

Wildlife and Countryside Act 1981 s.53 APPENDIX 2
**Application for an Order to Add Public Rights of Way to the Definitive Map
and Statement**

Chittoe Plantation, Bromham

Decision Report

1 The Application

1.1 Details

Application number:	2009/03
Application date:	18 th March 2009
Applicant:	Mr N Thomas Yew Tree House 55 Horsepool Bromham Chippenham Wiltshire SN15 2HD
Application to:	Add the footpath leading from the western and north western edge of CHITTOE PLANTATION through and around the plantation as shown marked red on the plan.
Width:	Approximately 2 metres
Basis of application:	That public rights exist and that the route should be recorded in the definitive map and statement.
Application contents:	Form 1 Notice of Application for Modification Order (18.03.09) Form 3 Certificate of Service of Notice of Application for Modification Order (18.03.09) Notice served on: Mr and Mrs J Seed, Wayside Lodges, Chittoe Heath, SN15 2EH B.C.H. UK Ltd, Irnham Grange, Irnham Road, Corby Glen, Grantham, Lincolnshire NG33 4NE Form 3 Certificate of Service of Notice of Application for Modification Order (6.11.09) Notice served on: Blue Haze Corp. PO Box 3162, Woodbourne Hall, Road Town, Tortola, BVI c/o Bircham Dyson Bell, 50 Broadway, Westminster, London, SW1H 0BL 1:5000 plan showing claimed paths in red 17 User evidence forms and maps with application plus 5 further forms and maps subsequently. Total user evidence submitted = 22 forms and maps.
Date of Schedule 14 Compliance:	06.11.09

1.2 Legal Empowerment:

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

The Wildlife and Countryside Act 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.*

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 over such that the land which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.

Section 53(5) 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.

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*

Sub-paragraph 2 describes what may happen if the owner or occupier of the land can not be traced.

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.

Following recent case law popularly known as 'The Winchester Case' ([2008] EWCA Civ 431) the Lord J Ward, Dyson and Thomas found that **if** the outcome of an application turned on the application of Section 67(3) of the Natural Environment and Rural Communities Act 2006 (NERC Act 2006) then strict compliance with Schedule 14 would be required in respect of the presentation of "copies of any documentary evidence ...which the applicant wishes to adduce in support of the application". This is required in Section 67(6) for Section 67(3) to apply.

However Dyson J, in paragraph 55 of his decision went on to say:

"I wish to emphasise that I am not saying that, in a case which does not turn on the application of section 67(6) it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the "trigger" for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3)"

Advice received from the Department for Environment, Food and Rural Affairs (DEFRA) on 2nd June 2008 confirms that surveying authorities retain the power to waive strict compliance where the case does not turn on the application of Section 67(3)(a) or (b) NERC Act 2006. This case is not affected by NERC Act 2006.

Officers consider that while this application did not meet strict compliance when made, owing to the failure of the applicant to serve notice on the owner of the freehold, this did not cause undue prejudice (as the land is leased under the terms of 999 years leases). The application was made fully compliant in November 2009 when notice was served upon the freehold reversioner. Officers also note that even without compliance the evidence contained within this application was considerable under the Council's own duty to keep the map and statement under continual review.

1.3 The claimed routes



1.4 Description of claimed routes

The claimed routes are within an area of woodland called Chittoe Heath Plantation in the parish of Bromham. A principle point of entry from the public road is at OS Grid reference ST9651 6672, a point opposite a car parking area at land which is known locally as 'the common' (it is however not registered as such).

The claimed route leads in an east north easterly direction through the woodland to the north of a line of properties, approximately 10 yards short of the eastern boundary fence the claimed route leads north north west keeping approximately 10 yards from the eastern perimeter fence where it either leads south west and south south west to form a perimeter path in the woodland or exits the woodland at two points along the north western boundary, which is a cul-de-sac public road, the u/c7018. There are also a number of claimed 'cross tracks' linking with the perimeter route.

2 Historical Context

2.1 Chittoe Heath Plantation

Chittoe Heath Plantation is a small area of woodland situated in the former parish of Chittoe. Chittoe was added to Bromham parish as a former tithing of Bishop's Cannings in 1934¹. All rights of way that are recorded in the definitive map and statement in the former parish of Chittoe are recorded as paths in Bromham Parish, the definitive map and statement post dating the parish boundary change by nearly 20 years.

Bromham parish is remarkable in Wiltshire as being the only extensive outcrop of lower greensand offering very fertile soils and was the seat of the Baynton family. Their large residence was destroyed during the English Civil War when in 1645 it was burnt down by Royalist troops. Instead of re-building the property at its original location (now the site of Bromham House Farm) Sir Edward Baynton built a new property at Spye Park. The present house dates from the 19th century and was the family seat of the Spicer family from 1864 until the sale of the estate in 2005 to the Blue Haze Corporation.

Spye Park is an extensive estate encompassing parkland, houses, farms and woodlands. It is especially well wooded and in 1939 extended to over 500 acres of woodland.

Chittoe Heath Plantation forms part of this extensive estate and the freehold of the land is retained by the current owners of the estate although the plantation is held on 999 year leases.

It is known from maps produced by the Ordnance Survey that Chittoe Heath Plantation was wooded in 1885 but was not wooded in 1773 when recorded by John Andrews and Andrew Dury as "Chitway Heath" in their Map of Wiltshire of that date. An excerpt of this map is reproduced on page 6, the white arrow pointing to the site of the plantation. Although the area of heath now known as Chittoe Heath Plantation was not planted with trees at this time the northern and western boundary roads were in existence though the map suggests that the southern Chittoe Heath road is possibly a later addition.

The Ordnance Survey 1" to one mile map ("Old Series") published in 1817 also shows the area as Chitway Heath and records that it was not wooded when the area was surveyed (1808 -1812). The southern road is however shown with one building along it.

In summary, the area of Chittoe Heath plantation was defined by 1817 and was planted as woodland some time between then and 1885. These woods were part of the Spye Park Estate but in 1954 they were leased to the Ministry of Agriculture, Fisheries and Food for a period of 999 years and were managed by the Forestry Commission until the lease was sold in 1992 to Bratton

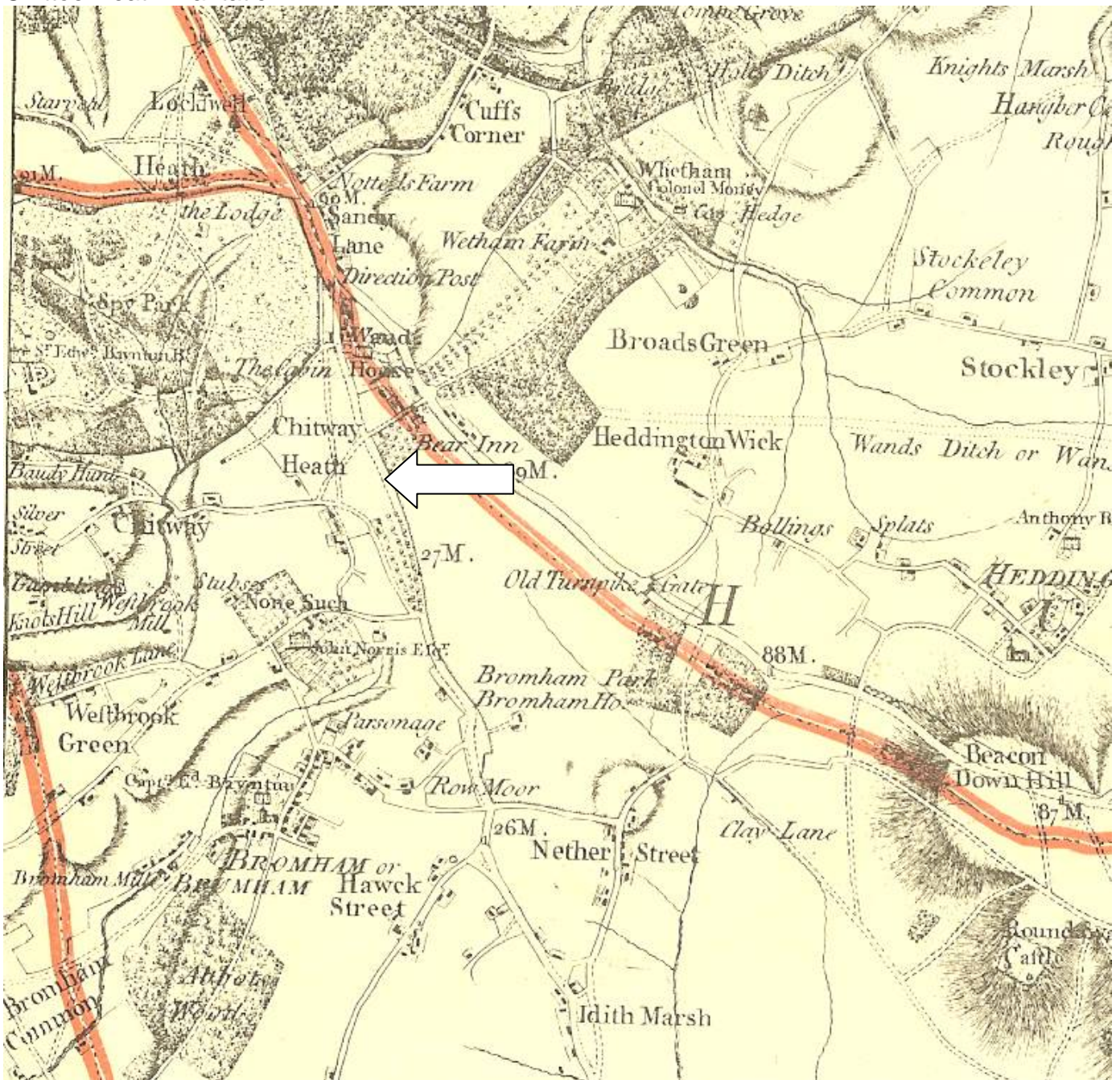
Limited. Bratton Limited sold the lease to BCH UK Ltd in 2002 who divided the plantation, retaining a small section (WT118032) and selling the lease on the remainder (WT 277081) to Mr and Mrs J Seed in 2008. Please see summary table below.

Ownership of Freehold	Ownership of Leasehold
Part of Spye Park Estate – Spicer 1864 – 2005	Original lease 27.08.54 to 1992 Ministry of Agriculture, Fisheries and Food
Part of Spye Park Estate – Blue Haze Corporation 2005 to date	1992 – 2002 Bratton Limited (thought to have been managed by Fellowprice Ltd)
	22.08.02 BCH UK Ltd
	11.12.08 plantation divided and lease for WT 277081 sold to Mr and Mrs J Seed

Plan showing land leased to Mr and Mrs Seed edged in green. Remaining section at south western corner lease retained by BCH UK Ltd



Excerpt from Andrews' and Dury's Map of Wiltshire 1773 White arrow points to site of Chittoe Heath Plantation



¹Victoria County History Vol VII

2.2 Tracks, paths and Woodland management

The Ordnance Survey's 1:2500 County Series maps provide a record of physical features from the time of their original survey (1885 for these map sheets) through a series of revisions to the mid 1930s and have been viewed. Later 1:2500 plans based on the national grid (reconstituted from former County series plans and revised) have also been viewed.

Chittoe Heath Plantation is shown on two sheets, Sheet 33.4 and Sheet 26.16. It is shown on Sheet ST96(66) for grid series maps.

Maps were viewed to see whether any paths through or around the woodland had been recorded by surveyors, what degree and type of planting existed and whether any other features were represented that are not visible today.

²Instructions to surveyors from 1883 onwards (Southampton Circular 16th February 1883) were that footpaths were shown by 'F.P.' the object being that the public may not mistake them for roads traversable for horses or wheeled traffic and in 1893 (Southampton Circular 7th July 1893) surveyors were instructed to show not only public F.P.s but also "private footpaths through fields if they are of a permanent character, these will generally be indicated by their being made or gravelled", however it was stated that "mere convenience footpaths for the use of a household, cottage or farm...should not be shown...Private paths in woods should not be shown".

From 1963 onwards the Ordnance survey represented not only types of tree (coniferous, non-coniferous, coppiced or scrub) but also the density of cover. The density is indicated (except for coppice) according to how far apart the trees or bushes are; 'close' (less than 5 metres), 'medium' (5-17 metres), 'open' (over 17 metres) and 'scattered' (Instructions for detailed survey, revision and examination of large scale plans 1963, Ordnance Survey). ³Hence 4 trees drawn together is 'close', 3 trees drawn together is 'medium', 2 trees drawn together is 'open' and single trees in a plantation are 'scattered'. Other conventions applied regarding paths, tracks and fences of a temporary nature were not shown.

