

Wildlife and Countryside Act 1981, Section 53

Application to delete a section of Milston 16 and add a restricted byway to form part of Milston 16 to correct a drawing mistake on the definitive map

Decision Report

The application

1. On 13 August 2001 Jancis Henman, on behalf of The Friends of Milston and Brigmerston, applied to Wiltshire County Council to:
 - (a) 'delete the footpath leading from Brigmerston corner, Church Road, Milston through the farmyard to RUPP 16 Milston leading to Durrington with a width of two metres.' and
 - (b) add 'the footpath leading from Brigmerston corner, Church Road, Milston and then running parallel to Barn House and Cottage on right then crossing diagonally left to join RUPP 16 leading to Durrington with a width of two metres.'

The applications are attached at BB1, **Appendix C**.

2. The application was supported by 41 user evidence forms completed by 42 people who claim to have used the route described in paragraph 1(b) above since 1916. A summary of the forms is attached at BB2, **Appendix C**.
3. Notice of the application was served on all owners and occupiers of land affected by both applications.

Legal considerations

4. Wiltshire Council is now the Surveying Authority for the county of Wiltshire excluding the Borough of Swindon. Surveying Authorities are responsible for the preparation and constant review of definitive maps and statements of public rights of way. Section 53(2)(b) of the Wildlife and Countryside Act 1981 states-

As regards every map and statement the Surveying Authority shall-

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of these events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.
5. The events referred to in subsection 2 above which are relevant to this case are:
- 53(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:
- (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to Section 54A, a byway open to all traffic;
- (ii) that there is no right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.
6. The Council must consider all available relevant evidence both user and historical. Section 32 of the Highways Act 1980 states:
- ‘A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.’
7. Section 53(5) of the Wildlife and Countryside Act 1981 allows for any person to apply for an Order under Section 53(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). The provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.
8. Schedule 14 to the 1981 Act states:
- Form of applications
1. An application shall be made in the prescribed form and shall be accompanied by-

- (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and
- (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

Notice of applications

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

- 9. A Surveying Authority has discretionary power to waive strict compliance to Schedule 14 when determining an application or may consider the application to be improperly made whereby the Surveying Authority may use the evidence brought to its attention as a trigger to make its own decision under Section 53(2) of the 1981 Act.

Following the decision in the Court of Appeal case R (on the application of the Warden and Fellows of Winchester College and Humphrey Feeds Limited) v Hampshire County Council and the Secretary of State for the Environment Food and Rural Affairs delivered on 29 April 2008 [2008] EWCA Civ 431 Lords Ward, Dyson and Thomas found that if the outcome of an application turned on the application of Section 67(3) of the Natural Environment and Rural Communities Act 2006 then strict compliance with Schedule 14 would be required in respect of the presentation of 'copies of any documentary evidence ... which the applicant wishes to adduce in support of the application'. This is required in Section 67(6) for Section 67(3) to apply. However, Justice Dyson went on to say in paragraph 55 of his decision 'I wish to emphasise that I am not saying that, in a case which does not turn on the application of Section 67(6), it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and

proceed to make a determination under paragraph 3, or to treat a non compliant application as the trigger for a decision under Section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3).'

10. Section 67 of the Natural Environment and Rural Communities Act 2006 ends certain unrecorded public rights of way. Section 67(1) states:

'An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement-

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

But this is subject to subsections (2) to (8).

Officers are not aware of any of the exceptions in subsection (3) relating to public rights applying to Milston 16. The section of the 2006 Act is attached at BB3, **Appendix C**. Milston 16 is shown on the definitive map and statement as a restricted byway. The application meets the requirements of schedule 14 of the 1981 Act.

11. The Highways Act 1980 allows, in Section 31(1) for the dedication of a right of way to be deemed highway unless there is sufficient evidence during the relevant 20 year period that there was no intention to dedicate it.

Section 31(1) states:

(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 sub-section (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 sub-section (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 1 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 sub-section (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 sub-section (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 sub-sections (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 sub-section (5) or the land (in the case of sub-section (6)) is situated or, where the land is situated in the City, the Common Council."

