Also submitted by Trevor Guley:

**Tony Barnett** letter dated 18 June 2018

*“I have been an employee of W.D. Guley and Sons for 60 years and therefore have some recollection of the situation to the field at Woodrow Road, Melksham.*

*Susan Gray informs me that there is an attempt to create a public right of way from Woodrow Road across the field, on the grounds that the gate has not been shut or locked.*

*I am aware that people have used the field to exercise their dogs etc, and some are claiming that the entrance to the field has never been gated or locked.*

*This is simply not true. This field has been used by my employers for in excess of 20 years. Frequently up until 2011 there were animals in the field and the gate was shut and locked.*

*If they intend to make use of the field in this way again, it will be necessary to prevent access through this gateway once again.”*

**10.5 Ms C Hall 20 June 2018**

*“Recently you wrote to us regarding applications to record Footpaths near the River Avon in Melksham. As you were asking for evidence that we had used the paths, I have attached several photos that hopefully may be helpful. Unfortunately as the majority of our photos and video footage contain our children or fellow dog walkers I have been a bit limited to what I could actually send. Please find below a description of the location of each photo:*

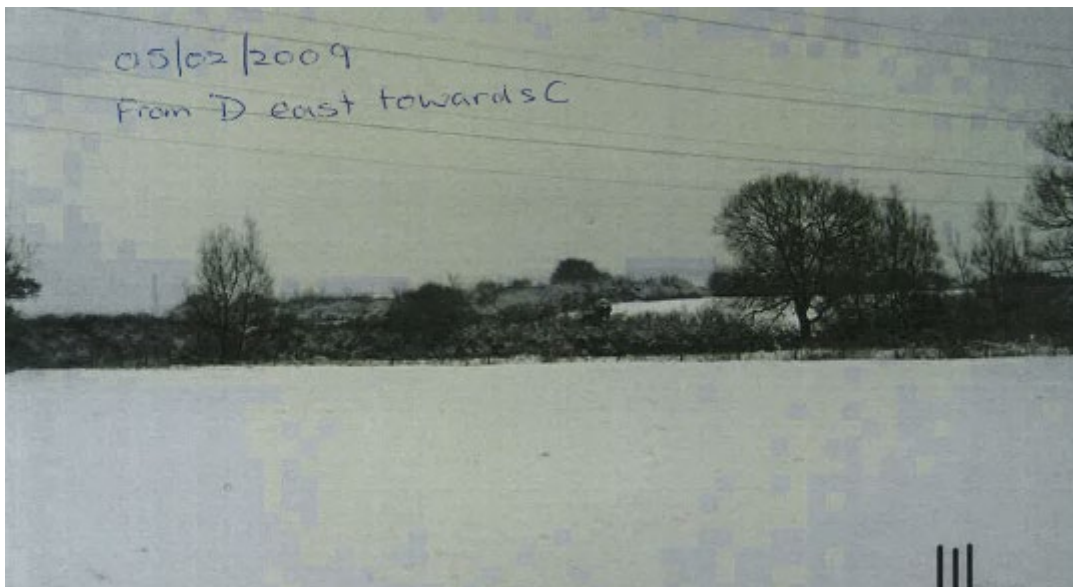
*Ref 2017/04*

*i) Photo taken 01/01/04 South of point G, looking south towards end of Riverside Drive playing field accessed by stile.*

*ii) Photo taken 22/07/07 Going west over cattle bridge between points E and G.*

*iii) Photo taken 05/02/09 Looking east, from point D across to C*

*iv) Photo taken 12/11/05 Between E and D, looking east towards point B*







#### 10.6 Melksham Without Parish Council 21 June 2018

*“The Parish Council considered the two applications and the map provided at their Full Council on Monday 18<sup>th</sup> June and would like to make the following comments:*

*The Parish Council do not support either of the two applications for new public rights of way under applications 2017/03 (red route on map) and 2017/04 (green route on map) for the following reasons:*

- They do not consider that there has been enough evidence provided to show that these are well used routes.*
- The Wilts and Berks Canal Trust have purchased land to re-instate a section of the old canal, the northern link from the river Avon up to Lacock, which will bring with it walking routes and ROWs along the tow path and the Council do not want to see the creation of any new footpaths now which could compromise this project.*
- The Parish Council would like to ensure that the current tenant farmer is consulted. The Parish Council understands that the previous tenant farmer on the red route farmed 90 acres of land on his own and was unable to police his land as the trespass level was so high.*
- The Parish Council understands that the Farmer on the green route has also given up keeping livestock on his land as the trespass level is so high.*
- The section of proposed footpath on the green route from points A to B replicates the existing Melksham Town ROW MELK6.*

*Thank you for consulting us.”*

#### 10.7 Susan Gray 20 June 2018

*“Further to our brief telephone call yesterday, and my letter which you should now be in receipt of.*

*I have found the paper work concerning the CA16. This was made in October 2017.*

*Also having now received 'the evidence received' I notice that no one is admitting there was ever a gate closed onto Woodrow Road ??? There must have been long periods when they did not use the route if this has not been noticed !!!*

*I believe one family (three forms) have actually constructed themselves a gateway into the field from their back garden. Is it really likely that they would have done this if they were not accessing the field by this route, rather than walking down the main road to access the field ??*

*I'm afraid the evidence of use from point A on Woodrow Road, just doesn't stack up."*

#### **10.8 Susan Gray and Trevor Guley 22 June 2018**

*"The field has been in the family's ownership and been farmed by us constantly for the entire period since 1997. Initially as previously mentioned in grass or maize, frequently cattle up until 2011.*

*I visited the site yesterday and spoke to a neighbour who lives over the road from the entrance, and she showed me a photograph which showed a closed gate close to the pavement. That is no longer present and there is actually not much evidence that the route from A to B has been used recently...The arable crop close to the edge of the field not trampled and brambles hanging over. (Which substantiates our previous comments that the majority of folk are respecting our cropping and we therefore had no reason to chase them off, if spotted whilst we are tending to said crop.*

*In order to access the site to load and unload cattle or whatever, it was necessary for us to establish an off road area just within the field, to avoid blocking Woodrow road whilst opening/shutting and locking the gate. The new gate was positioned approximately 12 ft into the field. Trevor informs me that he has seen people entering the field by climbing over the post and rail and allowing their dogs to enter underneath this fencing.*

*Even when the field was 'resting' and the animals returned home for winter housing the locked gate remained as we had problems with youths entering and racing round the field on little motorbikes on occasions. (It turned out that this did not stop them as they then used the public footpath MELW66 to access the field.*

***The majority of the time between 1997 and 2011 there was a closed and generally locked gate."***

#### **10.9 Barbara Ann Banks 22 June 2018**

*"I am writing to you in response to your letter of 4-5-18 regarding applications for footpaths in the fields north of Melksham on the eastern side of the R Avon.*