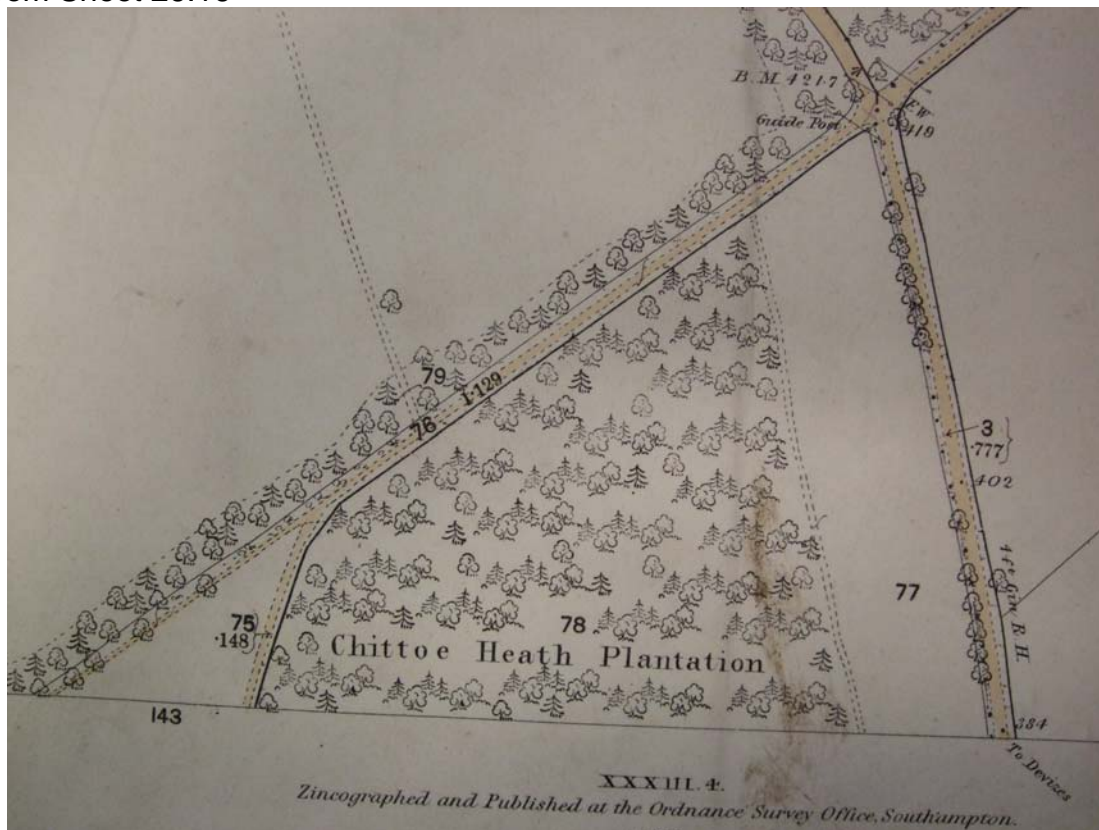
² Ordnance Survey Maps A Concise Guide for Historians Richard Oliver ISBN1 870598 24 5

³ Ordnance Survey Maps A Descriptive Manual J B Harley HMSO

Ordnance Survey 1:2500 First Edition 1885 Sheets 33.4 and 26.16

Chittoe Heath Plantation is named and shown as an area (parcel number 78) of Mixed Wood. An unfenced track is shown leading from north to south along the eastern boundary of the plantation. It does not carry the letters F.P. The roads surrounding the plantation are shown shaded and coloured sienna as metalled public roads.

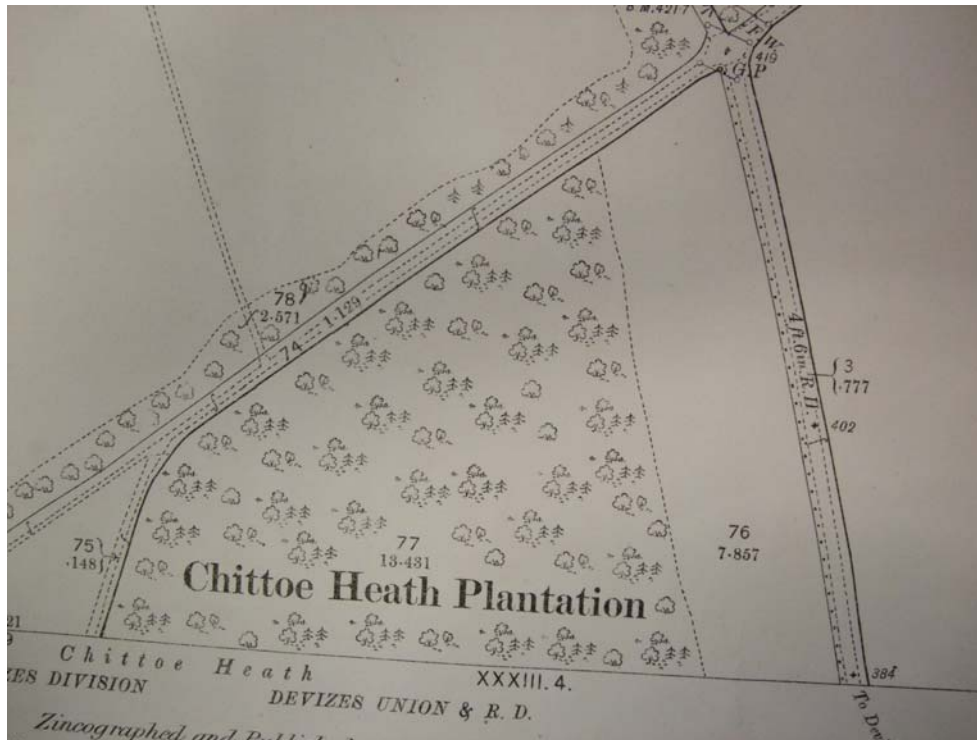
Excerpt from Sheet 26.16



Ordnance Survey 1:2500 Second Edition 1901 Sheets 33.4 and 26.16 revised 1899

Chittoe Heath Plantation is named and shown as an area (parcel number 77) of mixed woodland. The track that was shown in the First Edition of 1885 is represented by just one pecked line to show the limit of a clearing.

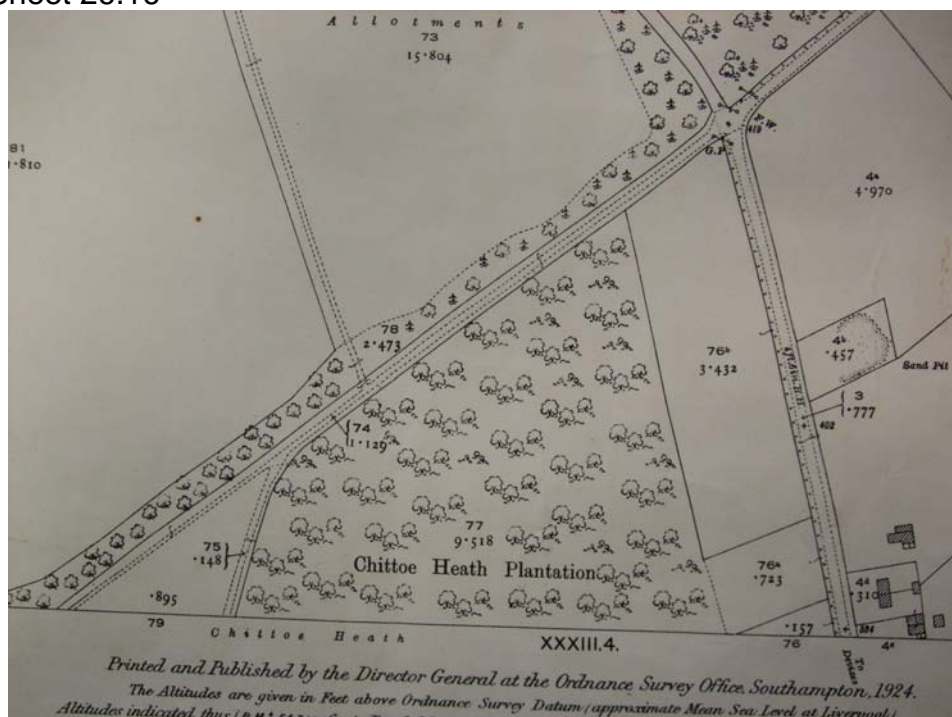
Excerpt from Sheet 26.16



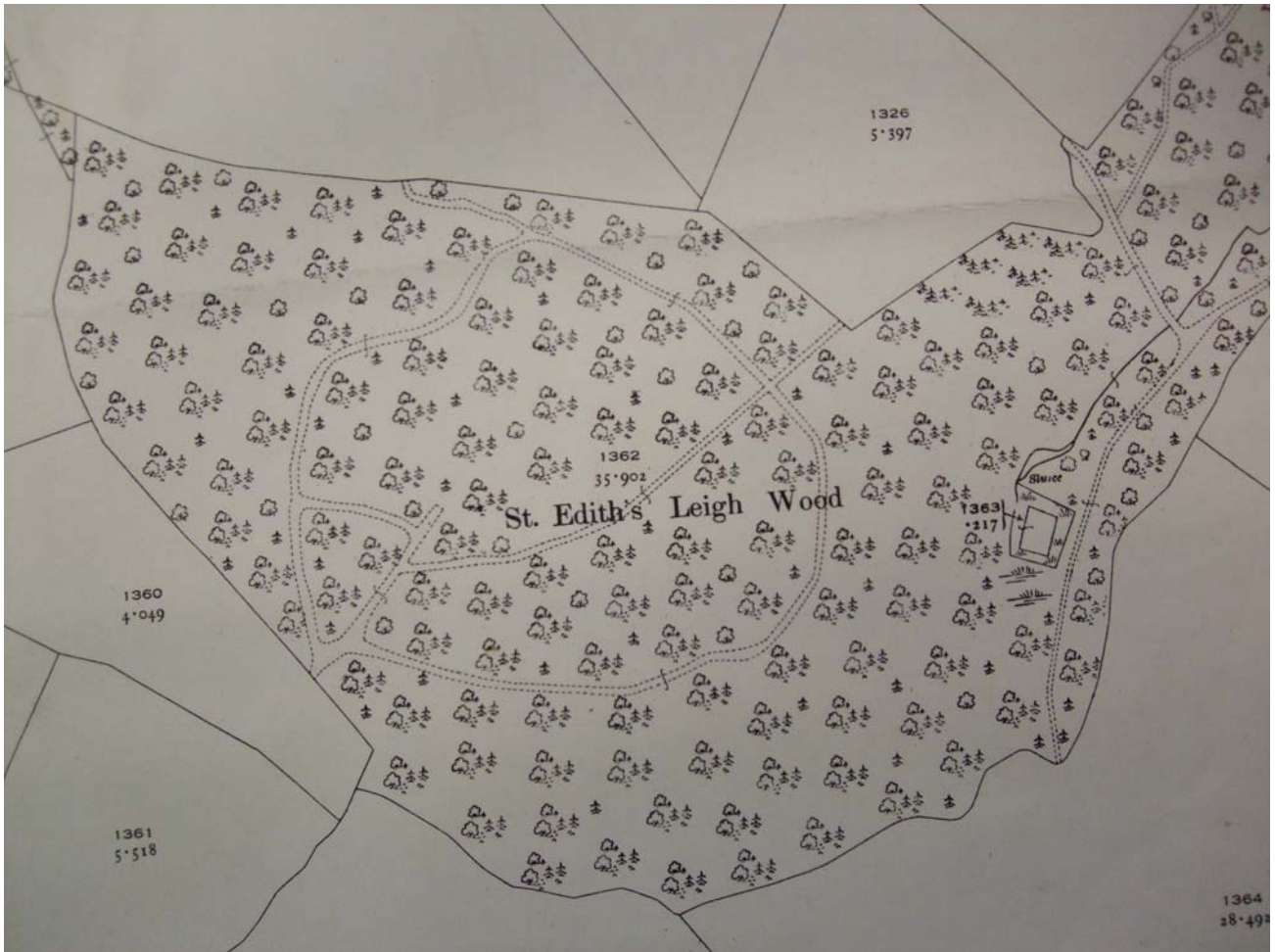
Ordnance Survey 1:2500 Edition of 1924 Sheets 33.4 and 26.16 revised 1922

Chittoe Heath Plantation is named and shown as an area of non-coniferous woodland and scrub. The land to the eastern boundary is shown fenced into one larger parcel (76b) and one smaller enclosure which remains open to the side of the woodland (76a).

Excerpt from Sheet 26.16



It is noted that an area of woodland to the north of Chittoe Plantation, St Edith's Leigh Wood is shown on the Edition of 1924 1:2500 Sheet 26.16 as having a significant number of tracks leading through it. However it is likely that these tracks formed permanent features and were in all likelihood stoned.



