

# AGENDA

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**Meeting:** Western Area Planning Committee

**Place:** Council Chamber - County Hall, Bythesea Road, Trowbridge, BA14 8JN

**Date:** Wednesday 9 June 2021

**Time:** 3.00 pm

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Please direct any enquiries on this Agenda to Ben Fielding, of Democratic Services, County Hall, Bythesea Road, Trowbridge, direct line 01225 718656 or email [Benjamin.fielding@wiltshire.gov.uk](mailto:Benjamin.fielding@wiltshire.gov.uk)

Press enquiries to Communications on direct lines (01225) 713114/713115.

This Agenda and all the documents referred to within it are available on the Council's website at [www.wiltshire.gov.uk](http://www.wiltshire.gov.uk)

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## Membership:

Cllr Christopher Newbury (Chairman)	Cllr Stewart Palmen
Cllr Bill Parks (Vice-Chairman)	Cllr Antonio Piazza
Cllr Trevor Carbin	Cllr Pip Ridout
Cllr Ernie Clark	Cllr David Vigar
Cllr Andrew Davis	Cllr Suzanne Wickham
Cllr Edward Kirk	

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## Substitutes:

Cllr Mike Sankey	Cllr Jon Hubbard
Cllr Tony Jackson	Cllr Graham Wright
Cllr Mel Jacob	Cllr George Jeans
Cllr Gordon King	Cllr Matt Dean

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## **Covid-19 safety precautions for public attendees**

To ensure COVID-19 public health guidance is adhered to, a capacity limit for public attendance at this meeting will be in place. **Please contact the officer named on this agenda no later than 5pm on Monday 7 June if you wish to attend this meeting.**

To ensure safety at the meeting, all present at the meeting are expected to adhere to the following public health arrangements to ensure the safety of themselves and others:

- Do not attend if presenting symptoms of, or have recently tested positive for, COVID-19
- Wear a facemask at all times (unless due to medical exemption)
- Maintain social distancing
- Follow one-way systems, signage and instruction

Where it is not possible for you to attend due to reaching the safe capacity limit at the venue, alternative arrangements will be made, which may include your question/statement being submitted in writing.

## **Recording and Broadcasting Information**

Wiltshire Council may record this meeting for live and/or subsequent broadcast. At the start of the meeting, the Chairman will confirm if all or part of the meeting is being recorded. The images and sound recordings may also be used for training purposes within the Council.

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**County Hall, Trowbridge**  
**Bourne Hill, Salisbury**  
**Monkton Park, Chippenham**

County Hall and Monkton Park have some limited visitor parking. Please note for

meetings at County Hall you will need to log your car's registration details upon your arrival in reception using the tablet provided. If you may be attending a meeting for more than 2 hours, please provide your registration details to the Democratic Services Officer, who will arrange for your stay to be extended.

### **Public Participation**

Please see the agenda list on following pages for details of deadlines for submission of questions and statements for this meeting.

For extended details on meeting procedure, submission and scope of questions and other matters, please consult [Part 4 of the council's constitution](#).

The full constitution can be found at [this link](#).

For assistance on these and other matters please contact the officer named above for details

# AGENDA

## Part I

Items to be considered when the meeting is open to the public

1 **Apologies**

To receive any apologies or substitutions for the meeting.

2 **Minutes of the Previous Meeting** (*Pages 7 - 14*)

To approve and sign as a correct record the minutes of the meeting held on 17 February 2021.

3 **Declarations of Interest**

To receive any declarations of disclosable interests or dispensations granted by the Standards Committee.

4 **Chairman's Announcements**

To receive any announcements.

5 **Public Participation**

**Statements**

Members of the public who wish to submit a statement in relation to an item on this agenda should submit this in writing to the officer named on this agenda no later than 5pm on Monday 7 June 2021.

Submitted statements should:

State whom the statement is from (including if representing another person or organisation);

State clearly whether the statement is in objection to or support of the application;

Be readable aloud in approximately three minutes (for members of the public and statutory consultees) and in four minutes (for parish council representatives – 1 per parish council).

Up to three objectors and three supporters are normally allowed for each item on the agenda, plus statutory consultees and parish councils.

Those submitting statements would be expected to attend the meeting to read the statement themselves, or to provide a representative to read the statement on their behalf.

**Questions**

To receive any questions from members of the public or members of the Council received in accordance with the constitution which excludes, in particular, questions on non-determined planning applications.

Those wishing to ask questions are required to give notice of any such questions electronically to the officer named on the front of this agenda no later than 5pm on Wednesday 2 June 2021 in order to be guaranteed of a written response.

In order to receive a verbal response questions must be submitted no later than 5pm on Friday 4 June 2021.

Please contact the officer named on the front of this agenda for further advice. Questions may be asked without notice if the Chairman decides that the matter is urgent. Details of any questions received will be circulated to members prior to the meeting and made available at the meeting and on the Council's website. Questions and answers will normally be taken as read at the meeting.

6 **Planning Appeals and Updates** (*Pages 15 - 16*)

To receive details of completed and pending appeals and other updates as appropriate.

7 **Rights of Way Applications**

To consider and determine the following rights of way applications.

7a **Parish of Melksham Path No.107** (*Pages 17 - 220*)

To consider the two objections and thirty representations received relating to the above Order to add footpaths over land near to the River Avon, Melksham Forest, Melksham.

7b **Westbury Path No.68** (*Pages 221 - 422*)

To consider the two objections and one representation received relating to the above Order to add a footpath leading from footpath Westbury 15 to Westbury railway station.

8 **Planning Applications**

To consider and determine the following planning applications.

8a **19/10805/FUL - Land to East of Trowbridge Rugby Club, Hilperton BA14 6JB** (*Pages 423 - 448*)

New sports facility to include a new fenced and floodlit 3G artificial grass pitch and a new pavilion providing inclusive ancillary facilities to support the pitch, together with new community coaching and education rooms and a training room/gym for use by football rugby club users. A new access road and additional parking is also proposed.

8b **20-08785-FUL - Land at 66A Westbury Leigh, Westbury BA13 3SQ** (*Pages 449 - 472*)

Demolition of the existing building. Construction of 4 new dwellings (revised

scheme following the withdrawal of application reference 19/09803/FUL for 5 dwellings).

9 **Urgent Items**

Any other items of business which, in the opinion of the Chairman, should be taken as a matter of urgency.

**Part II**

*Item during whose consideration it is recommended that the public should be excluded because of the likelihood that exempt information would be disclosed*

## Western Area Planning Committee

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### MINUTES OF THE WESTERN AREA PLANNING COMMITTEE MEETING HELD ON 17 FEBRUARY 2021 ONLINE .

#### **Present:**

Cllr Christopher Newbury (Chairman), Cllr Jonathon Seed (Vice-Chairman), Cllr Trevor Carbin, Cllr Ernie Clark, Cllr Andrew Davis, Cllr Peter Fuller, Cllr Sarah Gibson, Cllr Edward Kirk, Cllr Stewart Palmen, Cllr Pip Ridout and Cllr Suzanne Wickham

#### **Also Present:**

Cllr Jon Hubbard

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#### 8 **Apologies**

There were no apologies for absence.

#### 9 **Minutes of the Previous Meeting**

The minutes of the meeting held on 20 January 2021 were presented for consideration, and it was,

#### **Resolved:**

**To approve and sign as a true and correct record of the minutes of the meeting held on 20 January 2021.**

#### 10 **Declarations of Interest**

There were no declarations of interest.

#### 11 **Chairman's Announcements**

There were no Chairman's Announcements.

#### 12 **Public Participation**

The Chairman welcomed all present. He then explained the rules of public participation and the procedure to be followed at the meeting.

### 13 **Planning Appeals and Updates**

The update report on planning appeals was received, with details provided in relation to the appeals for Land North of St George's Road, Semington; Seymour Road, Trowbridge; Land Adjacent 2a Clivey, Dilton Marsh; Beckerley Farm, Holt; The Old Mill Annexe 33C Market Street, Bradford on Avon; Former Nursery Northleigh, Bradford on Avon.

#### **Resolved:**

**To note the Planning Appeals Update Report for 17 February 2021.**

### 14 **Planning Applications**

The Committee considered the following applications:

#### **14a 20/10572/FUL: Land Adjoining No.39 Craybourne Road, Melksham, SN12 7DJ**

The Planning Officer, Verity Giles-Franklin, presented a report which recommended that planning permission for the proposed detached 4-bed dwelling should be granted subjected to conditions.

Key issues included the principle of development, the impacts the development would have on the character of the area, as well as the impacts on neighbouring amenity for both existing and future occupiers, and highway safety.

Members of the Committee had the opportunity to ask technical details regarding the application. Details were sought about the scale and size of the proposed application, specifically the size of the fourth bedroom in the proposal.

No members of the public had registered an interest to present their views to the community however members were advised by the case officer that a late public representation had been received, although it did not raise any new additional points that were not covered within the report.

The neighbouring Unitary Division member, Councillor Jon Hubbard was invited to speak to the application, who recalled the town council meeting when the application had been discussed which led to the town council raising the concerns, as reported.

A motion was moved by Councillor Ernie Clark, seconded by Councillor Jonathon Seed, to approve the application in accordance with the officer's recommendation.

A short debate followed, with some members expressing that the application would not be out of keeping or constitute as overdevelopment of the plot.



At the conclusion of debate, it was,

**Resolved:**

**That application 20/10572/FUL be approved as per the following conditions:**

**1. The development hereby permitted shall be begun before the expiration of three years from the date of this permission.**

**REASON: To comply with the provisions of Section 91 of the Town and Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.**

**2. The development hereby permitted shall be carried out in accordance with the following approved plans:**

**Drawing No. 188/101, Site Location Plan, Existing Block/Roof Plan, Proposed Block/Roof Plan, Proposed Floor Plans, Proposed Elevations and Material Details, as received on 27 November 2020**

**REASON: For the avoidance of doubt and in the interests of proper planning.**

**3. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting or amending that Order with or without modification), no windows, doors or other form of openings other than those shown on the approved plans, shall be inserted in the north-west or south-east (side) elevations above ground floor ceiling level of the development hereby permitted.**

**REASON: In the interests of residential amenity and privacy.**

**4. No development above ground floor slab level shall commence on site until a scheme for the discharge of surface water from the site (including surface water from the access/driveway), incorporating sustainable drainage details, has been submitted to and approved in writing by the Local Planning Authority. The development shall not be first occupied until surface water drainage has been constructed in accordance with the approved scheme.**

**REASON: To ensure that the development can be adequately drained.**

**5. No development above ground floor slab level shall commence on site until a scheme of hard and soft landscaping has been submitted to and approved in writing by the Local Planning Authority, the details of which shall include: -**

- location and current canopy spread of all existing trees and hedgerows on the land;
- full details of any to be retained, together with measures for their protection in the course of development;
- means of enclosure including details and elevations of the fence bordering MELK14
- car park layouts;
- other vehicle and pedestrian access and circulation areas; and
- all hard and soft surfacing materials.

**REASON:** In order that the development is undertaken in an acceptable manner, to ensure a satisfactory landscaped setting for the development and the protection of existing important landscape features.

**6.** All soft landscaping comprised in the approved details of landscaping shall be carried out in the first planting and seeding season following the first occupation of the building(s) or the completion of the development whichever is the sooner; All shrubs, trees and hedge planting shall be maintained free from weeds and shall be protected from damage by vermin and stock. Any trees or plants which, within a period of five years, die, are removed, or become seriously damaged or diseased shall be replaced in the next planting season with others of a similar size and species, unless otherwise agreed in writing by the local planning authority. All hard landscaping shall also be carried out in accordance with the approved details prior to the occupation of any part of the development or in accordance with a programme to be agreed in writing with the Local Planning Authority.

**REASON:** To ensure a satisfactory landscaped setting for the development and the protection of existing important landscape features.

**7.** The dwelling hereby approved shall not be occupied until the telegraph pole at the site frontage has been relocated to enable unrestricted vehicular access to the car parking spaces for the new dwelling as shown on approved plan drawing no. 188/101 and for this car parking area to be consolidated, surfaced and laid out in accordance with the approved details. This area shall be maintained and remain available for this use at all times thereafter.

**REASON:** To ensure that adequate provision is made for parking within the site in the interests of highway safety.

**INFORMATIVES TO APPLICANT:**

**1.** The applicant is advised that the development hereby approved represents chargeable development under the Community Infrastructure Levy Regulations 2010 (as amended) and Wiltshire Council's CIL Charging Schedule. If the development is determined to be liable for CIL, a Liability Notice will be issued notifying you of the amount of CIL payment due. If an Additional Information Form has not already been submitted, please

submit it now so that we can determine the CIL liability. In addition, you may be able to claim exemption or relief, in which case, please submit the relevant form so that we can determine your eligibility. The CIL Commencement Notice and Assumption of Liability must be submitted to Wiltshire Council prior to commencement of development. Should development commence prior to the CIL Liability Notice being issued by the local planning authority, any CIL exemption or relief will not apply and full payment will be required in full and with immediate effect. Should you require further information or to download the CIL forms please refer to the Council's Website:

<https://www.wiltshire.gov.uk/dmcommunityinfrastructurelevy>

2. Any alterations to the approved plans, brought about by compliance with Building Regulations or any other reason must first be agreed in writing with the Local Planning Authority before commencement of work.

3. The application may involve the need for a new dropped kerb. The consent hereby granted shall not be construed as authority to carry out works on the highway. The applicant is advised that a licence will be required from Wiltshire's Highway Authority before any works are carried out on any footway, footpath, carriageway, verge or other land forming part of the highway. Please contact our Vehicle Crossing Team on: [vehicleaccess@wiltshire.gov.uk](mailto:vehicleaccess@wiltshire.gov.uk) and/or 01225 713352.

4. The relocation of the telegraph pole and street name signage would require the relevant prior consent of the appropriate utilities' undertaker and the Council.

**14b 20/04400/FUL: 16 Conway Crescent, Melksham SN12 6BD**

#### Public Participation

Richard Harlow, agent, spoke in support of the application.

The Planning Officer, Yancy Sun, presented a report which recommended that the retrospective application for the erection of an annex (to be used as ancillary accommodation) be approved subjected to conditions.

Key issues included the principle of the development, impact on neighbour amenity, impact on visual amenity, drainage and flooding as well as environmental impact.

Members of the Committee had the opportunity to ask technical details regarding the application. Details were sought on whether temporary permission would be appropriate for the application and whether there would be any fire implications if cooking was allowed to take place in the annex. Additional details were sought on drainage and whether there were regulations in place to prevent the annex being sub-let.

It was clarified that planning officers did not consider that a temporary permission would be appropriate for this case, and planning conditions were recommended to address the building regulation outstanding matters.

Members of the public then had the opportunity to present their views to the committee as detailed above.

The local Unitary Member, Councillor Jon Hubbard, then spoke in objection to the application. Additionally, Councillor Jon Hubbard read out a statement on behalf of a neighbour to the application.

A debate followed where it was noted that as this was a retrospective application, and it had to be assessed on its own merits. Additionally, members enquired whether condition 2 could be strengthened. Furthermore, the difficulty of enforcing the use of the annex by family members was noted.

A motion was moved by Councillor Jonathon Seed, seconded by Councillor Trevor Carbin, to approve the application in accordance with the officer's recommendation, with condition 2 being revised to include a more detailed note to the applicant to secure the necessary building regulation requirements pursuant to fire and public safety, as well as surface water drainage.

At the conclusion of debate, it was,

**Resolved:**

**That application 20/04400/FUL be approved as per the following conditions:**

**1. The development hereby permitted shall be carried out in accordance with the following approved plans:**

**AH2019/60, Sheet 1 of 1, Received 3 September 2020**

**REASON: For the avoidance of doubt and in the interests of proper planning.**

**2. Within three months of the date of this permission, written confirmation shall be provided to the local planning authority to evidence the annex having the appropriate connections to the surface water drainage sewer, or to a suitable alternative system.**

**REASON: To annex requires building warrant approval which shall confirm the most appropriate surface water disposal option to ensure that the development is provided with a permanent satisfactory means of drainage as well as conformity with the necessary and relevant building regulations.**

**NOTE: In discharging the above condition, the LPA is mindful that there are private surface water sewers in the locality, and should the applicant seek to make and maintain such a connection to a private sewer, in**

applying to discharge this condition, evidence of the third party agreement(s) should be provided along with the requisite location plan and technical detail submissions that would be subject to a liaison with the Council's Building Control team, Wessex Water and the Council's drainage team (where appropriate). Off-site connections are understood to require third-party agreements and the applicant should not delay in terms of seeking to secure these.

3. The ancillary annex accommodation hereby approved shall only enure for the benefit of the owner/occupiers of the host dwelling at No.16 Conway Crescent and it shall only be used for purposes ancillary to the residential use of the main dwelling, and shall remain solely within the same planning unit as the main dwelling and not be sold or let as a separate unit of accommodation.

**REASON:** To define the terms of this planning permission and in the interests of good planning.

4. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting or amending that Order with or without modification), no garages, sheds, greenhouses or any other ancillary domestic outbuildings shall be erected within the curtilage of the host dwelling unless approved under a separate planning application.

**REASON:** The Council is mindful of the extant nature of application 19/05319/FUL and in combination with this annex, it is considered necessary to remove any residual Permitted Development rights for any additional outbuildings in order to safeguard the character and appearance of the area.

#### **Planning Informatives**

Pursuant to condition 3, the applicant is advised that this application is approved on the basis that it has and maintains a direct, functional and dependant relationship with the main dwelling.

The applicant is advised that the development requires a retrospective building warrant, to include surface water drainage connections.

#### 15 **Urgent Items**

There were no Urgent Items.

(Duration of meeting: 3:00 pm – 4:35 pm)

The Officer who has produced these minutes is Ben Fielding of Democratic Services, direct line 01225 718656, e-mail [Benjamin.fielding@wiltshire.gov.uk](mailto:Benjamin.fielding@wiltshire.gov.uk)

Press enquiries to Communications, direct line (01225) 713114/713115

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**Wiltshire Council**  
**Western Area Planning Committee**  
**9<sup>th</sup> June 2021**

**Planning Appeals Received between 05/02/2020 and 28/05/2021**

Application No	Site Location	Parish	Proposal	DEL or COMM	Appeal Type	Officer Recommend	Appeal Start Date	Overturn at Cttee
20/00009/ENF	Lilac Cottage (Lavender Lodge) 40 Temple Corsley, Warminster	Corsley	Alleged unauthorised use for long term renting	DEL	Written Representations	-	12/02/2021	No
20/08688/VAR	Tenacity Hoggington Lane Southwick, Wiltshire BA14 9NR	Southwick	Removal of condition 4 of planning permission 19/06506/FUL (Erection of two dwellings (Revised version of application 18/05825/FUL))	DEL	Written Representations	Refuse	09/02/2021	No
20/06979/CLP	114 Downs View Bradford On Avon BA15 1PW	Bradford-on-Avon	Installation of a 20ft long x 8ft wide x 8ft 6in high shipping container for domestic storage purposes in the garden of the property.	DEL	Written Representations	Refuse	09/03/2021	No
21/01266/FUL	Land west of Jasmine House, Hilperton Road Trowbridge, Wiltshire	Hilperton	Erection of a bungalow	DEL	Written Representations	Refuse	21/04/2021	No

**Planning Appeals Decided between 05/02/2020 and 28/05/2021**

Application No	Site Location	Parish	Proposal	DEL or COMM	Appeal Type	Officer Recommend	Appeal Decision	Decision Date	Costs Awarded?
20/00009/ENF	Lilac Cottage (Lavender Lodge) 40 Temple Corsley, Warminster	Corsley	Alleged unauthorised use for long term renting	DEL	Written Reps	-	Dismissed	27/04/2021	None
20/00113/ENF	Peacock House 125 Beanacre Road Beanacre, Melksham	Melksham Without	Siting of 40 ton shipping container	DEL	Written Reps	-	Dismissed	15/03/2021	None
20/02092/FUL	Peacock House 125 Beanacre Road Beanacre, Melksham	Melksham Without	Shipping container for storage of tools, fork lift and other materials (retrospective) and raising of fence level	DEL	Written Reps	Refuse	Dismissed	15/03/2021	None
20/04259/FUL	Land adjacent 406C The Spa, Bowerhill, Melksham	Melksham Without	Construction of two bungalows and associated works	DEL	Written Reps	Refuse	Dismissed	08/02/2021	None
20/06196/FUL	147B Boreham Fields, Warminster, BA12 9EF	Warminster	Change of use of redundant commercial space into residential dwelling	DEL	Written Reps	Refuse	Dismissed	12/04/2021	None
20/06434/FUL	6 Ash Walk, Warminster	Warminster	Sub division of plot to create a separate dwelling (2 bed 3 person) at land to the side of 6 Ash Walk	DEL	Written Reps	Refuse	Dismissed	15/03/2021	None

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WILTSHIRE COUNCIL

AGENDA ITEM NO.

WESTERN AREA PLANNING COMMITTEE

9 June 2021

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**WILDLIFE AND COUNTRYSIDE ACT 1981 s.53 (“the 1981 Act”)**

**THE WILTSHIRE COUNCIL PARISH OF MELKSHAM PATH No. 107  
AND MELKSHAM WITHOUT PATH No. 151  
RIGHTS OF WAY MODIFICATION ORDER 2020**

**Purpose of Report**

1. To:
  - (i) Consider the two objections and thirty representations received relating to the above Order to add footpaths over land near to the River Avon, Melksham Forest, Melksham.
  - (ii) Recommend that Wiltshire Council supports the confirmation of the Order when the matter is referred to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA).

A copy of the Order and Order plan is appended at **Appendix A**.

**Relevance to the Council’s Business Plan**

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

**Background**

3. Wiltshire Council has statutory duties to maintain the legal record of public rights of way in Wiltshire (excluding the Borough of Swindon), to maintain the rights of way shown therein, and to assert and protect them for the use and enjoyment of the public. These duties are not discretionary.
4. The definitive map and statement is the legal record of public rights and is conclusive in law as to what it shows, but this is without prejudice to the existence of a more extensive public right (s.56 of the 1981 Act). The Council has a duty to keep it under continual review and make legal orders to modify it when evidence shows it is in error.
5. Members of the public may apply to the Council to modify the definitive map and statement and they do so under the provisions of Schedule 14 to the 1981 Act. The Council must determine these applications by investigating all available relevant evidence and by making a modification order where it is considered it is either shown on the balance of probability (i.e. it is more likely than not) or, in this case, that there has been a reasonable allegation that a public right has been acquired, that a change in the map and statement is required.

6. In October 2017 Wiltshire Council received an application from a resident of Woodrow Road, Melksham to record lengths of public footpath over land leading from Forest Row to the River Avon, along the river bank to Murray Walk and across the River Avon to public open space land at Riverside Drive.
7. The application was supported by evidence of use from 18 members of the public for various lengths of time from 1974 to 2017. The land is owned by a number of different parties (see page 4 and 5 **Appendix B**).
8. For a public right to be acquired by use, the use must be 'as of right', that is, without force, permission or secrecy and for the purposes of establishing deemed dedication by s.31 Highways Act 1980, that use must have been uninterrupted for a period of at least 20 years. The presumption of dedication may be rebutted by the actions of the landowner which may include closing the route, erecting signs to demonstrate that they had no intention to dedicate a right of way, effectively challenging the public, creating a permissive route or by making a statutory notice or deposit under s.31(5) or (6) Highways Act 1980.
9. If incontrovertible evidence exists to show that the public had not used the claimed route for a period of 20 years or more in an interrupted manner that was 'as of right' then Wiltshire Council may not make an Order to record the claimed route.
10. Although some evidence of interruptions to use and signage was adduced during the pre-order consultation stage, this does not amount to incontrovertible evidence, and the decision was taken to make an Order to record the paths as public footpaths.

The decision report to make the Order is appended at **Appendix B**

11. The Order was advertised from March 2020 to the end of August 2020 and two objections and thirty representations to it were received.

The objections and representations are appended here at **Appendix C**

### **Main Considerations for the Council**

12. Although the legal test contained in s.53(3)(c)(i) Wildlife and Countryside Act 1981 allows for an Order to be made where the evidence adduced only forms a reasonable allegation that a public right subsists (and there is no incontrovertible evidence to the contrary), the legal test to be applied to confirm an Order is that it is shown on the balance of probability (i.e. it is more likely than not) that a public right subsists. In other words, it is stronger test to be applied to confirm an Order. This approach was confirmed in *Todd and Bradley v SoSEFRA [2004] EWHC 1450* and upheld in *R(on the application of Roxlena Ltd) v Cumbria CC [2019] EWCA Civ 1639*.
13. In addition to the evidence adduced and investigated as part of the original application, the Council must now also consider the objections and representations to the order.

## **Consideration of the Objections and Representations (see Appendix C)**

### **14. Objection 1 TLT Solicitors acting for Cooper Tire and Rubber Company Europe Ltd (owner of part of the land)**

- Maintain that the black bridge (G to E on order plan) was gated 18 or 19 years ago, potentially blocked 1997 to 2017.
- Considers that access was not as order plan F to E but diagonally across the field from the gate.
- Their tenant, Mr Farthing, gave permission to people to use the route.
- Disputes user evidence and considers it insufficient.
- Not all users had used the black bridge spur.
- Includes aerial photographs to support their case.

### **15. Objection 2 Mr Tim Farthing, Farthing and Co (tenant and owner of part of the land)**

- Point F has only been possible since 2013.
- There is a metal 'private' sign at point F – this has moved and been covered in brambles but now re-erected.
- In the last 20 years there has been three stranded barbed wire at both ends of the bridge.
- There were a pair of lockable security gates on the black bridge, locked until 2000 until they were vandalised, and one thrown in the river.
- Provides photo of one of the metal gates.
- Provides photo of sign saying, 'private Avon Angling Club Only'.
- Provides aerial photo taken 1998 showing what is claimed to be the large metal gates across the bridge.

### **16. Representation 1 in support Mr B J Dicks and Ms S Wordley**

- Regular walkers of the route since 2007.

### **17. Representation 2 in support Mrs S Clover**

- Regular walkers since 1990.

### **18. Representation 3 in support Mr G Martin**

- Walked the route from 1995 to 2020.

### **19. Representation 4 in support Ms K Hart**

- Walked the route for four years.

### **20. Representation 5 in support Ms K Fountain**

- Mr K Porter walked the route since 1970.

21. **Representation 6 in support Mr K Porter**
  - Walked the route since 1970.
22. **Representation 7 in support Mr R Edwards**
  - Has used the path for ten years, his son in law has been using it for approaching fifty years.
23. **Representation 8 in support Mr K Clover**
  - Has continually used the path since 1987.
24. **Representation 9 in support Mr and Mrs R Hubin**
  - Have walked the paths since the 1980s.
25. **Representation 10 in support Mr R Purnell**
  - Has walked 'much' of the proposed route for over fifty years.
26. **Representation 11 in support Mr G Gudmundsen**
  - Has walked the route for three months.
27. **Representation 12 in support Mr K Davis**
  - Has walked the routes from shortly after 1989
28. **Representation 13 in support Mrs S C Sprules**
  - Has regularly walked the routes for over thirty eight years.
29. **Representation 14 in support Mrs P Cooke**
  - Has walked the routes and used the concrete bridge since 1951.
30. **Representation 15 in support Mr V Morris**
  - Has walked it since the late 1960s – stopped using it when barbed wire erected on bridge at end H.
31. **Representation 16 in support Mr P D Sprules**
  - Has used the routes since 1982.
32. **Representation 17 in support Ms S Aldridge**
  - Has used the route since 1987 and learnt about it from older users.

33. **Representation 18 in support Mr P Bailey**
- Has used most of the route for thirty years and recalls playing on the bridge as a child and recalls it being blocked.
34. **Representation 19 in support Mrs J Castell**
- Walked the route from 2009 to 'a couple of years ago'.
35. **Representation 20 in support Mr D Roderick**
- Walked it in 2017 until he was told it was private land with no right of way.
36. **Representation 21 in support Mr C Purvis**
- Has walked the route since 2009.
37. **Representation 22 in support The Bull Family**
- Generations of the family have used the routes including their grandmother in 1930 recalls standing on the bridge.
38. **Representation 23 in support Mr K Bourne**
- Has walked the route for over five years.
39. **Representation 24 in support Ms M Warren**
- Has walked the route and across the bridge since 2016.
40. **Representation 25 in support Mr P L Sidnell**
- Has walked the path since 2000.
41. **Representation 26 in support Mr and Mrs D Rae**
- Used the route FEGH (across bridge) 1970 to 1976 and others 1996 to 2020.
42. **Representation 27 in support Mr A Mockford**
- Has walked the route since 2015.
43. **Representation 28 in part support Mr A Baines**
- Supports part of the order route but does not record any actual use.
44. **Representation 29 in support Mrs F A Higgins**
- Has walked the path in 2020 only.

45. **Representation 30 Melksham Without Parish Council**

- Questions the need for path A to B as it is duplicated by an existing public footpath within 150 metres.

**Officer's Comments on the objections and representations**

46. The relevant twenty year period to consider use in is the period 1997 to 2017. Wiltshire Council must not take into consideration any use after 2017. A right of way could have been acquired over a different earlier period if an interruption to use had occurred at an earlier date. For example, the evidence of Mr Farthing suggests that a locked gate was across the way in the late 1990s; if this is found to have formed sufficient an interruption to use for this part of the Order, the relevant date for the section EGH would be say, 1979 to 1999. However, there is no clear date for the erection or locking of the gate and hence it is not possible to consider an earlier relevant period at this time.
47. In the initial decision report officers considered the effect of an interruption to use of a section of the claimed route leading over land owned by Wiltshire Council. Here, the route CD was subject to a partially made deposit under Section 31(6) Highways Act 1980. If this is held to be sufficient to call the route into question, then the deposit made in 1995 would require a relevant period from 1975 to 1995 to apply to that part of the route.
48. A recent decision by the Planning Inspectorate regarding an adjoining route in the field, known as Forty Acres, cast significant doubt on the effect of the Council's deposit and in any event, Wiltshire Council did not object to that Order and the route is now recorded as Melksham Without footpath number 152.

The Inspector's report addressing this issue is appended at **Appendix D**

49. In any event, in the case of this Order, Wiltshire Council has been able to demonstrate its willingness to dedicate this section of route (CD) by making a dedication agreement (also agreed with the tenant of the land) for this section. However, the need for this falls away as the Council has not objected to this Order and is clearly in acceptance of the non-application of the Section 31(6) deposit in 1995. Hence, it is considered that the relevant period 1997 to 2017 applies for this section as much as for the route ABCDEF and possibly EGH. The evidence supporting the Order may be considered as a whole.

A copy of the Dedication Agreement is appended at **Appendix E**

50. There are very clear differences in the evidence of the users of the path and the objectors, not least the effect of any gating or fencing arrangements on the bridge or the effect of signs at points H and F. As given in the objection from Cooper Tire and Rubber Company Europe Ltd, not all of the users used the section over the bridge EGH and the representations received, although boosting the numbers who had walked the route, added to the problem of interpreting the effect of any obstruction with some people referring to it and some not.

51. As a result of this, officers carried out a second consultation to obtain clearer evidence to bring before this committee. A total of twenty six users were written to (being those who appeared to have used the bridge in the relevant period) and further clarification on matters at the bridge was sought.
52. A total of eleven responded and their responses are appended at **Appendix F**. A summary table is included.
53. The responses are helpful for interpreting the evidence adduced by both the objectors and the supporters of the Order. Although the initial application was supported by evidence of use from eighteen people, the advertising of the Order brought forth further evidence from an additional twenty seven people, all of whom had walked the whole of, or parts of, the order route. Of those twenty seven additional users, twenty two had used the path for some, or all, of the relevant period (1997 – 2007). This takes the total number of users to forty.
54. Of those, it appears that three people (B Purnell, S Aldridge and V Morris) were prevented from using the route when the gates were across the route. Purnell and Aldridge confirmed this in their second consultation responses, but V Morris did not respond giving further details.
55. No-one recalls having been prevented from using the route by barbed wire and one witness describes the gates as being passable at the ends even when in place and closed. Other users describe the gates only being closed when cattle were grazing in fields separated by the river though another user recalls the gates being open with cattle accessing both fields. This is consistent with another witness recalling a cow falling from the bridge into the river.
56. Many users do not recall the gates at all though this may be explained by their relatively short life, their being open if cattle were not grazing fields on either side of the river independently or the gates being overgrown and unrecognisable (A Cooke).
57. Some users describe the bridge being used by school children linking the Forest estate with George Ward School (this would certainly have been a direct and attractive route for them in dry conditions) and some users refer to the need for the bridge to be open and available for anglers.
58. Very few users refer to the signs, though J Campbell remembers a sign near point F referring to 'Angling Club water'. In 2018 there was no sign at or near point F and the sign at point H was unreadable but the first word appears to have been 'private'.

### **Overview and Scrutiny Engagement**

59. Overview and scrutiny engagement is not required in this case.

### **Safeguarding Considerations**

60. There are no relevant safeguarding considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Public Health Implications**

61. There are no identified public health implications which arise from the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Corporate Procurement Implications**

62. There are no additional procurement implications associated with this recommendation. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Environmental and Climate Change Impact of the Proposal**

63. There are no environmental or climate change considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Equalities Impact of the Proposal**

64. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Risk Assessment**

65. Wiltshire Council is acting within its statutory duty and there is no risk associated with the pursuit of this duty.

### **Financial Implications**

66. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
67. The Order must be sent to SoSEFRA for determination and this may incur costs for the Council. The Order may be determined by written representations, at a public local hearing or a public inquiry.
68. In the event that SoSEFRA decides to determine the Order by written representations there is a minimal cost to the Council in officer time. Where a hearing is held there are costs associated with hiring a venue, these will be in the region of £200. Where a public inquiry is held and the Council takes a neutral stance the costs will be related only to venue hire. If the Council objects to or supports the Order the costs are likely to be in the region of £6,000 (for a 2-day inquiry).
69. Costs may be claimed against the Council if it is found by SoSEFRA to act unreasonably at an inquiry. The Council may seek costs against the objectors if they are found by SoSEFRA to act unreasonably at an inquiry.



## **Legal Implications**

70. Any decision of the Council is open to an application for judicial review in the high court. An appeal may be made by any aggrieved party and may be the result of a decision to either support or not support the confirmation of the Order.
71. If the appeal is allowed to be heard in the high court and the Council loses its case, all costs would be paid by the Council. If the Council wins its case, all costs would be paid by the opposing party. Further appeal may be made by either party. If the court finds against the Council in judicial review proceedings, the potential costs to the Council would potentially be in the region of £50,000.

## **Options Considered**

72. That:
- (i) Wiltshire Council support the confirmation (either wholly or in part with modification) of the above Order by SoSEFRA.
  - (ii) Wiltshire Council objects to the confirmation of the above Order by SoSEFRA.
  - (iii) Wiltshire Council takes a neutral stance when the above Order is submitted to SoSEFRA.

## **Reason for Proposal**

73. Where an Order is made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 the burden of proof needed to make the Order is weaker than that needed to confirm it (see paragraph 17). The Council must now decide on the stance it will take when the Order is forwarded to SoSEFRA.
74. There seems little doubt from the evidence adduced by all parties that at some time around the late 1990s (evidence of Mr Farthing states 1999) there were gates on the bridge across the River Avon (affecting route EGH only) and that from time to time there was also barbed wire either across the bridge or alongside it (acting as a parapet). However, it is not clear how long these features were in existence or whether they formed an actual barrier to public use. It is not clear whether the gates were vandalised or merely fell in the river owing to a lack of reasonable fixing (evidence of K Porter). It is unlikely that public use was by force as the gates were never reinstated and besides, we do not know if they fell or were vandalised by just one individual.
75. It is clear that the purpose of them was to control cattle and not to prevent public use and it is also apparent that they were short lived. Some witnesses recall them, some don't; some did not use the bridge when the gates were across but one person said he could just go round it. Everyone recalling the wire said you could just step over it. Additionally, it is clear that people with dogs would stay away from the area when the cattle were using the fields rather than risk a conflict. It is pivotal to the determination of route EGH whether the gates on the bridge formed an actual interruption to public use or not. If use continued in a manner whereby the shared use was tolerated then use would still be 'as of right' and uninterrupted.

76. It is difficult to judge, without the benefit of the cross examination of parties, on the balance of probabilities, whether there was an interruption, and, if there was, when it happened.
77. It is also a possibility that if the gates are to be taken as an interruption to public use then there is the added possibility that the removal of them and the reinstatement of free access across the bridge can be taken as an act of dedication at common law. A possibility given the additional presence of a stile facilitating access at point H (there was also a stile at point D).
78. For signage to be effective at defeating the presumption of dedication by s.31(1) Highways Act 1980 it must be clear that it shows the owners' non-intention to dedicate a public right of way. Signs saying land is private are not sufficient (since most land carrying rights of way is in private ownership) and besides, since the land to the west of point H is Public Land, it is not unreasonable to mark the boundary between public and private, especially where fishing rights are concerned. It is not known who erected the large metal signs, though it is clear that they were not maintained and by 2018 had fallen into total disrepair and were largely unreadable. The signs do not appear to have made specific reference to the owners' non-intention to dedicate a public right of way and may be taken as referring only to fishing rights.
79. It must also be borne in mind that although the route across the River Avon may have been subject to an interruption, this would not have affected use of the majority of the route and any Inspector would have the power to amend an Order to record a footpath only along the route ABCDEF.
80. Additionally, it is considered that nothing in the objectors' submissions demonstrates that the landowners brought their lack of intention to dedicate a public right of way to the attention of the relevant audience, that is, a considerable number of local users of the path. This is despite the landowners' stated intention not to dedicate and a limited range of grants of permission to some users. There was no satisfaction of any statutory process to demonstrate a negative intention to dedicate the land.
81. There is no doubt in this case that there is considerable conflict in the evidence, especially with regard to the effect of the gates and fences on the bridge and to effect, interpretation and longevity of the sign. Objectors also cast doubt on the routes that users took or the period in which they took them. The evidence from both sides would best be tested under cross examination at an inquiry.
82. In *R v Secretary of State for the Environment ex p. Bagshaw and Norton* [1994] 68 P & CR 402 Owen J "*In a case where the evidence of witnesses as to user is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing witnesses at the inquiry.*"
83. In making this Order the Council considered that a reasonable allegation as to the acquisition of public rights had been made. No further evidence has been adduced to suggest that the decision was incorrect and in the absence of further testing of the evidence under cross examination it is reasonable to consider that,

on the balance of probability, a public right has been acquired. Clearly, the testing of witnesses from both sides will be key to the final decision of SoSEFRA in this case but the Council's duty remains with supporting the Order based on the evidence it has before it.

84. The Order plan contains a small drafting error in the symbol used in the key. Any Inspector appointed by SoSEFRA has the power to correct that and it is recommended that they do.

### **Proposal**

85. That the Wiltshire Council Parish of Melksham Path No. 107 and Melksham Without Path No. 151 Rights of Way Modification Order 2020 is forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed with a modification to the Order plan correcting the symbol used in the key for points C to D.

### **Jessica Gibbons**

#### **Director, Communities and Neighbourhood Services**

Report Author:

#### **Sally Madgwick**

Definitive Map and Highway Records Manager, Rights of Way and Countryside

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### **The following unpublished documents have been relied on in the preparation of this Report:**

None

### **Appendices:**

Appendix A	Order and Plan
Appendix B	Decision report to make the Order
Appendix B.1	Landownership plan
Appendix B.2	Consultation response from T Farthing
Appendix B.3	User evidence summary
Appendix B.4	Wiltshire County Council s.31(6) Highways Act 1980 deposit
Appendix B.5	Draft Order
Appendix C	Objections and representations to the Order
Appendix D	Inspector's report relative to adjoining path MELW152
Appendix E	Dedication agreement affecting Wiltshire Council land
Appendix F	Second consultation responses

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WILDLIFE AND COUNTRYSIDE ACT 1981

THE DEFINITIVE MAP AND STATEMENT FOR THE MELKSHAM URBAN DISTRICT COUNCIL AREA DATED 1953 AND THE BRADFORD AND MELKSHAM RURAL DISTRICT COUNCIL AREA DATED 1952 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL PARISH OF MELKSHAM PATH No. 107 & MELKSHAM WITHOUT PATH No. 151 RIGHTS OF WAY MODIFICATION ORDER 2020

This order is made by Wiltshire Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the Definitive Map and Statement for the Melksham Urban District Council dated 1953 and the Bradford and Melksham Rural District Council dated 1952 as modified under the provisions of the Wildlife and Countryside Act 1981 require modification in consequence of the occurrence of an event specified in section 53(3)(c)(i) of the Act, namely 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.

