



## WILDLIFE AND COUNTRYSIDE ACT 1981 S.53

### DECISION REPORT

#### WESTBURY STATION “CINDER TRACK”

NB All documents (including user evidence forms, responses to consultations and correspondence) are available to be viewed at the Council's offices at Ascot Court, Aintree Avenue, White Horse Business Park, Trowbridge; please contact Sally Madgwick on 01225 713392.

#### 1.0 APPLICATION

Application number: 2017/01

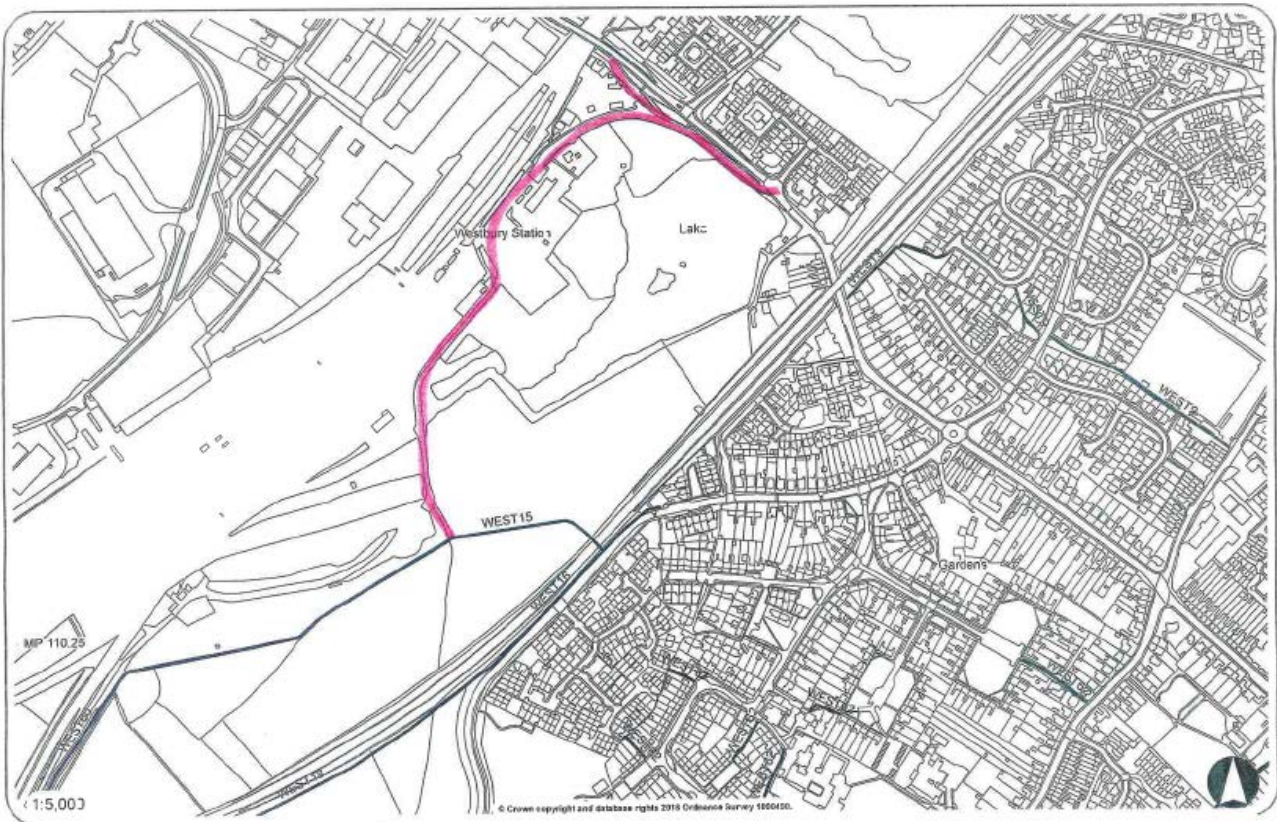
Date of application: 08 March 2017

Applicant: Cllr Russell Hawker  
25 Caspian Gardens  
Westbury  
Wiltshire  
BA13 3GP

Application for: An Order modifying the definitive map and statement for the area by adding a footpath from footpath Westbury 15 along a “cinder track” north to join with sidings yard lane (now blocked) along Station Approach to Station Road.

Application comprises: Form of Application for Modification Form 1  
Form of Certificate of Service of Notice of Application Form 3  
Notice served on:  
Network Rail Infrastructure Ltd  
DB Cargo Ltd  
Map to the scale 1:5000 showing claimed route highlighted in pink  
13 user evidence forms (UEFs)

## Application map



## 2.0 Enabling Legislation

2.1 Wiltshire Council is the surveying authority for the County of Wiltshire, excluding the Borough of Swindon. A surveying authority is the body responsible, *inter alia*, for the preparation and upkeep of the definitive map of public rights of way.

2.2 The Wildlife and Countryside Act 1981 (WCA 1981)(c.69) section 53(2)(b) applies:

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

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

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

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

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

*(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*

*(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

2.4 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.*

2.5 Section 53(5) WCA 1981 allows for any person to apply 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.

2.6 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.*

### *Notice of applications*

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.*

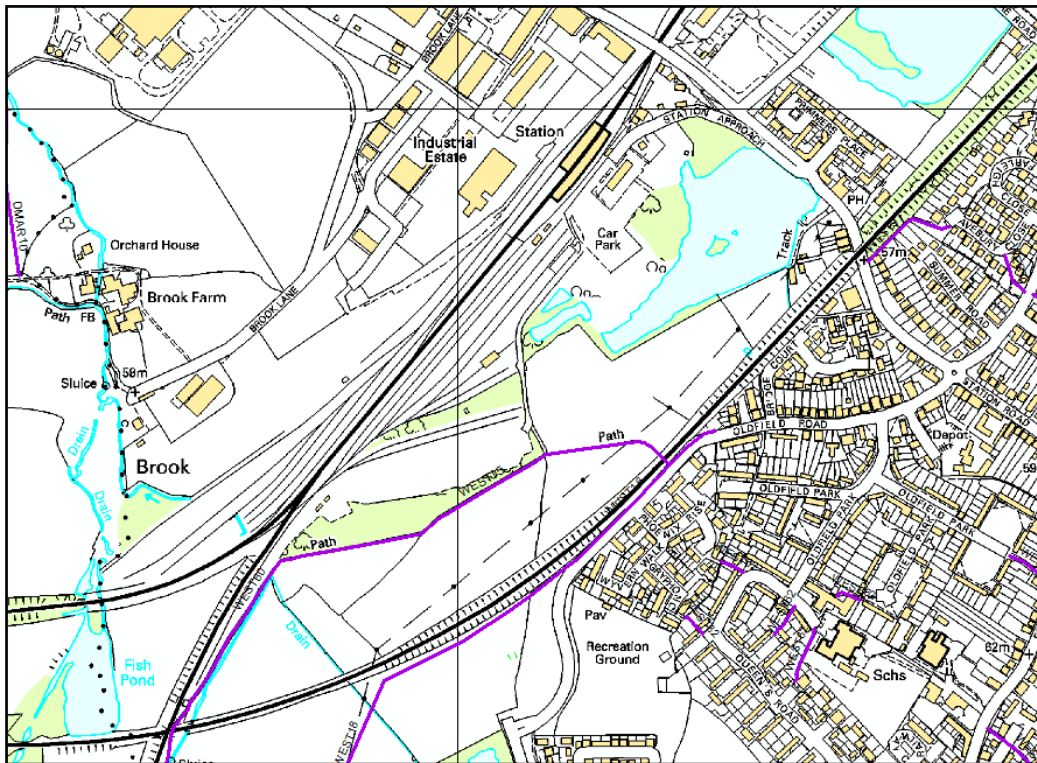
- 2.7 A surveying authority has discretionary power to waive strict compliance to Schedule 14 when determining an application or may consider the application to be improperly made whereby the surveying authority may use the evidence brought to its attention as a trigger to make its own decision under Section 53(2) of the 1981 Act ("the 1981 Act")
- 2.8 It is considered that this application was duly made in accordance with the provisions of Schedule 14 to the 1981 Act.

### **3.0 Land Ownership**

- 3.1 The land over which the claimed route leads is registered to DB Cargo (UK) limited and Network Rail. DB Cargo's land forms part of Registered Title no. WT210335 (Westbury Downside Sidings) and Network Rail's land forms the station car park and approach road. From 1905 to 1997 the whole of the land affected by the application to record a footpath appears to have been owned by first Great Western Railway, subsequently British Railways and Railtrack with the lease of title no. WT210335 passing to Mainline Freight Limited in 1996 (for a period of 125 years from 1994). DB Cargo (UK) Limited are registered as holding title absolute from 1997 onwards for the south western section of the route but have confirmed with officers that they only hold the lease, the land remaining in the ownership of Network Rail.
- 3.2 Adjoining land to the south and east of the claimed route is registered to a company called Square Bay (forming part of registered title WT282331).

#### 4.0 Current Records

- 4.1 The claimed route is not recorded in the definitive map and statement. The spur of the claimed route leading beside Station Road is recorded as part of the highway maintainable at public expense in Wiltshire Council's Highway Record.
- 4.2 Extract from the working copy of the definitive map (footpaths = purple)



- 4.3 Extract from the Highway Record (publicly maintainable highway shaded sienna)



## 5.0 Photographs (July 2017)



Claimed route obstructed by bund and fence. Leads to the right towards the station.



Claimed route from station leading towards fence and bund in photo above.



Claimed route towards station





Claimed route past station and along Station Approach



Claimed route along Station Approach



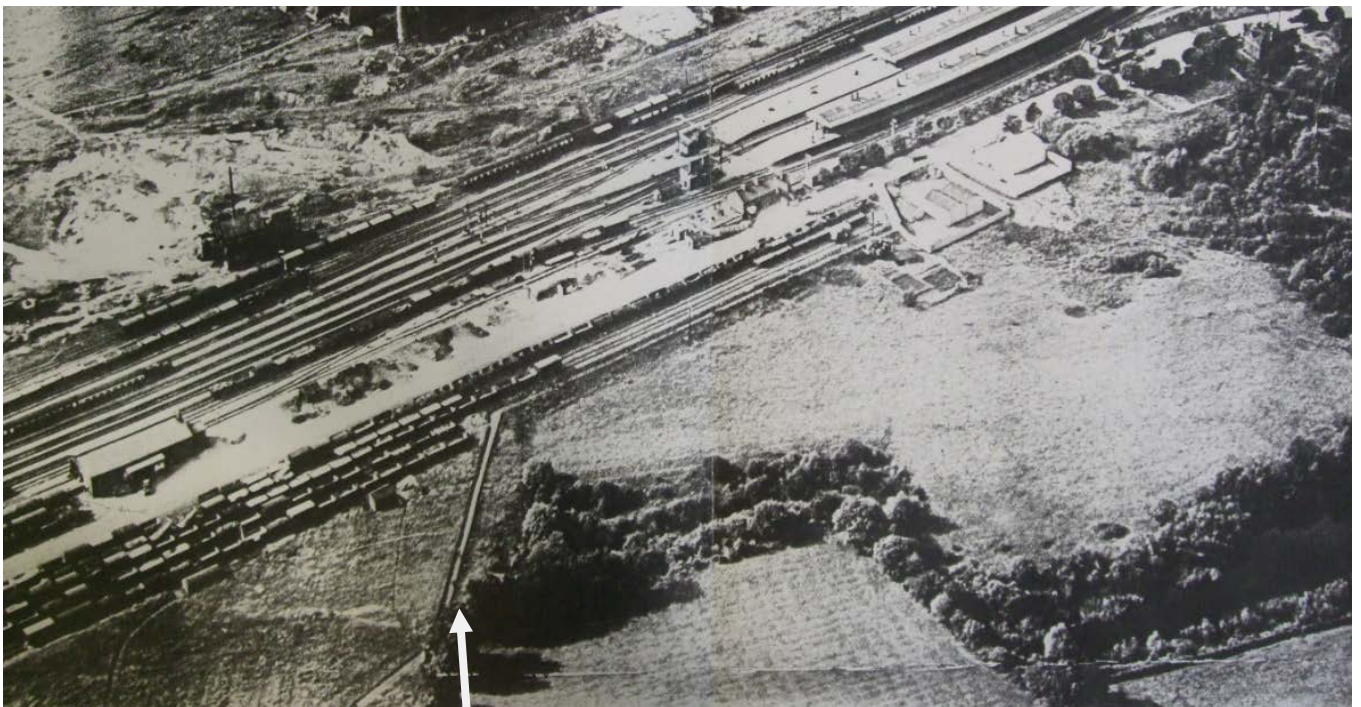
Station Approach junction with Station Road





## 5.2 Aerial photographs

1929 (Wiltshire and Swindon History Centre ref. 2233/200/2)



Claimed route is clearly shown.

2006



2014



## 6.0 Initial Consultation

6.1 The following letter and plan were circulated on the 18<sup>th</sup> July 2017:

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

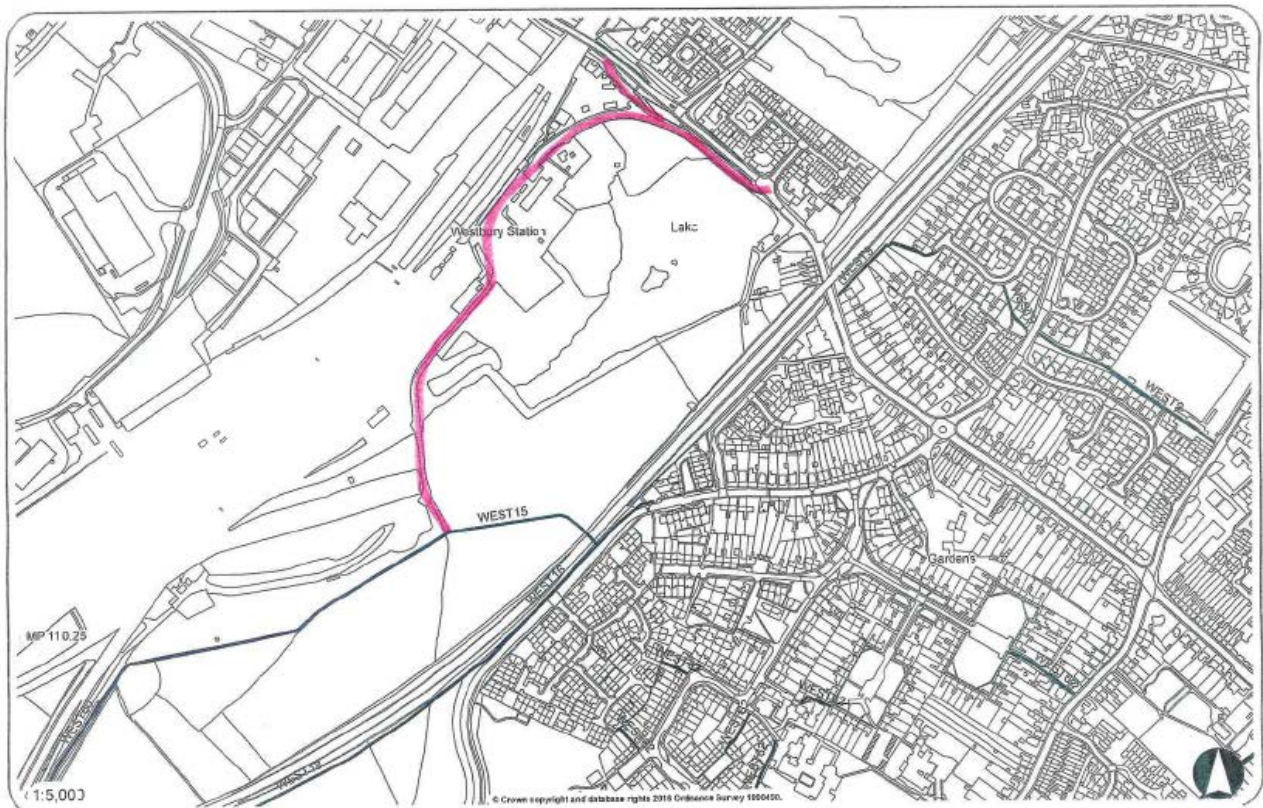
#### **Application for an order to record a footpath at Westbury in the definitive map and statement**