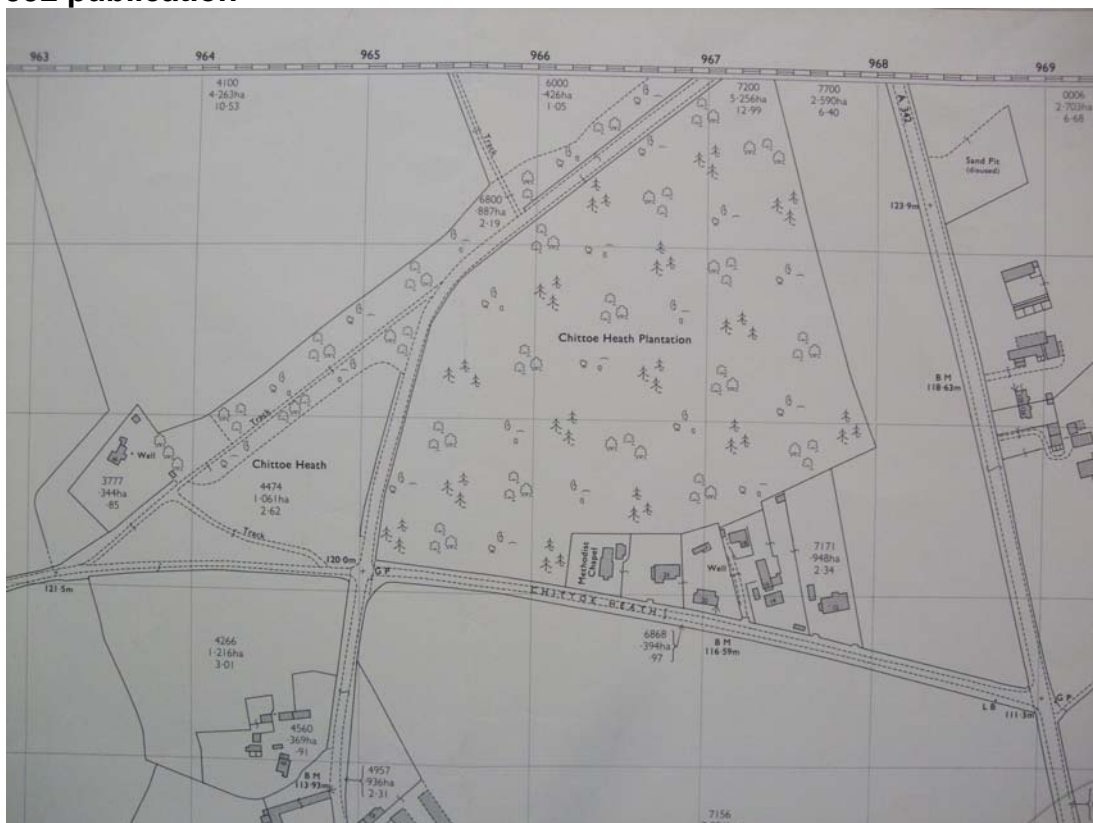
Ordnance Survey 1:2500 Grid Series Maps

2 of these maps were viewed, one from 1973 and the other from 1992. Both maps show the woodland as Chittoe Heath Plantation, a fenced area of mixed woodland. The density of planting is 'medium' (one tree every 5 to 17 metres) and there are areas of scrub shown distributed throughout the woodland approximately on the lines of the claimed routes. No paths are shown in the woods and the land to the east had, by 1971, become one fenced field.

ST9666-9766 Printed 1973 Revised from former County Plans Nov 1971



ST9666 1992 publication



Early estate maps dating from 1807, 1809 and 1812 (Wiltshire and Swindon History Centre 574\287, 574\288 and 574\289) do not show any planting on Chittoe Heath though an undated map associated with tithe surveys of the late 1830s/1840s does show the area planted.



Very little evidence of woodland management has been found. Ordnance Survey maps suggest that mixed woodland was planted at some time in the mid 1800s (possibly coincidental with the Spicer family's ownership of Spye Park Estate) and that there was clearance of coniferous species between 1899 and 1922 (again possibly coincidental with First World War demand). Maps suggest that some coniferous species were re-established by the early 1970s (possibly as a result of Forestry Commission involvement) but that a considerable amount of the woodland was 'scrub'.

A track along the eastern edge of the woods did exist in the late 1800s but by 1922 had ceased to be recorded as a feature.

The Forestry Commission (holders of the lease from 1954 to November 1992) wrote to Wiltshire Council on the 23rd December 2009 saying that regrettably due to changes in staff they were unable to confirm any specific details of the public in the wood or repairs to fences.

Local people suggest that some work was done in the woodland by students from Lackham College but officers have been unable to confirm this with the college.

A representative of the leaseholder (BCH UK Ltd) from 1992 to 2008 does report looking at replanting some trees in 2002 but makes no further mention of woodland work.

Having viewed the historical evidence officers consider that Chittoe Heath Plantation has never had any paths represented in it and has been recorded as fenced on all sides since 1922 albeit with two stiles since at least 1943 (see witness evidence). The track along the eastern edge was in place in the late 1800s but had ceased to be recorded by 1922. There has therefore been no evidence found to date to support that any historical paths existed through this woodland and the claim that public rights exist must therefore be determined by examination of the evidence of recent users submitted.

2.3 Additional information relating to Chittoe Heath west of the plantation

The presence of Chittoe Heath to the west of the plantation is mentioned by several witnesses who also walk there, exercise their dogs and use the hard standing area by the cross roads for car parking. This open area is not registered as common or town or village green though it would appear to be used as such. Officers noted that while searching for evidence of historical public rights at Chittoe Heath Plantation that the Field Notebook compiled by the Inland Revenue's valuer in respect of Chittoe Heath (OS parcel number 79) described Chittoe Heath as follows:

Situation: Chittoe Heath
Description: Recreation Ground
Extent: 3-3-0
Occupier: Trustees Recreation Ground
H Barten, address difficult to read, Bromham
Rev W Wolfenden, Chittoe Vicarage, Chittoe
J Baker, The Gardens, Spye Park
Capt J C P Spicer, Spye Park, Chittoe

Particulars: Land, given as Recreation Ground to parish of Chittoe ?? 79 O.S. ? (hard to read)
Situation: Charges, easements and restrictions affecting market value of fee simple: Public Right of User £100

The Field Notebook is held at The National Archive, Kew ref IR58/73254 entry no 772.

This document is clear that the land given to the public for general recreational use extended only to the 3.03 acres of OS parcel number 79 (the open heath) and not to Chittoe Heath Plantation (parcel number 77), however the presence of an adjacent public recreation space is significant for considering the context of the claimed use of the adjacent cul-de-sac road and plantation.

2.4 Additional information relating to the u/c7018

The road that leads along the north western and northern boundary of Chittoe Heath Plantation is recorded as a highway maintainable at public expense and is recorded as the u/c7018. Prior to 1966 the route formed part of the B3102, a through route linking to the A342 at a cross roads with the now A3102 to Calne. Public vehicular rights were stopped up for a short stretch leading to this cross roads by a S.108 Order made under the Highways Act 1959 but public rights on foot and on horseback (or leading a horse) were retained. The route effectively became a cul-de-sac highway at this date and is today extensively used for parking and recreational activities.

2.5 Aerial Photography

Aerial photography can be a useful aid when determining the line of path on the ground or on the presence of physical features in the landscape. It is of no value in determining whether the *public* used a route or way.

Aerial photographs of Chittoe Heath Plantation taken in 2006 and 2001 have been viewed. All photographs are taken during summer months and tree cover is too dense to determine whether there are any visible paths on the ground. An aerial photograph taken in 2006 is reproduced on page 13 demonstrating this.



Chittoe Heath Plantation 2006

3.0 Consultation and correspondence

3.1 Pre-investigation correspondence

Wiltshire Council received the application on the 18th March 2009 and acknowledged receipt on the 19th March 2009. Although officers were not in a position to deal with the application correspondence relating to it commenced on the 19th March 2009 with an enquiry from Wiltshire Council's relevant portfolio holder, Miss F de Rhe-Phillipe. On the 27th March 2009 a letter was received from Wansboroughs Solicitors objecting to the application on behalf of Mr and Mrs Seed. On the 8th April 2009 a local resident, Mr C Smith wrote to the Council objecting to the application on the grounds that he did not consider public rights had accrued and that there was no need for the right of way. Bromham Parish Council wrote to the Council on the 25th April 2009 objecting to the application on the grounds that it would not link up with existing footpaths and was detrimental to this area. On the 1st December Mogers Solicitors acting for Blue Haze Corporation wrote stating that the land is and always has been private property in respect of which no public rights exist.

Points raised will be addressed with other post consultation correspondence.

3.2 Initial Consultation

As part of the evidence investigation process an initial consultation was carried out. This was in the form of a letter dated 2nd December 2009 (reproduced below) giving the date for responses to be received by as the 5th February 2010. In practice this was extended to the 19th February at the request of Mr J Seed.

Wildlife and Countryside Act 1981 Section 53

Application for an order to add public footpaths to the definitive map and statement at Chittoe Plantation, Chittoe Heath, Bromham

On the 18th March 2009 Wiltshire County Council received an application for an order to be made that would record public footpaths at Chittoe Plantation, Chittoe Heath. The claimed paths are shown in red on the attached plan.

As part of the Council's investigations into whether public rights exist over this land as claimed, an initial consultation is carried out. I would therefore be grateful if you have any evidence that either supports that the public have used the claimed paths 'as of right' (that is without force, without secrecy and without permission) in the past (especially the period from 1989 to 2009) or that disputes this claim, that you could bring this evidence to the Council's attention by Friday 5th February 2010.

Any written evidence or perhaps photographs that relate to the perimeter fencing, entry or exit points into the woods, any signs erected on the land in the period leading up to January 2009 or the routes themselves would be especially relevant. Supporting statements or objections relating to desirability, the environment, health and safety or security are not relevant to this application.

The application is supported by the written evidence of 22 witnesses and witnesses are also invited to make any additional comments at this time.

This letter was sent to the following addresses:

Blue Haze Corp. c/o Bircham Dyson Bell 50 Broadway Westminster SW1 0BL	Oliver Price Wansbroughs Solicitors Northgate House Devizes SN10 1JX	Derwent Campbell Mogers Solicitors 24 Queen Square Bath BA1 2HY
Mr N Thomas Yew Tree House 55 Horsepool Bromham Chippenham Wiltshire SN15 2HD	Mrs R J Humphries Clerk to Bromham Parish Council 3 Roughmoor Cottages Bromham Chippenham SN15 2DU	Commons, Open Spaces & Footpaths 25a Bell Street Henley-on-Thames Oxfordshire RG9 2BA
Mr and Mrs J Seed Wayside Lodges Chittoe Heath Bromham Wiltshire SN15 2EH	Mr and Mrs C Smith Closeberries 89 Chittoe Heath Bromham SN15 2EQ	Mrs R Cunningham Wiltshire Bridleways Association Staddlehouse Charlton St Peter Pewsey SN9 6EU
The Company Secretary BCH UK Ltd Irnham Grange Irnham Road Corby Glen Grantham Lincolnshire NG33 4NE	The Secretary General ACU House Wood Street Rugby Warwickshire CV21 2YX	Mr Clarke Wiltshire Cycling Touring Club Hill House Kelsey Road Salisbury SP1 1JR

British Horse Society Stoneleigh Deer Park Kenilworth Warwickshire CV8 2XZ	Mr and Mrs M Wiggins 30 Bryans Close Road Calne SN11 9AB	Mr and Mrs A T Padwick Linden House London Road Devizes SN10 2DS
P A Brown Councillor for Bromham, Rowde and Potterne Rose Cottage Berhills Lane Rowde Devizes SN10 1ST	Mrs H Imrie Ashton House St Ediths Marsh Bromham SN15 2DJ	Mr K Appleton 47 Churchill Avenue Melksham Wiltshire
Mrs D Plummer BHS CABO Wiltshire Leaze Farm 65 Stanton St Quinton Chippenham Wiltshire SN14 6DQ	Mrs F Mead 9 Dean Close Melksham SN12 7EZ	Mr P Holt 8 Highfield Bromham SN15 2HJ
Byways and Bridleways Trust PO Box 117 Newcastle upon Tyne NE3 5YT	Mrs A Wade 8 Dean Close Melksham SN12 7EZ	Mrs E Kirk-Duncan Meadow Cottage 3 The Green Marston Devizes SN10 5SW
Esther Daly Senior Rights of Way Warden Wiltshire Highways Partnership Salisbury Road Marlborough SN8 4AE	Mrs J Stainer 3 Dean Close Melksham SN12 7EZ	Mr R Carver 51 The Gardens Bromham SN15 2HX
Jenny Lund 5 Chestnut Drive Rowde Devizes SN10 2PY	Mr M J Benham 51 Highfield Bromham SN15 2HS	Mr M N Parkinson 27 Greystones Bromham SN15 2JT
Mr B Riley 141 Bath Road Bradford on Avon Wiltshire BA15 1SS	Mrs L Thomas Yew Tree House 55 Horsepool Bromham SN15 2HD	
Mrs H D Woodbridge Area Commissioner British Driving Society Hafaway House Hoggs Lane Purton Swindon SN5 4BU	Mr and Mrs Du Boulay Lower Lodge 35 Bowden Hill Lacock SN15 2PP	
Major (retd) G D Micciche 34 Mintys Top Bromham Chippenham SN15 2HB	Mrs S Collins The Old Church Chittoe SN15 2EL	
Mr J Thompson 9 Ridgemoor Calne Wiltshire	Mrs M Hodsell The Old Police House Sandy Lane Chippenham SN15 2PZ	
Mr and Mrs C Thompson 44 Yard Lane Bromham Chippenham, SN15 2DT	Mrs M Beater 3 Rosemary Close Calne SN11 0UL	

In addition to the above consultation all those who had submitted user evidence forms were written to and asked specific questions relating to the evidence that they had already given on their form. An example is given below:

Dear Mr Holt,

Wildlife and Countryside Act 1981 Section 53

Application for an order recording public footpaths in the definitive map and statement at Chittoe Plantation, Bromham

Wiltshire Council has received an application to add paths at Chittoe Plantation to the definitive map and statement as public footpaths. An evidence form filled in by you forms part of the application and I would be very grateful if you could expand further on a couple of points that the application has raised. Also any photographs that you may have of the plantation would be very helpful indeed.

