

# Wildlife and Countryside Act 1981 s.53

## Application to Add a Public Right of Way to the Definitive Map and Statement

### STRATFORD SUB CASTLE, SALISBURY

#### Decision Report

- 1.1**
- Application number:** 2011/08
- Application date:** 19 June 2011 accepted as Schedule 14 compliant 06 July 2011
- Applicant:** “Re-Open Our Walk” Group  
c/o Martin Quigley  
115 Castle Road  
Salisbury  
Wiltshire  
SP1 3RP
- Application to:** Add a footpath leading from the northern most position of Stratford Field adjacent to the Stratford Bridge (A) towards the southern gateway (B) with access at points (C) on the map and to “beach” area (D)
- Width:** 5 metres (unrestricted access to “beach” area)
- Application comprised:** Notice of application for Modification Order (Form 1)  
Copy of notice of application for Modification Order to landowner (Form 2)  
Certificate of Service of Notice of application to the following owners and occupiers (Form 3):  
Melanie Auchterlonie  
(10 Kings Mead Place, Broad Bridge Heath, West Sussex, RH12 3TA)  
1:5000 Plan showing claimed route (sent 06 July 2011)  
Google aerial photograph with claimed route shown  
95 witness evidence forms (plus 4 subsequently submitted)
- Basis of Application:** That public rights exist and that the route should be recorded in the Definitive Map and Statement.
- 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 and statement of public rights of way.

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

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

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

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

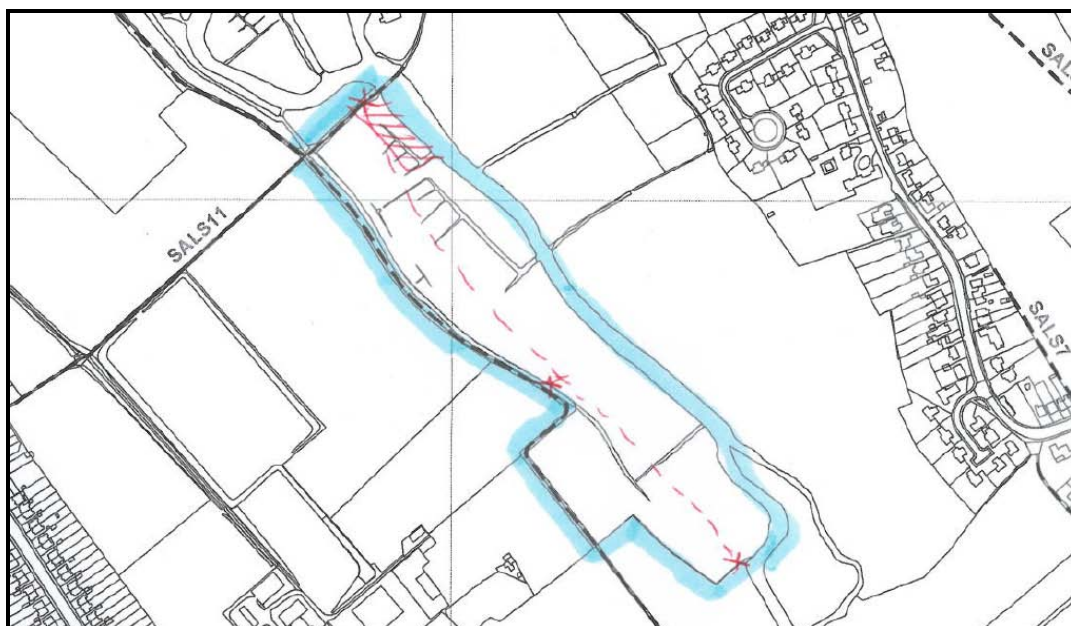
(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

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

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.

## 1.2 Description of Route:

The claimed route leads from the local nature reserve in a north north westerly direction through a field, leading to a beach area of the River Avon and on to join path Salisbury 11 at the bridge. The route leads through the field avoiding the drainage channels. There is an additional claimed access point on the western boundary accessed from path Salisbury 9.



**1.3 Site Visit 02 August 2011**

**Approaching claimed route (through gateway) from Avon Valley Local Nature Reserve**



**Claimed route from gateway leading across field (from south heading north)**



**Access point from path Salisbury 9 (western field boundary)**



**Access point from footbridge**



## Beach area from bridge



## 2.0 Compliance of the application

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

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

Schedule 14 to this Act states:

### *Form of applications*

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

Schedule 14 (2) requires that notice is served on owners and occupiers of any land to which the application relates.

This application comprised the below and is considered to be compliant with the legislation.

*Notice of application for Modification Order (Form 1)*

*Copy of Notice of application for Modification Order (Form 2) served on landowner (Melanie Auctherlonie)*  
*Certificate of Service of Notice of Application for Modification Order (Form 3)*  
*Map showing claimed route at a scale of 1:5000*  
*Aerial photograph showing claimed route*  
*99 witness evidence forms in total*

### **3.0 Context of the Application**

The application brings evidence to the Council's attention relating to use of the claimed route over a period dating back to 1945. This evidence will be considered in more detail later in this report. The Council has a duty to examine all available evidence, hence a number of maps and historical documents have been viewed to investigate whether there is evidence for the existence of a historic route for the public.

### **3.1 History of Landownership**

1741	From Victoria County History Vol. VI After 1741 it was provided that Mill and Bridge Meads might be fed in common from Lammas to Lady day with all cattle except sheep.
1800	From Enclosure Award Plan Land enclosed into three enclosures. Ownership unreadable ("Thomas ??")
1839	From Tithe Commissioners survey records: Claimed route was three enclosures belonging to: Dean and Chapter of Sarum ("Bridge Mead") Alexander James ("in Bridge Meadow") Alexander James ("Rosewells Acre in Bridge Meadow")
1910	From the Inland Revenue Finance Act 1910 Valuation Book: All forms part of hereditament number 187: Eccliaistical Commissioners
1921	Victoria County History Vol. VI R F S Coggan bought the land
1981	4 Sept 1981 King Edward's Hospital Fund for London managed by Cluttons NB Grazing licence to R Hounslow 1999 to approx. 2007
2004	Warren Armstrong
2007	Riverside strip of land sold to Salisbury and District Angling Club and fenced
2011	Melanie Aucterlonie

### **3.2 Stratford Sub Castle Enclosure Award 1800 EA/74 WSHC**

The land over which the claimed route leads was enclosed by this award dated 1800. The process of enclosure removed the common rights from land and allotted specific parcels of land to individual owners. The process was also capable of extinguishing existing rights of way and creating new ones.

The right of way that is now footpath Salisbury number 11 (Stink Pot Lane) is shown on the same route as in the definitive map and is labelled "From Bemerton" supporting that it was a public right

of way at that time. It is shown by a pecked symbol leading across fields and not as a sienna coloured route like other enclosed routes.

The land over which the claimed path leads is enclosed at this time and forms three distinct plots. No paths or tracks are shown across the land but the path that is now footpath Salisbury 9 leading outside of the western boundary of the land is shown by a pecked line.



### 3.3 Stratford Sub Castle Tithe Map and Apportionment T/A Stratford Sub Castle WSHC

The tithe surveys arose out of the Tithe Commutation Act of 1836 which required all titheable land to be surveyed and tithes apportioned accordingly and commuted to fixed rent charges. It was not

a function of the act or a requirement of the surveyors and commissioners that they should record public rights of way but in drawing maps and plans routes are often represented. It is a convention suggested by a parliamentary paper that roads should be coloured sienna and footpaths may be shown by hatched or pecked lines but it was not a requirement of the act.