The Authority have consulted with every local authority whose area includes the land to which this order relates.

The Wiltshire Council hereby order that:

- 1. For the purposes of this Order the relevant date is the 11<sup>th</sup> March 2020.
- 2. The Definitive Map and Statement for the Melksham Urban District Council area dated 1953 and the Bradford and Melksham Rural District Council area dated 1952 as modified under the provisions of the Wildlife and Countryside Act 1981 shall be modified as described in Parts I and II of the Schedule and shown on the plan attached to the Order.
- 3. This Order shall take effect on the date it is confirmed and may be cited as the Wiltshire Council Parish of Melksham Path No. 107 & Melksham Without Path No. 151 Rights of Way Modification Order 2020.

THE COMMON SEAL of WILTSHIRE COUNCIL was hereunto affixed this 18th day of March 2020

}  
}  
}  
}

*Kamreen Hussain*

In the presence of:



## SCHEDULE

### PART I

#### MODIFICATION OF DEFINITIVE MAP

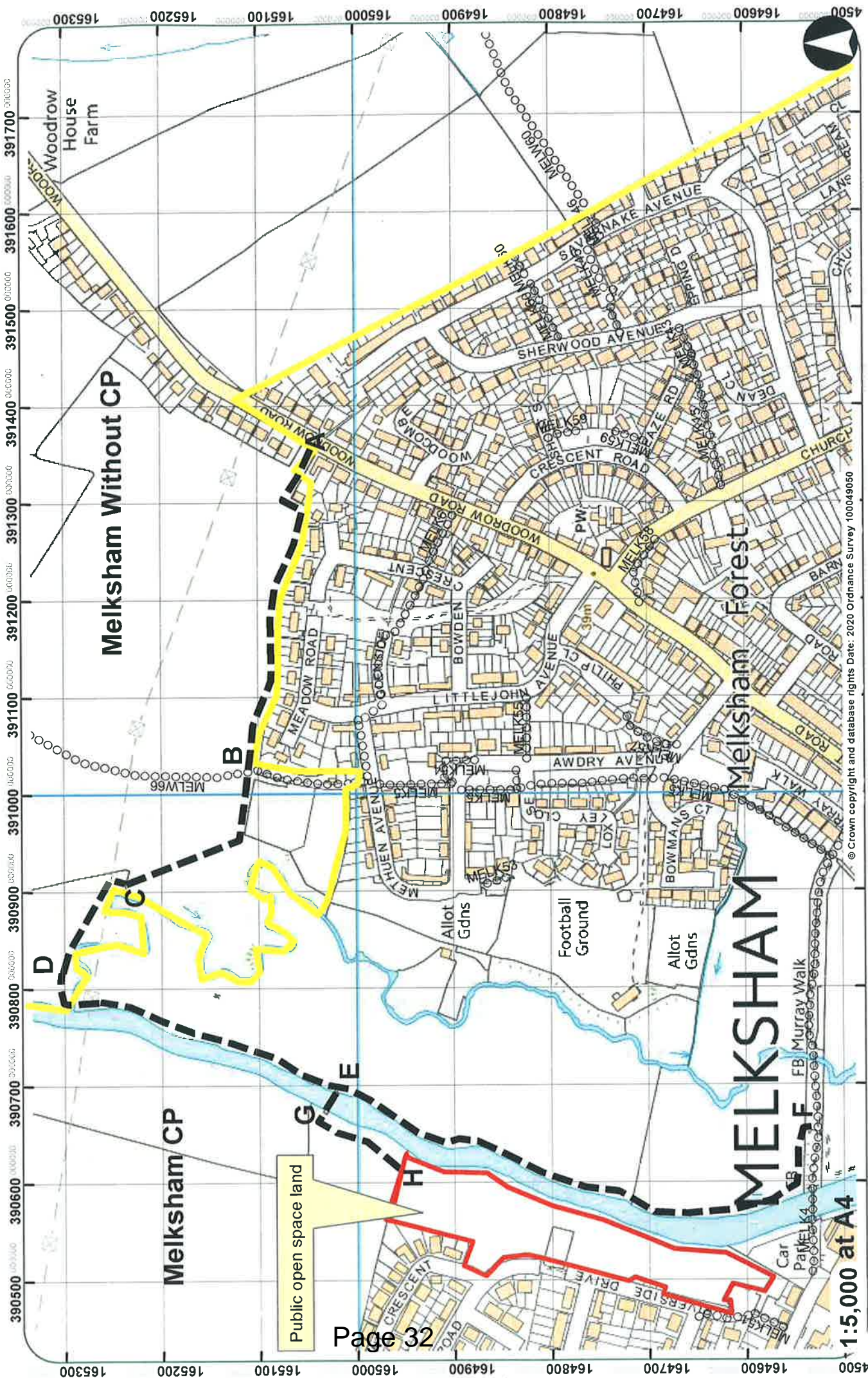
Parish	Path No.	Description of footpath to be added	Modified under section 53(3) as Specified
Melksham	107	<p>That length of footpath shown on the plan attached hereto by a black broken line leading from Point F at OS Grid ref. ST9066 6453 to the Parish Boundary close to Point D.</p> <p>Also that length of footpath shown on the plan attached hereto by a black broken line leading from Point E across the River Avon to Point G and H at OS Grid ref. ST9061 6495.</p> <p>Approximate length = 1014 metres Width = 1.6 metres</p>	53(3)(c)(i)
Melksham Without	151	<p>That length of footpath shown on the plan attached hereto by a black broken line leading from the Parish Boundary close to Point D to Point D at OS Grid ref. ST9082 6530. Also that length of footpath shown on the plan attached hereto by a black broken line leading from Point D to Point C at OS Grid ref. ST9090 6524 to Point B to Point A at OS Grid ref. ST9136 6505 at Woodrow Road.</p> <p>Approximate length = 630 metres Width = 1.6 metres except from OS ST9082 6530 to ST 9090 6524 where 2 metres.</p>	53(3)(c)(i)

## SCHEDULE

### PART II

#### MODIFICATION OF DEFINITIVE STATEMENT

<b>Parish</b>	<b>Path No</b>	<b>Description of path</b>	<b>Modified under Section 53(3) as specified</b>
Melksham	107	<p>FOOTPATH leading from its junction with Path no. 4 Murray Walk to the River Avon where broadly north and north north east along the field edge following the River to the Parish Boundary at OS Grid ref. ST9079 6529. Also from OS Grid ref. ST9070 6502 crossing the river by the bridge where south south west to the public open space land at OS Grid ref. ST9061 6495.</p> <p>Approximate length: 1014 metres Width: 1.6 metres</p> <p>Limitations and Conditions: Stile at OS Grid ref. ST9079 6529 Stile at OS Grid ref. ST 9061 6495</p>	53(3)(c)(i)
Melksham Without	151	<p>FOOTPATH leading from Parish Boundary at OS Grid ref. ST9079 6529 to ST9082 6530 and from OS Grid ref. ST9090 6524 south east to the field edge where broadly east across path no. 66 following the field edge to Woodrow Road at OS Grid ref. ST9136 6505.</p> <p>Approximate length: 630 metres Width = 1.6 metres except from OS ST9082 6530 to ST 9090 6524 where 2 metres.</p>	53(3)(c)(i)



Public open space land



**WILDLIFE AND COUNTRYSIDE ACT 1981 S.53**

**DECISION REPORT**

**APPLICATION FOR AN ORDER TO ADD A FOOTPATH LINKING WOODROW ROAD, MURRAY WALK AND RIVERSIDE DRIVE, MELKSHAM TO THE DEFINITIVE MAP AND STATEMENT**

**NB** All documents (including user evidence forms, responses to consultations and correspondence) are available to be viewed at the Council's offices, weekdays from 0900 to 1700, at County Hall, Trowbridge, BA14 8JN; please contact Sally Madgwick on 01225 713392

**1.0 Application**

**Application number:** 2017/04

**Application date:** 24 October 2017

**Applicant:** Mr Trevor McMaster  
159a Woodrow Road  
Forest  
Melksham  
SN12 7RQ

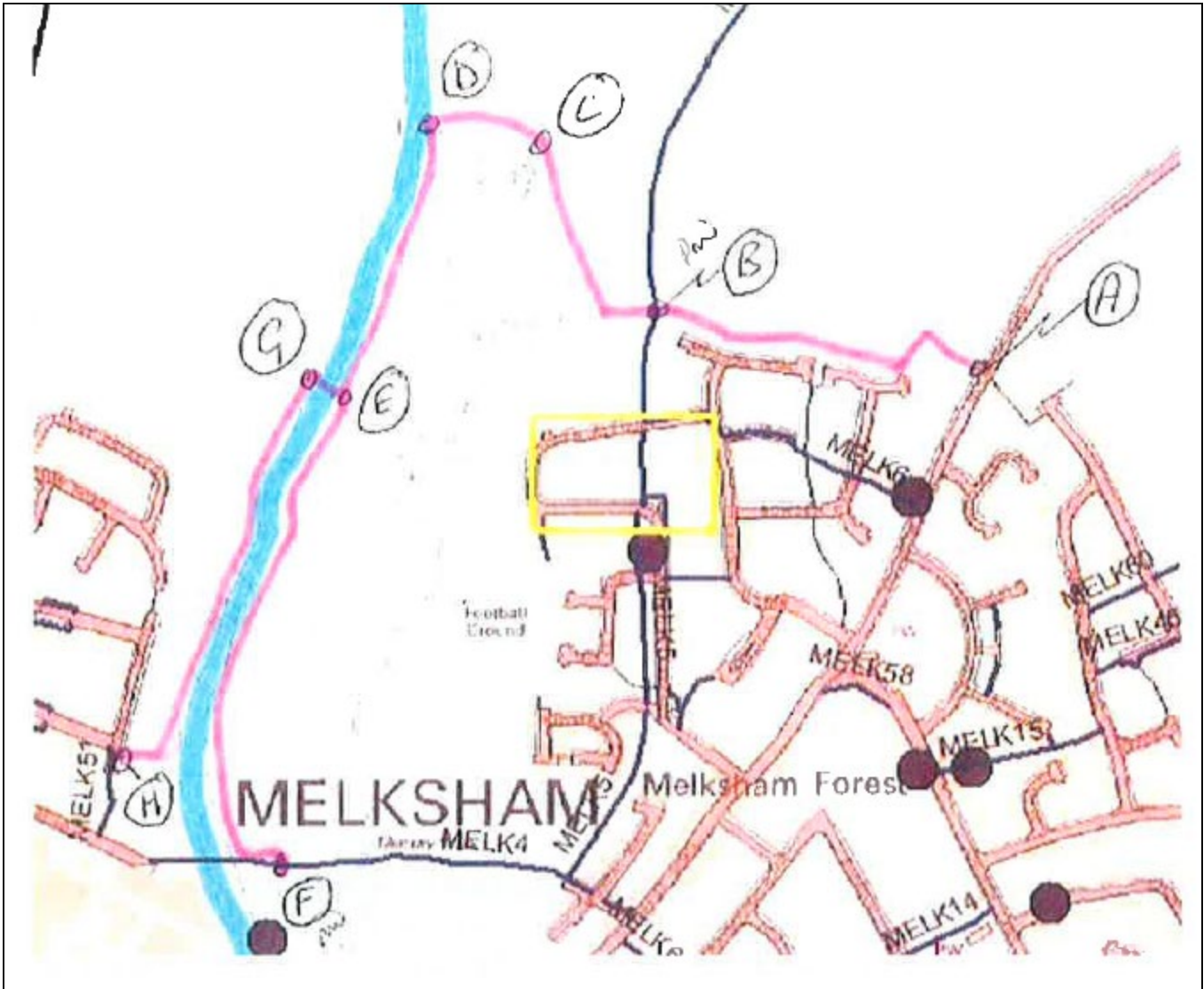
**Application to:** Add the footpath from Woodrow Road to Murray Walk  
Add the footpath from the above route to Riverside Drive

**Width:** At least 2 metres

**Application comprises:** Notice of application dated 21 August 2017  
Map of approx. 1:5000 scale showing claimed route in pink  
10 user evidence forms plus 4 (25 October 2017) plus 4 (25 June 2018) plus 3 (03 July 2018) TOTAL = 18  
Certification of service of notice of application 24 October 2018  
Notice served on: Wiltshire Council, Gareth Powell, Tim Farthing  
W D Guley & Sons, the owner/occupier of 2 fields/areas (by site notices).

**Basis of application:** That public rights on foot have been acquired over the claimed routes based on use by the public.

1.1 Extract from application map:



2.0 Legal empowerment

2.1 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 either:

*(3)(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 a restricted byway;*

or

*(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.*

- 2.2 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 (below):

*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.*

- 2.3 No historical documentary evidence has been adduced or found for the existence of this path.

### **3.0 Compliance of the application**

- 3.1 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.*

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*

(2) *If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description "owner" or "occupier" of the land (describing it) and by affixing it to some conspicuous object or objects on the land.*

(3) *When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.*

(4) *Every notice or certificate under this paragraph shall be in the prescribed form.*

3.2 The application is considered to be compliant with Schedule 14 to the 1981 Act.

#### 4.0 Land ownership details

The land is owned and occupied by the following:

**Land shown coloured blue** (Woodrow Road to stream):

Owner: Susan Gray, Holbrook Dairy Farm, Berryfield, Melksham, SN12 6EH

Occupier: W D Guley & Sons, Boundary Farm, 620 Berryfield Lane, Melksham, SN12 6EF

**Land shown coloured purple** (small section to River Avon):

Owner: Wiltshire Council

Occupier: Gareth Powell, 1 Forest Farm, Woodrow Road, Forest, Melksham, SN12 7RE

**Land shown coloured green** (eastern river bank section):

Owner: Cooper Tire & Rubber Company Europe Ltd, c/o TLT, One Redcliff Street, Bristol, BS1 6TP

Occupier: Tim Farthing, Riverside House, Beanacre, Melksham, SN12 7QB

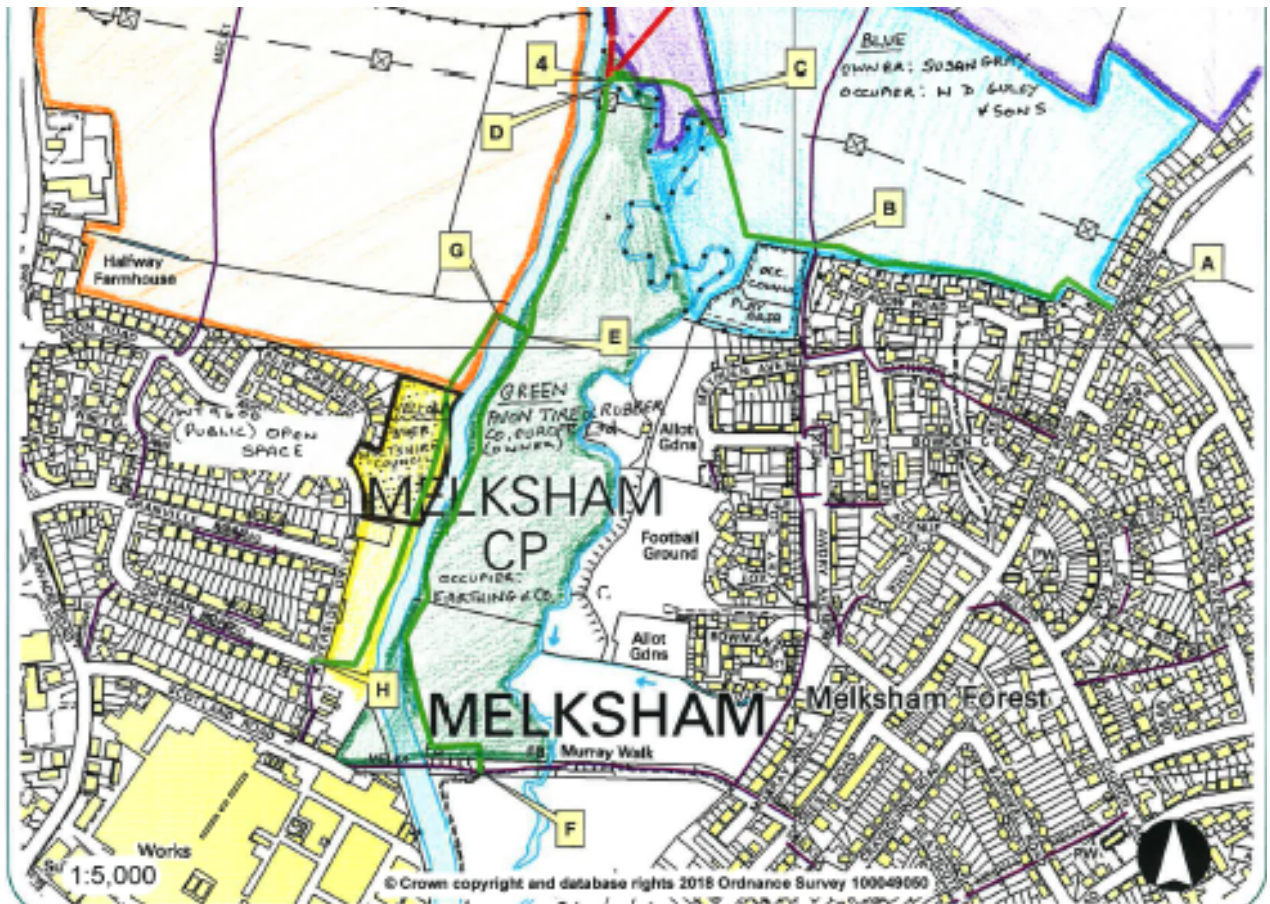
**Land shown coloured orange** (north western river bank section):

Owner and Occupier: Farthing and Co, Halfway House Farm, Beanacre, Melksham, SN12 7QA

**Land shown coloured yellow** (Riverside Drive section):

Owner: Wiltshire Council

Occupier: Part subject to a covenant to maintain as public open space (black edged area). Part maintained as public open space by Wiltshire Council.



**NB A copy of this plan is appended at [Appendix 1](#)**

The claimed route is shown on this plan as a solid green line leading from point A on Woodrow Road to points B, C and D (at the River Avon), then leading alongside the river to point E where the route divides, the eastern bank leads through to point F on footpath no 4, Murray Walk. The other spur leads across the bridge and along the western river bank to point H on Riverside Drive.

## 5.0 Images of the route taken 18 April 2018

### Gate at Point F (from Murray Walk MELK4)



**Field edge route after gate at F**



**Riverside route towards point E**



**Riverside route towards point E**



**Bridge between points E and G**



**Riverside route towards point D**



**Stream crossing and blockage at point D**



**Point A – junction with Woodrow Road**



**From point A looking west**



**Field edge route from point A to point B**





**Kissing gate on Footpath MELW66 where it crosses the claimed route at point B**



**Field edge route from point B towards point C**



**Route close to point C (recently obstructed at this point)**



**Bridge at point E looking across River Avon to point G**



**Route from point G on field edge, beside river**



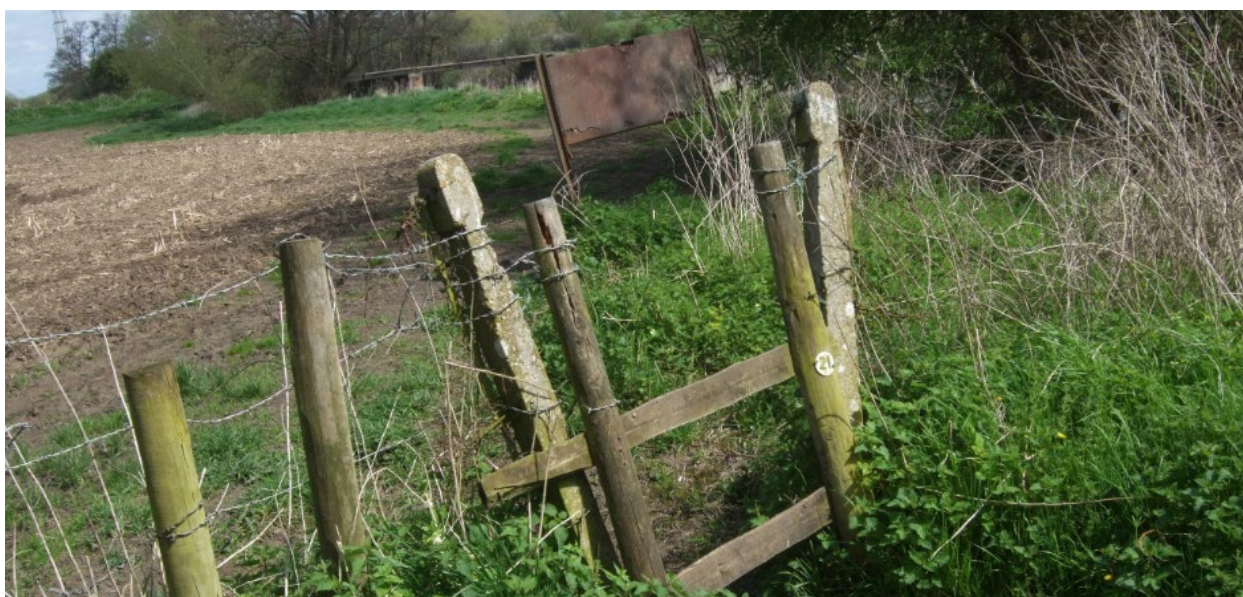
**Sign at junction of field**



**Close up of sign**



**Stile south west of sign in fenceline (between G and H)**



**Route continues from stile towards public open space area**



**Route continues through public open space area**



**Route continues through area managed as public open space**



**Junction of claimed route with footpath Melksham 51 at Riverside Drive (looking south west)**



**6.0 Aerial photographs**

**2001 (purple lines show existing recorded rights of way network)**



2006 (purple lines show existing recorded rights of way network)



2014



It is noted that aerial photographs show a large number of worn paths in the area of the claimed route, some coincident with the claimed route but others leading across fields.

For example in 2006, at point D:



And leading from point F:



**2006:**



**2014:**



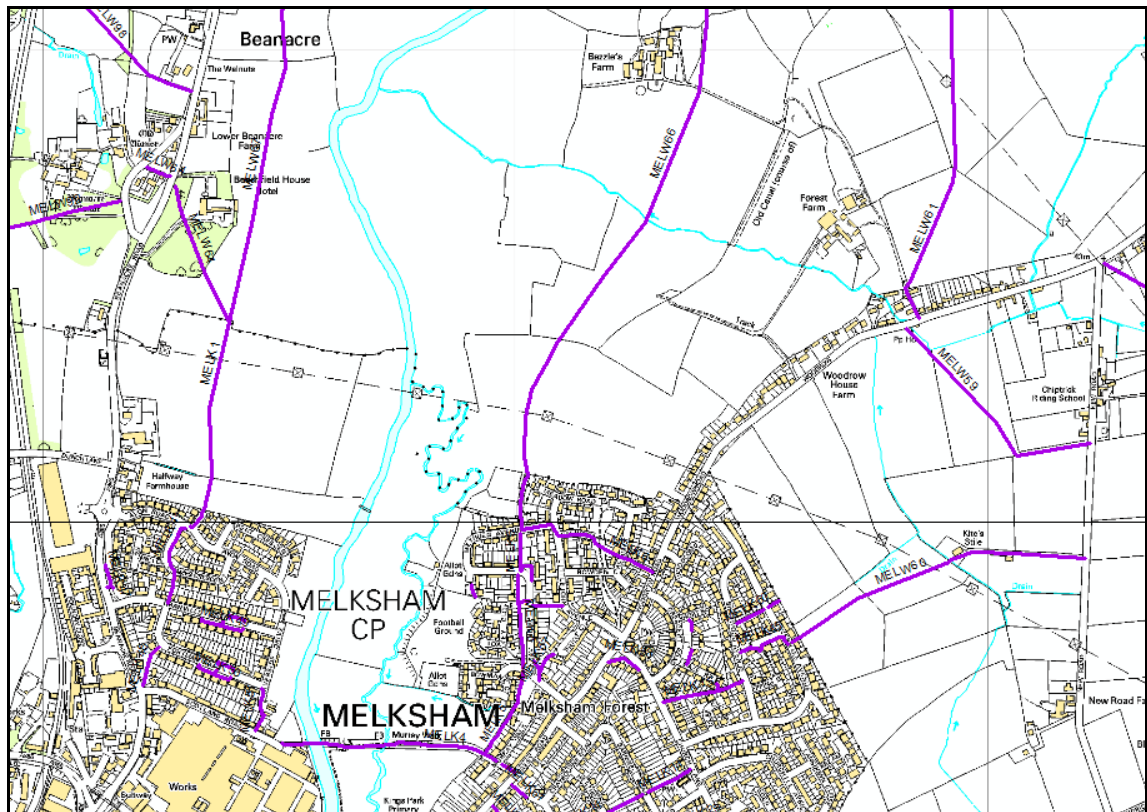
## **7.0 Current Records – Definitive Map, Highway Record and aerial photographs**

### **Definitive Map and Statement**

No part of the claimed route is recorded in the definitive map and statement. Parts A to B to C to D lie within the parish of Melksham Without and parts D to E to F to G to H are within the town of Melksham. These areas are covered by two definitive maps and statements (Bradford and Melksham Rural District Council Area and Melksham Urban



District) and neither include any part of the claimed routes. The working copy of the definitive map for the area is as below (footpaths = purple lines):



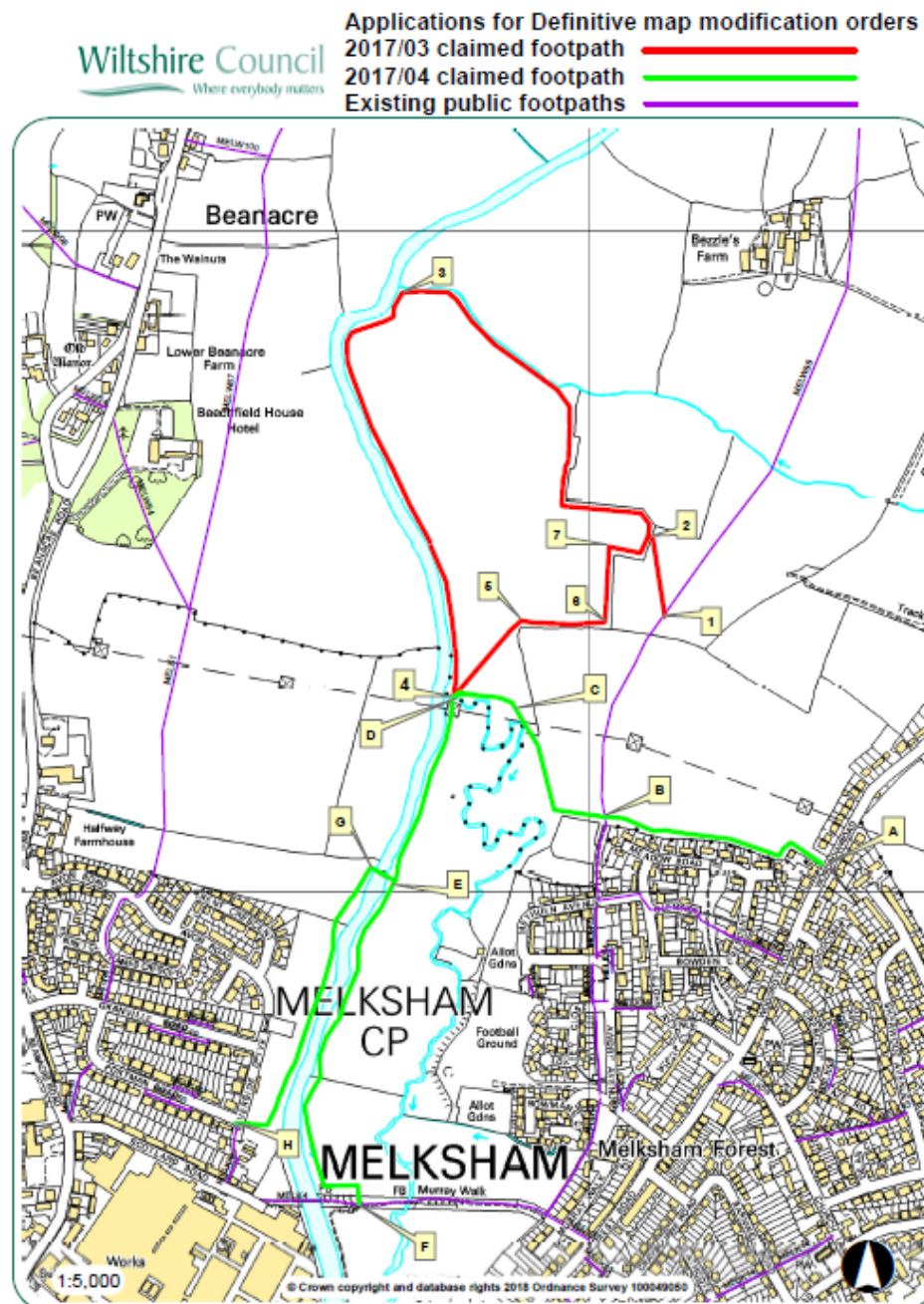
## 8.0 Context of application

The claimed routes lead over farmland to the east of the River Avon and over farmland and public open space land (owned and managed by Wiltshire Council) on the western side of the river. Historically the land appears to have been farmland; there was residential settlement to the east at Melksham Forest recorded in the late 1800s but very little to the west, an area dominated by a rubber factory since around 1900. The factory was formerly the Avon Rubber Factory, now Cooper Tires. The Cooper Tire and Rubber Company own some of the land over which the claimed route leads.

- 8.1 The areas of Melksham on the western side of the river and Melksham Forest on the eastern side were bisected by the Wilts and Berks Canal. The route of the canal (now disused and largely lost in this area) is defined by the tow path which survives as Melksham footpath no 5 and Melksham Without footpath no 66.
- 8.2 Historic Ordnance Survey maps record some footpaths (F.P.) in the area but none coincident with the claimed paths.
- 8.3 In the period after the Second World War period significant amounts of houses were built on either side of the river increasing the population in the area considerably. There appears to be no historic documentary evidence to support that the claimed routes were dedicated as public footpaths and the application relies wholly on the evidence of more recent use.

## 9.0 Consultation

Wiltshire Council has received two applications for DMMOs in this area. It has received the one being considered here (Woodrow Road to Murray Walk and across the river to Riverside Drive - 2017/04 'the green route') and another to record a footpath around fields to the north of those affected by 2017/04 ('the red route'). Owing to the possibility of confusion officers decided to produce a consultation plan showing both applications and to consult on both applications (2017/03 and 2017/04) at the same time. The evidence for both is distinct and each application may succeed or fail independent of the other, hence individual decision reports will be produced. The plan used for the consultation was as follows:



Copies of the original application plan were also circulated.

9.1 The following letter was also sent to consultees:

**Wildlife and Countryside Act 1981 s.53**

**Applications for orders to record public footpaths at Melksham in the definitive map and statement**

*Wiltshire Council has received two applications for definitive map modification orders to record public footpaths over land near to the River Avon at Melksham. Please find enclosed copies of the maps accompanying the applications and an overview map produced for clarity showing both routes (application 2017/03 in red and application 2017/04 in green).*

*Both applications adduce evidence of public use of the routes on foot for a variety of periods of time ranging from 1979 to 2017. A total of 14 people claim to have walked the red route, or parts of (2017/03) and 12 to have walked the green route (2017/04). All users claim to have walked the paths without force, permission or secrecy ('as of right') and to have seen others on the routes.*

*If it is established that it is reasonably alleged that a public right has been acquired then Wiltshire Council must make and advertise an order to record the route. Firstly though, Wiltshire Council has a duty to investigate all available relevant evidence and accordingly I would be very grateful if you have any evidence relating to these applications that you forward it to me by Friday June 22<sup>nd</sup> 2018.*

*Evidence in support may include dated photographs, further recollections or additional user evidence forms and evidence in objection may include details of land use, challenges, locked gates, signs, and any other actions taken to deter use or anything else that may be considered relevant.*

*Redacted copies of user evidence forms are available by request to owners or occupiers of the land.*

*If you have any queries relating to these applications please do not hesitate to contact me.*

9.2 Consultees were as follows:

All people who had submitted user evidence forms

The Auto Cycle Union

Open Spaces Society

British Driving Society

British Horse Society (Wiltshire and National)

Byways and Bridleways Trust

Cycling Touring Club

Trail Riders Fellowship

Wiltshire Council Senior Rights of Way Warden

Melksham Town Council

Melksham Without Parish Council

Wiltshire Councillor Melksham Without North

Wiltshire Councillor Melksham North

Wiltshire Bridleways Association

The Ramblers (Wiltshire)

Wiltshire Council as landowner

W D Guley & Sons

Mr T Farthing

Mr G Powell

Ms S Gray

Mr D Corsellis  
TLT LLP acting for Cooper Tyre and Rubber Company Europe Ltd  
Mr T McMaster (applicant 2017/04)  
Mrs S Carter (applicant 2017/03)

## **10.0 Consultation responses relevant to 2017/04**

### **10.1 Melksham Town Council 24 May 2018**

*“Members discussed your correspondence regarding applications being made for definitive map modification orders on two routes in Melksham.*

*Members initial thoughts were that there are many miles of PRow's in and around Melksham and that these should be used to their potential, rather than seeking to create more. They did however go on to raise the following points:*

- Consideration should be given to any SHLAA sites in these locations and the impact the formalisation of these footpaths could have on future potential development.*
- It was asked if approaches had been made by these applicants to landowners to seek permissive footpath rights; to allow access over their land without dedicating a right of way?*
- There was a general will amongst councillors present to preserve the riverside setting and the route in Green would definitely support this view, however they were mindful that landowners may not be quite so open to this suggestion.*

*I appreciate the comments above are not evidence to support or object to these applications, but purely observations.”*

### **10.2 Mr and Mrs Weare 29 May 2018**

*“Further to your letter of 04 May please find enclosed various photographs clearly showing the worn paths along the River Avon and around the fields locally known as “Forty Acres”. I have dozens of photos out there if you require more.*

*When I moved to Scotland Road in the late 1990's I asked my neighbours where I could walk my dog and was told there was a footpath along both sides of the river bank, over the hatches and into Forty Acres which then took you all the way out to Lacock. Sure enough there was a clear path through the park at the end of Scotland Road, over a stile, along the river, over the “black bridge” (G) down towards the “Hatches” (D) and over another stile (4) around 40 acres which also joined up with the existing Purple Footpath MELW66 on your map. I would alternate my route often starting my walk at F where there is another stile just past the F on your map. In more recent years I have also walked from D to B to A, but not as frequently and I do not have any photos of that part (somewhat less attractive).*

*I have also assumed there to be rights of way and was surprised when I recently found they were not. They have always been well walked, well worn paths with lots of walkers, dog walkers, ramblers and even jogger using them. The stiles have always been there, although some of them have become dilapidated in the intervening period. There is another stile at the half way point on your map between 3 & 2 in the corner where the red*

*path meets the brook. I never had any reason not to walk these paths and there has always been a great feeling of friendship and community in these fields, meeting with people we mostly knew by their dogs names, chatting about our dogs and enjoying the wildlife and amazing flora and fauna. We have made many friends over the years purely due to walking along these paths (we end got to know their real names!!).*

*I can confidently say these paths are used by hundreds of people, many of them daily. In Scotland Road alone I can think of at least 10 households that use these paths daily and that is only the ones that walk at similar times to us. We share our good times and bad times on these walks, I have shared many tears out there over the sad losses of our various dogs over the past 20 years and the introduction of new dogs.*

*I truly hope these paths can be designated for future generations to enjoy as we have done – we now walk out there with our grandchildren who have learned their love of nature from seeing the deer, rabbits, swans, geese etc. And their love of foraging from the delicious blackberries, hedgerow berries, sloes, elderflowers, elderberries, damsons, apples and wild hops which we have picked.*

*Many of the rights of way around us are being destroyed/becoming unusable, including MELW66, MELK1 and MELK67 on your maps, by the farmers that use those fields. MELW66 has been particularly badly effected by deep ploughing and harsh removal of hedgerows and meadow willows where the brook with the blue arrow meets the purple footpath – going from 1 towards Bezzles Farm. There is a large kissing gate there, as there is at B and just before 1. But, this had become almost unreachable particularly for older members of the community. This route in particular was a very popular walk.”*



2003 showing  
the stile at D(4)  
at the hatches &  
the path going  
up into 40 Acres



2003  
Path from F to E



2006 from  
E to D(4) looking  
towards D(4)



2007  
Near F  
going towards  
E

***“Wildlife and Countryside Act 1981 s.53***

***Application for definitive map modification orders to record public footpaths over land at Melksham***

*Further to your letter dated 4 May 2018, we are instructed by Cooper Tire & Rubber Company Europe Limited which is the freehold owner of land registered at HM Land Registry under title number WT160753 which is shown edged red on the attached title plan. As such we do not believe that the claimed footpath 2017/03 falls within our client's title.*

*With regard to claimed footpath 2017/04, none of the part of the claimed footpath between points A and D, or G and H fall within our client's title and approximately the northern half of the claimed footpath between points E and D also does not fall within our client's title.*

*All of the land that is subject to the route of the claimed footpath 2017/04 within our client's title is subject of a farm business tenancy which dates back to 25 March 2005. Our client's tenant, Mr T J Farthing, has had possession of the land since that date without any break. A copy of that farm business tenancy as executed by Mr Farthing is attached and we would draw your attention to clause 4.6 which requires Mr Farthing to take reasonable steps to prevent acts of trespass and to prevent any new footpaths or other easements or rights of way from being acquired. Please also note that Schedule 4 identifies Mr Farthing as responsible for repairs to field gates and posts (100%) and field boundaries and walls (100%).*

*From the above in relation to those parts of the claimed footpath 2017/04 that fall within our client's title, we believe that it is clear that our client did not intend to either dedicate any footpath or right of way nor should its actions indicate that deemed dedication should apply. The farm business tenancy covers all bar the very early part of the claimed period of time that the route has been used. We have not seen the user evidence but would suspect that this early period is most likely to be the part of the claimed period for which there is little user evidence or certainly less. Bearing in mind that only 12 people have claimed to have used the claimed footpath during the claimed period, we do not believe that there would be sufficient evidence to show that the claimed footpath had been used for a twenty year period and if the claimant is relying on common law principles, we would suggest that there would not be sufficient evidence in relation to the earlier period to rely on user evidence.*

*We would be grateful if you could keep us advised of progress of these applications as these will have a material impact on the agricultural activities carried out by our client's tenant as regulated by the existing farm business tenancy should an order be made.”*

Clause 4.6 states:

*“The Tenant will take all reasonable steps to prevent acts of trespass on the Holding and to prevent any new footpaths or other easements or rights of way from being acquired over the Holding and will notify the Landlord in writing of any encroachments or repeated acts of trespass on the Holding.”*

#### 10.4 W. D. Guley and Sons 15 June 2018

*“We are writing to comment on the claim of a footpath being established over land belonging to Susan Gray and farmed by W. D. Guley and Sons.*

*Firstly we would like to point out that we are very disappointed that our neighbourly attitude has created this situation.*

*Prior to 2011 our business as mainly Dairy, the field concerned being used sometimes to grow Maize, and sometimes grass for forage or grazing.*

*Whilst we were in Dairy. The field gate on Woodrow road was locked, when we had animals present, with a sign indicating that there may be a bull present to deter trespassers. However, there is another access to this field along the old canal route and when walkers were sighted in the field we were not always aware how they may have accessed the field. On occasions we have challenged people about their presence in the field and pointed out that the only public right of way is along the old canal route. We are concerned that increased access will result in further harm being caused to our crops or animals. When we are in the area we do have to remind users to keep their dogs on leads to stop them wandering all over the field and not keeping to the designated public footpath route.*

*It is in our interest to have ‘eyes’ locally to report if any animal was in trouble and also to advise when youths were using the field as a racing track for motorbikes, worrying cattle and destroying crops which is likely to increase in the new footpath sections are approved. (We had to contact the police about this on several occasions, after locals brought this to our attention).*

*In the years since 2011, we have been doing beef and arable and there has not been a locked gate to the field as we have had arable crops present. The gateway was not wide enough for large combine harvesters and so was widened but left a gap. (To have fitted new gates in this circumstance would have simply been, we felt, confrontational to our friendly neighbours ‘eyes on the spot’)*

*For economic reasons we will shortly be reducing the arable and increasing our beef grazing herd. We will therefore need to re-instate the locked gate so that the field can be used in this way.*

*In the period since the field has been used for Arable, we would suggest that it is possible that the route A to B may have been used irregularly and without our agreement.*

*We would however argue that route B to C would have left evidence of crop damage if it had been used on a regular basis, which we have not seen. Anyone out walking with or without their dogs should respect our crop and keep to the designated footpath.*