*From Sept 1984 – 1988 I walked the green route from point F round to point A every school day, to return home from walking my children to school, with my dogs.*

*The red route and the green route I have walked to exercise my dogs, most days since we moved here in 1984. I have often seen other dog walkers, families and joggers using the same paths. In all that time there was never any hindrance to walking these paths until 2017.*

*I include some photos taken while walking my dogs along these paths.*



*The 1<sup>st</sup> 3 were taken on the red path in Jan 2009.  
Nos 4 to 8 were taken in January 2001.  
Nos 9 to 11 were taken in winter 2013.  
No 14 in 2014.”*

**No 4 January 2011 between E and D**

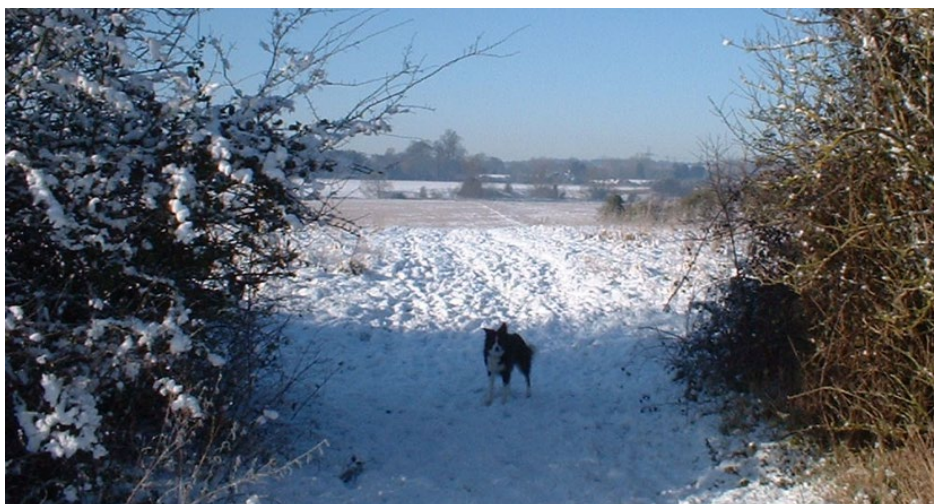


**No 5 January 2011 between E and D**

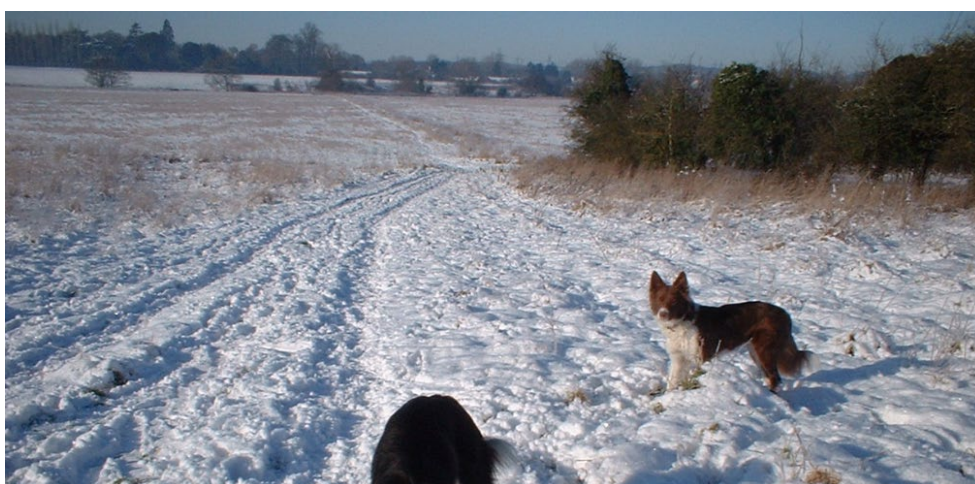




**No 6 January 2001** location not clear



**No 7 January 2001** location not clear



**No 8 January 2001** between D and B





**No 9 Winter 2013 between D and B**



**No 10 Winter 2013 between D and B**



**No 11 Winter 2013 between D and B**





#### 10.10 T Farthing on behalf of Farthing & Co 25 June 2018

*“In response to your letter dated 04.05.18, I am writing to oppose the footpath applications 2017/03 & 04, which was submitted to Wiltshire Council by Mr. Trevor Mc. Master on 31 August 2017.*

*We (Farthing & Co.) have been farming the land alongside the river Avon since 1980 where the “proposed” public footpaths 2017/03 & 04 on the map, from Murray Walk up to the the Council owned farm known as Forest Farm (formerly farmed by the late Don Burnell). On the west side of the river we farm between Melksham and Beanacre. Most of the land on the East side we rent from Cooper Tires, (formerly Avon Tyres), a small section of which we own ourselves.*

*The Black bridge which connects the two parcels of land either side of the river is jointly owned by ourselves and Cooper Tires. Approximately 30 years ago the East side buttress slipped partly into the river which made it totally impossible to cross so we repaired it ourselves. We were given permission from the Guleys in order to access the bridge from their side, off Woodrow rd. so that we could get the materials \* machinery to the site in order to repair the bridge.*

*About 12 months ago we received notification from Cooper Tires (copies enclosed) that the central pillar foundation has been severely eroded by the force of the river. At this point I was advised not to use it and to close it because it is unsafe.*

*Cooper Tires gave us permission to create an alternative access and plan to close the Black Bridge permanently as it has been declared unsafe.*

*On the matter of continual prolonged use of walkers paths, (as I stated in a previous letter to the council last year) 19 years ago we built some metal security gates on the west side of the black bridge which were kept locked for over a year until they were vandalised, one of which were thrown into the river, and still remains on the river bed to this day. The other one was brought back to the farm and one of the original metal gateposts used in its construction is still there on the bridge today. Therefore there was a **period of interruption** when the bridge could not be crossed by walkers.*



*There is a PRIVATE PROPERTY sign next to the river close to the black bridge which 10 years ago was still readable, the writing has now faded but it is still there.*

*We originally used the land for grazing cattle up until 2007. We kept bull and replacement heifers there for most of the year. In those days only a handful of people ever walked down there, to whom we had given verbal permission. The gate off Murray Walk was always locked and barbed wire put along the top to deter any would be trespassers as sign saying PRIVATE was on the right hand side of the gate on a post until about 10 years ago when we removed it as it was partly blocking our access.*

*The few people who used to walk along there accessed the land over the fisherman's style by the footbridge, NOT at point F on the map.*

*Quite often when the cattle were not there (usually between December and June) we would find that someone had cut the barbed wire next to the gate in order to get into the field, this can only be described as **forced entry**, however, the people who entered at point F on the map, did NOT take the sharp left route to the river as they are claiming to on the proposed footpath plan, as you can clearly see from the Google earth aerial photograph enclosed as evidence (taken at the end of May after we had harvested the grass).*

*It was only after we stopped keeping cattle there 10 years ago that the number of walkers increased and they have been doing so **without our knowledge or permission**.*

