

DECISION REPORT
WILDLIFE AND COUNTRYSIDE ACT 1981 – SECTION 53
APPLICATION TO ADD A BRIDLEWAY TO THE DEFINITIVE MAP AND STATEMENT OF
PUBLIC RIGHTS OF WAY IN OGBOURNE ST ANDREW

1. The Application

Application number: 2020/06D

Date of application: 30th April 2020

Applicant: Carolyn Davis (on behalf of Ogbourne St Andrew Parish Council)
Bridleway Cottage
Ogbourne St. Andrew
Marlborough
Wiltshire
SN8 1XF

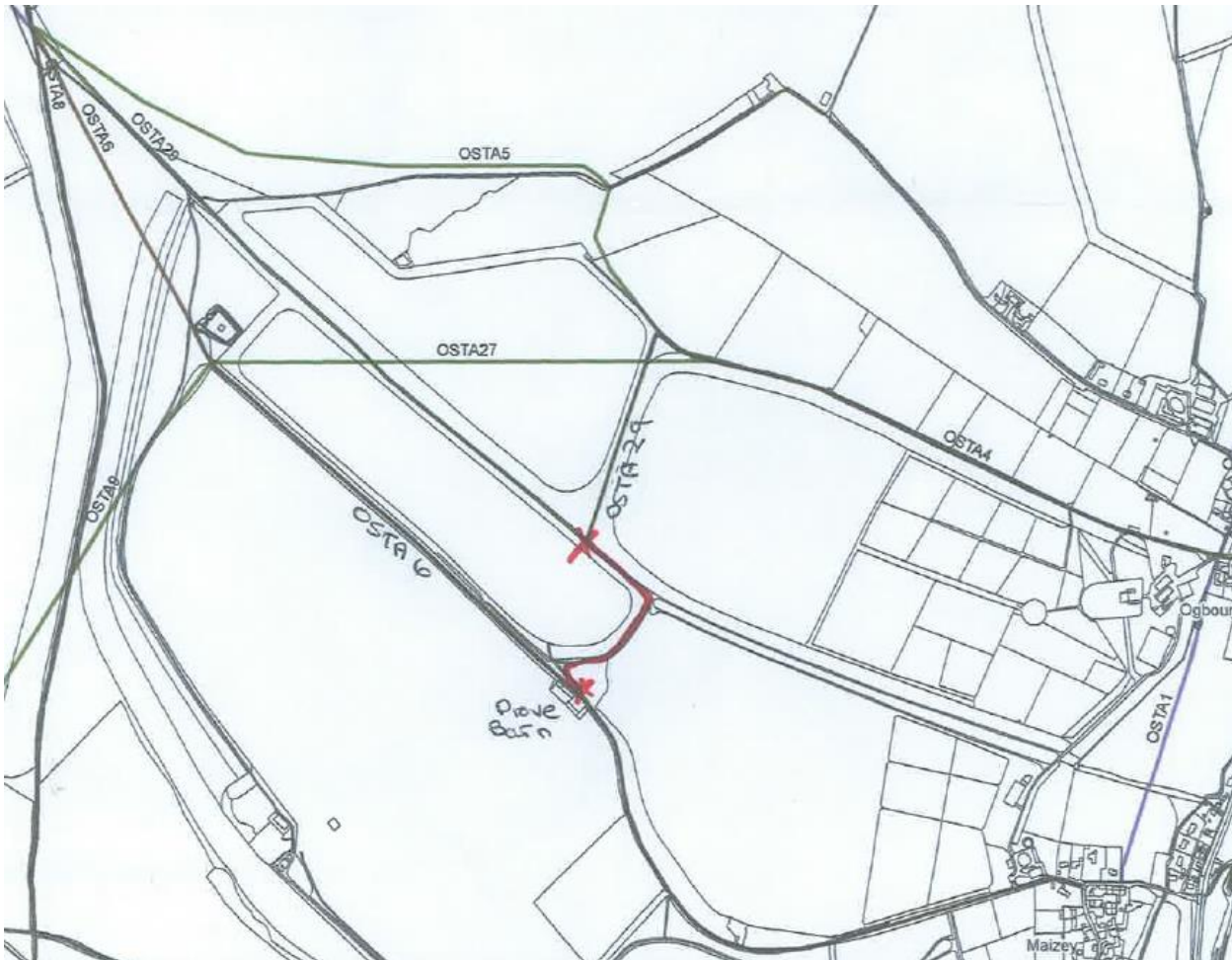
Application for: An Order modifying the definitive map and statement for the area by adding a bridleway that *“leaves Ogbourne St Andrew byway 6 at Drove Barn and links up with Ogbourne St Andrew bridleway 29, approximate width 2 metres”*

Application comprises: Form 1 notice of application for a modification order
Form 2 notice of application for a modification order
Form 3 Certificate of Service of Notice of Application , notice served on landowners Catherine Burrell and Lady Suzannah O’Brien.

Map to the scale of 1:10,000 showing the claimed route highlighted in red

27 User Evidence forms (4 more UEFs submitted at a later date).

Application map



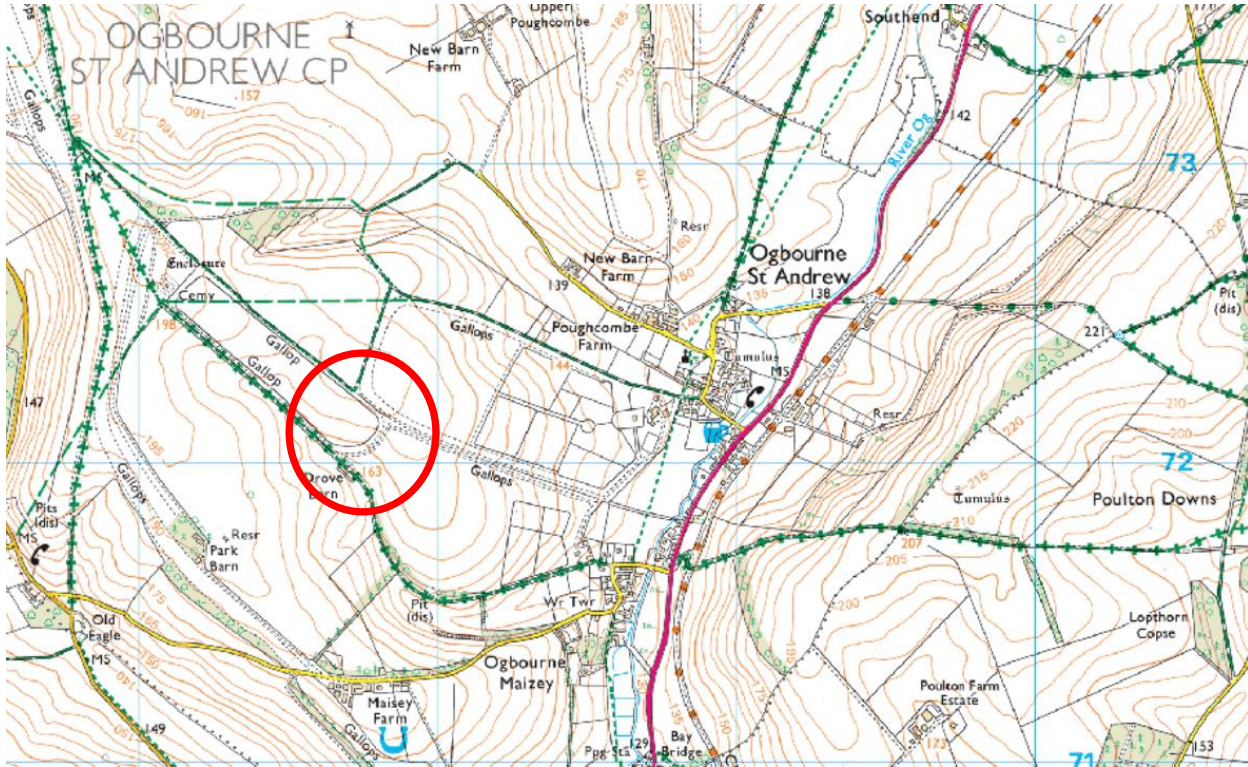
2. Purpose of Report

- 2.1 To determine an application, made under Section 53 of the Wildlife and Countryside Act 1981, to add a bridleway to the definitive map and statement of public rights of way, in the Parish of Ogbourne St Andrew. The claimed route leads from the junction of byway OSTA6 in a north easterly direction following a track to its junction with bridleway OSTA29.

3 Relevance to Council's Business Plan

3.1. Working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

4. Location



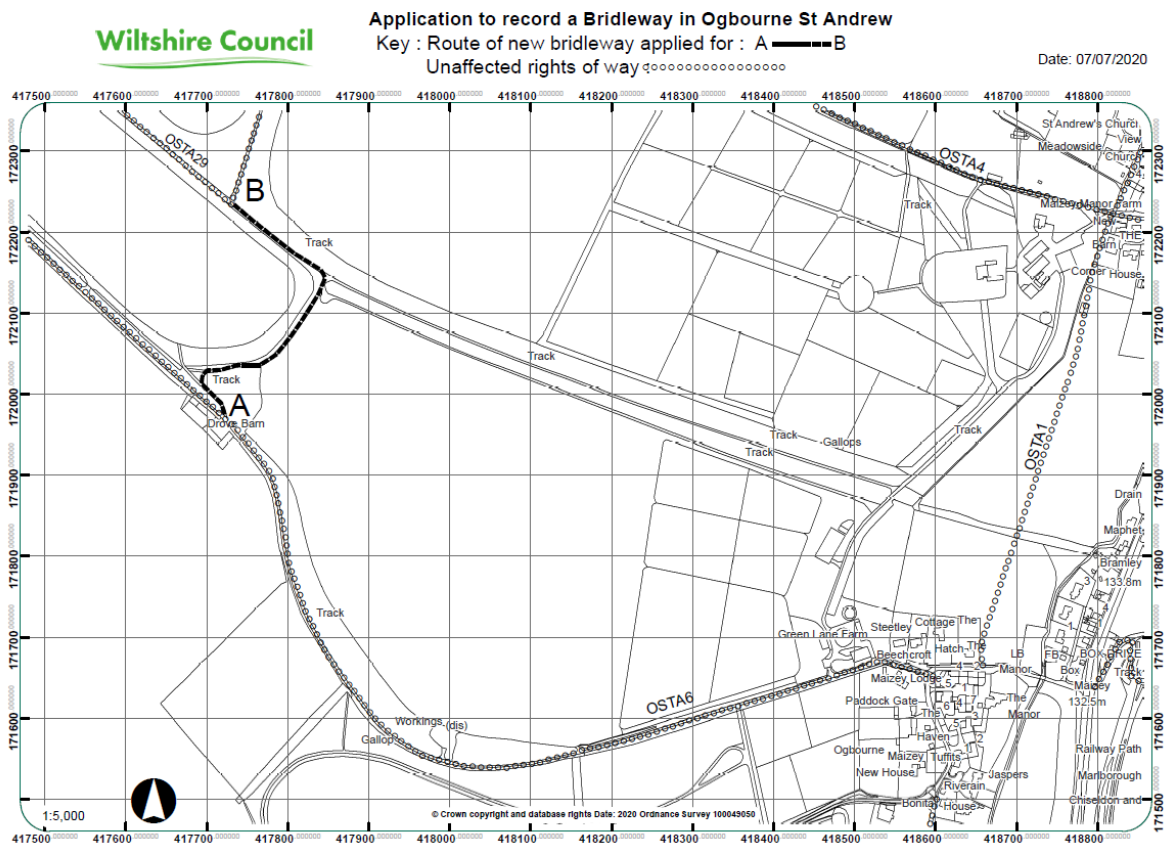
4.1 The claimed route is west of the village of Ogbourne St Andrew which itself is just north of the town of Marlborough. The claimed route follows the route of a track linking byway OSTA6 and bridleway OSTA29. The route is approximately 430 metres long.