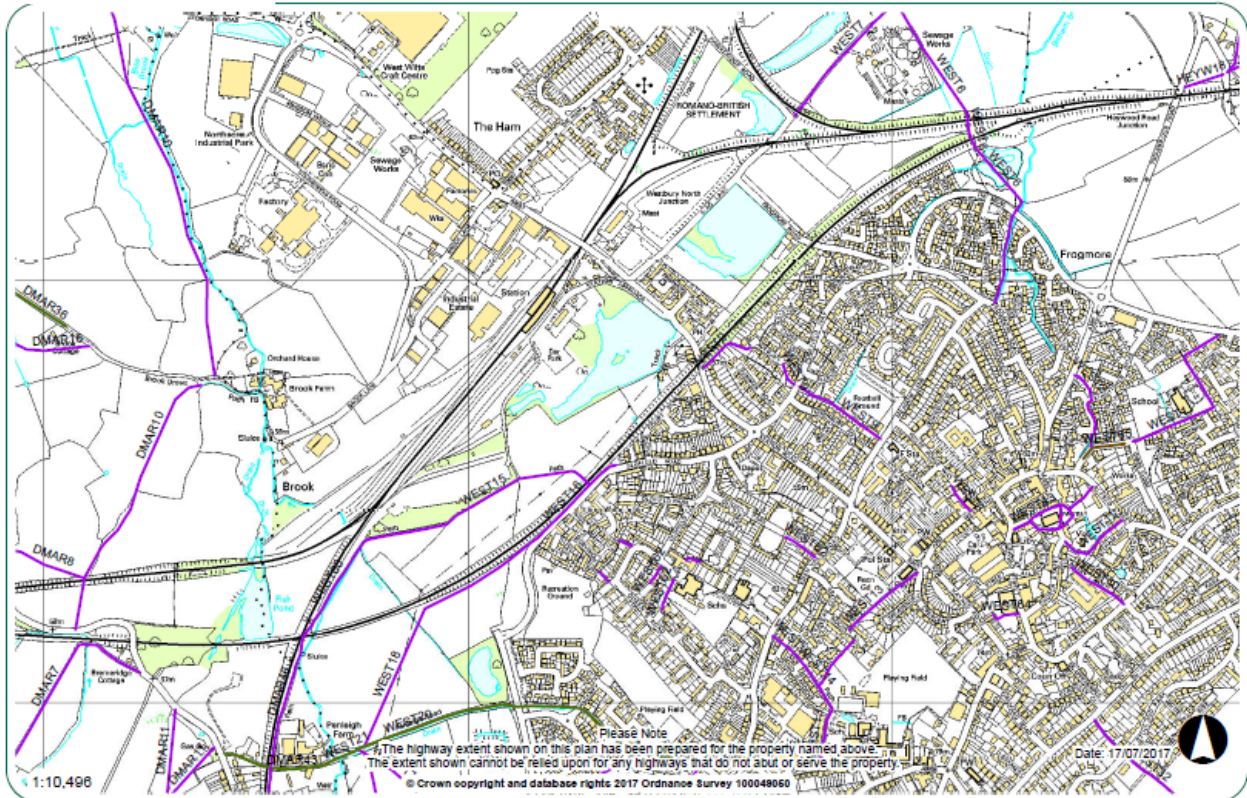
*On the 8<sup>th</sup> March 2017 Wiltshire Council received an application for an order to record a public footpath leading from footpath Westbury 15 leading north and north east along “the Cinder Track” to the car park at Westbury Station and then on past the station along Station Approach to join Station Road. A copy of the application plan is enclosed with the claimed footpath shown in pink. I have also attached a plan showing the wider network of public rights of way.*

*The application is supported by the evidence of 13 users of the path who claim to have used it on foot for a variety of periods between 1936 and 2016 in a manner that is ‘as of right’, that is, without permission, secrecy or force. All users recall seeing other members of the public using the path.*

*The Council is bound to consider all available relevant evidence and invites responses and evidence both in support and in opposition to the application. If you have already submitted a user evidence form you do not need to respond further though are welcome to if you have anything further to add.*

*Please ensure all responses have been received by the Council by 1700 on the 22<sup>nd</sup> September 2017.*





6.2 List of consultees:

- The Auto Cycle Union
- Open Spaces and Footpaths Society
- British Driving Society
- British Horse Society (national)
- British Horse Society (Wiltshire)
- Byways and Bridleways Trust
- Cycling Touring Club
- Trail Riders Fellowship
- Wiltshire Council Senior Rights of Way Warden – Paul Millard
- Westbury Town Council
- Wiltshire Council Councillor David Jenkins
- Wiltshire Bridleways Association
- The Ramblers
- Cllr Russell Hawker (applicant)
- Network Rail Infrastructure (London)
- Network Rail (Westbury)
- DB Cargo (UK) Ltd
- Square Bay (Westbury) LLP
- Ruth Vincent (witness)

Phyllis Harvey (witness)  
Ernest Clark (witness)  
Geoffrey Kingscott (witness)  
Simon Pond (witness)  
Martin Rogers (witness)  
Menna Milnes (witness)  
Patrick Stevenson (witness)  
Nic Cross (witness)  
Edwin Mead (witness)  
Stephen Hunt (witness)  
Merrilyn Richardson (witness)  
Peter Smith (witness)

## **7.0 Consultation responses**

### **7.1 Mr B Riley 20 July 2017**

*“The eight attached 1:2500 scale OS map extracts confirm the present line of the Cinder Path was first established between the revisions of 1899 and 1922, although parts of the path, or alternative routes, clearly existed before that.*

*A report dated 7 December 1904 by the Westbury Urban District Council Surveyor refers to “Footpaths affected by GWR plans: Brook House to Penleigh and Station Road to Dilton Marsh”. The latter could be a reference to your path. You would need to read the original report in the History Centre, Chippenham to find out more (Westbury UDC: Surveyor’s Reports 1901-1909, Ref. No G17/283/2). There should also be Railway deposited Plans and a Book of Reference available.*

*In 1933, the Westbury Loop Railway was opened. The History Centre should have copies of the Deposits and Plans. These plans may show the length running parallel with the railway, if so, the Book of Reference may indicate what its status then was.”*

### **7.2 Mr F Morland 30 August 2017**

*“The 1930 Act establishes that there were existing public rights of way over the lengths of two footpaths mentioned in Section 20(4)(a) and shown coloured brown between the points A and C and the points D and E respectively marked on the signed plan, which were extinguished by it.*

*So although the signed plan is silent on the point, the remainder of those footpaths continued as public rights of way after the Act was passed.*

*The question is - what were the original routes and extents of those public footpaths (and any others in the vicinity) and had any parts of them already been diverted or stopped up prior to the 1930 Act.*

*It seems almost certain that in order to construct the many additional railway lines and sidings required for its Westbury Engine Shed, completed and opened in 1915 (see Wilts VCH VIII, 171), the GWR would have had to follow a similar statutory procedure to that used later for the Westbury Avoiding Line.*

*The only plans, sections and books of reference deposited by the GWR around that time affecting Westbury are those shown in the catalogue of the Wiltshire Quarter Sessions records at the History Centre under reference A1/371/166MS in 1904.*

*Unfortunately, there were quite a number of GWR Acts passed in the period 1904-1915 and I have not yet come across any local reference sources indicating which (if any) of them authorised the construction of the Westbury Engine Shed.*

*However, it is probable that any such Act(s) would have contained clauses similar to those in the 1930 Act to divert or stop up public footpaths and rights of way in the vicinity.*

*So it may well be that some or all of the public footpaths and rights of way north of points C and E in the 1930 Act had already been changed by an earlier Act(s).*

*Incidentally, there are drawings of the Westbury Engine Shed dating from 1907 (see WSHC ref: 2515/403/2212). The contract for the construction of the Westbury Engine Shed was placed in October 1913 (see National Archives ref: RAIL 252/1759).*

### **7.3 D B Cargo (UK) Limited 04 September 2017**

*“Further to your letter of 18 July I note the content and plans. It seems that claims are being made for a footpath on land exclusively let to DB Cargo UK Ltd.*

*On behalf of DB Cargo UK Ltd I object to any public footpath across DB Cargo land as shown on the plan. There is no footpath as such but there is an important metalled road used for internal access linking different parts of the site. This roadway is used by Heavy Goods Vehicles for moving ballast and rail materials from a rail served strategic virtual quarry used to maintain railways in the surrounding area. This road is used by 60 commercial vehicles a day on a narrow lane with insufficient room for pedestrians on same road. This makes any use by third parties extremely dangerous and unsuitable on safety grounds. DB Cargo have now erected fencing to prevent this practise on safety grounds and prevent illegal trespass. There have been near miss incidents causing DB Cargo concern.*

*The route is an illegal short cut to the station and should not have footpath status. I assume your consultation includes Great Western who operate the station as their views should be taken on board. There are defined routes to the station which do*

*not include this illegal route. Users of the route are trespassing. The contact is Robert Jackson for the station.*

*In addition Network Rail are partners in the virtual quarry a key location for strategic railway maintenance in the South West. Please contact Peter Elliman on behalf of Network Rail.*

*In short there is great concern from DB Cargo, Network Rail and Great Western regarding such a route as it would interfere with commercial use of the site, is unsafe and just an illegal short cut.*

*Please register our strong objection to such a proposal. I hope this is sufficient to rebuff any such claims. If you would like a site visit to witness the situation this can be arranged with local DB contacts.”*

#### **7.4 Network Rail 11 September 2018**

*“ I refer to your letter dated 18<sup>th</sup> July 2017.*

*On behalf of Network Rail Infrastructure Limited, I wish to lodge an objection to the above mentioned application. The reasons for this objection are set out below.*

*The route shown coloured pink on the attached plan which is subject of the claim run along the Westbury Station Approach Road. This Roadway also forms the access into the depot and sidings. I therefore draw your attention to section 57 of the British Transport Commission Act 1949 which states that:*

*‘As from the passing of this Act no right of way as against the Commission [now Network Rail] shall be acquired by prescription user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot...premises of the Commission.’*

*On the basis of the above statutory provision the claim of a right of way through user is not valid and should be rejected.”*

#### **7.5 Robert Jackson – First Great Western 21 September 2018**

*“ First Great Western (GWR) is not supportive of the proposal.*

*Whilst we appreciate proposals may not be able to consider future development, but the key feature here is that future development will most likely create a new right of way. The development for the site owned by Square Bay is currently subject to a planning application.*

*In addition to this GWR believes your proposal imports a safety risk on the land which is leased to GWR as Station Facility Owner by Network Rail as Landlord.*

*Your line of the route does not take into account the fact there will be road traffic using the bays to the immediate north, taxi movement, buses using the area as a turning circle and heavy goods vehicle traffic to/from DB Cargo (which has historic rights to travel over the Station Approach and across the car park).*

*GWR cannot knowingly agree to a proposal that increases a safety risk – in this instance the risk being a pedestrian right of way cutting across the middle of a roadway.*

*Please also be aware that you would need to consider Railway regulatory procedures too. If for example your proposals resulted in a revision to the car park layout (i.e. a right of way being created) and/or resulted in a loss of parking bays – then under the provisions of the Railways Act 1993 (as amended from time to time), that you would have to go through the Minor Closure process (Minor Modification) to formally close any railway facilities (such as parking bays) and also a Station Change to obtain industry support and ORR approval for the scheme in general. You would need to have provision to compensate for any financial losses or costs (legal, operational and commercial) directly associated with your proposals that would be borne by any of the railway consultees.”*

## **7.6 Network Rail 14 September 2017**

In response to the case officer informing Network Rail that the Council was also considering pre-1949 Act evidence and inviting input:

*“In response to your query regarding the history of the site I can now offer you the following information in support of Network Rail Infrastructure’s objection to the above application.*

*The railway at Westbury was originally constructed under the powers of the Wilts Somerset & Weymouth Railway Act 1845 as amended by the Wilts Somerset & Weymouth (Amendment) Act 1846, both of which Acts incorporated the provisions of the Railway Clauses Consolidation Act 1845.*

*The plan accompanying the Parliamentary Bill for the 1846 Act (extract enclosed) shows the proposed centreline of the railway running along the alignment of the railway as constructed. The plan also shows the roadway now known as the B3097. I have annexed the referencing details of the roadway and the land over which the claimed route runs on the attachment.*

*Although the referencing details refer to footpaths, the alignment of these paths is not shown and they are purely referenced in private ownership. The railway line and station was subsequently constructed and opened for public use in 1848.*

*The Ordnance Survey map surveyed in 1884-85 (extract enclosed), clearly shows the station approach road upon its present day alignment. It does not indicate any way or footpath along the claimed route.*



*The Great Western Railway (No 1) Act 1894 authorised the construction of a new railway from Stert to Westbury. The Plan deposited with the Parliamentary Bill (extract enclosed) shows the roadway leading to the station in situ but offers no indication of any footpaths running through the site.*

*The claimed route running parallel to the B3097 would pass through enclosure 96 and/or 97 the referencing details of which are annexed to the plan.*

*The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot. Whilst not showing the station approach road the plan accompanying the Parliamentary Bill (extract enclosed) shows the lands in question to be purchased, the referencing details of which are annexed to the plan.*

*The 1899 – 1900 and 1902 Ordnance Surveys offer no additional information to the earlier surveys with no obvious footpaths along the claimed route. It also does not yet show the depot constructed.*

*The Great Western Railway (Additional Powers) Act 1905 authorised the purchase of additional lands at and near to the station. The plan accompanying the Bill (extract enclosed) includes land over which the claimed route is made. The referencing details are annexed to the plan.*

*You will also note that the plan is annotated as having the footpath running through enclosure 2 being diverted to run through enclosure 1. Section 53 of the Act authorised the stopping up and diversion of this footpath. The diverted footpath appears to follow the part of the route shown on the plan accompanying the application and annotated West 15.*

*I further attach a copy of Ordnance Survey plans from 1922. This plan shows the engine shed having been constructed upon the lands purchase under the 1905 Act. The plan clearly shows an annotated footpath network substantially similar to the path annotated West 15 on your plan. It is significant however that the way running along the claimed route is not similarly annotated.*

*The Great Western Railway Act 1930 authorised the construction of the Westbury Avoiding Line. The Plan accompanying the Parliamentary Bill shows the area of lands authorised for purchase (extract enclosed) through which the claimed route runs. The plan also shows the intended further diversion of the footpath running through the site which again is substantially similar to the route taken by West 15. There is no footpath shown running along the claimed route. Both the claimed route and the diverted footpath would both fall within enclosure 11 the referencing details of which I have annexed to the extract plan.*

*Finally I attach a copy of the Ordnance Survey of 1941 which is substantially similar to that of 1922 and offers no further evidence backing the claim of a right of way.*

*On the basis of all of this information it is evident that the claimed route was constructed part as access to the original railway station in 1848 and to serve the depot as the site developed over the years. Therefore Network Rail will rely upon*

*the previously stated Section 57 of the British Transport Commission Act 1949 to defeat this claim.”*

A copy of the above and the plans submitted are appended at **APPENDIX A**.

## **8.0 Officer’s Comments on initial consultation responses**

### **8.1 Mr B Riley**

The documents and references from Mr Riley have been inspected and are considered in this report at section 11.

### **8.2 Mr F Morland**

The documents and references from Mr Morland have been inspected and are considered in this report at section 11.

### **8.3 D B Cargo UK**

D B Cargo UK Ltd erected barriers to public use along the southern section of the claimed route. This was done to prevent public use which is referred to as “an illegal short cut to the station”. They also refer to public use as trespass. It is clear that neither Network Rail (the owner of the land) or DB Cargo UK (the tenant) do not regard the claimed path to the south of the station as a designated access route. However, matters relating to unsuitability or danger arising from other use are not relevant considerations under the Wildlife and Countryside Act 1981.

### **8.4 First Great Western**

Wiltshire Council cannot take into account any future development plans or alternative routes under the Wildlife and Countryside Act 1981, nor can it take into account considerations relating to suitability. It is clear from this response that Great Western Railway do not consider the southern part of the claimed route as being an access route to the station.

### **8.5 Network Rail**

Considerable historical information has been provided by Network Rail and this has been inspected and considered in this report at section 11. Network Rail do not consider there is any basis for public rights prior to 1949 and rely upon section 57 of the British Transport Commission Act 1949 to defeat the claim.

***57.** As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*

Whilst it is agreed that any acquisition by prescription is defeated by s.57, it is clear that this can only take effect from 1949 onwards.

## 9.0 General Context

The claimed route is a path that links Dilton Marsh and parts of Oldfield Road with Westbury Station and Station Road, it is clear that it has utility as a pedestrian route to the station and it also has utility as a through route to Station Road. The area is dominated by the railway and has been the subject of a considerable amount of change since the station was first opened in 1848 by the Wilts, Somerset and Weymouth Railway. A branch to Salisbury was opened in 1856 and by 1900 the Great Western Railway main line from London to the West Country also utilised the station. The Westbury avoiding line was built in 1929/1930 over land immediately south of the claimed route.