#### **In conclusion**

*We would contend strongly that the identified routes have not been regularly walked.*

*There was a locked gate at Point A up until 2011. In our opinion there is little or no evidence of a route being in regular use past point B since the field has been used for arable crops.*



*We do not want this particular route to be established as a public right of way, as it will inhibit our free use of the field in the future in particular for beef grazing if greater access is given. Of particular concern are dog owners who allow their dogs to roam freely potentially causing distress to the stock.*

*We can understand that the walkers from the Woodrow Road side of the field would appreciate connectivity to the old path MELW66. It may be possible to establish a compromise route along the northern perimeter of the field if this is absolutely required. However we would wish the route to be well fenced to prevent dogs from accessing the field and harassing the beef stock.”*

Also submitted by Trevor Guley:

**Tony Barnett** letter dated 18 June 2018

*“I have been an employee of W.D. Guley and Sons for 60 years and therefore have some recollection of the situation to the field at Woodrow Road, Melksham.*

*Susan Gray informs me that there is an attempt to create a public right of way from Woodrow Road across the field, on the grounds that the gate has not been shut or locked.*

*I am aware that people have used the field to exercise their dogs etc, and some are claiming that the entrance to the field has never been gated or locked.*

*This is simply not true. This field has been used by my employers for in excess of 20 years. Frequently up until 2011 there were animals in the field and the gate was shut and locked.*

*If they intend to make use of the field in this way again, it will be necessary to prevent access through this gateway once again.”*

**10.5 Ms C Hall 20 June 2018**

*“Recently you wrote to us regarding applications to record Footpaths near the River Avon in Melksham. As you were asking for evidence that we had used the paths, I have attached several photos that hopefully may be helpful. Unfortunately as the majority of our photos and video footage contain our children or fellow dog walkers I have been a bit limited to what I could actually send. Please find below a description of the location of each photo:*

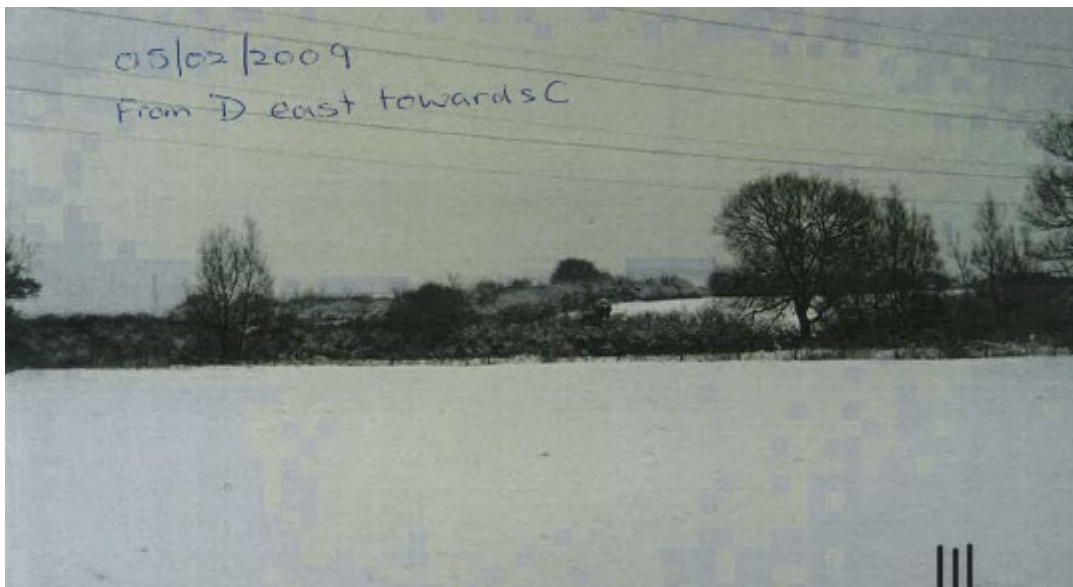
*Ref 2017/04*

*i) Photo taken 01/01/04 South of point G, looking south towards end of Riverside Drive playing field accessed by stile.*

*ii) Photo taken 22/07/07 Going west over cattle bridge between points E and G.*

*iii) Photo taken 05/02/09 Looking east, from point D across to C*

*iv) Photo taken 12/11/05 Between E and D, looking east towards point B*





#### 10.6 Melksham Without Parish Council 21 June 2018

*“The Parish Council considered the two applications and the map provided at their Full Council on Monday 18<sup>th</sup> June and would like to make the following comments:*

*The Parish Council do not support either of the two applications for new public rights of way under applications 2017/03 (red route on map) and 2017/04 (green route on map) for the following reasons:*

- They do not consider that there has been enough evidence provided to show that these are well used routes.*
- The Wilts and Berks Canal Trust have purchased land to re-instate a section of the old canal, the northern link from the river Avon up to Lacock, which will bring with it walking routes and ROWs along the tow path and the Council do not want to see the creation of any new footpaths now which could compromise this project.*
- The Parish Council would like to ensure that the current tenant farmer is consulted. The Parish Council understands that the previous tenant farmer on the red route farmed 90 acres of land on his own and was unable to police his land as the trespass level was so high.*
- The Parish Council understands that the Farmer on the green route has also given up keeping livestock on his land as the trespass level is so high.*
- The section of proposed footpath on the green route from points A to B replicates the existing Melksham Town ROW MELK6.*

*Thank you for consulting us.”*

#### 10.7 Susan Gray 20 June 2018

*“Further to our brief telephone call yesterday, and my letter which you should now be in receipt of.*

*I have found the paper work concerning the CA16. This was made in October 2017.*

*Also having now received 'the evidence received' I notice that no one is admitting there was ever a gate closed onto Woodrow Road ??? There must have been long periods when they did not use the route if this has not been noticed !!!*

*I believe one family (three forms) have actually constructed themselves a gateway into the field from their back garden. Is it really likely that they would have done this if they were not accessing the field by this route, rather than walking down the main road to access the field ??*

*I'm afraid the evidence of use from point A on Woodrow Road, just doesn't stack up."*

#### **10.8 Susan Gray and Trevor Guley 22 June 2018**

*"The field has been in the family's ownership and been farmed by us constantly for the entire period since 1997. Initially as previously mentioned in grass or maize, frequently cattle up until 2011.*

*I visited the site yesterday and spoke to a neighbour who lives over the road from the entrance, and she showed me a photograph which showed a closed gate close to the pavement. That is no longer present and there is actually not much evidence that the route from A to B has been used recently...The arable crop close to the edge of the field not trampled and brambles hanging over. (Which substantiates our previous comments that the majority of folk are respecting our cropping and we therefore had no reason to chase them off, if spotted whilst we are tending to said crop.*

*In order to access the site to load and unload cattle or whatever, it was necessary for us to establish an off road area just within the field, to avoid blocking Woodrow road whilst opening/shutting and locking the gate. The new gate was positioned approximately 12 ft into the field. Trevor informs me that he has seen people entering the field by climbing over the post and rail and allowing their dogs to enter underneath this fencing.*

*Even when the field was 'resting' and the animals returned home for winter housing the locked gate remained as we had problems with youths entering and racing round the field on little motorbikes on occasions. (It turned out that this did not stop them as they then used the public footpath MELW66 to access the field.*

***The majority of the time between 1997 and 2011 there was a closed and generally locked gate."***

#### **10.9 Barbara Ann Banks 22 June 2018**

*"I am writing to you in response to your letter of 4-5-18 regarding applications for footpaths in the fields north of Melksham on the eastern side of the R Avon.*

*From Sept 1984 – 1988 I walked the green route from point F round to point A every school day, to return home from walking my children to school, with my dogs.*

*The red route and the green route I have walked to exercise my dogs, most days since we moved here in 1984. I have often seen other dog walkers, families and joggers using the same paths. In all that time there was never any hindrance to walking these paths until 2017.*

*I include some photos taken while walking my dogs along these paths.*

*The 1<sup>st</sup> 3 were taken on the red path in Jan 2009.  
Nos 4 to 8 were taken in January 2001.  
Nos 9 to 11 were taken in winter 2013.  
No 14 in 2014.”*

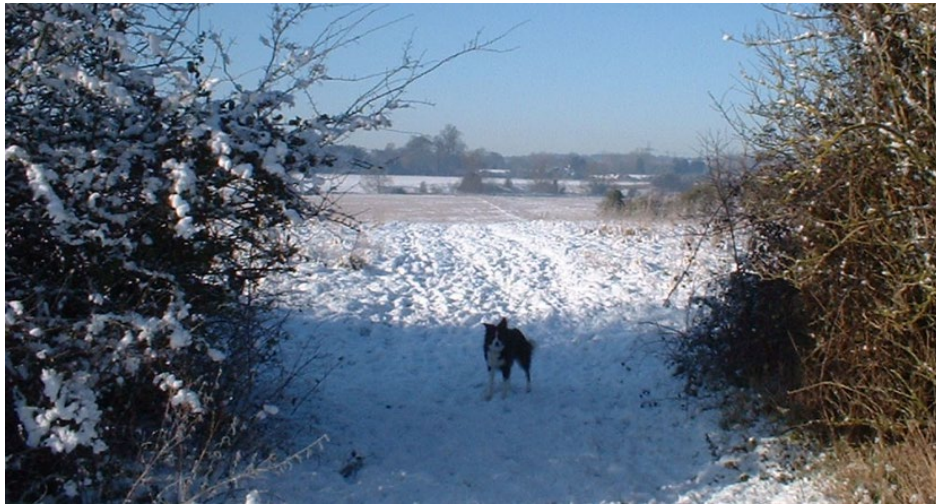
**No 4 January 2011 between E and D**



**No 5 January 2011 between E and D**



**No 6 January 2001** location not clear



**No 7 January 2001** location not clear



**No 8 January 2001** between D and B



**No 9 Winter 2013 between D and B**



**No 10 Winter 2013 between D and B**



**No 11 Winter 2013 between D and B**





#### 10.10 T Farthing on behalf of Farthing & Co 25 June 2018

*“In response to your letter dated 04.05.18, I am writing to oppose the footpath applications 2017/03 & 04, which was submitted to Wiltshire Council by Mr. Trevor Mc. Master on 31 August 2017.*

*We (Farthing & Co.) have been farming the land alongside the river Avon since 1980 where the “proposed” public footpaths 2017/03 & 04 on the map, from Murray Walk up to the the Council owned farm known as Forest Farm (formerly farmed by the late Don Burnell). On the west side of the river we farm between Melksham and Beanacre. Most of the land on the East side we rent from Cooper Tires, (formerly Avon Tyres), a small section of which we own ourselves.*

*The Black bridge which connects the two parcels of land either side of the river is jointly owned by ourselves and Cooper Tires. Approximately 30 years ago the East side buttress slipped partly into the river which made it totally impossible to cross so we repaired it ourselves. We were given permission from the Guleys in order to access the bridge from their side, off Woodrow rd. so that we could get the materials \* machinery to the site in order to repair the bridge.*

*About 12 months ago we received notification from Cooper Tires (copies enclosed) that the central pillar foundation has been severely eroded by the force of the river. At this point I was advised not to use it and to close it because it is unsafe.*

*Cooper Tires gave us permission to create an alternative access and plan to close the Black Bridge permanently as it has been declared unsafe.*

*On the matter of continual prolonged use of walkers paths, (as I stated in a previous letter to the council last year) 19 years ago we built some metal security gates on the west side of the black bridge which were kept locked for over a year until they were vandalised, one of which were thrown into the river, and still remains on the river bed to this day. The other one was brought back to the farm and one of the original metal gateposts used in its construction is still there on the bridge today. Therefore there was a **period of interruption** when the bridge could not be crossed by walkers.*



*There is a PRIVATE PROPERTY sign next to the river close to the black bridge which 10 years ago was still readable, the writing has now faded but it is still there.*

*We originally used the land for grazing cattle up until 2007. We kept bull and replacement heifers there for most of the year. In those days only a handful of people ever walked down there, to whom we had given verbal permission. The gate off Murray Walk was always locked and barbed wire put along the top to deter any would be trespassers as sign saying PRIVATE was on the right hand side of the gate on a post until about 10 years ago when we removed it as it was partly blocking our access.*

*The few people who used to walk along there accessed the land over the fisherman's style by the footbridge, NOT at point F on the map.*

*Quite often when the cattle were not there (usually between December and June) we would find that someone had cut the barbed wire next to the gate in order to get into the field, this can only be described as **forced entry**, however, the people who entered at point F on the map, did NOT take the sharp left route to the river as they are claiming to on the proposed footpath plan, as you can clearly see from the Google earth aerial photograph enclosed as evidence (taken at the end of May after we had harvested the grass).*

*It was only after we stopped keeping cattle there 10 years ago that the number of walkers increased and they have been doing so **without our knowledge or permission**.*

*We began growing crops down there 7 – 8 years ago and since then have lost contact with the few regular walkers to whom we had given permission, owing to the fact that we were no longer making the daily checks round our cattle.*

*Speaking to Don Burnell several years before he died, when he was actively farming the land, he told me that he gave his permission to all the people who walked there.*

*As a fellow farmer, I can understand why the new tenant is outraged to have people walking their dogs through his hay/silage crops when he needs to make good quality hay or silage for animal feed which is impossible to do if it is contaminated with dog excrement.*

*It is a fact that not all dog owners pick up after their dogs.*

*For cattle, the ingestion of dog excrement can have very serious consequences. We too suffered major problems in 2007 caused by this amongst our own stock, resulting in an unacceptable number of our heifers aborting their calves, following this they were unable to conceive again.*

*Some of the long term walkers, who are in support of the proposed footpaths, I can categorically state that I have given them my verbal permission, albeit a long time ago, and now, we feel very let down and disappointed that they are trying to claim it as a public right of way. We see it as abusing the privilege that we had granted them. In future we will be very cautious about allowing people to walk on our land at all.*

*For the avoidance of doubt, we will ask anyone who seeks permission to come onto our land to write an official letter to us confirming this, (such as the letter enclosed from Mrs Rossiter, who also used to walk on the 40 acre field at Forest Farm with the permission of Don Burnell, until the new tenant moved in there.) This is for our own protection and to avoid further abuse of privilege. We have recently purchased another*

*block of land at Queensfield Farm in conjunction with the Wilts & Berks Canal Trust. I still own a section of the canal on the Melksham side. They were hoping that with the permission of the remaining two landowners to allow a new public right of way from Melksham to Lacock on the old tow-path. In the light of what is happening now with this application, SM/2017/03&04. I am seriously reconsidering whether or not to co-operate with this idea.”*

Mr Farthing’s evidence includes letters from the following and a bridge report. Copies of these are attached at **APPENDIX 2**

- No 1 Letter from Mary Rossiter to Mr Farthing 03.06.2018
- No 2 Letter from former Woodrow Road resident (name unreadable) 18.06.2018
- No 3 Letter from Mr Bayley undated
- No 4 Letter from Mr Carpenter 16.06.2018
- No 5 Letter from Mr Greenman 17.06.2018
- No 6 Letter from N Young dated 21.06.2018
- No 7 Letter from M Crook dated 18.06.2018
- No 8 Letter from M Robinson dated 16.06.2018
- No 9 Letter from F D Robinson dated 16.06.2018
- No 10 Letter from Mr G Powell dated 19.06.2018
- No 11 E.mail from Mr J Thompson to Mr Farthing 06.06.2018
- No 12 Google Earth image 2002
- No 13 Google Earth image 2006
- No 14 Letter from Cooper Tires to Mr Farthing dated 08.05.2017
- No 15 Letter and bridge report from Environment Agency to Cooper Tires 10.04.2017

### **Summary of the above**

- No 1 Mary Rossiter** Mrs Rossiter had permission to walk land affected by application 207/03 (Mr Farthing now owns land at Queensfield Farm).
- No 2 Name unreadable** Recalls gate at point A on Woodrow Road being chained and padlocked.
- No 3 Mr Bayley** Has had permission to walk along the river bank since 1958
- No 4 C Carpenter** Had permission to walk from 1993 to 2005. Recalls Private Property signs near to Black Bridge and the gate at Murray Walk. Recalls old metal gate on bridge obstructing use. Recalls low numbers of walkers before 2000 and that only fisherman walked the river bank.
- No 5 P Greenman** Had permission to use Mr Farthing’s land from approx. 1988. Route was blocked by locked gates on Black Bridge about 18 or 19 years ago for about 2 years. Maize in field 2011 or 2012. Number of walkers has increased. Recalls two Private Property signs 1 by Black Bridge and other at the field gate at Murray Walk.
- No 6 N Young** Had permission for Mr Farthing’s land. Recalls Private Property sign by river near Black Bridge. Recalls someone quite often cutting barbed wire fence. In 2008 hardly anyone walked there.
- No 7 M Crook** The Avon Angling Club has over 250 members who fish along this stretch of river bank. Recalls a Private Property sign by the Black Bridge, by the

locked field gate at Murray Walk and another one at the stile (which was erected by Angling Club members).

- No 8 M Robinson** Used path since 1976 with permission. Recalls locked gates at Black Bridge 18 or 19 years ago. They were there a short time before they were destroyed. Recalls Private Property sign by Black Bridge and at Murray Walk. Recalls maize grown from 2011/2012. Has seen fence wire cut. Has seen an increase in numbers of walkers.
- No 9 F Robinson** Used path on Farthing land with permission since 1976 for daily walks. Maize was planted from 2011 onwards and more people walk there now. A metal padlocked gate was put on the Black Bridge and you couldn't walk across approx. 19 years ago. It was there for 2 years until vandalised. Has seen Private Property signs by Black Bridge and on field gate. Has seen wire cut.
- No 10 G Powell** Has farmed the land affected by 2017/03 since 2017. Has had fences torn down. Has been asked to permit people to use the path but has said no.
- No 11 J Thompson** Has walked on Farthing's land between 2000 and 2004 with permission.
- No 12 Google Earth image 2002** shows trodden path from back garden of 175 Woodrow Road
- No 13 Google Earth image 2006** Shows trodden path from gateway on Murray Walk (point F) across field i.e. not along claimed route.
- No 14 Cooper Tires** Black Bridge considered unsafe to use in 2017 and Mr Farthing was asked to refrain from using the bridge.
- No 15 Environment Agency** Bridge condition report

**10.11 Mr T Farthing e.mail 04 October 2017 10:47**

Correspondence submitted when application was made.

*"I would like to make it clear that the point of entry (F) on the map, from Murray Walk is marked incorrectly. It should remain alongside the river bank, where it always was. Walkers have been incorrectly using our gateway and making their own unofficial path through our field and trampling our crops. Please ensure that this is recorded correctly on any future Definitive Map."*

**10.12 Mr T Farthing 04 October 2017 22:59**

Correspondence submitted when application was made.

*"I have farmed the land on either side of Murray Walk for approx.. 40 years, we own some of the land on the east side, and also the land on the west side of the black bridge to the A350. For approx. 6 to 7 years we have grown maize on the land to the east of the river and have left a strip of land alongside the river for people to walk with their dogs. People used to walk down the bank by the foot-bridge where there is a stile."*

*However, over the last 2 to 3 years, people have caused damage to our crops by taking the incorrect route from the riverbank to our gateway, (marked F on the attached map) on the Murray Walk.*

*So we object to Mr Trevor Mc.Master's application Ref WW003, claiming this route as a footpath, as this part of the proposed route has not been used for a long period of time.*

*Prior to growing maize here, we have grazed cattle and always padlocked the gate (F on the map). Have you checked that Mr Mc.Master has lived in the area for at least 20 years.*

*In 1999, we erected some tall steel gates on the black bridge which prevented people from crossing over the river."*

#### **10.13 Wiltshire Council 02 July 2018**

*"Part of the route claimed under 2017/04 (green route) crosses the bottom of the field known as 40 acres at Forest Farm1. Although several of the user evidence forms state that the use of the route C – D was occasionally interrupted due to flooding we do not wish to object to this application on the basis that a path across the bottom corner of the field in the route C – D wouldn't unduly impact on agricultural operations. In fact during earlier discussions with the local walkers we tried to offer this section as a permissive path, however because it didn't lead to or from any formal right of way, and you could only get to it by trespassing on neighbouring third party land we were unable to progress this.*

*With respect to the section of path between H and G, in so far as it crosses Wiltshire Council owned public open space we would have no objection to a footpath being dedicated along this route however I do believe that the grounds of the claim are invalid because the land is already public open space and therefore the public have permission to freely walk across the land. This is a technicality rather than an objection."*

Wiltshire Council also submitted a statement of Evidence in Objection to application reference 2017/03 (red route).

#### **10.14 Trevor McMaster 03 July 2018**

*"I have marked Point "F" a Stile which the "Public" have now been using since Farmer Farthing chain locked the entrance proposed for 2017/03 & 04 at Point F some weeks ago.*

*I have also enclosed 2 photographs showing the Stile from the Murray Walk side and from the field.*

*I wish to point this out incase any confusion arises from Evidence forms reflecting this Stile rather than walking through the gate at point "f"."*

Photographs show a wooden stile with open access beside it at a point 25 yards east of the field gateway. This is on the opposite side of the gate from the Anglers' stile at the river.

**10.15 Jeremy Thompson submitted by Mr T Farthing 05 July 2018**

*"I lived in Woodrow & Forrest Road from the year 2000 until 2004.*

*I was able to go for walks along Murray Walk to the Black Bridge and back round, with the kind permission of Tim Farthing who farms the land."*

**11.0 Considerations based on evidence of use**

**Summary of User Evidence – APPENDIX 3**

**11.1 Statutory Presumed Dedication – Highways Act 1980 Section 31**

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 any 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 of 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 have 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 or statutory purposes to dedicate a way over the land as a highway if the existence of a highway would be incompatible with those purposes.*

NB The Growth and Infrastructure Act 2013 brought about alterations to s.31(6) extending the length of time that a deposit remains valid for from 10 years to 20 years.

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*).

## 11.2 The date when use was brought into question

The physical blockage of the path at point D and between points B and C when the tenancy of that land changed, stopped use of the claimed route F- E – D – C – B. The users of the path, in their evidence, do not record any other event that prevented their use of the way and it is therefore likely that they consider that the relevant period is the 20 years between 1997 and 2017.

- 11.3 In the evidence of Mr Farthing who owns land on the western side of the river and farms land on the eastern side it is considered that the public were physically prevented from crossing the Black Bridge by a locked metal gate erected across the bridge in 1999. The gate was vandalised and destroyed some time later, possibly 1 or 2 years later. Mr Farthing's evidence is also that the erection of signs saying "Private Property" would also have acted in a manner sufficient to call the public use into question. On the basis of Mr Farthing's evidence the relevant period would be from 1979 to 1999.
- 11.4 Wiltshire Council (who own the land between D and C now farmed by Gareth Powell) do not object to the footpath on this route but it is noted that in 1995 Wiltshire County Council made a Statutory Deposit under section 31(6) of the Highways Act 1980 for land including the land affected by this application in the region of the claimed route just north of point D towards C. The length of the route affected by this deposit is approximately 100 metres. On the basis of this evidence the relevant period for the Council owned land would be from 1975 to 1995.
- 11.5 For the following reasons officers consider that the relevant period for the Council owned land east of the River Avon is from 1975 to 1995 and for the remainder of the route 1997 to 2017.
- 11.6 **S.31(5) or (6) deposits**

Wiltshire Council has received no notices under s.31(5) Highways Act 1980 regarding the erection and subsequent damage to signs or notices.

- 11.7 Wiltshire Council has received only one Statement and Plan under s.31(6) Highways Act 1980. This was made by Wiltshire County Council on 28 November 1995 and in accordance with the provisions of s.31(6) at that time Wiltshire Council had a period of 6 years (i.e. until November 2001) to make a statutory declaration relating to there being no additional dedications of rights of way. No statutory declaration was ever made and accordingly the statutory requirements laid down in s.31(6) were not met. The deposit and relevant plan is appended at **APPENDIX 4**.
- 11.8 The purpose of the deposit and plan is to enable the landowner to state what rights of way exist over the land. In its deposit Wiltshire County Council does this and also states that no other ways have been dedicated as highways. The purpose of the subsequent statutory declaration (which in this case was not made) is to demonstrate the landowner's intention in stating that in the period between the deposit and the declaration no further ways have been dedicated. S.31(6) is clear that if this is done (and in the absence of a contrary

intention) it will provide sufficient evidence to negative the intention of the owner to dedicate any such additional highway.

- 11.9 But in this example there *is* evidence of a contrary intention and this may be the reason why a statutory declaration was never made. In their response to the initial consultation Wiltshire Council have made it clear that they ...*“do not wish to object to this application on the basis that a path across the bottom corner of the field in the route C – D wouldn’t unduly impact on agricultural operations”*. Additionally in an e.mail dated 08 November 2018 Wiltshire Council’s Estates Manager, Jenny Rowe, has confirmed that the Council would be prepared to dedicate the short section of path between C and D as a public footpath in the event that the remainder of the ‘green route’ was to be recorded as a public footpath.
- 11.10 However, even where the strict provisions of s.31(6) are not met (as in this case) it still remains necessary to consider the effect, if any, of the deposited statement and plan.
- 11.11 The statement and plan was filed in accordance with other deposits and held in the offices of the Rights of Way Service at County Hall, Trowbridge. The records were available for public viewing on request. The deposit pre-dates the requirement for the Council to record and display s.31(6) deposits in an on-line register.
- 11.12 In considering the weight to give this deposit as an event which calls into question the public’s right to use the route C- D it is useful to consider the proviso in s.31(1) (which must be satisfied) that *“there is sufficient evidence that there was no intention...to dedicate...”*. The leading decision is that of the House of Lords in R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28, [2008] 1 AC 221. Lord Hoffman said at paragraph 32:

*“..’intention’ means what the relevant audience, namely users of the way, would reasonably have understood the landowner’s intention to be.”*

Lord Hoffman went on to say at paragraph 33:

*“[section 31(1)] requires ‘sufficient evidence’ that there was no such intention [to dedicate]. 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...the objective acts must be perceptible by the relevant audience.”*

In the same case Lord Hope said at paragraph 57 that:

*“[the landowner] must take steps to disabuse the public of the belief that the way has been dedicated to public use...the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso”.*

Lord Scott, also in the same case, said (paragraph 68) that:

*“Evidence ‘sufficient’ to displace the statutory deemed conclusion of dedication should at least establish a positive intention.”*



11.13 In considering whether a deposit made under s.31(6) (albeit an incomplete one) is sufficient an action to bring a lack of intention to dedicate to the attention of the public Lord Hoffman, again in Godmanchester, at paragraph 34:

*“A well advised defender of rights of way, such as the Ramblers Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner’s intention can come to their attention or not”.*

11.14 Lord Hope, at paragraph 54 said:

*“...if there is a challenge, the right of the public to use the way will be taken to have been brought into question as soon as the landowner seeks in the way the statute mentions to negate the intention to dedicate. The same will be true of other acts, or of some other course of conduct, by which the landowner seeks to exclude the public. The steps which the statute mentions are not to be taken as exhaustive of those that may be taken for this purpose: see the words “or otherwise” at the end of section 31(2). Whatever he does, time will have begun to run against the landowner from the beginning of the period of 20 years calculated backwards from the first such act or from the start of that course of conduct.”*

11.15 It is considered that the deposit made in 1995 by Wiltshire County Council is effective in calling the public right into question and that the relevant period for the consideration of the acquisition of public rights over the Council owned land approximately D to C is for the period 1975 to 1995. The deposit cannot take effect over any other parts of the claimed route and the relevant period for these parts of the route remain between 1997 and 2017.

#### 11.16 **Signs and notices**

Section 31(3) of the Highways Act details how signage may displace the provisions of section 31(1):

*(3) Where the owner of the land over which any such way as aforesaid passes –*

*(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*

*(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected the notice, in the absence of proof of any contrary intention, is sufficient evidence to negate the intention to dedicate the way as a highway.*

11.17 User evidence forms ask, at question 8(c):

*Has there, to your knowledge, ever been on the way:*

*(a) ...*

*(b) ...*

*(c) Any notices or signs, e.g. ‘Private Road’. ‘No Public Right of Way’ etc. If so, state*

*where the items were in place or please mark the plan if necessary and state what was or is upon the notice. Dates are helpful.*

- 11.18 No users who submitted evidence in support recall see any such notices of signs.
- 11.19 Mr Farthing's evidence contains recollections of signs saying "Private Property" in 2 locations. One near the Black Bridge and one at F at the field gate.
- 11.20 The sign near the black bridge can be seen in the photograph at the bottom of page 10. It is generally unreadable but the first word may have been 'private'.
- 11.21 It is not known when the signs were erected or when they became unreadable. They have clearly not been maintained and, notwithstanding the effect of the wording, would fail to satisfy the requirement to maintain contained in section 31(3)(b) of the Highways Act 1980.
- 11.22 The evidence of the signs, even taken at its highest, is considered to also fail to satisfy section 31(3)(a) of the Highways Act 1980. The words 'Private Property' are informative and fail to convey any message inconsistent with the dedication of a highway.
- 11.23 In *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28 it is set out that:

*"...the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood what the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to "disabuse [him] " of the notion that the way was a public highway...It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate...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...the objective acts must be perceptible by the relevant audience."*

- 11.24 It is a feature of public rights of way that they lead over land that is in private ownership therefore a sign indicating this, especially one at the junction of public owned land (i.e. on the river bank near the Black Bridge) is unlikely to indicate to anyone using the way that the landowner had no intention to dedicate, the sign is merely informative as to the change in ownership and may even have been taken to refer to fishing rights.

#### 11.25 **Locked Gates**

A gate locked to prevent public access or that does physically prevent public access can call into question the public's right to use a path.

- 11.26 Users of the claimed route who support the application do not record any gate or obstruction to the route. However, Mr Farthing's evidence and that of several others refers to the gate being locked at point F until around 2007. Their evidence also refers to a locked gate across the Black Bridge from 1999 until around 2001. The evidence of Trevor Guley is

that there was gate at Woodrow Road (point A) and that it was locked when cattle were in the field from 1997 to 2011.

11.27 There is a clear conflict of evidence over the presence of gates, whether they were locked and whether they formed an obstruction. Where there is a conflict of evidence the Council must consider, when considering using section 53(3)(c)(i) of the 1981 Act, whether the application forms a reasonable allegation, and with regard to the obstruction of the path at the Black Bridge, it is considered that it does as there is nothing incontrovertible in the objectors' evidence relating to the gates.

## **11.28 Is there a route or path and did the public use it?**

### **Is there a route?**

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

11.29 Users in support of the application have all submitted a copy of the application map. However, in response to question 2 users have given full and personal descriptions of the path. For example Witness no 2:

*"The path used was defined by continual use of walkers (dog owners). Generally it was around the edge of pasture land/meadow. The field were not gated and fenced with a single strand electric fence that was used after the hay was made. The fields were then strip grazed to within approx. 5 metres of the River Avon."*

11.30 This accords well with the evidence of Mr Farthing who in his e.mail of October 2017 said that he "left a strip of land for people to walk their dogs" and that "people used to walk down the bank by the foot bridge where there is a stile."

11.31 Aerial photography reveals a number of trodden paths across the land that are not the subject of this application. However, the case officer found the claimed route largely visible, well trodden and easy to follow (not including obstructions at D and near C) in April 2018.

11.32 Additionally users of the path have submitted photographs demonstrating use of the path from 2003, 2004, 2005, 2007, 2009, 2011, 2013 and 2014.

### **11.33 Have the public used the route?**

There are 18 witnesses who have submitted user evidence forms. None claim to have been an employee or tenant or to have held any licence to access the land. The Planning Inspectorate's Consistency Guidelines at para. 5.13 states:

*“Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local community. It is unlikely that use confined to members of a single family and their friends would be sufficient to represent ‘the public’.”*

- 11.34 Of the 18 witnesses there are three couples from the same address who have given their evidence individually. This is not considered prejudicial to the application since it is recognised that use may have been individually and that each person would have different frequencies, different habits and differing recollections.
- 11.35 The area around the claimed route is relatively populous with housing to the east and west of the River Avon. It is considered that 18 witnesses is a relatively low number. 9 of these have used the path for the full 20 year period between 1997 and 2017. Many of the users have a high frequency of use with 9 using it daily and some of them twice daily. All users report seeing other users.
- 11.36 It is doubtful that all parts of the route were used by all users on every visit and there is evidence of a trodden path leading from one address which suggests that this was a preferred route to access the wider route for these people. However, the evidence before the Council is that these people used the route with high frequency. This is further supported by the action of the new tenant of the Council’s land (between C and D) who found it necessary to erect significant obstructions to prevent use and stated in his evidence that *“I have had a great deal of difficulty with dog walkers trespassing across your land.”*

### **11.37 Is there a sufficiency of use for the full 20 years**

There is no requirement for all users to have used the route for the full 20 year period and the Planning Inspectorate’s Consistency Guidelines state at 5.16 that *“Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (Davis v Whitby (1974)).”*

- 11.38 The Planning Inspectorate’s Consistency Guidelines state at 5.15 that there is *“no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use ‘by public’ and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence, etc).”*

- 11.39 At 5.20:

*“In R (Lewis) v Redcar and Cleveland Borough Council UKSC 11 (03 March 2010) Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in Sunningwell that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In R (Powell and Irani) v SSEFRA [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in Lewis were not authority for an additional test beyond the tripartite ‘as of right’ test. The judgements in*

*Lewis confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication arises from acquiescence in the use. Again in Redcar, in the Court of Appeal Dyson LJ refers to Hollins and Verney and the words of Lindley LJ.*

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

**11.40 The period 1975 to 1995 (relevant for the land owned by Wiltshire Council and affected by the s.31(6) deposit**

Only 9 users in support have given evidence of use in this period with only one user (number 16) having used the route for the full 20 years.

<b>Year</b>	<b>No of users</b>		<b>Year</b>	<b>No of users</b>
1975	1 (2 or 3 x per week)		1985	6
1976	3		1986	6
1977	3		1987	6
1978	3		1988	6
1979	6		1989	6
1980	6		1990	6
1981	6		1991	6
1982	6		1992	7
1983	5		1993	7
1984	5		1994	7
			1995	8

11.41 It is considered that there is an insufficiency of use for the period 1975 to 1995 for the area of land owned by Wiltshire Council on the eastern side of the River Avon.

**11.42 The period 1997 to 2017 (relevant for the land owned by Cooper Tyre and Rubber Company, Farthing and Co, Susan Gray and Wiltshire Council west of the River Avon**

18 users in support have given evidence of use in this period of which 9 have used the route for the full 20 years.

<b>Year</b>	<b>No of users</b>		<b>Year</b>	<b>No of users</b>
1997	9		2008	14
1998	10		2009	16
1999	12		2010	17
2000	13		2011	17
2001	13		2012	17
2002	13		2013	17
2003	13		2014	17
2004	13		2015	17
2005	13		2016	18
2006	13		2017	18
2007	14			

11.43 Officers are satisfied that numbers are sufficient to form a reasonable allegation that a public right was being asserted.

**11.44 Whether use was interrupted**

No users report their use being interrupted though objectors report that 1997 to 2011 locked gates at point A on Woodrow Road interrupted use as did a locked gate on the Black Bridge from 1999 for a period of approximately 2 years.

11.45 Again, this highlights a conflict of evidence whereby people claim to have continued to use the route despite there being claimed obstructions to that use. The original application continues to form a reasonable allegation but clearly evidence from both sides would benefit from further elucidation and cross examination.

## **11.46 Whether use was as of right – without secrecy, force or permission**

### **11.47 Secrecy**

Use cannot be considered to be ‘as of right’ if it has been carried out in a covert manner or perhaps only in the hours of darkness. There appears to be no element of secrecy in this case with numerous photographs taken during daylight hours and no landowners have challenged that use occurred.

### **11.48 Force**

Use cannot be considered to be ‘as of right’ if it has been carried out with the use of force. This may include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a gate locked to stop users. Additionally, use of a path where there are notices preventing it or making it clear that the landowner has no intention to dedicate the route as a right of way may also be considered to be use by force.

11.49 Again, there is a conflict of evidence with regard to the use of force. Users of the path claim not to have used force and they do not claim to have met obstructions until 2017. They have not recorded that any gate was locked against them. There are three points where force is alleged by objectors to the application, the gate at the Black Bridge which was allegedly vandalised and ended up in the river, the gate at point F where wire was allegedly cut and the gate at point A.

11.50 It is difficult to believe that walkers would be responsible for the vandalism of a large gate at the bridge and that they would then have thrown it in the river. It is more likely that this was carried out by other persons, however, if the gate was found to be locked to prevent public use then it is possible that there was use by force. Evidence from the landowners responsible for the gate at point A locked it when cattle were in the field and then left it locked to prevent motorcyclists when the cattle weren’t in the field. Neither action is a specific locking against public use on foot and their own evidence suggests that people just used to climb over the gate.

11.51 The reasonableness of the allegation formed by the application remains, though again, this is evidence that would be best tested under cross examination.

### **11.52 Permission**

No users supporting the application claim to have asked for, or been granted, permission to use the route. However, Mr Farthing’s evidence contains evidence from 7 people who specifically sought permission from Mr Farthing and 1 who “always understood that this was with Mr Farthing’s permission as it was private property.”

Use cannot be considered to be ‘as of right’ if it has been carried out with the express permission of the landowner or because of a statutory provision or right.

11.53 The Planning Inspectorate’s Consistency Guidelines is helpful in this respect:

*“5.24 If there is express permission to use a route then the use is not ‘as of right’. The issue of implied permission, or toleration by the landowner, is more difficult. In the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Lord Hoffman, Sunningwell 1999, held that toleration by the landowner of use of a way is not inconsistent with user as of right. In R(Beresford) v Sunderland CC [2003], Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Lord Scott stated in the Beresford case*

*“I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e. toleration or acquiescence, is consistent with the use being “as of right”.*

*5.25 Permission may be implied from the conduct of a landowner in absence of express words. Lord Bingham, in Beresford, stated that*

*“...a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, record, that the inhabitants’ use of the land is pursuant to his permission.”*

*But encouragement to use a way may not equate with permission: As Lord Rodger put it,*

*“the mere fact that a landowner encourages an activity on his land does not indicate...that it takes place only by virtue of his revocable permission.”*

*In the same case, Lords Bingham and Walker gave some examples of conduct that might amount to permission, but the correct inference to be drawn will depend on any evidence of overt and contemporaneous acts that is presented.”*

11.54 Aspects of *Beresford* relating to implied permission where land was held by a public body (or similar with a public duty) were overturned in the Supreme Court in the case of *R v North Yorkshire County Council & Others ex parte Barkas [2014] UKSC 31*. however, the principles outlined above and maintained within the Consistency Guidelines were not. In the case of *Barkas*, Lord Neuberger stated:

*“In relation to the acquisition of easements by prescription, the law is correctly stated in Gale on Easements (19<sup>th</sup> edition, 2012), para 4 – 115:*

*“The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription the distinction is fundamental. This is because user which is acquiesced in by the owner is ‘as of right’; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not ‘as of right’. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence.”*

11.55 The over-riding principle ingrained in any action taken by a landowner to indicate his lack of intention to dedicate is that it must be brought to the attention of the users. Whilst officers do not dispute that Mr Farthing did not intend to dedicate a right of way across his land and



indeed did grant verbal permission to a number of people to access the land it is considered that he failed to bring it to the attention of the relevant audience by any means (i.e. signage, notices or perhaps a revocation of the permission for one day a year).

11.56 Again it is helpful to turn to the Consistency Guidelines provided by the Planning Inspectorate which ably deal with the considerations of Lord Hoffman in the leading case in this area of work known as ‘Godmanchester’ (R(on the Application of Godmanchester Town Council)(Appellants) v SSEFRA and R (on the application of Drain)(Appellant) v SSEFRA [2007 UKHL 28]):

*“5.28 “Intention to dedicate” was considered in Godmanchester, which is the authoritative case dealing with the proviso to HA80 s.31. In his leading judgement, Lord Hoffman approved the obiter dicta of Denning LJ (as he then was) in Fairey v Southampton County Council [1956] who held “in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate.”*

5.29 ....

*“5.30 Lord Hoffman held that “upon the true construction of section 31(1), ‘intention’ means what the relevant audience, namely the users of the way, would reasonably have understood the owner’s intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to ‘disabuse’ [him] ‘ of the notion that the way was a public highway.”*

*“5.31 For a landowner to benefit from the proviso to s31(1) there must be ‘sufficient evidence’ that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way....”*

11.57 It is clear from the conflict of evidence relating to whether permission was granted or not that although Mr Farthing granted permission to some people it was not apparent to other users that they needed to ask for permission to walk the routes. There were no signs indicating use was by permission. Stiles were provided but no signs indicated to people that they were for use by anglers or for those permitted to walk that way, in effect, they acted as an invitation walk that way. The same is true of the land owned by Wiltshire Council and farmed by Don Burnell.

