

Wildlife and Countryside Act 1981 s.53

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

Land off Crab Mill Lane, Lea

Decision Report

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

- 1.1**
- Application number:** 2012/02
- Application date:** 14 January 2012
- Applicant:** Mr Maurice Moss
13 Pembroke Green
Lea
Malmesbury
Wiltshire
SN16 9PB
- Application to:** Add the footpath from tarmac road to Woodbridge Brook, follow Woodbridge Brook to hedge, turn right and follow hedge to top of hill. Route 1 At top of hill continue following the hedge line to bottom of hill. Turn right onto public footpath and continue towards Woodbridge Brook.
Route 2 At top of hill turn right and follow fence line back to Woodbridge Brook. At Woodbridge Brook turn right and walk back to tarmac road.
- Width:** 1 to 3 metres at the narrowest point
- Sch 14 Compliance:** Notice of application for Modification Order (Form 1)
Certificate of Service of Notice of application to the following owners and occupiers (Form 3):
Mr Smith, Crab Mill Farm, Crab Mill Lane, Lea, Malmesbury, SN16 9NF
Mrs J Wraight, Crabb Mill, Crab Mill Lane, Lea, Malmesbury, SN16 9NF
1:2500 Plan showing claimed route
29 witness evidence forms plus 2 subsequently submitted – total 31
- 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 –

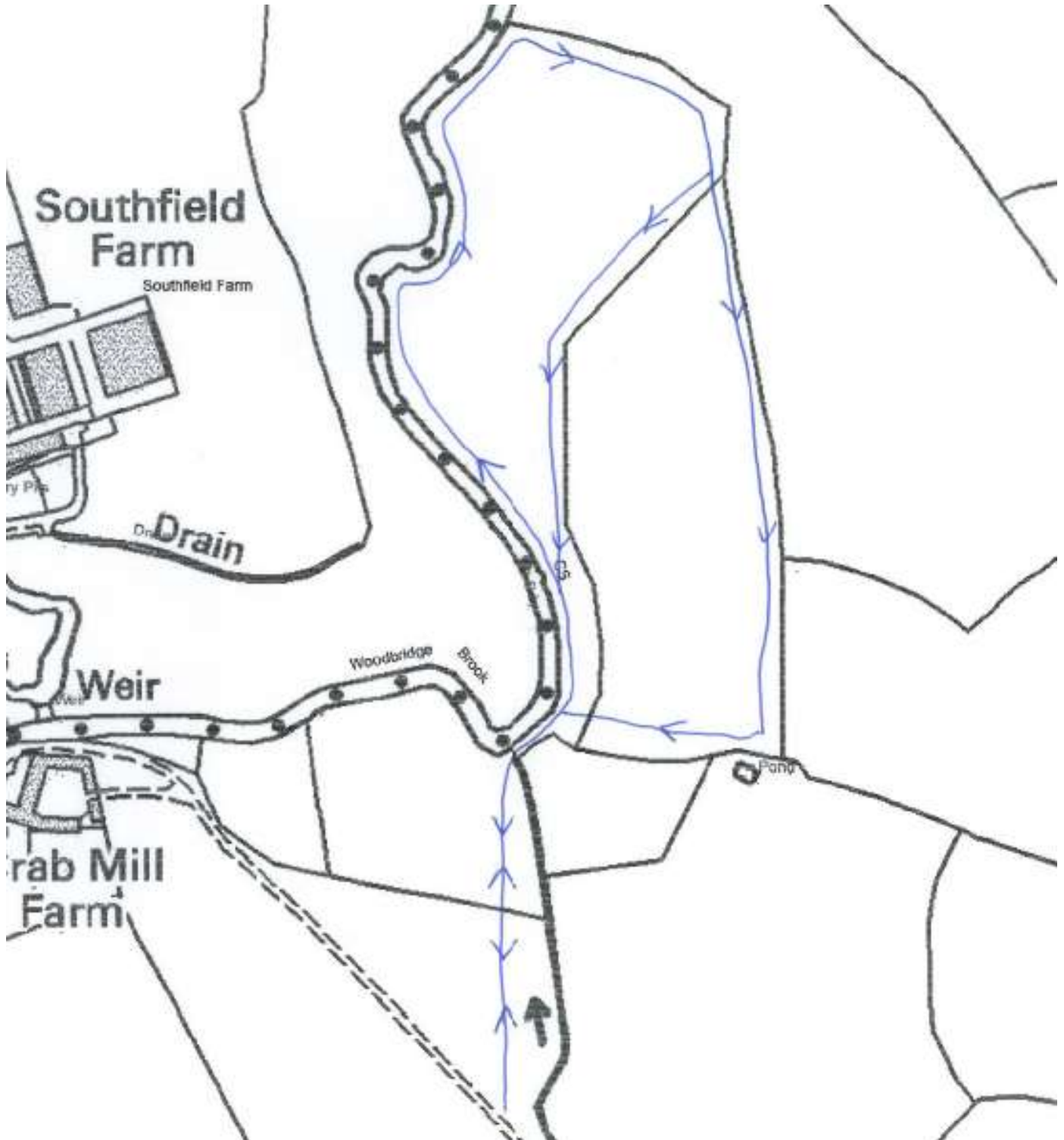
(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way over such that the land which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway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

1.2 Description of Route:

The claimed route leads from Crab Mill Lane in a northerly direction across two fields to Woodbridge Brook. At Woodbridge Brook the route joins public footpath Lea and Cleverton number 3 for a few metres until leading due north to follow Woodbridge Brook in an approximately northerly direction to the field boundary where it follows the hedge line to the top of the hill. Route 1 turns south west at this point and follows the field boundary to return to the Woodbridge Brook and footpath Lea and Cleverton 3. Route 2 proceeds across the field boundary and follows the hedge line to join public footpath Lea and Cleverton 3.