- 9.1 The claimed route leads around the perimeter of an area that was developed around 1915 to provide an engine shed and associated works for Great Western Railway; this area is still used for railway purposes and is leased to DB Cargo (UK) Ltd by the owners of the land, Network Rail.
- 9.2 Land to the north of the station was the site of Westbury Ironworks, the Great Western Iron Ore Smelting Company being formed to extract and smelt ore in 1857, by 1920 the works had stopped smelting and were sold in 1939.
- 9.2 The existence of the claimed route is well documented in plans and aerial photographs and the line of the path as it is today was clearly established at the time the engine shed was constructed. Specific documents have been investigated and will be presented in due course but it is noteworthy that the path is referred to in R J Cogswell's book "Westbury Ironworks" (1988) at pages 56 – 57. Mr Cogswell has clear recollections of the area and specifically the construction of the engine shed and alterations to the footpaths:

*"Those new fast trains were popular with the travelling public so more were added to the timetable, especially in summer. Freight traffic increased enormously too, particularly for perishable goods while every evening long trains took West Country milk up the line to London. The result of all this was that during the decade after 1900, Westbury with its direct connections not only with London and the far west but also to Bristol and from there South Wales and the north; even southwards – subject to the armed neutrality of the LSWR – with Southampton and Portsmouth – eventually to Brighton and Worthing. Thus Westbury became a railway town, the rail cross roads of the middle region of South-west England. And gained much in general prosperity thereby.*

*That however was only the beginning. As early as 25 February 1905, the Wiltshire Times was able to report that land was being surveyed for the building of a*

locomotive depot for GWR. After that came some years of rumour but in 1912 work preliminary to the building of the depot which railwaymen were to call "Westbury loco" began on a site on the town side of the main line railway yards and diagonally across from the ironworks. The land had been an outlying pasturage of Penleigh Farm and was, generally, some feet above the level of the existing rail tracks; therefore it had first to be brought to the level of the latter. That involved a huge amount of excavation all done by pick and shovel men with horses to haul away the excavated clay soil in skips on portable tramroads to be tipped into the western end of the station minehole. That very considerably altered the outline of the latter. The depot buildings, when they were put up were red brickwork, solid and well finished in GWR style. Besides an engine shed there was a workshop with machine tools and hoist for the lifting of engines for the changing of their wheels and so on; there was also a forge. All that machinery was driven by a steam engine supplied by a pair of locomotive type boilers. Outside was a full length turntable and an elevated coaling stage with water tank on top while close to it was a coal storage area with space for the contents of several hundred wagons. In addition, there were some miles of new rail tracks for service roads and sidings, even a reserved track for breakdown train vehicles and the local snow plough.

From ancient times the ground on which this complex was built in 1913/1914 had been crossed by a footpath from the town to Brook Mill, a mill for the fulling of cloth after weaving. The mill had a long history, Colt-Hoare records it as having changed hands in 1599. Therefore the path leading to it had been a clothier's path and as such it was a relic of the industrial history of Westbury. The mill was in full operation when the first railway line came to the town and as the path was there first, and in use, a level crossing was made for it over the tracks at a point close to the present South Junction, itself dating from 1851. Only the shell of the mill building and the waterways were left in the period now under review but the clothiers footpath remained although, by that time, only used for walks in the country and by ironworks quarry men living in Westbury on their way to Becketts and Bremeridge. The Westbury end of the footpath itself was a continuation of a lane through fields but now made up and named Oldfield Road which leads off Station Road.

After the GWR took over the ground public access, via the level crossing, to Brook Mill had to be maintained although the latter was only a ruin. This was very simply done by raising no objections to outsiders crossing the site as they pleased, even lingering or wandering about to see what was going on or – to use a modern expression – "inspecting progress". That was an opportunity which I and many others of all ages took full advantage of for more than a year. So the situation remained until the GWR made more permanent arrangements.

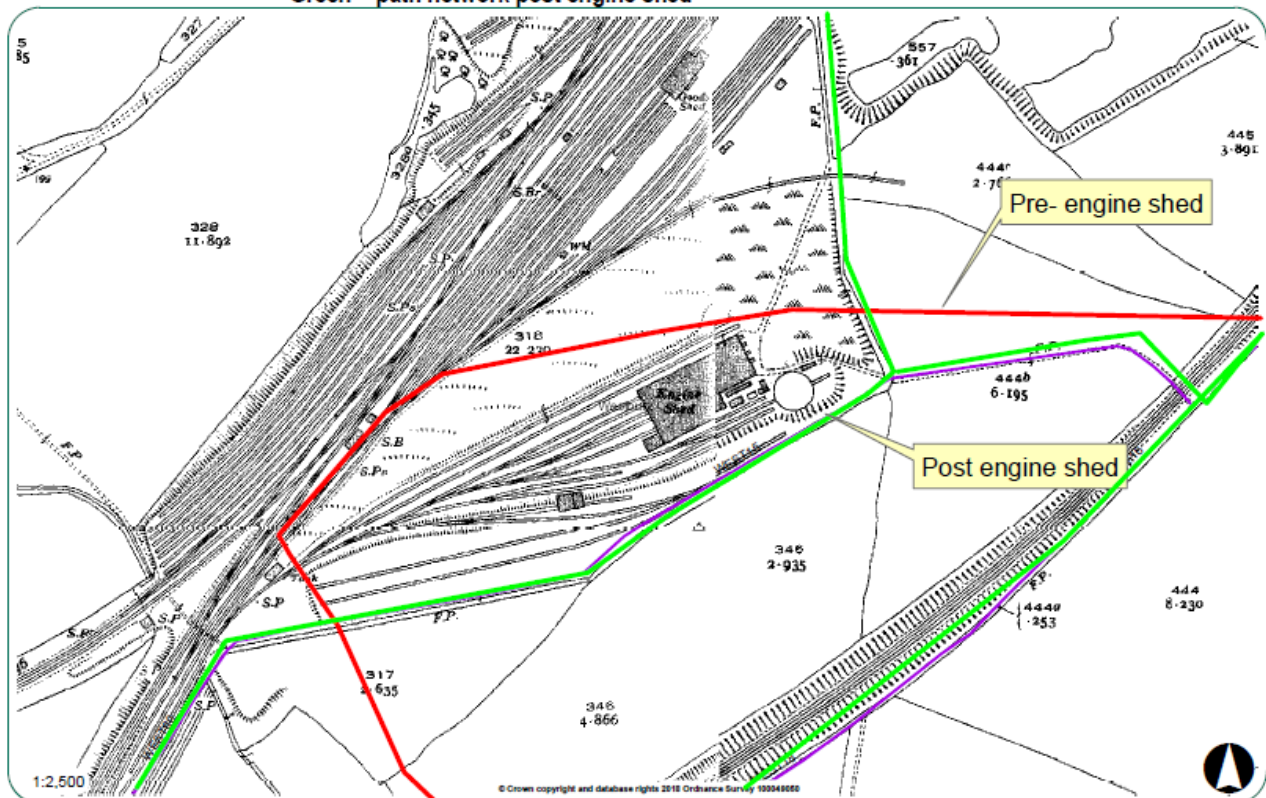
The arrangements made were that the lane – now Oldfield Road – and the path from its end across another field were surfaced with rolled in fly ash and the stiles across it replaced by kissing gates made wide enough for bicycles to be wheeled through.

**Elsewhere, an existing GWR owned footpath from the station to Dilton Marsh**

*and long known as Penleigh Footpath, was diverted across the, by then, filled in end of the Station Minehole to the kissing gate opposite to the pedestrian's entrance to the new depot. From where it continued on round to the old level crossing for Brook Mill, which had now been widened to cover six tracks and for which two new and very spacious stiles had by now been erected. ...”*

- 9.3 The plan shown below illustrates the effect of the Engine Shed development on the historic line of the footpath (shown in red). After the Engine Shed was built the paths shown in green reflects the path network (but also see alterations made in 1930).

Effect of the engine shed on the paths (based on paths marked on OS County Series maps)  
Purple = current rights of way  
Red = path network pre engine shed (1915)  
Green = path network post engine shed



- 9.4 The claimed route at this location has been in existence since the engine shed was built and was physically obstructed in 2016 by the erection of steel fencing and a bund across the path.
- 9.5 The claimed route in respect of the length from Station Road to the Station appears to date from the construction and opening of the station (1846 – 1848).

## 10.0 Historical Records

- 10.1 A route linking Dilton Marsh with Westbury can be seen on maps as a physical feature dating from the late 1800s to the present day (albeit with an altered route from 1915). Although it can be helpful to present these in chronological order to show the consistent recording of a way over time it does not allow for the need to

apply evidential weight to documents. For example although a way may appear on fifty commercial maps it does not necessarily carry as much evidential weight as if the way is shown in perhaps two publicly consulted documents or created, say, as the result of an Act of Parliament.

10.2 Therefore, in evaluating historical evidence it is necessary to recognise that differing weight must be given to different evidence. The following categorisation has been used;

Category A carries the highest weight and category F the lowest. This system of categorisation has been devised by officers with regard to The Planning Inspectorate’s Consistency Guidelines:

<http://www.planningportal.gov.uk/planning/countryside/rightsofway/guidance> (as revised to date of report) and Chapter 6 of the book ‘Rights of Way A Guide to Law and Practice – Fourth Edition’ by John Riddall and John Trevelyan.

Abbreviations: Wiltshire and Swindon History Centre, Chippenham (WSHC), The National Archive, Kew (TNA), House of Lords Record Office (HoL)

<b>Category</b>	<b>May provide evidence for</b>	<b>Examples</b>
A	Legal creation of a highway Reputation of a way as a highway Physical existence of a way Conclusive evidence of public rights	Inclosure Acts, awards and plans Orders creating, diverting or extinguishing highways Railway and canal acts and plans Definitive map and statement
B	Reputation of a way as a highway Physical existence of a way	Documents, maps plans drawn up as a result of legislation, consulted upon, but whose primary purpose was not to record public rights.  i.e. Tithe Commission, Inland Revenue Finance Act
C	Reputation of a way as a highway Physical existence of a way	Includes local government records (highway board, county council, parish council)
D	Reputation of a way as a highway Physical existence of way	Other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans, conveyances
E	Reputation of a way as a highway	Commercial maps, some Ordnance Survey records

	Physical existence of a way	
F	Reputation of a way as a highway Physical evidence of a way	Local repute, consultation responses

## 11.0 Category A Evidence

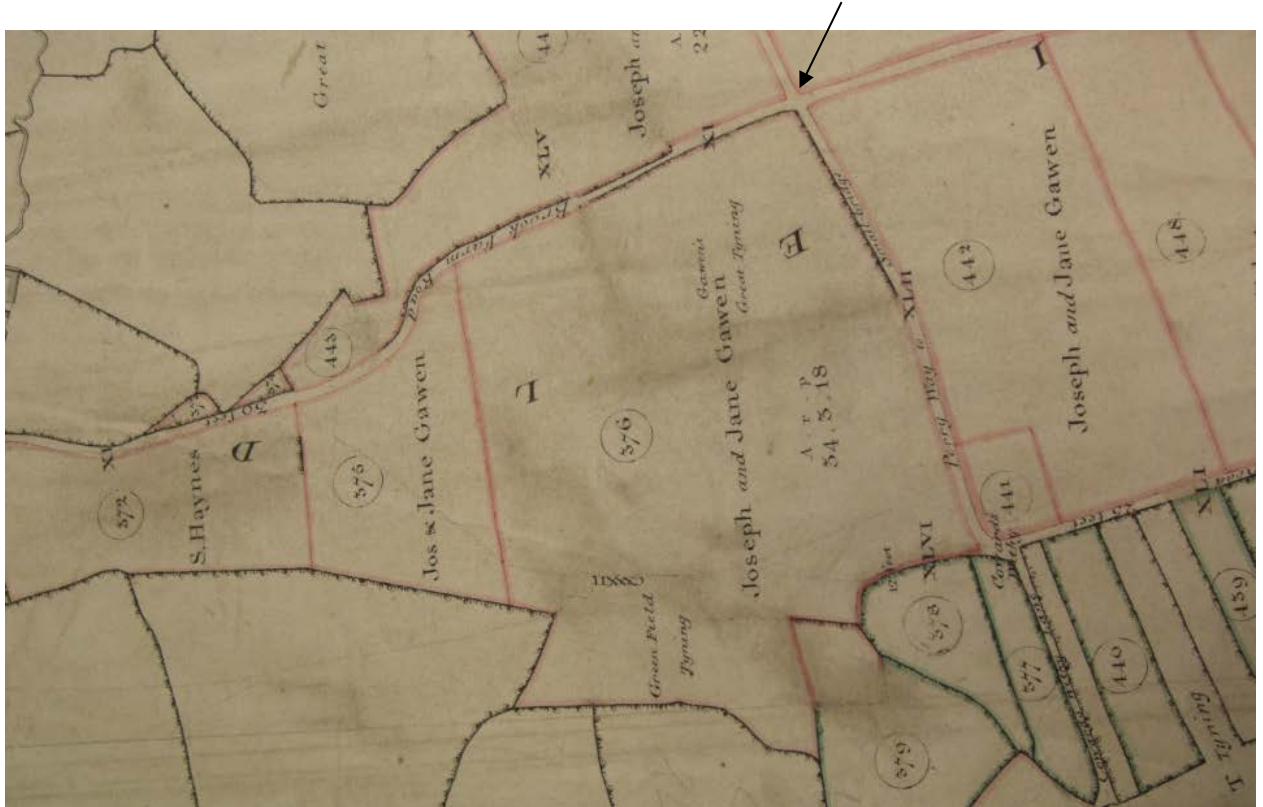
### 11.1 Inclosure Acts and Awards

Between 1545 and 1880 the old system of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners sought to improve the productivity of their land. The process of inclosure began by agreement between the parties concerned, although locally powerful landowners may have had significant influence on the outcome. By the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The process was further refined at the beginning of the nineteenth century with the passing of two main general acts, bringing together the most commonly used clauses and applying these to each local act unless otherwise stated.

- 11.2 The area of Westbury where the railway station is now situated was enclosed by Act of Parliament in 1808. The Act of Parliament was entitled “*An Act for Dividing and Allotting in Severalty the Open and Common Arable Fields, Common Downs, Common Meadows, Common Pastures and Commonable places within the Parish of Westbury in the County of Wilts.*” It is dated 1802 and was applied in conjunction with the 1801 “General Act” ( “An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure ; and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts”).
- 11.3 The Act empowered the Commissioners to create highways and to enclose and allot land (amongst other powers) and this was detailed in an Inclosure Award dated 29<sup>th</sup> July 1808. Wiltshire and Swindon History Centre (WSHC) Catalogue no. EA76.
- 11.4 Map B annexed to the award shows the land over which Westbury Station was subsequently built as being within parcel no. 376. The image below shows the land bordered by Brook Farm Road in the north and Perry Way to the east. The cross roads at the north eastern corner is where the Ham Post Office is today.

11.5

Position of Ham Post Office



11.6 The land is crossed by a public footway number CXXX11, Brook Footway.

*“CXXXII Brook Footway. One other public footway of the breadth of ffour ffet called Brook Footway numbered CXXXII in the Map B hereunto annexed branching out of Dyehouse Lane Road at or near a place called Cooks Styles ....”*

Brook Footway is the public footpath referred to in the extract from R J Cogswell’s book at paragraph 9.2 above.

11.7 This is the footpath that was, some 150 years later recorded in the definitive map and statement as Westbury footpath 15. However, the only route recorded in the award linking Dilton Marsh with this area is Penleigh Lane; there is no additional footpath shown that may coincide with the claimed footpath.

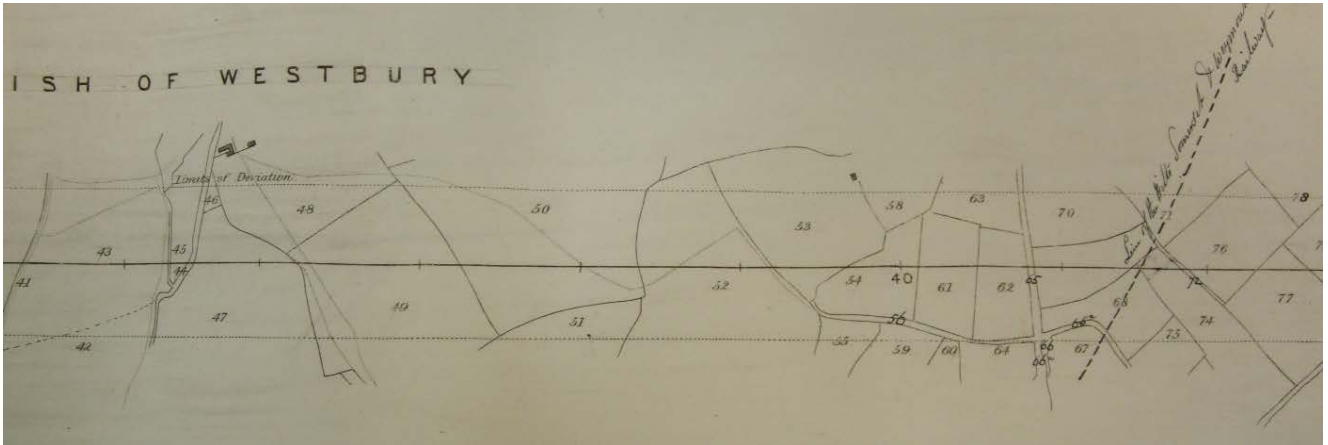
**11.8 Deposited Plans for Public Undertakings – Railway Plans**

Individual canal and railway schemes were promoted by Special Acts of Parliament. The process for Canal Schemes was codified by Parliamentary Standing Order in 1792 which was extended for railways in 1810. The Railway Clauses Consolidation Act 1845 was effective for the approval and construction of the railways at Westbury. The 1845 Act expanded the requirements laid down in 1810 with public rights of way which cross the route of the railway to be retained unless their closure has been duly authorised. Although it was not the primary purpose of the plans deposited with





11.13 It is noted that the plans show “Line of the Wilts Somerset and Weymouth Railway” on a route that although consistent with the plan deposited at the time (A1371/36 – Wilts, Somerset and Weymouth Railway 1844) the line was subsequently built on a different alignment (A1/371/68). The original deposited plan showed the line through the parish of Westbury through the village of Westbury Leigh and the intersection of the present Station Road and Oldfield Road in Westbury. Accordingly, in interpreting plan A1/371/41 MS it is necessary to disregard the position shown for the Somerset and Weymouth line.