*We began growing crops down there 7 – 8 years ago and since then have lost contact with the few regular walkers to whom we had given permission, owing to the fact that we were no longer making the daily checks round our cattle.*

*Speaking to Don Burnell several years before he died, when he was actively farming the land, he told me that he gave his permission to all the people who walked there.*

*As a fellow farmer, I can understand why the new tenant is outraged to have people walking their dogs through his hay/silage crops when he needs to make good quality hay or silage for animal feed which is impossible to do if it is contaminated with dog excrement.*

*It is a fact that not all dog owners pick up after their dogs.*

*For cattle, the ingestion of dog excrement can have very serious consequences. We too suffered major problems in 2007 caused by this amongst our own stock, resulting in an unacceptable number of our heifers aborting their calves, following this they were unable to conceive again.*

*Some of the long term walkers, who are in support of the proposed footpaths, I can categorically state that I have given them my verbal permission, albeit a long time ago, and now, we feel very let down and disappointed that they are trying to claim it as a public right of way. We see it as abusing the privilege that we had granted them. In future we will be very cautious about allowing people to walk on our land at all.*

*For the avoidance of doubt, we will ask anyone who seeks permission to come onto our land to write an official letter to us confirming this, (such as the letter enclosed from Mrs Rossiter, who also used to walk on the 40 acre field at Forest Farm with the permission of Don Burnell, until the new tenant moved in there.) This is for our own protection and to avoid further abuse of privilege. We have recently purchased another*

*block of land at Queensfield Farm in conjunction with the Wilts & Berks Canal Trust. I still own a section of the canal on the Melksham side. They were hoping that with the permission of the remaining two landowners to allow a new public right of way from Melksham to Lacock on the old tow-path. In the light of what is happening now with this application, SM/2017/03&04. I am seriously reconsidering whether or not to co-operate with this idea.”*

Mr Farthing’s evidence includes letters from the following and a bridge report. Copies of these are attached at **APPENDIX 2**

- No 1 Letter from Mary Rossiter to Mr Farthing 03.06.2018
- No 2 Letter from former Woodrow Road resident (name unreadable) 18.06.2018
- No 3 Letter from Mr Bayley undated
- No 4 Letter from Mr Carpenter 16.06.2018
- No 5 Letter from Mr Greenman 17.06.2018
- No 6 Letter from N Young dated 21.06.2018
- No 7 Letter from M Crook dated 18.06.2018
- No 8 Letter from M Robinson dated 16.06.2018
- No 9 Letter from F D Robinson dated 16.06.2018
- No 10 Letter from Mr G Powell dated 19.06.2018
- No 11 E.mail from Mr J Thompson to Mr Farthing 06.06.2018
- No 12 Google Earth image 2002
- No 13 Google Earth image 2006
- No 14 Letter from Cooper Tires to Mr Farthing dated 08.05.2017
- No 15 Letter and bridge report from Environment Agency to Cooper Tires 10.04.2017

### **Summary of the above**

- No 1 Mary Rossiter** Mrs Rossiter had permission to walk land affected by application 207/03 (Mr Farthing now owns land at Queensfield Farm).
- No 2 Name unreadable** Recalls gate at point A on Woodrow Road being chained and padlocked.
- No 3 Mr Bayley** Has had permission to walk along the river bank since 1958
- No 4 C Carpenter** Had permission to walk from 1993 to 2005. Recalls Private Property signs near to Black Bridge and the gate at Murray Walk. Recalls old metal gate on bridge obstructing use. Recalls low numbers of walkers before 2000 and that only fisherman walked the river bank.
- No 5 P Greenman** Had permission to use Mr Farthing’s land from approx. 1988. Route was blocked by locked gates on Black Bridge about 18 or 19 years ago for about 2 years. Maize in field 2011 or 2012. Number of walkers has increased. Recalls two Private Property signs 1 by Black Bridge and other at the field gate at Murray Walk.
- No 6 N Young** Had permission for Mr Farthing’s land. Recalls Private Property sign by river near Black Bridge. Recalls someone quite often cutting barbed wire fence. In 2008 hardly anyone walked there.
- No 7 M Crook** The Avon Angling Club has over 250 members who fish along this stretch of river bank. Recalls a Private Property sign by the Black Bridge, by the



locked field gate at Murray Walk and another one at the stile (which was erected by Angling Club members).

**No 8 M Robinson** Used path since 1976 with permission. Recalls locked gates at Black Bridge 18 or 19 years ago. They were there a short time before they were destroyed. Recalls Private Property sign by Black Bridge and at Murray Walk. Recalls maize grown from 2011/2012. Has seen fence wire cut. Has seen an increase in numbers of walkers.

**No 9 F Robinson** Used path on Farthing land with permission since 1976 for daily walks. Maize was planted from 2011 onwards and more people walk there now. A metal padlocked gate was put on the Black Bridge and you couldn't walk across approx. 19 years ago. It was there for 2 years until vandalised. Has seen Private Property signs by Black Bridge and on field gate. Has seen wire cut.

**No 10 G Powell** Has farmed the land affected by 2017/03 since 2017. Has had fences torn down. Has been asked to permit people to use the path but has said no.

**No 11 J Thompson** Has walked on Farthing's land between 2000 and 2004 with permission.

**No 12 Google Earth image 2002** shows trodden path from back garden of 175 Woodrow Road

**No 13 Google Earth image 2006** Shows trodden path from gateway on Murray Walk (point F) across field i.e. not along claimed route.

**No 14 Cooper Tires** Black Bridge considered unsafe to use in 2017 and Mr Farthing was asked to refrain from using the bridge.

**No 15 Environment Agency** Bridge condition report

#### 10.11 **Mr T Farthing e.mail 04 October 2017 10:47**

Correspondence submitted when application was made.

*"I would like to make it clear that the point of entry (F) on the map, from Murray Walk is marked incorrectly. It should remain alongside the river bank, where it always was. Walkers have been incorrectly using our gateway and making their own unofficial path through our field and trampling our crops. Please ensure that this is recorded correctly on any future Definitive Map."*

#### 10.12 **Mr T Farthing 04 October 2017 22:59**

Correspondence submitted when application was made.