Evidence submitted in support of the applications

12. The evidence provided by the members of the public who filled in the user evidence forms, referred to in paragraph 2 above, describes daily use in some cases, but otherwise, very regular use of the route claimed by the applicant for the additional right of way. The route being claimed is shown on the County Series Ordnance Survey map, plot number 69a. The use dates from 1916 until the route was obstructed in 2001. The use during this 85 year period was exercised as of right, openly and without the permission of the owner of the land over which the route crossed. The evidence provided described use on foot with two witnesses who stated they had cycled over it. Some witnesses described the route as Cuckoo Lane. The route was described as being outside the curtilage of Barn House and Barn Cottage. The former owner of Barn Cottage stated his bedroom window looked directly on to the path and the path was in daily use. Other witnesses referred to a former owner of Barn House being a keen gardener, who had often been seen in his garden whilst they used the path and he did not challenge their presence. A number of the witnesses described the route having a width of 15 feet.

Evidence discovered by the Council relating to the applications

13. The Planning Inspectorate has produced 'Definitive Map Orders: Consistency Guidelines' which provide information and references to resources and relevant case law to assist in the interpretation and weighing of evidence on Definitive Map Orders (DMOs). They are the primary reference material for Inspectors in determining such Orders.

In evaluating historical evidence it is necessary to recognise that differing weight must be given to different evidence. A number of general principles need to be applied when evaluating documents and there is a need to understand the context in which the maps were compiled:

- (a) Why was the document compiled?

What was the purpose of the compilation process and of the particular document within that process? If for example the recording of the existence of a public highway was of significance to the process of compiling the document, considerable evidential weight will be added. Weight is added if the document was conclusive evidence for a particular purpose.

- (b) How was the document compiled?

The requirements for recording need to be checked, for example what scales and conventions were applied to the mapping and recording process. Was the process based upon a new survey or on updated older records? Was there an external check on accuracy? Public participation in the process of compiling the document strengthens the value of the evidence.

(c) Who compiled the document?

Consideration needs to be made of the consequences of the legal effect of the compiler either including or failing to include a highway. Declarations against the compiler's interest carry more weight than declarations in the compiler's interest. The sanctions for falsifying evidence also affect the weight accorded to evidence.

Using these basic principles and having regard to the Planning Inspectorates Consistency Guidelines and advice in the book Rights of Way A Guide to Law and Practice by John Riddall and John Trevelyan Wiltshire Council officers have devised a system of categorising the historical evidence.

Category	May provide evidence for	Examples
A	Legal creation of a highway Reputation of a way as a highway Physical existence of a way Conclusive evidence of public rights	Inclosure Acts, Awards and plans Orders creating, diverting or extinguishing highways Railway and canal Acts and Plans Definitive Map and statement
B	Reputation of a way as a highway Physical existence of a way	Documents, maps and plans drawn up as a result of legislation, consulted upon but whose primary purpose was not to record public rights e.g. Tithe Awards, 1910 Inland Revenue Act documentation
C	Reputation of a way as a highway Physical existence of a way	Includes local government records e.g. Highway Boards, County Council, parish council
D	Reputation of a way as a highway	Other maps and documents showing highways additional to or as part of their purpose e.g. parish maps, estate plans and conveyances
E	Reputation of a way as a highway Physical existence of a way	Commercial maps and some Ordnance Survey records
F	Reputation of a way as a highway Physical evidence of a way	Local repute, consultation responses

14. In 'A History of the County of Wiltshire', volume 15 produced by the Victoria County History, Milston and Brigmerston are described-

'The villages of Milston and Brigmerston apparently originated within a westwards meander of the Avon, Milston on the north bank, Brigmerston on the south, and grew round a rectangle of lanes. The east side of the rectangle was a track in 1841 and did not survive in 1851. The name Church Road was applied to both the south and the west sides in the 20th century. Both villages were bypassed by the Figheldean-Bulford turnpike road. Brigmerston may have been the wealthier of the two settlements in the 14th century. Milston was more populous in the mid 19th century, Brigmerston in the later 20th.