For an Order to be made it must be reasonably alleged (or shown) that the public have used a route for a period of time 'as of right'. This means that they must have done so openly, without challenge or permission and without force. Although a number of witnesses have reported that they have done this it is necessary that the Council investigates all available evidence and I would be very grateful if you could answer the following questions. I have enclosed a blank map which it would be helpful if you could mark and also a SAE for your reply.

i) Other than the newly erected gate and 'hunt jumps' has the perimeter fencing changed (been erected or re-erected) in recent years?

ii) Approximately when were the stiles removed?

iii) Approximately at what date can you recall a sign near the corner stile and approximately when do you think it disappeared?

iv) Do you recall anyone selling plants in the wood? If so please mark where on the attached map and please give any details you can remember of who was selling them and of any signs referring to them.

v) You refer to the previous owner who 'wanted to put chalets in the wood'. Do you know who this was?

Thank you for your help. Please do not hesitate to contact me if you have any queries.

This approach proved successful and officers received 18 responses out of 22. Responses were often detailed and some people were able to provide photographs of themselves or family members using the claimed paths. Two witnesses were also interviewed on the telephone and one witness was visited in his house. Additional responses are shown in Appendix A in red.

A site meeting was held at Chittoe Heath Plantation with Mr J Seed on 16th November 2009 and officers visited the plantation on the 25th November 2009 and the 4th February 2010. The applicant was interviewed on the 9th December 2010 at his home.

3.3 Consultation Responses

Responses from witnesses are contained within the Summary of User Witness Evidence, Bromham at **APPENDIX A** and detailed below.

Letters have also been received from Mr E Heard (Mr S Spicer's – previous owner of Spye Park – stepson) and three representatives of BCH (UK) Ltd. Bromham Parish Council sent an e.mail to "support the views of the landowner". A large submission containing 37 separate pieces of evidence was received from Mr Seed. Further questions asked of Mr Seed's witnesses were asked eliciting further responses and these are recorded below.

Additionally correspondence has been received from the Forestry Commission following the case officer's enquiries but responses to enquiries have not been received from Mr J Spicer or Lackham College.

- i) Mrs E Kirk-Duncan (witness) 7.12.09. Does not recall having to climb or step over perimeter fence, did not receive permission, doesn't know if owner or occupier was aware and does not recall anyone selling plants.
- ii) Mrs L Thomas (witness) 9.12.09. Recalls old barbed wire along side of plantation opposite the heath, some of which was flat and fallen down. Recalls plants for sale around 3 or more years ago.
- iii) Mr and Mrs Wiggins (witnesses) 10.12.09 by telephone. Recalls some wire fencing but some all fallen down. Doesn't recall seeing plants for sale. Used to start their walks in the corner of the plantation by the car park. There was a stile there but it fell into decay and was not used as the fence got dilapidated. People always trod the same path and followed the perimeter of the woods about 10 or more feet inside. They were never challenged or had to ask permission but were recently challenged by someone in a car offering permission which they have accepted. Does not recall ever seeing a notice.
- iv) Mrs A Wade (witness) 12.09. Doesn't recall seeing a wire fence, entered and exited the woods where Mr Seed's new gate is. Can remember seeing two stiles and some plants for sale. Also entered and exited the wood opposite Bromham 75.
- v) Mrs F G Mead (witness) 12.09. Thinks that stiles and fence fell down 12 or 15 years ago. Doesn't remember seeing any signs. Does remember plants for sale. Marked three stiles on the map.
- vi) Mrs K Du Boulay (witness) 12.09. Does not recall any changes to the perimeter fence. Entered and exited the woods at one point where Mr Seed's gate is now (opposite the heath). Does not recall seeing the plants for sale.
- vii) Major G D Micciche (witness) 13.12.09. Recalls plants being for sale and marked on the map. The perimeter fence has always been in a state of disrepair with free access along its length. Has never been challenged or prevented access but stopped using the plantation when signs went up earlier in 2009. Map shows access points along northern and north western boundary.
- viii) Forestry Commission (previous leaseholder) 23.12.09. Due to staff changes unable to confirm any details specific to Chittoe Plantation. Common practice is not to deposit plans (S.31(6) Highways Act 1980) where they are only the leaseholder and would leave this to the freeholder to undertake. Generally they would prevent people from accessing leasehold woodlands whereas they allow open access where they own the freehold.
- ix) Mr P Holt (witness) 04.01.10. Long term knowledge of the woods. Recalls stiles in place 1972 to 1988 period. Recalls a signpost in place near the cross roads but can't recall the lettering being on it. During this period the fencing fell into disrepair and people (of which there were many) entered the woods without using the stiles. The interior of the wood was overgrown at this time and walkers either walked a perimeter track or cut across by the barbecue stand. Mr Holt used the woods daily and describes in detail changes to the vegetation. States that people would also go log foraging and mushrooming. In the mid 1990s when the wood changed hands some fencing appeared near to the houses. Recalls some fir saplings for sale and a moveable wire gateway near Bromham 75 junction. Provides a well drawn map which is reproduced later in this report.
- x) S Collins (witness) 03.01.10. Has lived in Chittoe since 1988 and walked in the area ever since. Has always walked openly without secrecy or permission but from 2000 to 2008 has

suffered limited mobility so would not have been able to step over a wire fence to gain access. Recalls a broken down stile from 1988/9 but that it was not a working construction. Recalls the plants being for sale. Recalls remains of a barbed wire fence which sunk into the ground as posts rotted. This was along the northern/north western boundary and did not present a physical barrier.

x) Mr R Carver (witness) 10.01.10. Recalls that fencing lay on the ground all along the north and north western boundary. It remained there and had not been maintained or re-erected. Entered and exited the plantation at numerous points. Does not recall any plants for sale and no signs until Mr Seed's signs went up about a year ago.

xii) Mr K Appleton (witness) 18.01.10. Entered the woods near the cross roads and opposite Bromham 75 junction. Recalls a single strand of barbed wire at an entry point for allowing vehicle access and recalls a stile being in place opposite the heath for as long as he can remember. His family can remember potted conifers for sale on the outside of the wood.

xiii) Mrs J Stainer (witness) 20.01.10. Entered and exited the plantation near to where Mr Seed's new gate is but sometimes used exit further along the road where barbed wire was laying flat on the ground.

xiv) Mr M J Benham (witness) 22.01.10 by interview. Mr Benham has lived in Bromham all of his life and can recall the woods since the late 1950s or early 1960s. He remembers courting his wife there in the 1960s and she too recalls them clearly. The woods were always busy with people walking and he had never been challenged or asked for permission. He was first challenged recently when Mr Seed asked him to leave. Mr Benham had been contacted by the previous owner's son (Mr Spicer) who apologised saying that he and his father had been happy with public use. The fence has been in disrepair for a very long time, people generally walked the claimed tracks but there were others that people used. He doesn't recall any signs but does recall some old stiles being in place, perhaps dating as far back as the 1960s. He can also recall a track being down the eastern boundary in the early days which had a stile at its junction with the road in the north. He always accessed the woods from the cross roads until the new fence was erected. Can recall fences being completely down along the boundary but especially opposite Bromham 75 junction. Produced a well drawn map which is reproduced later in this report. Also provided photographs taken of the walks in the woods and a considerable number of pictures taken with their dogs demonstrating his family's long term use of the woods.

xv) Mrs M Hodsell (witness) 20.01.10. Recalls plants for sale and several access points along the north/north western boundary. Remembers stile near the cross roads but used a gap close to where Mr Seed's new gate is. Recalls a removable wire being put in across an access gap to stop vehicles, opposite Bromham 75 junction. Has known the woods for 22 years and has not asked permission or used force or secrecy during this time. Has been a daily dog walker in the woods throughout this time. Recalls that the plants for sale had a Melksham 'phone number written by them. Provided a photograph of her grandson walking in the woods.

xvi) Mr R Townend (employee of BCH (UK) Ltd 27.01.10. Has worked for the owner of BCH (UK) since 2005 and was asked when in the vicinity (BCH is based in Lincolnshire) to view the plantation. Visited the site with Mr Kerry and noted a sign saying "Private Wood" but that this disappeared sometime after. On his first visit the barbed wire perimeter fence was there but as time went by (2005 to 2008) its condition deteriorated, he assumes by people breaking in to access the wood. Challenged some dog walkers in February or March 2008 telling them it was private property.

xvii) H Imrie (witness) 23.01.10. Has been walking in the woods for over 10 years and has never been challenged, it is very popular and she only stopped using the woods when Mr Seed's

private signs went up and new fencing was erected to clearly mark a boundary. Before this the edge of the woods was marked by occasional barbed wire fencing. Entered the woods via a gap near the cross roads and trod a circular route along a path exiting by a gap beside the road. Recalls a length of wire with a loop on to stop vehicles opposite the Bromham 75 junction. Can't recall any signs or stiles.

xviii) Mr E Heard (stepson of previous owner and estate manager 2003 to 2005, shoot manager 1990 to 2005). The plantation has always been fenced but it has been vandalised. There was never a single path intended for public access though as freeholder the estate had to remove a burnt out car and other rubbish tipped by the public during this time. He has known the plantation since 1974 and has always considered it private. His stepfather Simon Spicer did give permission to walk at Chittoe to specific friends. He objects to a new right of way being created.

xix) Mr N Parkinson (witness) 02.02.10. Entered the woods opposite Bromham 75 and can recall some single strands of loose wire in places but in others no wire and in some places the wire was so loose it was laying on the ground. Can not recall any works being done up to January 2009. Recalls plants appearing for sale around 2003 -2005 with a telephone number. Has walked in the woods since 1986 and exercised police dogs here both on and off duty. Has never been challenged even though the woods were at on at least one occasion up for sale, this led him to believe that the paths in and around the woods were a public right of way. Recalls movable wire gateway opposite Bromham 75 and there being a stile near the cross roads.

xx) Mr P Kerry (leaseholder since 2002 and owner of BCH (UK) Ltd) 02.10. Recalls putting up a sign saying "Private Woodland Keep Out" when he visited the woods with Peter Yates in August 2002. The sign was close to the access point into the woodland near the cross roads. They agreed to put up more signs and that Mr Yates did this a few months later. The signs remained up until sometime after January 2005.

xxi) Mr P Yates (employee of Mr P Kerry of BCH (UK) Ltd) 08.02.10. Recalls putting up sign with Mr Kerry in August 2002 saying "Private Woodland – Keep Out". It was on a stake and hammered in the ground near the public access point about 30 yards from the cross roads. The public were gaining access over a fence. Returned to the woods several months later and put up three more signs on stakes saying the same thing. He also has 10-15 conifer plants in pots for planting but couldn't plant them as the ground was hard. Instead he merely marked out with them the area on the ground on which we intended to plant more trees.

xxii) Mr E Heard (see xviii and in response to further questions from officer) 11.02.10. Fence was vandalised and pulled down along its entire length beside the road (whole of the north/north western boundary) and damage happened over a period of several years. The sign was near the cross roads and just said "private". Can recall collecting ground rent from a leaseholder in East Anglia but apologises that estate files are now archived or discarded.

xxiii) Mr J Seed 17.02.10. Mr Seed's letter of submission and analysis of witness evidence is appended at B (APPENDIX B) The key points of the objection are as follows:

- *That the public have entered the land concerned without permission knowing that the land is private, that there are and were no rights of way accrued or otherwise and most of the witnesses are unable to claim to have done so over a period of twenty years or more.*
- *That there is clear and explicit evidence that a sign saying "PRIVATE WOODLAND – KEEP OUT" was put up in approximately September 2002. That sign was followed by about three others which were put up early the following year. Signs advertising the sale of the private woodland were also periodically erected.*

- *That even where access has been effected there is no definitive path or paths. The application makes clear that it is an application for a single footpath and it makes no mention of multiple paths.*
- *Between 1954 and 1992 the leasehold of the land was owned by the Ministry of Agriculture Fisheries and Food and the witnesses cannot show any provision for public access over the land during this period and thus a right of way could not be claimed against the Crown for that period. This means that none of the witnesses can claim any rights prior to 1992 and thus cannot show any accrued rights for a 20 year period or more.*
- *That some of the witnesses have since written to us and accepted that there is no Right of Way and thus we suggest that their original witness statement is negated (copies of letters attached with Mr Seed's submission).*

Mr Seed's submission was also accompanied by a plan showing that the original owners access point was at A (see officer's map Appendix A) and that a site of open access was at the northern most corner (close to D see officer's map Appendix A).

Mr Seed's submission was also accompanied by copies of the letters from Mr Kerry (xx), Mr Yates (xxi), Mr Townend (xvi) and Mr Heard (xviii) which had been sent direct to the Council previously.

Also submitted were two photographs of signs erected by John Clegg and Co Saying "WOODLAND FOR SALE" and two photographs taken in January 2010 of the "long standing fence" at Chittoe Heath Plantation. Also submitted was a sales brochure (2002 sale) from John Clegg and Co, Rural Surveyors Valuers and Consultants. The sales brochure is for the leasehold of Chittoe Heath Plantation. The brochure makes no mention of any public use of the woods. The brochure records that "the lessee is responsible for the maintenance of stockproof fences on those boundaries shown with inward facing "T" marks on the sale plan". The sale plan shows that this refers to the southern and eastern boundary only. No boundary adjacent to the public roads carries the "T" mark.

Mr Seed's letter of objection states that some of the witnesses have written to him and have accepted that there is no Right of Way. Original signed copies of Mr Seed's Permissive Access to Chittoe Heath Plantation agreements for Mr M Wiggins (1st April 2009), Mrs M Wiggins (1st April 2009) and Mrs M Beater (22nd April 2009) were submitted.