This particular map is stamped by the tithe commissioner in 1839 and shows roads and paths. The land over which the claimed path leads does not appear to be drained at this time as waterways are shown in blue. The land affected by the claimed path appears as three separate enclosures in keeping with the Enclosure Map and are numbered 155, 156 and 157.

- 155** Owner: Dean and Chapter of Sarum  
Leased to Alexander James  
Occupied by James Charles 'Parsonage'. "Bridge Mead and field over the water. Water Meadow and arable".
- 156** Owner Alexander James  
Occupied by James Charles "in Bridge Meadow" "Water Meadow"
- 157** Owner Alexander James  
Occupied by James Charles "Rosewells Acre in Bridge Meadow" "Water Meadow"





Path Salisbury 11 is shown (coloured sienna continuing as both Woodford path 16 and as a pecked line continuing as Salisbury 11 does). The path that is Salisbury 9 is not shown though the water course that leads along the western edge of the land affected by the claim is shown.

### 3.4 Ordnance Survey County Series Plans 1:2500

The 1:2500 scale was introduced in 1853-4 and by 1896 it covered the whole of what were considered the cultivated parts of Britain. Sheet LX.7 (66.7) covers the area affected by the claim and was originally surveyed in 1879 with revisions in 1900, 1923, and 1936. J B Harley, historian of the Ordnance Survey, records that “the maps delineate the landscape with great detail and accuracy. In fact practically all the significant man made features to be found on the ground are depicted. Many phenomena make their debut on the printed map and as a topographical record the series transcends all previous maps. Every road....., field....., stream and building are shown; non-agricultural land is distinguished...quarries, sand, gravel and clay pits are depicted separately; all administrative boundaries..are shown;...hundreds of minor place names...appear on the map for the first time. Where appropriate, all topographical features are shown to scale. The series is thus a standard topographical authority”.

Richard Oliver in his book “Ordnance Survey Maps a complete guide for historians” recognises that surveying errors (and paper distortion during printing) cannot be ruled out, particularly where detail is sparse, but in practice such errors are likely to be very hard to demonstrate, because of a general paucity of suitable sources rivalling or bettering the OS in planimetric accuracy and completeness of depiction.”

Ordnance survey maps of this period, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.

An Ordnance Survey Instruction to surveyors was released on the 16<sup>th</sup> February 1883 which stated that:

#### FOOTPATHS

*All permanent footpaths whether public or private which are a physical feature on the ground must be shown on the 1:2500 and 1:500 plans, with the exception that on the 1:2500 plans footpaths in back yards and small gardens attached to houses, whether grass or gravel will not be shown. F.P. will be written to all footpaths except those in gardens or yards or in cases of very short paths, where the omission is not likely to mislead; the object of the insertion of F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic.*

*This is to embody and supersede all previous orders on the subject.*

*To be entered in the Detail Memo Book and returned with a notification that this has been done.*

*Signed*

*A C Cooke*

*M General*

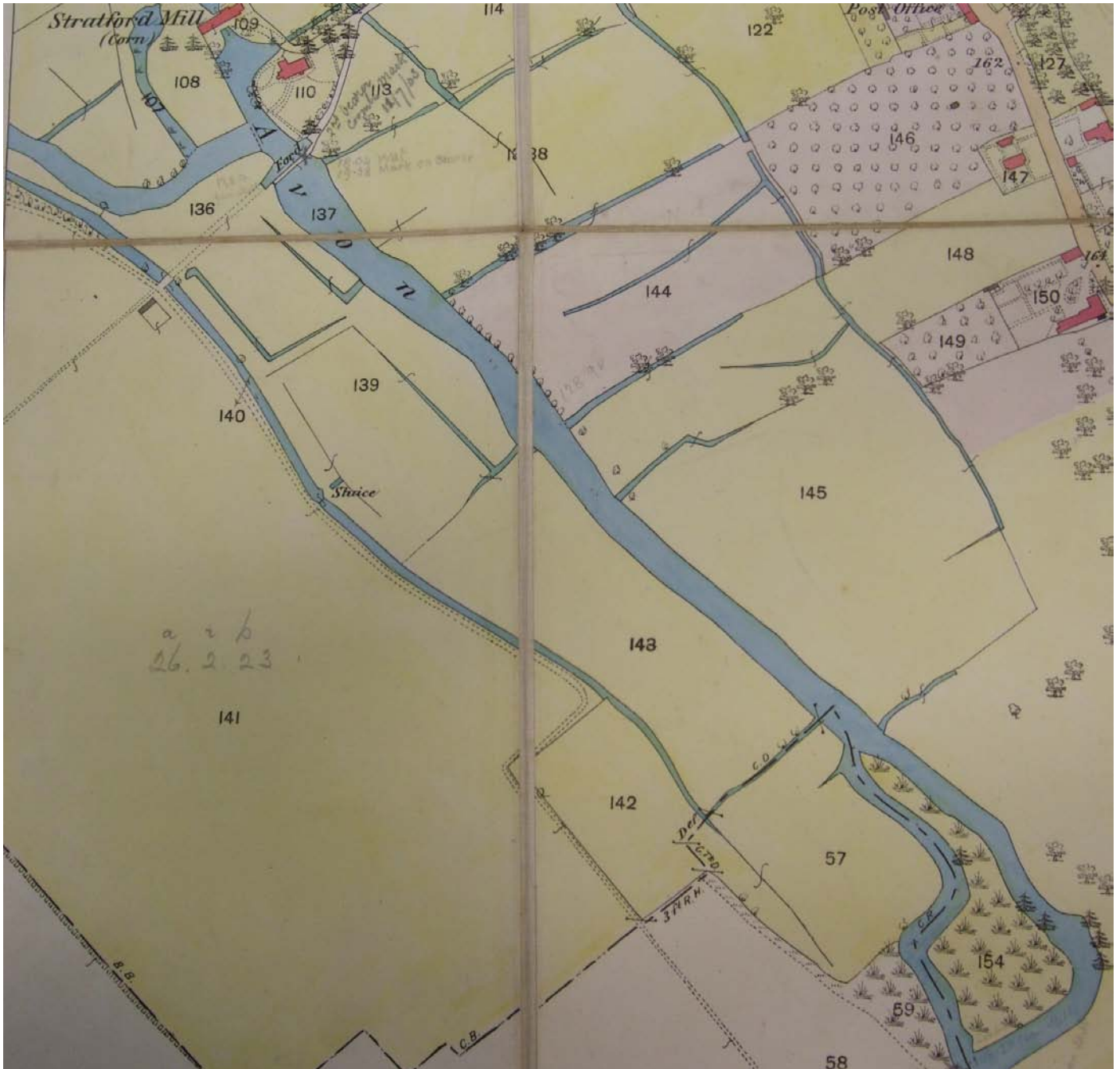
Against this background early Ordnance Survey can provide a valuable source of information relating to the physical existence of any paths, ways and field boundaries at the time of the survey or revision.