Brigmerston.

The north side of the rectangle of lanes, extending west beyond Church Road, formed a village street for Brigmerston.....The principal farmstead in the village, Brigmerston Farm, was at the west end of the street on the south side, the farm buildings west of the house. A new farmhouse was built south west of the buildings between 1851 and c. 1877.'

The location of the village street is shown on mapping to be dealt with later in this report. Part of the claimed additional right of way runs along the village street described above.

Victoria County History [VCH] was founded in 1899 and was originally dedicated to Queen Victoria. VCH is an encyclopaedic record of England's places and people from earliest times to the present day. Based at the Institute of Historical Research in the University of London since 1933, the VCH is written by Historians working in Counties across England.

Category A evidence

15. The definitive statement prepared under Section 32 of the National Parks and Access to the Countryside Act 1949 with the relevant date of the 16 November 1952 states 'Milston 16 C.R.B. From the northern end of Durrington path No.12 leading north across the Ford and *North-east along the cart track past Brigmerston Farm to Church Farm, ulc 10006* [authors italics]. The route described in the definitive statement is along a defined track which ran past and not through Brigmerston Farm i.e. on the route which the application seeks to have added to the definitive map and statement. No right of way is described on the route currently shown on the definitive map as the route of Milston 16. The definitive statement is attached at BB4, **Appendix C**.

Category B evidence

16. A Tithe Award dated 1841 covering the parish of Milston is held in the County History Centre. The map attached to the Award shows a lane along the route of the claimed right of way in the same manner as the C32 Figheldean to Bulford road and unclassified road 10006 Church Street. The road leads east

off Church Street to the river, an extract from the Tithe Award map is attached at BB5, **Appendix C**. A number of allotments are shown and numbered to the north and south of the lane which I have shown in a table attached at BB6, **Appendix C**. Whilst the allotments are in the ownership of only two people, Charles Edward Rendall and Reverend Peter Hall, a number of people occupy them for a variety of purposes as you might expect in a typical village street. The lane shown on the Tithe Award plan is in the approximate position of the lane shown on the County Series Ordnance Survey maps which I will be describing later on in this report and is the route of the claimed additional path in the application under consideration. No route is shown on the map along the line shown on the definitive map as the right of way.

The Tithe Award for Milston is derived from the Tithe Commutation Act of 1836 which reformed the way in which the established church was financed by tax (the tithe) on local agricultural output. The 1836 Act converted tithes into fixed money rent. The documents consist of three elements, the apportionment, the map and the file and they are solely concerned with identifying titheable land. The apportionments are statutory documents which were in the public domain; however, the maps were not made for the purpose of establishing or recording rights of way. Tithe maps are generally good evidence of the topography of the roads they portray, especially those which form boundaries of titheable land.

Category C evidence

17. In the papers of the Amesbury District census 1851 held in the History Centre a note and plan concerning the hamlet of Briggerston may be found, attached at BB7, **Appendix C**. The text states:

'Milston

This Parish consists of the Village of Milston and the hamlet of Briggerston close adjoining. There are in Briggerston 2 out of the way cottages, *situate in a hollow by the River side beyond Mr Edward's farm on a swampy trackway to Durrington*. They lay on the right hand side.' [Authors italics]

The plan, which is hand drawn and not to scale, identifies Mr Edward's farm alongside a 'road down to the river' with 2 'out of the way Cottages' shown on the opposite side of the road on the river side. From comparing the map and description against the Tithe Award map and the slightly later drawn Ordnance Survey maps it is reasonable to say the route being depicted on the map is the same route i.e. the route relating to the claimed additional way in the application.

18. Wiltshire County Council was required to consult with all the parish council's within its administrative area at the preparation stage of the definitive map and statement to ascertain the location and status of public rights of way within their parish. County Series Ordnance Survey plans were sent to the councils in 1950 with the request that they drew on the maps the routes of the public rights of way and described the route on forms. Milston Parish Council drew a right of way on a map along the track to which the application to add a right of way refers i.e. along the route past what is now Barn House and shown on the underlying Ordnance Survey map. On the form the parish council described the path as:

'Milston 2 Footpath Durrington to Brigmerston. Follows Durrington – Milston footpath for 250f then after stile thence north to unmetalled road.' The nature of the surface was described as 'Metalled for first 250f thence meadow for 300f then unmetalled road' The unmetalled road section of the path was described as being fenced.