4.2 An aerial photo of the area from 2001 showing the track on which the bridleway is claimed is shown below– bridleways are denoted by green lines and the byway by a brown line.



4.3 Claimed bridleway Route

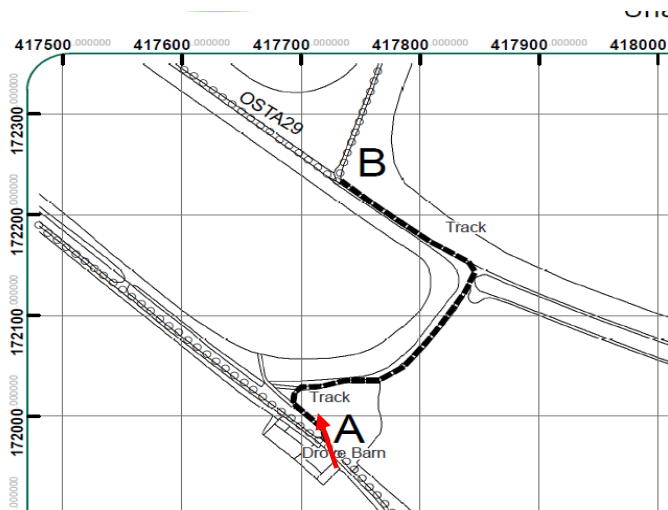
4.4. The below map depicts the claimed route with a black dashed line.



5. **Photographs**

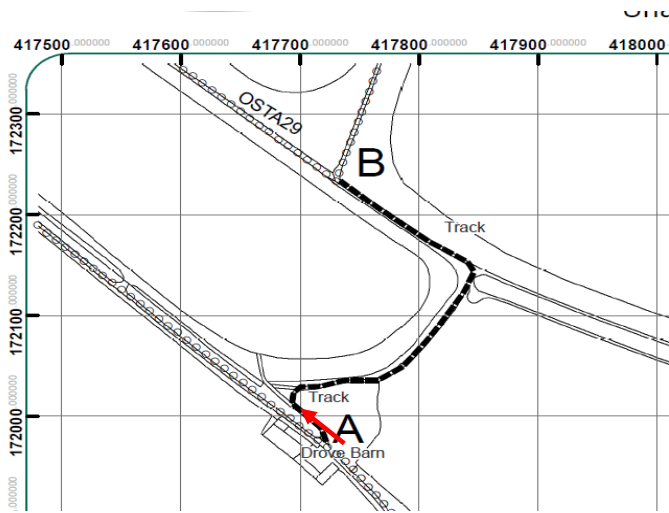
Photos taken in July 2020 of the claimed route.

5.1 The red arrow on the map shows where and which direction the photos below the map extract was taken.

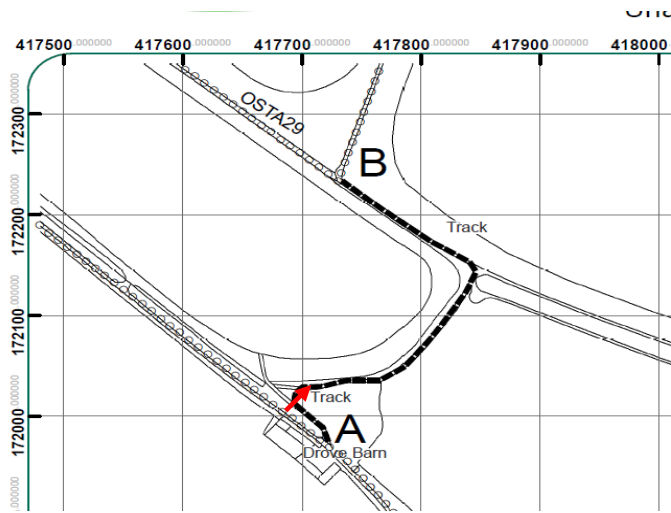


The claimed route , marked by red arrows leads off the existing byway , marked by a black arrow.

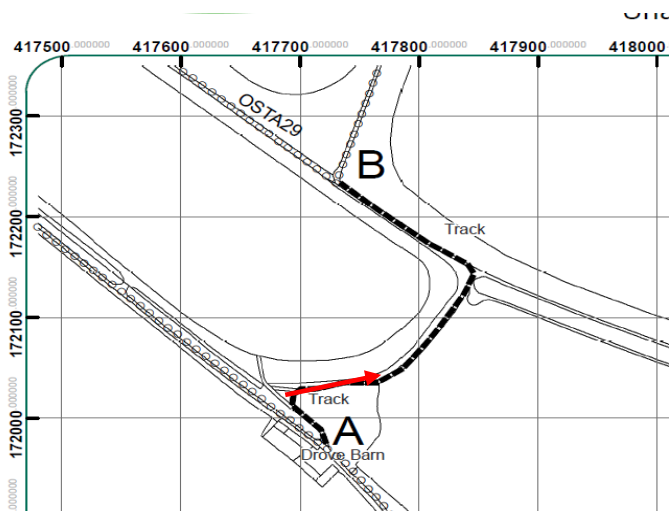
5.2



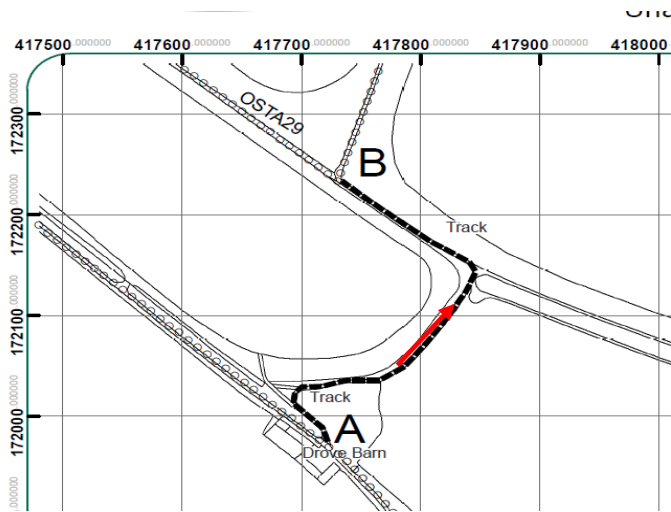
5.3



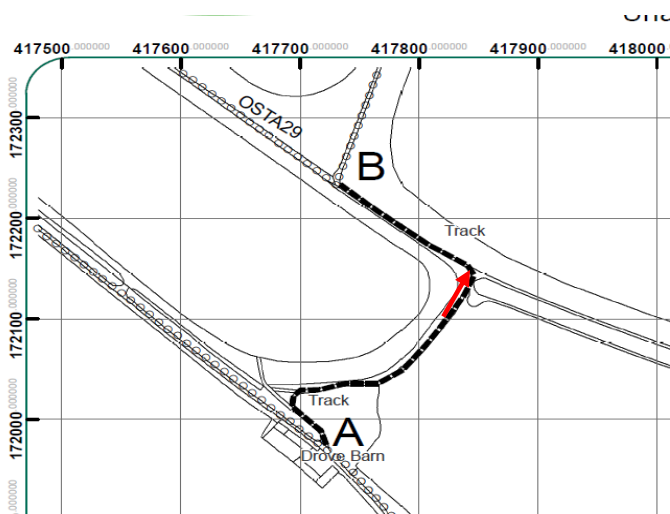
5.4



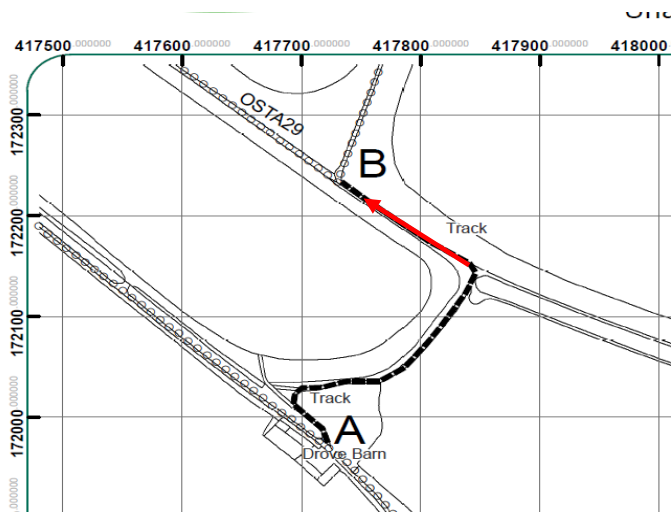
5.5



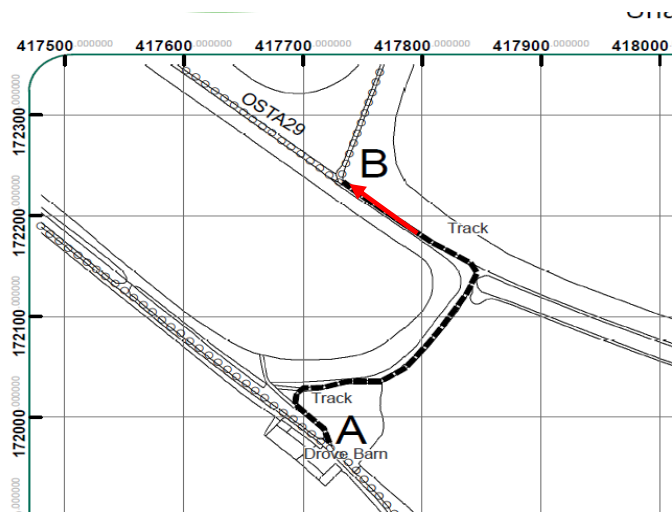
5.6



5.7



5.8



At this point the claimed route meets the existing bridleway OSTA29 which continues in both directions marked by the black arrows.

6. Registered Landowners

6.1. There are two land owners who are directly affected by this application.

Divers Trust Limited of Jersey. Accuro are appointed as directors and officers of Diver Trust Limited and have submitted representations.

Mrs Susannah O'Brien of Green Lane Farm, Ogbourne Maizey, Marlborough, Wiltshire, SN8 1RY.

6.2 The image below shows the land owned by Mrs Susannah O'Brien within the red boundary. The rest of the application route is the ownership of Divers Trust Ltd.