*"I have farmed the land on either side of Murray Walk for approx.. 40 years, we own some of the land on the east side, and also the land on the west side of the black bridge to the A350. For approx. 6 to 7 years we have grown maize on the land to the east of the river and have left a strip of land alongside the river for people to walk with their dogs. People used to walk down the bank by the foot-bridge where there is a stile."*

*However, over the last 2 to 3 years, people have caused damage to our crops by taking the incorrect route from the riverbank to our gateway, (marked F on the attached map) on the Murray Walk.*

*So we object to Mr Trevor Mc.Master's application Ref WW003, claiming this route as a footpath, as this part of the proposed route has not been used for a long period of time.*

*Prior to growing maize here, we have grazed cattle and always padlocked the gate (F on the map). Have you checked that Mr Mc.Master has lived in the area for at least 20 years.*

*In 1999, we erected some tall steel gates on the black bridge which prevented people from crossing over the river."*

#### **10.13 Wiltshire Council 02 July 2018**

*"Part of the route claimed under 2017/04 (green route) crosses the bottom of the field known as 40 acres at Forest Farm1. Although several of the user evidence forms state that the use of the route C – D was occasionally interrupted due to flooding we do not wish to object to this application on the basis that a path across the bottom corner of the field in the route C – D wouldn't unduly impact on agricultural operations. In fact during earlier discussions with the local walkers we tried to offer this section as a permissive path, however because it didn't lead to or from any formal right of way, and you could only get to it by trespassing on neighbouring third party land we were unable to progress this.*

*With respect to the section of path between H and G, in so far as it crosses Wiltshire Council owned public open space we would have no objection to a footpath being dedicated along this route however I do believe that the grounds of the claim are invalid because the land is already public open space and therefore the public have permission to freely walk across the land. This is a technicality rather than an objection."*

Wiltshire Council also submitted a statement of Evidence in Objection to application reference 2017/03 (red route).

#### **10.14 Trevor McMaster 03 July 2018**

*"I have marked Point "F" a Stile which the "Public" have now been using since Farmer Farthing chain locked the entrance proposed for 2017/03 & 04 at Point F some weeks ago.*

*I have also enclosed 2 photographs showing the Stile from the Murray Walk side and from the field.*

*I wish to point this out incase any confusion arises from Evidence forms reflecting this Stile rather than walking through the gate at point "f".*

Photographs show a wooden stile with open access beside it at a point 25 yards east of the field gateway. This is on the opposite side of the gate from the Anglers' stile at the river.



## 10.15 Jeremy Thompson submitted by Mr T Farthing 05 July 2018

*"I lived in Woodrow & Forrest Road from the year 2000 until 2004.*

*I was able to go for walks along Murray Walk to the Black Bridge and back round, with the kind permission of Tim Farthing who farms the land."*

## 11.0 Considerations based on evidence of use

### Summary of User Evidence – **APPENDIX 3**

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

Section 31 of The Highways Act 1980 states:

### *31. Dedication of way as highway presumed after public use of 20 years*

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

*(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes –*

*(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*

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

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

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

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

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

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

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

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

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

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

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

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

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

NB The Growth and Infrastructure Act 2013 brought about alterations to s.31(6) extending the length of time that a deposit remains valid for from 10 years to 20 years.

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

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



## 11.2 The date when use was brought into question

The physical blockage of the path at point D and between points B and C when the tenancy of that land changed, stopped use of the claimed route F- E – D – C – B. The users of the path, in their evidence, do not record any other event that prevented their use of the way and it is therefore likely that they consider that the relevant period is the 20 years between 1997 and 2017.

- 11.3 In the evidence of Mr Farthing who owns land on the western side of the river and farms land on the eastern side it is considered that the public were physically prevented from crossing the Black Bridge by a locked metal gate erected across the bridge in 1999. The gate was vandalised and destroyed some time later, possibly 1 or 2 years later. Mr Farthing's evidence is also that the erection of signs saying "Private Property" would also have acted in a manner sufficient to call the public use into question. On the basis of Mr Farthing's evidence the relevant period would be from 1979 to 1999.
- 11.4 Wiltshire Council (who own the land between D and C now farmed by Gareth Powell) do not object to the footpath on this route but it is noted that in 1995 Wiltshire County Council made a Statutory Deposit under section 31(6) of the Highways Act 1980 for land including the land affected by this application in the region of the claimed route just north of point D towards C. The length of the route affected by this deposit is approximately 100 metres. On the basis of this evidence the relevant period for the Council owned land would be from 1975 to 1995.
- 11.5 For the following reasons officers consider that the relevant period for the Council owned land east of the River Avon is from 1975 to 1995 and for the remainder of the route 1997 to 2017.
- 11.6 **S.31(5) or (6) deposits**

Wiltshire Council has received no notices under s.31(5) Highways Act 1980 regarding the erection and subsequent damage to signs or notices.

- 11.7 Wiltshire Council has received only one Statement and Plan under s.31(6) Highways Act 1980. This was made by Wiltshire County Council on 28 November 1995 and in accordance with the provisions of s.31(6) at that time Wiltshire Council had a period of 6 years (i.e. until November 2001) to make a statutory declaration relating to there being no additional dedications of rights of way. No statutory declaration was ever made and accordingly the statutory requirements laid down in s.31(6) were not met. The deposit and relevant plan is appended at **APPENDIX 4**.
- 11.8 The purpose of the deposit and plan is to enable the landowner to state what rights of way exist over the land. In its deposit Wiltshire County Council does this and also states that no other ways have been dedicated as highways. The purpose of the subsequent statutory declaration (which in this case was not made) is to demonstrate the landowner's intention in stating that in the period between the deposit and the declaration no further ways have been dedicated. S.31(6) is clear that if this is done (and in the absence of a contrary

intention) it will provide sufficient evidence to negative the intention of the owner to dedicate any such additional highway.

- 11.9 But in this example there *is* evidence of a contrary intention and this may be the reason why a statutory declaration was never made. In their response to the initial consultation Wiltshire Council have made it clear that they ...*"do not wish to object to this application on the basis that a path across the bottom corner of the field in the route C – D wouldn't unduly impact on agricultural operations"*. Additionally in an e.mail dated 08 November 2018 Wiltshire Council's Estates Manager, Jenny Rowe, has confirmed that the Council would be prepared to dedicate the short section of path between C and D as a public footpath in the event that the remainder of the 'green route' was to be recorded as a public footpath.
- 11.10 However, even where the strict provisions of s.31(6) are not met (as in this case) it still remains necessary to consider the effect, if any, of the deposited statement and plan.
- 11.11 The statement and plan was filed in accordance with other deposits and held in the offices of the Rights of Way Service at County Hall, Trowbridge. The records were available for public viewing on request. The deposit pre-dates the requirement for the Council to record and display s.31(6) deposits in an on-line register.
- 11.12 In considering the weight to give this deposit as an event which calls into question the public's right to use the route C- D it is useful to consider the proviso in s.31(1) (which must be satisfied) that *"there is sufficient evidence that there was no intention...to dedicate..."*. The leading decision is that of the House of Lords in R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28, [2008] 1 AC 221. Lord Hoffman said at paragraph 32:

*"..'intention' means what the relevant audience, namely users of the way, would reasonably have understood the landowner's intention to be."*

Lord Hoffman went on to say at paragraph 33:

*"[section 31(1)] requires 'sufficient evidence' that there was no such intention [to dedicate]. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness...the objective acts must be perceptible by the relevant audience."*

In the same case Lord Hope said at paragraph 57 that:

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

Lord Scott, also in the same case, said (paragraph 68) that:

*"Evidence 'sufficient' to displace the statutory deemed conclusion of dedication should at least establish a positive intention."*



11.13 In considering whether a deposit made under s.31(6) (albeit an incomplete one) is sufficient an action to bring a lack of intention to dedicate to the attention of the public Lord Hoffman, again in Godmanchester, at paragraph 34:

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

11.14 Lord Hope, at paragraph 54 said:

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

11.15 It is considered that the deposit made in 1995 by Wiltshire County Council is effective in calling the public right into question and that the relevant period for the consideration of the acquisition of public rights over the Council owned land approximately D to C is for the period 1975 to 1995. The deposit cannot take effect over any other parts of the claimed route and the relevant period for these parts of the route remain between 1997 and 2017.