From the Book of Reference (modern reference in italics):

<u>No on plan</u>	<u>Description</u>
65	Parish Road ( <i>Station Road</i> )
64	Arable
63	Arable
62	Arable
61	Arable
60	Pasture
59	Arable
58	Pasture
56	Occupation Road ( <i>Sopps Lane- now Oldfield Road</i> )
55	Pasture
54	Arable
53	Pasture
52	Arable and foot path ( <i>FP WEST15</i> )
51	Pasture
50	Pasture and foot path ( <i>Awarded footpath Brook Footway</i> )
49	Pasture and foot path
48	Pasture and foot paths
47	Pasture
46	Alder Bed Wood
45	Meadow

<u>No on plan</u>	<u>Description</u>
44	Mill Stream ( <i>Biss Brook</i> )
...	
31	Road ( <i>Fairwood Road</i> )

11.14 The deposited plan is consistent in showing the historic Brook Footway (which was diverted when the engine shed was built at the beginning of the 20<sup>th</sup> century) but provides no evidence to support the claimed route as a historic north/south path.

11.15 **Wilts, Somerset and Weymouth Railway 1844** (WSHC cat ref. A1/371/36 and A1/371/68 for the line as built).

The railway at Westbury was originally constructed under the powers of the Wilts Somerset and Weymouth Railway Act 1845 as amended by the Wilts Somerset and Weymouth (Amendment) Act 1846. The line was completed in 1848. The line (or the limits of deviation) identified footpath crossing consistent with the historic awarded route (Brook Footway) and indeed, crossing at the level was provided for, but it is not possible to identify any further footpaths. For reference purposes enclosure number 253 contains the Parish Road that is now Station Road (B3097).

11.16 **Great Western Railway Stert to Westbury** (WSHC cat ref. A1/371/112).

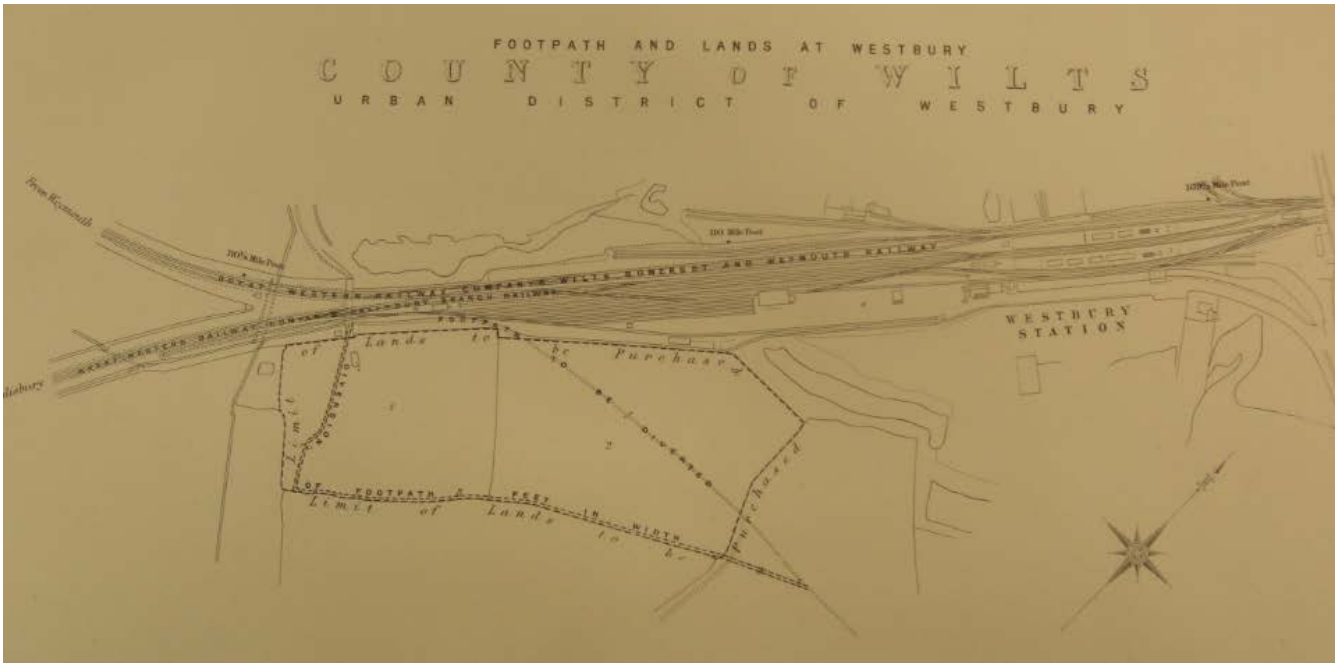
A further line leading eastwards from Westbury Station was authorised by The Great Western Railways (No 1) Act 1894. The deposited plan shows Station Approach already in position but no further evidence relating to footpaths in this area (i.e. the eastern end of the claimed route).

11.17 **The Construction of the Engine Shed**

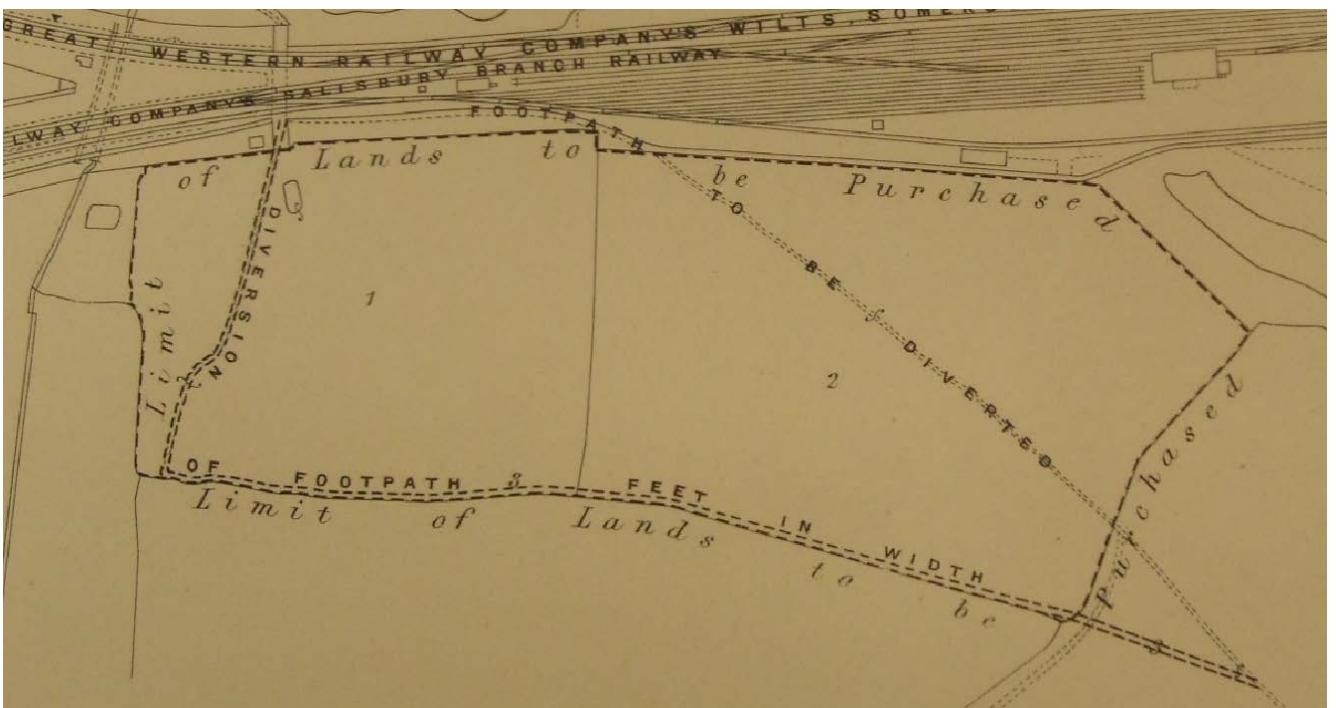
The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot and in 1904 a schedule and plans were deposited with the Clerk of the Peace with the intention that application be made to Parliament in their 1905 session to purchase land and divert public rights of way in a number of locations including Westbury.

11.18 **Great Western Railway (Additional Powers) Plans and Sections November 1904** (WSHC cat ref. A1/371/166).

The plans identifies land to be purchased at Pill, Bishopsworth and Westbury:



The plan clearly shows the line of the historic footpath (Brook Footway) to be diverted to a path around the perimeter of the proposed site:



The line of the claimed route is not shown.

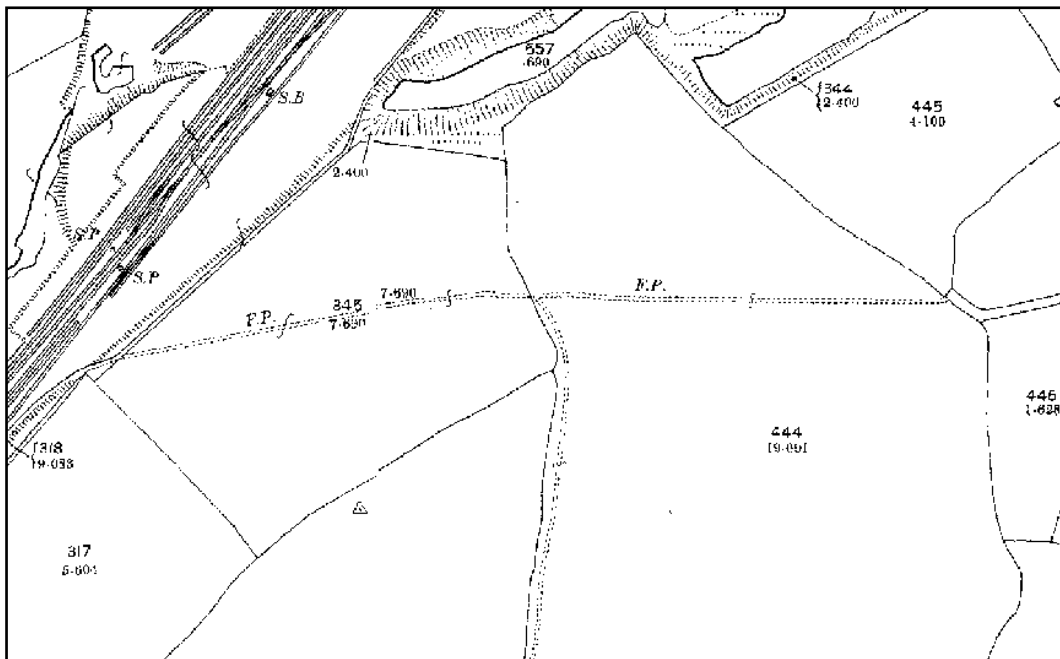
11.19 The application for additional powers extends to the Company (Great Western Railway) “with reference to new Railway Widening, Deviations and Alterations of Existing and Authorised Railways, Bridges and other Works, Roads, Footpaths and Lands in the Counties of Berks, Northampton, Oxford, Devon, Cornwall...Wilts...”

11.20 Application is made:

*“In the County of Wilts –*

*Certain lands in the parish and urban district of Westbury lying on and adjoining the south-eastern side of the Salisbury branch railway of the Company, and at and near to the junction of that branch railway with the Wilts, Somerset and Weymouth railway of the Company, and to empower the Company to stop up and extinguish all rights of way over the said lands, and in lieu thereof to make and maintain a new footpath crossing the Company’s said railways at or near the said junction at the south-eastern boundary of the Company’s property and terminating by a junction with the footpath intersecting the western and eastern boundaries of the field or enclosure No. 444 on the 25 inch Ordnance Map (2<sup>nd</sup> Edition 1901) of the said parish at a point 4 chains or thereabouts, east of the western boundary of the said field or enclosure.”*

Extract from the Ordnance Map 2<sup>nd</sup> Edition 1901 showing enclosure No. 444:



11.21 It is known that the Engine Shed was built (drawings related to the construction have been obtained from the National Railways Museum at York and will be discussed later in this report) by 1915.

**11.22 Westbury Avoiding Line**

Further additions to the railway network in this area occurred in the 1929/1930 with the construction of the Westbury Avoiding Line. Records relating to this have been viewed (WSHC Cat no. A1 371/173 MS 1929 and F1/500/2MS 1930).

11.23 **The Great Western Railway Act 1930** is entitled “An Act for conferring further powers upon the Great Western Railway Company in respect of their own undertaking and upon that company and the London Midland and Scottish Railway Company in respect of an undertaking in which they are jointly interested and for other purposes.” The Act addresses the construction of new railway lines, 1 deviation and 2 subways. The new railway in Westbury is referred to as Railway No. 2:

*“A railway (no.2) 2 miles 2 furlongs and 4 chains in length wholly in the county of Wilts commencing in the parish of Dilton Marsh in the rural district of Westbury and Whorwellsdown by a junction with the Company’s Wilts Somerset and Weymouth Railway and terminating in the parish and urban district of Westbury by a junction with the Company’s Stert and Westbury Railway:”*

11.24 A number of alterations to the rights of way network are provided for on page 25, s.20(4) – for the protection of Westbury Urban District Council:

*“(4) The council consent so far as their rights and interests are affected to the following provisions:*

*(a) Upon the Company providing a right of way along the southern boundary of the said Railway No. 2 between the points marked A and B on the plan signed by Raymond Carpmael on behalf of the Company and William Reginald Campbell Laverton on behalf of the Council (in this section referred to as “the signed plan”) all rights of way over so much of the two footpaths shown coloured brown on the signed plan as lies between the points A and C and D and E respectively marked thereon shall be extinguished;*