### First Edition 1:2500 Survey 1879 Printed 1881 Sheet 66.7

Mill Lane is clearly shown separately numbered and measured as a road. The road continues to Stratford Corn mill and over the bridge, which is narrower than the road. A ford is shown beside it on the mill side of the bridge (i.e. on the opposite side of the bridge to the claimed route) with the road continuing from the ford, the bridge route terminating at the bank. Paths that are now

recorded as Salisbury 9 and 11 are shown as unfenced paths. The Ordnance Survey did not use the symbols for F.P. and B.R. at the time of the survey.

The land over which the claimed route leads is shown with drainage channels, two of which cut across the claimed route. No path or track is shown across the two fields (parcels number 139 and 143).



### Second Edition 1:2500 Surveyed 1875 Revised 1900 Printed 1901

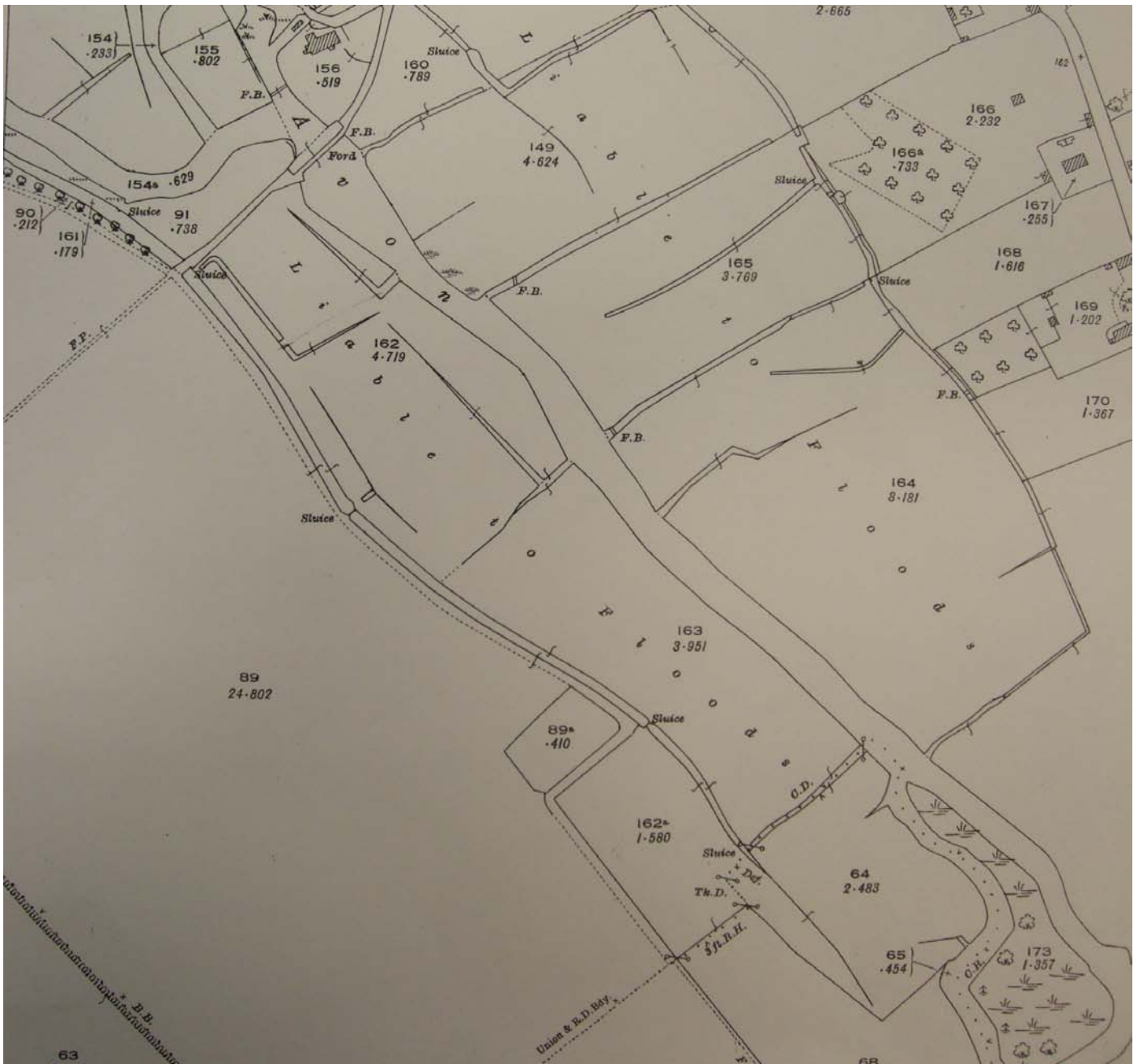
Mill Lane is shown as a road, separately numbered and measured extending over a footbridge (marked F.B.) and through a ford. The road ends at the junction of Salisbury paths 9, 11 and Woodford 16 with both Salisbury 9 and 11 labelled F.P. as footpaths. The land over which the claimed route leads is marked "Liable to floods" and shows a system of drainage channels and three sluices, 2 of which cross the line of the claimed route. No path is shown across this land (parcels number 162, 163 and 64).



**Edition of 1926 1:2500 Surveyed 1875 Revised 1923**

The representation of Mill Lane and the footpath network is essentially as the Second Edition although some field creations (parcel 89a) have caused some enclosure of Salisbury 9. It is noted that the marsh land at the southern end of land affected by the claimed route (parcel 66) is no longer shown as marsh land suggesting that drainage and sluices in Bridge Mead had taken effect.

The land affected by the claimed route is shown as "Liable to Flooding" with drainage and sluices as in 1901.



Revision of 1936 1:2500 Surveyed 1875 Revised 1936

Representation as 1926 edition.

#### 4.0 Aerial Photography

Aerial photography can provide evidence of the physical existence of features only. It cannot determine what has caused a physical feature (for example whether an apparent path was created by walkers, animals or is just a feature of the land i.e. caused by water runoff). A number of aerial photographs have been viewed in relation to this claim.

Wiltshire Council's archives hold aerial photographs from 1981, 1991, 2001 and 2006.

**1981** The photographs show the existence of some drainage ditches but not bisecting the fields in the same manner as shown on the early OS maps (1879 to 1936 inclusive). Some evidence of tracks approximately consistent with the claimed route can be seen and an area at the end of the bridge would appear to be widened and worn suggestive of an entrance to the field through which the claimed route leads.



Path or track

**1991** This photograph supports the suggestion of a worn path or track approximately along the claimed route. Numerous drainage channels and undulations in the field can be seen in this photograph and track is over the only ground not affected by these undulations.



Worn path or track

Some evidence of a path can be seen from Salisbury 9 through the nature reserve to the claimed path.

2001

This photograph clearly shows a worn path extending along the claimed route. Another path can be seen following the river bank though this is less distinct. The river bank path appears to cut in land for part of its route apparently to avoid some drainage ditches. The 'beach' area has the appearance of being worn from the end of the bridge.



Tracks clearly shown

It is also noted that by 2001 the path into the nature reserve from Salisbury 9 was clearly visible.

**2006** This photograph shows a very worn area from the bridge to the 'beach' area and some evidence of worn paths along the river bank and the claimed route. Again the path from Salisbury 9 to the nature reserve is shown.