7. The Application

- 7.1. Wiltshire Council are in receipt of an application dated 30th April 2020 made under Section 53 of the Wildlife and Countryside Act 1981, to add a bridleway to the definitive map and statement of public rights of way in the parish of Ogbourne St Andrew.
- 7.2. The application was submitted by Mrs Carolyn Davis (on behalf of Ogbourne St Andrew Parish Council). The route applied for is stated as a bridleway that leaves Ogbourne St Andrew byway 6 at Drove Barn and links up with Ogbourne St Andrew bridleway 29 and is approximately 2 metres wide.
- 7.3 The application was accompanied by a map depicting the claimed route with a red highlighter on an OS base map and 27 user evidence forms detailing use of the route. The user evidence forms will be analysed in detail later in this report.
- 7.4 The application forms submitted comply with the regulations set out in regulation 8(3) Schedule 7 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 SI 1993 No 12. The applicant served notice on the two affected landowners, Catherine Burrell and Lady Suzannah O'Brien. It was later clarified that the land owned by Mrs Catherine Burrell is held by a trust , Divers Trust Limited , who have responded to the consultation in conjunction with Mrs Burrell who resides locally.

8. Initial Consultation

- 8.1 Wiltshire Council undertook an initial consultation regarding the proposal on 7th July 2020. User groups, Ogbourne St Andrew Parish Council, the landowners and some neighbouring landowners, the Council member for area, and all interested parties were consulted as part of this process. The following replies were received. A copy of that letter can be seen below.

“Dear

Wildlife and Countryside Act 1981 s.53

Application for a definitive map modification order to add a bridleway in the parish of Ogbourne St Andrew

Wiltshire Council are in receipt of an application dated 30th April 2020 under the Wildlife and Countryside Act 1981 s.53 to add a public bridleway to the definitive map and statement in the parish of Ogbourne St Andrew. The claimed bridleway runs along a track west of Ogbourne Maizey between byway OSTA6 and bridleway OSTA29. This application is currently supported by 27 user evidence forms, documenting use of the claimed route.

The Council has a statutory duty to determine this application and I will be the case officer. In determining the application the Council must consider all relevant evidence made available to it and you are invited to submit any evidence that you may have that relates to the claimed route and that you would like the Council to take into account. If you have already submitted a witness form as part of the application there is no requirement to resubmit any previously stated evidence , however if you have any additional evidence you feel is relevant please supply this.

If I could receive any evidence that you wish to adduce for the Council to consider I would be pleased to receive it by Friday 4th September 2020. Currently due to restrictions at County Hall receiving any responses by email (craig.harlow@wiltshire.gov.uk) would be preferable. Any correspondence sent in writing to County Hall will be received but may not be picked up immediately.

Yours

Craig Harlow

Definitive Map Officer

Direct line: 01249 468568

Email: craig.harlow@wiltshire.gov.uk

Enc. Map showing claimed route”

Replies

8.2 Peter Gallagher – North Wiltshire Ramblers

Dear Craig

Thank you for your letter dated 7 July.

We are unable to provide any evidence of use of this path. We have contacted our members living in the area but it does not appear that any of them have used it.

When I walked the path after receiving your letter (having never, from memory, walked it before) I noted that there were no barriers or “Private” or similar notices of any kind. Bearing in mind there are racehorse gallops in close proximity to the path the absence of any such notices suggests to me that the landowner(s) are acquiescing in the use of the path by the public.

Best wishes

Peter Gallagher
Footpaths and Walking Environment Officer
Swindon and North East Wiltshire Group
The Ramblers

8.3 Alan Woodford

Hi Craig,

Please find attached a User Evidence Form relating to the above DMMO application.

The width of 2 metres specified on the application does significantly underestimate the width used. The track itself is around 12 feet wide and because it is so rutted grass adjacent to it has always been used by me and my companions.

Regards

Alan

Mr Woodford submitted a user evidence form which is considered in this report.

8.4 Ogbourne St Andrew Parish Council

Hi Craig,

I am the Chairman of The Ogbourne Maizey, Ogbourne St Andrew and Rockley Parish Council. I am writing to confirm that the issue of the bridleway was discussed at a recent Parish Council meeting. Carolyn's proposal was put to the meeting, together with a map showing the route of the proposed public bridleway.

One member of the parish council was not familiar with the route, but the other six members knew the route well and had all walked it at some stage. The council gave its unanimous support for the proposal. Although we understand that the landowner has no objection to the existing track becoming a public bridleway, the parish council had no official notification of this.

I hope that clarifies our position, but if you need any further information, please let me know.

John Hetherington

8.5 Bill Riley

Hi Craig,

Thanks for sending me details of the DMMO application in Ogbourne St Andrew. It seems like a useful link but I can't find any supporting historical evidence, so I guess it's all down to user evidence....

8.6 Emma Lavelle

Dear Mr Harlow

REF 2020/06D OSTA

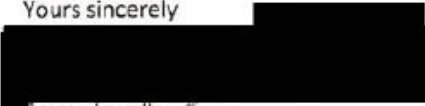
Re Application for a definitive map modification order

I write with regard to the modification order of a bridleway with the above reference. My husband and I own the land adjacent to the suggested route and would have some considerable reservations about the track becoming an official bridleway.

As a racehorse trainer, training in excess of seventy horses and employing over twenty staff, through most of the year we would be using the gallops that are accessed from that track and then gallop alongside it. My greatest concern is that of the safety of casual riders, cyclists and dog walkers, all of whom would have access to that track if it were to become a bridleway, as well as the safety of my own staff and horses if there were increased use. It is a fairly narrow piece of land at the start and so would make passing difficult with fractious thoroughbreds. We are running a business that generates important employment in the rural community and I am very keen to keep the risks of injury to a bare minimum wherever possible.

I absolutely believe that the countryside should be shared and enjoyed and as landowners with several bridleways on our land, we maintain them so that they can be used, but although some people are respectful a vast number do not follow the paths and we have already had several instances of horses being chased by dogs, walkers in the path of galloping horses and cyclists flying past. There are a huge number of bridleways within the area and it is a wonderful place to be able to ride horses but for the safety of those working in the area as well as those wanting to casually enjoy it I think that particular piece of track would be far better to remain as it is – a track.

Yours sincerely


Emma Lavelle

8.7 Susannah O'Brien (Landowner)

Dear Mr Harlow

Wildlife and Countryside Act 1981 s 53.

Application for a definitive map modification order to add a bridleway in the parish of Ogbourne St Andrew.

Please could the Council consider my objections to the application as the Land owner of part of the track.

1. Firstly the area is well served by bridleways . The proposed bridleway is a dog leg and unnecessary . In the very next field are two bridleways OSTA 29 and OSTA 27 which join up with OSTA 29.

2. Secondly the track up from Green Lane at the extreme left is used by race horses some four times a week. Peter Makin had a right of way for the purposes of gaining access to his gallops and that is extended to the current trainer Emma Lavelle who has given evidence too to you.

It is a narrow and steep track there with a sharp bend and obviously hazardous. There is also a right of way east to west in favour of my neighbour The Burrells' adjoining training establishment so there again is a risk to them .

3. Thirdly Carolyn Davis who has collected the User evidence statements, stated in the Ogbourne st Andrew , Maisey and Rockley Newsletter no 67 (submitted) to help support her application that " the current landowners are happy for it to be used " I.e. the track.

I had told her when she told me what she was doing ,that I objected to her application.

I believe that she used the press to get support and lead people to believe that it was uncontested by the land owners. It was a misrepresentation and not fair to have be side presented. In fact one lady who wrote a statement told me she had no idea I was objecting

.

I offered a permissive path to villagers to Carolyn which was rejected .

4. We have had problems with rural crime, trespassing , burglary , poaching. Another access is unwelcome . My fear is an increase from a few villagers who I know ,to strangers who do not understand or care so much about the area.

Susannah O'Brien

Mrs O'Brien was asked to fill in a landowner evidence form but one has not been returned to date.

8.8 Diver Trust Limited (Landowner)

Dear Mr Harlow

We refer to the attached addressed to Catherine Burrell which has recently been forwarded on to us. The letter is in respect to the Application for a definitive map modification order to add a bridleway in the parish of Ogbourne St Andrew. We are responding to the letter at the earliest opportunity following receipt by us of the same.

Accuro is appointed as the directors and officers of Diver Trust Limited. Diver Trust Limited is a company incorporated in Jersey and which owns in its capacity as trustee title numbers WT189793 and WT186612. These title numbers are in the process of being registered out of the name of Valla Nominees 4 Limited which had previously acted as a nominee for Diver Trust Limited. A copy of the TR1 form is attached to evidence Diver Trust Limited's capacity to be writing to you regarding this matter.

Diver Trust Limited wishes to register its objection to the request to establish the new bridlepath. Please find below the reasons why we are not in favour of the bridlepath:

- the proposed route comes off an already quite active byway- and the proposed track is quite wide and it does look vehicle friendly so if it was designated and identified as a bridleway it would encourage vehicles to travel up it. Catherine Burrell has a big problem already with cars / four wheel drives / motorbikes using the farm as speed / wheely practice- which is not only dangerous for the many horses being ridden on the farm, but they also damage the ground / grass gallops / dangerous for walkers / dogs too;*
- more people using the track equals more dogs- there were two recent incidents with dogs being out of control and chasing Catherine's horses - causing them to bolt blind. Of course this is*

dangerous, but one of them now seems to have a lasting phobia of dogs so if Catherine seeks to sell her she will be devalued as she will have to declare that she is not the quietest of rides as she is frightened of dogs;

- *Catherine had some farm machinery - some rollers - stolen from the top of the farm, close to the proposed track last year. The rollers had been stored at the same place for 20 years and the thieves towed them down the proposed track and then onto the byway. More people on this track will result in more people knowing things and more possible thefts;*
- *the land on every side of the proposed bridleway is open- We have not fenced the boundaries, and neither has the neighbour Sussanah Obrien. It is very special like this. It does however lend itself to travellers moving on to the land and again if the track was formalised then it would invite more people to see the area and encourage encroachment;*
- *Emma Lavell is a successful race horse trainer. She uses the track (with permission from Sussanah Obrien) to access her round gallop. If she is there with a large string of fit race horses and they are met with random riders / walkers / dogs coming down the proposed track the chances of an unhappy ending are high. It just wouldn't be safe for either Emma's horses, her staff, or the people accessing the track if it was to become a bridleway;*
- *the public can access all the areas perfectly adequately without the proposed bridleway. There is a super loop already in place and so we are not trying to keep people from enjoying the beautiful farms, we are just trying to maintain a level of safety for those involved in working in the area (mainly with valuable horses travelling at speed) and the public;*
- *the farmer who leases the land has advised that four wheel drives have been driven all over his oat crop, the day before it was to be harvested- and referred to wheel marks everywhere. They would have come up from the proposed bridleway; and*
- *Another neighbour Jilly Carter has had her trailer stolen from her storage barn recently- again another reason for trying to make the area no more accessible that it already is.*

We should be grateful if you would acknowledge safe receipt of this email. We trust the above is in order however should you have any queries, please let us know.