11.58 Wiltshire Council also own land on the west side of the river between the River Avon and Riverside Drive between point H and the stile onto Mr Farthings land close to the Black Bridge. This land is all managed as public open space. Part of the land (the northern section) was transferred to Melksham Urban District Council in 1966 and the Council covenanted to maintain the land as Open Space. The southern section was retained by the Council and managed as public open space after the properties in Riverside Drive, Portman

Road and Granville Road were sold under the 'Right to Buy' scheme or transferred to West Wiltshire Housing Society (now Selwood Housing).

11.59 The statutory power under which land was acquired is an important factor when considering whether a public right can be acquired over the land. It is a fundamental factor when considering the acquisition of public rights (whether by statute or common law) that the use must have been in a manner that is "as of right". This is in effect a tripartite requirement which includes the lack of force, the lack of permission and the lack of secrecy with which the use must have taken place. In the case of land which has been acquired by a public body for the purpose of recreation it has been held that any use by the public is "by right" and not "as of right". There being no element of trespass as the public had a right to be there from the outset.

11.60 In an appeal to the Supreme Court – *R (on the application of Barkas) v North Yorkshire County Council* [2014]UKSC 31 at paragraph 21 Lord Neuberger held that

*"so long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespasser, so that no question of user "as of right" can arise....*

11.61 It is considered that all use of the Council owned land on the west side of the river was 'by right' and not 'as of right' and cannot meet the proviso contained within section 31(1) of the Highways Act 1980.

#### **11.62 The intention of the landowners and subjective belief**

It is settled law that unless the landowner conveys his intention to the relevant audience it does not matter what, locked inside his mind, his intention was.

11.63 Nor does it matter what is in the mind of the user of the way or whether he believes it to be a public right of way or not; it is the nature of his actual use that is the consideration.

Lord Hoffman in *R v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] A.C. 335 at 356:

*"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 in the 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 existence of a legal right. But that does not mean that it must be ignored.”*

11.64 What matters in these cases is whether the use satisfies s.31(1) of the Highways Act 1980 and not the belief of the parties involved.

### **11.65 The common law test**

In the absence of evidence of actual express dedication by a landowner, proof of a past dedication is inevitably achieved by looking at the character and extent of use of the way using the principles of *“nec clam, nec vi and nec precario”* i.e. ‘as of right’ .

11.66 The common law test does not require a period of time to be satisfied (unlike the 20 years specified in s.31 Highways Act 1980) but use would be expected to be of such frequency so as for the owner of the land to be aware of the use and to be capable of demonstrating acceptance by the public at large.

11.67 The Planning Inspectorate’s Consistency Guidelines consider common law dedication at 5.49 and state:

*“In Nicholson Dyson J commented on an assertion that Jaques was authority for the view that the quality of user required to found an inferred dedication was different from that required to found a statutory dedication. To bring the statutory presumption into play it was not necessary that the user should have been so notorious as to give rise to the presumption necessary for common law purposes, that the owner must have been aware of it and acquiesced in it. Dyson J stated “The relevant criteria so far as the quality of the user is concerned are the same in both cases. The use must be open, uninterrupted and as of right. The notoriety of the use is relevant for common law purposes in the sense that the more notorious it is, the more readily will deduction be inferred if the other conditions are satisfied. But notoriety is also relevant for the purpose of the statute, since the more notorious it is, the more difficult it will be for the owner to show that there was no intention to dedicate.”*

11.68 There is some evidence of acts of dedication insofar as there were stiles on the land permitting access to walkers; notably the ones at point D and between the Public Open Space land and Mr Farthing’s land. However, there is some evidence that Mr Farthing and Mr Burnell granted permission for some people to access the land and there is evidence that Wiltshire Council permitted the route to be blocked between points C and D in 2016. There is therefore some evidence of dedication and acquiescence on the part of the landowners and the user evidence submitted is evidence of public acceptance of the route.

11.69 The presence of the stiles at H (it is still in place and used) and close to D at The Hatches (not now present but recorded by 10 of the users) indicates that any dedication of rights to the public (either by Statute or at common law) was subject to these limitations which in the event that an Order is made, should be recorded.

## 12.0 Conclusions on the statutory test

Wiltshire Council may consider using either section 53(3)(b) or section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 in respect of the evidence considered in this application.

- 12.1 Section 53(3)(b) requires that on the balance of probability a presumption is raised that the public have enjoyed a public right of way over the land for a set period of time.

Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. This section allows for the consideration of common law and the inclusion of historical evidence and is the more commonly used section. It offers a two tier approach to the evaluation of the evidence with a lower bar set to make an Order ('a reasonable allegation') than to confirm one ('on the balance of probabilities').

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

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

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

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

- 12.4 Test B is the weaker test and only requires that on the balance of probabilities it is reasonably alleged that public rights subsist. This allegation may only be defeated at the order making stage by incontrovertible evidence.

- 12.5 There is a clear conflict of evidence in this case and officers consider that much of the evidence on both sides is credible and would benefit from testing under cross examination.

- 12.6 The Council is bound to follow Test B as detailed above.

### 13.0 Conclusions on the common law test

Lord Hoffman highlighted the difficulties associated with identifying a qualifying act for a dedication at common law in paragraph 6 of *Godmanchester* [2007] UKHL 28:

*“As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of the landowners over many years are more likely explanations...”*

- 13.1 Although it is possible that the ongoing use by the public against a background of tolerance can lead to a dedication at common law without a specific act of dedication, the application of common law principles of dedication are not considered further in this case as it is considered that the application forms at least a reasonable allegation that the statutory requirement contained within s.31(1) of the 1980 Act has been met over parts of the route.

### 14.0 Legal and financial considerations and risk assessment

- 14.1 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. At the date of drafting this report the Council has been in receipt of this application for nearly 14 months.
- 14.2 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. If the Council is directed to make an Order it must do so. In the case of this application, the legal test for making an Order is weaker than the test to confirm it and there is a risk in deciding not to make an Order that the decision may be overturned by the Secretary of State at the appeal stage and that the Council is subsequently directed to make an Order.
- 14.3 If the Council makes an Order or is directed to make an Order, and when made and advertised it 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 £3500 - £5000 if Wiltshire Council supports the order; around £300 if it does not). The Council may support the Order, object to it or where directed to make it and applicable, may take a neutral stance.
- 14.4 Statute is clear as to the Council's duty in this matter and financial provision has been made to pursue this duty. 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).

## **15.0 Equality impact**

15.1 Consideration of the Equality Act 2010 is not relevant to the 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 landowners as appropriate.

## **16.0 Relationship to Council's business plan**

16.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. However, Wiltshire Council is committed to working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

## **17.0 Safeguarding considerations**

17.1 Consideration of Safeguarding matters is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981.

## **18.0 Public Health Implications**

18.1 Consideration of public health implications is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981.

## **19.0 Options to consider**

- 19.1
- i) To make an order under s.53(3)(b) or (c)(i) of the Wildlife and Countryside Act 1981 to record a footpath.
  - ii) Not make an order under s.53(3)(b) or (c)(i) of the Wildlife and Countryside Act 1981 and to refuse the application.

## **20.0 Reasons for recommendation**

Officers consider that the application forms a reasonable allegation that a public right of way subsists and that s.31(1) of the Highways Act 1980 is satisfied for parts, but not all, of the applicant route.

### **20.1 Route H to south of G – Wiltshire Council's land to Mr Farthing's land**

The land owned by Wiltshire Council is managed as public open space. Part of the land is governed by a conveyance requiring this and the southern section formed part of the open space provision for a housing development owned by the District Council and retained by Wiltshire Council as open space. Use of this land is 'by right' and cannot be qualifying use for the application of section 31(1) Highways Act 1980.

### **20.1 Route south of G to E to F and from E to D – Mr Farthing's land and land owned by Cooper Tire & Rubber Co. Europe Ltd and farmed by Mr Farthing**

The land is entered from the public open space land near point G over a stile. A sign is at this location which said 'Private Property'. There is some evidence that a similar sign was in place at point F. There is a stile at point D.

20.2 The wording of the sign 'Private Property' is not considered to convey a lack of intention to dedicate and notwithstanding that there is also no evidence of the maintenance of the signs or dates that signs were in place. There is a conflict of evidence relating to a locked gate on the Black Bridge in 1999 for a period of approximately 1 to 2 years and there is some evidence that permission to use the route was sought and granted. However, none of these matters are incontrovertible and are not considered to take effect for a date of calling into question.

20.3 The relevant period for this section of route is therefore considered to be from 1997 to 2017 and there is considered to be a sufficiency of use in that period to at least form a reasonable allegation that the proviso in s.31(1) Highways Act 1980 is satisfied.

#### 20.4 **Route D to south east of C – Wiltshire Council's land**

In 1995 Wiltshire Council deposited a statement and plan under s.31(6) of the Highways Act 1980 declaring that there was no intention to dedicate a any public rights of way.

20.5 It is considered that this had the effect of calling the public use of the way into question and the relevant period for this section is therefore considered to pre-date the deposit and to be from 1975 to 1995. There is an insufficiency of use in that period to satisfy the proviso in s.31(1) Highways Act 1980.

20.6 However, Wiltshire Council have stated that they will now dedicate a public footpath over this section if the application succeeds. Officers consider that a conditional Deed of Dedication could be made to secure continuity of the route should any order be confirmed.

#### 20.7 **Route south east of C through B to A – land owned by Susan Gray and farmed by W D Guley and Sons**

There is some evidence of the locking of a gate at Woodrow Road but no users report this prevented their access. This is another area where evidence is directly conflicting. The purpose of the locking of the gate appears to be for cattle security and to prevent ingress by motorcycles. There is no other evidence for an interruption to use and accordingly the relevant period has been taken as 1997 to 2017. There is considered to be a sufficiency of use to satisfy the proviso in s.31(1) Highways Act 1980 between these dates.

20.8 There is a clear conflict of evidence in this case with the evidence of Mr Farthing being heavily in conflict with that of the applicants. This is largely with regard to permission, signage and locked gates at the Black Bridge. There is a conflict of evidence over Susan Gray's land regarding a locked gate.

20.9 Mr Farthing has adduced evidence from 8 people who have either requested permission or understood they needed permission. However, 18 people have adduced evidence that they did not ask for permission.

- 20.10 It is the view of officers that notwithstanding Mr Farthing's view that the route was permissive (and indeed that of some other people within the community) he failed to bring it to the attention of the relevant audience, that is, the users of the path. There were no signs saying permission was needed, there was no mechanism for revoking that permission and there was no formal closure of the route (for example locking a gate to prevent access on an annual basis) to demonstrate that the landowner retained control over the use of the path.
- 20.11 There is no incontrovertible evidence to defeat this application (notwithstanding the effect of the s.31(6) Highways Act deposit made in 1995 and the land held and managed as public open space affecting parts of the route) and the Council is bound by the decision of Owen J in *R v Secretary of State for the Environment, ex p. Bagshaw and Norton* to proceed with making an Order under s.53(3)(c)(i) WCA 81. See Paragraph 12.2.
- 20.12 Additionally, in that case Owen J held that:
- “(2) In a case where the evidence from witnesses as to users is conflicting, if the right would be shown to exist by reasonably accepting one side and reasonably rejecting the other on paper, it would be reasonable to allege that such a right subsisted. The reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.”***
- 20.13 A highway must either link to other highways or lead to a place of public resort (such as a beach or a view point). While it is acceptable for a highway to commence at the public open space land at Riverside Drive (south of point G), the presence of a gap between D and C in the route where public rights are considered not to have been acquired (as a result of the 1995 s.31(6) deposit and the lack of evidence adduced in the period 1975 to 1995) is considered fatal to the Council's ability to make an Order to record parts of the claimed route. However, it is clear that some network opportunities would still exist for walkers if section A to B was recorded (this section links two highways) or if the section from the public open space land at Riverside Drive through G to E to F on Melksham 4, Murray walk, was recorded. These sections could potentially fulfil the proviso in s.31(1) Highways Act 1980 and be highways connecting to other highways.
- 20.14 However, Wiltshire Council's Estate Manager has confirmed that the Council would be prepared to dedicate the linking section of footpath over its land making it possible to make an order to those sections of the claimed route affected by the possible 'dead end' scenario.
- 20.15 Officers consider that in order to make an order capable of confirmation it would be necessary to first put into place a legal instrument that would create the length of footpath conditional on the confirmation of connecting paths. The Council may make a Deed of Dedication under Section 1 of The Localism Act 2011 to achieve this.



## 21.0 Recommendation

i) That Wiltshire Council makes a Deed of Dedication to create a length of footpath linking the ends of the claimed path over its land east of the River Avon, Melksham and that the dedication comes into effect on the confirmation of the Order recommended in ii below;

ii) That an Order to record a public footpath over land at Melksham as shown in **APPENDIX 5** is made and advertised under section 53(3)(c)(i) of The Wildlife and Countryside Act 1981 and Schedule 15 to that Act and that if no objections or representations are made that the Order is confirmed.

### Appendices:

<b>APPENDIX 1</b>	<b>PLAN SHOWING LAND OWNERSHIP AND CLAIMED ROUTE IN GREEN</b>
<b>APPENDIX 2</b>	<b>CONSULTATION RESPONSE FROM MR FARTHING</b>
<b>APPENDIX 3</b>	<b>SUMMARY OF USER EVIDENCE</b>
<b>APPENDIX 4</b>	<b>1995 S.31(6) DEPOSIT AND PLAN</b>
<b>APPENDIX 5</b>	<b>PLAN SHOWING PROPOSED ORDER ROUTE AND DRAFT ORDER</b>

Sally Madgwick

Team Leader Definitive Map and Highway Records

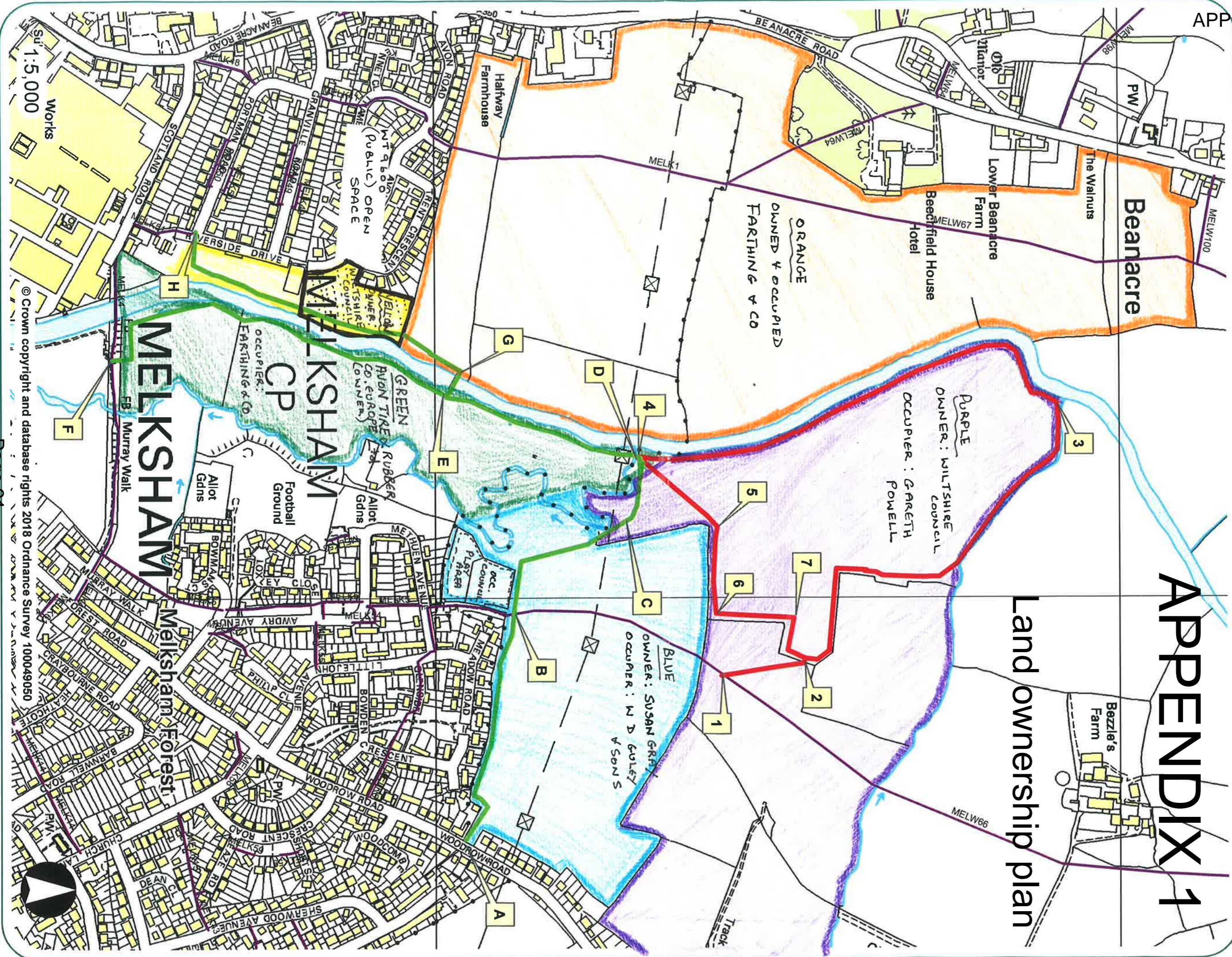
14 December 2018

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- Applications for Definitive map modification orders**
- 2017/03 claimed footpath
  - 2017/04 claimed footpath
  - Existing public footpaths

# APPENDIX 1

## Land ownership plan



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Consultation responses from T Farthing

From

MARY ROSSITER  
 [REDACTED] WOODROW RD.  
 MELKSHAM  
 SN12. [REDACTED]

To

MR. T. FARTHING

[REDACTED]  
 BEAVACRE RD  
 BEACRE, MELKSHAM.

(1)

Dear Mr Farthing.

I am writing to confirm that you have given me permission to walk with my dog on your land.

The land in question is Queensfield Farm, Woodrow Road, Melksham. That has been newly purchased by you, for this I am very grateful.

Previously I had permission to walk on Forest Farm land from Donald the farmer, mainly around the forty acre field, and beyond. But this has now changed due

Is a change of occupancy at  
Forest Farm.

My dog is eleven, and I am  
seventy four as it wont be forever.

However you have made it easier  
for me now, and not have to worry  
if I am trespassing on your farm  
land.

Yours sincerely

[REDACTED]

3.6.2018.

2

██████████ CHALLEYMEAD BROWCHAMON GIFFORD  
MR MELSHAM SN128 ██████████

18.6.18

Dear Sir

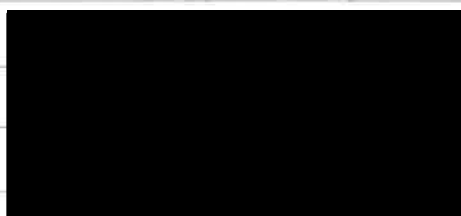
When I lived at  
158 Woodrow road. with my  
mother and father and after  
I left home to the best  
of my knowledge the  
gate next to our bungalow  
always had a chain &  
padlock on it as Mr  
David Gully at the time  
used to keep cattle out  
in the field.

Yours  
sincerely

3

Woodrow Rd  
MILKSHAM  
WILTS.

who it may concern  
have had permission of the part  
li. of Forest Farm (The Busnell &  
) and The Farthing to walk  
river bank on the properties  
the brook to the property.  
& I have crossed the river  
the old Black Bridge for the part  
es.





4

████████ Bath Rd.  
Shaw  
Melksham  
Wilts.

16 June 2018

To whom it may concern.

My Name is Chris Carpenter.

I used to live at No.3 Thames Crescent, Melksham.  
between the years of 1993 and 2005.

During this time I often walked across the land farmed by the Farthings between the Murray walk and the black bridge, and of course I asked their permission to do so as there were private property signs there, one by the black bridge down near the river near Trent crescent and another by the field gate off Murray walk. If their bull was in the field with the cows, I would avoid walking in the fields for fear of getting chased.

I remember they had some big old metal gates on the river bridge some time ago so you couldn't get across .

Prior to the year 2000, there were only a handful of people who ever walked there and it was only fishermen who walked along the riverbank.

Any people who claimed they have walked on the proposed route were actually trespassing if they had not been given the farmers permission.

Yours sincerely

████████████████████

C. Carpenter

5

Beacons,  
Melksham  
Wiltshire  
SN2 [REDACTED]  
1716118

Rights of Way Countryside  
REF SM/2017/03+04

Dear Sir/Madam,

I have lived in Beacons all my life and over the last 25-30 years I've walked regularly from my home to Melksham. I use the footpath from Beechfield House exiting it just before the houses down to the Black Bridge and across to Murray Walk. I have known the Farthing family all my life and they gave me permission to walk across the land that they farmed on both sides of the River Avon.

I can clearly remember that there were metal gates across the bridge which were locked, so I was unable to take my normal route for a couple of years, this I reckon was 18 or 19 years ago, the gates were vandalised, and never replaced.

It is only 6 or 7 years ago that the fields either side of the river have been ploughed up and planted with maize, and only since then has the number of walkers and trespassers increased.

Prior to this the Farthings kept a lot of cattle there, and I rarely saw any other people out walking, and those that did that I spoke to had all like myself been given permission from the Farthings.

There were two "Private Property" signs, one is down by the river before you get to the Black Bridge, but is now in poor condition, and the other, which has since vanished, was on a post next to the metal field gate off Murray Walk.

I write to support Mr Farthing to have the application for a public right of way thrown out, as this is actually private land, that has been wilfully and systematically trespassed in recent years by an increasingly large number of people.

Page 98

Yours faithfully

[REDACTED] (PATRICK GREENMAN)

To Whom it may concern.

Wellesley Close  
Bowerhill  
Melksham  
Wiltshire  
SN12

6

Ref: SM/2017/03 & 04

21 June 2018

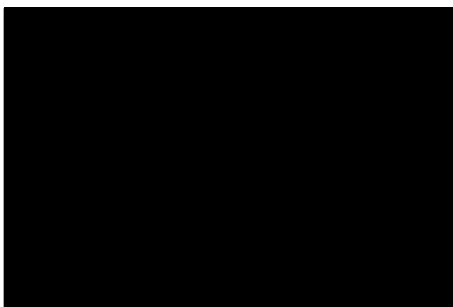
I used to live at 39. Avon Road, Melksham, Wilts. SN12 8BB with my parents until 2008.

I was friendly with one of the Farthing's workers and I was given the Farthing's permission to walk across the land which they farm on either side of the river Avon and across the old black concrete bridge. There was always a private property sign by the river near the bridge which is still there but rather rusty now and the lettering has worn off. When I lived here there were always cattle in the fields and if I ever noticed any problems with them, I would let the Farthing's know.

Quite often some person would cut the barbed wire fence so that they could get onto the land, seemingly oblivious to the fact that the cattle might escape out of the field, which on occasion has been the case and they have got out onto Murray walk.

10 years ago hardly anyone walked down here and those who did, so far as I know, had been given the Farthing's permission to do so.

Yours Sincerely



M Crook  
Corfe Road  
Melksham  
Wilts  
Sn12

7

18<sup>th</sup> June 2018

TO WHOM IT MAY CONCERN

Dear Sirs

Footpath Application – Murray Walk – River Avon

As secretary of Avon Angling Club I have an intimate knowledge of the above mentioned area, having fished and maintained the river bank for approximately 40 years.

Avon Angling members (in excess of 250) have benefitted for many years from Mr Farthing's permission to fish along this stretch of river and allowing us to erect several stiles for ease of access for our members, although it has always been private property.

- 1) There has been a private property sign and fence by the black bridge (off Thames Crescent) for as long as I can remember and until recently a stile for angler's access.
- 2) In Murray Walk the five bar gate has been locked and a private property sign affixed, with cattle residing until a few years ago.
- 3) The stile by Scotland Road bridge was constructed by Avon Angling Club to allow access for members and again there was a private property sign.

We as an Angling club would object to the granting of a public footpath as we have had to endure dog walkers aka trespassers with dogs running freely and unsupervised and the numerous inconsiderate owners failing to pick up faeces which poses a health risk to our members and will surely increase if made into a public footpath.

Regards  
M Crook

Mr M Robinson  
[redacted] Beanacre  
Melksham  
Wilts  
Sn12 [redacted]



16<sup>th</sup> June 2018

To whom it may concern.  
Sally Madgwick  
Wiltshire Council  
Rights of way and Countryside  
Reference:- SM/2017/03 & 04

My family moved to Beanacre in 1976 when I was three years old.

My Father used to take me when he walked our dog on Mr Farthings land on both sides of the river and I always understood that this was with Mr Farthing's permission as it was private property.

I can remember metal gates being locked on the Black Bridge because I used to walk back from a friends house in the Forest area of Melksham. Due to the gates I used to walk to Murray Walk, cross over the river and then walk back along it. Once past the houses I would rejoin the footpath that runs behind Beechfield House Hotel and follow it back to our house This would have been 18/19 years ago and after a short while the gates got vandalised/destroyed and not replaced .There still is a Private Property sign before you get to the Black Bridge and there was another one by the field gate at Murray Walk. This is no longer there , removed by vandals I guess.

Before Mr Farthing started to plant maize I can remember cattle being in the fields and very few people walking in those fields. Those who I did meet and speak to had been given permission by the Farthing family. I believe the maize has been planted for the last six/seven years. Over this time I have seen a large increase in people walking on Mr Farthings land and I have also noticed dog walkers not clearing up their dogs mess. I have found dog mess in plastic bags left in the fields and hedges and plastic bottles and beer cans left in the maize. Fence wire has been cut by people to make access easy.

I wish to support Mr Farthing in having the application for a public right of way thrown out. Over the last few years I have witnessed a big increase in the amount of litter/rubbish left on his land which has happened since the increase in people trespassing and not respecting what is private land.

Yours Sincerely

[redacted signature]

Mr F D Robinson

Beanacre

Melksham

Wilts

SN12

9

16<sup>th</sup> June 2018

To whom it may concern.

Sally Madgwick

Wiltshire Council

Rights of way and Countryside

Reference:- SM/2017/03 & 04

I have lived in Beanacre since 1976. Within the first couple of months of moving to Beanacre I met the Farthing family. This is when I asked their permission to walk on the land that they farmed on both sides of the river Avon. I have had dogs all my life so walk daily on Mr Farthings property often using the footpath which runs close to Beechfield House Hotel, I then come off the footpath, walk down to the Black Bridge and across to Murray walk. I then often walked into Melksham.

Over the last seven years or so Mr Farthing & family have planted maize on their land and I have noticed that over these years more and more people/walkers have trespassed on their property causing damage to their crops and fencing.

I remember before the maize was planted the Farthings kept cattle on the fields. At that time very few people walked in their fields and those that I met had been given permission to do so by the Farthing family.

About 19 years ago I can remember that you couldn't walk across the Black Bridge as there were metal gates padlocked together. I believe these were there for about two years until the vandals broke them and they haven't been replaced.

I can remember a Private Property sign being on a metal post near the field gate off Murray Walk. The sign is no longer there, having been removed, I believe, by vandals.

One Private Property sign remains, by the river before you get to the Black Bridge.

I wish to support Mr Farthing in having the application for a public right of way thrown out.

I have walked daily for many years on Mr Farthing's property. In recent years I have seen a large increase in people trespassing on what is private land.

I have witnessed fence wire cut, dog mess left on the ground and the maize crop damaged where people walk on it!

Yours Sincerely

[Redacted Signature]

F D Robinson

10

Woodrow Road  
Melksham  
Wiltshire  
SN12 [REDACTED]  
office@pactd.net

19 June 2018

To Who It May Concern

I am writing this letter with regard to the application for new footpaths across my farm and Tim Farthing's. In the first year that I have been a tenant at 1 Forest Farm I have had a great deal of difficulty with dog walkers trespassing across your land. It has been a great first year at the farm and I very grateful for the opportunity I have been given but it has been very difficult at times with people not sticking to the footpaths and just walking where they want to. I have been subject to a barrage of on line abuse from some of the local community, had fences torn down and thrown into the river, glass bottles smashed and cans left in fields and dog waste bags tied to gates and trees. My wife has also been verbally abused out walking in the fields, which resulted in police involvement and an official complaint made against the individual.

People have approached me and asked permission to continue to walk over the farm as the previous tenant had allowed them, but I have said that everyone is to stick to the one footpath which comes across my land, and explained my reasons why. However, this has been resolutely ignored.

With the new applications that have been sent in to the council, the trespassers created open days and evenings for people to go and fill in forms, sign letters and make an application. This has resulted in everyone submitting duplicate information and replicating the same form multiple times.

Sincerely yours,

[REDACTED]  
Gareth Powell

# Tim Farthing

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**From:** [REDACTED]  
**Sent:** 06 June 2018, 13:13  
**To:** [REDACTED]  
**Subject:** MURRAY WALK

Good day

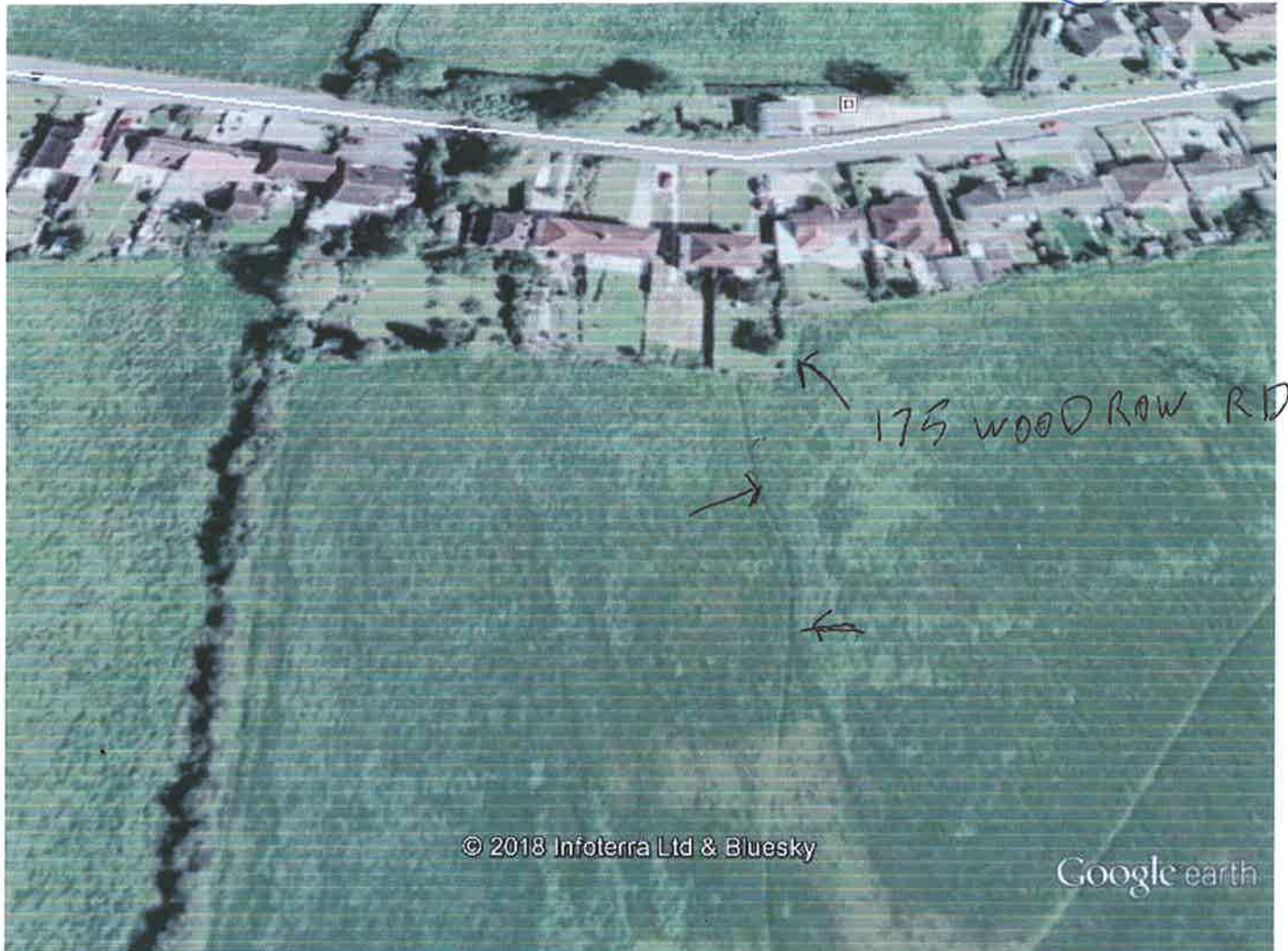
I lived in Woodrow road and Forrest road from the year 2000 until 2004  
I was able to go for walks from Murray walk to the Black Bridge and back round with the Kind permission of Tim Farthing who owns the land.

Regards  
Jeremy Thompson





12



Google earth



2002

This map clearly shows that the Carter family from 175. Woodrow Road, accessed the Guley's land via their own garden gate at the bottom of their garden. Obviously this is not the 'proposed footpath'. If the Carters want a footpath it should be routed straight through their garden onto Woodrow road.

13



Google earth



2006

This Google earth aerial photograph, taken approximately end of May 2006 after our silage has been harvested clearly shows the paths walkers have taken from our gateway off the Murray walk, which is definitely NOT the route of the proposed footpath, so people cannot claim to have regularly walked the proposed footpath.

These paths in the photograph would have been created between December - May once the cattle had been taken away, we often found that the barbed wire had been cut next to the locked metal 5 bar gate. The Cattle always grazed there from June-Dec along with our bull.



14

COOPER TIRE & RUBBER COMPANY UK LTD.  
BATH RD • MELKSHAM, WILTSHIRE, SN12 8AA • 01225 703101

Mr. Timothy Farthing  
Half Way Farm  
Bean Acre  
Melksham  
SN12 7QA

8<sup>th</sup> May 2017

Dear Mr Farthing,

**Ref: Black Bridge inspection report as commissioned by the Environmental Agency**

As discussed with you by telephone on Saturday morning 6<sup>th</sup> May, the Environmental Agency recently commissioned a "scour inspection report" on the Black Bridge. They have informed us that the **bridge was unsafe to use** and we want to make you aware of this. A copy of the letter from the Environmental Agency and the "scour inspection report" are included with this letter.

Please refrain from using the bridge. You did mention during our conversation on Saturday morning that there might be an alternative route for you to get access to the land you are currently renting from us. I suggest that we meet on an afternoon this week, or next, to check the viability of this proposed alternative.

Yours sincerely

  
**Philip Schneider**  
Chief Engineer  
Cooper Tire & Rubber Company Europe Ltd  
Telephone +44 (0) 1225 357766  
Mobile +44 (0) 7921 408716  
Fax +44 (0) 1225 357219  
Email [pschneider@coopertire.com](mailto:pschneider@coopertire.com)

Gavin Champion-HR Director  
Cooper Tire & Rubber Company Europe Ltd  
Bath road  
Melksham  
Wiltshire  
SN12 8AA

Our ref: FR/14/S090

Your ref:

Date: 10/04/2017

15

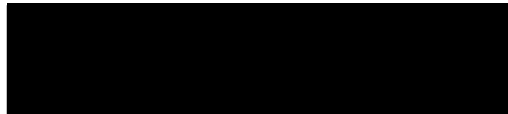
Dear Mr. Champion

**Black Bridge scour inspection report**

Following your correspondence with my colleague Melvin Wood, contractors CH2M have carried out a Scour inspection report on our behalf regarding Black Bridge in Melksham. As part owner of this bridge we have enclosed a copy of this report for your reference. As you will see, there is settlement and scour to the East abutment which has caused rotation of the structure. We have suspended our load assessment following the extensive scour found at this structure.

As part owner of the bridge please take note of the reports contents.

Yours sincerely



**Paula Humphrey**  
**Bristol Asset Performance**  
**Flood Risk Management**

[Enc CH2M Scour inspection report, & Living on the edge:]

# Scour Inspection Report

## Black Bridge (BA37)

PREPARED FOR: Environment Agency  
COPY TO: Leigh-Ann Jones  
PREPARED BY: Simeon Davies  
DATE: 31<sup>st</sup> March 2017  
PROJECT NUMBER: 487026

### Introduction

Black Bridge (BA37) carries a field accommodation bridge from east to west over the River Avon.


The structure is a two-span reinforced concrete deck cast on to six steel I beams with permanent concrete formwork panels, supported on a central engineering brick and stone pier and engineering brick and stone abutments.


The bridge measures 4.87m wide with equal 8.1m clear spans. Access to the watercourse was gained via the south west embankment; access to the abutments and central pier by the inspection technician was gained via water entry using surface supplied diving equipment.




Black Bridge (BA37)  
Grid Ref: ST 90684 65027  
South Elevation (Downstream)

## Inspection Findings

Access requirements	Waders	Drysuit	Diving	Platform/boat
Location	West abutment			
Photograph				
Construction details	The abutment is constructed predominantly in engineering brick with intermediate stone courses and is founded on stacked stone masonry blocks. It measures 3.16m high, 4.63m wide and 0.92m thick.			
Foundation details	The foundations appear to be stone masonry blocks bearing directly on to the natural riverbed, measuring up to 630mm high from the silt/stone riverbed.			
Water depth at abutment	0.7m at the abutment face, max depth within the channel was 2.0m.			
Direction of flow in relation to abutment	Parallel to abutments.			
Invert / bed material	Loose bed material, consisting mainly of silt and sporadic large stones.			
Existing scour protection	The engineering brick is founded on stacked stone masonry blocks, which protrude 700mm out from the face of the abutment; measuring 630mm high from bed level over the length of the abutment. There is a stone masonry revetment to the south west embankment, extending downstream, partially obscured by the adjacent earth embankment.			
Scour	There is no scour to the abutment or the stone masonry foundations. There is minor open jointing to the abutment face due to vegetation growth.			

Access requirements	Waders	Drysuit	Diving	Platform/boat
Location	East abutment			
Photograph				
Construction details	The abutment is constructed predominantly in engineering brick with intermediate stone courses and is founded on stacked stone masonry blocks. Upper courses of concrete block have been added. It measures 3.75m high, 4.63m wide and 0.92m thick.			
Foundation details	The foundations appear to be stone masonry blocks bearing directly on to the natural riverbed, measuring up to 630mm high from the silt/stone riverbed.			
Water depth at abutment	1.45m at the downstream elevation, 1.3m at the upstream elevation; max depth within the channel was 2.0m.			
Direction of flow in relation to abutment	Parallel to abutments.			
Invert / bed material	Loose bed material, consisting mainly of silt and large stone.			
Existing scour protection	The engineering brick is founded on stacked stone masonry blocks, which protrude 700mm out from the face of the abutment; measuring 630mm high over the length of the abutment. There is rock armour to the south east embankment, extending downstream. A concrete revetment extends upstream of the structure, predominantly obscured by the adjacent earth embankment.			
Scour	<p>There is settlement to the entire abutment. There is a concrete block repair/reconstruction to the top of the abutment measuring 720mm high on the downstream elevation reducing to 485mm high on the upstream due to the angle of the abutment. The south side of the abutment is 265mm lower than the north side (clearly visible in the photograph).</p> <p>There is scour to the south side of the abutment, measuring 1.7m long, 0.8m high and 1m deep. The stone masonry block foundations are missing over this length, with erosion to the riverbed and beneath the abutment.</p>			

	There is scour to the base of the concrete revetment to the north east of the abutment, measuring 0.5m high, 0.5m wide and 0.7m deep.
--	---

Access requirements	Waders	Drysuit	Diving	Platform/boat
Location	Central Pier			
Photograph				
Construction details	The pier is constructed in engineering brick with a stone masonry intermediate course and cut water. The pier measures 5.15m wide, 920mm thick and 3.1m high.			
Foundation details	The foundations appear to be stone masonry blocks bearing directly on to the natural riverbed, measuring up to 700mm high from the silt/stone riverbed.			
Water depth at pier	0.7m at the cutwater, max depth within the channel was 2.0m.			
Direction of flow in relation to pier	Parallel to pier.			
Invert / bed material	Loose bed material, consisting mainly of silt and large stones.			
Existing scour protection	The engineering brick is founded on stacked stone masonry blocks, which protrudes 800mm out from the face of the abutment; measuring 700mm high around the perimeter of the pier.			
Scour	<p>There is scour to the base of the cutwater, measuring 1.1m high, 0.92m wide and 1.2m deep.</p> <p>There is scour to the east side of the pier, measuring 1m long, 0.2m high and 0.5m deep.</p> <p>There is an area of missing brickwork to the north end of the west face of the pier, measuring 330mm long, 280mm high and 220mm deep.</p> <p>Around the pier, there is open jointing to the stone masonry foundations, measuring up to 200mm deep.</p> <p>There is scour to the downstream face of the pier, measuring 920mm wide, 500mm high and 300mm deep.</p>			



## Discussion and Recommendations

- 1) There is settlement and scour to the east abutment, which has caused rotation of the structure. The downstream 1.7m is completely unsupported due to the scour to the stone masonry foundations. In the short term, the abutment requires stabilizing by underpinning to prevent further deterioration of the structure. A long-term solution would also be required.
- 2) A weight limit should be attached to the structure following the load assessment calculations from the investigation works.
- 3) The voids to the cutwater should be filled, to prevent further deterioration of the pier, which could destabilise the bridge.