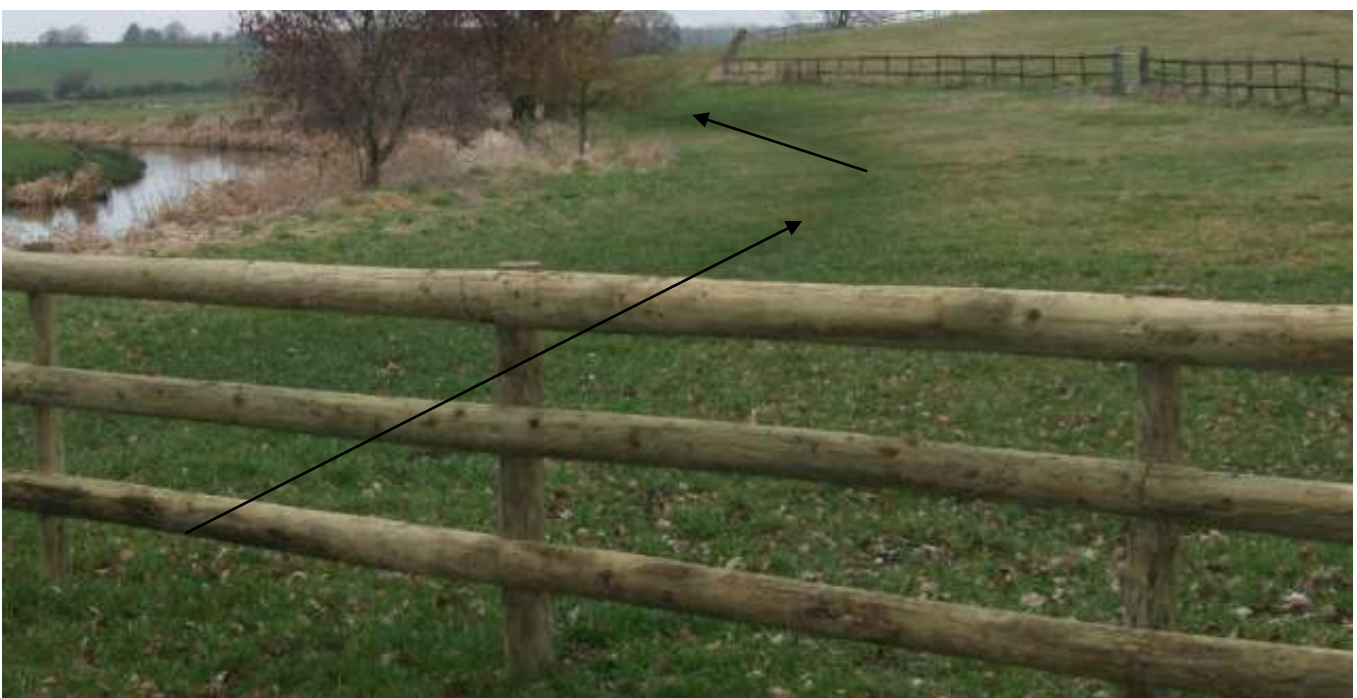
1.3 Application plan showing claimed route



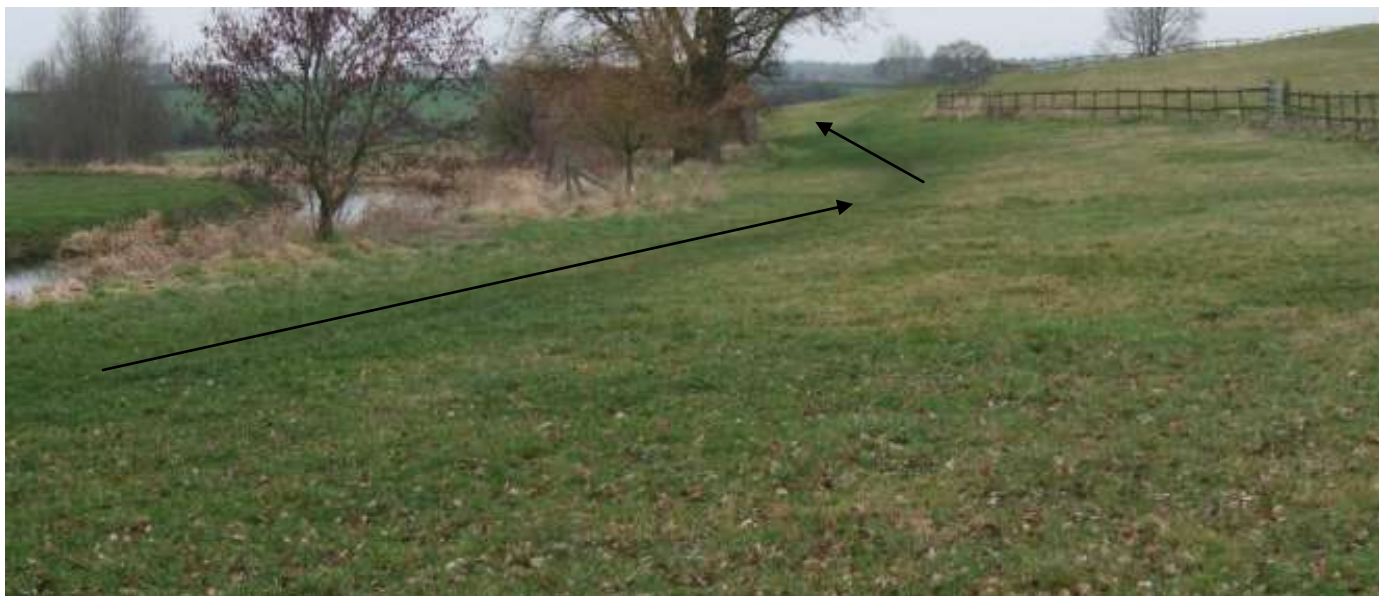
1.4 Site visit 28 February 2012



Route leading north from Crab Mill Lane towards Woodbridge Brook



Route leading north alongside Woodbridge Brook (fencing erected in the second half of 2011)



Continuation of route alongside Woodbridge Brook



Field edge route leading north at top of hill from Lea and Cleverton path number 3 28 Feb 2012

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)

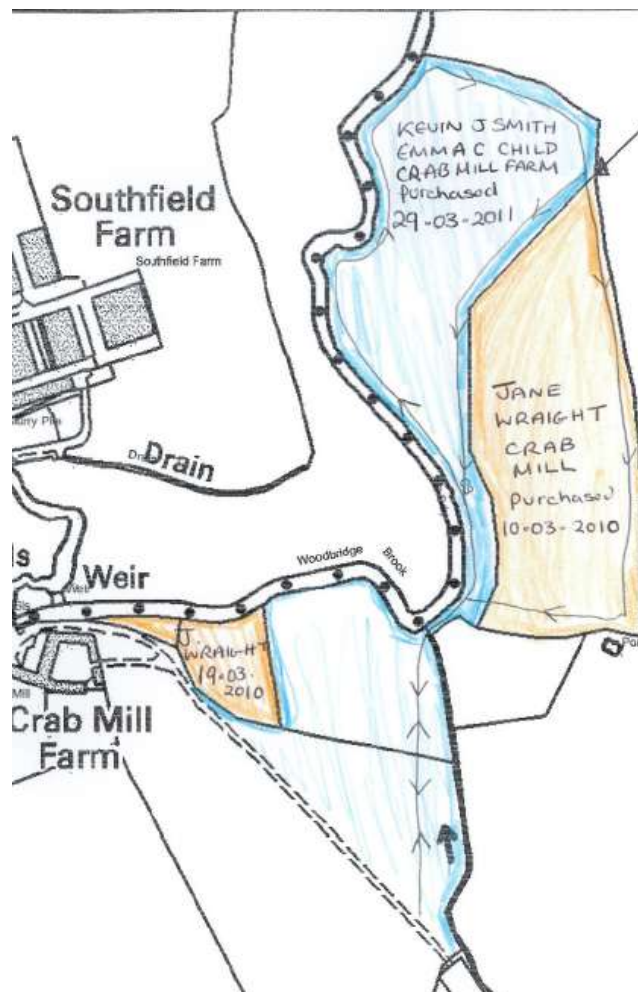
Certificate of Service of Notice of application to the following owners and occupiers (Form 3):