These agreements state:

Permissive Access to Chittoe Heath Plantation

Thank you for your letter (or the discussion as appropriate) re Chittoe Heath and we are now in a position to grant formal permission for access to Chittoe Heath Plantation under terms which have been advised by our solicitor.

This letter is thus to formally grant you permission to walk in our woodland ("the Land") at Chittoe Heath Plantation (shown edged red and coloured green on the plan attached) on the following terms:

- 1. This access is by our permission and not as of right;*
- 2. This permission is for your use only, and is not to be assigned;*
- 3. You agree that you have the benefit of no public or private right of access to, on or over the Land but that you enter the Land and remain on it by our permission;*
- 4. You do so at your own risk, and indemnify us against any loss or damage you may suffer;*
- 5. You keep dogs under reasonable control;*
- 6. You agree that this permission may be temporarily withdrawn by us for land management, conservation, and/or forestry purposes. We will always try to give you reasonable advance*

notice and will always publish any details of such restrictions on the wicket gate into the land marked W on the plan attached.

7. the Land remains private, with no public rights of way on it or access of any type, and it is confirmed that we have no intention to dedicate any such public rights of way or access.

We hope that you will feel that this, albeit legalistic, agreement will properly regulate the arrangements between us and give you the permissive access for which you asked. Please sign and return this letter to us and we look forward to seeing you enjoy the lovely woods on Chittoe Heath for many years to come.

Signed by CJ and ML Seed

Signed by XXXXXXXXXXXX

In confirmation and acknowledgement of the above terms.

Printed name and address

Dated

Mr Seed's submission was also accompanied by the following letters (original signed copies): Those who responded to the officer's requests for additional information are highlighted in yellow.

- a) **Mr F G Hazell**, Holmleigh, 18 Chittoe Heath, Bromham. Has known Chittoe Heath since 1943 and has lived there since 1985. Recalls the woods belonged to Spye Park in the 1940s and that it was fenced round with two stiles. In 1943 the wood was impossible to get through owing to thick brambles. The stiles were at the cross roads and along the old road where the buses used to go. His letter says "looking at the survey map the footpath came down from Spye Park and then following the road down to the cross road". He has never seen a Private Woods sign on a tree at the corner.
- b) Mr and Mrs D Moore, 24 Chittoe Heath, Bromham. Mr Moore has been the headkeeper at Spye Park for the past 11 years and has always respected the fact that the woods have always been fenced and a private sign has always enforced the wish of the owner. There has never been a right of way through the woods and he strongly objects to the application for one.
- c) Mrs C Bycroft, Francombe House, Spye Park, Chittoe. Has regularly walked her dogs in Chittoe Heath Woods. As far back as she can remember the woods have always been fenced and private and the only way in was, with permission from the owner, to step over the fence. She has always wandered around the woods following her dogs. There has always been a very visible private woods sign.
- d) Ms P Bryant (15.01.10) 1 Springfield Road, Rowde, Devizes. Frequently walked in the Chittoe area for the 39 years she lived in Sandy Lane. Has never walked in Chittoe Heath plantation as it has always been private property. Was related to tenants of land on the west side of the former B3102. The plantation has always been fenced and signed "Private Woods" at the road junction and whilst no-one was ever challenged (to her knowledge) they had to climb the fence and even then there was quite deep brush and weed and no path or route to follow.
- e) **Mr A Summers** (26.01.10), 14 Chittoe Heath, Bromham. Has lived at Chittoe Heath since 1967. Always known the woods as private property and they have always been fenced. Walkers had to step over the fence to enter. There has never been a single path for walkers in the woods.

- f) Mrs L Whichello (17.02.09), 30 The Pippin, Calne. Has walked in the plantation with her dogs for a couple of years. A lot of dog owners that have used and walked through the wood for years know it was private property. Has a heart and lung condition and finds it is on the flat and easier for her. Appears to have requested permission to continue from Mr Seed.
- g) **Carol Bealing** (31.03.09). Has been given permission from Mr Seed. Has spoken to a few of the “responsible people we sometimes met on our walks” and tells Mr Seed he may get more applications for permission.
- h) **W V Collens** (11.04.09). A regular walker in the area for the past 25 years who objects strongly to the application which would be a retrograde step to interfere with the existing arrangement which has markedly improved the condition of the area and the environment without imposing undue restrictions for genuine walkers and nature lovers. Concerned about the motives of the applicant. The proposed right of way is pointless and would lead nowhere. Does not know Mr and Mrs Seed but has the highest regard for what they have achieved and their willingness to share this area with the local community.
- i) A number of letters of objection that were all essentially the same were submitted from the following people:

Mr A Summers, 14 Chittoe Heath, Bromham
Diane Goddard, 16 Chittoe Heath
 F Hazell, 18 Chittoe Heath
 Mrs B Key, 24 Chittoe Heath
 Sebastian Long, Vicarage, Chittoe Heath
 Mrs I Baker, Gore Farm, Turnpike, Heddington
 Caroline Coles, Ivy Cottage, 74 The Green, Poulshot
 John White, Courtlands, Corsham Road, Corsham
 Mrs L White, Courtlands, Corsham
 N Bycroft, Francombe House, Spye Park
 C Bycroft, Francombe House, Spye Park
 Mr J Walker, Clayton Cottage, 111 Westbrook, Bromham
 Mrs C Walker, Clayton Cottage, 111 Westbrook, Bromham
 P Sanders, 8 Shackleton Close, Bowerhill, Melksham

The letter stated as follows:

I am resident of Wiltshire who knows Chittoe Heath Plantation well (or I am a local resident within walking distance of Chittoe Heath Plantation). I have lived in the area for several years up until the present date (or for many years or this sentence omitted). I understand that an application has been made to force a footpath over the private land of Chittoe Heath Plantation. This application is, I understand, witnessed by a group of people who are predominantly not local and drive to the area in order to walk dogs and allow them to foul the area.

I object to the application on the following grounds:

- *The land is private, always has been and there are no Rights of Way over the land.*
- *For many years, and at least the past twenty years, there has been a fence of two strands of barbed wire around the northern and western edge of Chittoe Heath Plantation and this has always been recognised by the local community as a clear expression of the owners' intent to keep the woods private.*
- *Any access by individuals has been by stepping over, around or breaking the barbed wire fence.*

- *The woods have been sold twice in the past twenty years and have been clearly advertised as private woods for sale for several months during these periods.*
- *In order to grant a Modification Order and grant a Right of Way there is a requirement to not only establish a Right (which does not exist as explained above) but also a Need for such Right of Way and there is clearly no need for this new right of way. The proposed paths are not link routes. The area already has two very closely located dedicated public spaces used for public enjoyment, including dog walking, one within ten metres and the other within two hundred metres of the woods. The current landowners have been very helpful in granting locals permission to walk in the woods whenever they have asked. There is therefore no established need for the path applied for.*
- *Even if a path were granted here there would be adequate grounds for extinguishing it on the grounds of potential criminal activity in the area. Because the woods have attracted unsavoury and potential criminal activity to the area. As a local I do not want a footpath to be granted which would simply encourage such activity in the cover of the woods. This potential criminal activity has disrupted the life of the community and prevents local children from either walking or playing in the woods, even with permission.*
- *There has been a history of vandalism, misuse and trespass in the area of Chittoe Heath woods (including the lighting of fires and illegal occupation by travellers and burning of cars). The grant of public access would increase the danger to the local community from these activities and hinder the landowners from preventing these occurrences.*
- *The granting of a public path in the woods would attract a considerable influx of day trippers driving to the area in their cars and thus detract from the convenience and enjoyment of a substantial section of local residents of their properties and local area.*

Conclusion *I wish to emphasises that I am a Wiltshire resident of Chittoe Heath Plantation (or within walking distance of Chittoe Heath Plantation, that I object to the inaccurate statement that the woods have been allowed to accrue a Right of Way. I also wish to record that there is no demonstrable need for such a Right of Way in Chittoe. Finally, and as a local resident, under no circumstances would I wish to see the woods, which are not an open space, granted Village Green Status as a result of an application by day trippers who drive to the area from towns and villages and are not part of the locality of Chittoe Heath.*

Original signed copies of letters submitted.

People who sent this form letter were written to on 18th February 2010 stating:

Dear F2,

Wildlife and Countryside Act 1981 Section 53

Application for an order to record public footpaths in the definitive map and statement, Chittoe Plantation, Bromham

You have recently submitted an objection to the above application to record public footpaths in the plantation at Chittoe Heath, Bromham. The council is charged with investigating all available evidence and I would be grateful if you could answer the following questions regarding your knowledge of Chittoe Plantation. Evidence given by you (including your objection) will be considered by the Council in respect of this application. If the application is refused but subject to an appeal, or if the application is approved but subsequently objected to, any information given by you will be forwarded to the Secretary of State and you may be asked to give evidence at a resultant inquiry. Your response to the following by 5th March 2010 would be appreciated.

i) Please give the approximate dates that you have known Chittoe Plantation for.

ii) Please give the approximate frequency with which you visited the perimeter of the woods.

iii) Was the fence around the perimeter intact or were there any gaps, stiles or gates in it prior to December 2008?

Your objection contains a number of relevant points, however, I must make it clear that matters related to desirability, need, the environment, crime or health and safety can not be taken into account when determining applications of this nature. The legal tests that must be applied in this case are whether it is reasonably alleged that the public have used the claimed route 'as of right' (that is without force, secrecy or permission) for a period of 20 years. If use has been 'as of right' the period of 20 years is counted back from the time the way was brought into question. This is the event that called the public's use into question and may be the erection of notices or the making of a deposit with Wiltshire Council under section 31(6) of the Highways Act 1980.

- j) Mrs C A Walker (14.08.09) Letter thanking Mr Seed for permission and objecting to the application.
- k) Carol Bealing (03.03.09). Letter thanking Mr Seed for permission. Would like to object to the non-existent right of way "you only have to look at the Ordnance Survey map to see there just isn't one".
- l) W V Collens (11.04.09). Letter in sealed envelope addressed to rights of way department. Letter is copy of that enclosed and detailed at h).

Responses from Mr Seed's witnesses:

5 responses were received from Mr Seed's witnesses and one letter was returned 'addressee gone away'.

1) Mrs Goddard (23.02.10) By telephone. Mrs Goddard has lived at Chittoe heath since December 1990 and has always walked in the woods having accessed them through her neighbour's garden (with their knowledge) . She now has permission from Mr Seed but in the past 'just did it'. Remembers that the woods have always been fenced but that over the years barbed wire stretched, fell down and wasn't maintained. There used to be a stile in the corner by the cross roads in the early days. There might have been signs in the Spye Park days, can't really remember. The woods used to be very overgrown but woodland works have cleared some trees and then more tracks appeared, could have been in the late 1990s but not sure. Objects because traffic has increased 10 fold since 1990, people park all over the place and don't necessarily clear up after their dogs.

2) Mr W Collens (25.02.10) Has known Chittoe Plantation since about 1985 and walked occasionally in there prior to 2003. Gained entry via trodden down areas where no standing fencing was apparent or signs evident. Marked area on map which shows a length between Bromham 75 and the northern most claimed access point.

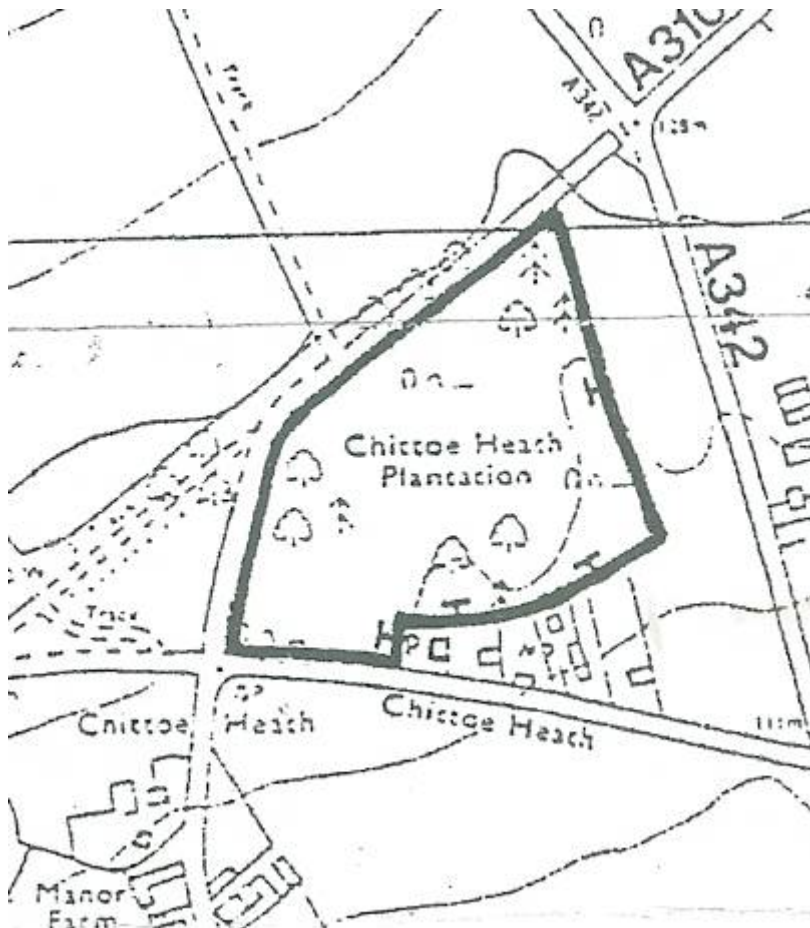
3) C Bealing (28.02.10) has known Chittoe Plantation for about 15 years. Did use plantation before Mr Seed bought it and fenced it and does now have permission. Previously it seemed fairly open land and she didn't know who to request permission from. Does not recall seeing any signs forbidding access. There was at some time a perimeter fence but it was either cut or stretched or buried in so many places it made access very easy although there has never been a path shown on a map. Submitted a map marked with easy access points, these are at a number of places alongside the road – for example at the cross roads, opposite Bromham 75, near the lay by and the north eastern extent of the plantation.