#### 11.16 **Signs and notices**

Section 31(3) of the Highways Act details how signage may displace the provisions of section 31(1):

*(3) Where the owner of the land over which any such way as aforesaid passes –*

*(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*

*(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected the notice, in the absence of proof of any contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

11.17 User evidence forms ask, at question 8(c):

*Has there, to your knowledge, ever been on the way:*

*(a) ...*

*(b) ...*

*(c) Any notices or signs, e.g. ‘Private Road’. ‘No Public Right of Way’ etc. If so, state*

*where the items were in place or please mark the plan if necessary and state what was or is upon the notice. Dates are helpful.*

- 11.18 No users who submitted evidence in support recall see any such notices of signs.
- 11.19 Mr Farthing's evidence contains recollections of signs saying "Private Property" in 2 locations. One near the Black Bridge and one at F at the field gate.
- 11.20 The sign near the black bridge can be seen in the photograph at the bottom of page 10. It is generally unreadable but the first word may have been 'private'.
- 11.21 It is not known when the signs were erected or when they became unreadable. They have clearly not been maintained and, notwithstanding the effect of the wording, would fail to satisfy the requirement to maintain contained in section 31(3)(b) of the Highways Act 1980.
- 11.22 The evidence of the signs, even taken at its highest, is considered to also fail to satisfy section 31(3)(a) of the Highways Act 1980. The words 'Private Property' are informative and fail to convey any message inconsistent with the dedication of a highway.
- 11.23 In *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28 it is set out that:

*"...the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood what 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...It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate...In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind...the objective acts must be perceptible by the relevant audience."*

- 11.24 It is a feature of public rights of way that they lead over land that is in private ownership therefore a sign indicating this, especially one at the junction of public owned land (i.e. on the river bank near the Black Bridge) is unlikely to indicate to anyone using the way that the landowner had no intention to dedicate, the sign is merely informative as to the change in ownership and may even have been taken to refer to fishing rights.

#### 11.25 **Locked Gates**

A gate locked to prevent public access or that does physically prevent public access can call into question the public's right to use a path.

- 11.26 Users of the claimed route who support the application do not record any gate or obstruction to the route. However, Mr Farthing's evidence and that of several others refers to the gate being locked at point F until around 2007. Their evidence also refers to a locked gate across the Black Bridge from 1999 until around 2001. The evidence of Trevor Guley is



that there was gate at Woodrow Road (point A) and that it was locked when cattle were in the field from 1997 to 2011.

11.27 There is a clear conflict of evidence over the presence of gates, whether they were locked and whether they formed an obstruction. Where there is a conflict of evidence the Council must consider, when considering using section 53(3)(c)(i) of the 1981 Act, whether the application forms a reasonable allegation, and with regard to the obstruction of the path at the Black Bridge, it is considered that it does as there is nothing incontrovertible in the objectors' evidence relating to the gates.

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

### **Is there a route?**

To satisfy section 31 (1) 'a way of such a character' the route must be definable. In *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 Lightman J said that the true meaning and effect of the exception of "a way of such character that use of it by the public could not give rise at common law to any presumption of dedication" is that "the user must be as a right of passage over a more or less defined route and not a mere or indefinite passing over land".

11.29 Users in support of the application have all submitted a copy of the application map. However, in response to question 2 users have given full and personal descriptions of the path. For example Witness no 2:

*"The path used was defined by continual use of walkers (dog owners). Generally it was around the edge of pasture land/meadow. The field were not gated and fenced with a single strand electric fence that was used after the hay was made. The fields were then strip grazed to within approx. 5 metres of the River Avon."*

11.30 This accords well with the evidence of Mr Farthing who in his e.mail of October 2017 said that he "left a strip of land for people to walk their dogs" and that "people used to walk down the bank by the foot bridge where there is a stile."

11.31 Aerial photography reveals a number of trodden paths across the land that are not the subject of this application. However, the case officer found the claimed route largely visible, well trodden and easy to follow (not including obstructions at D and near C) in April 2018.

11.32 Additionally users of the path have submitted photographs demonstrating use of the path from 2003, 2004, 2005, 2007, 2009, 2011, 2013 and 2014.

### **11.33 Have the public used the route?**

There are 18 witnesses who have submitted user evidence forms. None claim to have been an employee or tenant or to have held any licence to access the land. The Planning Inspectorate's Consistency Guidelines at para. 5.13 states:

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

- 11.34 Of the 18 witnesses there are three couples from the same address who have given their evidence individually. This is not considered prejudicial to the application since it is recognised that use may have been individually and that each person would have different frequencies, different habits and differing recollections.
- 11.35 The area around the claimed route is relatively populous with housing to the east and west of the River Avon. It is considered that 18 witnesses is a relatively low number. 9 of these have used the path for the full 20 year period between 1997 and 2017. Many of the users have a high frequency of use with 9 using it daily and some of them twice daily. All users report seeing other users.
- 11.36 It is doubtful that all parts of the route were used by all users on every visit and there is evidence of a trodden path leading from one address which suggests that this was a preferred route to access the wider route for these people. However, the evidence before the Council is that these people used the route with high frequency. This is further supported by the action of the new tenant of the Council’s land (between C and D) who found it necessary to erect significant obstructions to prevent use and stated in his evidence that *“I have had a great deal of difficulty with dog walkers trespassing across your land.”*

### **11.37 Is there a sufficiency of use for the full 20 years**

There is no requirement for all users to have used the route for the full 20 year period and the Planning Inspectorate’s Consistency Guidelines state at 5.16 that *“Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (Davis v Whitby (1974)).”*

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

- 11.39 At 5.20:

*“In R (Lewis) v Redcar and Cleveland Borough Council UKSC 11 (03 March 2010) Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in Sunningwell that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In R (Powell and Irani) v SSEFRA [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in Lewis were not authority for an additional test beyond the tripartite ‘as of right’ test. The judgements in*



*Lewis confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication arises from acquiescence in the use. Again in Redcar, in the Court of Appeal Dyson LJ refers to Hollins and Verney and the words of Lindley LJ.*

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

**11.40 The period 1975 to 1995 (relevant for the land owned by Wiltshire Council and affected by the s.31(6) deposit**

Only 9 users in support have given evidence of use in this period with only one user (number 16) having used the route for the full 20 years.