Mr K Smith, Crab Mill Farm and Ms J Wraight, Crabb Mill

1:2500 Plan showing claimed route

31 witness evidence forms

2.1 Land Ownership Details



Notes: From 2002 to 2010 Ms Wraight has not been at her property (Crabb Mill) very often. Land owned by Mr K Smith was previously owned by Mr and Mrs I Perry. In 1990 land was leased to Mr and Mrs Baker of Southfield Farm for grazing. Dates for purchase from Land Registry. Ms Wraight's land was sold to Crabb Mill in 1992 by Mrs C Bateman. Mrs Bateman bought the land in 1986 from Mr D Stratton (evidence from Ms Wraight).

3.0 Context of the Application and Historical Evidence

Source: Victoria County History and Wiltshire and Swindon History Centre

The village of Lea lies 2.5 km east of Malmesbury and forms part of the parish of Lea and Cleverton. The parish population remained relatively low throughout the 1800s rising from 252 in 1801 to 484 in 1871 but development in the village in the latter parts of the 19th century caused the population to rise to 695 in 1981 and 769 in 2001. Over 100 houses were built between 1970 and 1980.

The claimed route leads off a lane known as Crab Mill lane. This is today recorded as an unclassified road (the u/c 1079) which ends at Crab Mill, continuing as footpath Lea and Cleverton 1. However, the route is shown as a through road on Andrews and Dury's Map of Wiltshire dated 1773 and would historically have provided a through route linking the settlements and permitting access to the mill from the east and the west.