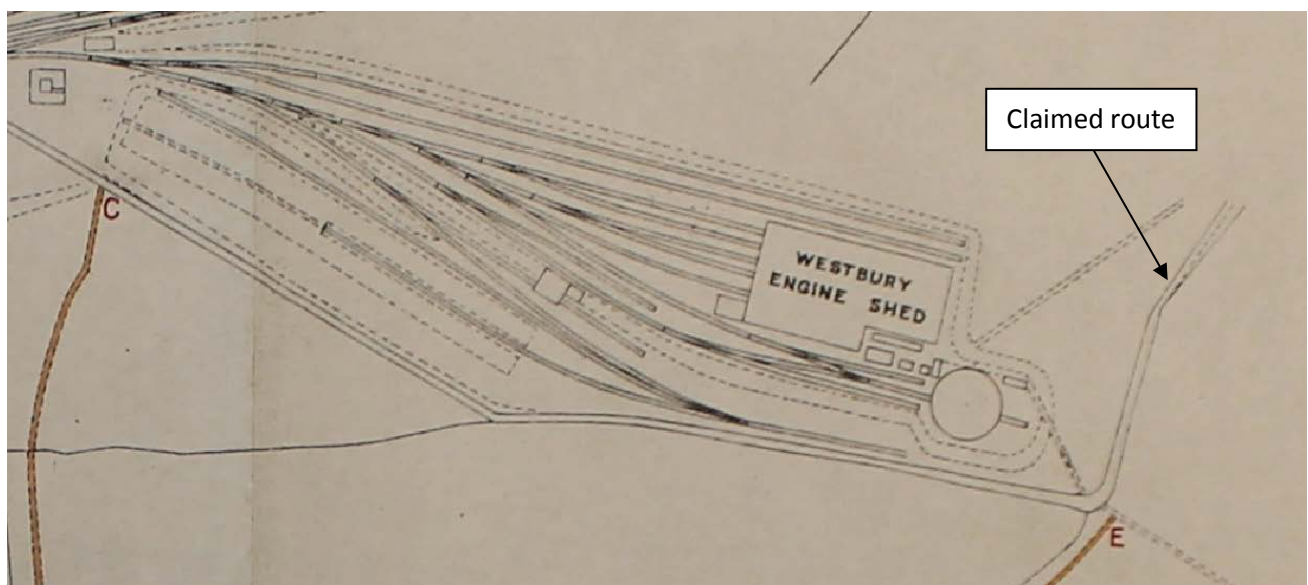
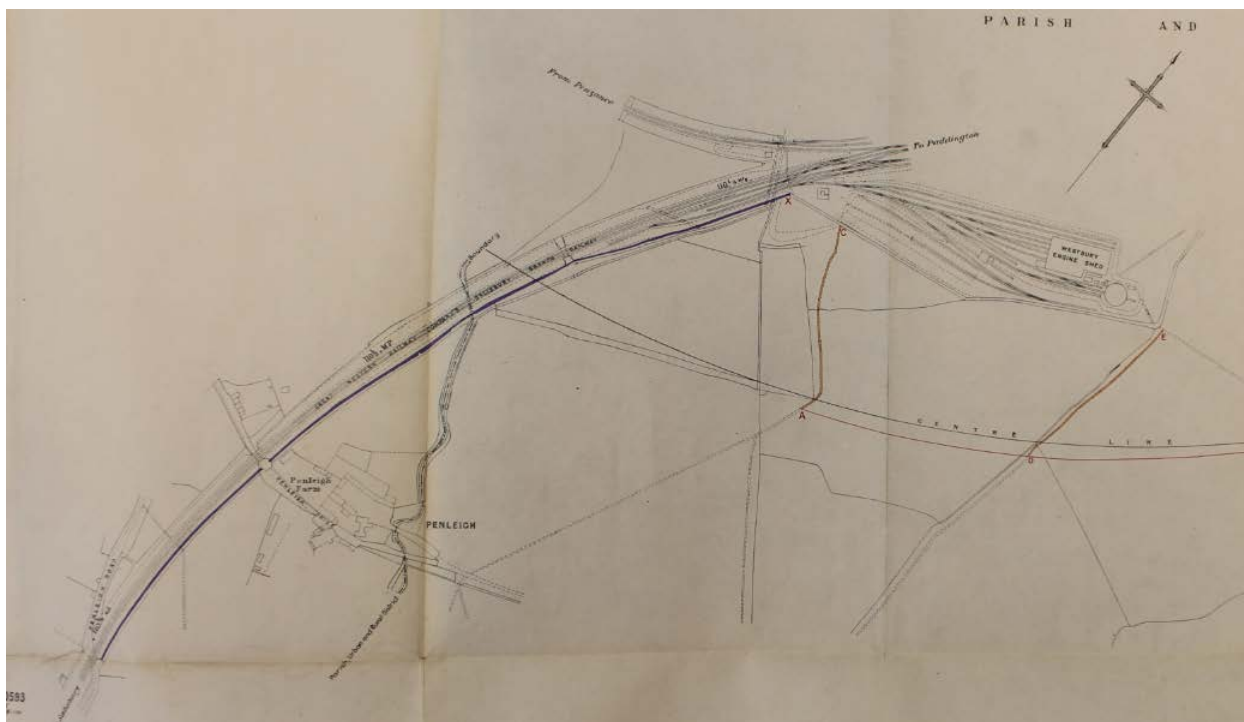
*(b) Upon the Company providing a right of way along the southern boundary of the said Railway No. 2 between the points F and G marked on the signed plan all rights coloured red on the signed plan as lies between the points G and H marked thereon shall be extinguished;*

*(c) Upon the commencement by the Company of the construction of the said Railway No. 2 all rights of way over the footpath shown coloured blue on the signed plan shall be extinguished;*

*(d) The Company shall provide a subway under the said Railway No. 2 in the enclosure numbered on the said deposited plans 52 in the said parish and urban district at or near the point J on the signed plan such subway to be constructed with a span of not less than six feet and with a headway of not less than eight feet. Upon the completion of the said subway the Company may divert the footpath shown coloured green on the signed plan to such extent as may be reasonably necessary so that the same shall pass through the said subway and thereupon all rights of way over so much of the existing footpath as lies between the respective points of commencement and termination of such diversion shall be extinguished;*

(e) From and after the construction of the said Railway No. 2 the public shall have the right to use the footpath on the Company's property passing along the eastern side of the Company's Salisbury Branch Railway and coloured purple on the signed plan between Penleigh Road and the point X marked on the said plan and the said Railway No. 2 by means of a level crossing or footbridge as they may determine:

11.25 The plan accompanying the Act (WSHC cat. Ref no. 2525/bx10935) clearly shows the changes detailed above. These are reflected in the working copy of the definitive map today. The claimed route is shown as a continuation of the footpath marked in purple to point X (the Penleigh Path – Westbury 60) and footpath Westbury 15 towards the station but is unaffected by the 1930 Act being outside the lines of deviation or area of interest.

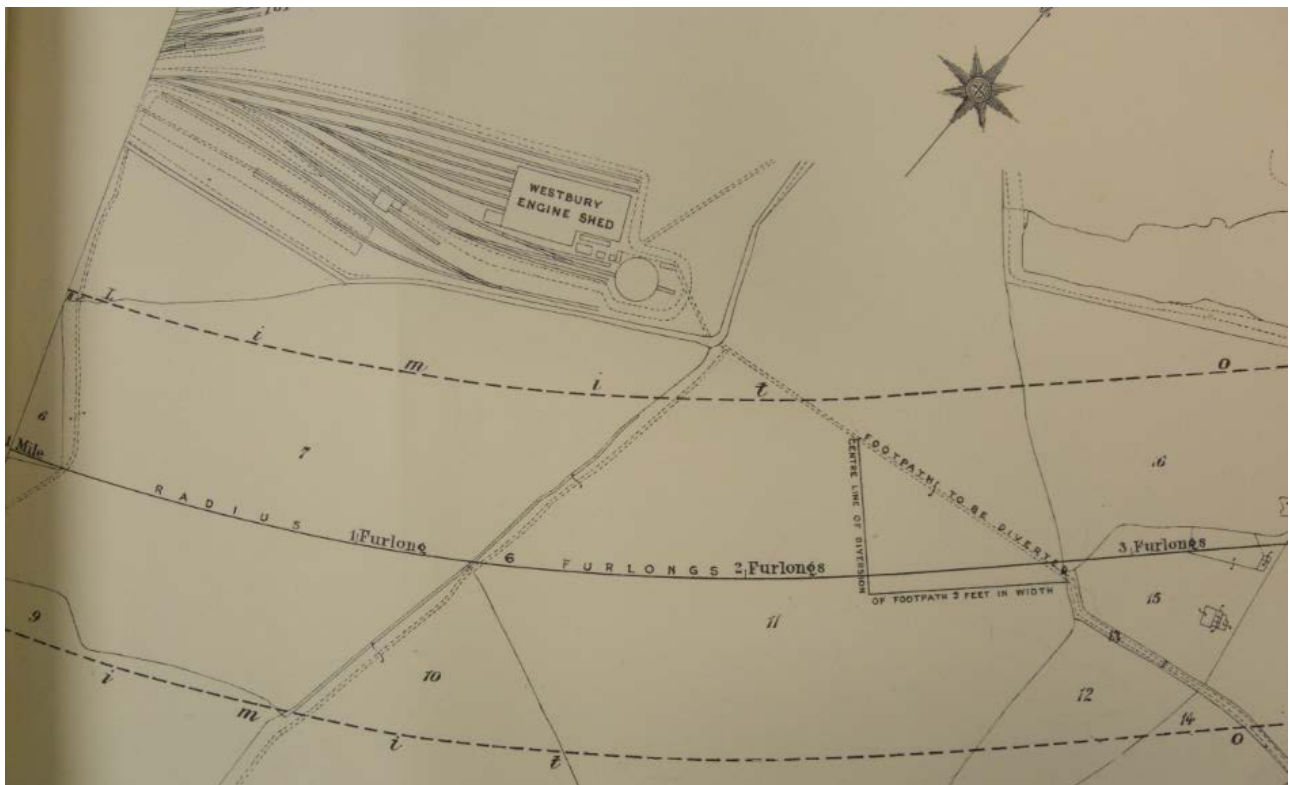


11.26 Deposited Plans for Railway no. 2 WSHC cat ref no. A1/371/173

The plans for the new railway authorised by the above 1930 Act were deposited with the Clerk of the Peace on the 29<sup>th</sup> November 1929 for Parliament to consider in its sessions of 1930. An overview plan clearly shows the line of the ‘avoidance line’ in red:



11.27 The detailed plan shows the claimed route and Engine Shed outside the Limit of Deviation. However, the claimed route is clearly represented as a part of the path network:





## 11.28 Category B Evidence

This category includes documents, maps plans drawn up as a result of legislation, consulted upon (i.e. in the public domain), but whose primary purpose was not to record public rights. i.e. the records of the Tithe Commission or the Inland Revenue.

## 11.29 Westbury Tithe Survey 1840 WSHC Cat ref no. TAWestbury

The purpose of the Tithe Survey was to survey lands that were liable to tithes and to commute these tithes (where a percentage of the products of the land were taken by the Church) to money payments or rent charges. This was enabled by the Tithe Commutation Act of 1836.

11.30 The Westbury Tithe Survey plan and apportionment document have been stamped as being received by the Tithe Commissioners on October 15<sup>th</sup> 1842. The survey pre-dates the railway. The purpose of the survey was to identify and catalogue land, specifically with a view to identifying land that was in agricultural production (since land that wasn't – i.e. houses or roads – was exempt from tithes). The Westbury tithe map records roads coloured sienna and un-numbered (so free from tithe) and it is possible to identify the road to Brook Mill and Sopps Lane (now Oldfield Road). However, no footpaths or bridleways are shown.

11.31 In the book entitled The Tithe Maps of England and Wales, Roger Kain and Richard Oliver record that the Westbury Tithe map shows a range of features (including foot and bridleways) that are not apparent on the copy held at the Wiltshire and Swindon History Centre. The maps inspected and described by Mssrs Kain and Oliver are the record copy plans held at The National Archive at Kew and may show greater refinement (though they would be expected to be copies of the essential information). In any event, the award of the Brook Foot Way at inclosure in 1808 and its recognition in the deposited plans associated with the railway provide compelling evidence for the existence of this footpath notwithstanding its apparent omission from the tithe map. A footpath leading across agricultural land is unlikely to have had an effect on the productivity of the land and omissions may well have been deliberate as their presence was irrelevant to the purposes of the Act.



**11.32 Inland Revenue Finance Act 1909/1910 records** WSHC Cat ref. No. L8.10.44

As a result of the Finance Act 1909/1910 the Inland Revenue conducted a valuation survey of all property for the purposes of imposing a tax on any increased value at the time of its subsequent sale. The Act proved unpopular and was substantively altered by repeal in 1920, however, the detailed survey of property remains as a record made at the time. Surveyors used Ordnance Survey maps as base maps (usually 1:2500 County Series maps revised in around 1899) and by use of colour detailed who owned what parcels of land or hereditaments.

11.33 The owners of land were able to claim exemptions from the tax for public rights of way (amongst other things) and public roads in the control of the highway authority were also exempt. Accordingly these records can be useful in rights of way cases.

11.34 All of the land affected by this application is shown coloured pink as part of hereditament 281. 281 includes the railway line and the station and comprises that land that forms the public undertaking that is the railway. No detail or annotation regarding the claimed route is shown.

**11.35 Category C Evidence**

These records relate to the reputation of a route as a public right of way and include local government records (highway board, County Council, Parish Council).

**11.36 Westbury Urban District Council Minutes 1901 – 1909** WSHC Cat. No. G17/283/2

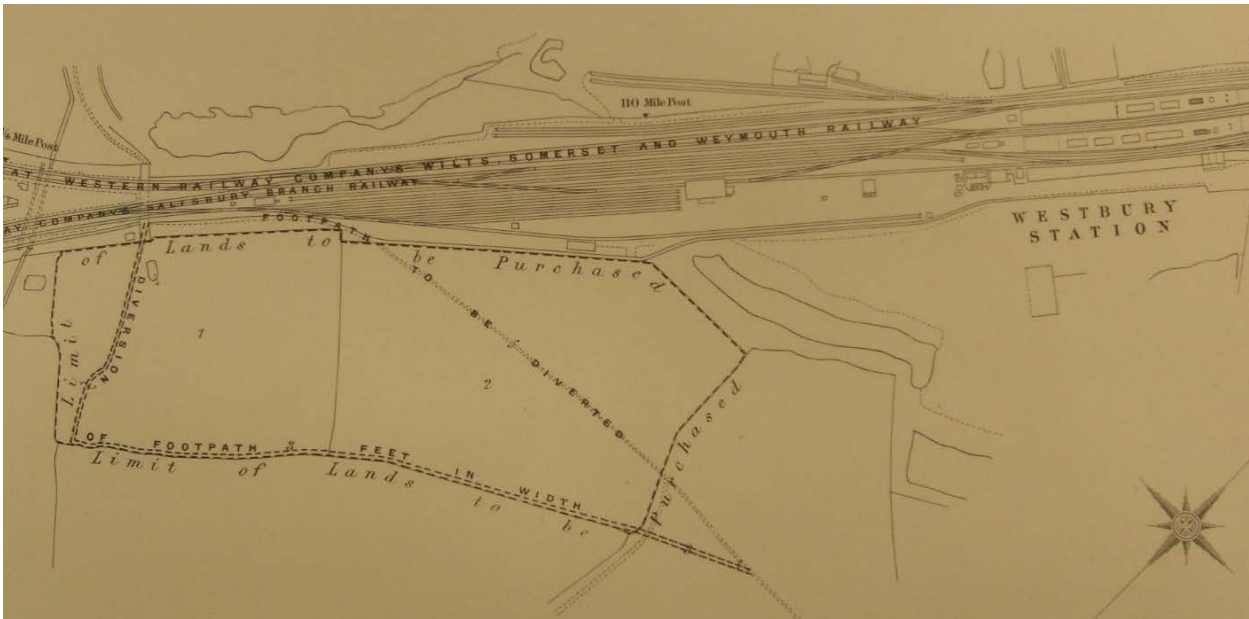
**07 December 1904 – Surveyors' report**

*“GWR Plans – I have examined the parliamentary plans deposited at the Clerk’s Office by the G.W. Railway Company, The boundary line shown as limit of land to be acquired by the Company encloses two public footpaths. One of these paths from Brook House to Penleigh is not shown to be interfered with. The other footpath from Station Road to Dilton Marsh is shown as proposed to be diverted. The diversion at one end is at the point where the order path referred to crosses the railway and extends towards the Station Road a distance of 1400 feet, in an easterly direction. To replace this path one is provided at the south boundary of the land acquired, 3 feet wide and inside the G.W. R. limit from the point at 1400 feet from the Railway a distance of 1400 feet about to intersect the path first referred to, at a point 500 feet from the crossing where diversion commences.*

*The alteration thus makes a difference of 500 feet in the length of the path from Station Road to Dilton Marsh and Bremeridge. This extra distance by which the other path from Penleigh House to Station Road is shortened.*

*I can find no reason why the Council should oppose the action of the G.W.R. company.”*

11.37 A copy of the Deposited Plan referred to can be seen below:



11.38 The claimed route is not shown. The underlying plan shows a path leading on the south side of the tracks which would, theoretically, permit access through from Dilton Marsh to the station (this path is also shown on early – pre 1922 – OS County Series maps) but no mention is made of this and it is unaffected by the proposed land purchase. It however clear that the path diverted to the west and south replaces the historic Brook Mill footpath across the site.

11.39 An earlier reference to Station Road Footpath was found (dated 02.10.1901) but this related to a path “on the Station Road” and referred to a grant from the County Council to lay asphalt on the Station Road. It is considered more likely than not that this refers to the existing highway that forms Station Road and is maintainable at public expense.

#### 11.40 **Category D Evidence**

This category includes other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans or conveyances.