4) Mr A Summers (1.03.10) has known Chittoe Heath since 1967 and has suffered with dogs off of leads entering his garden from the plantation. The fence round the plantation was intact but at times it was broken down and repaired many times.

5) Mr F G Hazell (2.03.10) Walks the woods three times a day and has done so since 1985. Remembers two stiles at opposite corners of the woods one partly remains and the other is no longer there. The fence around the woods was destroyed several times. Enjoys meeting people in the woods and records that his house has had a gate into the woods since before the war.

6) Additional material from Mr Seed. Sales particulars for the lease woodland dated 1991 (13.060 acres) and 2008 (12.09 acres) . The 2002 sales particulars are for the 13.06 acres. Both the 1991 and the 2002 sale detail the responsibility for the fence as only extending to that area shown with inward facing "T" marks. This shows that the responsibility for the roadside fence was not a part of the lease.

Map from sales particulars showing inward facing T marks:



4.0 Interpretation of the Evidence

4.1 Statute Law

The evidence submitted with the application suggests that the woods have been used by the public for a considerable number of years; the routes may also have a historical context and/or evidence of public use in earlier times and I am mindful that either the principles of dedication at common law (the principal of long term use by the public and either acceptance by the landowner

by making no objection if such use is considerable or perhaps by an express dedication) or those laid out by statute in s.31 of The Highways Act 1980 need to be found to apply for the application to succeed. Given the lack of historical evidence and difficulties associated with common law dedication (of which there is little evidence) it is necessary to consider the application of Section 31 of the Highways Act 1980.

Section 31 of The Highways Act 1980 states:

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

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

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

(3) Where the owner of the land over which any such way as aforesaid passes –
(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and
(b) has maintained the notice after the 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 the land as a highway would be incompatible with those purposes.

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*).

4.2 The Calling into Question of the public right to use the way

The period of 20 years (in s.31(1)) is taken as 20 years counted back from the date that the way was first called into question.

Section 31

(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.

Section 31(7) defines the owner of land as follows:

(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.

Although the current landowners and the stepson of the previous landowner and former estate manager both deny any intention to dedicate the route I find that there is no *evidence of any act by the landowner* in accordance with Section 31 subsections (3),(4),(5) and (6) of The Highways Act 1980. This is supported by case law.

In the cases of *R.(Godmanchester Town Council) v. Secretary of State for the Environment Food and Rural Affairs and Cambridgeshire County Council* and *R. (Drain) v. Secretary of State for the Environment Food and Rural Affairs and Yattendon Estates Ltd* heard in the House of Lords, judgement delivered 20 June 2007 [2007] UKHL 28, two test cases were brought before the House of Lords for a ruling on the effect of the provision in s.31(1) of the Highways Act 1980. The main issue in both appeals concerned the nature of the evidence which is sufficient to demonstrate that there was no intention to dedicate.

Lord Hoffman reasoned:

“ It should first be noted that s.31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be a difficulty in satisfying such a requirement without any evidence at all. It requires ‘sufficient evidence’ that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner’s consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J, in *Billson’s Case [R v S of S for the Environment ex p. Billson [1999] QB374]* it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience”.

Although there is evidence that some signs were erected in 2002 by BCH (UK) Ltd and again in 2008/2009 by Mr Seed (who also verbally challenged the public) Section 31 of the Highways Act does not strictly refer to actions that may be undertaken by the owner of a lease, only the freehold reversioner.

In practice the owner of a 999 year lease may effectively own the land and although Mr Seed’s lease did not specifically refer to a duty to prevent ingress by the public there is no doubt from the statement of witnesses and evidence on the ground that his actions were perceptible by the relevant audience.

In *Applegarth v Secretary of State for the Environment Transport and the Regions [2001] EWHC Admin 487* Munby J reasoned that in respect of the application of section 31(2)

“Parliament cannot have intended that section 31(2) should not be brought into play, for example, if a way is deliberately and totally obstructed by the tenant under a long lease whose landlord, being entitled only to a peppercorn rent, has long since lost all interest in the way, or by concerned inhabitants infuriated by the fact that what is in truth only a footpath is being used by motor-bike riders.”

Additionally in *Rowley and Cannock Gates Ltd v Secretary of State for Transport Local Government and the Regions [2002] EWHC 1040* Elias J considered the acts of a tenant with regard to interrupting use as of right. In this case the tenant had inadvertently allowed public use to accrue rights by not differentiating sufficiently between use by implied licence or implied permission (because he knew the users) and use by the public generally. Elias J overturned an inspector’s decision that a tenant’s acquiescence should not bind the landlord.

“I consider that the conclusion reached by the Inspector that there was no evidence that any turning back had in any event been authorised by the freeholder involved an error in law. A similar argument was advanced in Lewis and rejected, the court apparently taking the view that if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that: see Lord Evershed at p.443”.

Hence if the actions of the owner of the lease for Chittoe Plantation are considered with respect to Sections 2 and 3 of the Highways Act 1980 there are three possible dates for the calling into question of the public’s right to use the way:

- i) August 2002. The date of the erection of signs by BCH (UK) Ltd
- ii) Dec 2008/January 2009. The date of the erection of signs and challenges by Mr Seed.
- iii) March 2009. The date of the application.

Section 3 of the 1980 Act requires that the notices are *inconsistent with the dedication of the way as a highway*; case law determines that the challenge must be perceptible to the relevant audience. There is considerable doubt about what the notices erected by BCH (UK) Ltd said, although Mr Kerry and Mr Yates remember that they said “Private Woodland – Keep Out”, Mr Townend recalls that they said “Private Wood” and Mr Heard recalls that they said “Private”. Their presence does also not seem to have been noted by the majority of users and they certainly did not prevent use whereas Mr Seed’s signs some 4 years later were noticed by the public and his challenges were effective.

It is feature of rights of way in England and Wales that there is a public right over private land, hence a sign stating that the land is Private is not inconsistent with the dedication of a way as a highway. The addition of the words Keep Out may be taken to mean that the woods should be kept out of and that a path should be adhered to, however, Mr Seed’s sign is wholly inconsistent with the dedication of the way as a highway.

Sign erected by Mr Seed at popular entry point



Officers therefore consider that the public's use was brought into question by Mr Seed and that the 20 year period that should be considered is from December 1988 to December 2008.

4.3 The nature of the public use

Section 31(1) of the Highways Act 1980 requires that the way must have been enjoyed by the public 'as of right'. The term 'as of right' is considered to mean without force (*nec vi*), without secrecy (*nec clam*) and without permission (*nec precario*). These points will be considered individually:

i) Without Force. If users employ force to perhaps break a lock on a gate or to cut barbed wire then this requirement is not satisfied.

There is no doubt that Chittoe Plantation has been enclosed for a considerable period of time. The Ordnance Survey mapped it as fenced and all witnesses refer to there being a fence or parts of a fence in varying states of decay around the woodland, specifically around the north and north western boundary where all public access has occurred. There is clearly a conflict of evidence relating to this fence, those objecting to the application maintain that the fence has been vandalised. Mr Townend, while inspecting the plantation for BCH (UK) Ltd reported that the fence had been intact in 2005 but that it had deteriorated by 2008 presumably because people had been breaking into the woodland. Mr Yates reports that in 2002 the public were gaining access over a fence and Mr Heard reports that the fence was vandalised over a number of years but does not say when. Mr Seed states that although he has erected the new gate pictured on p.29 and some 'hunt jumps' along the perimeter, other than that he has not maintained the perimeter fence at all. Mr Hazell remembers the woods from 1943 and that they were fenced at that time. 19 other objectors refer to the woods as being fenced.

Witnesses for the application refer to there being; some wire, broken down fencing, some wire up and some fallen down, short sections of wire with gaps, fences having fallen down, broken down rusty barbed wire, remains of a wire fence, small quantities of disused barbed wire, remains of barbed wire not fixed, some barbed wire, some old wire, some barbed wire but not in all places and broken wire remains.

Inspection of the fence in December 2009 revealed that much of it is made up of old rusty wire with sections crudely cut in and twisted in places. There is a mix of old and new staples suggesting some re-erection and some gaps. See photos below:



Gap near north eastern corner of woods (point D Appendix A)



Gap near cross roads (point A Appendix A)



Mix of new and old fencing



Mix of different types and ages of wire



New wire across gap (users refer to there being a single strand looped 'gate' at this point) Point C Appendix A



Many users recall there being stiles allowing access into the woodland though it is noted that some users do not. A number of users refer to the stiles being around the areas of A and D but refer to them falling into disrepair and not being used as people just walked into the woods through gaps in the fences. Although officers did not note any evidence of stiles on visits in 2009 it was noted that Mr Fred Hazell, an objector to the application, who has known the woods since

1943 recalls that there were two stiles, one at the cross roads and the other on the back road “were the buses used to use until it was blanked off”. The road was “blanked off” in 1966.

Analysis of the user evidence reveals that generally people who knew the woods before the late 1980s remembered the stiles whereas those that used the woods more recently did not.

Dates of users who recall stiles	Dates of users who do not recall stiles
1982 – 2008	1998 – 2008
1980 – 2009 (fell down a long time ago)	1986 – 2008
1980 – 2009 (fell down a long time ago)	1998 – 2009
1962 – 2009 (stiles down)	1997 – 2009
1982 – 2009 (primitive)	1989 – 2009
1960 – 2009	1996 – 2009
1989 – 2009 (only in early years)	1996 – 2009
1986 – 2009	1997 – 2009
1991 – 2006 (stiles in disrepair)	1986 – 2009
1972 – 2008	1981 - 2009
1993 – 2009	
2002 - 2009	

It seems reasonable to assume that the stiles fell down and into total disuse around 1990. Exactly what constitutes a stile and what doesn't when the stile is in disrepair is a moot point and because of this it is likely that some users will have recorded the stiles and some would not, it is also possible that if the point of entry to the woods was just a few feet away, they would not have seen them at all.

It is also noted that not all users have placed the position of the stiles in the same place on a map. Although the majority of those that recall stiles remember one being near the cross roads others have recalled stiles at different places along the northern boundary. Given that witnesses are recalling the position of a stile that they may not have used for 20 years this is perhaps not surprising, though it does underline the fact that the majority of users accessed or exited the woods at a variety of different places as well as near the cross roads.

Another point of entry is recorded by users is by lifting a moveable fence. Users that recall this feature describe it as being a strand of wire with a loop at one end which they were able to lift and replace to gain entry. This was between points B and C on the plan in Appendix A and witnesses claim it was across a vehicular access point to stop the ingress of motorcycles.

No evidence of fence repair or maintenance has been available to officers from the Forestry Commission (tenants 1954 to 1992) or from BCH (UK) Ltd. BCH (UK) Ltd report that the fence was intact in 2005 but had been vandalised by 2008, this is not consistent with the evidence of users who refer to a longer period over which the fence fell down in places.

It is noted from the sales brochure for Chittoe Heath Plantation produced by John Clegg and Co produced in 1991 and 2002 and provided by Mr Seed that the repair responsibility for the fences extends only to the maintenance of stock proof fences on the boundaries to the east and the south. The lessee is not responsible for the maintenance of stock proof fences where the plantation borders the public highway and where the public accessed the land.

Officers consider that the woods have been fenced for a long period of time, Ordnance Survey mapping suggests since the late 1800s. However, it is known that the responsibility for the maintenance of the roadside fencing is not the leaseholder's and this could explain how the fence fell into disrepair and was not maintained. Although the existing fence wire or posts forms a boundary there can be little doubt that it has been in a state of disrepair for some time.

Additionally it is not sensible to envisage a woodland that is 'sealed' by fencing with no entrances or exits as suggested by many of the objectors. The woodland has clearly been managed (sales brochure refers to felling and planting) and access would have been needed. It is also reasonably alleged that from 1943 to the late 1980s there were two stiles on the roadside perimeter. These were installed before the land was leased; it is not known by whom but logically they would have been installed by the Spye Park Estate though for the use of whom is not known, woodland management or horse riding/hunting would have required wider access points though other private access (walking, shooting) could have been over stiles.

Even if at times in the past the fence had been vandalised deliberately to gain access, there is no history of maintenance and hence once down, it would have stayed down and subsequent users would not have required force to use the access points created.

On cross examination witnesses provided by Mr Seed agree that the above applied, Mrs Goddard who has known the plantation since 1990 recalls that over the years barbed wire fencing stretched and fell down and wasn't maintained, Mr Collens records that in the area by the lay-by he gained access to the plantation via trodden down area where no standing fencing was apparent or signs evident, Mrs Bealing records that there had been a perimeter fence at some time but it was either cut or stretched and buried in so many places that it made access very easy, she used the plantation prior to Mr Seed buying and fencing it.