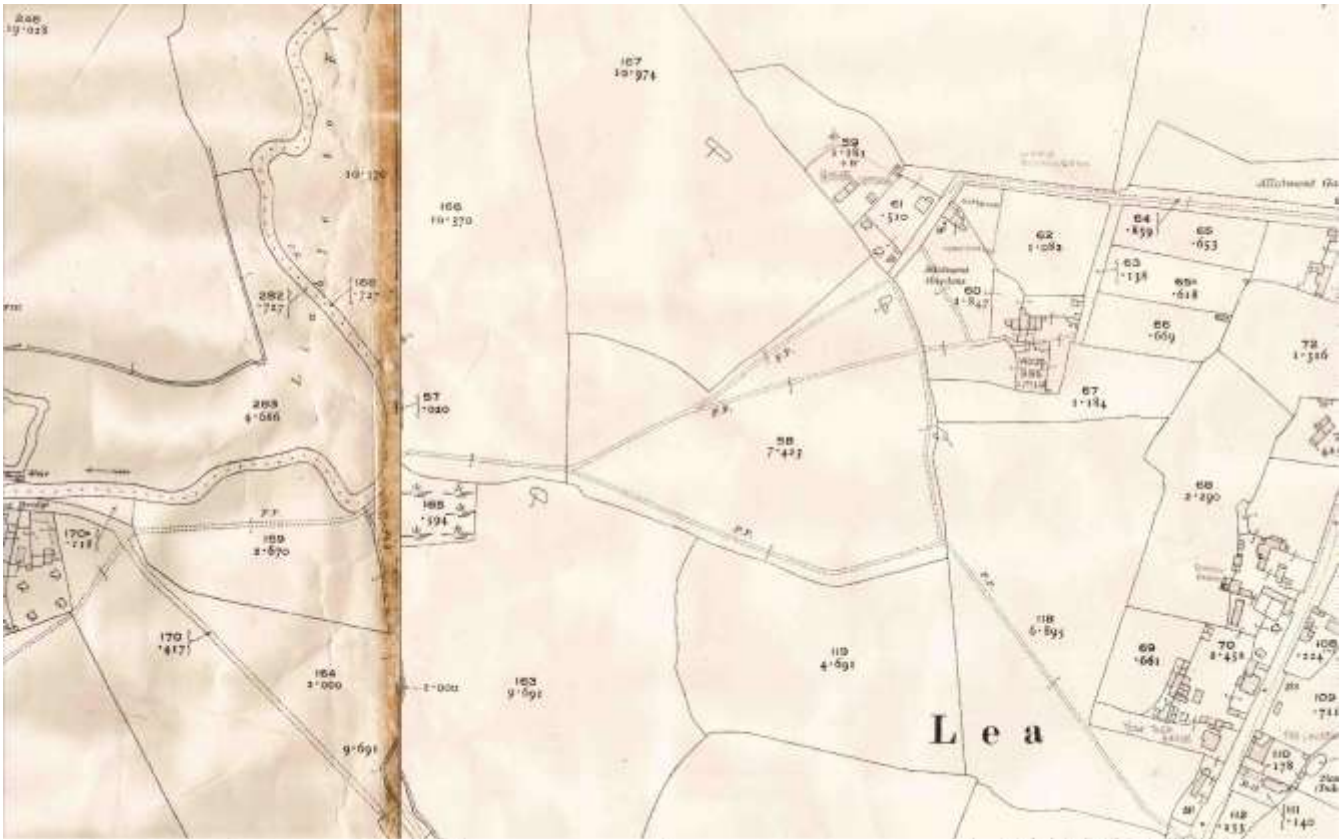
Crab Mill Lane

Excerpt from Sheet 17 Andrews' and Dury's Map of Wiltshire 1773

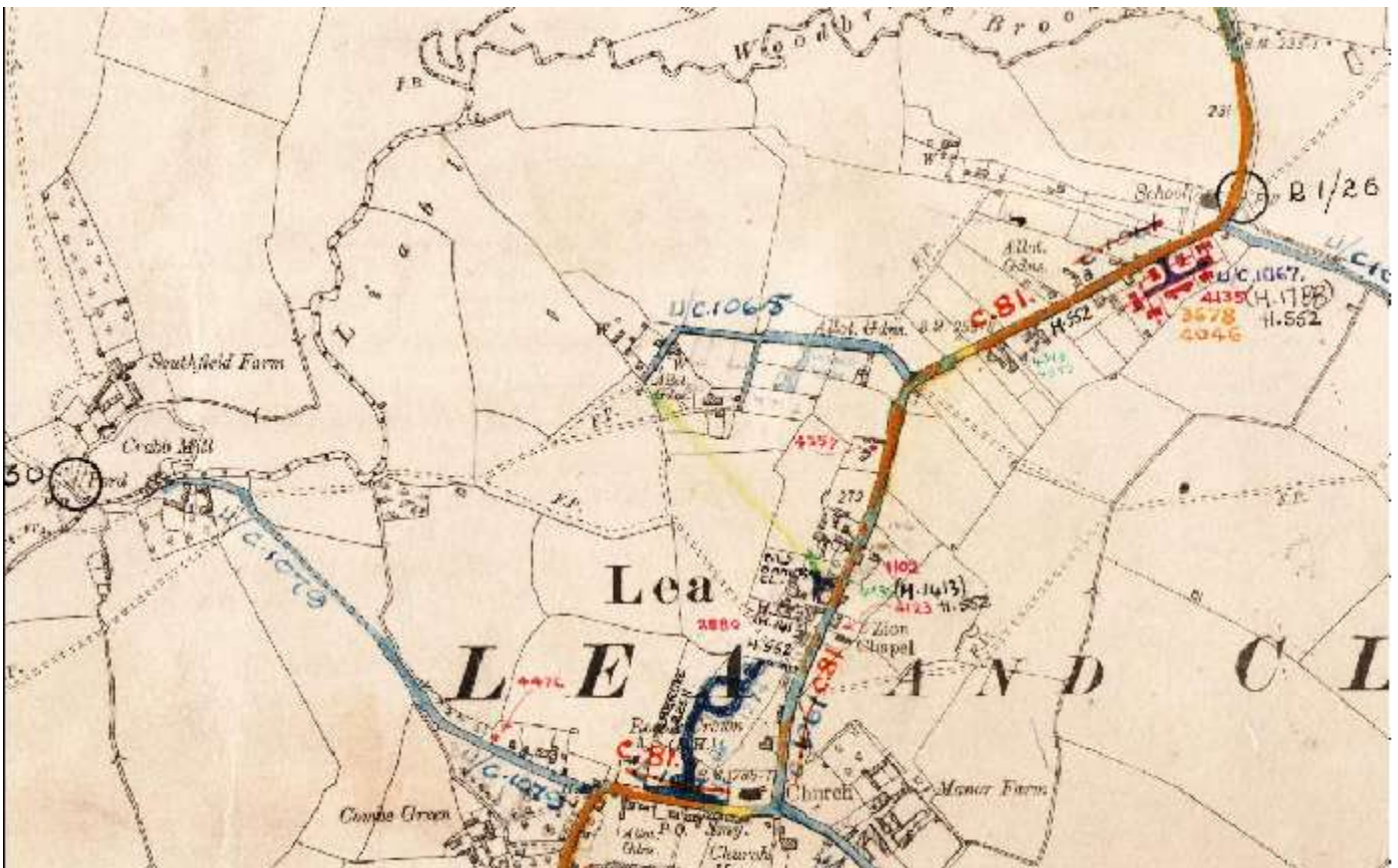
Crab Mill stands on the Woodbridge Brook. There was a mill recorded there in 1421 (Crabwell Mill) as a part of Lea Manor. The current Crab Mill was built in the early 17th century and is currently called Crabb Mill. The mill went out of use between the years 1927 and 1939.

Ordnance Survey maps of the late 19th century record that paths now recorded as Lea and Cleverton 3,4 and 5 are historic footpaths (the Ordnance Survey showed paths that were physical

features) but no maps have been viewed that show any paths as physical features or otherwise on the claimed routes.

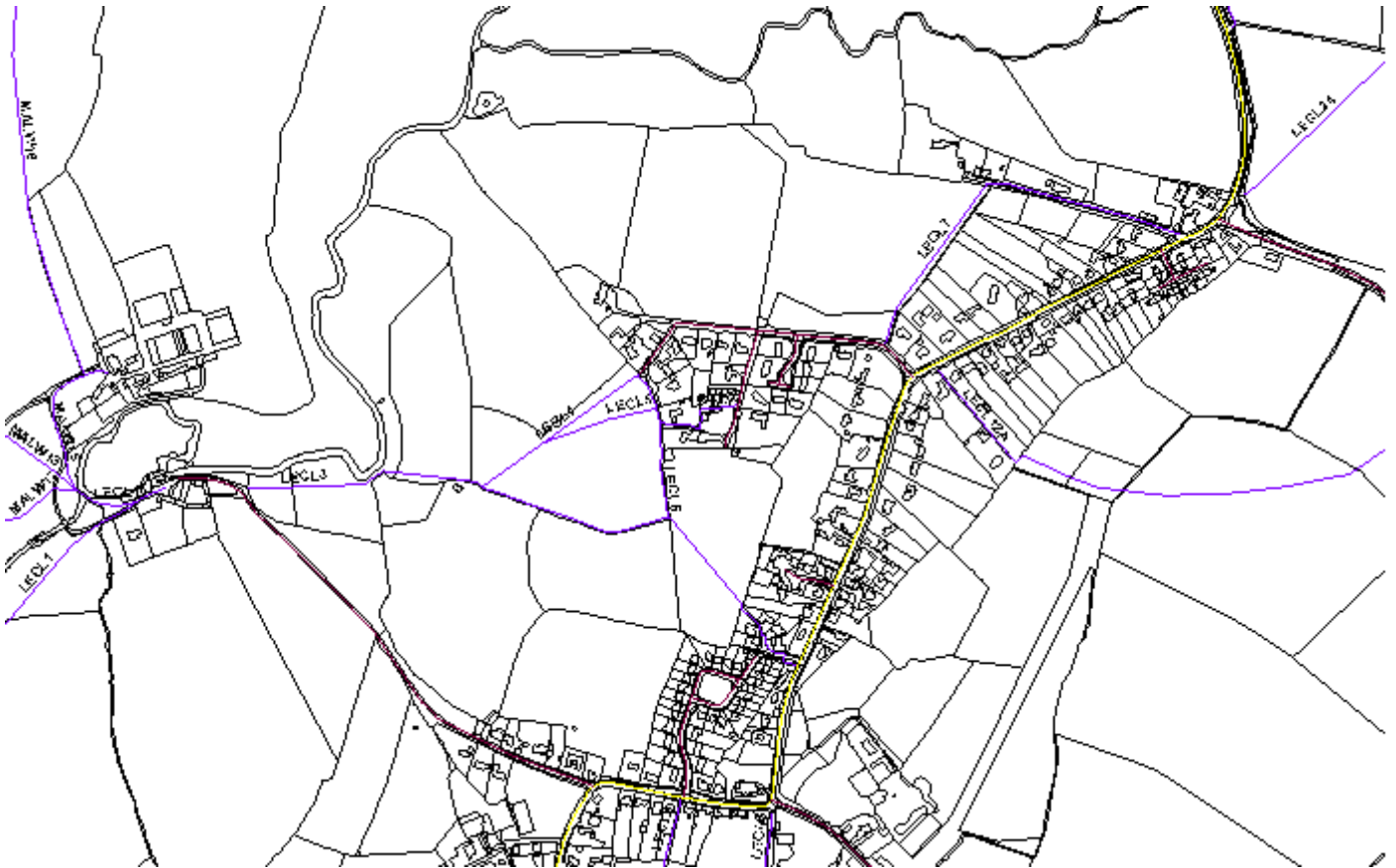


Excerpt from Ordnance Survey 1:2500 County Series map c.1925 Not to scale.