#### 11.41 **Great Western Railway Records**

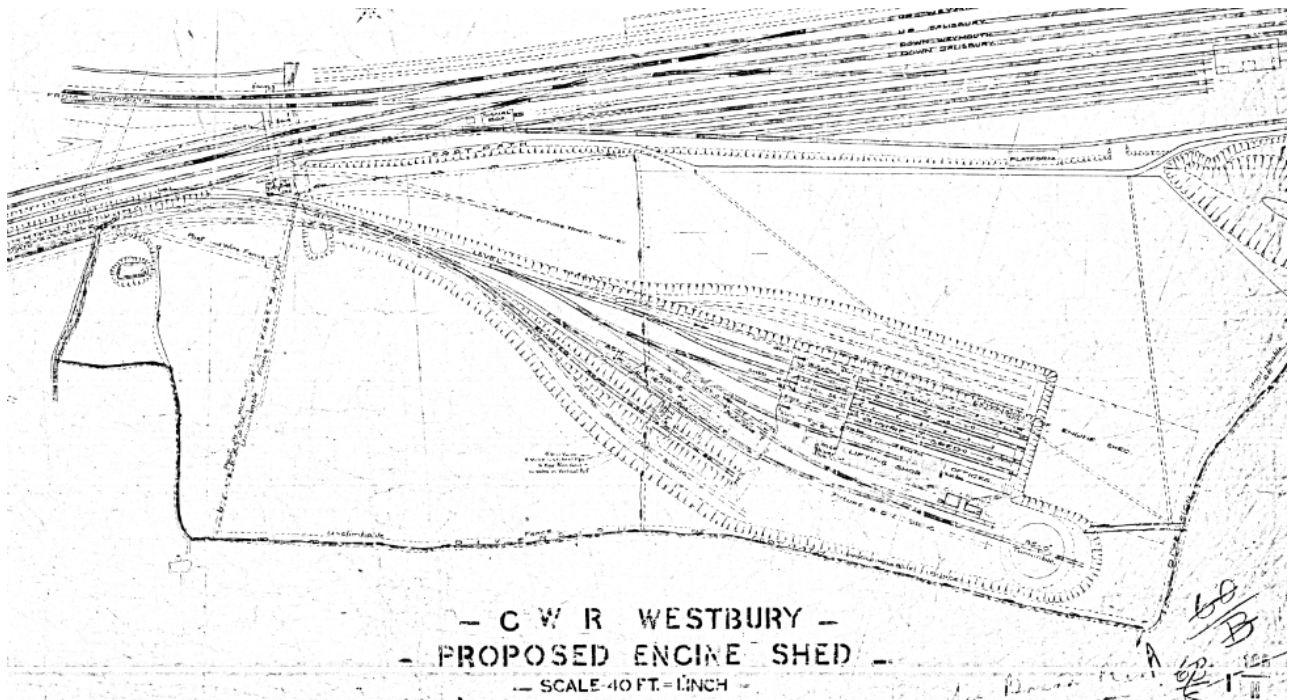
Documents that have been archived by Great Western Railway have been sourced from the Wiltshire and Swindon History Centre (General cat. No 2515) and the National Railway Museum at York.

#### 11.42 **G W R Westbury Proposed Engine Shed Plan National Railway Museum 24079**

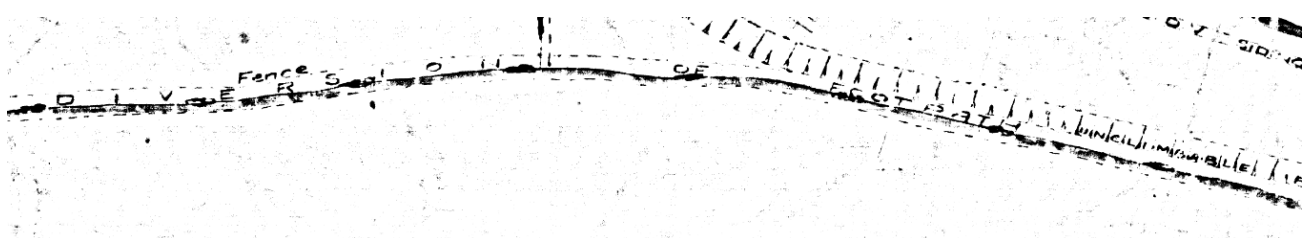
The plan is labelled “Drawing No. 1” and is drawn at the scale of 40 feet to one inch. It shows the area developed for the Engine Shed and includes considerable detail relating to the development including detail relating to an “Unclimbable Fence”

around the development separating it from the footpath labelled “Diversion of Footpath” and bounded for some of its length on the side furthest from the Engine Shed by a “Post and Wire” fence.

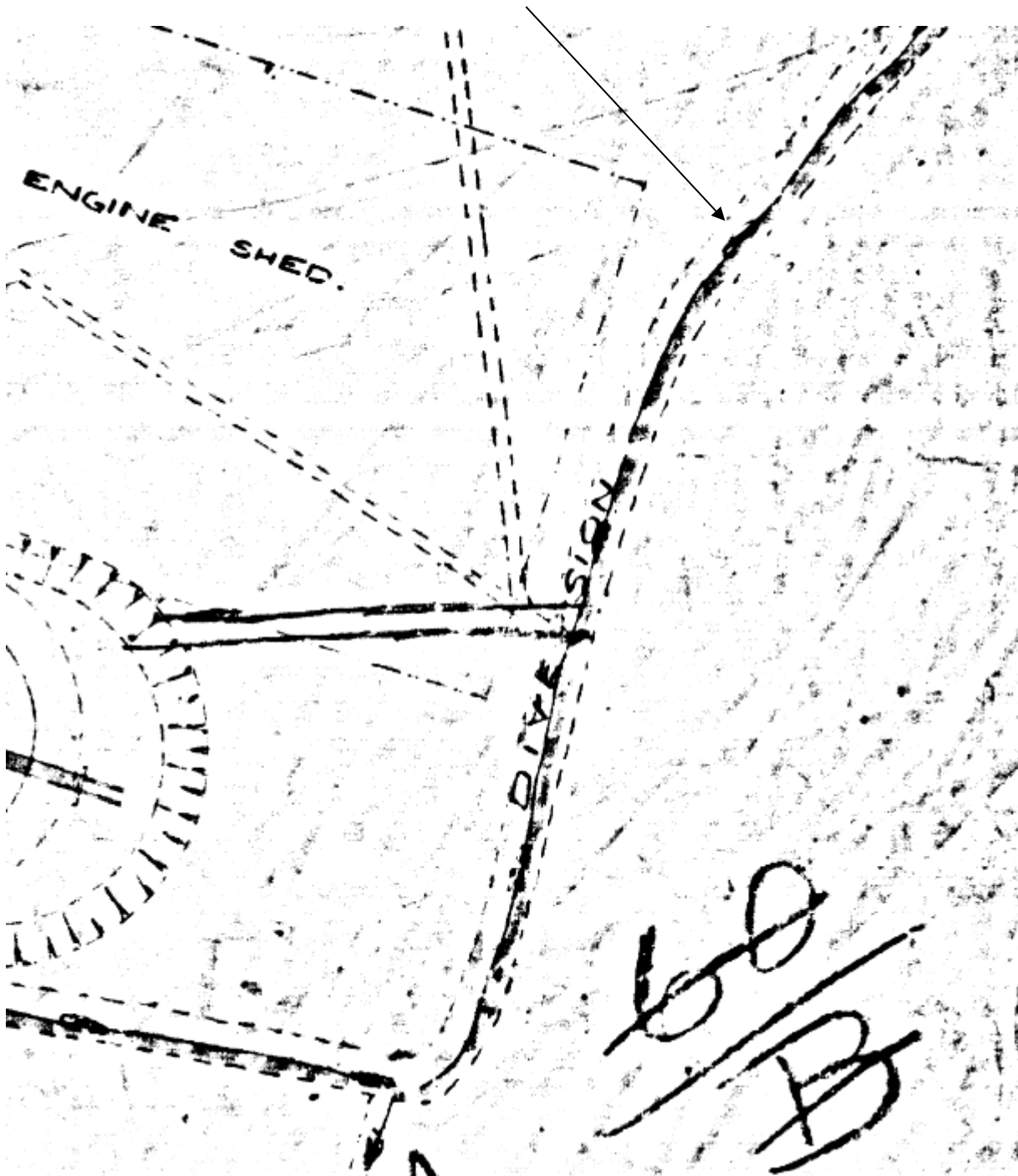
11.43 This plan shows the claimed footpath as part of the proposed diversions and the claimed route is labelled “Diversion of..” the words ‘footpath’ presumably appearing on the next sheet which has not been accessed.



The southern section of diverted footpath is marked:



11.44 The claimed route is shown as below:



11.44 The plan, insofar as the path network is concerned, reflects the network as built and not as represented on the 1904 Deposited Plan. It accords well with R J Cogswell's account of the development taking place.

11.45 **G. W. R. 2 Chain Survey 1933** WSHC Cat. No. 2515 250/452

This record is a highly detailed colour survey of the station and surrounds. It is a leather bound book containing a large scale plan and is entitled:

*G.W.R. – Westbury Station & Avoiding Line – 2 – Chain Survey 1933. Vol. 216 (Part 1.)*

It contains a memo:

*“GREAT WESTERN RAILWAY – MEMO to be affixed to each of the new Surveys.*

*This Plan is kept by the Heads of Departments for their own use only. It is not to be produced nor is any part of it to be copied for the information of Owners of adjoining property or others.*

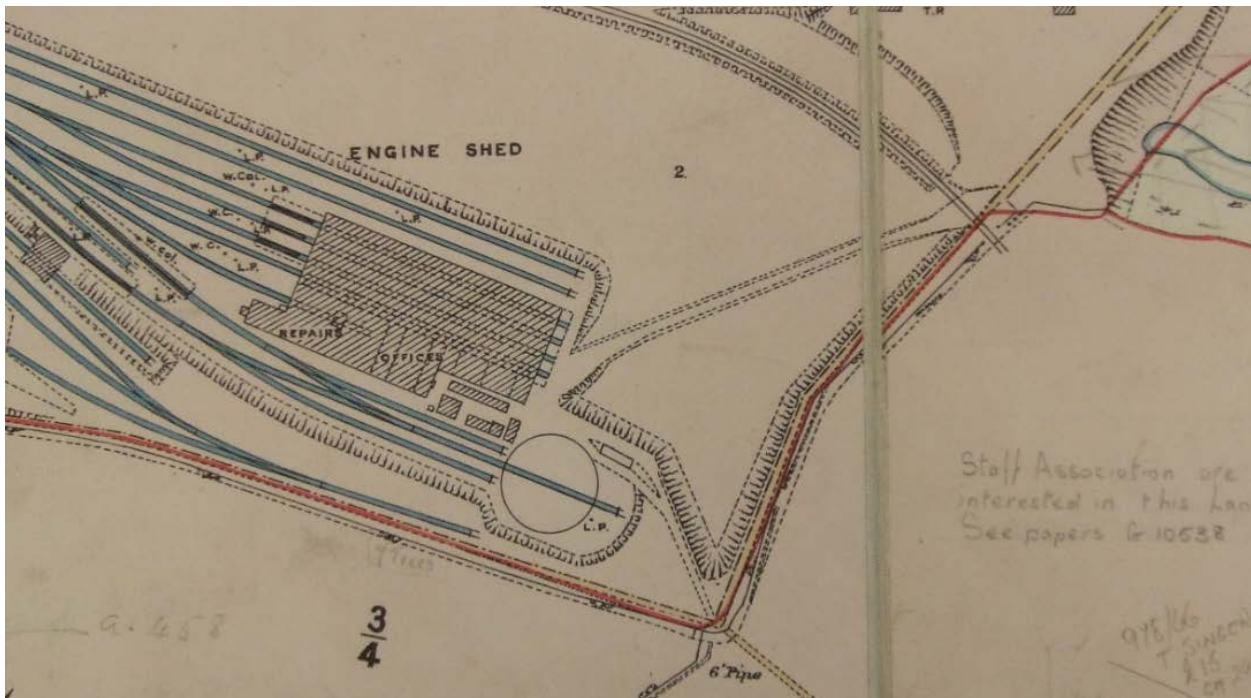
*Care has been taken to make the Plan as accurate as possible, but there is reason to doubt whether it can in all cases be relied upon.*

*If cases should arise as to the rights or title of the Company, the Plans to the Title Deeds must alone be relied upon to supply the necessary information.*

*F.R.E> Davis, Secretary February 1934.”*

It also contains a note: *“Rights of Way Con<sup>oe</sup> dated 28.7.1932...”*

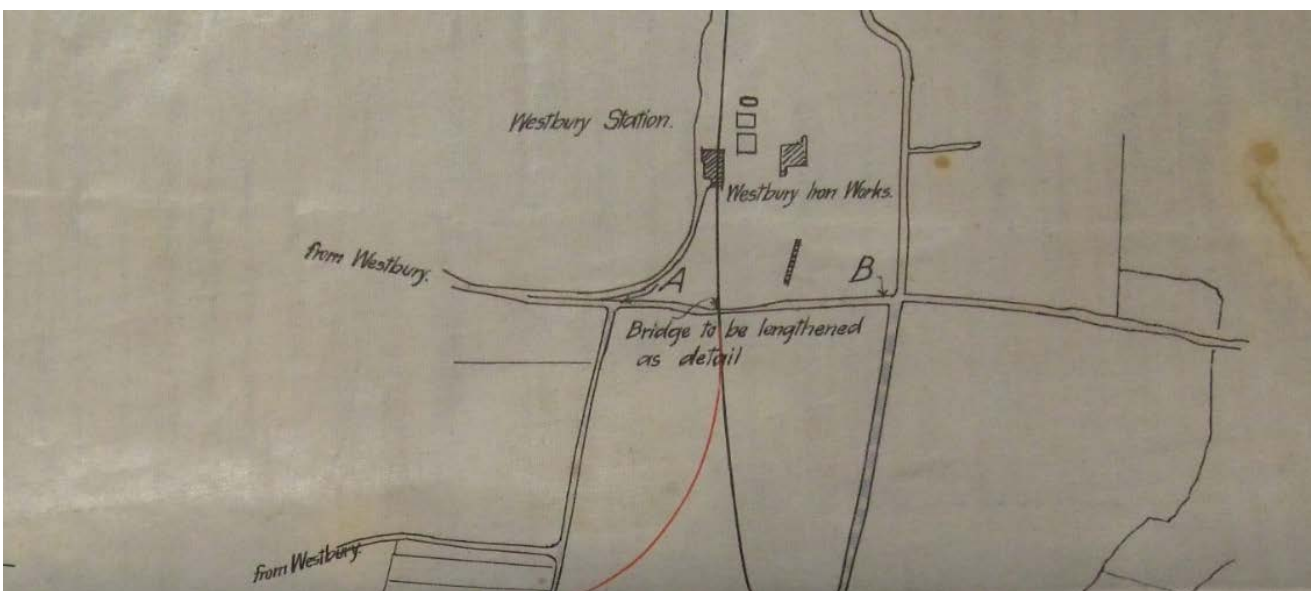
11.46 The claimed route is shown coloured sienna in the same manner as the footpath network.





**11.47 Plans for Proposed Reconstruction and Lengthening of Bridge over Railway at Westbury Station** WSHC Cat. No. 1219/18

These plans are not dated however the overview plan shows the area around Station Approach. The claimed route (in respect of that section leading from Station Approach to station Road for pedestrian use) is not shown. It is possible that the bridge reconstruction works coincided with the provision of this additional access but this is not known. It is noted that the plans show Westbury Iron Works so it is assumed that they date from the 1930s or earlier.



**11.48 W. S. & W Westbury to Salisbury Plan c.1844** WSHC Cat. No 1780/26

This plan shows the lands to be purchased for the original railway. It is drawn at the scale of 4 chains to one inch by R Tarr and shows the land around the station "Station Ground" and surrounding fields. Roads are shown coloured sienna and the

footpath from Brook Mill leading over the proposed line (diverted when the Engine Shed was built) is shown but not labelled.

#### 11.49 **Category E Evidence**

This category of evidence includes commercial maps and plans including those of the Ordnance Survey.

#### **Ordnance Survey 1:2500 County Series mapping 1884 - 1939**

The 1:2500 scale was introduced in 1853-4 and by 1896 it covered the whole of what were considered the cultivated parts of Britain. Sheets 44.7 and 44.8 cover the applicant route. J B Harley, historian of the Ordnance Survey, records that “the maps delineate the landscape with great detail and accuracy. In fact practically all the significant man made features to be found on the ground are depicted. Many phenomena make their debut on the printed map and as a topographical record the series transcends all previous maps. Every road...., field...., stream and building are shown; non-agricultural land is distinguished...quarries, sand, gravel and clay pits are depicted separately; all administrative boundaries..are shown;....hundreds of minor place names...appear on the map for the first time. Where appropriate, all topographical features are shown to scale. The series is thus a standard topographical authority”.