With kind regards

Divers Trust were also requested to fill in a landowner evidence form, which was completed by Catherine Burrell and returned.

LANDOWNER EVIDENCE FORM

The object of this enquiry is to establish whether a Public Right of Way exists. It is important that you answer all the questions accurately and as fully as possible. This is of special importance as the information given may be examined at a Public Inquiry or Hearing.

FULL NAME Catherine Burrell

ADDRESS Mainway Manor Farm Ogbourne St. Andrew.

Tel no (day) [redacted] Tel no (eve) [redacted]

e.mail address [redacted]

PATH DETAILS:

Parish

Claimed Status of Way

Description of Path (also see attached map)

From: To:

1. The route of the way is shown on the accompanying plan.

Does the route cross or adjoin your land?

YES / NO

If no, no further questions need to be answered.

If yes, please indicate on the plan the position of your land and state the number of years it has been in your ownership 20 years or tenancy

2. Do you believe this way to be public?

(a) If so, with what status NO

(b) For how long have you held this belief? forever

3. Have you seen, or been aware of, members of the public using this way?

(a) If so, please state the period, regularity and nature of such use Yes, with permission

4. Have you ever required people to ask permission before using the way?

If so, please give details yes. The area is used by the land owners with prior permission to aid the training of their racehorses / competition horses. It is not suitable for other as increased traffic at inappropriate times will be dangerous for all.

5. Have you deposited a Section 31 (Highways Act 1980) plan and statement? YES NO

If so, please give details and dates

6. Have you, or someone on your behalf, ever turned back or stopped anyone from using the way?

If yes, please give details and appropriate dates yes n/a

Dangerous as rickshaws on the path. & it is private land.

7. Have you, or someone on your behalf, ever told anyone using the way it was not public?

If yes, please give details and appropriate dates yes n/a

8. Have you ever erected notices or signs stating that the way was not public?

a. If yes, please give details and approximate dates yes Sept 2020

Increased mof + traffic in the area is dangerous.

b. State whether these notices were ever defaced or destroyed and whether they were replaced.

no

c. Show their position on the accompanying plan

9. Have there, to your knowledge, ever been on the way any stiles or gates? YES NO

a. If yes, state whether the gate or gates were ever locked n/a

b. Show their position on the accompanying plan

10. Have you ever obstructed the way?

a. If yes, state where, how and when no

11. Can you give any further information? Please continue on a separate sheet of paper if needed.

we are no boundaries / fencing in the area, which is as the land ordering the "downs" should be increased traffic will change all this well as encouraging more traffic. mof. joyrides which are already a problem.
I hereby certify that, to the best of my knowledge and belief, the information that I have given is true.

Signed: [Redacted]

Date: 12.9.20.

Please return this form and any accompanying map to:

Rights of Way and Countryside Section, Communities and Neighbourhood Services, Wiltshire Council, County Hall, Trowbridge, BA14 8JN

Information relating to how Wiltshire Council will manage your data can be found at:

<http://www.wiltshire.gov.uk/recreation-rights-of-way>

9. Main Considerations for the Council

9.1. The definitive map and statement of public rights of way are conclusive evidence as to the particulars contained therein, however this is without prejudice to any question whether the public had at that date any right of way other than that right. Wiltshire Council is the

Surveying Authority for the County of Wiltshire, excluding the Borough of Swindon. The Surveying Authority is the body responsible for the preparation and continuous review of the definitive map and statement of public rights of way. The Wildlife and Countryside Act 1981 Section 53(2)(b) applies:

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

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

9.2. The event referred to in subsection 2 (as above) relevant to this case is:

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

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

9.3. Section 53 (5) of the Act allows any person to apply for a definitive map modification order under subsection 2 (above), as follows:

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

9.4. Schedule 14 of the Wildlife and Countryside Act, states:

“Form of applications

1. *An application shall be made in the prescribed form and shall be accompanied by:
 - (a) a map drawn to the prescribed scale and showing the way or ways to which, the application relates; and
 - (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.”*

The prescribed scale is included within the *“Statutory Instruments 1993 No.12 Rights of Way – The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993”*, which states that *“A definitive map shall be on a scale of not less than 1/25,000.”*

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*
 - (2) *If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description ‘owner’ or ‘occupier’ of the land (describing it) and by affixing it to some conspicuous object or objects on the land.*
 - (3) *When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.*
 - (4) *Every notice or certificate under this paragraph shall be in the prescribed form.*

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

- “(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has*

been actually enjoyed by the public as of right without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

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

 - (a) *has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*
 - (b) *has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*
- (4) *In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.*
- (5) *Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.*
- (6) *An owner of land may at any time deposit with the appropriate council-*

 - (a) *a map of the land on a scale of not less than 6 inches to 1 mile and*
 - (b) *a statement indicating what ways (if any) over the land he admits to having been dedicated as highways;*

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

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

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

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

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

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

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

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

“Evidence of dedication of a way as highway

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

10. Historic Records

- 10.1 This application was submitted with no historic evidence to demonstrate the route is or has been a public right of way, however officers are still obliged to investigate the historic nature of the applied for route.

Maps and documents dating back to the 18th century have been viewed depicting the area concerned. 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 many commercial maps it does not necessarily carry as much evidential weight as if the way is shown in 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 (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.

| Category | May provide evidence for | Examples |
|----------|--|---|
| 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 Physical existence of a way | Commercial maps, some Ordnance Survey records |
| F | Reputation of a way as a highway Physical evidence of a way | Local repute, consultation responses |

11. Category A

11.1 Evidence within this category is potentially of the highest weight and includes conclusive evidence (i.e. the definitive map and statement), inclosure acts, awards and plans, legal orders or events and deposited railway plans (i.e. arising from an act of parliament which specifically required the identification and verification of public rights of way).

11.2 The area concerned was not subject to an inclosure act and no other category A evidence has been found showing the route in question.

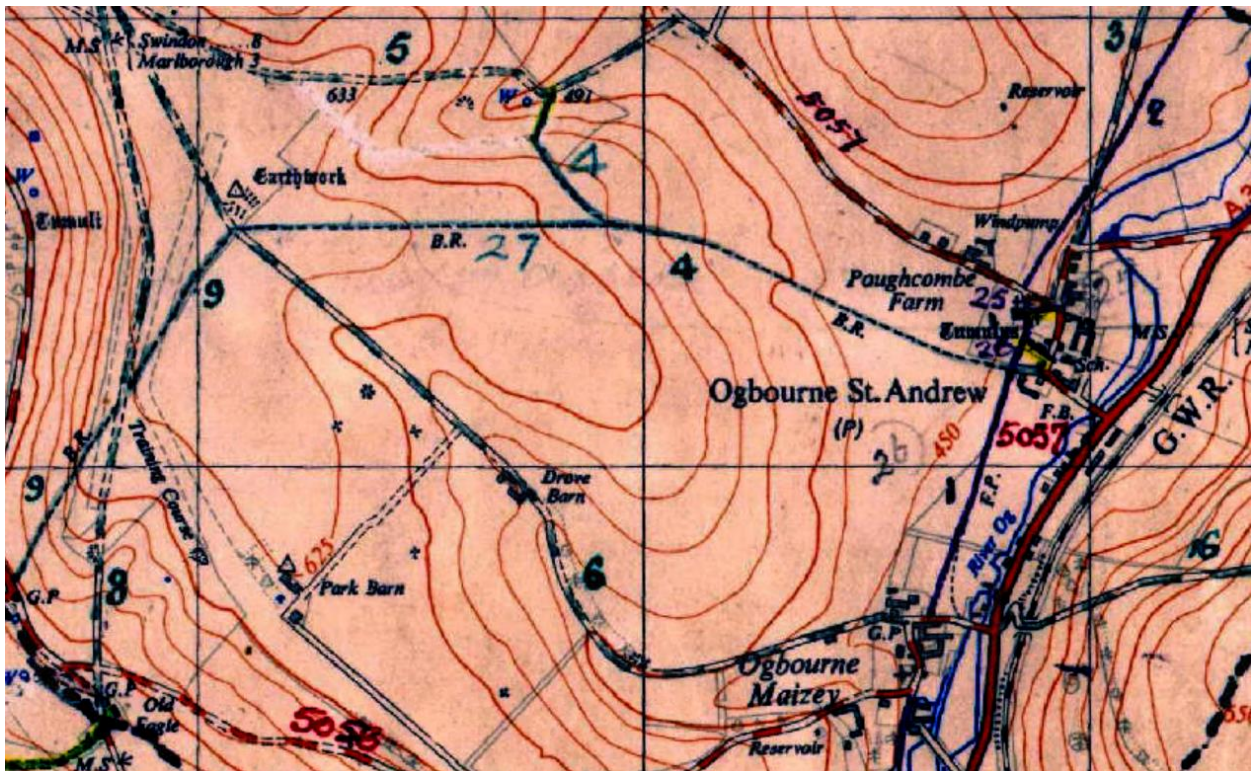
11.3. **Definitive Map and Statement**

As a result of the National Parks and access to the Countryside Act 1949 every surveying authority (in this case Wiltshire Council) holds and maintains a definitive map and statement which is a legal record of the public rights of way in its area. If a way is shown on the map then it is legal conclusive evidence that those rights existed at the relevant date of the map. However, the absence of a route is not conclusive that there may be unrecorded rights or the

showing of, for example, a footpath, does not preclude that a higher right on horseback may be unrecorded.

The Marlborough and Ramsbury Rural District Council Area Definitive Map and Statement dated 1952 does not depict the route.

See below image of the definitive map.



As stated above the absence of the route on the definitive map does not preclude unrecorded rights existing.

12. Category B

Category B evidence may be documents or plans drawn up as a result of legislation and consulted upon but where the primary purpose was not to record public rights. Examples of this includes records from the Tithe Commissioners and the Inland Revenue.

12.1 The Tithe Commutation Act of 1836

A system of taxation existed in Britain whereby farmers and people who worked the land were bound to pay tithes to the church. These payments were in kind and generally represented one tenth of production. The system was both unpopular, cumbersome and increasingly unjust as the industrial revolution gathered pace. The Tithe Commutation Act of 1836 sought to commute these tithe payments in kind to annual rent-charges. Parliament appointed a three man commission to direct a staff of assistant commissioners, valuers and surveyors who mapped, valued and apportioned rent charges among thousands of separate parcels of the titheable land in different states of cultivation.

12.2 Tithe surveys required careful mapping and examination of the landscape and land use and the maps and apportionments documents that resulted can offer valuable evidence of how the parish was at that time.

12.3 The Tithe Commissioners seconded Robert K Dawson from the Royal Engineers to organise and superintend the land surveys. Dawson had a background in surveying and produced a paper, the details of which it was considered all tithe maps should be drawn to. This paper (British Parliamentary Paper XLIV 405 1837) only ever served in an advisory capacity as the Tithe Act itself contained contradictory clauses on the nature of maps (*Tithe Surveys for Historians by Roger J P Kain and Hugh C. Prince*) and was amended in 1837 allowing commissioners to accept maps of a variety of scales and dates.