Excerpt for Ordnance Survey 1:10560 map 1929 Not to scale

The above map is useful as it shows the area of the claimed routes in the context of the local area in the early part of the 20th century. The following map demonstrates how development has occurred in the area west of Crab Mill.



The definitive map and statement for the area is the Malmesbury Rural District Council definitive map and statement dated 1952. At the time this was drawn up Lea and Cleverton Parish Council did not claim public rights of way over the claimed routes and none have been claimed until the application of January 2012.

4.0 Initial Consultation

An initial consultation was carried out between 29 February and 13 April 2012. This was extended at the request of Mr Smith's solicitors to May 11 2012. The initial consultation letter was as below:

Wildlife and Countryside Act 1981 S.53

Application for an order to add public footpaths to the definitive map and statement at Lea, Malmesbury

Wiltshire Council has received an application for a definitive map modification order to record public footpaths over land near Crab Mill Farm, Lea. Please see the attached maps. The application is supported by 31 user evidence forms submitted by members of the public who have walked all or parts of the claimed routes for various lengths of time.

For the application to be successful it must be shown that, on the balance of probability, that use has been 'as of right', that is without force, permission or secrecy. Evidence must also be considered relating to interruptions to use, any signs or notices displayed, any challenges or

permissions from landowners or tenants and any legal deposits made by landowners with Wiltshire Council.

If you have any additional evidence for the Council to consider I would be pleased to receive it by 13 April 2012.

The letter was circulated to statutory consultees, landowners, witnesses and interested parties as follows:

The Secretary General ACU House Wood Street Rugby Warwickshire CV21 2YX	Mrs D Plummer BHS CABO Wiltshire Leaze Farm 65 Stanton St Quinton Chippenham Wiltshire SN14 6DQ	Mr A Heron Ashbourne House Crab Mill Lane Lea Malmesbury SN16 9NF
Commons, Open Spaces & Footpaths 25a Bell Street Henley-on-Thames Oxfordshire RG9 2BA	Byways and Bridleways Trust PO Box 117 Newcastle Upon Tyne NE3 5YT	Mr S Masson 2 Rushcroft Close Lea Malmesbury Wiltshire
Mrs R Cunningham Wiltshire Bridleways Association Staddlehouse Charlton St Peter Pewsey SN9 6EU	Stephen Leonard Senior Rights of Way Officer Wiltshire Highways Partnership The Avenue Wilton Salisbury SP2 0BT	Mr C Daws Coombe Crab Mill Lane Lea Malmesbury SN16 9NF
Mr Clarke Wiltshire Cycling Touring Club Hill House Kelsey Road Salisbury SP1 1JR	Maurice Chandler 8 Malmesbury Road Leigh Swindon SN6 6RH	Mr M Porter Hazelea The Street Lea Malmesbury SN16 9PA
British Horse Society Stoneleigh Deer Park Kenilworth Warwickshire CV8 2XZ	Mr B Riley 141 Bath Road Bradford on Avon Wiltshire BA15 1SS	Mrs V Suter Rose Cottage Lea Malmesbury Wiltshire
Mr J Parmiter Clerk to Lea & Cleverton Parish Council 33 Pembroke Green lea Malmesbury SN16 9PB	Mrs H D Woodbridge Area Commissioner British Driving Society Hafaway House Hoggs Lane Purton Swindon SN5 4BU	Mr P Holmes West View Lea Wiltshire SN16 9PF
Cllr T Sturgis Wiltshire Councillor	Mr M Moss 13 Pembroke Green	Mrs K Roy Ashmidie House

Brinkworth Division Brook Farm Great Somerford Chippenham SN15 5JA	Lea Malmesbury SN16 9PB	Crab Mill Lane Lea Malmesbury SN16 9NF
	Mr J McManus The Cottage Crab Mill Lane Lea Malmesbury SN16 9NF	Mrs S Bobbett Ashdene The Street Lea Malmesbury Wiltshire
	Mr T Coleman 18 Pembroke Green Lea Malmesbury SN16 9PB	Mrs S Wilson Yew Tree House Lea Malmesbury SN16 9PA
Mrs J Ind Cleverleys Coombe Green Lea SN16 9PF	Mrs J Cole 9 Pembroke Green Lea Malmesbury SN16 9PB	Ms Janice Cowley Osborne Clark Solicitors 2 Temple Back East Temple Quay Bristol BS1 6EG
Mr A Francis The Villa Lea Malmesbury Wiltshire	Mr and Mrs C Kerstar Churchwood House Crab Mill Lane Lea Malmesbury	Mrs J C Jones 3 Rushcroft Close Lea Malmesbury SN16 9YJ
Mrs M Knight 2 The Cedars Lea Malmesbury SN16 9FE	Ms S Seymour 27 Pembroke Green Lea Malmesbury Wiltshire	Mr I Perry Apartment 40 1 Goat Wharf Brentford TW8 0AS
Mr K E Keilholz 6 The Crescent Lea SN16 9NE	Mr T Bobbett Ashdene Lea Malmesbury SN16 9PG	
Mr N Seymour 27 Pembroke green Lea Malmesbury	Mr S Suter Rose Cottage Lea Wiltshire SN16 9PF	
Mr and Mrs M Saxty 6 Pembroke Green Lea Malmesbury Wiltshire	Mrs G Porter Hazelea The Street Lea Malmesbury	
Mrs Y Collingwood 26 Pembroke Green Lea Malmesbury Wiltshire	Mrs R Milton-Daws Coombe Crab Mill lane Lea Malmesbury SN16 9NF	
Mr B Gore	Mrs J Masson	

4.1 Initial Consultation Responses – Summary of Points Made

Mr McManus March 2012 submitted photographs of members of the public using parts of the claimed routes in 2005, 2007, 2009 and 2011.

Mr K Smith 05 March 2012 e.mail providing details of previous ownership of Crab Mill Farm.

Mr C Daws 05 March 2012 e.mail stating that since 2010 he had used all the claimed footpaths shown on the map in particular path ABC and along the river bank. From 2008 to 2010 he had occasionally used path ABC. At no time had he used force, permission or secrecy and had not had interruptions or seen signs, notices or any actions by the landowners relating to their use of the land.

Mr I Perry 07 March 2012 letter stating that Mr Perry owned Crab Mill Farm from 1989 to 2011. He highlights that none of the land is visible from Crab Mill Farm and that he was only at the property at weekends so no permission was granted or observed from Monday to Friday of any week. Only occasionally had he seen any dog owners, often challenging them about using paths other than the existing footpaths which are clearly marked. He had never given permission for anyone to use the land for any reason whatsoever.