## **5.0 Other Photographic Evidence**

Wiltshire Council is the highway authority for this area and has a duty to inspect and maintain not just the public rights of way but also the bridges. The footbridge at the northern end of the claimed route was inspected on the 19 April 1993 and 23 March 1995. Photographs have been viewed which show the end of the bridge. Some witnesses describe gaining access to the claimed path as being 'through the bridge rails' and is clear from aerial photographs that there is significant wear on the ground at this point.



**19 April 1993** The barbed wire field fence has been secured to the bridge rails at the claimed land side of the bridge.



**23 March 1995** This photograph show that the fence is connected to the bridge with barbed wire in a manner consistent with the 1993 photograph but that there appears to be a fence post missing. There is significant evidence of wear on the ground at this point even though it is securely fenced. This wear could be attributable to water runoff from the bridge deck. It is noted that the final rails on the bridge show wear (darker polishing) at this point consistent with claims that people went through them.



## 6.0 Witness Evidence of Use

The application brought to the Council's attention evidence of knowledge of the claimed route by a total of 99 individuals, 92 of whom had used the claimed route. **SEE APPENDIX A**

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.*

It is considered that prima facie there is a sufficiency of evidence and that it is appropriate to consider both statute law and common law.

### 6.1 Statute Law Relating to Use by The Public

The evidence submitted with the application suggests that the claimed route has been used by the public for a considerable number of years (since 1945); the route does not appear have a historical context and/or evidence of public use before this time and I 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.

Section 31 of The Highways Act 1980 states:

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

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

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

*(3) Where the owner of the land over which any such way as aforesaid passes –*  
*(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*  
*(b) has maintained the notice after the 1<sup>st</sup> January 1934, or any later date on which it was erected, the notice, in the absence of proof of 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*).

## **7.0 Testing the Evidence**

### **7.1 Initial Consultation**

The following letter and plan showing the claimed route was circulated:

*Wiltshire Council has received an application for an order adding a public footpath to the definitive map and statement. The application relates to a claimed path across land at Stratford sub Castle leading from the bridge over the River Avon between Stink Pot Alley and Mill Lane in a south south easterly direction to a gateway leading to the Salisbury City Council owned nature reserve and as shown by a broken black line on the attached plan.*

*The application is supported by 95 user evidence forms submitted by people who claim to have used the way for varying lengths of time since 1945.*

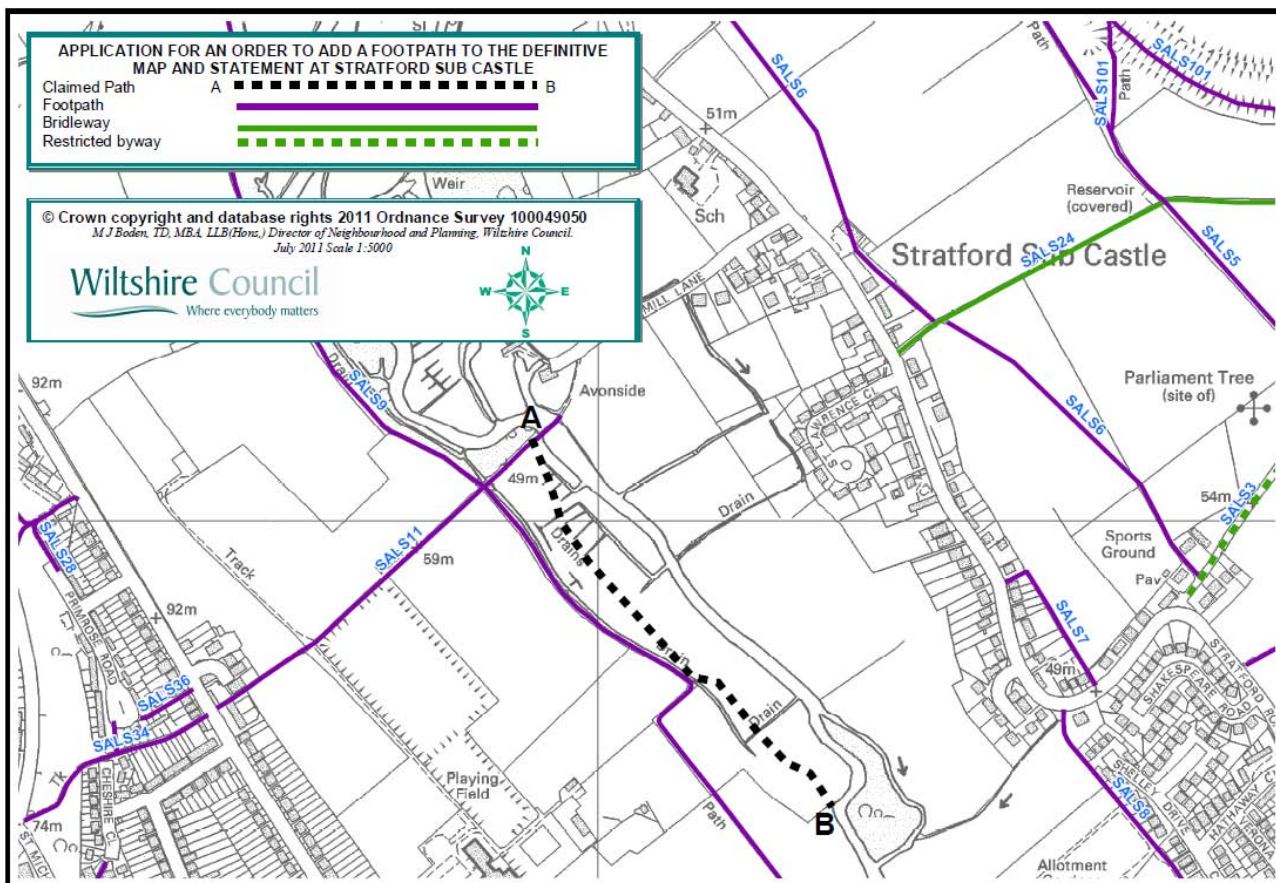
*For public rights to have been acquired it is important that this use by the public has been 'as of right' that is without permission, without secrecy and without force. If you have any evidence relating to permissions granted, signs observed or any other evidence that you would like to bring to the Council's attention I would be pleased to receive it by Friday 16 September 2011. Please be as specific as you can be about dates and locations. Please also note that matters of desirability, need, the environment and health and safety are not issues that can be considered under the legislation.*

*When officers have considered all available evidence a decision will be taken by senior officers as to whether the application will be upheld and an order made or whether the application will be refused. Should an order be made there is a statutory period for receipt of formal objections and you will receive notification of this as appropriate.*

The letter and plan were circulated to:

All witnesses  
Salisbury City Council

Current landowner (Ms Auchterlonie)  
 Mr W Armstrong (landowner 2004 to 2011)  
 Cluttons (managed land for client c.1990 – 2004)  
 Mr P Coggan (son of landowner 1921 – 1990s)  
 Mr R Hounslow (grazing licence 1999 to c.2007)  
 Avon Valley Nature Reserve  
 Wiltshire Wildlife Trust  
 Salisbury and District Angling Club (purchased and fenced riverside strip in 2007)  
 The Auto Cycle Union  
 Commons Open Spaces and Footpaths  
 Wiltshire Bridleways Association  
 Cycling Touring Club  
 British Horse Society  
 Wiltshire Councillor Mary Douglas  
 Byways and Bridleways Trust  
 Wiltshire Council Senior Rights of Way Warden Nick Cowen  
 Wiltshire Ramblers' Association  
 Wiltshire Council County Ecologist Fiona Elphick  
 British Driving Society  
 Mr D Mills (neighbour overlooking claimed route)



Map not to scale

## 7.2 Responses – relevant points

### R Hounslow – Grazing Licence 1999 to c.2007

He grazed the field with cows and cows with a bull. He shut and locked the gate when the bull was there and when he saw people he turned them back. The cattle were not in the field all of the

time and were not there for 9 months of the year. He grazed the land through to the allotments as well and when the bull wasn't there the gate was open so cattle could graze all of the land. He was responsible for the new gate going in. He knew that people used the beach area and didn't mind but did find that fences were damaged.