12.4 Roger J P Kain and Richard Oliver in *The Tithe Maps of England and Wales* at page 23 note that the portrayal of features on tithe maps is very variable across parishes and that advice to the privately commissioned surveyors was itself imprecise and that although the official instructions required that surveyors should include such detail on their maps as it is usual to find on estate maps, there was no statutory requirement to do this.

12.5 There are however general conventions that are observed and at page 24 Kain and Oliver observe that:

“Roads are usually shown on tithe maps as they normally bounded individual tithe areas. Only very rarely is their status as public or private indicated with any certainty, though the general convention of colour filling public roads in sienna is often followed.”

“Foot and Bridleways ...are sometimes explicitly annotated as such, but more usually they are indicated by single or double pecked lines.”

12.6. **WHSC Ref- TA/ Ogbourne St Andrew** The 1844 tithe map for Ogbourne St Andrew has been viewed at the WSHC. The relevant section can be seen below and the application

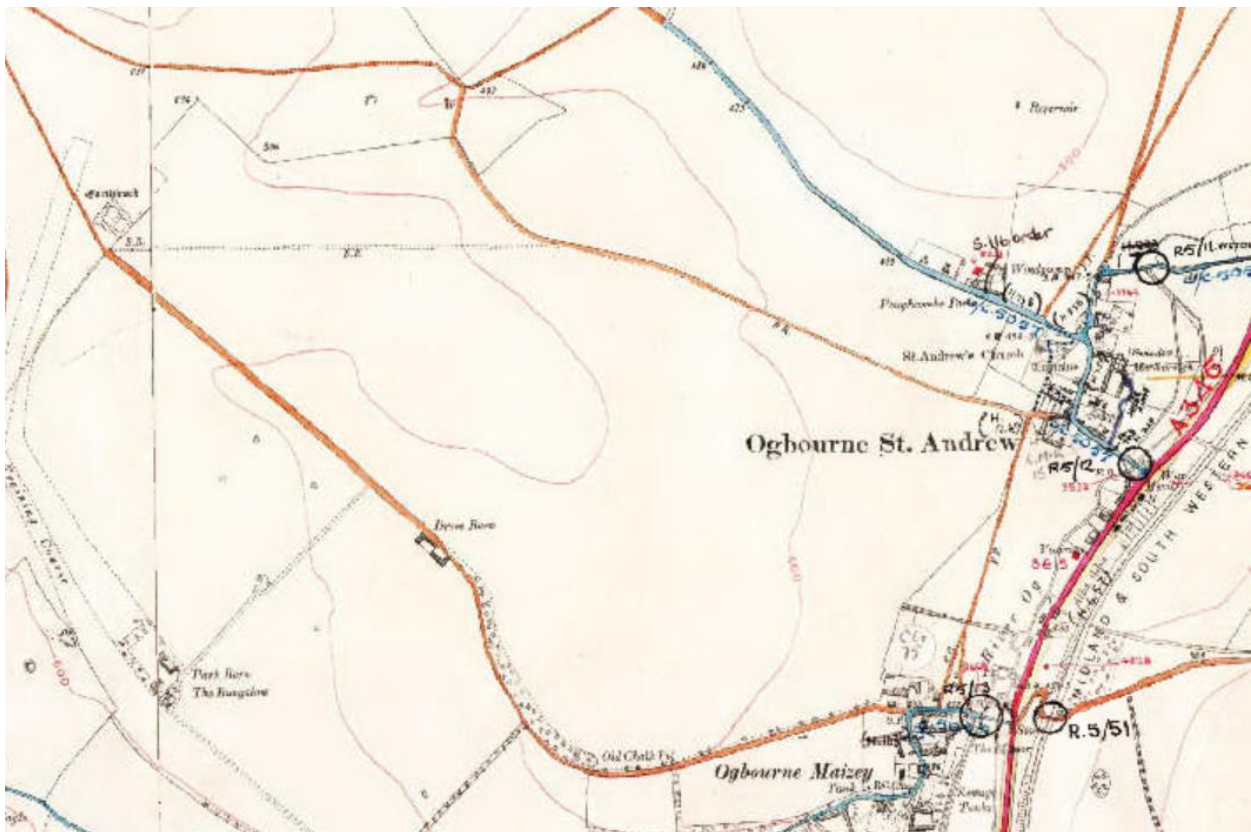
route cannot be seen , the track is not in existence or any path or other feature that follows the same route.



13. Category C

13.1 Wiltshire County Council Highway Record

Sometime after the taking over of the responsibility for rural roads Wiltshire County Council amalgamated the information and produced a highway record. This record has been maintained and amended since that time and forms part of the Council's records of highways maintainable at public expense. The route under investigation is not shown, indeed once again it appears the route is not marked by any physical feature.



14. Category D,E,F

Officers have viewed a number of Ordnance survey maps at a scale of 6 inches to one mile for the area dating from 1889, 1900 and 1925 and the path in question is not depicted on any of those maps. No physical feature can be seen on the route of the application route on those maps. No other records have been found that depict or describe the route.

The historic records viewed give a clear picture that the route in question was not a physical recorded feature until more recent years and no documentary evidence has been found that the route has historic rights.

15. Twenty Year Use

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

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

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

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

In *R (Lewis) v Redcar and Cleveland Borough Council* UKSK 11 (03 March 2010), a Town and Village Green registration case, Lord Walker refers to Mr Laurence QC, who:

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

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

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

15.3. The application was submitted claiming the route as a bridleway , to acquire rights as a bridleway through section 31 of The Highways Act the users must demonstrate their use was

in the manner of a bridleway. That being on horseback or by bicycle. If a user only used the way on foot as a pedestrian their use would only satisfy that of a public footpath, not a bridleway. As such the analysis of the user evidence will be tackled in two parts , one to investigate the use claimed in the manner of a footpath and one of any use that would be considered in the manner of a bridleway, that use being on horseback and on a bicycle.

16. User Evidence Forms

16.1 A total of 31 witness forms have now been submitted as evidence. 27 of these were submitted as part of the original application with a further four forms being submitted during the consultation phase.

16.2 It is useful to present the information within the user evidence forms within a table. This can be seen at appendix 1 to this report.

16.3 The table records the information submitted and signed as a statement of truth by the individuals that filled in the forms. It is important to examine this evidence to see if the use claimed satisfies section 31 of the Highways Act.

16.4 Clarification Points.

The table appended documenting the information contained within the 31 UEFs resulted in officers seeking to clarify some points with individuals where some information was unclear.

The following points have been clarified.

16.5 User No.2 Gillian Carter submitted an evidence form which included use dating from 1960 through to 2020 on horse back and on foot. Mrs Carter ticked every box relating to her frequency of use of the route, officers sought to clarify how often she may have used the route on horse or foot at various different time periods. When contacted Mrs Carter could not clarify when or how often she may have used the route in the past 60 years as such her evidence cannot be analysed in a manner that officers can use for the application. Her user evidence form stands as submitted but her evidence will not be included in further detailed analysis of the submitted evidence.

16.6 User No.3 Andy Curtis stated his use was annually to monthly from 1963-2020, further clarification was sought , in particular his use from 2000-2020. Mr Curtis stated on a telephone call to officers that his use could be stated as on horseback as daily 20 years ago, down to weekly 10 years ago and less than weekly, but likely to be every other week in the last few years.

16.7 User No.10 Mrs Brown stated in her form she had permission to use the route from Mr Margesson in the 1970s. Officers sought to clarify how this permission came about and any further details on the permission granted. Mrs Brown stated the permission came via her husband who worked on the farm, she also clarified Mr Margesson has not been the landowner for 30 years or more, as such any permission verbally given by him would have expired with him ceasing to be the owner. Mrs Brown also stated she would like to amend her use of the path and that it had only been on foot not on horse as stated in her user evidence form as she had not ridden for the last 30 years. As such her use stated in her UEF that she used the path weekly on horse from 1973-2020 should now be considered to be only on foot not on horse.

16.8 User No.23 Alex Matthews stated he had permission to use the route from the landowner in 2000. Mr Matthews has clarified that his permission was from Mrs Green who was at the time part owner of the land in conjunction with Mrs Burrell who is a current owner. As such Mr Matthews use post 2000 is considered to be by permission and therefore is not as of right from that time onwards. Mrs Green was part owner with the current owner Mrs Burrell and as such it can be deemed that the permission given may have continued after Mrs Green ceased to be owner as Mrs Burrell continued to be owner. Mr Matthews use is therefore deemed to be by permission from 2000.

16.9 User No.24 Mrs Gordon – Finlayson clarified by phone and email that her use stated as from time to time on her bicycle in her UEF would be on average once or twice a month during the period 1994-2020.

16.10 User No. 31 Mrs Amanda Field clarified by phone that her use was daily between 1993 and 1998 and 2013-2020 while living in the village. She also clarified that her use in the intervening years when not living in the village was occasional as she would return to walk the route when she wanted to enjoy that area of the countryside. She also stated use was never challenged and it was a well-used and known route as the area was open with no barriers.

All of these points that have been clarified are reflected in the following analysis, i.e. Mrs Carter's evidence is not included ,Mrs Browns use on horseback is not included etc.

16.11 The application was submitted claiming the route as a bridleway , to acquire rights as a bridleway through section 31 of The Highways Act the users must demonstrate their use was in the manner of a bridleway. That being on horse back or by bicycle. If a user only used the way on foot as a pedestrian their use would only satisfy that of a public footpath, not a

bridleway. As such the analysis of the user evidence will be tackled in two parts , one to investigate the use claimed in the manner of a footpath and one of any use that would be considered in the manner of a bridleway, that use being on horseback and on a bicycle.

16.12 The relevant Period.

The period of 20 years which must be considered is taken as 20 years counted back from the date that the way was first called into question. In this case it is deemed the way was brought into question when this application was submitted as the route has not blocked in any manner and no history of blocking or signage interrupting use has been adduced before the application was submitted. Therefore, the relevant 20 year period to consider will be 2000-2020(April).