Osborne Clark 30 March 2012 letter from David Shakesby acting for Mr Smith requesting an additional 28 days to gather and consider evidence. Will object on technical grounds on the basis that whilst the new footpath starts and ends on a footpath, it starts and ends at the same place so is effectively a cul-de-sac (*this is rebutted at 6.6*). Additionally considers that the applicants will be unable to make out the necessary evidence to establish a footpath in these circumstances.

Jane Wraight 04 May 2012 Submission from the owner of Crabb Mill and the most easterly part of the affected land. Includes responses to witness statements by number, photographs, aerial photographs and information relating to previous owners.

- i) *“Mr Moss states he has walked the land in question for 40 years. Mr Derek Stratton who farmed the land knows Mr Moss from the days when they walked down to Crabb Mill but he never saw them on the land as claimed”.*
- ii) *“With regard to the grazing of the land Southfield Farm can confirm that up until 2002 they had cattle out on the land with an electric fence running down Crab Mill Lane to contain the stock.”*
- iii) *“My land was also grazed and the stock had access to the river via Mr Perry’s land.”*
- iv) States that between 2002 and 2010 she had not been at Crabb Mill much owing to personal business. As a result the use of her land did not come to her notice until summer 2011 when she started approaching people asking them to clear up after their dogs and keep to the marked paths.
- v) States that the area marked CDE is a haven for wildlife which can be observed from the existing footpaths and Wiltshire Council is urged to consider the impact on this wildlife.
- vi) Aerial photograph taken 14 October 1974. High quality photograph of the area annotated to show position of electric fence and other features. Does not show beaten tracks on claimed routes or existing definitive footpaths.

vii) Aerial photograph taken 22 August 1994. High quality photograph of the area annotated to show position of some landscape features. Shows cattle grazing in field crossed by Lea and Cleverton path 3 and several beaten tracks, not necessarily coinciding with claimed routes or definitive footpaths. Most likely to be attributed to animal use though clearly some coincide with parts of recorded footpaths and claimed routes

viii) Comments on UEFs from Ms Wraight

UEF No.	Comment
1	Walking groups do not use these routes, they use clearly signed footpaths
2	Livestock have been kept on the land. Has spoken to Mr McManus on the land.
	A notice had been placed on the boundary fence saying it wasn't a public footpath but this was torn down.
	Spoke to several people about them not being on a public footpath
	Can see only some of the land from Crabb Mill
3	Public footpaths were lightly used until approx 10 – 12 years ago when dwellings in the village increased and more people and dogs walked. 15 years ago this wasn't the case.
4	Had challenged this witness as stated on UEF and he in turn had heard of other challenges.
5	Notices sent by the Council were ripped off.
6	Disputes that anyone ran on fields but they do run on Crabb Mill Lane which is tarmaced.
7	You would not walk to Malmesbury using the claimed routes, you would use the definitive routes.
8	Fencing broken down by dog owners and notice removed.
11	Fence is on boundary of her land and has been there for 27 years.
16	Fence lowered to be like a style was done by dog walkers climbing over the fence. Notice torn down and ignored.
18	Was not unpleasant to people when challenging them.
	Land was used for cattle, pigs and horse prior to 27 years ago.
19	Some statements say no livestock but this lady is correct.
21	Disputes statement regarding a lease. Can be confirmed by Mr Trevor Baker.
22	Land Registry will confirm that her land purchases are not recent. <i>NB Land Registry show sale to Ms Wraight to be 2010.</i>
23	Asked people to keep to public footpaths
30	Never seen anyone having a picnic. One gentleman asked for permission to pick fruit but not this witness.

Additional Information from Ms Wraight: –

The previous owner of the 5 acres sold it to Crabb Mill in 1992. Prior to this 2 ponies lived in the field.

Mrs C Bateman, 30 Pound Hill, Alresford, Hampshire, SO24 9BW

The owner prior to Mrs Bateman owned all the land in question and left 26 years ago. He kept cattle, pigs and a horse.

Mr D Stratton, Anne Braynes Cottage, Willesley, Gloucester

Lea and Cleverton Parish Council Letter dated 02 May 2012.

“You will recall that in our recent telephone conversation that I indicated to you that the Members have considered this matter and are unable to offer any knowledge in support or rejection of the application.

They are not aware of any agreement, formal or informal regarding the use of the land in question as a public right of way. They do accept that it is very probably that parishioners have allowed their dogs to openly wander at will and freely over the area rather than adhering to existing right of way on Crab Mill Lane. It is therefore presumed that previous landowners have nominally acquiesced without any formal written comment or prohibition of any kind.”

Calvert Smith and Sutcliffe Acting for Mr I Perry. Letter dated 11 May 2012. Issues raised summarised and in italics.

- i) Mrs Perry rarely ventured outside Crabb Mill Farm and gardens.
- ii) Mr and Mrs Perry were not at the property during the week nor for several months of the year since they have a house in Spain.
- iii) Mr Perry only walked the grounds of the farm 3 or 4 times per year, usually on a Sunday morning and rarely encountered anyone during these trips.
- iv) Mr Perry is very surprised that so many people have regularly walked the land.
- v) Mr Perry notes that only 4 out of 31 people mention they met Mr Perry in his 22 year occupation.
- vi) Mr Perry recalls meeting Mr McManus and the three Dalmatians at the drain, however this was on the public right of way.
- vii) Mr Perry says he has no reason to erect barriers or signs as to his knowledge there are very few walkers and only on a few occasions.

Additional letter from Mr Perry dated 19 April 2012.

“Further to my letter of 7th March I now understand that the applicants have to show 20 years continuous use of the “footpaths” shown on their application. This is not possible. Between 1990 and 2000 I leased my land to Mr and Mrs Baker of Southfields Farm. Between April and November each year they grazed their dairy herd (generally behind electric fences) on the land in question. No dog walker/rambler would walk through a herd of cows! Mr and Mrs Baker and Jane Wraight (Crabb Mill) can confirm this. I hope the Council will dismiss the application as the usage claims are totally untrue.”

Osborne Clarke Acting for Mr K Smith. Letter dated 11 May 2012. The below is a summary of the issues raised in this letter. Summary in italic text.

The Application

Recognises that the application is made pursuant to s.53 of the 1981 Act and s.31 of the Highways Act 1980. These require that the public has used the route for an uninterrupted period of at least 20 years ‘as of right’, that there is not sufficient evidence to rebut the presumption arising from s31 of the 1980 that the landowner intended to dedicate the land as highway and that the route must be capable of subsisting as a highway at common law.