At the bridge end the field was securely fenced and there was no gate and no stile. He put up notices to ask people to use the footpath outside the field. In 2004 when Warren Armstrong bought the field he put up notices on the boundaries saying there was no right of way. He was not aware of any dispute to this at the time.

### **M Gilchrist – Local person with former Avon Valley Local Nature Reserve Involvement**

The board walk through the nature reserve was installed around 1995 but there was a riverside track there before capable of accessing the claimed route. The gate between the nature reserve and the claimed route was sometimes open, sometimes shut and sometimes locked. He can recall the signs that Mr Armstrong put up when he bought the land.

Natural England give the date of declaration of the adjoining land as a nature reserve as 28.2.1993.

### **Mr M Clarke, Stratford Mill**

Has lived at Stratford Mill since 1993 and owns land adjoining the land over which the claimed route leads. Cattle have grazed the land affected by the claim for many years and watered in the River Avon just downstream of the footbridge. The land has been securely fenced and where it adjoins Salisbury paths 9 and 11 has been robust and complete.

In 2004 Mr Armstrong erected a stile near the footbridge and placed a permanent clear notice to the effect that "permissive access was allowed but could be withdrawn at any time". The notice was present until 2011 and was taken to mean that Mr Armstrong had no intention to dedicate any part of the land to the public. Was not aware of any objections to the notice.

He states that the starting point of the claimed route was exactly where Mr Armstrong put the notice so everyone must have seen it.

There was no way of getting from Sals 9 to the claimed route at the Salisbury end until a kissing gate was put in by the local authority. Not clear whether this is a public right of way or not.

### **Roger Leary – user of the path**

Has walked here for three years. The gate at the south end was always open. The notice was not conspicuous and may have only been put there five years ago when the owner wanted to sell. Did not see any notice at point A but the stile was well kept. Walked the path regularly every week and always saw others using it but never animals grazing. Does not consider he had permission or used secrecy or force.

### **Nick Cowen – Senior Rights of Way Warden Wiltshire Council**

Has been a warden since 1990. Salisbury path 9 was a narrow path leading between hedges and fences until 2001 when it was improved. Pre 2001 the path was well worn with exposed roots and could be muddy in the winter possibly from runoff water from the cultivated fields to the west.

The path was improved (trimmed back, levelled, drained and surfaced) in 2001/2002 as a result of Salisbury's Walking for Health promotion. It has always been a well used path but the new surface encouraged more use in the winter months (cyclists use it too).

The walks in the area have been promoted as Health Walks and as part of another health walking promotion called "Countryside Connection".

### **Dr G Powell – user of the path**

Regularly walked the route since 1992, at least once a month. Has never seen signs saying he couldn't walk it or granting him permission to do so. The field has always been open, there was a stile at the bridge end. The path across the field was always clearly visible.

### **Warren Armstrong – landowner September 2004 to March 2011**

Placed permissive access signs at points A and B and at interim point C adjoining Salisbury 9. The signs said *"Parsonage Farm, Permissive Access only. No cycles or motorised vehicles. Access prohibited when cattle are present as they can be dangerous. This is private property with no public right of way. Permissive access may be withdrawn at any time."*

In 2004 he replaced the fence and the gate at the bridge end as they had been badly damaged by people climbing over them which had allowed cattle to escape. The gate at point B (southern end of claimed route) had to be repaired because it had buckled under the weight of people climbing it. Both gates had been padlocked by the tenant farmer.

In 1997 he had asked the then landowner's agent (Cluttons) if he could walk his dog in the field and had been told yes subject to no animals being present and the tenant farmer agreeing.

### **Philip Coggan – son of landowner 1921 to 1990s**

Has known the land for 50 plus years and has been aware of walkers and dog walkers using the route regularly but not when cattle were in the field. Organisations have requested permission to use the field (i.e. scouts)

Has known that people had been turned back when using the route if cattle were present and that they have been challenged. Has escorted people without fishing licences out of the field himself.

His family put up signs saying "Beware of the Bull" which were not defaced.

Only records a stile at the bridge which was put in by previous owner. The way was not obstructed.

The worn path seen on aerial photos is that used by his cattle and tractor and trailer as it was the only dry access route for putting food down.

In the early 1970s his father attended a court hearing when two boys shot another boy with an air gun in the field. The boys were not on a foot path and had not asked for permission. Believes the path was only created around 2000 when Mr Armstrong bought it.

### **Miranda Gallagher – user of the path**

Submitted an aerial photograph taken on Sunday 18 June 2000. A worn track can be seen along parts of the claimed route and is consistent with the Council's 1991 and 2001 images.



A photograph was also submitted which appears to show someone walking on the path on 23 August 2007.

An article from the Independent newspaper was also submitted featuring the claimed route as part of a “walk of the month”. The article is dated Sunday November 15 2004. The article is entitled “Walk of the Month : Wander back 5000 years in four hours” and is written by Ian McCurrach describing a route linking Salisbury Cathedral and Stonehenge.

*“...the route is not waymarked...”*

*“...The route takes you along a raised boardwalk with the Avon Valley Local Nature Reserve on your left. Stick closely to the river all the time, frequently passing under the canopies of weeping willow and hawthorn. Don't follow the raised boardwalk as it branches to the left but carry straight on along the river. Look out for a village on the right and in the distance a large flat-topped hillock. Eventually you will reach a footbridge which you cross, carrying straight on onto the village of Stratford sub Castle...”*

It is pointed out that there is no obstruction when passing between the nature reserve and the field and that the instruction is clear in directing the walker to carry on along the river rather than taking path Salisbury 9. Ms Gallagher goes on to add:

*“The path was obviously well used and popular enough for a journalist in a national newspaper to have walked it and direct his readership to use it. He would not have done this if it seemed to be private.”*

#### **David Amey – Local resident**

Has lived in the area and walked the Avon Valley for most of his 73 years. Has always understood that the field is water meadow for livestock and that any access has been at the discretion of the owner.

In the past there have been notices informing the public of this and he has used Salisbury 9 accordingly. Over the past few years there have been no livestock and the gate at the southern end has been left open or broken down allowing numerous people to take a short cut across to Mill Lane or an open space to exercise their dogs.

#### **David Mills – Local resident overlooking the water meadow and claimed route**

Has lived there since October 1993. For most of the period 1993 to 2003/4 the land was leased to Mr Hounslow who grazed cattle there. The field was fenced and gated at the southern end. He believes there was signage saying the land was private. People did walk there but alongside the river and not along the claimed path unless wet.

Had many conversations with the agent (Cluttons) and the tenant about vandalism and security as people damaged fences and gates in order to obtain access. Has recovered escaped cows on several occasions. Anglers had to have access to the river bank and this made it impossible to make the field impenetrable to people requiring illegal access.