16.13 The Route.

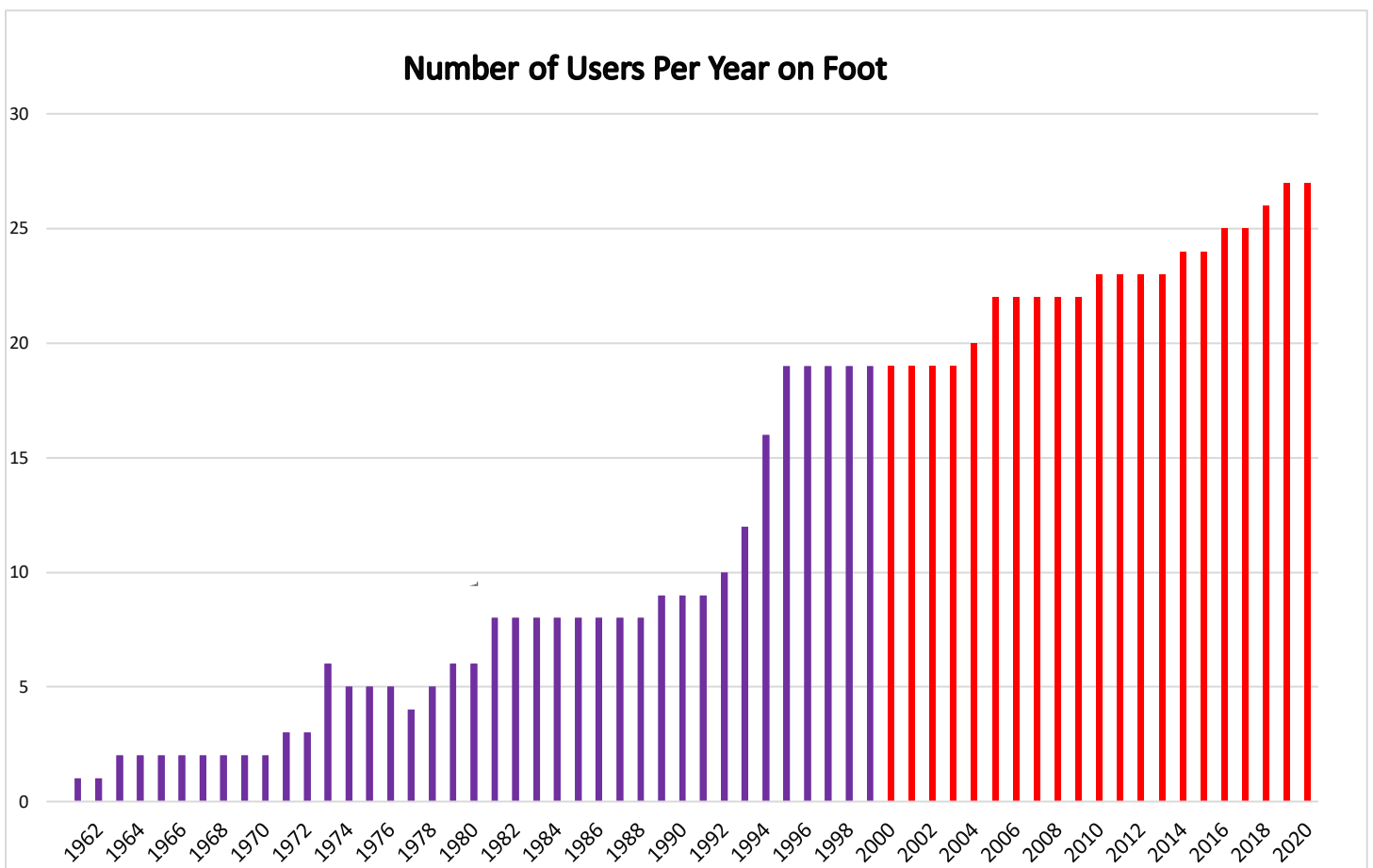
31 users have submitted evidence documenting use of the route applied for. All users claim use of the same route, there is no deviation in any of the maps submitted. It is noted the map was supplied by the applicant to users, but all users have signed the map as the route they used, and many have described the route. The route claimed is shown marked by a red line on the map below.



16.14 The route follows a track , as can be seen in the photos at section 5 of this report. During the investigation some users have stated that the track was created in the late 80s or early 90s and before this date the route used would have been slightly further north along the edge of the gallops. As it appears the track was created in , at the latest the early 90s, the use during the relevant 20 year period , 2000-2020 would have been wholly on the track. As such all of the use documented by the user evidence during the relevant period is over the same defined track.

16.15 Frequency and Level of Use

The level of use over the relevant 20 year period is an important factor to consider , while there is no statutory number of users required to satisfy section 31 the use should have been of a manner that represents the public and would have been clear to the landowner a right was being asserted.



16.16 The table above shows the number of users using the route on foot per year as per the evidence submitted. The use documented begins in the early 1960s and slowly but steadily increases through to 2020. The relevant period for this case, which is 2000 to 2020, is represented by red bars on the graph. This relevant period shows use in 2000 was 19 users using the route with that number rising to 27 by 2019. While it is likely others may have been using the route, this is the documented use that has been submitted in user evidence forms and only the evidence produced can be considered.

For context of the level of use that has been documented the population of the parish of Ogbourne St Andrew was 352 in 2001 and 417 in 2011.

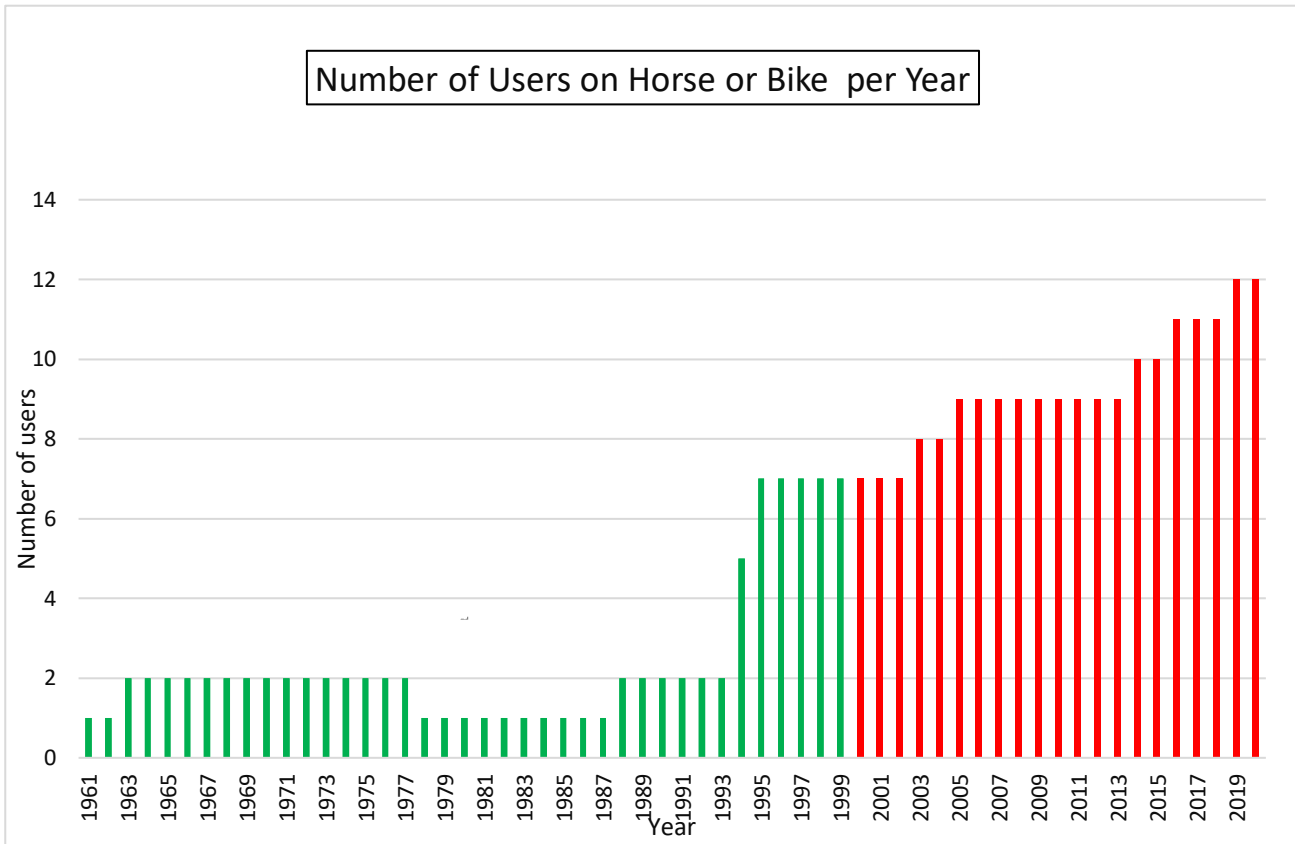
16.17 The frequency of this use must also be considered. In the relevant period between 19 and 27 people are using the route on foot in a manner which is as of right, that being without permission, force or secrecy. Of the 27 people using the route in the period 2000-2020, 23 of them during their period of use are using the route on foot at least weekly for at least part of their years of use. Every year there are multiple users using the route on a weekly basis on foot.

16.18 The level of use is a relevant consideration; the use of the route must be over the whole 20-year period and as the Planning Inspectorate DMMO consistency guidelines state at 5.15 *“Use should have been by a sufficient number of people to show that it was use by ‘the public’ and this may vary from case to case.”*

At 5.20 the guidelines also state in reference to user evidence *“In R(Lewis) v Redcar and Cleveland Borough Council UKSC 11(03 March 2010) Lord Walker said that if the public is to acquire a right by prescription they must bring home to the landowner that a right is being asserted against him.”*

16.19 The level of use recorded on foot demonstrates a consistent use by the public over the route in question for the last 20 years as of right, that is without force, permission or secrecy. The level and frequency of use meets the criteria set out in section 31 of the Highways Act 1980 and demonstrates that the route has at least public footpath rights over it.

16.20 Use in the manner of a Bridleway



The level of use of the route in the manner of a bridleway will now be examined. The table above demonstrates the number of users per year in the relevant 20 year period using the route in the manner of a bridleway, that is either on horseback or on a bicycle.

16.21 The graph shows the number of users using the route from 1961 through to 2020 either on horseback or on a bicycle. The relevant 20 year period is marked by red bars on the graph. It can be seen that the number of users on horseback or on bicycle is 7 in the year 2000 and that number rises up to 12 in the year 2020.

16.22 The numbers of bridleway users are clearly lower than those on foot, which may be expected as less people in general will own a horse or be able to ride a horse than are able to walk in the countryside. The frequency of use of the users using the route on horseback or on a bicycle must be examined. Referring to the table appended to this report documenting the use claimed by the users, the relevant users who claim use in the manner

of a bridleway are numbers 1,3,4,15,18,19,20,22,24,28,29 and 30. Their frequency of use can be seen in this table which will be examined in more detail.

16.23 The focus of the frequency analysis of the route will be on the relevant 20 year period from 2000 -2020. During this period , beginning in 2000, of those 7 users that are using the route on bicycle or on horseback 5 of them are using the route on at least a weekly basis if not more often. The two other users are using the route monthly or less in 2000. As time progresses in 2003 another user begins to use the route every few months on horseback. In 2005 user No. 20 Mrs Jimenez- Aldridge begins using the route daily on horseback. This level of use of at least 6 users either riding a bicycle or a horse on the route at least weekly if not more often continues through to 2014. In that year another user (user no.30) begins using the route 3 or 4 times a week on a bicycle. Use again increases in 2016 and 2019 with other users beginning to use the route on a bicycle, monthly and 2/3 times a week respectively. By 2020 at least 8 users are documented using the route on at least a weekly basis in the manner of a bridleway, with others using on a less regular basis. It is also noted that a large proportion of the users (of all types) saw other people using the route on a bicycle or horse back.

16.24 The frequency of the use claimed by these 12 users shows a regular consistent use of the route throughout the 20 year period. With use by multiple users on at least a weekly basis every year. This level of use in a rural area of the county is sufficient to bring home to the landowner that the route was being used and demonstrates public use of the route in the manner of a bridleway.