Evidence in Support of the Application

- i) *Witness number 2 (Mr McManus) records that there was a broken gate across the southern leg which was not locked. It therefore had to be opened to be climbed over. There is reference to conversations with Mr and Mrs Perry indicating that his use was permitted or tolerated.*
- ii) *Witnesses 3, 5, 7, 8, 9, 13, 17, 21, 23, 25, 26, 28 and 30 all refer to the gate.*
- iii) *Witness 7 refers to Mr and Mrs Perry allowing public access which indicates permission.*
- iv) *Witness 8 refers to a lowered section of fence which has to be climbed over. This is also mentioned by witnesses 15, 25, 30 and 31.*
- v) *Witness 14 indicates that he had heard new owners were not going to be as accommodating as Mr and Mrs Perry and stopped using the routes. This indicates that he understood there to be a revocable permission.*
- vi) *Witness 19 records that she asked for and was given permission 43 years ago.*
- vii) *Witness 21 records that she was given permission.*
- viii) *Witness 22 records that Mr and Mrs Perry never objected indicating toleration or permission.*

Intention to Dedicate

States that the applicants can not establish an intention on the part of the landowner to dedicate the land in perpetuity as a highway for the following reasons:

- a) *the southern leg used to have a gate across it*
- b) *the southern leg was regularly fenced off with electric fencing*
- c) *evidence, even from applicants, suggests a significant part of the use was by express permission and some witnesses consider it by implied permission.*
- d) *the gate, inaccessibility of parts of the land whilst being grazed amount to interruptions to the claimed period of use.*

An intention to dedicate cannot be shown.

As of Right

Use must be without force, without secrecy and without permission. Witnesses state that they climbed over or opened a gate, climbed under electric fencing or climbed over or under a broken down section of fence. This use is by force. It would also be obvious to any reasonable observer that persons using the routes were not doing so as of right.

It is given in R v Secretary of State for the Environment ex parte Bilson [1999] QB 274 that evidence of express or implied permission is fatal to the application.

Southern leg

The southern leg is a deviation from the two sections of existing highway, essentially cutting the corner between Crabb Mill Lane and the existing footpath. A deviation from an adjoining highway or a recreational walk along a longer route of a footpath proper between two points cannot be claimed as a footpath. See British Museum Trustees v Finnis (1833) 5 C&P 460 and Bilson (above).

The cul-de-sac

The law does not recognise that a cul-de-sac can be a highway; a highway must lead from one place to another.

Grazing licences

Between approximately 1989 and 2011 a nearby farmer (Mr Baker) took a grazing licence on all of the land affected by the application between approximately March and October and Mr Baker had control of the land between these months but had no authority to dedicate the land as a highway in perpetuity.

This occupation during each year acted as an interruption to the claimed public use.

Conclusion

It is stated that Mr Smith submits that for all of the reasons set out above none of the routes may be added to the definitive map and statement. In particular it is considered that the southern leg is not capable of being deemed to have been dedicated as a public footpath and that other routes affected by this would become cul-de-sacs and hence not capable of being deemed to have been dedicated as a public footpath either.

5.1 Officer's Comments: User Evidence – See Appendix A

The evidence submitted with the application suggests that the route has been used by the public since 1971; the route does not appear to 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. Whilst the dedication of this route may have occurred at common law at some time in the past, it is recognised that such a dedication is difficult to determine and hence it is considered appropriate to apply 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.

(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 if the existence of 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*).

6.0 Consideration of all evidence

6.1 Calling into question

Section 31(2) states that the 20 years of public use is to be calculated retrospectively from the date that the public use was brought into question.

31 User evidence forms with individually annotated maps were provided to support the application. A number of witnesses recorded having their use challenged by the landowners (Ms Wraight and Mr Smith) in the autumn of 2011. Additionally other witnesses had heard of others who had been challenged around this time. It was these challenges and the erection of fencing on Mr Smith's land that brought about the application for a modification order (received by Wiltshire Council in January 2012). Hence it is considered that the 20 year relevant period for the application of s.31(1) is from 1991 to 2011.

It is considered that it was only at this time was public use effectively challenged. Case law requires that there is sufficient evidence that there was no intention on the part of the landowner to dedicate the route as a public highway (Godmanchester and Drain House of Lords ([2007] UKHL 28). Lord Hoffman at para. 33 said:

“ 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 any 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”.

The evidence provided shows that 31 witnesses walked the route A to B on the consultation map from Crab Mill Lane to footpath LECL3 (“the Southern leg”) during this period with 10 having walked it for the full 20 year period.

26 witnesses had walked the route leading alongside Woodbridge Brook and along the northern boundary of the land (“the perimeter route”). Of these 9 had walked it for the full 20 year period.

12 witnesses had walked the route leading alongside Woodbridge Brook returning to its start point at point D on the consultation map. Of these 4 had walked it for the full 20 year period. One of these 4 states that they walked with permission, however it is not clear from whom they had permission.

Nearly all witnesses reported that their use had been without permission, secrecy or force. None of them had worked for the landowner.

6.2 Without permission

It is noted that two witnesses expressly refer to using the routes with permission. Witness number 19 states “yes, I have walked the fields around Lea with permission...” and witness number 21 states that they met with Mr and Mrs Baker of Southfield Farm who said they could walk anywhere on their land.

The submission of Osborne Clarke dated 11 May 2012 on behalf of Mr Smith considers that evidence of express or implied permission is fatal to the application. It is agreed that use must be without permission but noted that very few of the users claim to have had either express or implied permission. The submission of Mr Perry dated 07 March 2012 confirms that he “never gave permission for anyone to use my land for any reason whatever.” Ms Wraight does not state whether she did or did not give permission for any use. It is also noted that implied permission is not necessarily fatal to a claim based on use by the public that is ‘as of right’. In a recent case involving a village green the question of whether implied permission would be fatal to user ‘as of right’ was considered by the House of Lords in *R(Beresford) v Sunderland City Council* [2004] 1 AC 889 (paras 5,6 and 7) Lord Bingham says:

*“I can see no objection in principle to the implication of a licence where the facts warrant such an implication...a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants’ use of the land is pursuant to his own permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants’ use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use...Authority, however, establishes that a licence to use land cannot be implied from mere inaction of the landowner with knowledge of the use to which his land is being put...In *R v Oxfordshire County Council, Ex p Sunningwell District Council* [2001] 1 AC 335 it was held by the House that the landowner’s toleration of local inhabitants’ user of the land in question was not inconsistent with such user having been as of right, and so did not prevent registration of the land in question as a town or village green.”*

Additionally, Lord Walker of Gestinhorpe, at para 85 says:

“The fact that the City Council and its predecessors were willing for the land to be used as an area for informal sports and games, and provided some minimal facilities (now decaying) in the form of benches and a single hard cricket pitch, cannot be regarded as overt acts communicating permission to enter. Nor could the regular cutting of the grass, which was a natural action for any responsible landowner. To treat these acts as amounting to an implied licence, permission or consent would involve a fiction....”