- 11.50 Richard Oliver in his book “Ordnance Survey Maps a complete guide for historians” recognises that surveying errors (and paper distortion during printing) cannot be ruled out, particularly where detail is sparse, but in practice such errors are likely to be very hard to demonstrate, because of a general paucity of suitable sources rivalling or bettering the OS in planimetric accuracy and completeness of depiction.”
- 11.51 Ordnance Survey maps from 1888, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.
- 11.52 However, surveyors were instructed to represent Footpaths with the letters F.P. and in his book *Ordnance Survey Maps a concise guide for historians* Richard Oliver states:

*“From 1883 onwards footpaths were shown by F.P., ‘the object of...F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic’. (SC, 16.2:83).*

*In 1893 it was specified that “all footpaths over which there is a well known and undisputed public right of way’ were to be shown and also ‘private footpaths through fields (but not in gardens)...if they are of a permanent character.....Mere convenience footpaths for the use of a household, cottage or farm or for the temporary use of workmen should not be shown..”*



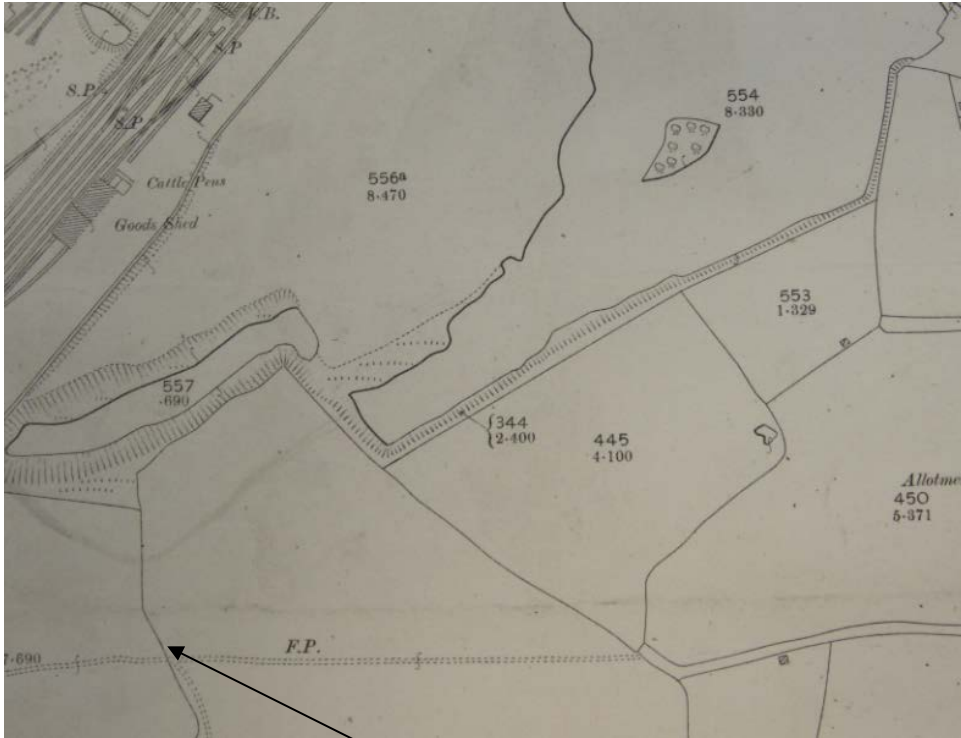
11.53 OS County Series 1:2500 Sheets 44.7 and 44.8 1884 survey



At the time of the survey a path extending north from the Brook Mill to Sopps Lane (awarded footpath) footpath is shown leading to the Station. The Southern intersection with the Brook Mill path is coincident with the claimed footpath though its line leads over the footprint of the land enclosed for the Engine Shed development some 20 years later.

11.54 OS County Series 1:2500 Sheet 44.8 Second Edition (revised 1899)

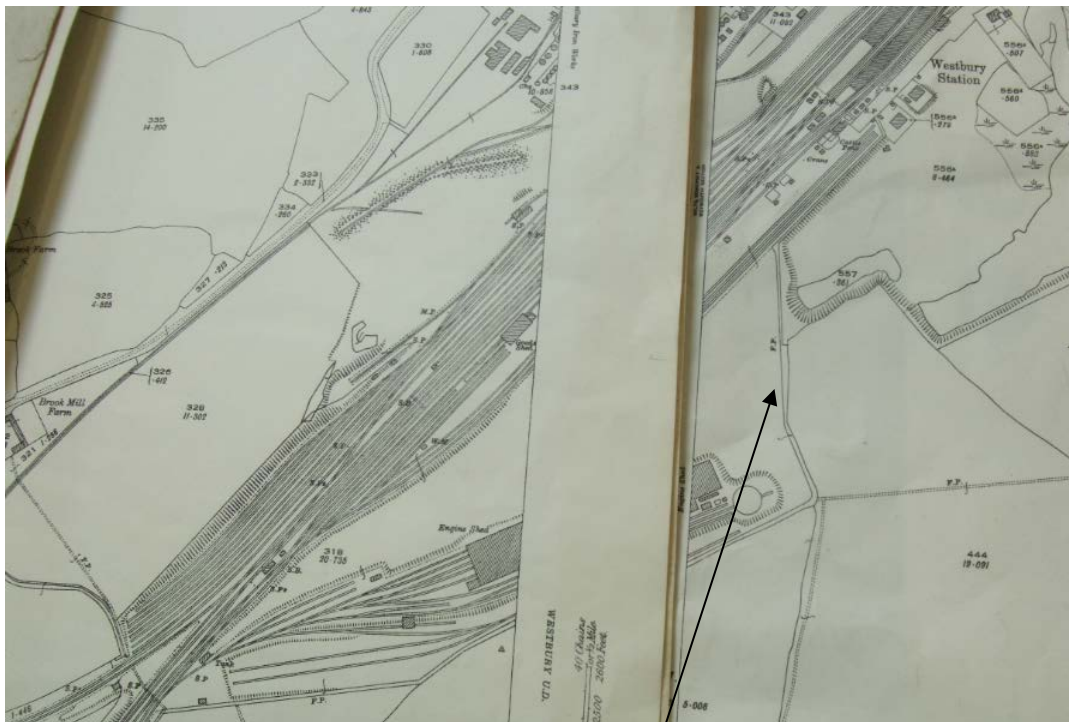
The map had been revised and no longer shows the footpath leading north through the quarry and to the Station. The shape of the quarry has also altered, however, the line of the Brook Mill footpath remains unaltered and again is recorded as "F.P."



Line of path revised not to be shown.

**11.55 OS County Series 1:2500 Sheets 44.7 and 44.8 Edition of 1924**

This map was revised in 1922. The claimed route is shown marked F.P. as well as Brook Mill footpath. The Brook Mill footpath is shown largely as diverted (there is a difference in the line at the western end) in the 1904 deposited plans.

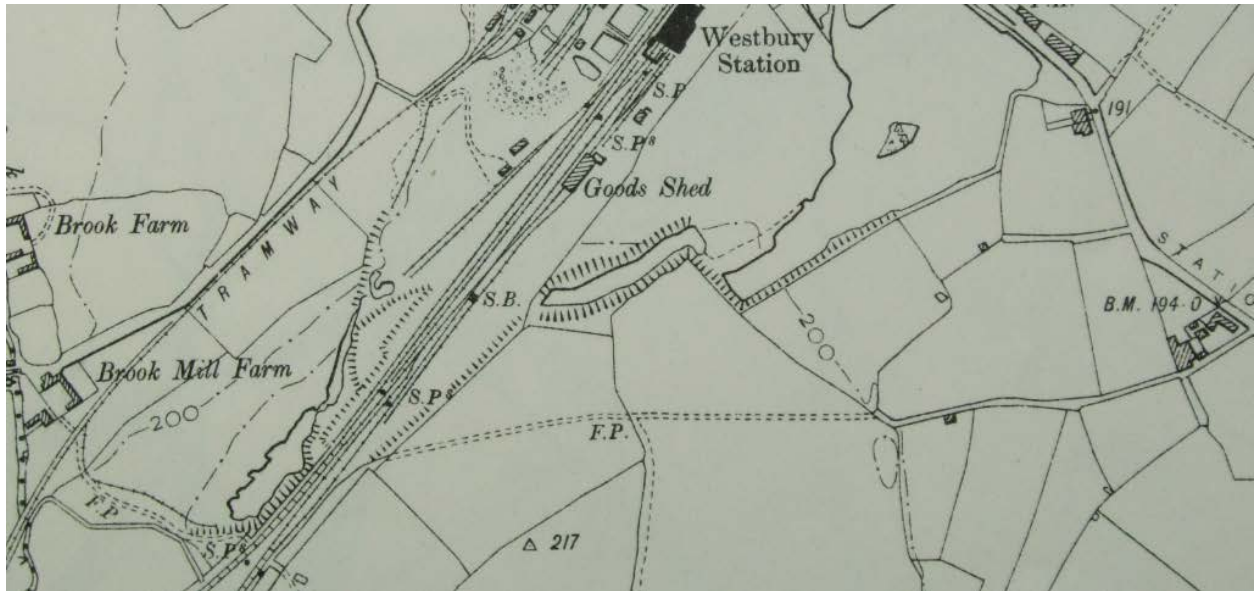


Claimed route

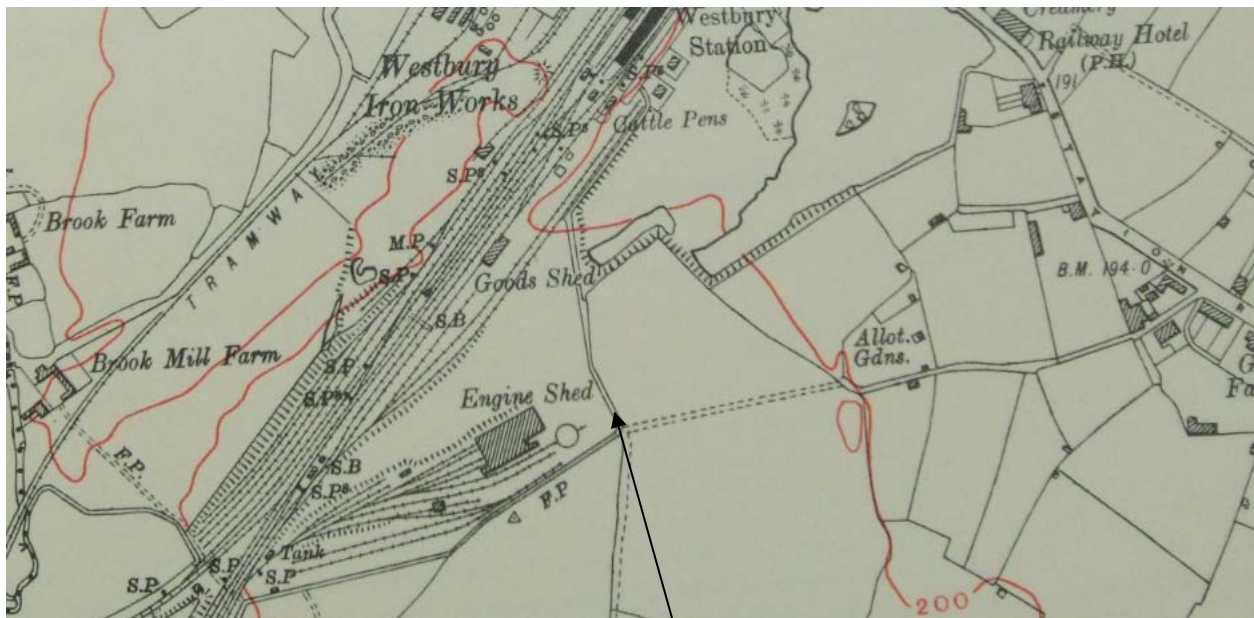
### 11.56 OS County Series 1:10560 Sheet 44

Although derived from the 1:2500 survey these plans are useful as they show the area on one map sheet making the effect of the Engine Shed on the area very clear:

#### 1901 Edition



#### 1926 Edition

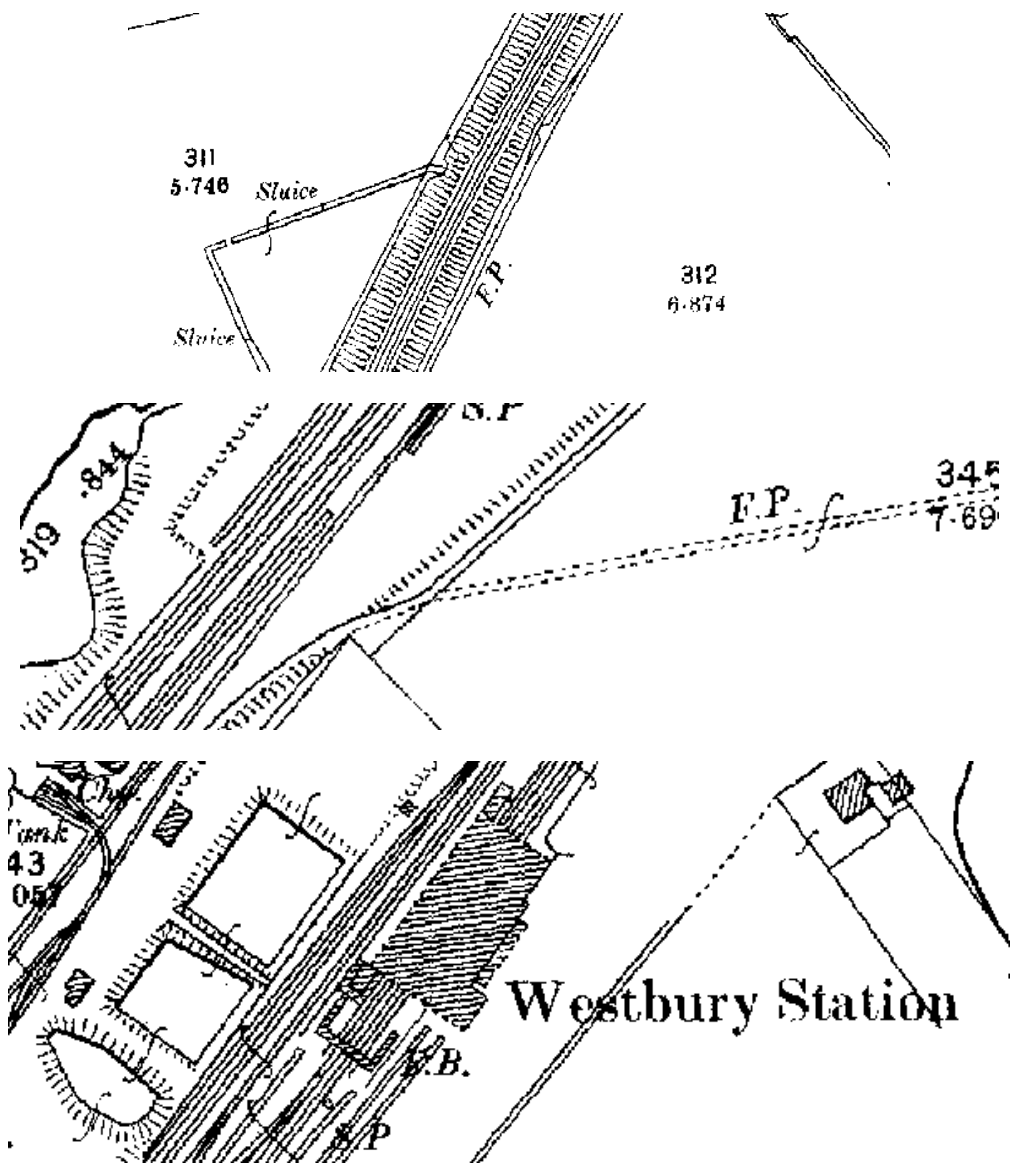


Claimed path

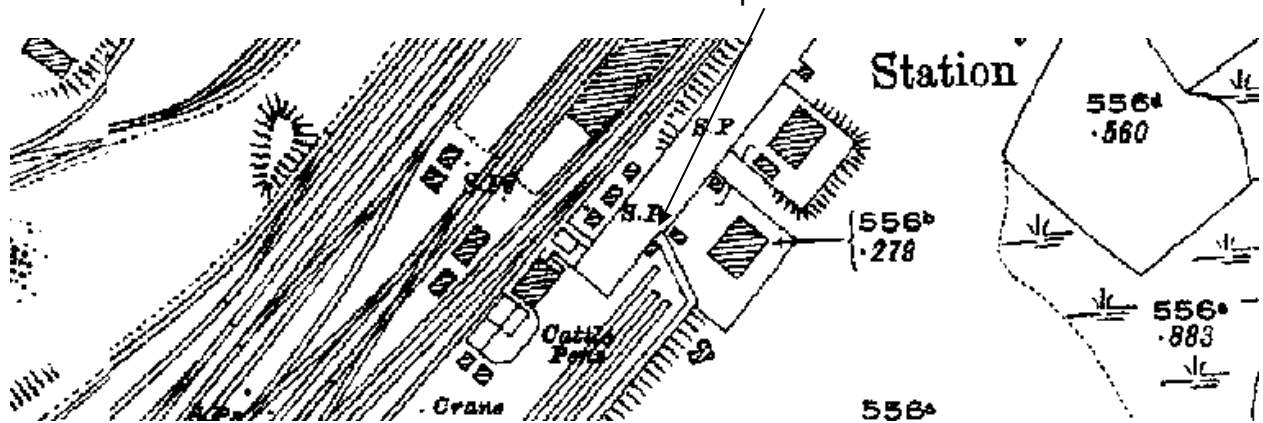
11.57 It is clear from OS maps that pre-date the Engine Shed that a footpath (marked 'F.P.')

It is clear from OS maps that pre-date the Engine Shed that a footpath (marked 'F.P.')

would have been possible to walk from Dilton Marsh to Penleigh via Penleigh Lane and then north on a fenced path to Westbury Station. NB Dilton Halt was not open until 1937.



It is noted however that the label "F.P." does not extend beyond the Brook Mill footpath even though, according to the mapping, the route onwards was possible. It is noted that this route was not longer possible after the Engine Shed was built, the access constructed instead was the claimed path:



11.58 Ordnance Survey mapping therefore supports other evidence viewed. i.e. that the claimed route was only created when the Engine Shed was built (believed to have been finished in 1915). Although it appears likely that a fenced path existed to the south side of the tracks before this time it is known that no footpath existed in this direction before the railway was built and further, Ordnance Survey mapping cannot provide direct evidence of public use.