On 8 February the County Surveyor wrote to Mr Bartlett, Chairman of Milston Parish Meeting, regarding the survey of rights of way:

'The cart track or unmetalled road which you refer to in your description of path No. 2 continues southwards to the western end of path No. 1 after crossing a ford. I think this should be added to your schedule, but I should be glad to have your observations as to whether this is a public right of way throughout its whole length.'

In his reply dated 4 July the Chairman confirmed 'Para 2 Agree with W.D.L.A. footpath No 2 should be as originally shown.'

Whilst the length of path being referred to in the letter is not the length of way which is the subject of the application, but its continuation, the Chairman is clearly confirming the location of the entire length of the path which it is claiming as a public right of way i.e. along the route shown by the Ordnance Survey as a track alongside what is now Barn House, not a line through Brigmerston farmyard. Documents appended at BB 8, **Appendix C**.

Category D evidence

19. On 16 November 2000 Salisbury District Council received an application for permission for development at Barn House, Brigmerston which was given the reference S/00/2164. The application was made by R and S Howes Partnership, agents on behalf of Mr J Elliott of Barn House, Brigmerston, Wiltshire, who was stated to be the owner of the Barn House. The development proposed was to 'demolish and re-build' Barn House. The site plan produced to a scale of 1:2500 appears from how the plots are numbered, e.g. plots 64, 66 and 72, to be based on the County Series Ordnance Survey map. The site is delineated by a red line. On the block plan produced at a scale of 1:500 Barn House is shown along 'Existing Lane' i.e. the route sought

to be added to the definitive map. On the Appraisal page within the documentation held with the application in the County History Centre, under site notes, against 'HIGHWAY Traffic, Access, Parking' an officer had commented 'In need of renovation'. The application completed presumably with the knowledge of the owner of Barn House at that time clearly acknowledged the existence of a track outside his curtilage on the route which the application seeks to add to the definitive map.

The application was approved on 9 February 2001 with one of the conditions being:

'3. There shall be no new buildings, structures (including gates, walls and fences) or raised ground levels within

a) 8 metres of the top of any bank or watercourses

b) 8 metres of any side of an existing culverted watercourse inside or along the boundary of the site, unless agreed otherwise in writing by the Local Planning Authority.'

Copies of papers attached at BB9, **Appendix C**.

Category E evidence

20. Evidence in this category includes commercial and Ordnance Survey maps. The value of this category of evidence lies in the continuity of the records over a long period of time, the different compilers and the public use of them. Not all commercial maps are derived from the same surveys.
21. Andrews' and Dury's map of Wiltshire was produced in 1773 at a scale of approximately 2 inches to the mile. The map was based on an original survey. The conventions used on the map to indicate natural and artificial features are those generally employed at the time. Whilst the Wiltshire map has no key the compiler's map of Hertfordshire does have a key and the symbology deployed on that map appears to be the same as used on the Wiltshire map. Relief is represented by vertical shading, woods are depicted as compact clumps of roughly drawn tree-tops and roads are traced by double lines and turnpike gates are marked. The map does show a T junction of roads at the heart of the hamlet of Brigmerston one of which leads in an easterly direction to the river with buildings lying to north and south of the road. Whilst the map is crudely drawn, considering the map in the context of the other evidence available to Council, the map is showing a route in the approximate position of the route shown on the later Tithe Award map and County Series Ordnance Survey maps as the claimed additional right of way. The map is appended at BB10, **Appendix C**.