<b>Year</b>	<b>No of users</b>		<b>Year</b>	<b>No of users</b>
1975	1 (2 or 3 x per week)		1985	6
1976	3		1986	6
1977	3		1987	6
1978	3		1988	6
1979	6		1989	6
1980	6		1990	6
1981	6		1991	6
1982	6		1992	7
1983	5		1993	7
1984	5		1994	7
			1995	8

11.41 It is considered that there is an insufficiency of use for the period 1975 to 1995 for the area of land owned by Wiltshire Council on the eastern side of the River Avon.

**11.42 The period 1997 to 2017 (relevant for the land owned by Cooper Tyre and Rubber Company, Farthing and Co, Susan Gray and Wiltshire Council west of the River Avon**

18 users in support have given evidence of use in this period of which 9 have used the route for the full 20 years.

<b>Year</b>	<b>No of users</b>		<b>Year</b>	<b>No of users</b>
1997	9		2008	14
1998	10		2009	16
1999	12		2010	17
2000	13		2011	17
2001	13		2012	17
2002	13		2013	17
2003	13		2014	17
2004	13		2015	17
2005	13		2016	18
2006	13		2017	18
2007	14			

11.43 Officers are satisfied that numbers are sufficient to form a reasonable allegation that a public right was being asserted.

**11.44 Whether use was interrupted**

No users report their use being interrupted though objectors report that 1997 to 2011 locked gates at point A on Woodrow Road interrupted use as did a locked gate on the Black Bridge from 1999 for a period of approximately 2 years.

11.45 Again, this highlights a conflict of evidence whereby people claim to have continued to use the route despite there being claimed obstructions to that use. The original application continues to form a reasonable allegation but clearly evidence from both sides would benefit from further elucidation and cross examination.



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

### **11.47 Secrecy**

Use cannot be considered to be ‘as of right’ if it has been carried out in a covert manner or perhaps only in the hours of darkness. There appears to be no element of secrecy in this case with numerous photographs taken during daylight hours and no landowners have challenged that use occurred.

### **11.48 Force**

Use cannot be considered to be ‘as of right’ if it has been carried out with the use of force. This may include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a gate locked to stop users. Additionally, use of a path where there are notices preventing it or making it clear that the landowner has no intention to dedicate the route as a right of way may also be considered to be use by force.

11.49 Again, there is a conflict of evidence with regard to the use of force. Users of the path claim not to have used force and they do not claim to have met obstructions until 2017. They have not recorded that any gate was locked against them. There are three points where force is alleged by objectors to the application, the gate at the Black Bridge which was allegedly vandalised and ended up in the river, the gate at point F where wire was allegedly cut and the gate at point A.

11.50 It is difficult to believe that walkers would be responsible for the vandalism of a large gate at the bridge and that they would then have thrown it in the river. It is more likely that this was carried out by other persons, however, if the gate was found to be locked to prevent public use then it is possible that there was use by force. Evidence from the landowners responsible for the gate at point A locked it when cattle were in the field and then left it locked to prevent motorcyclists when the cattle weren’t in the field. Neither action is a specific locking against public use on foot and their own evidence suggests that people just used to climb over the gate.

11.51 The reasonableness of the allegation formed by the application remains, though again, this is evidence that would be best tested under cross examination.

### **11.52 Permission**

No users supporting the application claim to have asked for, or been granted, permission to use the route. However, Mr Farthing’s evidence contains evidence from 7 people who specifically sought permission from Mr Farthing and 1 who “always understood that this was with Mr Farthing’s permission as it was private property.”

Use cannot be considered to be ‘as of right’ if it has been carried out with the express permission of the landowner or because of a statutory provision or right.

11.53 The Planning Inspectorate’s Consistency Guidelines is helpful in this respect:

*“5.24 If there is express permission to use a route then the use is not ‘as of right’. The issue of implied permission, or toleration by the landowner, is more difficult. In the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Lord Hoffman, Sunningwell 1999, held that toleration by the landowner of use of a way is not inconsistent with user as of right. In R(Beresford) v Sunderland CC [2003], Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Lord Scott stated in the Beresford case*

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

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

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

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

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

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

11.54 Aspects of *Beresford* relating to implied permission where land was held by a public body (or similar with a public duty) were overturned in the Supreme Court in the case of *R v North Yorkshire County Council & Others ex parte Barkas* [2014] UKSC 31. however, the principles outlined above and maintained within the Consistency Guidelines were not. In the case of *Barkas*, Lord Neuberger stated:

*“In relation to the acquisition of easements by prescription, the law is correctly stated in Gale on Easements (19<sup>th</sup> edition, 2012), para 4 – 115:*

*“The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription the distinction is fundamental. This is because user which is acquiesced in by the owner is ‘as of right’; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not ‘as of right’. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence.”*

11.55 The over-riding principle ingrained in any action taken by a landowner to indicate his lack of intention to dedicate is that it must be brought to the attention of the users. Whilst officers do not dispute that Mr Farthing did not intend to dedicate a right of way across his land and



indeed did grant verbal permission to a number of people to access the land it is considered that he failed to bring it to the attention of the relevant audience by any means (i.e. signage, notices or perhaps a revocation of the permission for one day a year).

11.56 Again it is helpful to turn to the Consistency Guidelines provided by the Planning Inspectorate which ably deal with the considerations of Lord Hoffman in the leading case in this area of work known as ‘Godmanchester’ (R(on the Application of Godmanchester Town Council)(Appellants) v SSEFRA and R (on the application of Drain)(Appellant) v SSEFRA [2007 UKHL 28]):

*“5.28 “Intention to dedicate” was considered in Godmanchester, which is the authoritative case dealing with the proviso to HA80 s.31. In his leading judgement, Lord Hoffman approved the obiter dicta of Denning LJ (as he then was) in Fairey v Southampton County Council [1956] who held “in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate.”*

5.29 ....

*“5.30 Lord Hoffman held that “upon the true construction of section 31(1), ‘intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the owner’s intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to ‘disabuse’ [him] ‘ of the notion that the way was a public highway.”*

*“5.31 For a landowner to benefit from the proviso to s31(1) there must be ‘sufficient evidence’ that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way....”*

11.57 It is clear from the conflict of evidence relating to whether permission was granted or not that although Mr Farthing granted permission to some people it was not apparent to other users that they needed to ask for permission to walk the routes. There were no signs indicating use was by permission. Stiles were provided but no signs indicated to people that they were for use by anglers or for those permitted to walk that way, in effect, they acted as an invitation walk that way. The same is true of the land owned by Wiltshire Council and farmed by Don Burnell.