16.25 Whilst the focus of the analysis of use must be on the relevant 20 year period , the use pre 2000 on foot , bicycle and horse shows use of the route since the 1960s and adds to the reputation of the way as a route used in the area for recreational use over a number of decades.

16.26 At this stage of the process , i.e. the decision to make an order or not, the test is one of whether there is a reasonable allegation that rights subsist over the route subject to this application. From the analysis carried out of the user evidence it demonstrates that there is a reasonable allegation that bridleway rights subsist over the route.

17. **Objections**

17.1. As part of the consultation process the landowners and adjacent landowners were consulted. Emma Lavelle and the landowners Mrs Susannah O'Brien and Divers Trust Limited submitted objections to the application which can be seen at 8.6 through to 8.8 of this report. The objections are considered below.

17.2 Emma Lavelle's objection can be seen at 8.6 and within it she states she is a racehorse trainer who owns land adjacent to the application route. Ms Lavelle's main point of objection are the safety of her staff and horses with the potential increased use of the route if it were to be recorded as a public right of way as it is used as access to the adjacent gallops. She also says there have been other incidents with horses being chased by dogs and cyclists near the gallops. The points raised by Ms Lavelle of safety for her staff and horses and dogs near horses and people not following existing paths cannot be considered when reaching a decision to make an order or not. They can be sympathised with but only the legislation set out in section 31 of the Highways Act can be considered. Ms Lavelle raises nothing in her response to the consultation that demonstrates the route was used in any manner other than as of right by the users who have submitted evidence and she does not demonstrate the owners of the land made any effort to restrict or control use of the route.

17.3 Mrs Susannah O'Brien is a landowner directly affected by the application, her objection to the application can be seen at 8.7 of this report.

Within the objections she raises 4 points , those being there are other routes available, so the application route is unnecessary, the route would be dangerous with it being used by race horses, the way in which the applicant gathered the evidence and crime in the local area.

17.4 The first point raised may be true, there are other recorded rights of way in the vicinity but it can be seen the track subject to the application can offer another link to the other rights of way , creating more options for users, potentially shorter circular routes linking back to the village. It is clear why the track may have been used and that there are other options in the vicinity, ultimately this point of objection cannot be a relevant consideration when making a decision on the application , only the points of section 31 of the Highways Act 1980 can be considered.

17.5 The second point of objection raised safety concerns regarding the route being used and the potential conflict with racing horses , it being in close proximity to the gallops. This has been

considered in Emma Lavelle's objections and the same considerations apply here. It can be sympathised with but cannot be a relevant consideration when making a decision.

17.6 The third point of objection raised concerns the way in which the applicant Mrs Carolyn Davis gathered her evidence. Mrs O'Brien has supplied a copy of The Ogbourne St Andrew, Maisey and Rockley Newsletter no.67 in which the application was advertised. In which it is stated "the current landowners are happy for it to be used" Mrs O'Brien states she told Mrs Davis she objected to her application when it was discussed. Mrs O'Brien says this is therefore a misrepresentation and not fair, the implication suggested being that as a result of this people may have supported the order believing the landowners did not object and may have not if they knew the landowners objected. Also a permissive path was offered and rejected. Mrs Davis has clarified by email how she gathered evidence and supplied the following;

17.7 *"For your information, I attach the letter which I send out to people whom I thought might complete user evidence statements.*

I am about to embark on a project, the details of which are explained in the following article, which is destined for the next Parish Newsletter.

I would be grateful if you would be able to complete a "User Evidence Statement" which I will forward to you separately, together with a map indicating said track. The statement must be completed by one person only - but you are encouraged to print more off for other family members to complete - this is certainly a case of the "more the merrier". Please return completed statements to me at Bridleway Cottage, Ogbourne St Andrew.

The description of the route for upgrade is "the track of approximately 500 metres in length, leaves Ogbourne St Andrew byway 6 at Drove Barn and links up with Ogbourne St Andrew bridleway 29"

Thank you in anticipation of your support.

Carol

PROPOSED UPGRADE OF TRACK TO BRIDLEWAY

For many years (at least since the early 1960s and probably before) a large number of us have been using the track which links the Green Lane byway at Drove Barn to the Bridleway which comes up from St Andrew, before heading up alongside the round gallop towards the Horsemans Graveyard.

This link that we have been enjoying, is not a right of way, and although the current landowners are happy for it to be used, this may not always be the case.

Following the introduction of the Countryside and Rights of Way Act (2000) which determined that any historic footpath or Bridleway in England that existed before 1949 needs to be recorded on the Definitive Map by 2026, or it could be extinguished forever.

So conscious of this deadline, I am proposing, on behalf of the Parish Council, to apply for the link between the two existing rights of way, to be upgraded to a Bridleway.

I am confident of achieving the upgrade, but in order to substantiate the application, Public Rights of Way User Evidence Statements need to be completed. To this end, I have already started to email this document, together with a map of the area in question, to people whom I know use or have used the link.

The plan is to get as many User Evidence Statements completed as possible for me to present to Wiltshire Council along with the application.

If you haven't already received a User Evidence Statement for completion, and would like to support my application, please email me - davisian51@btinternet.com and I will forward one to you.

Carolyn Davis

- 17.8 Whilst it may be true some people may have not submitted user evidence forms if they knew the landowners would object we do not know if this is the case. The user evidence forms submitted are statements of truth signed by the individuals and the information within will be analysed as such as a record of the use of the application route, with clarification sought where required.
- 17.9 The fourth point of objection refers to crime and the potential this route being recorded could lead to more crime and people not known to the area using the route. It appears that the route has been being used already for many years and is surrounded by recorded public rights of way, so it would seem unlikely recording this track as a public right of way would directly result in an increase in any crime in the area. This however cannot be a relevant consideration to the making or not of an order.
- 17.10 In a later separate email exchange with Mrs O'Brien she has stated that in reference to the route her "*husband would stop people using it and it was rare to find anyone on it*". A challenge on the route is a relevant consideration as it would demonstrate the owner did not consent to use and was actively trying to disabuse use of the track. None of the users have stated they were ever stopped from using the route and as such it appears any efforts made to deter use was not made clear to the public that was the intention of the owner of the land. Until recently and throughout the relevant 20 year period (since the application was made a sign and gate have been erected on the route) the submitted evidence shows the route was

open and accessible with no signs indicating the way was private or to deter people from using the route.

17.11 All of the points raised in initial response to the consultation by Mrs O'Brien and the later comment regarding her husband stopping people using the route have been considered and discussed above. All of the issues raised except her husband challenging people on the route cannot be relevant considerations when making a decision on this application as only the legislation set out in section 31 of the Highway Act 1980 can be considered. The challenges her husband was making to people using the route is not reflected in the user evidence and appears to have not been communicated to the local users of the route. The numbers of people using the route on foot, bicycle or horseback on a frequent basis every week would indicate it is likely a landowner who was present on the route would have seen people using the route on a regular basis. The points raised in objection demonstrate the use of the route was in a manner as of right and do not demonstrate as a landowner Mrs O'Brien has obstructed or restricted use of the way or communicated to the public she did not intend on dedicating the way as a public right of way. She appears to have acquiesced to the use of the route, that is not to say she was actively encouraging use of the way or intended for it to be a recorded right of way but that she made no efforts to the contrary.

17.12 The third objection received was from Diver Trust Limited who are a directly affected landowner. The 8 bullet points identified in the objection can be summarised as referring to crime in the local area, safety and conflicts between users of the rights of way network and the gallops in the area and that the route is unnecessary due to the other rights of way in the area. These points have been covered in previous objections discussed above in this report. Whilst officers can sympathise with the conflict between the gallops and users including dogs and crime in the area this is not something which can be considered when reaching a decision on this case. Nothing within Divers Trust Limited response demonstrates any action has been taken by the landowner to communicate a non-intention to dedicate the way as a public right of way. It also does demonstrate that the users of the way , as claimed in the user evidence forms, were using the way in any other manner than as of right , in a manner to satisfy section 31.

17.13 Divers Trust have also submitted a landowner evidence form filled in by Catherine Burrell which can be seen at 8.8 of this report. Of note within this form is that Mrs Burrell states she saw people using the route but with permission and that she or someone on her behalf has turned people away from using the route, although no details of this are given as requested by the form. Other than the two users who stated they had permission to use the route ,

neither of whom got permission from any current landowner and not Mrs Burrell , nobody has stated they had permission to use the route. It may be that Mrs Burrell is referring to the race horses / trainers using the route to access the gallops that had permission but there is no further evidence of the general public having or requiring permission to use the route on a walk , cycle or ride. There is also no record within the user evidence of anybody being turned away from using the route during the relevant period.as stated by Mrs Burrell.

17.14. Mrs Susannah O'Brien has also been asked to fill in a landowner evidence form but she has stated she had trouble returning the form, assistance was offered but to date one has not been returned to officers.

17.15 Mrs Elizabeth Wright who submitted a user evidence form has since emailed stating that she now believes the route should remain permissive due to the problems recording the route may cause with illegal use by motor vehicles and that she is now aware the landowner does not support the application. This is noted and an email was sent in response asking if she would no longer like to present her evidence at a possible future public inquiry but no response has been received. As Mrs Wright did not state that her user evidence form was incorrect, just that she no longer supports the application, her evidence of regular use of the way has been included in the analysis.

18. Landowner's intention

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

"...in order for there to be "sufficient evidence there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the public who use the path...that he had no intention to dedicate. He must

in Lord Blackburn's words, take steps to disabuse these persons of any belief that there was a public right..."

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

*"...the cogent and clear analysis of Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB at 458, quoted by Lord Hoffman, clearly indicated that the intention referred to in the proviso to section 1(1) of the 1932 Act was intended to be a communicated intention. That analysis was accepted and recorded in textbooks and it was followed and applied in cases identified by Lord Hoffman by High Court Judges and by the Court of Appeal for the subsequent forty years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section (1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1980 Act."*

Lord Hoffman went on to say at paragraph 32:

*"I think that upon the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way would reasonably have understood the owner's intention to be. The test is...objective: not what the owner subjectively intended not what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* (1885), to "disabuse" [him] of the notion that the way was a public highway."*

18.3. Under section 31(6) of the Highways Act 1980, landowners can deposit statements and declarations with the Highway Authority acknowledging public rights of way across their land and stating that, at that time, they have no intention to dedicate any further public rights of way. No record of any deposit made under section 31(6) has been found affecting the land and the landowners do not claim to have made one. Deposits could also be made under the 1932 Rights of Way Act. The deposits made under the 1932 Act have also been checked and no such deposit has been found affecting the land at Ogbourne St Andrew subject to this application. No signs or notices are claimed to have been erected by the landowners during the relevant 20 year period or any time before that to deter use or state that they were not dedicating the way as a right of way. It is noted that a sign has now been erected on the bank next to the track in question stating, "PRIVATE LAND NO PUBLIC RIGHT OF WAY" . This sign appears to have been erected since the application was made and as such is not a relevant consideration. If a sign is erected and torn down a landowner can give notice to the

Highway Authority under section 31(5) of the Highways Act this has occurred, no record of any such notice affecting the land in question has been found or claimed.