22. Greenwoods map of Wiltshire dated 1820 has been examined and it shows a fenced track on the same alignment as the mapping evidence I have previously described. According to the inscription on the map it was completed after an actual survey of the county made in 1819 and 1820. John Chandler in his book *Printed Maps of Wiltshire 1787 – 1844* states the following about the map:

'In surveying Wiltshire, Greenwood had the advantage over his predecessors of the Ordnance Survey's published trigonometrical survey, which described with great accuracy the principal and some of the secondary triangulation of England and Wales. He might also, although he appears not to, have used and copied from the recently published Ordnance Survey sheets covering the south and centre of the county. His surveying methods, it must be confessed, fell far short of the standards set by the Ordnance Survey, but his map should not be disregarded on that account. Unlike the Ordnance Survey he appears to have relied for his information not only on topographical survey, but also on existing local manuscript maps, such as estate and enclosure maps; on printed guidebooks and official sources, such as census reports, for the orthography of names and hierarchy of settlements; and on local knowledge collected by the surveyors, especially relating to boundaries. The achievement of mapping Wiltshire's parish boundaries, two decades before the appearance of the tithe commutation maps, was in itself a considerable one, which should deserve our respect. And in other regards, too, the existence of a detailed map compiled largely independently of Andrews and Dury and the Ordnance Survey, from a new topographical survey and from secondary sources, should give Greenwood's map an importance and significance for Wiltshire historians which has not hitherto perhaps been adequately appreciated.'

The route depicted by Greenwoods on his map is shown extending down to the river Avon much further than on the Ordnance Survey manuscript drawing of 1808 which I will describe later. I suggest this different depiction is an example of Greenwood's surveyors having consulted other local records in the compilation of the map. An extract from the map is produced at BB11, **Appendix C**.

23. John Cary was born in Warminster in 1754 and worked from London as a map maker, engraver and publisher. He was active in the early part of the 19th century. In 1794 he was commissioned by the Postmaster General to undertake a survey of main roads in the country and he undertook considerable work on the English Ordnance Survey prior to 1805. Cary appears to have used actual surveys, as well as the work of others, in the production of his maps. On his map of Wiltshire dated 1832 roads are recorded in one of four classifications, a detailed road classification system at that time which is particular to Cary's maps. The 1832 map shows a parochial

road on the line of the claimed right of way. An extract from the map is produced at BB12, **Appendix C**.

24. In 1969 the publishers, David and Charles, produced what was referred to as sheet 14 in the Old Series Ordnance Survey 1 inch maps. The survey in Wiltshire began in 1793. The local topographical survey was undertaken between 1807 and 1811 at a uniform scale of 2 inches to 1 mile. The published map is a composite document embodying material from a succession of dates. The engraving of 1817 based on the survey of 1807-1816 remains intact over much of the sheet. The major revisions result from the periodic insertion of railway material.

The relevant section of the map is produced as printed and an extract at an enlarged scale at BB13, **Appendix C**, shows a fenced road along the route shown on the Tithe Award map leading from Brigmerston through buildings to Durrington.

25. According to the notes on Cassini's Popular Edition of the Ordnance Survey 1 inch map, map 184 Salisbury and The Plain 'The original impetus behind the creation of the Ordnance Survey and the original Old Series maps had been one of military necessity. Although the maps had soon assumed a more civilian aspect and market, the Ordnance Survey continued to fulfil an important wartime role. During the First World War its normal activities were suspended and over 5,000 people were engaged on military work, producing more than 32 million maps for the war effort.

The end of the conflict co-incided with another revolution as dramatic as that which had swept the country three generations earlier with the advent of the railways – the increased use of the motor car. By the 1920s, this new and independent means of transport had helped create an entirely new market for maps..... Responding to this, the Ordnance Survey, under the Director-Generalship of Colonel Charles Close, began re-surveying the country in 1912 with a view to producing maps that were both accurate and eye-catching in design. After the war, and guided by the results of public consultation, the one-inch Popular Edition was launched.'

The relevant sheet shows a fenced track on the same alignment as the earlier Old Series map described in the above paragraph but by the time of this survey the road no longer continued through to Durrington. The map is produced at BB14, **Appendix C**, together with an enlarged extract and an extract from the key to the map. According to the key on the map the route is shown as a road less than 14 feet wide.