It is considered that access to Chittoe Heath Plantation by the public has not been by force .

ii) Without secrecy

Since it is the fact that use continuing without objection or challenge that gives rise to the presumption of dedication (a central tenet of Section 31 of the Highways Act 1980), it must follow that the owner must have been aware of the use to object should he have wished to do so.

Presumed dedication was made a feature of rights of way law in 1932 when it was included in the Rights of Way Act of that year and since that time landowners have been able to prevent the public acquiring rights by a number of prescribed ways.

Witnesses for the application have provided evidence of use of Chittoe Heath Plantation since the 1960s with use increasing to the time of application. They report clearing branches from routes, meeting other users, parking cars nearby and in parts of the plantation well trodden paths are visible. Users report that mountain bikers used a track, that people collected firewood and mushrooms and that dogs were let off of leads. One local resident reports that loose dogs from walkers upset their chickens.

Mr Heard, the step son of the previous owner of the land, resident from 1975 to 2005 and fully engaged in all aspects of the estate recalls removing a burnt out car and rubbish from the plantation and recalls that the fence was vandalised over a period of years.

Spye Park estate gave the adjacent land that is Chittoe Heath for public recreation (see 1909/1910 Finance Act records) and were hence aware that the public were being encouraged to come to the area. In fact, two stiles were in place on perimeter of the plantation during their ownership. These are well documented by longer term users and especially detailed by Mr Hazell who has known the plantation since 1943.

Objectors and nearby residents report that people walked in the plantation by climbing over the fence indicating that they were aware of the use. Users report that plants were placed for sale along the claimed route for a period in the early to mid 2000s.

It is likely that the level of use meant that that Spye Park Estate as the landowner to 2005 was aware that the public walked in Chittoe Plantation and there is no evidence that Spye Park Estate made any objection, infact it seems likely that they erected the stiles present from at least 1943. Although the Forestry Commission as leaseholder (1954 to 1992) have a general policy of excluding the public from leasehold woodlands there is no evidence that they did anything to prevent public access. BCH (UK) Ltd realised that the public were accessing the woods in 2002 when they became leaseholders and erected some signs declaring that the woods were private. The signs were neither maintained nor notice to the Highway Authority made that they had been torn down or defaced. Mr Seed, who lives adjacent to the woods was clearly aware that the public used the woods as he had not been the leaseholder for very long before he firmly challenged the public's use; he must have been aware of the use prior to purchasing the plantation.

Given the cases discussed earlier in Applegarth and Rowley (page 28) it is taken that either the landowner or the leaseholder could have been aware to challenge the use. For example even though Blue Haze Corp. is a remote landowner, the leaseholder during this period was aware of the use and it was held in Rowley that the acquiescence of a tenant could bind the landowners on the issue of dedication of a public right of way.

It is considered that use by the public was open and was of a kind that was capable of being challenged and was therefore without secrecy.

iii) without permission

An owner of land may give permission verbally, in writing or by the placement of signs (for example 'permissive path'). Any of these actions will mean that use has not been 'as of right'. One of the witnesses in support of the application, Mrs Collins, states that the previous owner or occupier was aware of the public using the way because "the previous owner of Spye Park allowed reasonable and responsible access. We believed it was owned by Spye. We never saw any owners there". Mr Seed suggests that Mrs Collins obtained permission but in response to the direct question of whether anyone had ever given her permission she answered no.

It is possible that the presence of stiles implies permission, however in the case of R (Beresford) v City of Sunderland (2001) the House of Lords held that the provision of seating for use of the public on a claimed village green did not imply permission, hence use of the green had been 'as of right'. Equally the fact that some persons used the way with permission will not necessarily prevent use by the public in general from being without permission. The same case also held that a grant or permission could not be inferred just because the owner simply tolerated the use, there had to have been some positive act required on their part.

There being no evidence that use of Chittoe Plantation by any of the users has been by permission in the period leading up to Mr Seed's ownership of the lease. It is therefore considered that use had been without permission.

4.4 That the public knew that the woods were private – subjective belief

It has been suggested to officers that because users knew the woods to be private, their use can not be considered to have been ‘as of right’.

It is a feature of public rights of way in England and Wales that they pass over land that is in private ownership; that is, that the public has a right, in law, to pass and repass over a defined route on land that is privately owned.

Neither is the state of mind of the user a consideration, all that may be considered is whether that use has gone on, without permission, without force and without secrecy. This point was addressed by Lord Hoffman in the House of Lords in the case of Regina v Oxfordshire County Council and others ex parte Sunningwell Parish Council [2000] 1 AC 335. In his judgement Lord Hoffman dismisses any additional requirement of subjective belief for the satisfaction of ‘as of right’:

“In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in any way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years’ user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like Steed when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr J G Ridall’s article “A False Trail” in [1997] 61 The Conveyancer and Property lawyer 199.”

It is considered that it is not relevant to this case whether the users knew the woods were privately owned or not.

4.5 Sufficiency of evidence

It has been suggested by objectors that there is insufficient evidence of use and that not all users have satisfied the twenty year use requirement. On the subject of sufficiency of evidence The Planning Inspectorate issues Consistency Guidelines for modification orders and the following is taken from the current edition:

There is no statutory minimum level of user required for the purpose, and the matter does not appear to have been tested in the courts. However, it is clear that Inspectors must be satisfied that there was a sufficient level of use for the landowner to have been aware of it, and have had the opportunity to resist it if he chose. In Hollins v Verney (1884) it was said that: No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment and that no actual user can be sufficient to satisfy the statute ... unless the user is enough to

carry to the mind of a reasonable person (owner, etc.) the fact that a continuous right of enjoyment is being asserted and ought to be resisted..... *It follows then that use of a way is less cogent evidence of dedication if the landowner is non-resident – at any rate, if the owner had no agent on the spot – than if he is resident. If the landowner did not know that the way was being used, no inference can fairly be drawn from his non-interference.*

Use of the way should also have been by a sufficient number of people to show that it was use by the public – representative of the people as a whole, or the community in general (see 'The Public' above) – and this may well vary from case to case. Very often the quantity of valid user evidence (see 'User evidence,' below) is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.).

It was held in Mann v Brodie 1885 that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. Watson J said: If twenty witnesses had merely repeated the statements made by the six old men who gave evidence, that would not have strengthened the respondents' case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence. Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. However, Dyson J in Dorset 1999 did not question that the Inspector had found the evidence contained in five user statements insufficient to satisfy the statutory test, even though the truth of what was contained in them had been accepted.

A total of 22 users have submitted evidence and many of these report having seen other users in the plantation. Additionally objectors and the current leaseholder Mr Seed record that they have been aware of the use and that the use is frequent.

Users do not all had to have used the claimed route for a period of 20 years, it is however necessary to show that there has been 20 years use as of right, that is, spanning the entire period albeit by different people. The evidential value is increased if users have known and used the claimed route for the full period and it is noted that of the 22 users 9 have used the claimed paths for a period of 20 years or more (within the relevant period) and a further 3 have used the paths for 19 years.

It is considered that there is a sufficiency of evidence to support this application.

4.6 The route used

Section 31(1) provides:

“Where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication...”

The meaning of the expression “a way” was critical in the case considered by the House of Lords in 1991 in *Attorney-General ex rel. Yorkshire Derwent Trust Limited v Brotherton* [1991] 1 AC 425 (“Derwent”). In *Derwent* navigation rights were in issue and Lord Oliver identified this as the physical site upon which the physical feature described as “the way” runs. As he pointed out:

“You do not dedicate a right or direction of travel. You create a right by dedicating the land for use as a public passage.”

It has been held that although it must be shown that the way has been used for a period of 20 years it is not necessarily fatal that the line of travel has altered lightly over this period. This may be relevant to this application as it is clear that whilst users accessed the plantation, since 1943 on the account of Mr Hazell) at a stile near the cross roads (at A) the erection of a fence across the line of travel sometime prior to the 2008 sale of the lease caused any users still using this point of access to deviate slightly north. This is reflected in the application which claims the route from a point where Mr Seed’s new gate is now. It is clear from statements that some users had used this access point before the erection of the new fence and the erection of the new fence was clearly not to prevent access but to divide the land prior to the sale by BCH(UK) to Mr Seed.

In the case of *R v S of S for the Environment ex p. Blake* [1984] JPEL 101 it was held that the erection of a barrier (a gate locked against users) had caused users to take a substantial diversion. It follows that this diversion would have to also accrue 20 years of use ‘as of right’ to be a public right of way. It is however not considered that in this case it was a substantial diversion that walkers may have used to avoid this fence, indeed some users do not claim to have used the old stile entrance at the cross roads at all.

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

It is noted that the applicant claims a number of routes, one leading around the perimeter of the plantation and a number of others linking in (see map at rear of appendix A).

Nineteen witnesses claim to have walked a perimeter route though they have not marked their maps identically. Maps provided by witnesses were of a scale of 1:2500 and had no distinguishing features shown within the plantation. It is therefore perhaps not surprising that there is some degree of disagreement between them. There is considerably greater variance with the evidence given for the use of the cross paths and not all witnesses claim to have used all of the routes claimed in the application. The most commonly reported cross path leads from point B to the eastern perimeter path and it would seem that only witnesses 2,3,4,5,10 and 12 have walked the same route as shown on their evidence maps.

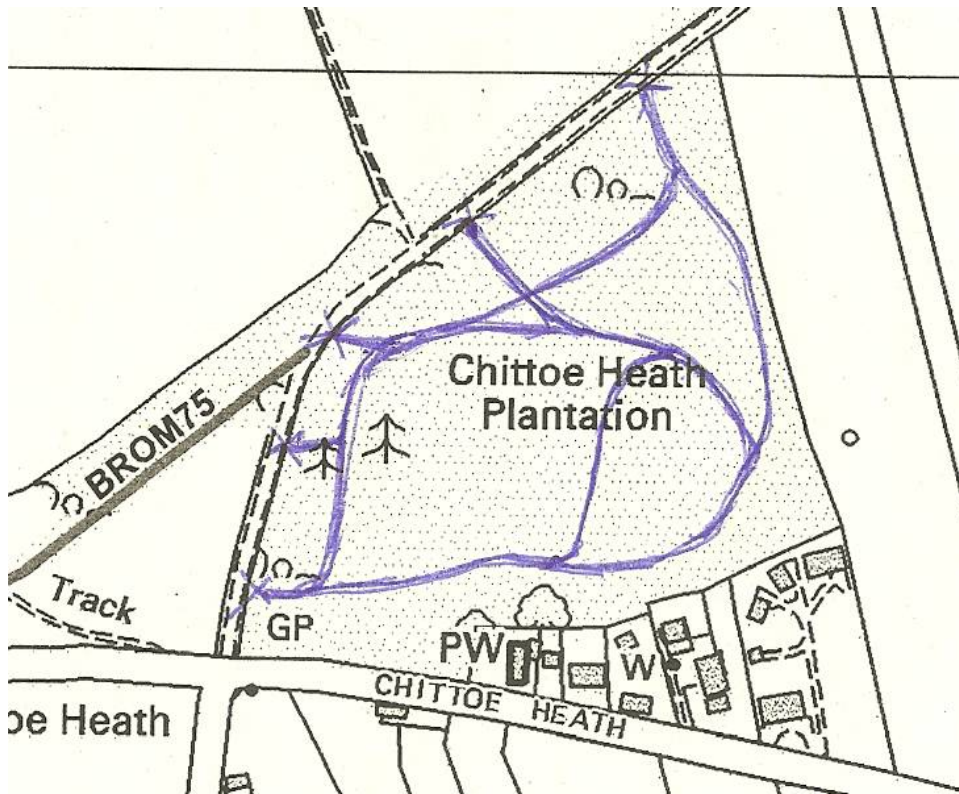
Of the 22 users 10 can recall seeing the plants for sale (possibly in the late 1990s) and they all agree that the plants were for sale in the same place, hence it is likely that not only because they all saw the plants but also because the plants were put on a route where people walked that these people were all walking the same track. This is at a point approximately 50 metres into the plantation opposite the Bromham 75 junction.