Additional Photographs/Notes



Photograph No. 1: Scour to the cutwater of the central pier



Photograph No. 2: Scour to the east abutment



**Photograph No. 3: Missing brickwork to the central pier**



**Photograph No. 4: Typical open jointing to the stone masonry block foundations**

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## User Evidence Summary Application no. 2017/04 - southern or green route

Provisional relevant period 1997 – 2017

No	Time of use	Years in rel. period	Frequency	Other users?	Signs	Gates/stiles etc	Challenge	Was the landowner aware?	Notes
1/04	1998 – 2017	19	Daily or every two days	Several walkers, dog walkers and joggers	No	No	No	Yes. A clearly defined footpath has been made over time, clearly showing regular and sustained use of the route and, given the number of people using it, the landowner must have seen walkers at some point whilst tending their land.	
2/04	1995 – 2017	20	Between 7 and 4 times per week	Yes dog walkers	Only for canal walk by play area and continuation of path after Forest Farm land	The only gates were on public footpath to Lacock	No	I often walked with the farmer (don) with my dogs off the lead. I helped him move his fence for the next days grazing and my right to access was never questioned. He often talked to walkers if he was in the field at the time	The path was defined by continual use of walkers (dog owners). The fields were not gated and fenced with a single strand electric fence that was used after the hay was made. The fields were then strip grazed to within approx. 5 metres of the River Avon
3/04	2003 -2014	11	Daily	Yes also walking pet dogs	No	No	No	Yes due to the well trodden track through the field and the number of people who use the land for the same purpose.	Followed a dirt track and didn't deviate

No	Time of use	Years in rel. period	Frequency	Other users?	Signs	Gates/stiles etc	Challenge	Was the landowner aware?	Notes
4/04	1985 – 2017	20	Daily	Dog walkers	No	Stile at D	No	Yes because of the worn tracks around the field	Enclosed photo of worn path beside river
5/04	1979 – 2017	20	Monthly more in spring and summer	Walkers	No	Stile at D	No but barbed wire and trees put across track in May 2017	Yes previous farmer would have seen well worn tracks	Photo of stile at point D in 2007, worn path and new fence 2017
6/04	1979 – 2017	20	2 to 3 times per month	Yes several people walking	No	No	No fencing and barbed wire May/June 2017	Yes the amount of people who used the way. The farmer must have seen them. Also the paths were well worn,	
7/04	1979 – 2017	20	Monthly to 2008 then bi weekly	Lots of people walking or walking with dogs	No	Stile at D until 2014	No fence put up about May 2017	Yes because obvious week worn tracks on route	
8/04	1999 – 2017	18	Daily	Yes walking and jogging	Footpath signs at B	Old step stile at The Hatches (D)	No	Yes the footpaths were clearly worn and sometimes the farmer would be working in the field also the stile was being repaired if needed	Form stated “photographs attached” but none were.
9/04	2000 – 2017	17	Daily	Yes walking and jogging	Footpath signs at B	Old step over stile at the hatches (D)	No	Yes it was a clearly worn footpath and he has seen people walking	

No	Time of use	Years in rel. period	Frequency	Other users?	Signs	Gates/stiles etc	Challenge	Was the landowner aware?	Notes
10/04	1992 – 2017	20	3 times a day 52 weeks per year	Yes walkers	Sign on Murry Walk showing Lacock along the route	No gates stile at D	No	Yes I often saw the farmer and would stop for a chat. Many times I informed the farmer if one of his livestock was distressed or had fallen into the river.	Photo of dogs and walkers in Forty Acres dated 1996.
11/04	2010 – 2017	7	Daily	Yes other dog walkers	No	Stile at sports field and the hatches. Removed and not replaced	No	Yes obvious track around the fields and the fact that he put up fences only where people enter the field	
12/04	1999 – 2017	8	Daily	Walkers with dogs	No	Stile at D and G when started walking	No only when fence put up at D	Yes frequently would see farmer to wave to when walking along path D and C. Farmer at G and E would often pass us when tending livestock/crops and be unconcerned with us walking past.	
13/04	1976 – 2018	20	Twice weekly	Yes walking with dogs	No	No	No	Yes path is very well worn.	
14/04	1976 – 1982 and 2016 – 2018	1	More than 6 times per year	Yes and walking	No	Can't recall	Can't recall	Yes due to the number of people using the route.	
15/04	1996 – 2017	20	Almost every day	Yes and with dogs	No	No	No	Yes because of the well worn path made by people walking on it for many yrs	

No	Time of use	Years in rel. period	Frequency	Other users?	Signs	Gates/stiles etc	Challenge	Was the landowner aware?	Notes
16/04	1974 – 2017	20	2 or 3 times per week	Yes – regular dog walkers and others	Not until 2017	Stiles at F, G and D	Aware of others being challenged in 2017 but not before	Yes. The well used footpath was obviously being used a lot. The farmer has tried his best to try and cover up the footpath on the forty acre field	
17/04	2009 – 2017	8	Twice daily	Yes – other dog walkers, school children, cyclists and workers	No	Two styles into fields as well as gates which were never locked	No	Yes. All the fields used to be to pasture. The field to the north did have some trees and masonry in the middle which apparently was used for target practice by the Home Guard during the last war. It was an area very popular with the young people.	
18/04	2009 – 2017	8	Twice daily	Yes – many other dog walkers, school children, cyclist and people going to work	No never	Yes gates at F never locked	No	Yes. All fields were to pasture. The field to north had some trees and masonry in the middle which were used by the Home Guard during the last war.	



## WILTSHIRE COUNTY COUNCIL

DEPOSIT OF PLANS UNDER SECTION 31(6)  
OF THE HIGHWAYS ACT 1980

The Wiltshire County Council of County Hall, Bythesea Road, Trowbridge, Wiltshire, hereby deposit plans numbered 1-57 in attached schedule under Section 31(6) of the Highways Act 1980 showing land(s) in the ownership of the County Council delineated in red on the said plans. The paths and ways shown as denoted by the O.S. symbol for footpaths have been dedicated as public footpaths, the paths and ways as denoted by the O.S. symbol for bridleways have been dedicated as public bridleways, and the ways denoted by the O.S. symbol for byways have been dedicated as byways open to all traffic. No other ways over the said land(s) have been dedicated as highways.

Signed: 

For and on behalf of Wiltshire County Council

Dated this 28 November 1995

WILTSHIRE COUNTY COUNCIL

DEPOSIT OF PLANS UNDER SECTION 31(6)  
OF THE HIGHWAYS ACT 1980

No	O S Sheet	Location	No	O S Sheet	Location
1	SU 05 NE SU 06 SE	All Cannings	16	ST 94 SE	Chitterne
			17	ST 97 NE	Christian Malford
2	ST 93 SW	Berwick St Leonard	18	ST 95 SW	Coulston
3	SU 19 SW	Blunsdon		ST 95 SE	
4	SU 02 SW	Bowerchalke	19	ST 98 SE	Dauntsey
5	ST 86 NW	Box		SU 08 SW	
6	SU 08 NW&NE SU 09 SW&SE	Braydon	20	ST 95 NE ST 96 SE	Devizes & Potterne
7	ST 97 SE ST 97 NE	Bremhill	21	ST 98 SW ST 98 SE	Draycot
8	ST 98 NE SU 08 NW	Brinkworth	22	ST 95 SW	Edington
9	SU 02 NW SU 02 SW	Broadchalke	23	SU 18 SW	Elcombe Estate
10	ST 96 SE	Bromham		SU 17 NW	
11	ST 95 NW ST 95 NE	Bulkington		SU 1083-1183	
				SU 1283-1383	
12	SU 07 NE	Bushton	24	ST 95 NW	Erlestoke
13	ST 97 SE SU 07 SW	Calne		ST 95 NE	
14	SU 09 SE	Chelworth	25	ST 92 NE SU 02 NW	Fovant
15	ST 97 SW ST 97 SE	Chippenham	26	ST 97 NE	Foxham

**WILTSHIRE COUNTY COUNCIL SCHEDULE OF DEPOSITED PLANS** *Page 2*

No	O S Sheet	Location	No	O S Sheet	Location
27	ST 93 SW	Hindon	39	SU 08 NW	Purton
28	ST 73 NE ST 83 NW	Kilmington		SU 08 NE SU 09 SW	
29	SU 07 NW SU 07 NE	Lyneham		SU 09 SE	
30	SU 04 NW	Maddington	40	ST 96 SE	Rowde
	SU 04 NE		41	ST 82 NE	Sedgehill
	SU 04 SW		42	ST 95 NW	Seend
	SU 04 SE			ST 95 NE ST 96 SW ST 96 SE	
31	ST 95 NE	Marston	43	ST 88 NW	Sherston
	SU 19 NW SU 19 NE			ST 88 NE	
32	ST 96 SW	Melksham	44	ST 98 SW	Startley
	ST 96 NW			ST 98 SE	
33	ST 83 NE	Monkton Deverill	45	SU 13 SW	Stratford sub Castle
34	SU 17 SE	Ogbourne St George		SU 13 SE	
	SU 17 NE		46	SU 18 NE	Stratton St Margaret
	SU 27 SW SU 27 NW		47	ST 92 NE	Sutton Mandeville
35	SU 15 NW	Pewsey		ST 93 SE SU 02 NW SU 03 SW	
	SU 15 NE		48	ST 92 NW	Tisbury
	SU 16 SW SU 16 SE			ST 92 NE ST 93 SW ST 93 SE	
36	ST 97 SW	Pewsham	49	ST 85 NE	Trowbridge
37	SU 23 SW	Pitton		ST 86 SE	
38	ST 95 NE	Poulshot			
	ST 96 SE				

**WILTSHIRE COUNTY COUNCIL DEPOSITED PLANS SCHEDULE *Page 3***

No	O S Sheet	Location	No	O S Sheet	Location
50	SU 15 SW SU 15 NW	Upavon	55	ST 97 SE ST 97 SW ST 97 NE ST 97 NW	West Tytherton
51	SU 28 SW	Wanborough			
52	ST 84 NE	Warminster			
53	ST 85 SE	Westbury			
54	ST 85 SE ST 85 NE	West Ashton	56	SU 15 NW SU 16 SW	Wilcot
			57	SU 18 SW SU 18 SE	Wroughton

**MEMORANDUM**

**To:** R J Kerr-Bonner  
Farms Department  
Wiltshire County Council

**From:** County Secretary & Solicitor

**Ref:**

**Ref:** BB/AP/  
**Ext:** 3044

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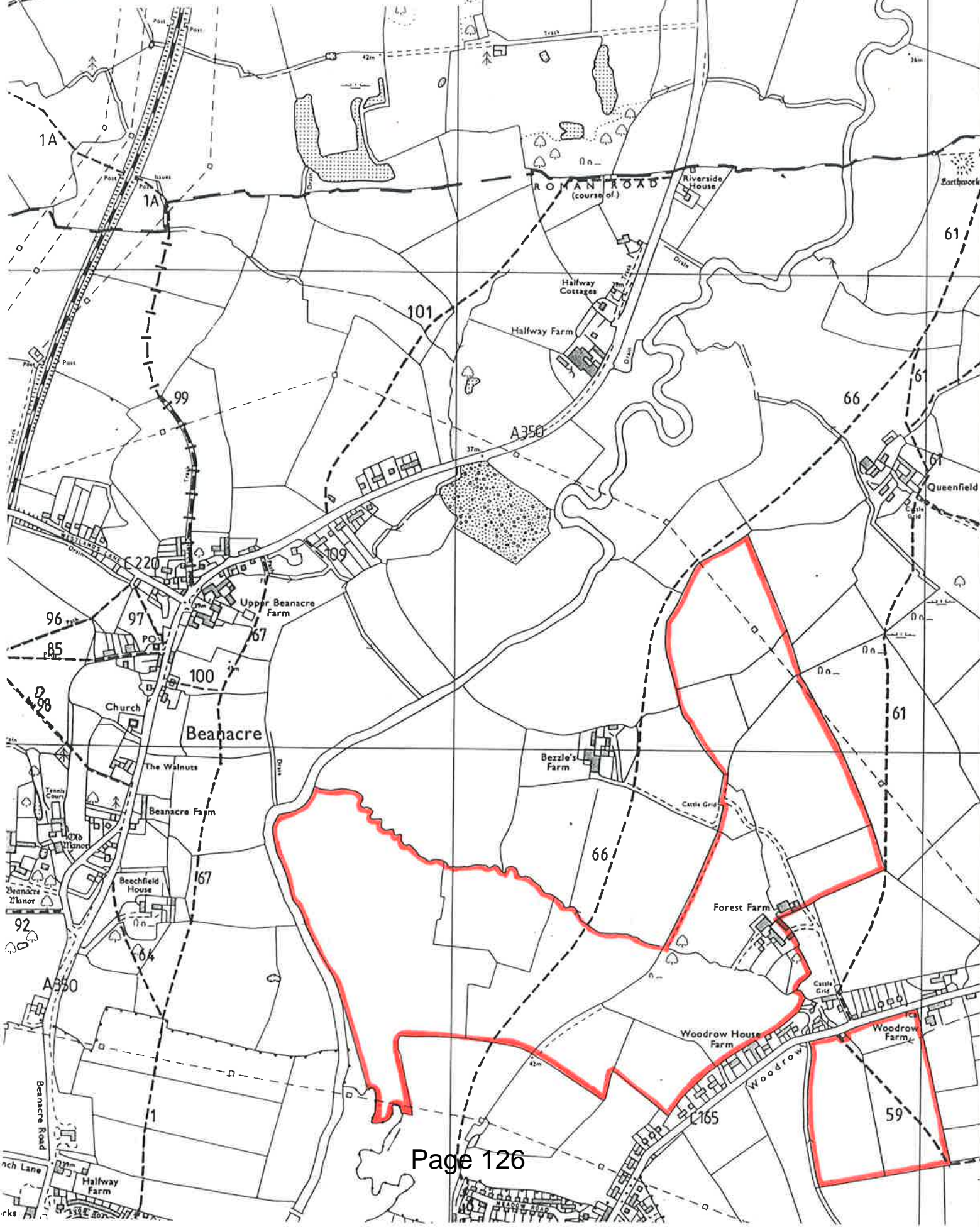
**Re: Highways Act 1981 - Section 31**

I acknowledge receipt of the plans sent to the Rights of Way Dept. to be deposited.

MELKSHAM

O.S. Sheet :- ST 96 NW.

SCALE :- 1/10,000.



WILDLIFE AND COUNTRYSIDE ACT 1981

**THE DEFINITIVE MAP AND STATEMENT FOR THE MELKSHAM URBAN DISTRICT COUNCIL AREA DATED 1953 AND THE BRADFORD AND MELKSHAM RURAL DISTRICT COUNCIL AREA DATED 1952 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL PARISH OF MELKSHAM PATH No. 107 & MELKSHAM WITHOUT PATH No. 151 RIGHTS OF WAY MODIFICATION ORDER 2019**

This order is made by Wiltshire Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the Definitive Map and Statement for the Melksham Urban District Council area dated 1953 and the Bradford and Melksham Rural District Council area dated 1952 as modified under the provisions of the Wildlife and Countryside Act 1981 require modification in consequence of the occurrence of events specified in section 53(3)(c)(i) of the Act, namely 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;

The Authority have consulted with every local authority whose area includes the land to which this order relates.

The Wiltshire Council hereby order that:

1. For the purposes of this Order the relevant date is the **XXXXX**
2. The Definitive Map and Statement for the Melksham Urban District Council area dated 1953 and the Bradford and Melksham Rural District Council area dated 1952 as modified under the provisions of the Wildlife and Countryside Act 1981 shall be modified as described in Parts I and II of the Schedule and shown on the plan attached to the Order.
3. This Order shall take effect on the date it is confirmed and may be cited as the Wiltshire Council Parish of Melksham Path No. 107 & Melksham Without Path No. 151 Rights of Way Modification Order 2019.

**THE COMMON SEAL of**                    }  
**WILTSHIRE COUNCIL was**                }  
**hereunto affixed this **XX** day**       }  
**of **XXXXX**                2019**            }

**in the presence of:**

## SCHEDULE

### PART I

#### MODIFICATION OF DEFINITIVE MAP

<b>Parish</b>	<b>Path No</b>	<b>Description of footpath to be added</b>	<b>Modified under Section 53(3) as specified</b>
Melksham	107	<p>That length of footpath leading from Point F at OS Grid ref. ST9065 6454 to the Parish Boundary close to Point D. Also from Point E over the River Avon to Point G and H at OS Grid ref. ST 9062 6495 and as shown on the plan attached hereto by a black broken line.</p> <p>Approx length = 950 metres Width = 1.6 metres</p>	53(3)(c)(i)
Melksham	151	<p>That length of footpath leading from the Parish Boundary close to point D to Point D continuing from Point C to B to A on Woodrow Road and as shown on the plan attached hereto by a black broken line.</p> <p>Approx length = 630 metres Width 1.6 metres</p>	53(3)(c)(i)



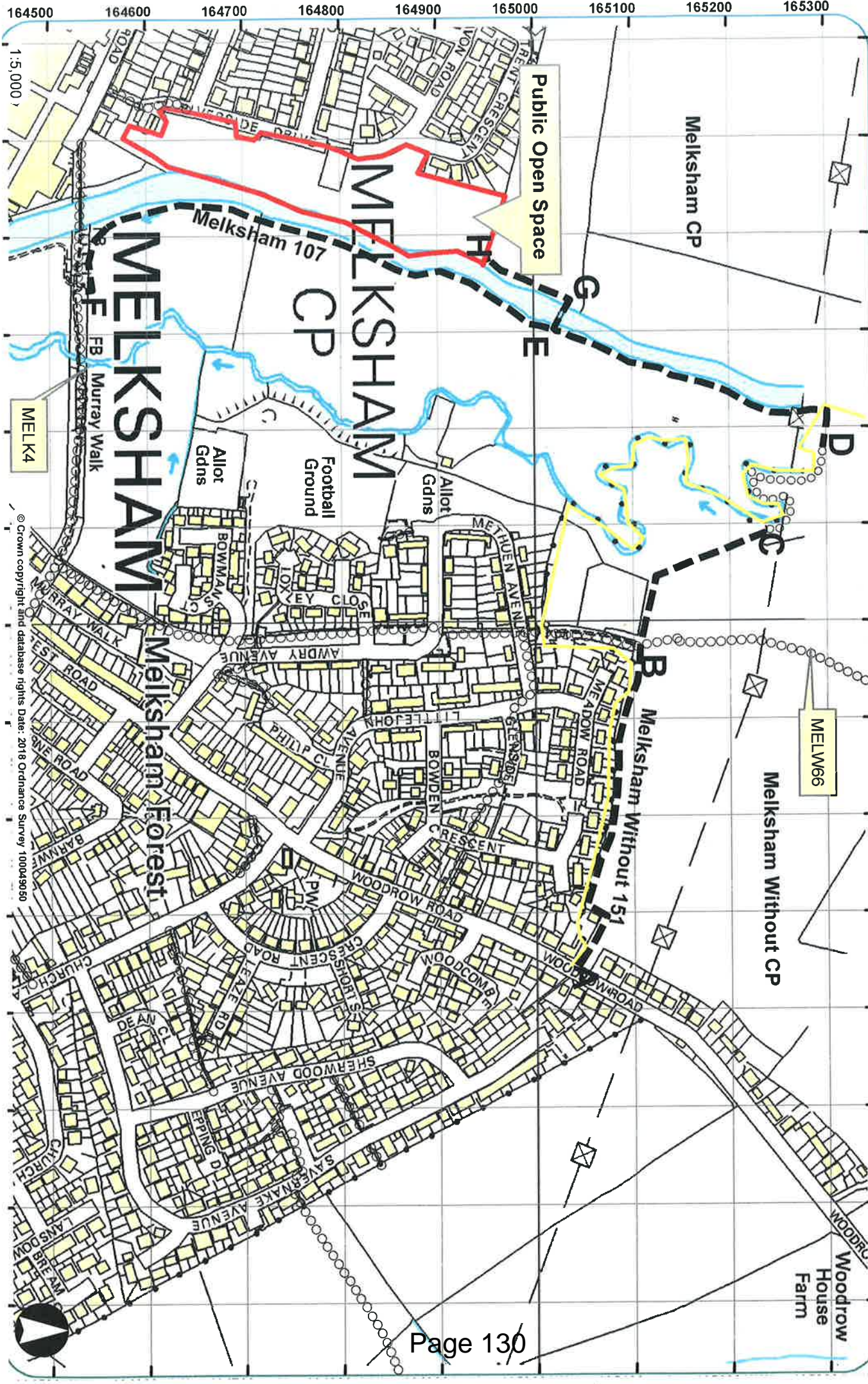
## SCHEDULE

### PART II

#### MODIFICATION OF DEFINITIVE STATEMENT

Parish	Path No	Description of path	Modified under Section 53(3) as specified
Melksham	107	<p>FOOTPATH leading from its junction with Path no. 4 Murray Walk to the River Avon where broadly north and north north east along the field edge following the River to the Parish Boundary at OS Grid ref. ST 9079 6529.</p> <p>Also from OS Grid ref. ST 9070 6502 crossing the river by the bridge leading south west to the Public Open Space land at OS Grid ref. ST 9062 6495</p> <p>Approximate length: 950 metres Width: 1.6 metres</p> <p>Limitations and Conditions: Stile at OS Grid ref. ST 9079 6529 Stile at OS Grid ref. ST 9062 6495</p>	53(3)(c)(i)
Melksham Without	151	<p>FOOTPATH leading from Parish Boundary at OS Grid ref. ST 9079 6529 to ST 9082 6530 and from OS Grid ref. ST 9090 6524 south east to the field edge where broadly east across path no. 66 following the field edge to Woodrow Road at OS Grid ref. ST9136 6504</p> <p>Approximate length: 630 metres Width: 1.6 metres</p>	53(3)(c)(i)

Footpath subject to Deed of Dedication C ○○○○○○○○○○ D Parish Boundary  
 390800 390900 391000 391100 391200 391300 391400 391500 391600 391700



© Crown copyright and database rights Date: 2018 Ordnance Survey 100049050

To: Sally Madgwick,

Mr B J Dicks  
Woodrow road  
Melksham,  
Wilt

APPENDIX C  
Objections and  
Representations

ROW,

Wilts Council,  
Bythesea Road,  
Trowbridge.

Dear Madam,

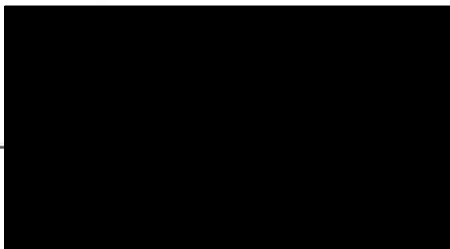
Ref SAM/2017/04

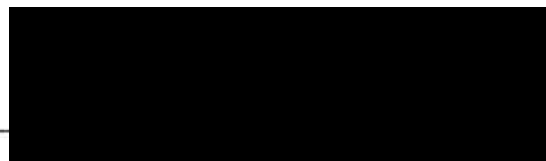
9/4/20

Melksham Path 107 and Melksham without 151.

I support the recording of the path. I live a few yards away from the Woodrow Road entrance. I have walked the route many times over the years. My partner Sue and I board dogs at our home and often they have accompanied us along the route. Always on a lead. I also like the accessibility over the concrete bridge onto the public area opposite Riverside Drive. I moved to Woodrow Road in 2007. I and my partner Mrs Susan Wordley are regular walkers. She also supports the path being recorded.

Yours faithfully,





Church Walk  
Melksham

SN12

11. April 2020

Dear Sally,

Melksham / 2017 / 04

I am writing in support of the recording of the path and I believe this is a very important issue.

My family and I have used this path for 29 years as we have regularly walked our dogs around this area.

We moved to Forest Road in October 1990 and my oldest son had his first puppy Roobarb. With small children in tow, we began a long number of walks with Roobarb across the fields from howbawne, observing the countryside rules of sticking to the field edges and closing gates

Where we opened them.

Sadly Roobasb passed away in 2004 and we replaced her with Bow. We then added Coco in 2015 and the two dogs had regular walks with various family members almost every day until the current time. Bow passed away in 2018 and now it's Coco and the family.

We have been saddened by the radical behaviour of the Council farmer and also his neighbours and feel that their actions have spoilt the pleasure of local people beyond the measures needed.

We hope that the path will be granted a right of way and that we can all live together peacefully.

It would be lovely to see the 40 acre field farmed correctly and in the spirit of  
yours sincerely, <sup>the</sup> ~~grazing~~ of a  
Council farmer.

  
Mrs Sarah Clover

7-4-20

██████████ Forest Road  
Melksham  
Wiltshire  
SN12 ██████████

REF: SAM/2017/04

Dear Sally Madgwick,  
I would like to say  
that I support the  
recording of the R.O.W  
SAM/2017/04. I have been  
walking this route  
since 1995 to 2020.

Yours faithfully  
██

Received 24.4.20

[REDACTED]  
[REDACTED] Awdry Avenue  
Melksham  
SN12 [REDACTED]

Email: [REDACTED]

Sally Madgwick  
ROW  
Wiltshire County Council  
Bythesea Road,  
Trowbridge  
BA14 8JN

16th April 2020

Ref No: 107 & 151

Dear Sally Madgwick,

**The Wilts County Parish Melksham Path No. 107 and Melksham Without Path No. 151  
ROW Modification Order 2020 Ref: SAM/2017/04**

I am writing to you in support of the above Modification Order.

Over the past four years, since moving to Melksham, I have frequently walked with my dog along these footpaths enjoying the peacefulness, beautiful views of the river and spotting birds and flowers. If I manage to catch sight of a kingfisher, it makes my day. It will be a shame if this footpath disappears especially as we are urged to take more exercise by walking thus reducing pollution plus it is good for people's mental health and wellbeing.

I sincerely hope this modification comes into being.

Stay safe and well.

Yours sincerely

[REDACTED]  
Kathy Hart

Received  
24.4.2020

## Kay Fountain

Sally Madgwick,  
ROW, Wilts Council,  
Bythesea Road,  
Trowbridge, BA14 8JN

██████████ Bowmans Court

Melksham

Wilts

SN12 ██████████

19/04/2020

Ref: SAM/2017/04

To Whom It May Concern

I have been walking on the path described in this ROW modification since July 2017, and I fully support the plan to adopt it as a right of way.

During the time I have lived in Melksham I have witnessed conflict between the tenant of the fields next to the paths and the local community which has used the path peacefully for many years. I feel that the current situation is not healthy for either party and can only be resolved by the adoption of the ROW.

The tenant of the fields has grubbed up trees and hedges to use as barricades to block the path. He has ploughed the paths next to the river edge in an attempt to destroy them and in doing so has contravened regulations regarding cultivation on river banks. He has damaged tree roots stabilising the river bank and destroyed valuable wildlife habitat. In addition he threatens to shoot dogs he finds on his land even though there is no livestock on the majority of fields adjacent to the path. I believe it is only by adopting the ROW that the conflict causing this environmental destruction will end and both parties can move forward with a constructive plan to ensure that everyone's needs are fulfilled, and everyone's rights are respected.

Kind regards,

██  
Kay Fountain B. Vet. Med. MVS (Conservation Medicine) MRCVS



████████ Granville road  
Melksham  
Wilts.  
Sn12 ██████████

Received  
24.4.2020

19th April 2020

Ms. Sally Madgwick  
ROW  
Wilts. Council  
Bythesea road  
TROWBRIDGE  
Wilts.  
BA148JN

Dear Ms. Sally Madgwick,

Ref: SAM/2017/04

I am an enthusiastic supporter of the recording of this path.

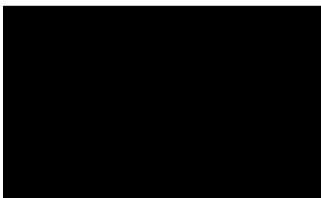
I fully support the continued use of this pathway, as I have walked this path since 1970.

I have used it to go birdwatching and latterly as a keen wildlife photographer.

You can contact me on 01225 ██████████ or at the above address.

Kind regards,

Kevin Porter.



Received  
24.4.2020  
REF  
SAM 2017/04.

Robert Edwards.  
Halfway Farmhouse  
Beandene Rd  
Melksham  
Wilts  
SN12.

YES I AM 100% IN FAVOUR of this footpath  
my name & address is at the top of this letter.  
Since I retired and moved to this address,  
I like to walk in the countryside and have found  
the footpaths are the best way to appreciate the  
country and the wildlife. Since losing my wife  
I have become to rely even more on these  
walkways. And I have been using this particular  
walk for at least the last 10 years.  
it would be "Perfect" if this walk  
could be extended along the river all the  
way to Lacock. That would be some walk!

yours Sincerely

P.S. my Son in Law has been using that  
walk since he was a child he is now  
54 (so many years.)

Church Walk  
Melksham  
Wilts  
SN12

Received  
24.4.2020

17/04/2020

Dear Ms Madgwick

I am writing in support the recording of the proposed footpath Path 107 and 151 in Melksham.

I have been a resident of Melksham since 1985 and have used the footpath since 1987 on a continual basis. The path is a benefit to many people in the town, not just dog walkers but those who enjoy the fresh air and respect the country side.

I hope that you and the council will look favourably on this ROW as it has been in place for a large number of years.

Yours sincerely

  
  
Keith Clover

Received  
24.4.20



Sawyer's Creek

Melksham

SD12



15.4.20

Ref SAM/2017/4

Dear Ms Madyard,

My husband & myself  
made walked the fields  
& rights of way from  
Woodrow W. across the  
fields to harvest & down  
over 40 acres across the  
Black Bridge over to  
Beun area. Since the  
1980's until present day.

We support the  
recording of the said path.  
Yours faithfully



Recd 29 APRIL 2020

[REDACTED] Avon Road  
Melksham  
Wiltshire  
SN12 [REDACTED]

23 April 2020

Sally Madgewick  
Wiltshire County Council  
Rights of Way Dept.

Dear Ms Madgewick,

I am writing to you on behalf of my wife and myself in support of the scheme SAM/2017/04 to make a footpath along the side of the river Avon at Melksham.

I have been resident at Avon Road Melksham for over 50 years and during that time have often walked much of the proposed route; which, in spite of the deplorable state of the trees along the river bank and although it has become increasingly difficult in more recent times since the field concerned has been ploughed is still a delightful experience at any time of the year and will I am sure be a welcome amenity for the people of the town.

The recent lockdown and restrictions on walking far from home has made it clear to me that there are all too few decent paths that can be walked close to where I live and I think this proposal would help considerably in redressing the balance.

Yours sincerely,

[REDACTED]

Robert J Purnell.

Recd 29 April  
2020

██████████ FOREST ROAD  
MELKSHAM  
SN12 ██████████

Ref. SAM/2017/04

I'veer Sally,

I'm writing in support of the proposed right of way. I've only lived in Melksham for 3 months but have walked the route daily as I thought it already was a right of way. It is very well used by dog walkers, runners, families and even teenagers at all times of the day. I think it would be a welcome link with the missing waterway route.

Yours sincerely,

██████████  
G. GUÐMUNSEN

████████ Addison Road  
Melksham  
Wilts  
SN12 ██████████

23<sup>rd</sup> April 2020

Sally Madgwick  
ROW  
Wiltshire Council  
Bythesea Road  
Trowbridge  
BA14 8JN

*Recd 29 April 2020,*

Ref: SAM/2017/04

Dear Ms Madgwick,

I would like to support this application. I moved to this area in 1989 and can remember walking these paths from shortly after that date. We have always been keen walkers and have walked these on a regular basis. I have never been challenged when walking these paths nor seen anything to show otherwise. These footpaths have been and should be a valued local asset.

Yours sincerely,

████████████████████  
Kevin Davis

06 May 2020

Rights of Way and Countryside  
County Hall  
Bythesea Road  
Trowbridge  
Wiltshire  
BA14 8JN

Mrs S C Sprules  
■ Portman Road  
Melksham  
SN12 ■

Your ref:  
Our ref: SAM 2017/04

Dear Mrs Sprules

**Wildlife and Countryside Act 1981 s.53  
The Wiltshire Council Parish of Melksham Path No. 107 & Melksham Without Path  
No. 151 Rights of Way Modification Order 2020**

Thank you for your letter supporting the above order. This has been accepted as a duly made representation. You will have noticed that owing to the current pandemic and restrictions on movement the advertisement period for this order is unusually long. Accordingly I am unlikely to write to you again on this matter until later in the summer when I will know what other representations and objections have been made.

If you have any queries in the meantime please don't hesitate to contact me.

Yours sincerely

Sally Madgwick  
Definitive Map and Highway Records Manager  
Direct Line: 01225 713392  
Sally.madgwick@wiltshire.gov.uk



Portman Road,  
Melksham,  
Wiltshire,  
SN12  
5th May 2020

Sally Madgwick,  
ROW,  
Bythesea Road,  
Trowbridge,  
BA14 8JN.

Ref.-SAM/2017/04

Dear Sally Madgwick,

I am writing in reference to the new footpath at Ref. SAM/2017/04. My family and I have been using these routes to walk our dogs for over 38 years. I have lived in Portman Road since 1982 and these routes were always accessible for people to walk along.

When using these routes, I would walk from Riverside Drive playing fields and go into the field where there used to be a stile into that field. I would then cross the black bridge into the fields across the river. I would then either turn left and head towards the brook, cross the brook into the other fields and head up towards Woodrow Road. Or I would head towards Murray Walk and exit the fields that way. I would sometimes enter the fields starting at Murray Walk. If these routes were to become public footpaths my family and I would regularly use these walks.

Thank you for your time.

Yours sincerely,

Mrs. S.C. Sprules.

P.S.

I would also like to take this opportunity to bring to your attention the footpath from Avon Road to Beanacre. This is another walk my family and I use however; it is not maintained by the farmer and there is no footpath to walk on as he ploughs it up all the time. In addition, the first bridge across the ditch from Avon Road is damaged and is not very safe to walk on and needs repairing.

St Margarets Gdns  
MELKSHAM.

SN 12

30-04-20

Re: ROW Ref SAM/2017/04

My husband and I  
have been regular walkers  
in the fields off Murray  
Walk Melksham since  
1957. As a child I  
walked from Lower Forest  
to Banuack across the  
concrete bridge on a  
regular basis so I  
have used the bridge  
since 1951.

Yours sincerely

MR V MORRIS

██████████ GRANVILLE RD

MELKSHAM

WILTSHIRE

SN12 ██████████

21225 ██████████

27<sup>th</sup> APRIL 2020

Year of birth 1959.

I have lived in Melksham for 60 years  
My mother always walked the  
dog and took us children with her that  
was late 1960s

Going from Granville rd via H-G-E  
as marked on your map up to D-C  
and back along the small stream  
to Murray walk, over the green  
bridge by the Avon and home.

Had a brother living in Meadow  
rd in the 1970s, again used to use  
from Granville rd H-G-E across  
the field to B, then half way  
towards A enter my brother's home  
via back garden.

Spent many years also fishing with  
my brother between F-D.

Have spent many years walking  
our dogs with my wife along the route.  
But local farmer in his wisdom  
to put up barbed wire in position  
H, and all along the bridge G-E

Making it rather dangerous, for  
myself the wife and dogs, so stopped  
using

With this information I support  
the recording of the path

[REDACTED]

(VICTOR MORRIS)

email

[REDACTED]

please could you let me know  
that you have received this please  
and that i have not wasted my time

yours sincerely

[REDACTED]

Portman Road,  
Melksham,  
Wiltshire,  
SN12 [REDACTED]  
5th May 2020

Sally Madgwick,  
ROW,  
Bythesea Road,  
Trowbridge,  
BA14 8JN.

Ref.-SAM/2017/04

Dear Sally Madgwick,

I am writing in reference to the new footpath at Ref. SAM/2017/04. My family and I have been using these routes to walk our dogs for over 38 years. I have lived in Portman Road since 1982 and these routes were always accessible for people to walk along.

When using these routes, I would walk from Riverside Drive playing fields and go into the field where there used to be a stile into that field. I would then cross the black bridge into the fields across the river. I would then either turn left and head towards the brook, cross the brook into the other fields and head up towards Woodrow Road. Or I would head towards Murray Walk and exit the fields that way. I would sometimes enter the fields starting at Murray Walk. If these routes were to become public footpaths my family and I would regularly use these walks.

Thank you for your time.

Yours sincerely,

[REDACTED]

Mr. P.D. Sprules.

P.S.

I would also like to take this opportunity to bring to your attention the footpath from Avon Road to Beanacre. This is another walk my family and I use however; it is not maintained by the farmer and there is no footpath to walk on as he ploughs it up all the time. In addition, the first bridge across the ditch from Avon Road is damaged and is not very safe to walk on and needs repairing.

Recd  
7/5/20

SUE ALDRIDGE

████████ SCOTLAND ROAD

SN12 ██████████

F. SAM / 2017 / 04

Dear Sally Madgwick,

I am writing to support the Row. I moved to Melksham in 1987. I was shown the R.O.W. by the previous owner of the house and then by a couple in Riverside Drive. I have been walking the displayed route for over 30 years. The couple who showed me the route had been walking it for many years but have both passed away. I know of many people who used to walk this route that have now died. I hope this can be taken into consideration.

Yours Sincerely ██████████

SUE ALDRIDGE

SCOTLAND ROAD

SN12 8AJ.

REF. SAM/2017/04

Dear Sally Madgwick,

I am writing to support the Row. I moved to Melksham in 1987. I was shown the R.O.W. by the previous owner of the house and then by a couple in Riverside Drive. I have been walking the displayed route for over 30 years. The couple who showed me the route had been walking it for many years but have both passed away. I know of many people who used to walk this route that have now died. I hope this can be taken into consideration.

Yours Sincerely

# Paul Bailey

## Painter & Decorator

(City and Guilds Advanced Craft Qualified)

Forest road  
Melksham  
Wiltshire  
SN12

Phone 01225

Mobile

Email paul@

Sally Madgwick,  
R O W,  
Wilts Council,  
Bythesea Road,  
Trowbridge  
Wiltshire,  
BA14 8JN

14<sup>th</sup> April 2020

Ref SAM/2017/04

Re – Dog walking along River Avon

Dear Sally,

I have lived in Forest Road for 30 years and I have kept dogs for all of that time. I have tried to walk my dogs along the river past the Black bridge and up to the back of Forest for all of that time (weather permitting). The present farmer has done everything in his power to stop this even blocking the Black bridge off, of which I played over when I was a child. Please keep this foot path open.

Kind regards

Paul Bailey



Recd 13/5/20

Forest Road, Melksham, Wiltshire, SN12

Sally Madgwick - Rights of Way  
Wiltshire Council  
Bythesea Road  
TROWBRIDGE  
Wiltshire  
BA14 8JN

May 12<sup>th</sup> 2020

**REF: SAM/2017/04**

Dear Ms Madgwick

I would like to add my support to the recording of the path as described under this reference from Murray Walk (F) along the river in it's entirety to point (A) and also across the concrete cattle bridge (G - H).

I moved to Melksham in 2009 and used this path every day, sometimes twice to walk my dog, it was a beautiful walk along the river and looking out across a flower meadow, which has sadly now been taken over by Maize.

Our dog died a couple of years ago and I am dismayed to find out that this path is now under some jeopardy and wish strongly to support keeping it open as I will be getting another dog/dogs in the not too distant future and it would be sad to not have the open space and riverside walk to enjoy. It would also be sad for future generations as we are a nation of walkers and dog lovers.

During this CV19 crisis we decided to take that walk again for exercise and was horrified to see that areas have been blocked making it almost impossible to pass, a very sad unhappy experience.

Please let this path remain open and unblocked.

Yours sincerely

Jayne A Castell (Mrs)

Recd 13/5/20

█ Lansdown Close,  
MELKSHAM.  
Wiltshire.  
SN12 █  
mobile: █  
email: █

Date 11th May 2020.