11.58 Wiltshire Council also own land on the west side of the river between the River Avon and Riverside Drive between point H and the stile onto Mr Farthings land close to the Black Bridge. This land is all managed as public open space. Part of the land (the northern section) was transferred to Melksham Urban District Council in 1966 and the Council covenanted to maintain the land as Open Space. The southern section was retained by the Council and managed as public open space after the properties in Riverside Drive, Portman

Road and Granville Road were sold under the 'Right to Buy' scheme or transferred to West Wiltshire Housing Society (now Selwood Housing).

11.59 The statutory power under which land was acquired is an important factor when considering whether a public right can be acquired over the land. It is a fundamental factor when considering the acquisition of public rights (whether by statute or common law) that the use must have been in a manner that is "as of right". This is in effect a tripartite requirement which includes the lack of force, the lack of permission and the lack of secrecy with which the use must have taken place. In the case of land which has been acquired by a public body for the purpose of recreation it has been held that any use by the public is "by right" and not "as of right". There being no element of trespass as the public had a right to be there from the outset.

11.60 In an appeal to the Supreme Court – *R (on the application of Barkas) v North Yorkshire County Council* [2014]UKSC 31 at paragraph 21 Lord Neuberger held that

*"so long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespasser, so that no question of user "as of right" can arise....*

11.61 It is considered that all use of the Council owned land on the west side of the river was 'by right' and not 'as of right' and cannot meet the proviso contained within section 31(1) of the Highways Act 1980.

#### **11.62 The intention of the landowners and subjective belief**

It is settled law that unless the landowner conveys his intention to the relevant audience it does not matter what, locked inside his mind, his intention was.

11.63 Nor does it matter what is in the mind of the user of the way or whether he believes it to be a public right of way or not; it is the nature of his actual use that is the consideration.

Lord Hoffman in *R v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] A.C. 335 at 356:

*"In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years user, it*

*is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored.”*

11.64 What matters in these cases is whether the use satisfies s.31(1) of the Highways Act 1980 and not the belief of the parties involved.

### **11.65 The common law test**

In the absence of evidence of actual express dedication by a landowner, proof of a past dedication is inevitably achieved by looking at the character and extent of use of the way using the principles of “*nec clam, nec vi and nec precario*” i.e. ‘as of right’ .

11.66 The common law test does not require a period of time to be satisfied (unlike the 20 years specified in s.31 Highways Act 1980) but use would be expected to be of such frequency so as for the owner of the land to be aware of the use and to be capable of demonstrating acceptance by the public at large.

11.67 The Planning Inspectorate’s Consistency Guidelines consider common law dedication at 5.49 and state:

*“In Nicholson Dyson J commented on an assertion that Jaques was authority for the view that the quality of user required to found an inferred dedication was different from that required to found a statutory dedication. To bring the statutory presumption into play it was not necessary that the user should have been so notorious as to give rise to the presumption necessary for common law purposes, that the owner must have been aware of it and acquiesced in it. Dyson J stated “The relevant criteria so far as the quality of the user is concerned are the same in both cases. The use must be open, uninterrupted and as of right. The notoriety of the use is relevant for common law purposes in the sense that the more notorious it is, the more readily will deduction be inferred if the other conditions are satisfied. But notoriety is also relevant for the purpose of the statute, since the more notorious it is, the more difficult it will be for the owner to show that there was no intention to dedicate.”*

11.68 There is some evidence of acts of dedication insofar as there were stiles on the land permitting access to walkers; notably the ones at point D and between the Public Open Space land and Mr Farthing’s land. However, there is some evidence that Mr Farthing and Mr Burnell granted permission for some people to access the land and there is evidence that Wiltshire Council permitted the route to be blocked between points C and D in 2016. There is therefore some evidence of dedication and acquiescence on the part of the landowners and the user evidence submitted is evidence of public acceptance of the route.

11.69 The presence of the stiles at H (it is still in place and used) and close to D at The Hatches (not now present but recorded by 10 of the users) indicates that any dedication of rights to the public (either by Statute or at common law) was subject to these limitations which in the event that an Order is made, should be recorded.



## 12.0 Conclusions on the statutory test

Wiltshire Council may consider using either section 53(3)(b) or section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 in respect of the evidence considered in this application.

- 12.1 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. It offers a two tier approach to the evaluation of the evidence with a lower bar set to make an Order ('a reasonable allegation') than to confirm one ('on the balance of probabilities').

- 12.2 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.

- 12.3 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.

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

- 12.5 There is a clear conflict of evidence in this case and officers consider that much of the evidence on both sides is credible and would benefit from testing under cross examination.

- 12.6 The Council is bound to follow Test B as detailed above.

### **13.0 Conclusions on the common law test**

Lord Hoffman highlighted the difficulties associated with identifying a qualifying act for a dedication at common law in paragraph 6 of *Godmanchester* [2007] UKHL 28:

*“As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of the landowners over many years are more likely explanations...”*

- 13.1 Although it is possible that the ongoing use by the public against a background of tolerance can lead to a dedication at common law without a specific act of dedication, the application of common law principles of dedication are not considered further in this case as it is considered that the application forms at least a reasonable allegation that the statutory requirement contained within s.31(1) of the 1980 Act has been met over parts of the route.

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

- 14.1 Failure to progress this case to determination within a year of application may result in the applicant seeking a direction from the Secretary of State. As Wiltshire Council prioritises user based applications it is likely that the Council would be directed to make a determination. At the date of drafting this report the Council has been in receipt of this application for nearly 14 months.
- 14.2 If Wiltshire Council refuses to make an order the applicant may lodge an appeal with the Secretary of State who will consider the evidence and may direct the Council to make the order. If the Council is directed to make an Order it must do so. In the case of this application, the legal test for making an Order is weaker than the test to confirm it and there is a risk in deciding not to make an Order that the decision may be overturned by the Secretary of State at the appeal stage and that the Council is subsequently directed to make an Order.
- 14.3 If the Council makes an Order or is directed to make an Order, and when made and advertised it receives objections which are duly made it must be forwarded to the Secretary of State for determination. Through their agent, the Planning Inspectorate (PINS), the order may be determined by way of written representations (no additional cost to the Council), a local hearing (cost £200 to £500) or a public inquiry (cost £3500 - £5000 if Wiltshire Council supports the order; around £300 if it does not). The Council may support the Order, object to it or where directed to make it and applicable, may take a neutral stance.
- 14.4 Statute is clear as to the Council's duty in this matter and financial provision has been made to pursue this duty. It is considered unlikely that judicial review would be sought by any

party if the statute is adhered to. Costs arising from judicial review of the Council's processes or decision making can be high (in the region of £20,000 to £50,000).

## **15.0 Equality impact**

15.1 Consideration of the Equality Act 2010 is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. If the path is recorded in the definitive map and statement it must be as used and accepted by the public though any further improvements to access could be pursued by negotiation with the landowners as appropriate.

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

16.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. However, Wiltshire Council is committed to 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.