#### 11.59 **Category F Evidence – User evidence**

The application adduced 13 User Evidence Forms demonstrating use from 1936 to 2017. Of these 8 people had used the full route from Station Road past the station and onto Westbury path no. 15 south of the Engine Shed (i.e. use as a through route) and 5 people had used only that section between Westbury path no. 15 and the station. All believed their use to have been 'as of right' (that is without force, secrecy or permission) and none had been stopped or challenged until the bund and fence were erected across the path. A summary of the user evidence is appended at **APPENDIX B**.

11.60 Comments included:

1. 1989 – 2016 *"...it has since been used on a regular basis by those living in Dilton Marsh and Westbury Leigh to get to Westbury Station to catch the train as well as the railway workers using it."*
2. 1936 – 1990s *"First used as a child "to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937."*
3. 1956 – 2016 *"I have cousins older than myself who have used the path."*
4. 1975 – 2016 *"Information passed on by local residents, some of them are in their eighties, confirm that the route has been used as long ago as the 1950s and 1960s in continuous fashion."*
5. 2002 – 2016 *"The nearest alternative for pedestrians is Station road which is a much longer route from the Oldfield Park Estate and wider Westbury."*
6. 1997 – 2017 *"Access along Station Road is possible though hazardous on foot under the railway bridge."*
7. 1971 – 2016 *"It is useful for residents of Dilton Marsh and Westbury Leigh to be able to walk to Westbury Station on this route in order to catch a train. This is necessary because many trains do not stop at Dilton Marsh halt."*
8. 1990 – 2016 *"As well as providing the most direct pedestrian route...this route (in conjunction) with the Cinder Track is of considerable historic importance with its strong links to Westbury's railway and industrial heritage."*

9. 1981 – 2001 *“In BR days and Railtrack and Network Rail the civil engineers used to maintain the footpath (cinder track).”*
10. 1950s to 2000s *“I have always believed the path was railway property.”*
11. 1970 – 2016 *“I believe the route provides a useful shortcut...it is a more pleasant, varied and safer walking route than by road.”*
12. 1972 – 2017 *“I understand that historically the “cinder track” was constructed to allow railway and other workers to walk to work. It came into use by the general public.”*
13. 1987 – 1997 *“My impression is that the footpath ran from Penleigh through to Westbury Station (why else would it exist) and the roadway...was constructed over the line of the footpath.”*

## **12 Consideration of the Evidence – Legal Empowerment**

12.1 Historical evidence may be considered by virtue of s.32 of the Highways Act 1980:

### **Highways Act 1980 Section 32 Evidence of dedication of way as highway**

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

12.2 Evidence of use may be considered under common law (i.e. where the landowner and has made an act of dedication or behaved in such a manner as to imply such an act and the public have accepted it by use) or by statute law (Section 31 of the Highways Act 1981).

### **Highways Act 1980 Section 31 Dedication of way as highway presumed after public use of 20 years**

*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*).

### 12.3 The land over which the claimed route passes is affected by the **British Transport Commission Act 1949**.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*



### 13 Consideration of the Evidence

The evidence has been tabulated according to evidential weight as follows:

Category of Evidence	Document	What it shows	Evidence of public rights over claimed route
A	Westbury Inclosure Award 1808	Public footway awarded (Brook Footway), now footpath Westbury 15	None
A	Railway Plans A1/371/41 MS 1845	Brook Footway recorded	None
A	Railway Plans A1/371/36 and 68 1844	Crossing at the level for Brook Footway	None
A	Railway Plans A1/371/112 1894	Station Approach shown.	None
A	Railway Plans A1/371/166 1904 Relates to new engine shed	Diversion of Brook Footway shown. Claimed route not shown.	None
A	Railway Plans A1 371/173 MS 1929 and F1/500/2MS Westbury avoiding line. The Great Western Railway Act 1930	The Act allows the diversion of footpaths to the south of the Engine Shed. The claimed route is shown joining the public rights of way network but unaffected by the Act.	Evidence of existence of southern part of path joining the public rights of way network.
B	Westbury Tithe Survey 1840	No footways or paths shown in the area of interest (Brook Footway omitted)	None
B	Inland Revenue Finance Act 1909/1910	Land shown as part of the railway hereditament.	None
C	Westbury Urban District Council Minutes 1904 G17/283/2	No objection made to the plans to divert as a result of the 1904 deposited plans to build the engine shed. Diversion plan of Brook Footway as the 1904 Act.	None
D	GWR records National Railway Museum Drawing no 1 – engine shed	Plan of new engine shed shows claimed route with words “Diversion of...” alongside (text ends at page end). Other routes say “Diversion of footpath”.	Claimed route is shown as a diversion. Path joins footpath network.
D	GWR records 2 Chain survey 1933 WSHC 2515 250/452	Southern part of claimed route shown coloured sienna. Joining public footpaths also coloured sienna.	Coloured in the same way as public footpath network.

Category of Evidence	Document	What it shows	Evidence of public rights over claimed route
E	OS 1:2500 1884	Footpaths shown (“F.P”) no engine shed. Path shown leading to the station from the south.	None (evidence of a path leading to the station from the south)
E	OS 1:2500 1924	Engine shed shown. Claimed route shown and marked F.P.	Claimed route shown and marked “F.P”
E	OS 1:10560 1926	Engine shed shown. Claimed route shown and marked F.P.	Claimed route shown and marked “F.P”
F	User evidence	Evidence of public use and repute from 1936 to 1990s.	One user pre 1949 Two users from the 1950s recall knowing of earlier use
F	R J Cogswell book	Recalls Engine Shed being built. Claimed route described as “an existing GWR owned footpath from the station to Dilton Marsh and long known as Penleigh Footpath was diverted across the, by then, filled in end of the Station Minehole to the kissing gate opposite to the pedestrian’s entrance to the new depot.	Penleigh Footpath is likely to be path shown on pre-Engine Shed OS on GWR land. Diversion refers to claimed route (as is the only route linking Dilton Marsh with the station).

Consideration has been given to the following:

- i) Is the path a historic public right of way (pre-dating the railway) that has not been recorded in the definitive map?
- ii) If not, when was the path physically created?
- iii) Were public rights acquired over it prior to 1949?
- iv) Have, on the balance of probability, public rights been acquired over it post 1949?

### 13.1 i) Is the path a historic public right of way?

The claimed path was not awarded to the public as a footpath at the time of enclosure though the adjoining path, Brook Footway (now partially Westbury 15), was. The claimed path has not been recorded on any maps, plans or documents until the Engine Shed was proposed (between 1904 and 1915).

### 13.2 The claimed path did not pre-date the railway (1845) and did not pre-date the Engine Shed (1915).

**13.3 ii) When was the path physically created?**

The claimed path was created when the Engine Shed was built. This is evidenced by the eye witness account of R J Cogswell in his book 'Westbury Ironworks', by a G.W.R. plan for the 'proposed engine shed' and from Ordnance Survey mapping revised in 1922 from an 1899 revision. Some evidence exists that the path was surfaced by G. W. R. and maintained in more recent times by British Rail, Railtrack and Network Rail. The date of construction of the path is taken as 1915, the date on which the Engine Shed was completed though R J Cogswell recalls seeing the path being built a little earlier.

**13.4 iii) Were public rights acquired over it prior to 1949?**

Owing to the provisions of section 57 of the British Transport Commission Act 1949 no right of way by prescription or use can be acquired over land in the Commission's ownership where it forms an access or approach to any station or depot.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath or thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot or any dock or harbour premises of the Commission.*

13.5 The claimed route from both the south (Dilton Marsh) and the north (Station Road) have been used as access routes to the station. The route from the north is entitled "Station Approach" and although it is questionable whether the route to the station from the south was intended to be an access route to the station (since it is now closed to the public) it has, *de facto*, been used for this purpose and this is supported by evidence submitted in support of the application.

13.6 If the provisions of s.57 of the British Transport Commission Act 1949 are held to apply for the entire route it is necessary to consider whether public rights were acquired prior to 1949.

13.7 Section 16 of the Railway Clauses Consolidation Act 1845 permits any railway company to make any road or way as they think proper for the utilisation of the railway.

**Works to be executed.**

Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works; (that is to say,)

They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;

They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;

They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences, as they think proper;

They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and

They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:

Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers.

- 13.8 The question however is, whether the acquisition of public rights over that land was incompatible with the statutory purpose of the railway company. If public use is incompatible then s.31(1) of the Highways Act 1980 must fail. However, where public use is not incompatible with that statutory purpose then a right may be acquired.

#### Section 31(1) Highways Act 1980

*(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.*

- 13.9 In the case of *British Transport Commission v Westmorland County Council*; *British Transport Commission v Worcestershire County Council* [1957] 2 All ER 353 in the House of Lords it was held that the test whether a statutory corporation (i.e. the British Transport Commission) could validly dedicate to the public a right of way over their land was whether the dedication was compatible with the statutory purposes for which the corporation had acquired the land; the question of incompatibility was one of fact to be determined by a consideration of the probabilities reasonably foreseeable or of the likelihood whether the right of way would interfere with the adequate fulfillment of the statutory purposes.

13.10 Viscount Simmons in his leading judgement said:

*“Any examination of this question must begin with R v Inhabitants of Leake ((1883), 5 B & Ad 469), which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J in that case (ibid., at p 478):*

*“If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power.*

*Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though on one hand it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?”*

13.11 It is considered that the use of the land by the public on foot did not interfere with the statutory purpose of the railway (on the contrary it augmented it) and that public rights could have been acquired over it for the period 1915 to 1949 notwithstanding any other action to prevent it occurring.

13.12 There is some relevant evidence for this period. A G.W.R. drawing for the proposed engine shed describes it as a Footpath (though not a Public Footpath) and shows it connected to the public rights of way network with the word “diversion” on it. G.W.R. drawings produced as a “2 Chain Survey” in 1933 record the path as connecting to the public rights of way network in the same way as the track plan and proposed engine shed plan.

13.13 R J Cogswell describes the path in the period 1905 – 1915 as being:

*“...the arrangements made were that the lane – now Oldfield Road – and the path from its end across another field were surfaced with rolled-in fly ash and the stiles replaced by kissing gates made wide enough for bicycles to be wheeled through. Elsewhere a GWR owned footpath from the station to Dilton Marsh and long known as Penleigh Footpath, was diverted across the, by then, filled-in end of the Station Minehole to the kissing gate opposite to the pedestrians’ entrance to the new depot. From there it continued on round to the old level crossing for Brook Mill.”*

Underlining added to emphasise the reference to the claimed route.

- 13.14 Mrs P Harvey gave evidence of having used the route in the 1930s as a child “to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937.” Users from the 1950s both give evidence that suggests use before that time “I have cousins older than myself who have used the path” and “ I have always believed the path was railway property”.
- 13.15 It is a fact that since 1904 the land over which the path leads has been “railway property” (i.e. G.W.R., British Transport Commission, Rail Track and Network Rail).

#### **14.0 Legal and Financial Considerations**

- 14.1 The determination of Definitive Map Modification Orders (DMMOs) and the continual review of the definitive map are statutory processes for which financial provision has been made. In determining applications for DMMOs the Council is acting in pursuit of its statutory duty and cannot be challenged in so doing (subject to due process being followed).
- 14.2 If an order is made and advertised and no objections are forthcoming the Council will not incur any further costs beyond advertising the confirmation of the order. If the order attracts objections that are not withdrawn it must be forwarded to the Secretary of State for determination. It may be determined by written representations (no additional cost to the Council), a local hearing (additional costs to the Council in the region of £300) or a public inquiry (additional costs to the Council in the region of £4000).
- 14.3 If an order is not made and the application is refused, the applicant has a right to appeal to the Secretary of State for Environment, Food and Rural Affairs within 28 days of notification. If the appeal is upheld Wiltshire Council will be directed to make an order.

#### **15.0 Risk Assessment**

- 15.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety. These have been raised by D B Cargo UK Ltd who lease part of the claimed route, however, these concerns are not relevant to the recording of the route though would be likely to be considered for the management of the route in the event it was recorded as a public right of way.
- 15.2 The Council is the surveying authority for the County of Wiltshire (excluding the Borough of Swindon) and has a duty to keep the definitive map and statement under continual review (s.53(2)(b) WCA 81). There is therefore no risk associated with the Council pursuing this duty correctly.

15.3 If the Council fails to pursue this duty in this case it is liable to complaints being submitted through the Council's internal procedure leading to the Ombudsman. Ultimately a request for judicial review could be made.

## **16.0 Environmental Impact of the Recommendation**

16.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to the environment.

## **17.0 Equality Impact**

17.1 The character of the route will not alter with the making of an order to record the way as a public footpath. The legal right to pass and repass over the entire width will be protected which will ensure that obstructions and encroachments may be removed by Order of the Council. This could lead to greater accessibility.

## **18.0 Safeguarding Considerations**

18.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to safeguarding.

18.2 It is however noted that there are no considerations arising.

## **19.0 Public Health Considerations**

19.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to public health.

## **20.0 Relationship to the Council's Business Plan**

20.1 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.

## **21.0 Options to Consider**

- i) To make an Order to modify the definitive map and statement to show the claimed route as a public footpath
- ii) To make an Order to modify the definitive map and statement to show part of the claimed route as a public footpath
- iii) To refuse the application for an Order

## **22.0 Reason for Recommendation**

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. However, where historical evidence is considered the provisions of s.53(3)(c)(i) apply.

22.1 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').

22.2 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.

22.3 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.

22.4 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.

22.5 Officers consider there are two key considerations here.

i) Was it legally possible for the public to acquire a right over the land?

ii) Is there a sufficiency of evidence to establish public use in a manner that was 'as of right'?

22.6 The landowner (Network Rail) relies on Section 57 of the 1949 British Transport Commission Act (the 1949 Act) to re-but the claim for public rights. This applies to land held after 1949 and to a route that forms an access or approach to any station or depot.



- 22.7 The northern leg of the claimed route (Westbury Station to Station Road) is the main access route to the station and is called “Station Approach”. It is very clear that this section of the path is affected by Section 57 of the 1949 Act. It is also clear that the route has always been “Station Approach” and as such has provided access for the services of the railway at the invitation of the railway. Such use would be ‘by right’ and not ‘as of right’. Neither statutory or common law dedication can occur under these circumstances.
- 22.8 There is clearly incontrovertible evidence that a public right cannot have been acquired over Station Approach. The situation with the section south from the station to Westbury 15 is less clear and relies on whether the route was provided as an access route for the public or whether public use was an act of trespass.
- 22.9 The southern leg of the claimed route (past the Engine Shed to the Station) has been used as an access route to the station but not named as such or signposted and promoted as such. As an access route to the station or the depot it is affected by Section 57 of the 1949 Act and public rights cannot be acquired post 1949.
- 22.10 Officers have some evidence of use of this route from 1915 (R J Cogswell), 1936 onwards (1 UEF) and, by repute, prior to the 1950s (2 UEFs). However, it cannot be ignored that when the public rights in this area were proposed to be diverted in the 1904 deposited plans (and again in 1930) the application route was not identified by either G.W.R. or, significantly, the Urban District Council. It was identified as a footpath diversion in the G.W.R. plans for the proposed engine shed (and built as per these plans) but this is not a document of significant evidential weight in the same way Deposited Plans or local authority records are. It may have reflected what was actually built but it does not reflect the public facing document that was the 1904 Act.
- 22.11 If it is accepted that the claimed route is an access route for the station then the application must fail as use cannot have been ‘as of right’ but by way of licence or permission from the landowner (the railway company) to access its facilities. This is reflected in the powers of the 1949 Act but is a general principle in the same way you would not acquire a public right of way across the forecourt of a shop you were visiting. Use of the path has only been within the period of GWR’s (and subsequent railway operators) ownership of the land. The tenant to some of the land (DB Cargo UK) considers public use to have been trespass. If the evidence supported that pre-1949 use was by trespass (i.e. not at the invitation of the railway company to use its premises, perhaps as a through route) then, if there was a sufficiency of evidence, it is considered that a reasonable allegation of public rights could be made.
- 22.12 Officers consider there is an insufficiency of evidence relating to the actual use of the applicant route in the period prior to 1949.
- 22.13 This insufficiency has meant it has been impossible for officers to judge whether the public only used the route for access to the station or as part of a wider walk.

22.14 For Test B (the weaker test) detailed at paragraph 22.2 to apply there must be a sufficiency of evidence to demonstrate to the owner of the land that a right was being asserted against him and was not merely an occasional act of trespass. The Council has before it some evidence of use prior to 1949, however, use at this level would be difficult to recognise as an assertion of a right against an undoubted back drop of GWR staff utilising the pedestrian access to the Engine Shed.

### **23.0 Recommendation**

**That the application for a definitive map modification order to record a public footpath from Westbury 15 along a “cinder track” north to join sidings yard lane (now blocked) along Station Approach to Station Road is refused.**

Sally Madgwick

Rights of Way Officer – Definitive Map

04 April 2018