Mr Armstrong purchased the field in 2003/2004 and when he sold the strip of river bank to the angling club he put up permissive notices on the field path to encourage use of this path as the riverside path was no longer available (this was fenced off).

During Mr Armstrong's ownership he does not recall seeing any grazing animals.

## **Melanie Auchterlonie – Owner of the land April 2011 onwards**

Bought the land 5<sup>th</sup> April 2011. Lived in Salisbury and knew the field during 1991 to 1996.

No searches on her property revealed a right of way. A local information website states “..these water meadows are made available by Parsonage Farm. Permissive access is at the discretion of the land owner and, in this case, is denied whenever there are cattle grazing in the meadow”. The extract is undated.

A photograph of the sign at the gate at the southern end was submitted. It stated “*Parsonage Farm. Permissive Pedestrian Access only. No cycles or motorised vehicles. Access prohibited when cattle are present as they can be dangerous. This is private property with no public right of way. Permissive access may be withdrawn at any time.*”

Another photograph of the remains of a broken sign of the same type was submitted. The broken sign is on the fence post by the stile where the water meadow meets Salisbury 9 (mid way along claimed route).

Between 1991 and 1996 Ms Auchterlonie kept her pony in the field to the south and can recall that cattle grazed the field in the summer and a private sign was on the gate and that the fencing was secure all around the field. Both gates were locked.

Has contacted Cluttons (the agent for the landowner c.1991 to 2004) who have declined to respond but have said that it was likely that the tenancy agreements made (Pat Coggan, Andrew Barratt and Richard Hounslow) would have contained caveats regarding prevention of public access or any rights of access or any intention to dedicate as such.

### **7.3 Second Consultation**

An investigation of the evidence submitted revealed that there were several points that required clarification. These related to:

**Signage** – Some witnesses recalled signs and some did not. However there seemed to be reasonable agreement that some signs had been in place regarding permissive access during the time Mr Armstrong owned the land. Users of the path that recalled the signs state they went up around 5 years ago and this agrees with the evidence of Mr Mills who states they went up when the riverside path was fenced in 2007. However, the evidence of the landowner at the time, Mr Armstrong gives that the signs went up in December 2004 and this agrees with the evidence of Mr Clarke of Stratford Mill.

As a result further questions relating to signage were asked of Mr Armstrong and Ms Auchterlonie.

This is considered an important point as the signs were undoubtedly erected and two were still in position in April 2011 (evidence of Ms Auchterlonie) and officers saw one in August 2011.

**Date of Calling Into Question** – If the erection of the signs called any public right into question then only evidence of use predating 2004 (or 2007) would be considerable. Hence 54 users were identified who had used the route for the full 20 years between 1984 and 2004 and additional

questions were asked of them relating to the route they took at that time and how they accessed the field during that time only.

Additional questions were also asked of Melanie Auchterlonie and Warren Armstrong.

NB Subsequent to this second consultation being circulated an expired s.31(6) deposit was found. This was in place between March 1997 and February 2003.

## **7.4 Second Consultation Responses (22 received out of 54 sent)**

### **Melanie Auchterlonie – current landowner (April 2011 on)**

In April 2011, when she bought the land there were two signs fully displayed on the route (the Parsonage Farm permissive access signs referred to in her earlier evidence). These were at either end of the claimed route (bridge and southern gate). Broken sign remains by Salisbury 9 junction halfway along claimed route.

In April 2011 the gate at the southern end of the route was chained and locked open.

Sent photographs showing the field in 2005. Claims that short grass is because land has been grazed by animals which would have needed to be contained.

User evidence submitted in support of the claim shows that only 65 of the 98 have used it for 20 years. 7 of these live too far away to realistically walk it. 8 have used a different route.

### **Claire Connor – User of path 1979 – 2011**

Map shows riverside path walked with small variation at northern end. Map does not agree with application route.

Used stile near bridge.

Would be prepared to give evidence at inquiry subject to it being at a convenient time.

### **Gervase Evans – User of path 1968 – 2011**

Map shows riverside route walked if not wet (until fenced off for anglers). Walked claimed route when wet. Entered field over a stile.

Would be prepared to give evidence at a public inquiry.

### **Susan Saunby – User of path 1970 – 2011**

Map shows claimed route. Used a stile at the bridge end and entered the field through a gate that was always open.

Would not be prepared to give evidence at a public inquiry.

### **S Hall – User of path 1973 – 2011**

Map shows the riverside route. Entered field over a stile at the bridge end.

Would be prepared to give evidence at a public inquiry.

### **Mrs S Bailey – User of path 1976 – 2011**

Map shows most of claimed path with part of riverside walk included at southern end. Recalls using a stile at the bridge end and an old stile and then a gate at the southern end.

Would not give evidence at a public inquiry.

### **Warren Armstrong – landowner 2004 – 2011**

Confirms that he inspected the fences and notices regularly. The original notices were plastic and broken within days so were replaced with metal notices. These were original attached at the stile by the bridge, the stile halfway along the claimed route and on the gate at the southern end, but the metal replacement only went at the bridge and gate ends. They were attached with blind bolts and self tightening nuts and successfully withstood some attempts at removing them.

He didn't replace the central one when it broke as it was at a point that was fairly difficult to climb over (not really a stile, more just post and rail fencing). He only recalls seeing one person using this access point.

### **P Goddard – User of path 1984 – 2011**

Map confirms both riverside path and claimed route. Recalls that Salisbury 9 was impassable for a long time.

Used to access field through bars in the bridge before the stile went up. Changed to the claimed route after 2007 when fishing club closed off the riverside walk but also used claimed route when the ground was wet.

A rickety stile was replaced by the gate at the southern end. The gate was permanently left open.

Would be willing to give evidence at a public inquiry as would other local people.

### **Ann Rumbold – User of path 1945 – 2011**

Map confirms claimed route. Access over stile at bridge end and a stile and then a gate at the southern end. Gate always open unless there were cows. People were not told they couldn't enter but when foot and mouth happened they were asked to avoid spreading it. The message was removed after this time (2001).

Many people have enjoyed this walk and it is a more peaceful walk than the Salisbury 9 as running clubs and cycles go past too fast making walkers end up in the nettles.

May not be able to attend a public inquiry.

### **Julia Greenstock – User of path 1977 – 2011**

Map confirms use of the claimed route and the riverside path. Entered field by way of a stile near the bridge and a gate (always accessible) at the southern end. Sometimes used a stile in the middle to Salisbury 9.

The path has never been obstructed and people were invited to use the field as the farmer installed stiles.

Would be willing to attend a public inquiry.

#### **M Pearce – User of path 1983 – 2011**

Map confirms use of the beach area and then some of claimed route. Access over a stile near the bridge.

Would be willing to attend a public inquiry if not at work.

#### **Martin Quigley – User of path 1970 – 2011**

Map confirms use of claimed path. Accessed field over a stile for the majority of the time at the bridge and through a gate at the southern end. Sometimes used entry point halfway along on to Salisbury 9.

The path has always been open and free to use in the 44 years he has lived in Salisbury.

Would be willing to give evidence.

#### **S and J Allen – User of path 1970 – 2011**

Map shows a route across the field accessed over a stile near the bridge.