6.3 Without interruption

Section 31(1) of the Highways Act 1980 specifies that the use by the public must be without interruption for the 20 year period and it is noted that the period of use covers the period February 2001 to July 2001, a period when the majority of rights of way were closed to the public during an outbreak of foot and mouth disease. Wiltshire County Council acted at that time under the powers of the Foot and Mouth Disease Order 1983 and the order permitted closure of some land regardless of the presence of rights of way. The Planning Inspectorate has issued a revised Advice Note 15 on this topic (June 2009) which concludes that ‘it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an “interruption” under section 31(1) of The Highways Act 1980.

The submitted evidence, supports that the public have used the claimed route, on foot, for a full period of 20 years as of right and that the requirements of section 31(1) are satisfied subject to there being sufficient evidence that there was no intention during the period to dedicate it. Evidence of non intention to dedicate may be found as follows:

- (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.

No evidence of such notices has been discovered. Some users refer to a recent notice regarding 'dog mess' but neither users or landowners refer to signs inconsistent with the dedication of 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.*

No evidence of such notices has been discovered.

- (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.*

The Highway Authority (Wiltshire County Council and latterly Wiltshire Council) has not received any such notice and no evidence of such notice being served has been discovered.

- (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 –

- (iii) within ten years from the date of deposit*
(iv) 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.

Officers have searched archive deposits dating back to 1932 and no deposit, statement or statutory declaration has been made affecting the claimed route.

6.4 Without secrecy

No users claim to have used the paths secretly and use has been frequent and during daylight hours. In his submission dated 07 March 2012 Mr Perry states that "only occasionally I saw any

dog owners – often challenging them about using paths other than the existing public footpath”. Mr Perry was not at the property on weekdays or for periods of the year when he was at his house in Spain. Ms Wraight did not become aware of the use until late in the summer of 2011. Mr Smith bought Crab Mill Farm in March 2011 and became aware of the use later in the summer; he notes that the property has not been inhabited since March 2011.

It is considered that owing to absence from their properties landowners may not have been aware of the extent of the public use. However the nature of the public use would appear to have been without secrecy as it was noticed by Mr Perry on the occasions he was there and was apparent to both Ms Wraight and Mr Smith when they were at their properties.

6.5 Without force

No users claim to have used force to access the claimed routes. Users report that a gate formerly existed on the southern leg but that it was never locked and fell into disrepair (witness no. 2 thinks ‘about 5 years ago’). Other users refer to this as a ‘disused gate’, ‘an old gate in the hedge’, ‘a gate in place when the land was used for cattle’ and ‘a gate that has always been open’. It is clear that force was not needed to access the southern leg.

Use of the perimeter route requires that users cross a fence line between land owned by Ms Wraight and Mr Smith. Users record that to cross this fence line there was ‘a broken fence’(several) and ‘a low fence that needs stepping over’.

This fence was not in position in 1971, 1974 or 1981 (evidence from aerial photographs) but was apparent in 1992 and 1994. Hence it is likely that some sort of fence was in existence throughout the relevant period. Ms Wraight states that she erected the fence in 1985 but this pre-dates the Crabb Mill purchase of the land.

There are no claims that force was needed to cross the fence and no evidence that the fence was damaged so as to cause problems for anyone grazing the land. There are no reports of the fence being repaired and the fence was clearly not a bar to access as use continued.

There are clear conflicts relating to the evidence of the fence on the perimeter route and this form of evidence is best given verbally and subject to cross examination.

6.6 The character of the way

It is a requirement of s.31(1) that the way may be any way “*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*”. Examples of ways that may not be of such character include ways where public use is specifically prohibited (for example a motorway) or a discontinuous length of highway wholly unconnected with the highway network. There is however no requirement that a way must be of utility value or perhaps provide a shorter or more direct route. A way may be a cul-de-sac and may end at a place of public resort. Osborne Clark’s submission (4.1) in this respect is incorrect.

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.

6.7 Subjective belief

It has been suggested that anyone using the land would have known it was private and that they were not using a public right of way and hence their use cannot 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."

7.0 Widths, Conditions and Limitations

Users report one gate on the southern leg and a broken down fence on the perimeter route. They refer to the broken down fence as needing to be stepped over in a manner similar to a low stile.

Witnesses claim a width ranging from 0.5 metre to 4.5 metres. The mean width is 1.5 metres.

8.0 Decision

Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw* (1994) 68P & CR 402 (*Bagshaw*):

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

Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed paths is finely balanced but there is no incontrovertible evidence

that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged.

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

There are contradictions in the evidence given. Objectors to the application consider that use has been interrupted by stock grazing and fencing and that use was not without force or permission. There is credible evidence that the land has been managed for stock and it would be difficult to apply Test A without further testing of the evidence under cross examination.

Test B is the weaker test and only requires that on the balance of probabilities it is reasonably alleged that public rights subsist. This may only be defeated by incontrovertible evidence. Incontrovertible evidence is that contained within s.31(3)(4)(5) and (6) of the Highways Act 1980.

The Council is not aware of any incontrovertible evidence and Test B must apply.

9.0 Legal Considerations and Risk Assessment

If Wiltshire Council refuses to make an order the applicant may lodge an appeal with the Secretary of State who will consider the evidence and may direct the Council to make the order. Given recent experiences of officers and the application of *Norton and Bagshaw* as referred to above it is considered highly likely that Wiltshire Council would be directed to make an order as there is no incontrovertible proof to defeat Test B.

Failure to progress this case to determination within a year of application may result in the applicant seeking a direction from the Secretary of State. As Wiltshire Council prioritises user based applications it is likely that the Council would be directed to make a determination.

If the order, when made and advertised receives objections which are duly made it must be forwarded to the Secretary of State for determination. Through their agent, the Planning Inspectorate (PINS), the order may be determined by way of written representations (no additional cost to the Council), a local hearing (cost £200 to £500) or a public inquiry (cost £1500 to £3000 if Wiltshire Council supports the order; around £300 if it does not).

Statute is clear as to the Council's duty in this matter and it is considered unlikely that judicial review would be sought by any party if the statute is adhered to. Costs arising from judicial review of the Council's processes or decision making can be high (in the region of £20,000 to £50,000).

10.0 Equality Impact

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

11.0 Other Considerations

The route claimed by the applicant has not been available to the public since late in 2011. Officers have considered whether it would be appropriate to negotiate access while the application is being considered or the provision of a permissive route. However, the applicant considers that a public right has been acquired and it is the nature of such a right that it is forever. A permissive route

would not be and does therefore not provide an appropriate consideration. It is also noted that if a right of way has been acquired, a permissive route is not needed, even if the right is unrecorded.

It is considered that the best course of action for all parties is to resolve the issue of whether public rights subsist over the claimed route in as efficient and timely manner as possible, as provided by the statute.

It is recommended that an Order should be made under s.53(3)(c)(i) of the Wildlife and Countryside Act 1981 adding footpaths as claimed to the definitive map and statement and that if no duly made objections or representations are received during the statutory period of advertisement that the order is confirmed

Sally Madgwick
Rights of Way Officer

07 June 2012