## **17.0 Safeguarding considerations**

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

## **18.0 Public Health Implications**

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

## **19.0 Options to consider**

- 19.1
- i) To make an order under s.53(3)(b) or (c)(i) of the Wildlife and Countryside Act 1981 to record a footpath.
  - ii) Not make an order under s.53(3)(b) or (c)(i) of the Wildlife and Countryside Act 1981 and to refuse the application.

## **20.0 Reasons for recommendation**

Officers consider that the application forms a reasonable allegation that a public right of way subsists and that s.31(1) of the Highways Act 1980 is satisfied for parts, but not all, of the applicant route.

### **20.1 Route H to south of G – Wiltshire Council's land to Mr Farthing's land**

The land owned by Wiltshire Council is managed as public open space. Part of the land is governed by a conveyance requiring this and the southern section formed part of the open space provision for a housing development owned by the District Council and retained by Wiltshire Council as open space. Use of this land is 'by right' and cannot be qualifying use for the application of section 31(1) Highways Act 1980.

### **20.1 Route south of G to E to F and from E to D – Mr Farthing's land and land owned by Cooper Tire & Rubber Co. Europe Ltd and farmed by Mr Farthing**



The land is entered from the public open space land near point G over a stile. A sign is at this location which said 'Private Property'. There is some evidence that a similar sign was in place at point F. There is a stile at point D.

20.2 The wording of the sign 'Private Property' is not considered to convey a lack of intention to dedicate and notwithstanding that there is also no evidence of the maintenance of the signs or dates that signs were in place. There is a conflict of evidence relating to a locked gate on the Black Bridge in 1999 for a period of approximately 1 to 2 years and there is some evidence that permission to use the route was sought and granted. However, none of these matters are incontrovertible and are not considered to take effect for a date of calling into question.

20.3 The relevant period for this section of route is therefore considered to be from 1997 to 2017 and there is considered to be a sufficiency of use in that period to at least form a reasonable allegation that the proviso in s.31(1) Highways Act 1980 is satisfied.

#### 20.4 **Route D to south east of C – Wiltshire Council's land**

In 1995 Wiltshire Council deposited a statement and plan under s.31(6) of the Highways Act 1980 declaring that there was no intention to dedicate a any public rights of way.

20.5 It is considered that this had the effect of calling the public use of the way into question and the relevant period for this section is therefore considered to pre-date the deposit and to be from 1975 to 1995. There is an insufficiency of use in that period to satisfy the proviso in s.31(1) Highways Act 1980.

20.6 However, Wiltshire Council have stated that they will now dedicate a public footpath over this section if the application succeeds. Officers consider that a conditional Deed of Dedication could be made to secure continuity of the route should any order be confirmed.

#### 20.7 **Route south east of C through B to A – land owned by Susan Gray and farmed by W D Guley and Sons**

There is some evidence of the locking of a gate at Woodrow Road but no users report this prevented their access. This is another area where evidence is directly conflicting. The purpose of the locking of the gate appears to be for cattle security and to prevent ingress by motorcycles. There is no other evidence for an interruption to use and accordingly the relevant period has been taken as 1997 to 2017. There is considered to be a sufficiency of use to satisfy the proviso in s.31(1) Highways Act 1980 between these dates.

20.8 There is a clear conflict of evidence in this case with the evidence of Mr Farthing being heavily in conflict with that of the applicants. This is largely with regard to permission, signage and locked gates at the Black Bridge. There is a conflict of evidence over Susan Gray's land regarding a locked gate.

20.9 Mr Farthing has adduced evidence from 8 people who have either requested permission or understood they needed permission. However, 18 people have adduced evidence that they did not ask for permission.

- 20.10 It is the view of officers that notwithstanding Mr Farthing's view that the route was permissive (and indeed that of some other people within the community) he failed to bring it to the attention of the relevant audience, that is, the users of the path. There were no signs saying permission was needed, there was no mechanism for revoking that permission and there was no formal closure of the route (for example locking a gate to prevent access on an annual basis) to demonstrate that the landowner retained control over the use of the path.
- 20.11 There is no incontrovertible evidence to defeat this application (notwithstanding the effect of the s.31(6) Highways Act deposit made in 1995 and the land held and managed as public open space affecting parts of the route) and the Council is bound by the decision of Owen J in *R v Secretary of State for the Environment, ex p. Bagshaw and Norton* to proceed with making an Order under s.53(3)(c)(i) WCA 81. See Paragraph 12.2.
- 20.12 Additionally, in that case Owen J held that:
- “(2) In a case where the evidence from witnesses as to users 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.”***
- 20.13 A highway must either link to other highways or lead to a place of public resort (such as a beach or a view point). While it is acceptable for a highway to commence at the public open space land at Riverside Drive (south of point G), the presence of a gap between D and C in the route where public rights are considered not to have been acquired (as a result of the 1995 s.31(6) deposit and the lack of evidence adduced in the period 1975 to 1995) is considered fatal to the Council's ability to make an Order to record parts of the claimed route. However, it is clear that some network opportunities would still exist for walkers if section A to B was recorded (this section links two highways) or if the section from the public open space land at Riverside Drive through G to E to F on Melksham 4, Murray walk, was recorded. These sections could potentially fulfil the proviso in s.31(1) Highways Act 1980 and be highways connecting to other highways.
- 20.14 However, Wiltshire Council's Estate Manager has confirmed that the Council would be prepared to dedicate the linking section of footpath over its land making it possible to make an order to those sections of the claimed route affected by the possible 'dead end' scenario.
- 20.15 Officers consider that in order to make an order capable of confirmation it would be necessary to first put into place a legal instrument that would create the length of footpath conditional on the confirmation of connecting paths. The Council may make a Deed of Dedication under Section 1 of The Localism Act 2011 to achieve this.

## 21.0 Recommendation

i) That Wiltshire Council makes a Deed of Dedication to create a length of footpath linking the ends of the claimed path over its land east of the River Avon, Melksham and that the dedication comes into effect on the confirmation of the Order recommended in ii below;

ii) That an Order to record a public footpath over land at Melksham as shown in **APPENDIX 5** is made and advertised under section 53(3)(c)(i) of The Wildlife and Countryside Act 1981 and Schedule 15 to that Act and that if no objections or representations are made that the Order is confirmed.

### Appendices:

<b>APPENDIX 1</b>	<b>PLAN SHOWING LAND OWNERSHIP AND CLAIMED ROUTE IN GREEN</b>
<b>APPENDIX 2</b>	<b>CONSULTATION RESPONSE FROM MR FARTHING</b>
<b>APPENDIX 3</b>	<b>SUMMARY OF USER EVIDENCE</b>
<b>APPENDIX 4</b>	<b>1995 S.31(6) DEPOSIT AND PLAN</b>
<b>APPENDIX 5</b>	<b>PLAN SHOWING PROPOSED ORDER ROUTE AND DRAFT ORDER</b>

Sally Madgwick

Team Leader Definitive Map and Highway Records

14 December 2018