No further comment is given

#### **David Hopkinson – User of path mid 1960s – 2011**

Map shows application route. Entered field through metal bridge railings and also over a stile in the fence. Also entered field in the middle over a wooden stile and at the southern end he entered through a gate which was usually open but occasionally closed when he climbed over it. Through each entrance the dog would get beneath the fence.

Is willing to give evidence at a public inquiry.

#### **Mrs E A Evans – User of the path 1970 – 2011**

Map shows application route. Entered field over a stile near the bridge. The stile “came and went” over the years but was there in 2004. When it was not there climbed through bridge railings. Sometimes used a stile in the middle of the path but generally walked through the open gate, or over the gate or used a stile to the side.

If needed will give evidence but is a carer and would prefer not to if possible.

#### **Robert Read – User of the path 1982 – 2011**

Map shows application route. Entered field over a stile at the bridge and through an open gate at the southern end.

Would be willing to give evidence at a public inquiry but not on a Monday.

### **Robert Mullins – User of the path 1961 – 2011**

Map shows the application route. Entered field over a stile at the bridge or over a stile mid way along (at junction with Salisbury 9) or at the southern end over a stile or through a gate.

Would be willing to give evidence at a public inquiry.

### **Miss P H Jones – User of the path 1980 – 2011**

Map shows the riverside route and the application route. Used the riverside route until 2004 though during wet periods the drains became 'very squelchy' and a more passable route was used. Broke ankle in 2004 and therefore did not use the route for some time. When started walking there again found the riverside route fenced and used a path further away from the river which was much easier going- this was the application route. Used this route from that time.

Up to 2004 access at the bridge end was through the bridge railings though this became more difficult with time as the bank eroded making the drop larger.

In 2004 the stile at the southern end was still there but by then inaccessible owing to erosion and vegetation.

The gate at the southern end was certainly always open from 2004 until May 2011 when access was denied.

From 1979 to 1987 kept a pony and a horse at parsonage Farm and during the summer took them down to the bridge and used the river (ford) at the mill side. There were often people in the river and field on the side where the claimed path is.

Would be willing to give evidence at a public inquiry.

### **Mr and Mrs Best – User of the path 1946 – 2011 and 1949 – 2011**

Plan shows access near the bridge (but on wrong side of the river). Always accessed through an old rickety stile or through the fence. Have never been refused access at any time even when cattle were grazing.

### **Mr and Mrs Southey – Users of path 1977 – 2011 and 1978 – 2011**

Maps marked with application route on showing a stile near the rbridge and a gate at the southern end of the path.

Mr Southey may be able to attend (dependent on date). Mrs Southey is not willing to attend a public inquiry.

## **8.0 Interpretation of the Evidence**

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

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

This application does not bring any historical evidence to the council's attention and none has been discovered. There is no evidence of an express dedication by a landowner and hence the claim must rely on use by the public of the way, 'as of right'. Section 31 (1) requires that a period of 20 years of use 'as of right' must be satisfied for the way to be deemed to have dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

**8.1 Date of 'calling into question'** To establish the 20 year period it is necessary to look to any acts that may have challenged the public's use of the way. This includes the erection of signs and notices inconsistent with the dedication of the way as a highway, notices given to the relevant authority in respect of these signs, a deposit made under section 31(6) of the 1980 act, verbal challenge or physical obstruction (perhaps a gate locked specifically to prevent access by the public).

The following possibilities are considered for the date of calling into question:

- i) June 2011 Application for a modification order to add the claimed route.
- ii) April 2011 Physical blocking of the way by Melanie Auchterlonie when she bought the land. Verbal challenges to the public evidenced by witness statements in support of the application and from Ms Auchterlonie.
- iii) 2007 The fencing of the riverside path and the erection of new stiles and permissive route signs by Mr Armstrong. This evidence from witness statements in support of the application and from Mr Mills.
- iv) 2004 The erection of a new stile and notices by Mr Armstrong three months after he bought the land in 2004. This evidence from Mr Armstrong and Mr Clarke.
- v) 1997 In March 1997 A deposit made under s.31(6) of the Highways Act 1980 was made by Cluttons, the agent for the landowner at that time – the King Edwards Hospital Fund for London. This deposit was held by Wiltshire County Council and contained a Deposited Statement and plan and a Statutory Declaration. The plan shows that the land affected by the application was included and that no public rights of way were shown across it nor was it the landowners intention to dedicate any. **SEE APPENDIX B**. The period covered by this deposit is six years (i.e. 1997 to 2003).

Although events i and ii could be taken as qualifying events it is considered that the signs erected and maintained by Warren Armstrong were clearly worded stating that the way was permissive and that permission may be withdrawn at any time. It is noted that not all users recall these signs but a lot do. There may be several reasons for this but the most likely are that the sign on the gate

was not visible when the gate was open (which from around 2007 it is likely that it always was), that people access the path through the bridge rails and not over the stile and that when out for a recreational walk people may not notice signs.

I am however satisfied that they were in place, that they were maintained and that their wording was sufficient to satisfy s.31(3) of the Highways Act 1980.

It would therefore be necessary to count the 20 years back from the time of erection of these notices. The evidence of Mr Armstrong is taken for this.

Additional to this action by the later landowner, Mr Armstrong, in 1997 the landowner at that time, the King Edward Hospital Fund, made a deposit with the highway and surveying authority, Wiltshire County Council under s.31(6) of the Highways Act 1980.

This deposit is sufficient evidence to negative the intention to dedicate a public highway (s.31(1) Highways Act 1980) for the period 1997 to 2003. As a 20 year period cannot be achieved between either 2003 and 2004 (the date of Mr Armstrong's signs) or 2003 and 2011 (the date of Ms Auchterlonie's challenge), the relevant period becomes the 20 years prior to 1997.

### **The relevant period is 1977 to 1997.**

**8.2 'a way'** Section 31(1) refers to 'a way'. Witnesses claim that a defined path exists between the bridge and the gate at the southern end of the field. Officers have observed that in August 2011 a clear path was visible and hence it is likely that claimed route could be considered to be 'a way'. Aerial photographs dating back to 1981 support the existence of a way.

**8.3 'a way of such character'** section 31(1) refers to 'a way of such character'. Lightman J in *Oxfordshire County Council v Oxford City Council* ([2004] Ch253) said that the true meaning and effect of the exception of "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" is that "the user must be as a right of passage over a more or less defined route and not a mere and indefinite passing over land". The exception could also apply to routes that did not connect to highways or lead to a place of popular resort.

The claimed route has at its northern end footpath Salisbury 11, a public highway. The southern end does not link with a public highway but leads into a local nature reserve. This is clearly a place of popular resort where access is encouraged (i.e. provision of boardwalks) and hence qualifies.

Although some witness have claimed the whole width of the field as the right of way and many describe playing in the river at the northern end the vast majority of users specify a width of between 1 and 3 metres (see Appendix A – Width) consistent with the use of the defined path seen on aerial photographs and on the ground.

**8.4 'enjoyed by the public'** Case law from the 1930s (*Merstham Manor Ltd v Coulsdon & Purley RDC* [1937] 2 KB 77) established that enjoyment in this context means "having had the amenity or advantage of using".

Enjoyment of the public does not require that the way must have attracted people from far and wide. In *R v Inhabitants of Southampton* ([1887] 19 QBD 590) Coleridge C. J commented that in the common law context use by "the public" must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is only the residents in the neighbourhood who ever use a particular road or bridge." Additionally, *Dyfedd CC v S of S for Wales* (CA)(1989)



59 P & CR 275 found that use which qualifies in all other aspects is not disqualified because the only purpose was recreational.