Attn: Sally Madgwick  
ROW  
Wiltshire County Council  
BA14 8JN

Ref SAM/2017/04  
Subject: Rights of Way Modification Melksham Without Path 151

Dear Sally,

I am just an individual walker.

I 1st walked this footpath back 2017 twice until I got told "I was on a private land & no right of way". So I stayed away.

Since finding your notification at the Woodrow Road entrance I have enjoyed walking this path 6 or 7 times during this Covid-19 lock-down and if allowed will continue to enjoy the walk.

I do hope that certain sections of the route can be improved safety wise i.e. the corner (d on the map) at the river where the old Avon joins the re-routed Avon. Would a path width be established

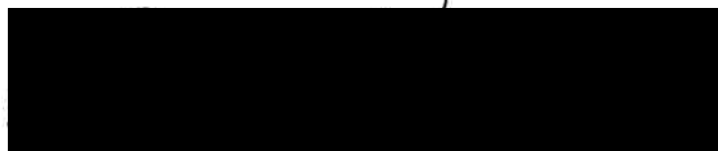
Question: Is it possible to get at printed copies of ROW around Melksham & Melksham Without If I have limited time to be out to exercise (Corona-virus Lock-down) I might like to walk somewhere different away from the roads & streets but on a known route.

Keep up the good work.

I remain

Yours Sincerly

David Roderick



Received & acknowledged  
28 May

■ Sandridge Road 2019  
Melksham  
SN12 ■

Sally Madgwick  
ROW  
Wiltshire Council  
Bythesea Raod  
Trowbridge  
BA14 8JN

Case Reference: SAM/2017/04

Dear Sally,

**Ref: Rights of Way Path No.107\***

I write in support of the application for Rights of Way through the fields to the North of Melksham and to the East of the River Avon.

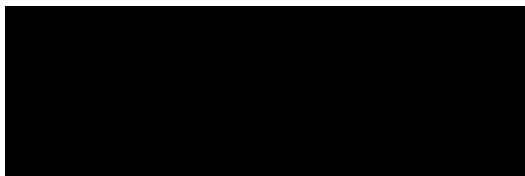
We moved to Melksham in Aug 2009 and very quickly discovered dog walking routes that appeared well used by locals in the fields owned by Cooper Avon Tyres and Melksham Council (40 Acre Field). At the time I assumed that all these routes were permissive due to the number of dog walkers I would meet, and at no time did I see any 'Prohibited' or 'Private Property' signage. Neither did any farm worker/owner approach me to either order me off the land or grant formal permission to use it; there would just be a wave of greeting.

I have walked these fields since late 2009 to the present day, except when thwarted by obstructions placed at the access points a fews ago (which walkers have since been able to find a way around). I have included some photos that I took a few years ago on my dog walks, include one when farm workers were harvesting hay (again, I was never challenged by workers) to prove that I used those fields at the stated times.

I very strongly support this application to grant Rights of Way, as indicated on maps posted at various points around these fields, and in the meantime I continue to walk my dog in them.

Yours Sincerley,

Craig Purvis





**40 ACRE FIELD - 9 AUG 2012, 10.53AM NOTE: FOR YEARS THESE FIELDS WERE USED FOR HAY AND THEREFORE ALLOWED TO GROW AS GRASS MEADOWS.**



**THE BOUNDARY BETWEEN COOPER AVON TYRE'S FIELD AND 40 ACRES. THE STY ENABLING WALKERS TO CROSS THE FENCE IS OBVIOUS, BUT FURTHER PROGRESS ON THIS DAY WAS BLOCKED BY THE SWOLLEN RIVER AVON FILLING THE SMALL BROOK THAT FORMS THE BOUNDARY BETWEEN THE FIELDS - 23 JAN 2010, 11.27AM**

Beanacre Rd  
Melksham  
Wilts

SN12

18<sup>th</sup> May 2020.

Ref: SAM/2017/04

Dear Sally Madgwick,

I am writing in

regards to the Wiltshire County Parish of Melksham path No. 107 & Melksham without Parish No. 151 Row modification order 2020. I wish to support the recording of the above mentioned paths.

I have used these footpaths since I was a young child. My mother, auntie and grandparents also enjoyed using these footpaths for many, many years. When my grandmother passed away last Summer we found a box of photos, one of which was a photo of my grandmother as a young lady in the 1930's stood on the bridge across the river that is included as part of the footpath.

It is imperative that future generations are able to enjoy the countryside using these footpaths as my family have for 3 generations. Unfortunately the 4<sup>th</sup> generation sadly are unable to access

and enjoy the walks we have as the footpath has been blocked by the farmer, I look forward to hearing that these footpaths have been recorded and reinstated.

Yours hopefully,

Caroline Bull, Susan Bull, Roger Bull,  
Philip Bull and Juno (the dog).

**Kieren Bourne**

**Scotland Road, Melksham, Wiltshire, SN12, UK**

Ph: [REDACTED] e: [REDACTED]

Sally Madgwick  
Wiltshire Council  
Bythesea Road  
Trowbridge  
BA14 8JN

Re: Ref. SAM/2017/04

Dear Ms Madgwick,

I am writing in support of having Melksham path 107 open as a public right of way. We moved to Melksham just over five years ago and have enjoyed using this walkway with our dog. We are responsible dog walkers, picking up after her, and putting her on a lead when necessary. We were dismayed to see the pathway blocked by the farmer without any notification, especially as we were given to understand that it was council property, and the former farmer had welcomed walkers.

With or without a dog, this is a lovely walk for those who enjoy the countryside and desire to maintain physical and mental well-being. I am, therefore, writing to you in full support of retaining this walk as a council supported right of way.

Thank you for your consideration to this matter.

Yours sincerely,

[REDACTED]

Kieren Bourne

Foundry Close  
Melksham

SN12

27/5/2020

01225

Sally Madgwick Row Wilts  
Council,  
Bythesen Road  
Trowbridge  
BA14 8JN

Dear Sally

~~MEMO~~

Ref SAM/2017/04

I have lived in Melksham since January 2016

I walk my dog in the area ref above. I used to be able to walk across the bridge and along the river bank. This is close to home for me and a lovely walk at the moment with spring summer weather. I would like to be able to cross the bridge and walk by the river again if there is to be a new pathway

Yours sincerely



Scotland Road  
Melksham  
Wilts  
SN12 [REDACTED]

29<sup>th</sup> May 2020

For the attention of Ms Sally Madgwick

RefSAM/2017/04

I write to say that I support the recording of the path along the river avon at the bottom of Scotland. Road and have used it to walk my dogs since the year 2000

Yours faithfully

[REDACTED]

Peter Leslie Sidnell

Forest Road  
Melksham  
Wilts  
SN12  
7 July 2020

Dear Ms Sally Madgwick,

SAM 2017/04 Melksham Path 107 and Melksham Without Path 151 Right of  
Way Modification Order 2020

I wish to add my support for the above order. I have been using those paths for many years without anyone stopping me or hindering me until recently, when it has been made difficult by the farmer cultivating right to the edge of the field. I used the path labelled FEGH on the map, which crosses the river, regularly between 1970 and 1976 , when I was at George Ward School. Since returning to Melksham in 1996 both my husband and I have used that path and the one labelled A-B-C-D-E-F in all seasons. Since 2011 and retiring we have probably walked that path several times a month and since getting a dog in 2015 more frequently than that, usually several times a week.

The health benefits of those walks to the people of Melksham cannot be underestimated. When my husband was diagnosed with heart failure in 2015 it was a lifesaver for him to be able to take gentle walks over reasonably flat country. I think there will be many in similar circumstances who's physical and mental wellbeing have been aided by walking those footpaths.

Thank you for allowing us a say in this matter, it is appreciated.

Yours Sincerely

Gina Rae (and David Rae)

Mr A D Mockford

Melksham

Ms S Madgwick  
ROW, Wilts Council  
Bythesea Road  
Trowbridge  
BA14 8JN

Tel:  
E-mail:

1 August, 2020

Reference: Wiltshire Footpath Application Numbers Nos 2017/03 and 2017/04

Dear Ms Madgwick,

I am writing to you to register my support for the modification orders (reinstatement) of Paths under the reference above in the Melksham and Melksham Without Parish.

Since moving to Melksham in Mar 2015 and enquiring with some long-standing residents, I was advised of the lovely walks available around Melksham and the open countryside available for recreation and to walk my dogs. Two of the walks I was informed of were quoted as longstanding rights of way, and had been for many years, they were the Riverside Walk (2017/04) and the circular route around 40 Acre Meadow (2017/03).

I was therefore somewhat disheartened a few years ago when the local farmer(s) went to extreme lengths to remove/block access to those routes and even more disheartened to see the damage caused to the natural meadow and river banks by the ploughing of the fields so close to the edge; which has caused unnecessary erosion, destruction of bank habits for wildlife and the falling of trees into the waterway and the excessive pruning of the hedgerows.

I had walked both of these routes regularly 2-3 times a week (sometimes more) with my dogs for most of the last 5 years (except when the route was impassable).

I would also add that many other areas of open land and natural beauty in the Melksham Without Parish and Bower Hill areas have been given over to extensive housing developments and so have further reduced the open country side and spaces where people and dogs can walk more freely – whilst further increasing the population. So, it is even more important that we preserve what little open space we have left.

Whilst I appreciate that there is a need for more housing, there is also a need for open accessible countryside, which seems to be ever decreasing around the Melksham area. I therefore fully support (and appreciate) the reinstatement of the footpaths noted above for the use of public access, now walked almost daily. I see no reason why access to, and use of the footpaths cannot be in harmony with the farmers use of the land, like so many other permissive footpaths around the country.

Yours Sincerely,

(Signed copy on request)

A D Mockford

**Madgwick, Sally**

---

ack. 04 Aug  
2020

**From:** Alan Baines [REDACTED]  
**Sent:** 28 July 2020 20:06  
**To:** Madgwick, Sally  
**Subject:** RoW Modification Order 2020 Ref: SAM/2017/04

Dear Ms. Madgwick,

Ref: SAM/2017/04.

I am submitting a representation in respect of the part of the Order creating Melksham Without Path No. 151 between existing Path MELW66 (Point B) and Woodrow Road (Point A).

This is an unnecessary duplication of the existing Path MELK6, which runs from MELW66/MELK5 to Woodrow Road only some 150m from Point A. In following the field edge from Point B to Point A, the new path would be detrimental to the residents of Meadow Road and Lincoln Green, Melksham by destroying the privacy of their rear gardens and could present a security risk. In addition, a path following the field boundary would not necessarily be the 'desire line' for many walkers and so fails to assist the landowner to deter trespass.

I hope the Order can be modified to remove the section of new path east of MELW66.

The remainder of the Order provides a useful addition to the Rights of Way network in the area, however I am concerned about the use of the 'concrete bridge' between Point E and Point G, as its in-river supports are understood to have been condemned as unsafe by the Environment Agency.

Thank you for the opportunity to present views on this Order.

Sincerely,

A.F. Baines  
[REDACTED] Woodrow Road  
Melksham  
SN12 [REDACTED]

Recd 26  
CA AUG.



Sawernake Ave

Rf SAM/2017/04

Melksham

Wiltshire

24-8-20

Dear Sally Madgwick,  
I have only been  
using this footpath this year,  
whilst walking from home  
during the time we have to  
stay away from people. There  
are not very many footpaths  
from this area into countryside.  
It has been useful & enjoyable.

Yours sincerely



(MRS FAHIGANS)

2017/04

**Madgwick, Sally**

---

**From:** Lorraine McRandle [REDACTED]  
**Sent:** 25 August 2020 12:48  
**To:** Madgwick, Sally  
**Cc:** Teresa Strange  
**Subject:** Rights of Way Modification Order Melksham Path No 107 and Melksham Without Path 151

Hi Sally

Sorry for the lateness in responding to the above Order (however, I note the deadline for a response has been extended until 27 August due to Covid), as this item was deferred from a Full Council meeting in early July, which was the first Full Council meeting since 9 March, until 27 July, given the amount of stuff to get through on the agenda and I have only just completed the minutes.

Please see an extract below from the Full Council meeting held on 27 July:

**c) Rights of Way Modification Order 2020**

**i) To note an order to modify Melksham Footpath No 107 & Melksham Without Path No 151 has been made. To consider whether the Parish Council wish to make a representation (deadline for comments has been extended to 27 August 2020)**

Councillor Baines questioned the requirement for the new path Melksham Without 151 to be created between points B-A on Woodrow Road as this duplicated Melksham Path No 6 which emerged onto Woodrow Road from Melksham Without Footpath 66 within 150m of point A.

**Resolved:** To make a representation stating on the basis that points (B-A) of new Footpath 151 duplicates an existing path within 150m of this location, the parish council question its requirement.

Again, apologies for the delay.

Regards

Lorraine McRandle  
Parish Officer  
Melksham Without Parish Council  
Sports Pavilion  
Westinghouse Way  
Bowerhill, Melksham  
Wiltshire, SN12 6TL  
01225 705700  
[clerk@melkshamwithout.co.uk](mailto:clerk@melkshamwithout.co.uk)  
[www.melkshamwithout.co.uk](http://www.melkshamwithout.co.uk)

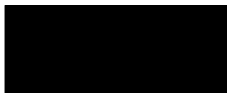


Our ref 301R/KE01/052491/000007  
Your ref SAM 2017/04

Wiltshire Council  
Rights of Way and Countryside  
County Hall  
Bythesea Road  
TROWBRIDGE  
BA14 8JN

By email : [Sally.madgwick@wiltshire.gov.uk](mailto:Sally.madgwick@wiltshire.gov.uk)

Direct tel



Date 27 August 2020

Direct fax

Email



Dear Sirs

**Wildlife and Countryside Act 1981 s.53  
The Wiltshire Council Parish of Melksham Path No. 107 & Melksham Without Path  
No. 151 Rights of Way Modification Order 2020**

We act for Cooper Tire & Rubber Company Europe Limited which is the freehold owner of land registered at HM Land Registry under title number WT160753. We refer to your letters dated 18 and 20 March 2020 in which we were advised that the above Order had been made and that the period of notice had been extended to 27 August 2020. Our client objects to the Order with particular reference to the bridge which we believe is known as "the Black Bridge". Rather than reiterate the content of our letter dated 7 June 2018 (copy attached) we would be grateful if the content of that letter could also be taken as forming part of our client's objection.

We have been engaging with our client's tenant, Mr T J Farthing with regard to the use or otherwise of the land as a footpath. Mr Farthing has already submitted material to the Council and we understand will also be objecting to the Order. We note that the Council considers that Mr Farthing's evidence and that of the applicants is at odds. Whilst it may appear that that is the case, we have asked our client's Facilities Manager what he may recall of use of the Black Bridge as he has been engaged by our client over the whole period of time that is in question. He has confirmed that he remembers Mr Farthing putting barbed wire across the Black Bridge probably he believes, to stop his cattle crossing the bridge and although he does not recall the gates that Mr Farthing has referred to, on a site visit this week, he has confirmed that there is a gate post on the western side of the Black Bridge which would suggest that there was a gate at some point in the past. Unfortunately, our client's Facilities Manager only visited the land about once a year so it is not particularly surprising that he may not have seen the gate (especially as it was on the far side of the river from our client's land). However, Mr Farthing has provided letters from individuals who confirm that there were metal gates 18 or 19 years ago. Our view is that this element of the evidence is strong.



We have also obtained a number of photographs of the land which we have also supplied to Mr Farthing. Unfortunately, we have not been able to source photos of the period that Mr Farthing believes may have included the gate in around 2000. Our photographs are from 1998, 2002 and 2003. What they do appear to support is Mr Farthing's contention that at that time, access to the land was made from the field access on Murray Walk and not in the corner next to the bridge on Murray Walk. The track across the field clearly does not stick to the boundary and then along the river bank (from Point F to Point E) but crosses from the access point diagonally across the field towards Point E. Mr Farthing has advised that access at the point referred to by the applicants is down a bank and is steep and potentially dangerous so is very unlikely to have been used by the vast majority of people who might want to walk in an area such as this. It is more likely that they would have used a field access with a gate.

The photographs show clearly a large tree adjacent to the Black Bridge on the western side of the river. From the photographs, it is not possible to see from the air due to the presence of this tree whether the gates referred to by Mr Farthing are present. Should the confirmation of this Order be subject of an inquiry, it may be necessary to employ an expert in examining these types of photograph to establish whether these photographs do show the gate.

One area of evidence that Mr Farthing and some of the applicants agree on is that there has been signage erected on the land and although it may not be in good repair or clear at the time that the applicants produced their evidence, at the beginning of a 20 year period or even rather later into that period it was no doubt clearer. Mr Farthing has also provided evidence of giving permission to various individuals and organisations to use part of the land. Even if it is the case that certain individuals thought that Mr Farthing had tolerated their presence on the land (and Mr Farthing has told us that this is not the case), for a busy farmer to identify individuals, some of whom he has given permission to, and then ask them to leave every time he sees them is an unreasonable expectation. That does not mean that he did not give permission or assert his ownership or legal right to use the land without third parties trespassing on the land.

We do not believe that the Council has considered properly the paucity of evidence from the applicants. We have considered the evidence provided in the application dated 21 August 2017 and focussed on the route from Point E to Point F and then across the Black Bridge to Point G as this affects our client's land. In particular we would like to point out the following:

- 1 We would expect that the main users of the Black Bridge would be residents from the western side of the river. There are only user evidence forms for 5 residents from the development on the western side of the river and 2 of those appear to be from the same household. If the Black Bridge had been blocked by Mr Farthing during the period 1997 to 2017 they would not have been able to cross as the gates and wire were on the western side of the bridge. So even if residents from the eastern side of the river had been able to get to the far side of the Black Bridge but were prevented from going any further, residents from the western side would not have been able to access the bridge at all.
- 2 Of the 12 people who claim to have walked the proposed route (E-G), only 3 described their route as including the Black Bridge. Mr Lush's evidence is from 2010 to 2017, Ms Hall from 1999 to 2017 and Mrs Whittaker from 2003 to 2014. Therefore there is no evidence of use from 1997 to 1999 and if Mr Farthing is correct and he blocked the bridge during 2000, there would only be continuous use from 2000 to 2017 which falls short of the 20 year period. This also does not take account of any break in use when Mr Farthing put barbed wire up to prevent cattle crossing the bridge. In any event evidence from only 3 people with a consistent period of 7 years across all three materially fails to demonstrate sufficient use under common law.
- 3 We would like to suggest that Mrs Whittaker's evidence is inconsistent in any event. Her address is on the eastern side of the river but she describes her route from Tamar Road which is on the western side of the river.





- 4 Mr and Mrs Weare specifically state that they pass the Black Bridge on the route from F-E-D-C-B. However in their submission of 29 May 2018 as referred to in the Council's Report, they do include the Black Bridge in their route. This would appear to suggest that they have been prompted or are confused.
- 5 We note that the Council has indicated in its Report that 18 witnesses submitted user evidence. However, we have only been provided with 12 completed forms so we are unclear where the number 18 has come from unless we have not been provided with everything that the Council has in its possession. There is a clear inconsistency as there are 18 witnesses detailed in Appendix 3 to the Report but Ms Madgwick in her email of 12 June 2018 only summarised 12 forms.
- 6 The Council in its concluding paragraph 20.1 groups together the route from G-E-F and from E-D. This does not take into account the fact that there is very little evidence in relation to the Black Bridge in essence making an assumption that there is evidence in relation to the Black Bridge just because there is more evidence in relation to the route D-F (all on the eastern side of the river). In fact the Council factually is incorrect when it says that 12 people have claimed to have walked that route when 7 of the 12 do not mention the Black Bridge at all.

Whilst we understand that the Council might consider that the evidence needs testing, with respect we believe that there is not sufficient evidence to merit making this Order. This is a substantial route which at the most 18 people (and we think that it is 12 at most) are claiming to have walked for some of the time largely over only part of it. It is unfortunate that the applicants have, thus far, managed to persuade the Council to have expended its valuable resources in entertaining this application when their evidence is unreliable and the merits of the application itself are gravely flawed.

Yours faithfully

TLT LLP

Encs



www.TLTsolicitors.com

Our ref 301R/KE01/VV01/052491/000007  
Your ref SM/2017/03 & 04 MELK

Ms S Madgwick  
Acting Team Leader Rights of Way and Highway Records  
Rights of Way and Countryside Waste and Environment  
Wiltshire Council  
County Hall  
Bythesea Road  
TROWBRIDGE  
BA14 8JN

By email : [sally.madgwick@wiltshire.gov.uk](mailto:sally.madgwick@wiltshire.gov.uk)

Direct tel

Date 7 June 2018

Direct fax

Email [REDACTED]@tltsolicitors.com

Dear Madam

**Wildlife and Countryside Act 1981 s.53**

**Application for definitive map modification orders to record public footpaths over land at Melksham**

Further to your letter dated 4 May 2018, we are instructed by Cooper Tire & Rubber Company Europe Limited which is the freehold owner of land registered at HM Land Registry under title number WT160753 which is shown edged red on the attached title plan. As such we do not believe that the claimed footpath 2017/03 falls within our client's title.

With regard to claimed footpath 2017/04, none of the part of the claimed footpath between points A and D, or G and H fall within our client's title and approximately the northern half of the claimed footpath between points E and D also does not fall within our client's title.

All of the land that is subject to the route of the claimed footpath 2017/04 within our client's title is subject of a farm business tenancy which dates back to 25 March 2005. Our client's tenant, Mr T J Farthing, has had possession of the land since that date without any break. A copy of that farm business tenancy as executed by Mr Farthing is attached and we would draw your attention to clause 4.6 which requires Mr Farthing to take reasonable steps to prevent acts of trespass and to prevent any new footpaths or other easements or rights of way from being acquired. Please also note that Schedule 4 identifies Mr Farthing as responsible for repairs to field gates and posts (100%) and field boundaries and walls (100%).

From the above in relation to those parts of the claimed footpath 2017/04 that fall within our client's title, we believe that it is clear that our client did not intend to either dedicate any footpath or right of way nor should its actions indicate that deemed dedication should apply. The farm business tenancy covers all bar the very early part of the claimed period of time that the route has been used. We have not seen the user evidence but would suspect that this early period is most likely to be the part of the claimed period for which there is little user evidence or

certainly less. Bearing in mind that only 12 people have claimed to have used the claimed footpath during the claimed period, we do not believe that there would be sufficient evidence to show that the claimed footpath had been used for a twenty year period and if the claimant is relying on common law principles, we would suggest that there would not be sufficient evidence in relation to the earlier period to rely on user evidence.

We would be grateful if you could keep us advised of progress of these applications as these will have a material impact on the agricultural activities carried out by our client's tenant as regulated by the existing farm business tenancy should an order be made.

Yours faithfully

A solid black rectangular redaction box covering the signature area.

TLT LLP





ST86/95 30.09.02 10:31:32 1: 7500 WGS84: Lat. 512242.8N Lon. 0020748.8W Run 005 No. 7737

FS300 1/ 240 f/5.6 FF---- EC----- SP- v/h.06193 00% dt008.4 ds037 27.2V -62mb ER00 C4IM5136:



WILD 15/4 UA0-S  
No 13205 153.67

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AF/ 98/202 RC30 5159 153.660 ST86/96 1# 8500 17/09/98 Run 005 5232

FS400 1/1000 f/4.0 1/3 FF2.0 EC 0 SP- w/h.04754 00% dt013.3 ds007 25.1V -64mb ER00 CAM5159

Tim Farthing  
Farthing & Co.

Beanacre  
Melksham  
Wilts  
SN12

13/08/2020

S. Madgwick  
Rights of way and Countryside  
Wiltshire Council  
Bythesea Rd.  
Trowbridge  
BA14 8JN

**ref.SAM/2017/04 - Objection statement**

Dear Sally Madgwick.

Further to our original submission of evidence 25/06/2018.

I write to re-iterate my objection to the proposed footpath.

**The Wildlife and Countryside Act 1981 s.53 -The Wiltshire Council Parish of Melksham Path No.107 & Melksham Without Path No.151 Rights of way modification order 2020.**

With reference to the map at point F. - Any person claiming to have walked from this point towards the river has been doing so without our permission and only since 2013 when we started growing maize in this field.

There is a metal "PRIVATE" sign post (as shown in the enclosed photograph,) although somewhat rusty, it has always been at the entrance to this field off the Murray walk, however, we had to remove it temporarily in 2013 in order to gain access across Murray walk for our maize harvesting equipment, the sign was still there although we had put it to one side where it became obscured by brambles. It has now been re-erected to the right hand side of the metal gate.

The part of the proposed footpath (point F on the map) from the gateway off the Murray walk towards the River Avon was never ever used when it was pasture and people only began to create this route from the first year that we grew maize in that field (2013) There must have been a certain individual who took it upon them-self to destroy our planted crops in order to create a new pathway to the river. Not only was this trespassing, it was also an act blatant vandalism.

It is highly likely that in the future we will again be using this land for grazing our cattle. It cannot be underestimated that the presence of walkers amongst livestock poses a risk not only for the cattle but more importantly to any trespassers who seem

to think they can walk wherever they like with their dogs. There have been a number of fatalities in such circumstances where cattle have chased or been chased by dogs and tragically their owners have been trampled to death by those cattle.

It has been established that dog faeces are a known cause of abortion in pregnant cattle where they have ingested parasites from dog faeces left in the grass, please read the enclosed article "Neospora threat to cattle from dog mess set for summer rise" - ( Farmers weekly 07.08.2020).

Why should farmers have to find their income subjected to losses arising from this totally avoidable scenario.

### The Black bridge

When we grazed cattle down there, which was within the last 20 years we always had three strand barbed wire fence gates at **both** ends of the bridge to keep the cattle off the bridge. This would have made it very difficult for any trespassers to cross as it was not easy to take down or get through.

We also erected a pair of lockable security gates on the bridge with the specific intention of preventing people from using it, which remained locked until the year 2000 until they were vandalised, one of which was thrown into the river, the other we had to remove and take back to our farm where it may be seen today if anyone needs reminding of what they looked like.

Since our last submission of evidence we have obtained a black & white photograph taken in 1998 which we believe shows the gates on the bridge. This means that people could not have used it for the full 20 years from the date of the footpath application.

The black bridge between points G & E on the map has been declared unsafe by the environment agency. We have been instructed by them to stop using it, and as a result we are considering removing it altogether. We have tried to prevent people crossing the river here by informing the public with an "unsafe bridge sign" plus a barricade of security fencing on the bridge, which again, someone wilfully removed and threw into the river.

If I ever notice any walkers heading for the black bridge I warn them that it is structurally unsafe and I also remind them that they are trespassing on PRIVATE PROPERTY.

Regarding the applicant Claire Hall's statement, where she says that the "farmer" had seemed unconcerned about her being there, the so-called, "farmer" was most likely an employee or a contractor working for us for whom it would have been no concern of theirs to confronted her, as they would not know who we had given permission to and who we had not.

To summarise our very strong objection to this footpath proposal, as the Tenant/Landowner, it seems to me that any Council decision based on the often inaccurate evidence of so few people is clearly un-representative.

On behalf of Farthing & Co.

for all the reasons stated above, we totally reject this footpath proposal.

Yours sincerely.

Tim Farthing.



# Neospora threat to cattle from dog mess set for summer rise

By Tim Reif

Hot summer weather and a post-lockdown desire to escape to the countryside is raising fears among farmers of a spike in deadly neospora infections in livestock.

The disease – which leads to abortions, still births and infertility in cattle – is caused by livestock grazing pasture contaminated with dog faeces containing eggs from the parasite neospora caninum.

“It’s distressing for the stock, for the farmers and nationally it’s an expensive disease for the whole livestock sector,” said Paula Matthews, who has had to deal with the issue for more than seven years on her family’s Surrey farm.

The land’s proximity to London, its Area of Outstanding Natural Beauty status, and the many miles of public rights of way that cross it, mean it is a popular destination for walkers – and even more are set to visit during August, Mrs Matthews said.

“There’s wider awareness among the public of the problems dogs can cause in terms of sheep worrying, but neospora isn’t on their radar in the same way,” she added.

No prevention and no cure

“There is no prevention and no cure. We’re taking the actions we can in terms of biosecurity – such as trying to avoid putting cows and calves in fields where there are footpaths and calving indoors – but we need the public to take dog mess home and bin it.

“We really enjoy talking to the public and explaining how we’re producing food, but we’re trying to do it in a clean and safe way. We’re happy to see people use footpaths responsibly and dogs are welcome in the countryside as long as they’re under close control.”

Tom Halliday, who runs a 550-cow spring-

## TIPS TO PREVENT NEOSPORA

- Prevent dog faeces contaminating pasture for grazing or conserving
- Keep hay, bedding and water free from faecal contamination by dogs
- Keep dogs away from calving areas
- Dispose of placentas, foetuses and stillborn calves in a correct and timely manner
- Make sure on-farm food stores are dog-proof

calving herd in Shropshire, said losing stock to neospora had cost him a fortune. He reckons he has lost 60-plus animals to the disease in the past 12 months.

“We’ve got about a 15% infestation – if we can keep it at that and start to bring it down, it’s just another problem we’ll live with, I

suppose. It’s frustrating because we’ve always prided ourselves on having fantastic fertility – it’s what drives our business.”

He added: “The dog walkers here are actually all quite responsible, but they probably simply don’t even know their pet has got the disease.

“The most effective way to combat the issue is to work with people and ask them to help us. We have put signs up asking them not to leave dog mess in the fields.”

Bag it, bin it

Harriet Ranson, the NFU county advisor in Leicestershire, Northamptonshire and Rutland, said: “Bag and bin is the only acceptable method for a responsible dog owner.

“We need to educate people about the sad, costly and often entirely unintended consequences of not bagging and binning. We absolutely want people to enjoy the countryside, but they’ve got to do it responsibly.”



Paula Matthews: ‘Neospora isn’t on visitors’ radar’











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# Appeal Decision

**by Helen Slade MA FIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 04 December 2019**

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## **Appeal Refs: FPS/Y3940/14A/13**

- This appeal, dated 28 February 2019, is made under Section 53(5) of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Wiltshire Council ('the Council') not to make an Order under 53(2) of that Act.
- The application (Council reference 2017/03) was made on 21 July 2017. It was refused by the Council on 9 January 2019 and the applicant was notified by letter dated 31 January 2019.
- The Appellant claims that the Definitive Map and Statement for the area should be modified to show the appeal routes as a Public Footpath.

**Summary of Decision: The appeal is allowed.**

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## **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.
2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.
3. Submissions have been made by the appellant, Mrs Susan Carter, who has been assisted by Mr Trevor McMaster, and by Wiltshire Council, both as landowner and surveying authority. Other submissions have been made by Mr Alan Baines.
4. I understand from the papers on the file that two applications were made which affected two parcels of adjoining land. For clarity this appeal relates to the application for a circular path around the field known locally as the Forty Acre field.

## **The Main Issues**

5. The application was made under Section 53(2) of the 1981 Act which requires surveying authorities to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
6. Section 53(3)(b) of the 1981 Act provides that one of those events is the expiration of a period of time during which there has been enjoyment of the route by the public sufficient to raise a presumption that the way has been dedicated as a public path.

7. Another applicable event is set out in Section 53(3)(c)(i) of the 1981 Act which provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] 68 P & CR 402, and upheld in *R v. Secretary of State for Wales ex parte Gordon Michael Emery* [1997] EWCA Civ 2064:
- Test A: Does a right of way subsist on the balance of probabilities?
  - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

For the purposes of this appeal, I need only be satisfied that the evidence meets Test B, the lesser test.

8. With respect to evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where there is evidence that any way over land which is capable of giving rise to a presumption of dedication at common law has been used by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention to so dedicate during that period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
9. It is also open to me to consider whether dedication of the way as a highway could have taken place at common law. This requires me to examine whether the use of the route by the public and the actions of the landowners or previous landowners have been of such a nature that dedication of a right of way could be shown to have occurred expressly or, alternatively, whether dedication could be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The burden of proof lies with the person or persons claiming the rights.
10. Section 32 of the 1980 Act provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, 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.
11. I must also have regard to advice and guidance issued by the Department for Environment, Food and Rural Affairs ('Defra') and judgements of the courts.
12. The principal issue in this appeal is whether or not the Council was correct to conclude that the submission in 1995 of a deposit under Section 31(6) of the 1980 Act had the effect of bringing the use of the path into question, and



whether it had continuing effect as demonstrating a lack of intention to dedicate.

## **Reasons**

### ***Description of Appeal route***

13. The appeal route commences at a junction with Footpath 66 Melksham Without at Ordnance Survey Grid Reference ST911 654, and passes across a small field before running around the edge of a larger field, known locally as the Forty Acre field. It passes through points 2, 3, 4, 5, 6, and 7 returning to point 2, creating a circular walk with a linking spur. Between points 3 and 4 it runs alongside the River Avon (see map at Appendix 1).
14. The land over which the claimed route runs is part of a farm owned by Wiltshire Council called Forest Farm. It was occupied until 2017 by Mr Donald Burnell, and then taken on, in April of that year, by Mr Gareth Powell.

### ***Statutory Dedication: Section 31 of the 1980 Act***

15. The Council considers that the right of the public to use the claimed route was brought into question on 28 November 1995 when a deposit was made under Section 31(6) by the landowner, Wiltshire Council. The appellant considers that the right of the public to use the route was brought into question in 2017, when the route was blocked by fencing.
16. The appropriate statutory period during which to examine the evidence is the 20 years dating back from the date on which the right of the public to use the way was brought into question. Consequently, there is a disagreement about the relevant period of 20 years to examine in relation to usage. By taking the earlier period, dating back from 1995, the Council has concluded that there is insufficient evidence of usage at the beginning of that period. If the later period had been relied upon (ending with the erection of fencing in 2017 by the new tenant) the investigating officer's report indicates that they considered that there would have been sufficient use by the public, as of right, to satisfy the relevant usage criteria. However, in the opinion of the Council, the deposit of 1995, and later discussions about potential permissive access over the land, demonstrate a continuing lack of intention to dedicate public rights of way and thus preclude the making of an order.
17. Both the Council and the appellant rely heavily on comments made in the decision in *Godmanchester and Drain v SSEFRA* [2007] UKHL 28 ('*Godmanchester*') to support their arguments so I need to carefully appraise those comments.

*Did the deposit of the map constitute an act which brought the right of the public to use the way into question?*

18. Firstly, I need to determine whether or not the deposit made under Section 31(6) by the Farms Department of Wiltshire County Council in November 1995 was an act which brought the use of the claimed route into question. The Council considers that the judgement *Godmanchester* suggests that, even though there was no public register of such depositions at the time, the deposition of the maps was sufficient to bring to the attention of the public that their right to use the way was brought into question. In support of their argument they quote the following passage:

*"A well-advised defender of rights of way, such as the Ramblers' Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner's intention can come to their attention or not."*

19. I consider that the Council's interpretation of this clause, taken in isolation, is mistaken. This excerpt is preceded by the words:

*" A notice to the council under section 31(5) is plainly regarded as second best and is only allowed when the original notice has been torn down or defaced, just as substituted service is allowed only when there is good reason to dispense with personal service. It is true that users of the way are not very likely to call at the County Council offices to ask whether any notices under section 31(5) have been lodged, but..."*

20. The quote relied upon therefore does not refer to a deposit under Section 31(6) but to the serving of a notice on the Council after notices posted on site have been torn down or defaced. Section 31(5) provides that:

*"Where a notice erected 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 a 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 a highway."*

21. Section 31(3) provides that:

*"Where the owner of the land over which any such way as aforesaid passes-*

- a) Has erected in such 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 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.*

22. The document to which the Council is referring in its reasoning, and which was actually deposited, was the initial stages of making a deposit and declaration under Section 31(6). Consequently I consider that the Council is relying on a misunderstanding of the judgement, or a misreading of it at the very least.
23. There is no evidence of any notices having been posted on site, nor of the subsequent serving of a notice on the Council under Section 31(5). In any case, I think that Lord Hoffman was saying, in the last sentence of the extract I have quoted above in paragraph 18 above, that merely because a less than transparent method of declaring a lack of intention to dedicate a highway was sufficient in certain specific circumstances, that was not the same as saying that it did not matter, generally speaking, whether the matter was brought to the public's attention or not. Clearly, in my view, he was saying that, in general, such an intention ought to be drawn to the public's attention for it to be an effective rebuttal; thereby being consistent with the overall thrust of

the *Godmanchester* decision which concluded that an act which was effective in demonstrating a negative intention to dedicate would normally also be an act which brought the right of the public into question.

24. In paragraph 33 of the judgement Lord Hoffman is clear that the acts in question must be objective and must be perceptible by the relevant audience (i.e. the public). He goes on to support his arguments by stating in paragraph 35 (following on from the excerpt relied upon by the Council)

*"The same point may be made about the elaborate provision for maps, statements and statutory declarations in section 31(6). What would be the point of all this if Parliament was using the word "intention" in a subjective sense which could be proved by any relevant evidence? And why did Parliament, by Schedule 6, paragraph 4 of the Countryside and Rights of Way Act 2000, insert a new section 31A (not yet in force in England) into the 1980 Act to establish a register of the maps and statements deposited under section 31(6) and require that it should be available for inspection free of charge? Surely to make such alternative methods of rebutting the presumption available to the public, so as to approximate as far as possible to the primary method of rebuttal.<sup>1</sup>*

25. Furthermore, Section 31(6) of the 1980 Act states:

*"An owner of land may at any time deposit with the appropriate council—*

*(a) a map of the land on a scale not less than 6 inches to 1 mile; and*

*(b) a statement indicating what ways (if any) over the land he admits to have 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 [the relevant number of] years from the date of the deposit, or*

*(ii) within [the relevant number of] 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 lodgment 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."*

26. The legislation is clear that it is only the **complete** deposit and subsequent statutory declaration which effectively negates an intention to dedicate and I therefore agree with the appellant that the mere deposition of the map in 1995, without the subsequent declaration, is not sufficient in that regard. If it is not sufficient evidence of a lack of intention to dedicate is it hard to see how it can be an effective action in bringing the right of the public to use the way into question, following the principles set out in *Godmanchester*.

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<sup>1</sup> i.e. the primary method of rebuttal is the erection of notices to that effect.

27. I therefore disagree with the Council and do not consider that the deposit of the map in 1995 constituted an act which brought the right of the public to use the way into question.

*Was the Section 31(6) deposit sufficient evidence of a lack of intention to dedicate?*

28. As I have set out above, Section 31(6) of the 1980 Act states that only the complete deposit and subsequent statutory declaration automatically constitutes the required sufficiency of evidence of a lack of intention to dedicate a highway over the land shown in the accompanying map. At the time the deposit was made it was necessary to make the accompanying declaration within 6 years of making the deposit. There is no evidence to show that such a declaration was made, and therefore I consider that the initial deposit, whilst perhaps being some evidence of the landowner's intentions, is not sufficient evidence to satisfy what is generally referred to as 'the proviso' of Section 31(1).

*Did the deposit of the map have continuing effect as evidence of a lack of intention to dedicate?*

29. Since I am of the view that the deposit was not sufficient evidence in itself in this regard, it follows that I do not consider that it can have had continuing effect to a sufficient degree. Furthermore, the submission from Wiltshire Council as landowner, in relation to this appeal, makes no reference to the matter whatsoever which suggests to me that they may not have been aware of its existence. This also undermines the ability of the deposit to provide an effective demonstration of the landowner's intention in terms of a continuing effect.

*The date on which the right of the public to use the way was brought into question*

30. In the light of the views I have expressed above, I therefore agree with the appellant that the date on which the right of the public was brought into question is 2017, when the fence was erected across the way by the new tenant of the farm, and not 1995.

*Whether there has been use of the way by the public during the relevant period of 20 years (1997 -2017)*

31. In the Council's Decision Report, dated 4 January 2019, the investigating officer concluded (at paragraph 11.25) that there was a way of such character to be eligible for consideration under Section 31 of the 1980 Act. I accept that the aerial photographs may show other ways that have been used in addition to the claimed route, but I have no reason to contradict the Council's view that the claimed route is capable of being identifiable. Any slight deviation or error in the vicinity of point 1, as referred to in the submission by the Council as landowner, is a question of evidence, and may be explained by the scale of the map.
32. The investigating officer also concluded that the use that was made of the route was exercised without force, without secrecy and without clear permission. Thus the use of the way was as of right, albeit the report focusses on an earlier period of time (pre-1995). However there is no evidence that the nature of the use altered after 1995 other than to become even more frequent.