Witnesses also record using different access points to the plantation with 19 reporting using an access point near to the cross roads/Mr Seed’s new gate (point A on map in Appendix A), 16 reporting using an access point opposite Bromham 75 (point B), 9 report accessing the plantation further along the road by the lay by (point C) and 14 report accessing the plantation at point D

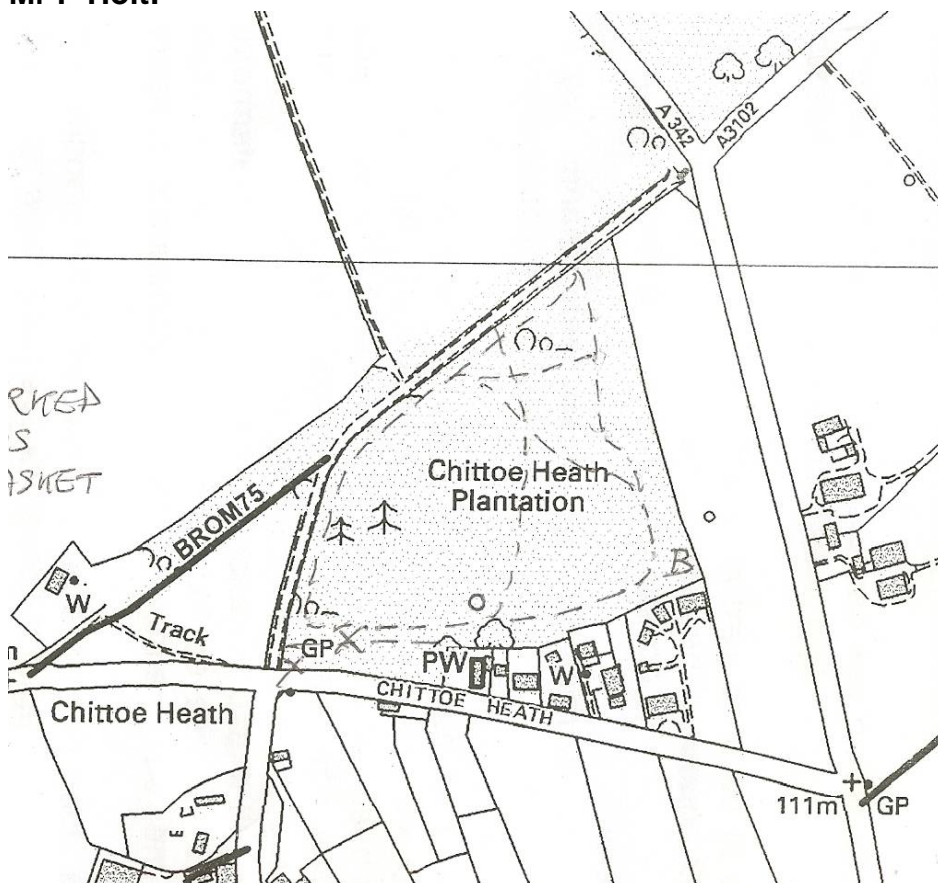
which is the entrance to the woods near the eastern boundary and probably location of the second stile reported by Mr Hazell as being up in 1943.

Examples of variance of routes claimed by witnesses:

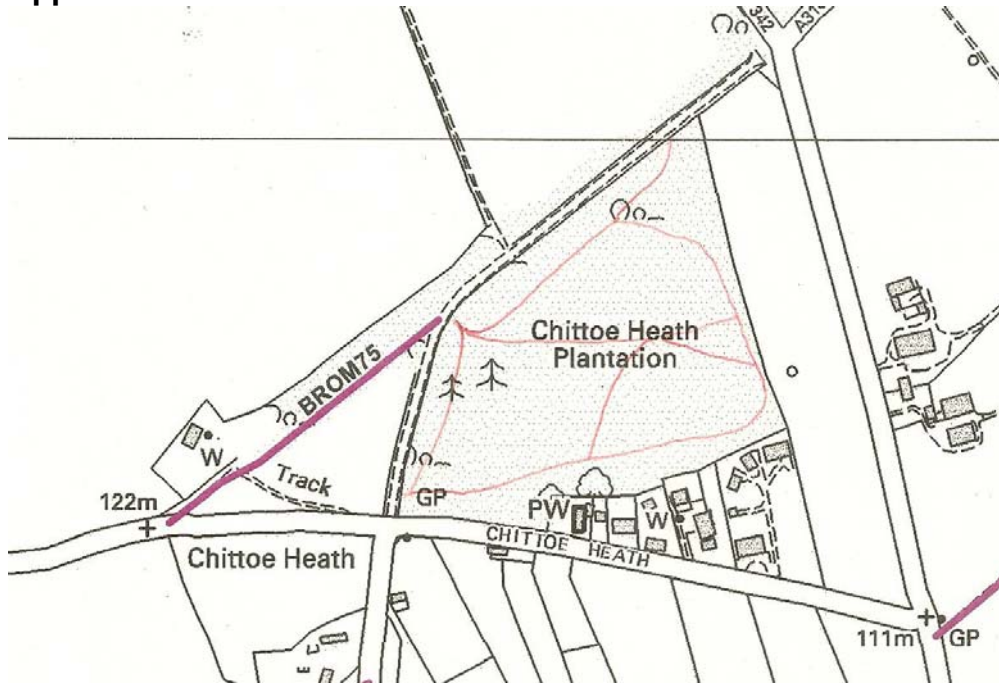
Ms H Imrie:



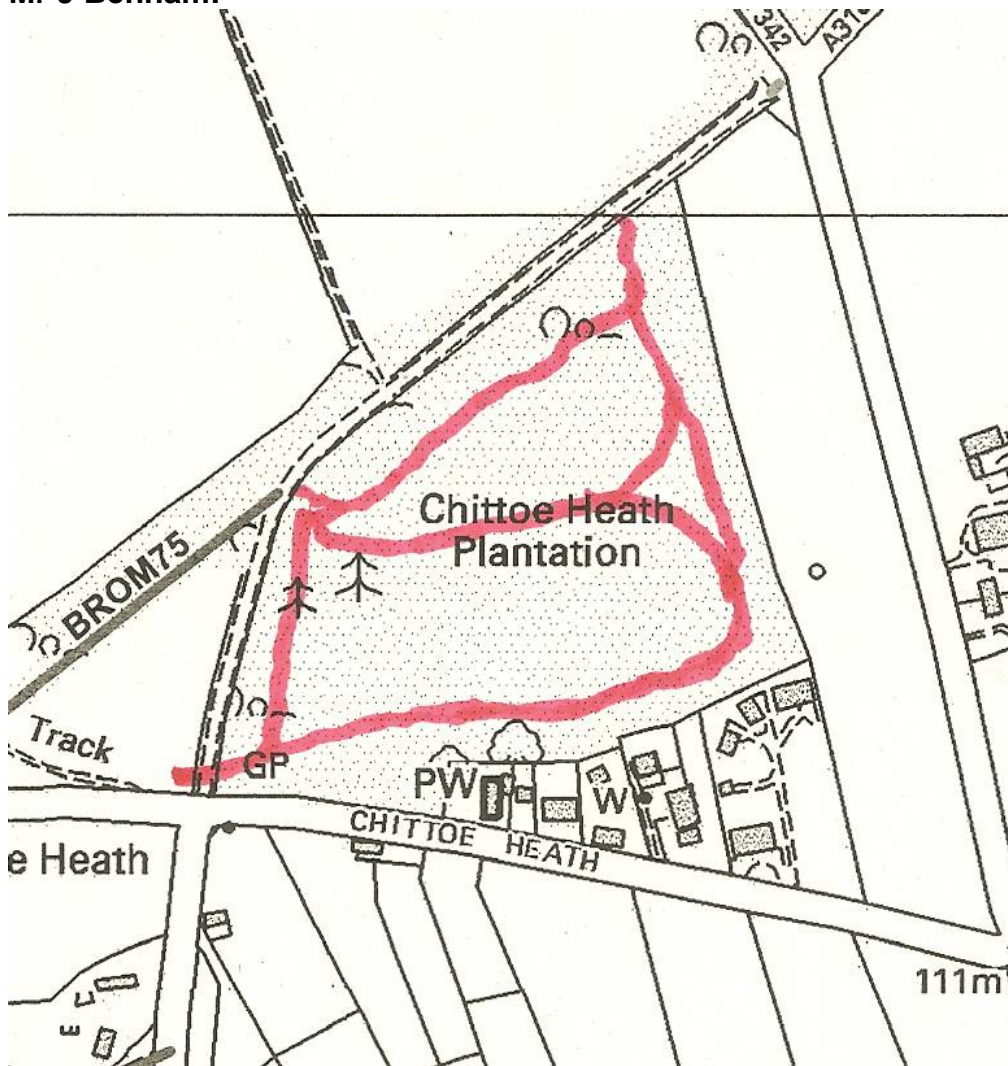
Mr P Holt:



Application:



Mr J Benham:



It is clear that there is variance in the routes drawn on the maps. Officers would normally in a circumstance such as this meet witnesses individually on site and ask them to walk where they had in the past. This was not possible in this case as the leasehold owner, Mr Seed, did not grant permission for officers to meet others in the woods.

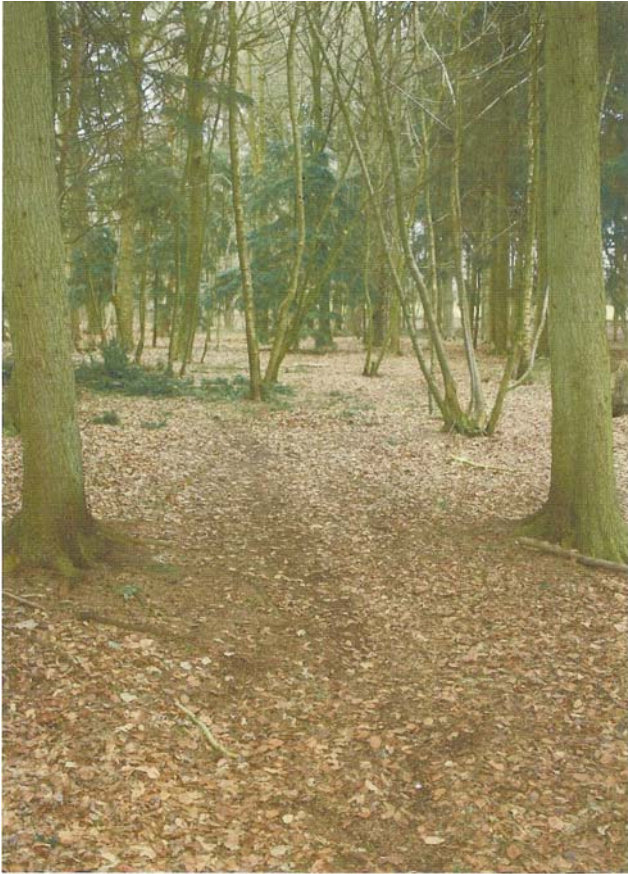
Free access was granted to officers though it is noted that is not required as officers are authorised under the Highways Act 1980 s.289 to enter land to survey and under s.293 of the Countryside and Rights of Way Act 2000 to enter land to survey.

As a result of these restrictions the case officer requested that users submit photographs of the routes they had used. Commander Padwick, Mr Benham and Mrs Hodsell were especially helpful in this regard.

Commander Padwick's photos show that he had walked the same route at different times of the year, below are two images which show that he had walked the perimeter track from the bluebells corner leading north about 10 metres in from the eastern boundary fence. One image is taken in the winter and the other in the spring. A distinctive tree shows that they are taken in the same spot. The photographs spanned the years 2005 to date.



Mr Benham's photographs show that in some places a distinct path could be seen but in others it could not:



Officers visited the site in December and in February and found that whilst in parts the perimeter route was clear and unequivocal, in other parts it was impossible to discern any walked line. It was also not possible to tell where cross paths went.

In the area along the eastern boundary it is reasonably clear where the path leads:



But along the road boundary it is not clear where the path is:



The next picture is taken from the access point opposite Bromham 75 looking south towards Mr Seed's new gate – access point A. It is not clear where the path is:



Referring to Lightman J' s comments in *Oxfordshire County Council v Oxfordshire City Council* [2004] Ch 253 it is not considered that the right of passage has been established over a more or less defined route. Officers are also mindful of a decision by the Planning Inspectorate in 2005 not to confirm an order made by Wiltshire County Council to record a path in Marlborough for this reason.

4.7 Application of the law to Crown Land

Between 1954 and 1992 the leasehold for Chittoe Plantation was held by the Crown. Although in general only the person or statutory body that holds the freehold in land has the legal capacity to dedicate in *Rowley v SSTLR and Shropshire County Council (QBD)* [2002] EWHC 2758 it was held that the acquiescence of a tenant could bind the landowners on the issue of dedication of a public right of way. Hence although the Crown did not have the power to dedicate, their acquiescence could have led to deemed dedication of the way.

The general principle is that legislation applies to Crown Land only if particular legislation provides for it to apply. Thus since the National Parks and Access to the Countryside Act 1949 and the Wildlife and Countryside Act 1981 provide that they are to apply to Crown Land, rights of way over Crown Land can be shown on definitive maps. However, the Highways Act 1980 and its predecessors do not bind the Crown and any claim for a right of way across land which is, or was, Crown land, cannot rely on the 20 year provisions of section 31 of the 1980 Act. It is however noted that the Crown may enter into an agreement under section 327 of the 1980 Act for it to apply. It is also noted that dedication may occur at common law over Crown Land.

It is also noted that in the Forestry Commission's response to the officer's enquiries that they did not consider that they had the power to dedicate as they sated that they considered that the freeholder should deal with any statutory deposits (S.31(6) of the 1980 Act).

Officers consider that because the Crown was not the freehold reversioner it would still be possible for Section 31 of the 1980 to apply.

5.0 Conclusion

The evidence given by witnesses both for and against the application has been found to be cogent, honest, accurate, credible and largely consistent.

For an order to be made to record public footpaths in the definitive map and statement it must be shown that a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates.

This report has looked to the satisfaction of Section 31(1) of the Highways Act 1980. If Section 31 (1) is satisfied then it is necessary to look for evidence that there was no intention during the relevant period to dedicate it.

Section 31 (1) states:

Where a way over any land, other than a way of such 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 and 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.

This report finds that whilst it is reasonably alleged that the public had enjoyed use of paths in the woods at Chittoe Plantation 'as of right' and without interruption for a full period of 20 years between December 1988 and December 2008 the application fails to satisfy where 'the way or ways' are. It is clear that the public have accessed the plantation at different places and can not show that they all walked the same tracks for the entirety of the claimed route or routes. In places where the tracks are defined it would be possible to draw an Order plan and define the route; however in other places it is not possible to tell within an accuracy of perhaps 10metres where the claimed 2 metre wide path is.

This application is therefore refused.

Sally Madgwick
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15th March 2010