18.4 The two landowners have claimed that challenges have been made to people using the route, Mrs Burrell has not provided any further details of these challenges and Mrs O'Brien has stated her husband turned people away. The user evidence records no challenges on the route to the users although one user does state they have heard a previous owner stopped a walker. No physical blockages in terms of signage or obstructions are recorded or evidenced on the route prior to this application. It is noted since the application signage and a field gate have been erected across the route. The landowners have not demonstrated by their actions or lack of an intention to not dedicate the way as a public right of way. One user did gain permission to use the route in 2000, that user has stated he gained permission from Mrs J Green who was part owner of a stable yard at the time. Mr Matthews has stated "*The request came about casually on an occasion when we spoke in her stable yard*". It does not appear to have been an overt action by the then part owner Mrs Green that she was actively ensuring or insisting anyone using the route had permission but that Mr Matthews asked as they were in conversation in the stable yard. No other users have stated they had permission to use the route or were challenged when using the track. The landowners appear to have acquiesced in the use of the track and made any efforts to communicate they had any intention to not dedicate the way as a public right of way was not communicated to the users of the way at large. If the owners wished to do so they had the ability to do so by erecting signage or a gate, as has now erected, depositing a section 31(6) notice or making their efforts of challenge known throughout the small rural community.

19. Width

19.1. The evidence has demonstrated that a route not shown on the definitive map and statement should be shown. If an order is made to record this path the route and width of the path has to be considered.

19.2. The 31 users who filled in a UEF were asked the width of the route in the form. The answers given vary from a minimum of 2 metres up to 5 metres. The most common answers were "tractor width" or "farm machinery width" with 8 people stating that or similar. The next most common answer was 3 metres wide with 7 people stating that. Only 7 people state the width was less than 3 metres (1 stated "don't know"). The route follows a constructed track and the route was being used by horses and multiple people the whole of the track will have been

used, as such the width of the track would be an appropriate width to record for the width of the route, which the users answers also reflects.

19.3 Taking into account both the physical track and the answers given by the user evidence forms the recorded width for the right of way will be 3 metres.

20. Common Law Dedication

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

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

A highway can be created at common law by a landowner dedicating the land to the public for use as a highway, either expressly, or in the absence of evidence of actual express dedication by landowners, through implied dedication, for example making no objection to overt public use of the way. It also relies upon the public showing their acceptance of the route by using the way. Whilst the principles of dedication and acceptance remain the same in both statute and common law, there is a significant difference in the burden of proof, i.e. at common law the burden of proving the owners' intentions remains with the applicant. Whilst it is acknowledged that dedication of the route as a public highway may have taken place at common law at some time in the past, it is recognised that in practice evidence of such dedication is difficult to obtain and it is then more usual to apply Section 31 of the Highways Act 1980.

20.2. In this case I do not believe the landowners' actions have expressly dedicated the way as a highway. It could be argued the landowners' lack of objection to use of the path by not taking any action to express their intention not to dedicate way as a highway could lead to there being a case at common law. However, the use by the public is of a level that section 31 will be relied upon for the making of the order.

21. Conclusion

- 21.1 The law requires that any evidence of there being rights not currently recorded on the definitive map and statement must be shown on the balance of probabilities. This means that it is more likely than not that something is shown. To make an order to record public rights the evidence has only to form a reasonable allegation. However, to confirm the order the legal test is stronger i.e. on the balance of probabilities.
- 21.2 As there appears to be no historic documentary evidence the route has had public rights over it in the case fully relies upon section 31 of the Highways Act to establish a public right. The route must have been used over a 20 year period by the public, with permission, secrecy or force. The landowner can defeat such a claim by proving they made their non intention to dedicate the way as a public right of way. This can be achieved in a number of ways, a deposit can be made on land under the Highways Act 1980, section 31(6). Under this section landowners can deposit statements and declarations with the Highway Authority acknowledging public rights of way across their land and stating that, at that time, they have no intention to dedicate any further public rights of way. A landowner may also erect signage to indicate to the public the way is private and not a public right of way. Further to this if this signage is torn down a landowner may give notice to the Highway Authority under section 31(5) of the Highways Act 1980 that that has occurred. A landowner could also willingly obstruct the route to the public or consistently challenge the use of the route by the public.
- 21.3 This application to add a bridleway to the definitive map and statement in the parish of Ogbourne St Andrew has in total 31 user evidence forms from members of the public claiming to use the application route. Examination of these forms has led to some clarifications being sought. The analysis of the evidence in section 16 of this report presents the evidence post the clarifications and is therefore an accurate analysis of the evidence available to officers at this time. A total of up to 26 users on foot and 12 on a bicycle or on horseback are using the path as of right during the relevant 20 year period. The use on foot and on bicycle or horse back has been on a regular basis throughout the 20 year period, 2000-2020, to demonstrate a right was being asserted on the route in question.
- 21.4 The landowners' actions must be considered and if they have taken any steps to disabuse the public that were using the route they were not intending to dedicate the route as a public right of way. In this case no section 31(6) deposit covers the land, no record of any signage on the route is available or has been presented by the landowners (signage has since been erected) and therefore no section 31(5) has been served to Wiltshire Council. Mrs O'Brien has stated her husband challenged people on the route and Mrs Burrell has stated people were challenged on the route. These challenges are not recorded by any of the user

evidence and no other action has been taken that demonstrates the owners had an issue with people using the route. The use of the way increases as the years progress indicating the way was used by at least the local population openly over many years and no evidence of a reputation that use of the way was contentious has been presented.

21.5 In conclusion the landowners have not demonstrated that they communicated to the public their non intention to dedicate the way as a public right of way , which is what must be considered. It may not be the case that the landowners were actively seeking to dedicate the route as a right of way but they have not taken appropriate actions to communicate to the public that were using the route it was not a public right of way. The mechanisms to do so are available to any landowner but in this case they have not been undertaken. .

21.6 The application is for a public bridleway and as such the route must be used in the manner of bridleway to satisfy section 31 to record it as a public bridleway. The level of use on horseback or on a bicycle is lower than on foot but still is at a level , between 8 and 12 users , that for the area is of a sufficient level to demonstrate the route was being used in the manner of a public bridleway. The frequency of the use by those users on horse back or on bicycle , as discussed at section 16.17 , is of a level over the 20 year period to form a reasonable allegation that bridleway rights subsist and as such the way should be recorded as a public bridleway.

21.7 Having considered all the available evidence, officers conclude that that a right for the public on horseback and on bicycle subsists over the land in question and that there is no incontrovertible evidence that such a right does not exist. The evidence submitted in the user evidence forms shows the way was used in a manner that was without permission, force or secrecy by a proportion of the public on foot, horseback and on bicycle. The landowners' have submitted no evidence which demonstrates they communicated to the public they did not intend to dedicate the route as a public right of way. At this time officers believe the evidence demonstrates a reasonable allegation that a bridleway should be recorded on the definitive map and statement. They therefore consider that Wiltshire Council have a duty to make a Definitive Map Modification Order.

21.8 Making an order to record the route as a public bridleway on the definitive map and statement allows, if statutory objections are made to the order and are not withdrawn, for the

order and the evidence to be considered by an independent inspector appointed by the Secretary of State.

22. Overview and Scrutiny Engagement

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

23. Safeguarding Considerations

Considerations relating to the safeguarding of anyone affected by the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

24. Public Health Implications

Considerations relating to the public health implications of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based only on the balance of probabilities determined by the relevant evidence.

25. Environmental Impact of the Proposal

Considerations relating to the environmental impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based only on the balance of probabilities determined by the relevant evidence.

26. Equalities Impact of the Proposal

Considerations relating to the equalities impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based only on the balance of probabilities determined by the relevant evidence.

27. Risk Assessment

27.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety.

- 27.2 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.
- 27.3 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.

28. Financial Implications

- 28.1. The determination of definitive map modification order applications and modifying the definitive map and statement of public rights of way accordingly is a statutory duty for the Council. The costs of processing such orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.
- 28.2. Where no definitive map modification order is made, the costs to the Council in processing the definitive map modification order application are those required by the statutory administrative procedures.
- 28.3. Where a definitive map modification order is made, and objections received which are not withdrawn, the order falls to be determined by the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA). An Independent Inspector appointed on behalf of the SoSEFRA will determine the order by written representations, local hearing or local public inquiry, which have a financial implication for the Council. If the case is determined by written representations the financial implication for the Council is negligible, however where a local hearing is held, the costs to the Council are estimated at £200 - £500 and a public inquiry could cost between £1500 - £3000, if Wiltshire Council supports the order (where legal representation is required by the Council) and around £200-£500 if it does not support the order (i.e. where no legal representation is required by the Council as the case is presented by the applicant). Any decision taken by SoSEFRA is liable to challenge in the High Court, the council would bear no financial burden at this stage as the decision has been made by the SoSEFRA.

29. Legal Considerations

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

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

30. **Options Considered**

To:

- (i) Refuse to make a definitive map modification order, under Section 53 of the Wildlife and Countryside Act 1981, where it is considered that there is insufficient evidence that a right of way for the public on foot, on horseback or bicycle subsists or is reasonably alleged to subsist, or
- (ii) Where there is sufficient evidence that a right for the public on foot subsists or is reasonably alleged to subsist, the authority is required to make a definitive map modification order to add a footpath to the definitive map and statement of public rights of way, under Section 53 of the Wildlife and Countryside Act 1981.

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

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

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

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

To confirm the Order, a stronger test needs to be applied; that is, essentially that contained within Test A. In *Todd and Bradley v SoSEFRA [2004] EWHC 1450 (Admin)*. Evans-Lombe J found that the appropriate test for confirmation is the normal civil burden of proof that such a way subsists on the balance of probabilities.

Test B is the weaker test and only requires that 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.

31. Reasons for Proposal

It is considered that there is sufficient evidence to meet test B to make an order, which is the test being considered by officers at the order making stage. As described in the above paragraph 30.2 that a public right on foot, horseback and bicycle exists over the route in the parish of Ogbourne St Andrew subject of this application and subsequent investigation. The user evidence supplied demonstrated 20 years of uninterrupted use of the route in the relevant period to satisfy section 31 of the Highways Act. This evidence demonstrates bridleway rights should be recorded over the track subject to the application. Officers believe test B has been met as the evidence demonstrates it is reasonable to allege that on the balance of probabilities the existence of a public bridleway over the route subject to this application in the parish of Ogbourne St Andrew.

32. Recommendation

That Wiltshire Council makes a definitive map modification order to record a public bridleway to be known as bridleway Ogbourne St Andrew 38. The bridleway is to be recorded in the parish of Ogbourne St Andrew leading north west and then north east and then north west

from Byway Ogbourne St Andrew 6 (OSTA6) to its junction with bridleway OSTA29 with a recorded width of 3 metres.

Craig Harlow

Definitive Map Officer

2nd November 2020

Appendix 1 – User evidence forms table