33. There is evidence that, in 2001, discussions were held between a body called the Melksham Trust Riverside Project and various other parties in connection with the creation of a permissive path alongside the River Avon. Wiltshire Council, in their submission as landowners, state that the tenant of the land crossed by the claimed path (Mr Burnell) was consulted about the proposals and was opposed to any increased access. However I see that in a contemporaneous note of a telephone call from Mr Burnell, dated 24 July 2001, Mr Burnell appears to have expressed no major objection. He is reported to have said that it was his neighbour who was 'dead against' it.
34. I note also that the appellant has referred to use of the land by 'hundreds of people with Don's<sup>2</sup> permission' but I take account of the fact that the appellant has subsequently clarified this by saying that she used the word permission in a colloquial sense meaning that she was 'able to use the route in the same way that I am able to use the roads around Melksham'. She confirms that she never asked for, or received, permission from anyone to use the route.
35. I am satisfied from the evidence available that no formal or implied permission was given to the large numbers of people claiming to have used the route, either by the tenant farmer, or by the Council. Consequently I agree with the Council that the use of the claimed route has been exercised as of right.
36. There is no evidence to show that the numbers of people claiming use of the route were in any way not representative of 'the public'.
37. I therefore conclude that there has been use of the claimed route by the public as of right for a period of 20 years dating back from 2017.

*Whether there has been any interruption to use*

38. With respect to the reported flooding of the claimed route, its location is one on which occasional and seasonal flooding might be expected. It is quite possible for highways to be dedicated subject to a limitation accepted by the public. In this case, the inability or difficulty of using the path for a few days or weeks could, in my view, fall into the category of a limitation and would not represent an interruption to use in the sense intended in Section 31 of the 1980 Act.
39. I therefore conclude that any interruption due to flooding may be considered to be a limitation to public's use of the ways concerned and, likewise, would not prevent the making of an order.
40. There is no evidence of any other interruption to the claimed use.

*Whether there is sufficient evidence of a lack of intention to dedicate a highway during the relevant period*

41. I have already expressed the view that the deposit made under Section 31 of the 1980 Act in 1995, and consequently prior to the relevant 20 year period, did not have continuing effect as it was never completed.
42. During the 20 year period dating back from 2017 there is no evidence of any equivalent act on the part of the landowner (i.e. Wiltshire Council or its

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<sup>2</sup> Mr Burnell

predecessors) and the tenant appears to have had no major objection to the level of access which was being enjoyed by the public. The user evidence submitted has not been seriously disputed and, consequently, I infer that it is an accurate reflection of what was happening on the ground. The Council accepts in its Decision Report that from the evidence submitted with the application it can be deduced that usage had increased over time. Certainly routes were visible in aerial photographs by the year 2006, although not so clear prior to that in 2001. However that does not mean that the route was not being used as claimed, and Mr Burnell was certainly aware of some use of his field by 2001, and appears to have accepted it.

43. I conclude that there is insufficient evidence of any lack of intention to dedicate a highway over the claimed route during the relevant period of 20 years.

***Common Law dedication***

44. In the light of my conclusion with regard to a potential statutory dedication I have not needed to examine the evidence in relation to a common law dedication.

***Conclusions on the evidence***

45. I consider that there is little in the way of conflicting evidence but there are some legal points which may be arguable in relation to the status of the deposit made under Section 31 and intentions of the landowner. However, taking all the evidence together I consider that Test B is satisfied. It is reasonable to allege that a right of way exists over the claimed route and there is no incontrovertible evidence that it could not.

**Conclusion**

46. Having regard to these, and to all other relevant matters raised in the written representations I conclude that the appeal should be allowed.

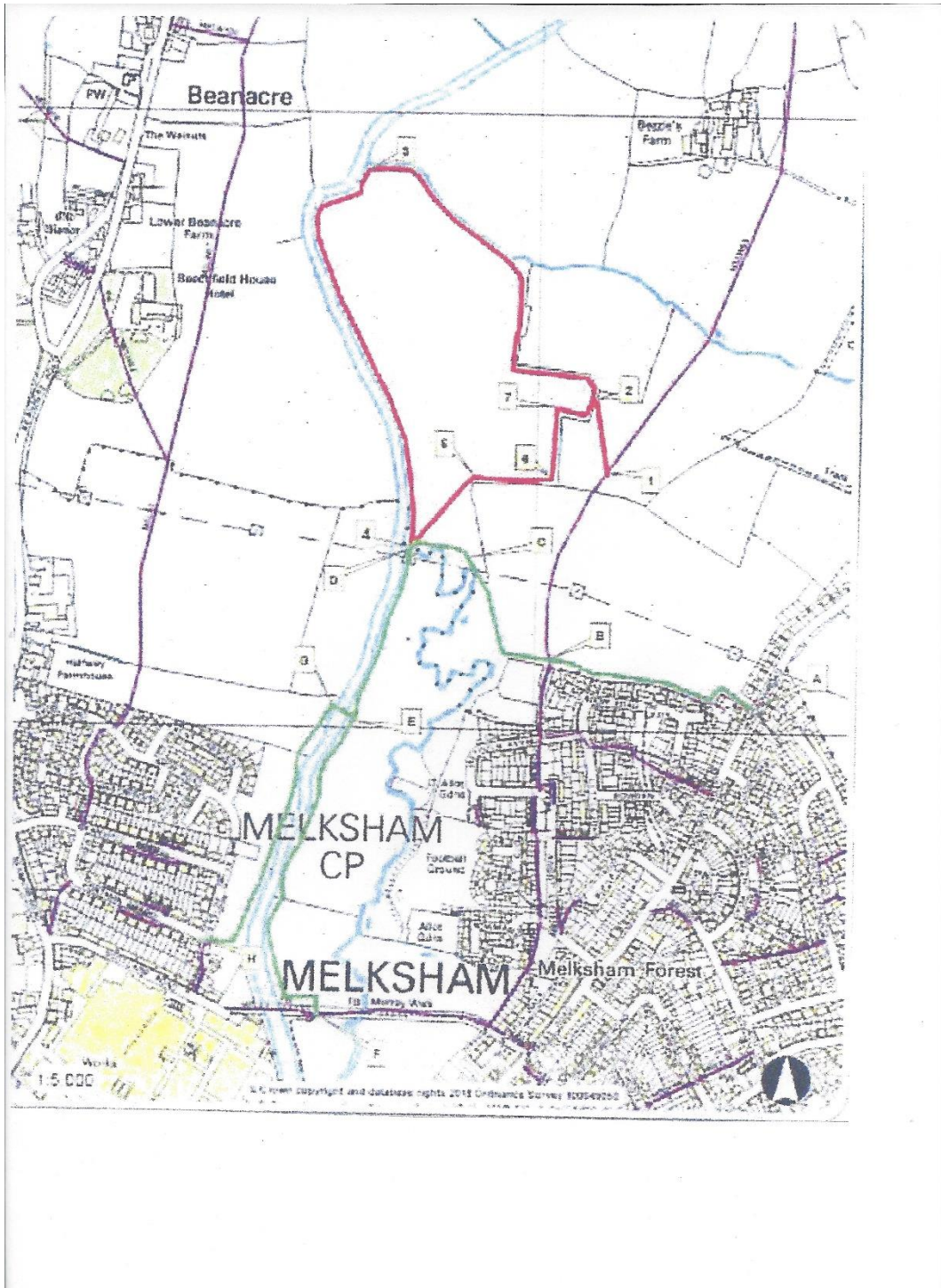
**Formal Decision**

47. The appeal is allowed, and Wiltshire Council is directed to make an Order within three months of the date of this decision.
48. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Helen Slade*

**Inspector**

**APPENDIX 1**



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THIS DEED OF DEDICATION is made on the 11<sup>th</sup> day of MARCH 2020

## Parties

**WILTSHIRE COUNCIL** of County Hall, Bythesea Road, Trowbridge, Wiltshire, BA14 8JN ("the Council") (1)

**GARETH POWELL** of Forest Farm No.1, Woodrow Road, Melksham, Wiltshire, SN12 7RE ("the Tenant") (2)

### 1 Whereas

- (1) The Council is registered at H M Land Registry as proprietor with title absolute under Title Numbers WT108277 and WT291518 of the land known as Forest Farm Melksham Wiltshire SN12 7AR part of which is for the purpose of identification only shown edged red on the attached plan and which includes the Land which is to be dedicated
- (2) The Tenant is the tenant under a farm business tenancy dated 10 May 2017 made between the Council (1) and the Tenant (2) of land known as Forest Farm No. 1 Melksham which includes the Land
- (3) The Council as landowner has consented and agreed to dedicate over the Land the public right of way mentioned below
- (4) The Tenant as tenant of the Land has joined into this Deed to give his consent and agreement to the dedication of the public right of way mentioned below
- (5) This Deed is made in pursuance of the Council's powers under Section 1 of the Localism Act 2011 and any other such powers them enabling

### 2 Interpretation

In this Deed



- 2.1 "footpath" means the footpath leading across the Land between point A and point B having a width of 2 metres more particularly described in the Schedule and as shown on the Plan by a broken black line
- 2.2 "Land" means the strip of land at Forest Farm Melksham in the parish of Melksham Without Wiltshire to be dedicated as a public footpath
- 2.3 "Plan" means the plan attached to this Deed
- 2.4 Any reference to a clause or the Schedule is a reference to a clause or Schedule to this Deed.
- 2.5 A reference to a statute includes any statutory modification or re-enactment of it and every statutory instrument direction or specification made or issued under the statute deriving validity from it.
- 2.6 The clause headings in this Deed are included for convenience only and shall not affect its interpretation

**NOW THEREFORE** in pursuance of the above Agreement **IT IS AGREED** as

follows:

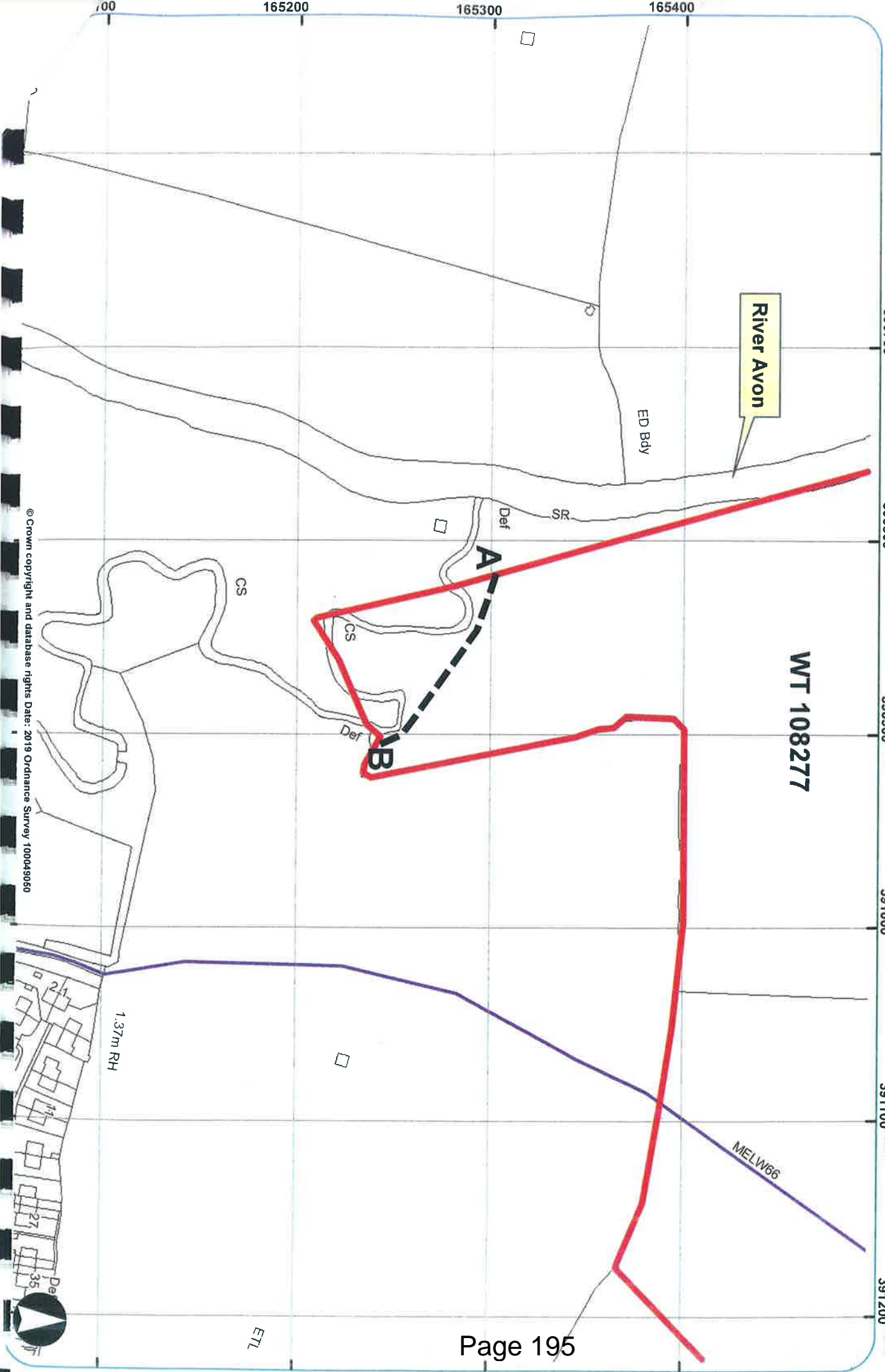
### **3 Dedication**

Subject to the provisions of clause 4 below:

- 3.1 in consideration of these presents the Council as landowner DEDICATES FOR USE BY THE PUBLIC for the purpose of the footpath the Land subject to the limitations and condition specified in the Schedule to the intent that the Land shall be enjoyed by the public as a footpath
- 3.2 the Tenant consents and agrees to the dedication of the Land as a public footpath

Deed of Dedication - Forest Farm, Melksham  
Footpath to be dedicated A B  
Land owned by Wiltshire Council WT108277 bordered in red

Date: 01/05/2019



© Crown copyright and database rights Date: 2019 Ordnance Survey 100049050

- 3.3 the Council as local highway authority for the County of Wiltshire hereby accepts the dedication of the footpath
- 4 The dedication of the Land for the purpose of the footpath WILL ONLY TAKE EFFECT on the occurrence of the confirmation of The Wiltshire Council Parish of Melksham Path No. 107 & Parish of Melksham Without Path No. 151 Rights of Way Modification Order 2020 or the enactment of any other legal order or instrument creating a public right of way adjoining at points A and B on the Plan
5. Subject to the dedication of the Land for the purpose of the footpath taking effect in accordance with the provisions contained in clause 4 above the Council shall at its own expense undertake any work that it considers necessary to bring the footpath into a fit condition for use by the public and will arrange for signing and waymarking to be carried out where necessary and upon completion of any work required the Council shall give Notice in one local newspaper circulating in the area in which the footpath is situated that as of that date of publication the footpath shall become a highway maintainable at public expense

#### **SCHEDULE**

Footpath commencing at Point A leading to Point B as shown on the Plan.

Approximate length = 110metres

Width = 2 metres

#### **Limitations and conditions**

Kissing Gate to BS5709:2018 at Point A

Kissing Gate to BS5709:2018 at Point B

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it

Executed as a Deed by  
affixing the COMMON SEAL  
of **Wiltshire Council**  
in the presence of:



Senior Solicitor

Signed as a Deed by

**Gareth Powell**



In the presence of:

NK Godwin

N. H. LUDLOW

2. Forest Farm  
Woodrow Rd  
Melksham

SNIZTRÉ

Dated

11<sup>TH</sup> MARCH.

2020

Wiltshire Council

and

Gareth Powell

AGREEMENT FOR DEDICATION

under S.1 of the Localism Act 2011

of

Public footpath at

Forest Farm Melksham Forest

Melksham Wiltshire

I R Gibbons  
Solicitor to the Council  
Wiltshire Council  
County Hall  
Bythesea Road  
Trowbridge  
Wiltshire  
BA14 8JN

**Post Order Consultation Responses**

**THE WILTSHIRE COUNCIL PARISH OF MELKSHAM PATH No. 107 & MELKSHAM WITHOUT PATH No. 151 RIGHTS OF WAY MODIFICATION ORDER 2020**

**1) Consultation letter sent to all users who had used the bridge route EGH before 2017:**

***“Wildlife and Countryside Act 1981 s.53***

***The Wiltshire Council Parish of Melksham Path No. 107 & Melksham Without Path No. 151 Rights of Way Modification Order 2020***

*I am writing to you because you have told the Council that you have walked paths in the area west of Melksham Forest around the River Avon. I have enclosed a map showing the paths affected by the above order. These are shown by a broken black line leading from A at Woodrow Road through to F at Murray Walk and over the River Avon at point E to G and on to the open land to the south east of Riverside Drive. The route E to G crosses a concrete bridge sometimes known as the ‘black bridge’.*

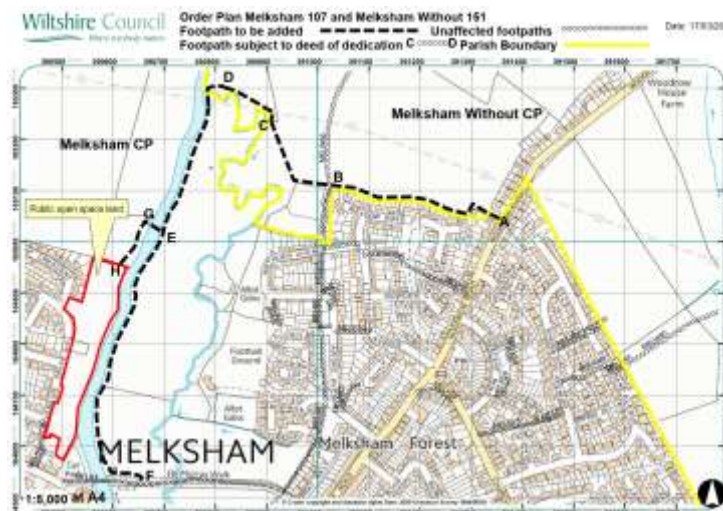
*I would like to ask you for your recollections of using the bridge E - G in the years before 2001 or thereabouts.*

*The owner of the land claims to have erected large metal gates across the bridge and they were kept locked up to the time they were vandalised and thrown in the river around the year 2000. Please find enclosed a photograph of one of the gates. It is also claimed that within the last 20 years there were also three stranded barbed wire fence gates at both ends of the bridge to keep grazing cattle off the bridge.*

*Could you please let me know:*

- 1) Did you use route E-G-H and if so, during which years?*
- 2) If you did use the route E-G-H, do you recall either the gates or the barbed wire on the bridge?*
- 3) If you do recall either the gates or the barbed wire what did you do? Did it stop you in your walk? Did you go a different way? Did you just go around or over them?*
- 4) If you do recall being obstructed by the gates or the fence, roughly for how long could you not use the bridge?*

*Please respond by email or by using the envelope provided.”*



## 2) Table of responses:

Name	Years of use	Comments
1. B Purnell	Over 50 years	Recalls bridge in 1965. Open with railings on each side. Used by children to access George Ward School from Forest estate. Recalls bridge being blocked to him "for a short time" in the 1990s (recalls barbed wire and locked gates). Used an alternative route when gates were locked, however, they didn't last for very long and were soon broken and he recalls them in the river. May have been earlier than 2000 when this happened.
2. S Sprules	Over 38 years	Does not recall the metal gate. Recalls cattle crossing the bridge to use fields on both sides during the day. No sign of structure to support gates. Barbed wire was on bridge but along it to stop cattle falling in and not across it. There was a stile at H.
3. P Sprules	Used routes since 1982	Does not recall a gate across the bridge at any time. He recalls the cattle crossing the bridge freely. Recalls barbed wire along the bridge but not across it. Fishermen also used the bridge so needed access.
4. A Cooke	From 1975 to date	Recalls gates on the bridge at one end but they were covered in ivy making them unusable and unrecognisable as gates. Barbed wire was sometimes pulled across the bridge to control cattle but he easily stepped over it – it was not an obstacle. Is only aware of recent attempts to prevent use.
5. K Davis	From 1989 onwards	Doesn't recall any gates and nor do his sons. They don't remember never being able to cross the bridge.
6. M Bryant	1976 to 1997 and 2008 onwards	Used EGH regularly 1976 to 1997 and there was never any gate or wire to obstruct him. Since 2008 there has been no gate and barbed wire was on the floor so was walked round until it was removed.
7. S Aldridge	1987 onwards	Recalls gates on black bridge, closed when cattle were grazing on either side. Gates were open when the cattle were not out. Recalls gates being vandalised and barbed wire appearing as a safety measure for the cows. Used the route throughout but when gates were closed, used an alternative.
8. P Cooke	1950 – 2015	Does not recall gates at any time. Recalls barbed wire for a few weeks but then it fell down and then she was able to cross it. Was possibly affected for about 3 months.
9. K Porter	1965 onwards	The gates were never fitted properly as there were no posts and we could walk round them. The barbed wire wasn't a fence, it was a few strands that could be stepped over. Thinks they were there more than 20 years ago. He was never obstructed by anything when using the bridge.



10. J Campbell	Since 1994	Used the route 'on and off' depending where the cattle were (he had dogs). Has not seen the gates but did see barbed wire. Was a fisherman and had to use the bridge to 'go to his peg'. People talk about the route being a walk to George Ward School. Recalls signs saying 'Angling Club water' near point F.
11. The Bull family	Since 1945	Has family recollections of use since 1922. Children use bridge to get to school. Father (born 1939) recalls hand rails and C Bull recalls remains of them. No-one remembers any gates ever. Has some recollection of barbed wire in the early 1990s. Walkers could get through. Barbed wire was not very effective for the cattle as she recall one falling in. Did avoid the route when cattle were out as they have dogs. Could always use the bridge though chose not to when cattle were grazing. Recalls some blocking of the bridge with an uprooted tree and branches.

Avon Road,  
Melksham,  
Wilts..  
SN12

Sally Madgwick,  
Rights of Way and Countryside,  
County Hall,  
Trowbridge,  
Wiltshire.  
BA14 8JN

Dear Sally,

I am writing with regard to your enquiry concerning the footpath proposals.

The Bridge (EG) as I understand it, was built to give access to concrete Rifle Range 'Butts' which stood in the field between the stream (the original course of the river) and the present River Avon (which was cut as a Mill-Stream). The Butts were part of a rifle range but this had not been used for many years when I came to live here in 1965.

The Bridge was completely open with railings on each side and was used regularly by the school children from Melksham Forest as a short cut to George Ward School, the path ran from the A350 opposite Dunch Lane down the side of the hedge; across the Bridge and straight across the field to the stream, which it crossed with a purpose built stile in the fence. The path continued on up the side of the allotments and gave access to the area around Methuen Avenue.

Question 1 - Regarding my use of the path E-G-H?

I used to walk across the Bridge at G-E regularly sometimes from H but more often I walked down the hedgerow, as the children did, joining it from the footpath which leads from Tamar Road to Beanacre.

Question 2 - Do I recall it being blocked?

After the land changed hands (sometime in the 1990's I think) attempts were made to close off the bridge and I recall barbed wire fences and later the locked gates similar to those in the photograph, I do not remember the date of this but for a short time it was impassable to me.

Question 3 - What did I do during the time it was impassable?

While the Bridge was barred I walked the fields on the Avon Road side of the river and also as I had always done; those on the other side of the A350 along by the railway and the Power Station. There was access to these from Dunch lane by a stile which has since been allowed to fall into disrepair and replaced by a hole in the hedge (attempts were recently made to block this up). Originally all the fields were unploughed pasture land and there were plenty of places to walk including a footpath from Tamar Road all the way to Beanacre, which has since been rendered impassable by the ploughing.

#### Question 4

If my memory serves me correctly the bridge was not impassable for very long - the gates were heavy and not well fixed at their hinges; consequently they were soon broken and I remember seeing them in the river, the handrails along the side of the bridge were also broken around this time; again I am not sure of the date but it was certainly no later than 2000 earlier I think, I remember that at about this time the pier of the bridge on the far side from Avon Road was almost washed away and the bridge was made unsafe, to repair it the stream was filled in around about point C on the map, to allow heavy plant into the field, the damage was repaired using the concrete from the 'Butts'. The stream was never cleared out again and remains blocked and stagnant to this day. By the time the school closed the fields were being ploughed regularly and the path was not much used. The path from H-G has always been a problem and although regularly used has often been blocked since the land has been ploughed.

When I walked the fields regularly there was a footpath along the river from F-D and a proper stile by the big pylon at point 'D' with stepping stones to cross the stream but the hole in the hedge at 'B' is quite recent I think.

The river Avon is a great asset to Melksham but In my time here I have watched the river banks deteriorate until now they are in a very poor condition, was caused firstly by leaving the willows unpollarded to collapse in and block the stream and later by ploughing far too close to the edge causing the banks to collapse

The suggestion of a path would in my opinion go some way to stopping further damage by the ploughing at least.

I hope this information is of some assistance.

Yours Sincerely,

  
Bob Purnell.

② SHIRLEY  
SPRULES

■ Portman Road  
Melksham  
Wiltshire  
SN12 ■■■■■

Ref.2017/04

Dear Sally Madgwick,

I am writing in response to the Melksham path no.107 & Melksham without path No.151, right of ways modification order 2020.

In reference to the route E-G-H outlined in the map that had been enclosed with the previous letter, I have walked this route since 1982, when I moved into the area.

While it has been stated that there was a metal gate on the bridge over 20 years ago, I do not recall there been one and I never saw a metal gate like the one in the picture in the river.

Before the fields were used for crops, they used for grassland for the cattle which would cross the bridge to use the fields on each side during the day. Even after the fields were used for crops there was no gate or barrier in place. There is no structure or wall on the bridge that a gate such as the one in the picture could be attached to. There has been barbed wire on the bridge which ran along the length of the bridge to prevent cattle from falling into the river. I do not recall barbed wire being in place to prevent access to the bridge.

In addition, I would also like to mention that there used to be a stile at H, allowing access into that field from the public open space land.

Yours sincerely,  
Mrs. Shirley Sprules

## Madgwick, Sally

---

**From:** [REDACTED]  
**Sent:** 10 January 2021 15:42  
**To:** Madgwick, Sally  
**Subject:** Melksham Right of Ways  
**Attachments:** Melksham Right of Way Path.docx; Melksham Right of Way Paths.docx

Dear Sally Madgwick,

I am emailing in response to the letter I received about the Melksham Path number 107 and Melksham Without Path Number 151. I have attached two letters, one from myself and one from my husband in response to the E-G-H route.

Yours sincerely,

Shirley Sprules

(3) PETER  
SPRULES

Portman Road  
Melksham  
Wiltshire  
SN12

Ref.2017/04

Dear Sally Madgwick,

I am writing in response to the Melksham path no.107 & Melksham without path No.151, right of ways modification order 2020.

In reference to the route E-G-H, I have walked that route since 1982 when I moved into the area. Over the years that I have walked across the black bridge over the River Avon, I have never seen a metal gate across that bridge or in the river. To my knowledge, it was not there before or after 2000. Before the fields were ploughed up for crops, the fields were grasslands for cattle to use. The cattle would cross the bridge to access both sides and tractors would also cross the bridge at times, so why would there be a big metal gate on the bridge? Plus, there is no structure on the bridge to attach anything like the gate in the picture too.

The only barbed wire that I saw was along the bridge to stop cattle falling in the river. I cannot remember wire across the bridge to prevent access.

Furthermore, fishmen used to use the bridge to cross from side G-F, they would enter the field by H entrance where there used to a stile into the field.

Yours sincerely,  
Mr. Peter Sprules.

**Madgwick, Sally**

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(4) ADRIAN  
COOKE

**From:** [REDACTED]  
**Sent:** 22 December 2020 13:29  
**To:** Madgwick, Sally  
**Subject:** Access to Melksham fields

Dear Sally,

Thank you for the letter of enquiry on the Melksham access pathways matter. I can confirm that I have indeed used the route E-G-H as shown on your map continually since 1975 to the present day.

I can also confirm that there once were gates at one end of the bridge, but they were completely covered in ivy making them unrecognisable and unusable as gates, and to my knowledge they were never closed.

As for the barbed wire, I can also confirm that when there were cattle in the field, barbed wire was pulled across the bridge, and was removed after the cattle were removed. However you could easily step over the wire so it was never an obstacle to using the fields beyond - fields that I've camped in as a boy, and now walk my dog in. Not until very recently did the farmer try to unsuccessfully stop people using it, because he was stopped from using the bridge himself due to structural concerns and heavy vehicles (sour grapes).

I hope you find this useful.

Yours sincerely,  
Adrian Cooke

**From:** [REDACTED]  
**To:** Madgwick, Sally  
**Subject:** 2017/04  
**Date:** 21 December 2020 10:50:40

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⑤ KEVIN  
DAVIS

Dear Ms Madgwick,

Thank you for your email regarding the bridge from points E-G on Modification Order 2017-04.

I believe we did use the path between E - H somewhere around 2000 , probably from the late 1990's. I've asked both my sons as well and we cannot recall any large metal gates. Also, we can't remember not being able to cross the bridge at any time.

Hope this helps,

Regards

Kevin Davis



**From:** [REDACTED]  
**To:** Madgwick, Sally  
**Subject:** Rights of way modification  
**Date:** 29 December 2020 10:27:17

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⑥ MARK BRYANT

29 December 2020

I am responding to the letter you sent me on the 14 December 2020 with reference to The Wiltshire Council Parish of Melksham Path No. 107 & Melksham Without Path No. 151 Rights of Way Modification Order 2020

I used the said route E-G-H regularly from years 1976 to 1997 and there was never any gate or barbed wire in place to obstruct my walk

I didn't use the above route between years 1997 to 2008 but since 2008 I have used the route again and I have never seen a gate but there was barbed wire which was laid on the floor so I walked around it the barbed was then removed and hasn't been there for at least 8 years I have never been obstructed from using the bridge

Yours sincerely  
Mark Bryant

7 SUE ALDRIDGE  
SCOTLAND ROAD  
MELKSHAM  
SN12

Dear Sally Madgwick,

Thankyou for your letter ref 2017/04.  
I moved to Melksham in 1987 and have  
lived in Scotland road ever since.

I remember the gates on the 'black bridge'  
which were always closed if cattle were  
grazing on either side of the bridge and  
understood the safety value of this. When  
cows were not out these gates were open.  
I also remember them being vandalised and  
then barbed wire being put across, and  
this was also a safety measure for the  
cows. Therefore when the gates were  
open or no barbed wire up, yes I did  
walk from H - G - E. When the gates  
were closed I walked from F onwards  
along the river. At H there is a style  
and I have enclosed photos of it as  
it is now, these have always been there  
since the estate was built and are  
the concrete V shaped style. The farmer  
blocked this style about 5 years ago.

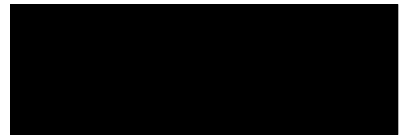
So to answer your questions,

- 1) Yes I used the route from 1987. E-G-H
- 2) Yes I remember the gates and barbed wire.
- 3) I went a different way, F-E-D etc.
- 4) The bridge was shut off from June - October, approximately.

I have never been told by anyone that I cannot walk this route. Tim Farthing's father Norman would often be in the fields and never mentioned that it was not a public right of way. I always respected the area and kept my dogs on the lead if cows were out. I would also ring Norman if there were any problems with the cows.

I hope this is helpful. Can I also mention that there is a public right of way from Tamar Close to Bearacre. This same farmer never clears this since he has been growing maize. At the moment it is ploughed and as it is rough ploughed is unwalkable. When maize is being grown I can't understand why he doesn't want people to walk across the land.

Yours Sincerely,





⑧ POPPY COOKE

St Margaret's Eden.  
MELKESHAM.

SN 12

31-12-20.

Ref 2017/04.

Dear Miss Madgwick

Re Melkesham path NO 107.

Melkesham Without path NO 151.

In reply to your

question

1) 1950 - 2015.

2) I do not recall gates  
at any time.

3) I do recall barbed wire  
which was there for a  
few weeks and then  
one was able cross over  
it once it collapsed.  
When the wire was in  
existence we used to  
walk another way.

4) We probably did not use Dredge for about 3 months crossing another walk.

I would like to add that I have walked that Dredge since the late 1940 - early 1950's as a child from Forest Farm to Beacon.

This walk has always been very much a community dog walking area and even in my old age I feel very strongly that it should stay so.

Yours sincerely



(Poppy & Cooke)

⑨ KEVIN PORTER

Sally Madgwick  
Rights of Way and Countryside  
Country Hall  
By the sea road  
Trowbridge  
BA14 8JN

K. Porter

Granville Road

Melksham

SN12

28/12/2020

Dear Sally Madgwick

In answer to your questions in your letter dated 14/12/2020, yes I used route E-G-H from 1965 with other local children, and my grandfather regularly took me with him when he walked the dog. The route walked was from H, as I lived in Granville Road then, as I do now.

I remember the gates not being fitted properly, as there never was the correct posts to hold them, and we could get around them.

The barbed wire wasn't a fence. It was a few low strands of wire which could be stepped over.

These were in place more than 20 years ago, for a short period of time as I remember and did not stop me walking the route.

I was not obstructed by the gates or wire as there was always a way around or through.

I can't remember exact dates.

Yours sincerely,

KEVIN PORTER

(10) J CAMPBELL

J. CAMPBELL

WOODROW ROAD

MELKSHAM

SN 12

MOR

19 DEC. 20.

DEAR M<sup>r</sup> MADENICK,

RE: YOUR LETTER CONCERNING USE OF ROUTE E-G-H.

- 1/ I HAVE WALKED DOGS USING THIS ROUTE ON AND OFF SINCE 1994. DEPENDING ON WHERE THE CATTLE WERE IN THE FIELD WOULD MAKE MY CHOICE OF ROUTE. AT NO TIME DURING THIS PERIOD HAVE I EVER SEEN BATES ON THE BRIDGE. I HAVE SEEN THE BARBED WIRE AS CLAIMED.
- 2/ ANOTHER POINT WORTH BEARING IN MIND IS THE AVON ANGLING CLUB. AS A PREVIOUS MEMBER OF THE CLUB I FISHED IN COMPETITIONS ON THE STRETCH OF RIVER BETWEEN POINT H-D AND LIKE OTHER ANGLERS USE THE BRIDGE IF REQUIRED TO GET TO MY 'PEG'.
- 3/ VARIOUS PEOPLE I HAVE TALKED TO ALSO REMARK ABOUT THE BRIDGE BEING PART OF THE ROUTE TO THE GEORGE WARD SCHOOL FROM THE FOREST ESTATE. I WOULD GUESS THE PUPILS WERE THE ONLY WHO LET THE BARBED WIRE DOWN.
- 4/ THERE IS A VERY RUSTY SIGN IN THE FIELD AT POINT 'H'. I THINK IT MAY HAVE BEEN ABOUT ACCESS. TO ENTER THE FIELD REQUIRES CLIMBING A FENCE. SIGNS AT THE MURRAY HALLS END A 'F' AND ON THE RIVER BANK BY "GREEN BRIDGE" STATE "AVON ANGLING CLUB WATER".



I state this is of some help to you I moved to Mountain  
in 1986, and into the forest area in 1988.

I know and often talk to life time locals who know and talk  
about the area in question.

Yours Sincerely



**Madgwick, Sally**

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**From:** Carrie Bull [REDACTED]  
**Sent:** 17 January 2021 17:26  
**To:** Madgwick, Sally  
**Subject:** Path No.107 and 151 RIGHTS OF WAY

Dear Sally Madgwick, REF:2017/04

In response to your letter dated 14th Dec 20. Please see below our response to the following points 1-4;

1) Did you use route E-G-H and if so during which years ?

At least the last 3 generations of our family since the second world war have had many decades of free and unfettered use of the route E-G-H. My late grandmother who was born in 1922 used this route as a young lady and my father born in 1939 used this same route when he was young. We like many, many others have continued to use this route and I myself have walked this route since a child in the 1980's. Children for generations have walked across the black bridge to and from school each day. At one point from what I can remember there was also a wooden stile/step at point H to access the route.

2) If you did use the route E-G-H, do you recall either the gates or the barbed wire on the bridge?

My father remembers hand railings at the sides of the bridge and I remember remnants of hand railings. In all the years of using this route none of us have any memory of ever seeing any gates on the bridge. We do have some recollection of there being barbed wire on the ends of the bridge possibly in the early 1990's.

3) If you do recall either the gates or the barbed wire what did you do ? Did it stop you in your walk? Did you go a different way ? Did you just go around or over them ?

As far as we can remember the barbed wire at the ends of the bridge was passable for footpath users to get through. Although the land owner has said that the barbed wire was erected to keep the grazing cattle off the bridge this did not prevent cattle from falling in to the river as on one occasion my mother called the fire service after seeing a cow in distress in the river after falling in from the bank. Personally, we tried to avoid this route if we were walking with the dog when there were cattle grazing to prevent any unnecessary distress to the cattle and keep ourselves from sustaining injury.

4) If you do recall being obstructed by the gates or the fence, roughly for how long could you not use the bridge ?

As previously stated above we have no recollection of there being any gates and we were able to use the bridge getting through the wire when the cattle were not grazing.

The black bridge was deliberately blocked by the land owner several years ago with a huge uprooted tree and further branches etc to try to prevent people from using this route. There is a further footpath that goes directly across this land owner's same field which he plants over every year to try to prevent people from using this route as well.

It is very difficult to understand why one landowner has tried so persistently to prevent people from accessing footpaths across their land which has been enjoyed for so many decades. Never has there been such a time when going out for a walk and immersing oneself in the beauty of nature ever been so

important as it is now. Neither has there been such a time for landowners to work together to protect and conserve our environment. Of course, the users of footpaths and fields must also play their part in respecting the land and nature` too. Other land owners in the surrounding areas leave wide edges to their ploughed/planted fields where there are footpaths which locals can then access easily. This encourages walkers to stick to the correct footpath routes and also helps conserve wildlife.

And finally, since the age of time bridges were meant for crossing whether it be by foot, pony, bike or tractor !

I look forward to hearing of the rightful re-instatement of this footpath.

Yours very hopefully,

Carrie Bull and the Bull family

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WILTSHIRE COUNCIL

AGENDA ITEM NO.

WESTERN AREA PLANNING COMMITTEE

9 JUNE 2021

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**WILDLIFE AND COUNTRYSIDE ACT 1981 s.53 (“the 1981 Act”)**

**THE WILTSHIRE COUNCIL PARISH OF WESTBURY PATH No. 68  
RIGHTS OF WAY MODIFICATION ORDER 2020**

**Purpose of Report**

1. To:
  - (i) Consider the two objections and one representation received relating to the above Order to add a footpath leading from footpath Westbury 15 to Westbury railway station.
  - (ii) Recommend that Wiltshire Council takes a neutral stance when the matter is referred to the Secretary of State for Environment, Food and Rural Affairs.

A copy of the Order and Order plan is appended at **Appendix A**.

**Relevance to the Council’s Business Plan**

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

**Background**

3. Wiltshire Council has statutory duties to maintain the legal record of public rights of way in Wiltshire (excluding the Borough of Swindon), to maintain the rights of way shown therein, and to assert and protect them for the use and enjoyment of the public. These duties are not discretionary.
4. The definitive map and statement is the legal record of public rights and is conclusive in law as to what it shows, but this is without prejudice to the existence of a more extensive public right (s.56 of the 1981 Act). The Council has a duty to keep it under continual review and make legal Orders to modify it when evidence shows it is in error.
5. Members of the public may apply to the Council to modify the definitive map and statement and they do so under the provisions of Schedule 14 to the 1981 Act. The Council must determine these applications by investigating all available relevant evidence and by making a modification order where it is considered it is shown on the balance of probability (i.e. it is more likely than not) or, in this case, that there has been a reasonable allegation, that a change in the map and statement is required.