26. Sheet 54 of the First Edition 6 inches to 1 mile Ordnance Survey sheet surveyed between 1877-78 shows a fenced track to the north of Brigmerston Farm on the same alignment as the other mapping evidence already

described, no route is shown passing through the farm yard. An extract from the map is at BB15, **Appendix C**.

27. J B Harley, in his book *Ordnance Survey Maps a descriptive manual* published by the Ordnance Survey in 1975, states that Ordnance Survey maps at the scale of 1:2500 originated in the mid nineteenth century in response to the urgent need for accurate plans for land registration purposes. An extract from the 1st edition of the relevant sheet, which was surveyed in 1877-78, is reproduced along with an extract from the 1926 revision at BB16, **Appendix C**. Both editions show a track which is separately numbered and measured to the north of Brigmerston Farm along the alignment of mapping previously described, such as the Tithe Award map. In his description on Areas in his book Mr Harley states 'The system by which each parcel of land is numbered, its area calculated from the map, and this value printed on the sheet is peculiar to the 1:2500 series and helps render it an important tool in the conveyancing and registration of land. The Ordnance Survey large scale maps, which show practically all permanent fences and hedges, are particularly suitable for use as the basis of the description of the land to which each title refers.... A parcel is accordingly defined as any area which is measured and published on the plan; it may be a single feature, usually an enclosure, or it may consist of several adjacent features grouped together. As a general rule parcels are bounded by lines of natural detail, such as hedges or streams (although in creating 'Town Areas' other features such as railways are used), but they are sometimes bounded artificially as by administrative boundaries or the sheet edge. Each parcel is given a reference number....there are minimum areas below which certain features are not measured separately...In any case there are exceptions to such thresholds and some features are *always* separately numbered and measured irrespective of their size. They include railways in rural areas (in built up areas they may form part of 'Town Areas'), all public roads, whether fenced or unfenced..' Mr B St G Irwin Director General of the Ordnance Survey at the time the book was published stated in the Foreword of the book that Dr Brian Harley was a leading authority on Ordnance Survey maps.

Decision.

28. The judgement given by the Court of Appeal in *R v Secretary of State for the Environment ex parte Burrows and Simms* (1991) 2 QB 354 held, in effect that if evidence comes to light to show that a mistake had been made in drawing up the definitive map, such a mistake can be corrected in either of the three ways envisaged in Section 53(3)(c) of the Wildlife and Countryside Act 1981.
29. Under Section 53(3)(c)(i) the Surveying Authority is not required to prove 'beyond all reasonable doubt' that rights exist. The burden of proof lies on the 'balance of probability', i.e. that it is more likely than not, that the rights exist. An Order may be made under this section where rights can be 'reasonably alleged to subsist'; however, at the confirmation of an Order a more stringent

test applies, that public rights 'subsist'. The wording for Section 53(3)(c)(iii) is different, as the Surveying Authority has to be satisfied that there 'is' no public right of way shown on the definitive map.

30. The earliest map examined, which officers believe shows the route which is the subject of the application, is Andrews' and Dury's map of Wiltshire dated 1773. Whilst it may be argued that this map is on such a small scale, 2 inches to 1 mile, that it is not possible to identify with any degree of accuracy the route of a particular way, when compared with the later mapping evidence, in particular the large scale Ordnance Survey maps, a picture of the road layout of this area becomes clear. There is a consistent portrayal of the claimed route as part of the local road network on the maps described in this report. This supports the application applied for by Jancis Henman and triggers the duty of the Council to modify the definitive map and statement accordingly by adding to the definitive map and statement as a restricted byway the claimed route and the deletion of the section of Milston 16 at Brigmerston Farm. The historical evidence is entirely supported by the significant amount of user evidence also submitted with the application. No statements and plans have been deposited under Section 31(6) of the Highways Act 1980 for the area over which Milston 16 runs.
31. No mapping evidence has been discovered by council officers to confirm that the section of Milston 16 currently shown on the definitive map through Brigmerston farmyard is correct. Taking the map evidence into consideration with all the other evidence relating to Milston 16 the Council has considered officers believe that section of Milston 16 shown through the farmyard should be deleted from the definitive map.

Barbara Burke

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