Officers consider that the claimed use has been by members of the public at large and not by some permitted right associated with, say, residents of Stratford sub Castle or those involved with the local nature reserve. It is natural that a short route such as this has amenity value for local people and unless recorded, its use will only arise from local repute. It is additionally noted that the claimed route may have been that promoted in a national newspaper in 2004.

**8.5 'as of right'** use that is 'as of right' is use that is without permission, without secrecy and without force.

It does not matter what is in the mind of the user when they are using the route, the only thing that is relevant is whether their use was without permission, secrecy or force.

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."*

Additionally 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.

Hence it is not relevant whether the users knew the land was in private ownership or used for grazing cattle, what matters is whether their use was for a full period of 20 years and was, as of right.

**Without permission** No users report ever having asked or been given permission to use the route prior to the erection of Mr Armstrong's signs.

**Without secrecy** Users report using the route during normal hours to visit shops, to visit friends, to exercise dogs and for pleasure. All users report seeing other users and local residents, tenants and landowners all acknowledge that people have used the land.

**8.6 Without interruption** Section 31(1) refers to actual interference which stops the public use for a time. Examples of this may include the locking of gates specifically to interrupt public use or an action under sections 31(3)[4][5] and [6] of the 1980 Highways Act.

There is some evidence that the gate at the southern end of the route was locked (if there was a bull in the field) but other witnesses report that it was always open and accessible. Some evidence reports that the public were excluded when cattle were grazing. There is clear conflict in the evidence relating to access. If the gate was locked to prevent the public entering then the use was not without interruption. If the gate was locked to prevent the public leaving the gate open and the cattle escaping then this would not interrupt the use and people do record having gone over the gate. Some users also report that there was an old stile at this point as well as a gate.

Access to Salisbury 9 and 11 was prevented to the public between March 2001 and July 2001 as a result of a declaration made by Wiltshire County Council under Article 37A of the Foot and Mouth Disease Order 1983. Hence access to both ends of the claimed route was denied during that period.

The Planning Inspectorate (PINS), in Advice Note 15 (2009), advises that this interruption to use of ways would not seem to be classified as an interruption to use under section 31(1). PINS consider that closures under the Plant Health (Great Britain Order) 1993 have not had implications for claims of deemed dedication under section 31(1) and are not aware of any case law from which a parallel may be drawn. PINS also state that over a period of 20 years or more there may well be periods when, for a variety of reasons, a way has not been used. There is no evidence of interruptions to use between the years 1977 and 1997.

**8.7 Section 31(1) the proviso** – the closing phrase of section 31(1) is that a way is deemed to have been dedicated ‘unless there is sufficient evidence that there was no intention during that period to dedicate’. The period under consideration is 1977 to 1997.

Once 20 years uninterrupted use of right has been proved the burden is on the landowner to show that there is sufficient evidence that there was no intention to dedicate. Section 31 details several ways in which a landowner may show that he had no intention to dedicate. Officers have received no evidence of any of these actions between 1977 and 1997, nor is it sufficient for any landowner to say that locked in their own mind was the knowledge that they had no intention to dedicate.

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”.

Mr Coggan states that signs during his family’s ownership (1921 to 1981) were in place saying ‘private’ but it is not clear to what they referred (they could have referred to fishing rights) and are not considered sufficient to satisfy s.31(3) Highways Act 1980.

## 8.8 Width

Witnesses were asked how wide they considered the claimed path to be. A table of responses can be found at the end of Appendix A. There is a reasonable variance with responses as the claimed route is unfenced and leads across a field. The following table gives a summary of responses:

<b>Width</b>	<b>No of responses</b>
<b>1 metre</b>	<b>2</b>
<b>1 – 2 metres</b>	<b>25</b>
<b>2 metres</b>	<b>21</b>
<b>2 – 3 metres</b>	<b>16</b>
<b>Wider than 3 metres</b>	<b>7</b>
<b>‘whole field’</b>	<b>7</b>

## 9.0 Conclusion

With reference to Appendix A. A total of 99 witnesses have submitted user evidence forms relating to their use up to 2011. Of these 99, 82 witnesses have submitted user evidence forms relating to their use in the years up to 1997.

Of these 82, 12 witnesses do not give evidence for the claimed route during that period (several people used the riverside path until it was fenced in 2007 and only latterly started using the application route). If the evidence of these people is deducted there are 30 who claim to have used the application route for the full 20 year period between 1977 and 1997 and who claim to have used the application route for part of that period. All of these people claim to have used it ‘as of right’.

The evidence of these people forms at least a reasonable allegation that public rights subsist. There are however clear contradictions in the evidence of users of the path and the owners and lessees of the land and some other witnesses. The key areas where differences exist are:

- 1) The frequency with which the gate at the southern end was left open or was shut and locked with the intention of excluding the public and when the old stile was in position at this location (one witness reports it still being there but almost unusable by 2004).
- 2) The means by which the public accessed the northern end of the claimed path near the bridge. Evidence has been given relating to stiles, a gate and climbing between the bridge rails. Additionally, Mr Armstrong states that he removed a gate at the bridge end because it had been climbed over by people and replaced it with a stile.
- 3) The presence of signs.
- 4) The issue of challenge.

Prior to the deposit of the s.31(6) statement, plan and statutory declaration in 1997 the Council has seen no incontrovertible evidence to defeat s.31(1) of the Highways Act 1981.

An order to add a public right of way to the definitive map and statement an order may be made under s.53(3)(b) and s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 (WCA81).

It is required that for an order to be made under s.53(3)(b) WCA81 the event is:

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

The legal test is 'the balance of probabilities'. A weaker test is however permitted to make orders under s.53(3)(c)(i) WCA81.

Further to the case of R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P and CR 402 it is clear that an order may be made under section 53(3)(c)(i) by applying one of the following tests;

**TEST A** Does a right of way subsist on the balance of probabilities? This requires that there is clear evidence in favour of public rights and no evidence to the contrary.

**TEST B** Is it reasonable to allege that on the balance of probabilities a right of way subsists. This requires that the allegation of public rights is reasonable and there is no incontrovertible evidence to the contrary.

Owen J said:

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

To confirm such an order, the stronger test (essentially that contained within Test A) needs to be applied. In *Todd and Bradley v SoSEFRA*[2004]EWHC 1450 (Admin) Evans-Lombe J found that the appropriate test for confirmation is the normal civil burden of proof that such a way subsist on the balance of probabilities. This would be the test applied by an inspector appointed by the Secretary of State or any court.

## 10.0 Recommendation

That an order be made under s.53(3)(c)(i) WCA81 as appended at C. After due advertisement in accordance with Schedule 15 to the 81 Act, if no objections or representations are received the order should be confirmed. If objections or representations are received the order must be sent to the Secretary of State for Environment, Food and Rural Affairs for determination.

31 October 2011

Sally Madgwick  
Rights of way Officer  
Department of Neighbourhood and Planning  
Wiltshire Council  
County Hall  
Trowbridge  
BA14 8JN

01225 713392

[Sally.Madgwick@wiltshire.gov.uk](mailto:Sally.Madgwick@wiltshire.gov.uk)