6. On 8 March 2017 Wiltshire Council received an application from Cllr Russell Hawker for a definitive map modification order to add public footpaths at Westbury Station to the definitive map and statement. The application adduced evidence of use by the public over a short path linking Station Road with Station Approach, over Station Approach itself and over another path linking Station Approach with footpath Westbury 15 leading past the railway station itself, along an access road to sidings and sheds now used by DB Cargo and a section of path skirting the outside of the land used by DB Cargo, but within, Network Rail's site.
7. Officers of Wiltshire Council considered the application and evidence and a decision was made on 12 June 2018 to refuse the application. A copy of that decision report is appended here at **APPENDIX B**.
8. The applicant exercised their right to make an appeal against this decision (under Schedule 14 Wildlife and Countryside Act 1981) and on 14 April 2020 an Inspector from the Planning Inspectorate, appointed to act on behalf of the Secretary of State for Environment, Food and Rural Affairs, issued a direction to Wiltshire Council to make an Order to record part of the application route as a footpath. A copy of the Appeal Decision and Direction is appended here at **APPENDIX C**.
9. In his decision the Inspector found that although historical documentary evidence clearly supported the physical existence of the claimed routes from 1848 (in the case of Station Approach) and 1915 (in the case of the path linking Westbury 15 with the railway station), none of the available historical documentary evidence indicated the existence of public rights over the routes (paragraph 13 Appendix C).
10. The Inspector went on to say that accordingly, the determination of the appeal depended entirely on the evidence of public use of the route, either by deemed dedication under the provisions of s.31 of the Highways Act 1980 or inferred to have been dedicated at common law.
11. In considering evidence of public use of the way, both Wiltshire Council and Network Rail had submitted that the provisions of s.57 of the British Transport Commission Act 1949 applied and that post 1949, it had not been possible for the public to acquire rights over any road or footpath forming an access to a station.
12. The Inspector upheld that this was the case over Station Approach, as this was clearly an access road to the station, but he considered that where people had used the route from Westbury 15 through to Station Road via Station Approach as a through route and not as access to the station, that the provisions of s.57 may not apply. He also considered that a public right may have been acquired prior to the 1949 Act, but that little evidence had been adduced to support that possibility.
13. If that was the case, and in the absence of any evidence of action by the landowner before 2016 that would evidence a lack of intention to dedicate, the Inspector found that the application formed a reasonable allegation that public rights subsisted over part of the route and directed Wiltshire Council to make an Order accordingly.

14. Wiltshire Council made the Order as directed on 17 July 2020 and advertised it between 7 August 2020 and 2 October 2020. During this time two objections and one representation were received. Copies of these are appended here at **APPENDIX D**.
15. The Order must now be forwarded to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA) for determination as Wiltshire Council may not confirm an Order where there are outstanding objections or representations.
16. This committee is asked to consider the evidence relating to this case and any adduced by duly made objections and representation and recommend what stance Wiltshire Council should take when the matter is sent to SoSEFRA.

### **Main Considerations for the Council**

17. Although the legal test contained in s.53(3)(c)(i) Wildlife and Countryside Act 1981 allows for an Order to be made where the evidence adduced only forms a reasonable allegation that a public right subsists (and there is no incontrovertible evidence to the contrary), the legal test to be applied to confirm an Order is that it is shown on the balance of probability (i.e. it is more likely than not) that a public right subsists. In other words, it is stronger test to be applied to confirm an Order. This approach was confirmed in *Todd and Bradley v SoSEFRA [2004] EWHC 1450* and upheld in *R(on the application of Roxlena Ltd) v Cumbria CC [2019] EWCA Civ 1639*.
18. In addition to the evidence adduced and investigated as part of the original application, the Council must now also consider the objections and representation to the Order.

### **Consideration of the Objections and Representation (see Appendix D)**

#### **19. L B and Co on behalf of DB Cargo (UK) Ltd 21 September 2020**

Key points:

- (i) DB Cargo objects to the making of the Order.
- (ii) DB Cargo is the UK's largest rail freight operator. DB Cargo operates sidings adjacent to Westbury Railway Station and the claimed footpath runs through its freight transshipment operation.
- (iii) DB Cargo considers that the provisions of the British Transport Commission Act 1949 apply. Specifically, Section 57:  
*"As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or harbour premises of the Commission."*
- (iv) DB Cargo maintains that this clearly applies to "any" route forming an access or approach to any station, goods yard etc and does not specify that the route must exclusively provide access to those facilities. Hence it is irrelevant that some people used it as a through route, since it clearly was an access route to the station, goods yard, etc.

20. **Dentons on behalf of Network Rail Infrastructure Limited 02 October 2020**

Key points:

- (i) Network Rail objects to the making of the Order.
- (ii) Network Rail considers that the provisions of Section 57 of the British Transport Commission Act 1949 apply.
- (iii) Section 57 of the 1949 Act applies not just in relation to land forming an access or approach to a station, but also in respect of accesses or approaches to *inter alia* a goods-yard or depot.
- (iv) Additional use of the route as a through route does not negate the effect of the route providing access to the station and does not negate the effect of s.57 of the 1949 Act.
- (v) Network Rail adduces a Great Western Railway (GWR) document stamped by a Deeds department stamp in 1911 and re-stamped in 1940 by the Divisional Engineers Office. The document is a plan of the engine shed site. Point C on this plan is on the Order route (Westbury 68). The plan is annotated “*On Good Friday barriers to be placed at the points A, B, C and D*”. From this, Network Rail maintains that it is evident that the rail operator (then GWR) intended to exercise control over the route by closing it for one day every year. This would be sufficient to interrupt use of the way and demonstrate a lack of intention to dedicate the route as a public right of way.
- (vi) Network Rail recognises that safety concerns are irrelevant to the confirmation of the Order but wishes to highlight concerns of public safety relating to conflict with DB cargo vehicle movements and increased use of the level crossing used by the adjoining footpath Westbury 15 at Oldfield Road.

21. **Mr Francis Morland 02 October 2020**

Key points:

- (i) Mr Morland wishes to make this representation to the Order.
- (ii) He supports the addition of the footpath to the definitive map and statement.
- (iii) Considers that the Order should be modified by SoSEFRA to include the through route to Station Road (including Station Approach).
- (iv) Considers that the Inspector had not adequately considered the historical evidence relating to the through route.
- (v) Disputes the relevant date of the Order as being the date of the decision.
- (vi) Refers the Council to the case of *Network Rail Infrastructure Ltd v Welsh Ministers [2020] EWHC 1993 (Admin)*.

**Officer’s Comments on the objections and representation**

22. **L B and Co on behalf of DB Cargo (UK) Ltd.**

This objection relies on the action of s.57 of the British Transport Commission Act 1949 applying to the claimed route. If they are correct in this, the effect would be that it was not possible to acquire a public right by prescription at anytime after 1949. Their objection does not address the existence of the route prior to 1949 or the possibility that a public right may have been acquired over it before that time.



23. Their comments relating to the suitability of the route or matters related to health and safety concerns are irrelevant for the purposes of s.53 of the Wildlife and Countryside Act 1981.
24. Their view relating to the British Transport Commission Act 1949 is in agreement with that of officers of the Council when the application was originally refused but conflicts with the view of the Inspector who considered that use of the route as a through route rather than just a route to the station, goods yard or depot would amount to qualifying use.

25. **Dentons on behalf of Network Rail Infrastructure Limited**

This objection also considers that the action of s.57 of the British Transport Commission Act 1949 has prevented a public right being acquired after 1949. They also adduced evidence of control being exerted over the route to prevent a public right being acquired before 1949. The plans submitted show clearly an intention of the Great Western Railway Co. to lock a barrier across the route on Good Fridays. The action of locking a gate or barrier across a route has long been a means by which a landowner could interrupt public use and so stop a public right being acquired by prescription.

26. It is not known whether rail services operated on a Good Friday or whether the engine shed and depot was open on that day, but if they were not, then additionally this could be supportive of the route being considered an access route to the station or depot – in other words, the route was closed on a day when no inconvenience would be felt by users of the station or by workers at the engine shed or depot.
27. The concern expressed by Network Rail relating to an increase in use of a nearby level crossing is irrelevant for the purposes of s.53 Wildlife and Countryside Act 1981.

28. **Mr Francis Morland**

Although Mr Morland agrees with the making of the Order to record part of the applicant route as a public footpath he does not agree with the Inspector's report and finding that the route known as Station Approach should not be included in the Order, or the small section that is already recorded in the Council's highway record. Although officers do not agree with Mr Morland on this point, if he is able to convince any subsequent Inspector that the first inspector erred on this matter, that Inspector has the power to modify the Order by making additions.

29. Mr Morland also considers that at the appeal stage the Inspector did not give sufficient weight to the historical evidence relating to the path. He adduces no further evidence to support this though likens the argument to being similar to a recent judgement (*Network Rail Infrastructure Ltd v Welsh Ministers [2020] EWHC 1993 (Admin)*). In this case, the railway line was found to post date the existence of a public highway and accordingly, the highway rights prevailed over the railway land as they had not been lawfully extinguished.

30. A full investigation into the documentary historical evidence for this area has been carried out by officers of the Council (see **Appendix B**). The appeal Inspector was in agreement with the officers' finding that there was an insufficiency of evidence to support the notion that the claimed route was part of the footpath "Brook Footway" as awarded by Act of Parliament at inclosure in 1808. Officers consider that this footpath, now part extinguished where it crossed the railway line and part diverted at the site of the engine shed, is now recorded as footpath Westbury 15, the linking path to the claimed route.
31. Historic Ordnance Survey maps (paragraph 11.53 **Appendix B**) show a footpath existing within the GWR land alongside the railway linking Penleigh and the station and this path was interrupted by the building of an engine shed (completed 1915). However, the Ordnance Survey maps carry a disclaimer to the effect that any roads or paths therein shown are not to be assumed to be public. The Ordnance Survey records topographic detail and hence recorded the path (as it did exist), but they were not in a position at that time to know what rights existed over it.
32. As this path was interrupted by the building of the engine shed, it seems likely that the claimed path (i.e. the order route) is the replacement path installed by Great Western Railway.
33. The deposited plan for the alteration of public rights of way can be seen at page 35 of **Appendix B** and clearly shows the diversion of the public right of way across the site to a route south of the site, forming what is now Westbury 15. The claimed route is not shown.
34. Additionally, support of the claimed route being a diversion of a 'private' GWR route can be found in the extract from R J Cogswell's book on Westbury Ironworks. The author remembers the building of the engine shed and after a lengthy discussion regarding the existing footpath across the site and its replacement (now part of Westbury 15 and as shown on the deposited plan) also records that: "...Elsewhere, an existing GWR owned footpath from the station to Dilton Marsh and long known as the Penleigh Footpath, was diverted across the, by then, filled in section of the Station Minehole to the kissing gate opposite to the pedestrians' entrance to the new depot. From there is continued round to the old level crossing for Brook Mill..."
35. In that description Cogswell describes the order route as being a "GWR owned footpath" which, supported by the fact that its diversion did not form part of the deposited plan, suggests to officers that this was not a historic public footpath but one that was constructed by GWR for railway purposes.

### **Overview and Scrutiny Engagement**

36. Overview and scrutiny engagement is not required in this case.

### **Safeguarding Considerations**

37. There are no relevant safeguarding considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Public Health Implications**

38. There are no identified public health implications which arise from the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Corporate Procurement Implications**

39. There are no additional procurement implications associated with this recommendation. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Environmental and Climate Change Impact of the Proposal**

40. There are no environmental or climate change considerations associated with the confirmation of this Order. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.
41. Though not relevant to the Council's decision in this matter it is noted that a pedestrian and cycle route leading parallel to the claimed route and linking footpath Westbury 15 with the railway station has been provided for within the adjacent 'Spinnaker' housing development. Although this development is not yet complete, the new shared use path will enable pedestrian and cycle access to the station for not just residents of 'Spinnaker' but also for anyone who would previously have used the Order route. The proposed new route avoids any conflict with vehicular traffic accessing the station or D B Cargo's site and meets a range of objectives including SO2,11,12,13 and 14 In the Wiltshire Local Transport Plan 2011 – 2026.

### **Equalities Impact of the Proposal**

42. These considerations are not relevant considerations for the purposes of s.53 of the 1981 Act.

### **Risk Assessment**

43. Wiltshire Council is acting within its statutory duty and there is no risk associated with the pursuit of this duty.

### **Financial Implications**

44. Wiltshire Council has made financial provision for the pursuit of its statutory duty under s.53 of the 1981 Act.
45. The Order must be sent to SoSEFRA for determination and this may incur costs for the Council. The Order may be determined by written representations, at a public local hearing or a public inquiry.
46. In the event that SoSEFRA decides to determine the Order by written representations there is a minimal cost to the Council in officer time. Where a hearing is held there are costs associated with hiring a venue, these will be in the region of £200. Where a public inquiry is held and the Council takes a neutral stance the costs will be related only to venue hire. If the Council objects to or supports the Order the costs are likely to be in the region of £6,000 (for a 2-day inquiry).

47. Costs may be claimed against the Council if it is found by SoSEFRA to act unreasonably at an inquiry. The Council may seek costs against the objectors if they are found by SoSEFRA to act unreasonably at an inquiry.

### **Legal Implications**

48. Any decision of the Council is open to an application for judicial review in the high court. An appeal may be made by any aggrieved party and may be the result of a decision to either support or not support the confirmation of the Order.
49. If the appeal is allowed to be heard in the high court and the Council loses its case, all costs would be paid by the Council. If the Council wins its case, all costs would be paid by the opposing party. Further appeal may be made by either party. If the court finds against the Council in judicial review proceedings, the potential costs to the Council would potentially be in the region of £50,000.

### **Options Considered**

50. That:
- (i) Wiltshire Council supports the confirmation of the above Order by SoSEFRA.
  - (ii) Wiltshire Council objects to the confirmation of the above Order by SoSEFRA.
  - (iii) Wiltshire Council takes a neutral stance when the above Order is submitted to SoSEFRA.

### **Reason for Proposal**

51. Where an Order is made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 the burden of proof needed to make the Order is weaker than that needed to confirm it. In the Council's original decision to refuse to make an Order, it was considered that there was an insufficiency of pre-1949 evidence of a public right subsisting over the route and that the provisions of s.57 of the 1949 British Transport Commission Act had prevented a public right being acquired after 1949.
52. At the appeal stage the Inspector supported much of that view but considered that there was a reasonable allegation (in the absence of incontrovertible evidence to the contrary) that a right had been acquired over some of the claimed route post 1949 and the Council was directed to make the Order before this committee.
53. Since that time, very little further evidence has been adduced for the committee to consider. Both the landowner and tenant consider that the Inspector was incorrect in his view of the applicability of the 1949 Act, effectively agreeing with officers at the application stage. The only new evidence adduced at this stage is the plan of the Engine Shed works showing that it was the intention of GWR to erect a barrier across the order route once a year (on Good Fridays). The evidence suggests that this was in the pre-1949 period.

54. In consideration of the clear differences in opinion officers are guided by The Planning Inspectorate's Rights of Way Advice Note No. 1 *Conduct of Inquiries and Hearings into Rights of Way Orders where Order Making Authorities Do Not Actively Support an Order.*

***“Background***

*4. In most cases, an OMA will not make an order unless it is satisfied that the circumstances justify it. Exceptions to this occur when an OMA declines to make the requested order but the applicant successfully appeals to the Secretary of State. This will result, in the case of definitive map orders, in the OMA being directed to make the order under Schedule 14 of the Wildlife and Countryside Act 1981.*

*5. In such circumstances, where an OMA has previously assessed the facts of the case and decided the making of an order is not justified, it may opt to oppose confirmation of the order or it may choose to adopt a neutral stance whereby it neither supports nor objects to confirmation.”*

55. Owing to the clear differences in opinion and the possible need to hear the evidence of use at a public inquiry where it can be tested, officers do not consider it appropriate to recommend actively opposing this Order, but instead to take a neutral stance, leaving the interested parties to present their cases to an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs. Where the Council takes a neutral stance it neither supports or objects to the Order but acts in a manner to facilitate any hearing or inquiry (for example making the initial submission, managing papers for public deposit, booking venues and liaising with the Planning Inspectorate).

**Proposal**

56. That the Wiltshire Council Parish of Westbury Path No. 68 Rights of Way Modification Order 2020 is forwarded for determination to the Secretary of State for Environment, Food and Rural Affairs and that Wiltshire Council takes a neutral stance at any hearing or inquiry.

**Jessica Gibbons**

**Director, Communities and Neighbourhood Services**

Report Author:

**Sally Madgwick**

Definitive Map and Highway Records Manager, Rights of Way and Countryside

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**The following unpublished documents have been relied on in the preparation of this Report:**

None

**Appendices:**

Appendix A	Order
Appendix B	Decision Report to Refuse the Application
Appendix B.A	Network Rail objection at consultation stage
Appendix B.B	User evidence
Appendix C	Planning Inspectorate Appeal Decision
Appendix D	Objections and representation to the Order

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**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE DEFINITIVE MAP AND STATEMENT FOR THE WESTBURY URBAN DISTRICT COUNCIL DATED 1953 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL PARISH OF WESTBURY PATH No. 68 RIGHTS OF WAY MODIFICATION ORDER 2020**

This order is made by Wiltshire Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") as directed by an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs that the Definitive Map and Statement for the Westbury Urban District Council dated 1953 as modified under the provisions of the Wildlife and Countryside Act 1981 because it appears to require modification in consequence of the occurrence of events specified in section 53(3)(c)(i) of the Act, namely 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;

The Authority have consulted with every local authority whose area includes the land to which this order relates.

The Wiltshire Council hereby order that:

1. For the purposes of this Order the relevant date is the 14<sup>th</sup> April 2020
2. The Definitive Map and Statement for the Westbury Urban District Council dated 1953 as modified under the provisions of the Wildlife and Countryside Act 1981 shall be modified as described in Parts I and II of the Schedule and shown on the plan attached to the Order.
3. This Order shall take effect on the date it is confirmed and may be cited as the Wiltshire Council Parish of Westbury Path No. 68 Rights of Way Modification Order

THE COMMON SEAL of            }  
 WILTSHIRE COUNCIL was        }  
 hereunto affixed this  
 17<sup>th</sup> day of July 2020            }



in the presence of:

*M. E. Yecker*  
 Team Leader (Legal)

92080

## SCHEDULE

### PART I

#### MODIFICATION OF DEFINITIVE MAP

<b>Parish</b>	<b>Path No</b>	<b>Description of footpath to be added</b>	<b>Modified under Section 53(3) as specified</b>
Westbury	68	FOOTPATH leading from point A to point B as shown by a bold black broken line on the plan attached hereto.  Width: Point A to Point Y = 2 metres Point Y to Point B = 3.7 metres  Approximate length = 450 metres	53(3)(c)(i)

## SCHEDULE

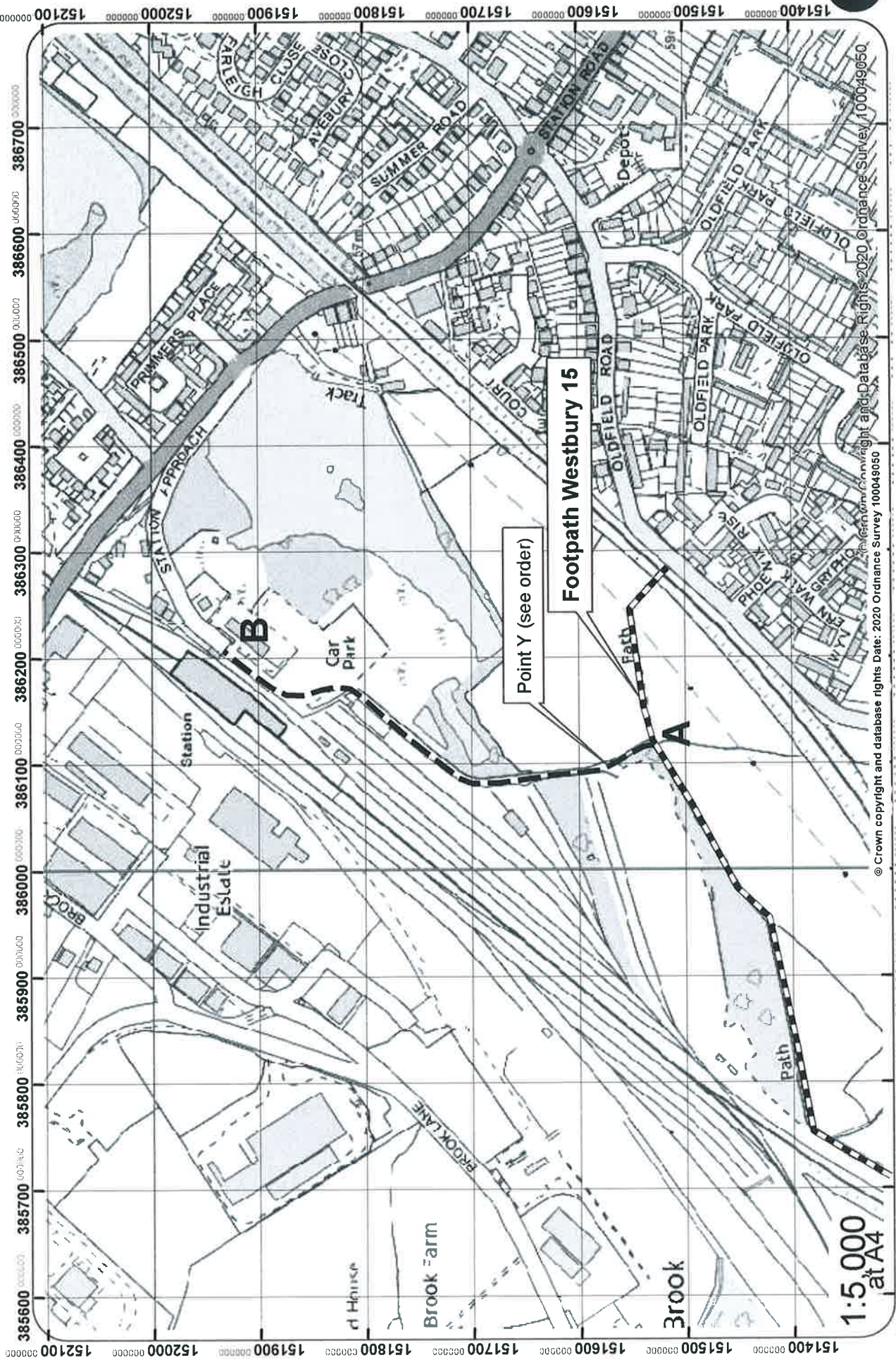
### PART II

#### MODIFICATION OF DEFINITIVE STATEMENT

<b>Parish</b>	<b>Path No</b>	<b>Description of path</b>	<b>Modified under Section 53(3) as specified</b>
Westbury	68	FOOTPATH leading from Westbury Path no. 15 at OS Grid reference ST8612 5153 in a north north west and north east direction to the station car park where north north east and north east to join Station Approach at OS grid reference ST 8621 5193.  Width ST8612 5153 to ST8610 5157 = 2 metres ST8610 5157 to ST 8621 5193 = 3.7 metres	53(3)(c)(i)



Westbury 68 Order Plan  
Footpath to be added A - - - - - B



1:5 000  
at A4

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## WILDLIFE AND COUNTRYSIDE ACT 1981 S.53

### DECISION REPORT

#### WESTBURY STATION “CINDER TRACK”

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

#### 1.0 APPLICATION

Application number: 2017/01

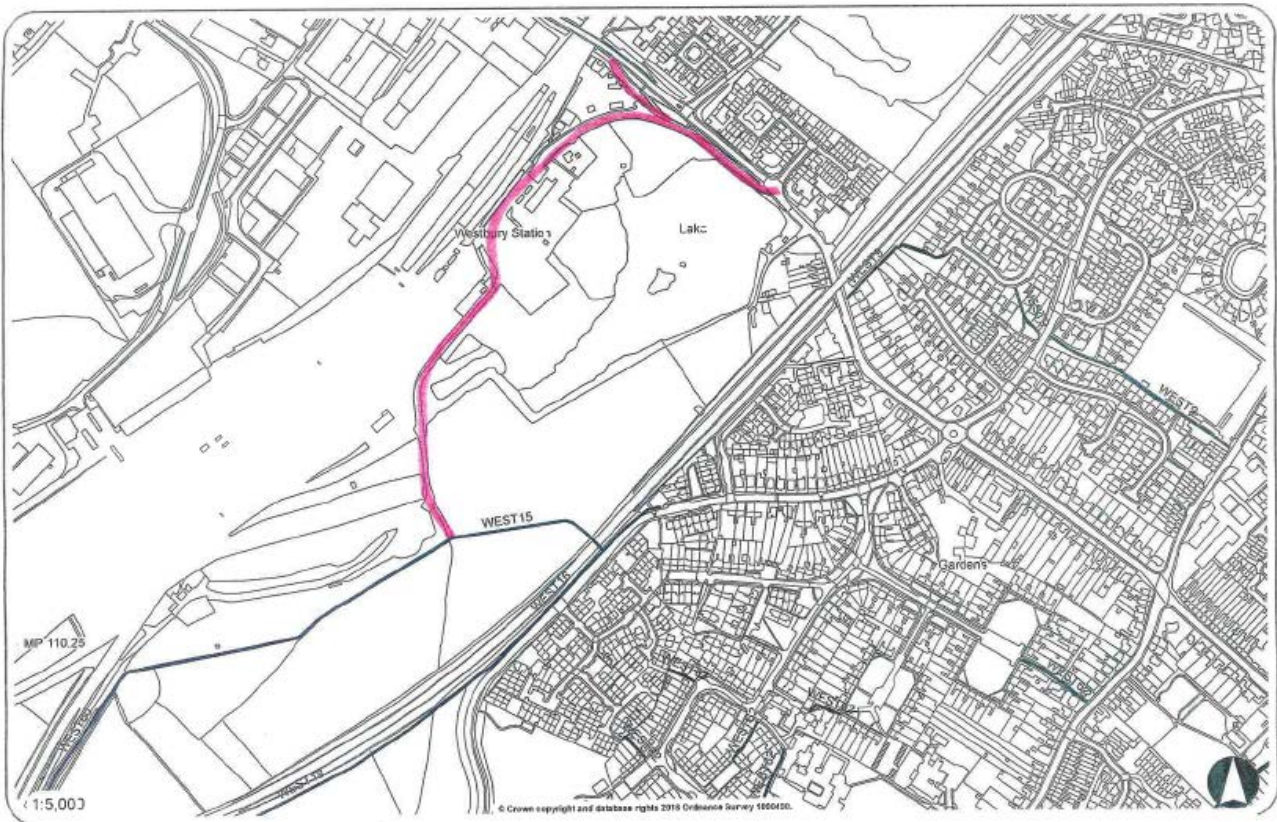
Date of application: 08 March 2017

Applicant: Cllr Russell Hawker  
25 Caspian Gardens  
Westbury  
Wiltshire  
BA13 3GP

Application for: An Order modifying the definitive map and statement for the area by adding a footpath from footpath Westbury 15 along a “cinder track” north to join with sidings yard lane (now blocked) along Station Approach to Station Road.

Application comprises: Form of Application for Modification Form 1  
Form of Certificate of Service of Notice of Application Form 3  
Notice served on:  
Network Rail Infrastructure Ltd  
DB Cargo Ltd  
Map to the scale 1:5000 showing claimed route highlighted in pink  
13 user evidence forms (UEFs)

## Application map



## 2.0 Enabling Legislation

- 2.1 Wiltshire Council is the surveying authority for the County of Wiltshire, excluding the Borough of Swindon. A surveying authority is the body responsible, *inter alia*, for the preparation and upkeep of the definitive map of public rights of way.
- 2.2 The Wildlife and Countryside Act 1981 (WCA 1981)(c.69) section 53(2)(b) applies:

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

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

2.3 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;*

*(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*

*(iii) that there is no public 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.*

2.4 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 (below):

*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.*

2.5 Section 53(5) WCA 1981 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.

2.6 Schedule 14 to this Act states:

*Form of applications*

*1. An application shall be made in the prescribed form and shall be accompanied by –*

*(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and*

*(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.*

### *Notice of applications*

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*

*(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description "owner" or "occupier" of the land (describing it) and by affixing it to some conspicuous object or objects on the land.*

*(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.*

*(4) Every notice or certificate under this paragraph shall be in the prescribed form.*

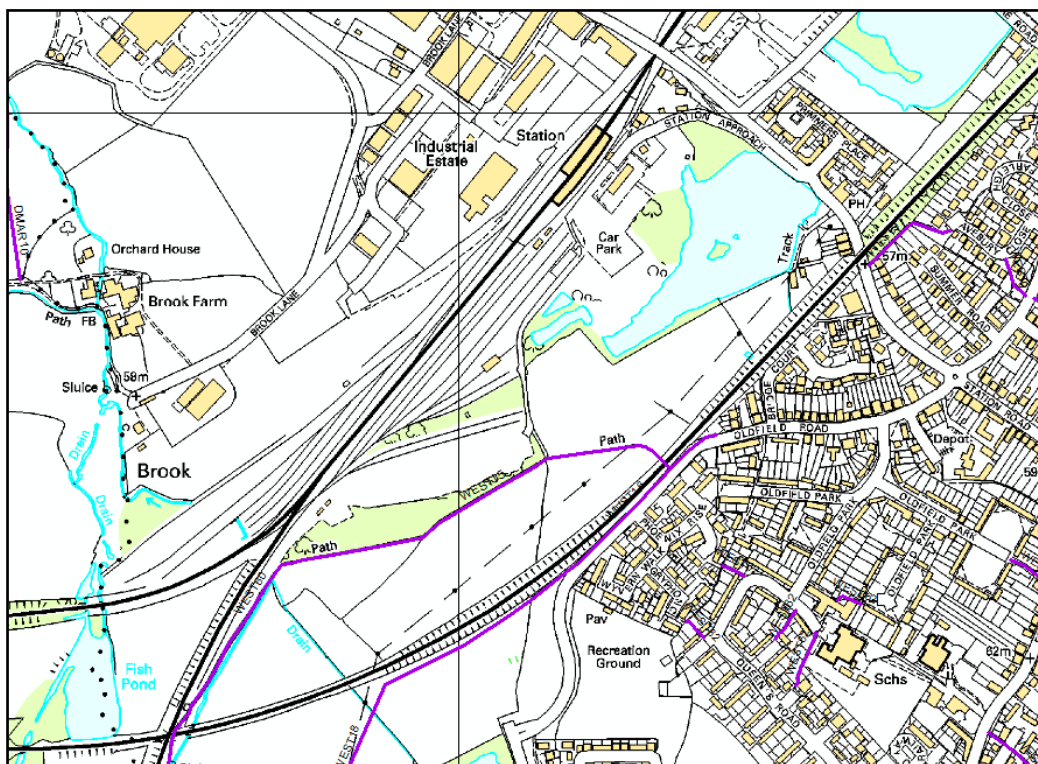
- 2.7 A surveying authority has discretionary power to waive strict compliance to Schedule 14 when determining an application or may consider the application to be improperly made whereby the surveying authority may use the evidence brought to its attention as a trigger to make its own decision under Section 53(2) of the 1981 Act ("the 1981 Act")
- 2.8 It is considered that this application was duly made in accordance with the provisions of Schedule 14 to the 1981 Act.

### **3.0 Land Ownership**

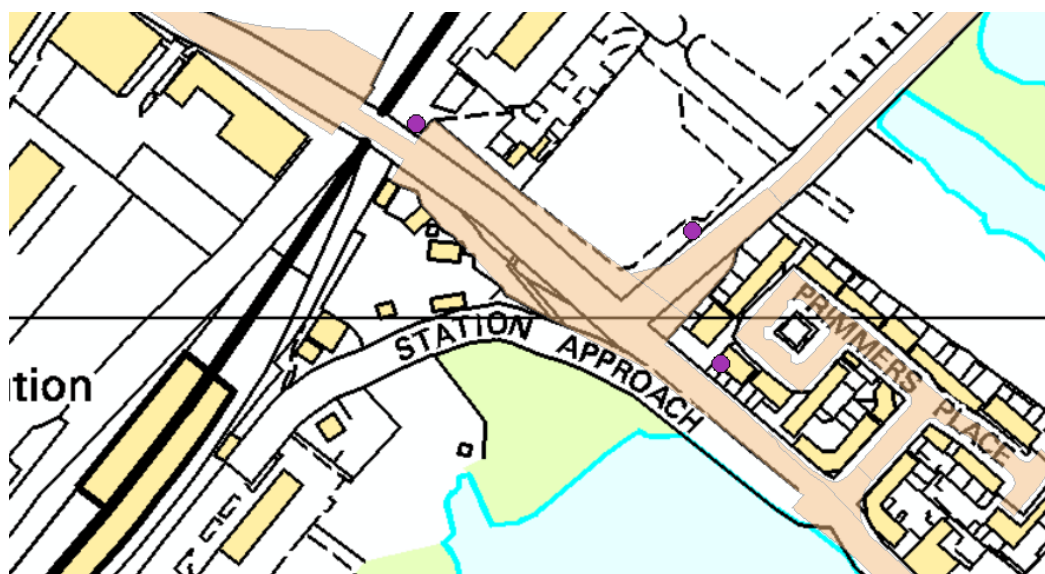
- 3.1 The land over which the claimed route leads is registered to DB Cargo (UK) limited and Network Rail. DB Cargo's land forms part of Registered Title no. WT210335 (Westbury Downside Sidings) and Network Rail's land forms the station car park and approach road. From 1905 to 1997 the whole of the land affected by the application to record a footpath appears to have been owned by first Great Western Railway, subsequently British Railways and Railtrack with the lease of title no. WT210335 passing to Mainline Freight Limited in 1996 (for a period of 125 years from 1994). DB Cargo (UK) Limited are registered as holding title absolute from 1997 onwards for the south western section of the route but have confirmed with officers that they only hold the lease, the land remaining in the ownership of Network Rail.
- 3.2 Adjoining land to the south and east of the claimed route is registered to a company called Square Bay (forming part of registered title WT282331).

#### 4.0 Current Records

- 4.1 The claimed route is not recorded in the definitive map and statement. The spur of the claimed route leading beside Station Road is recorded as part of the highway maintainable at public expense in Wiltshire Council's Highway Record.
- 4.2 Extract from the working copy of the definitive map (footpaths = purple)



- 4.3 Extract from the Highway Record (publicly maintainable highway shaded sienna)



## 5.0 Photographs (July 2017)





Claimed route obstructed by bund and fence. Leads to the right towards the station.



Claimed route from station leading towards fence and bund in photo above.



Claimed route towards station





Claimed route past station and along Station Approach



Claimed route along Station Approach



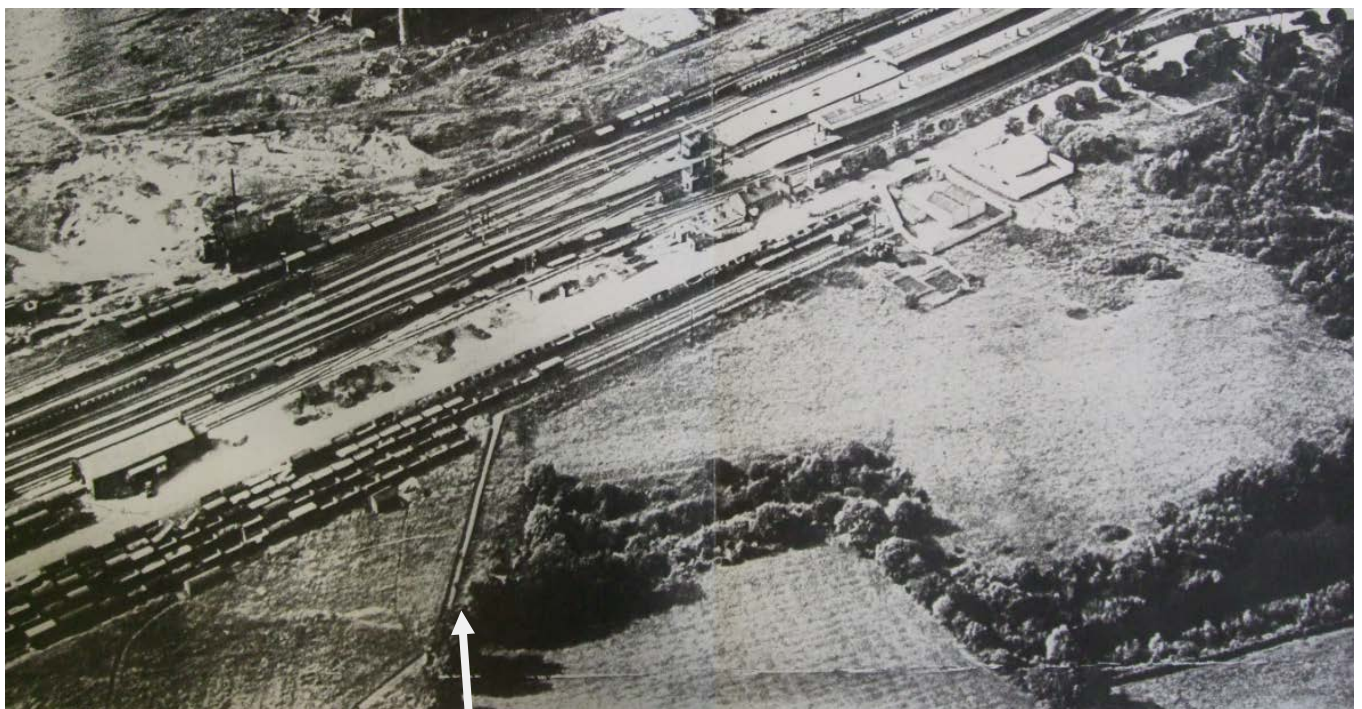
Station Approach junction with Station Road



Ramp from Station Approach to Station Road is recorded as publicly maintainable highway on the Council's Highway Record.

## 5.2 Aerial photographs

1929 (Wiltshire and Swindon History Centre ref. 2233/200/2)



Claimed route is clearly shown.

2006



2014



## 6.0 Initial Consultation

6.1 The following letter and plan were circulated on the 18<sup>th</sup> July 2017:

### **Wildlife and Countryside Act 1981 s.53**

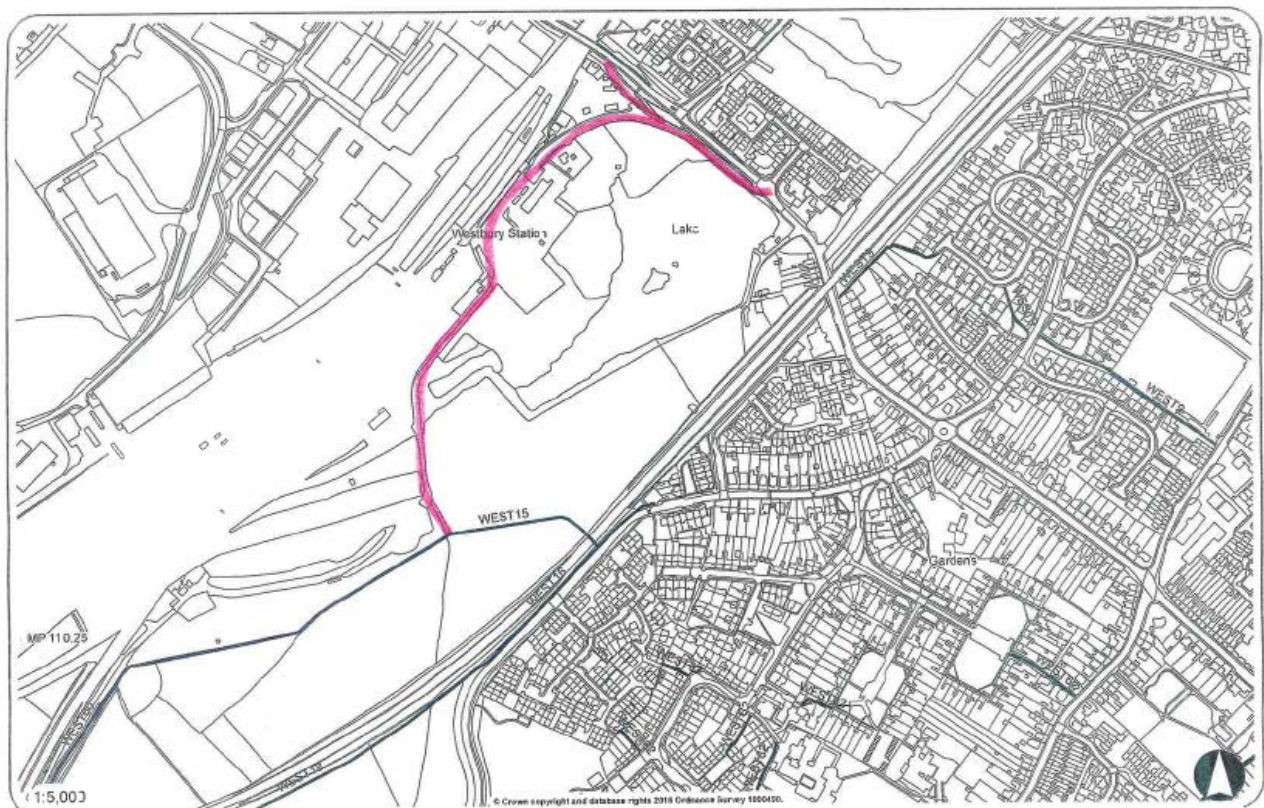
#### **Application for an order to record a footpath at Westbury in the definitive map and statement**

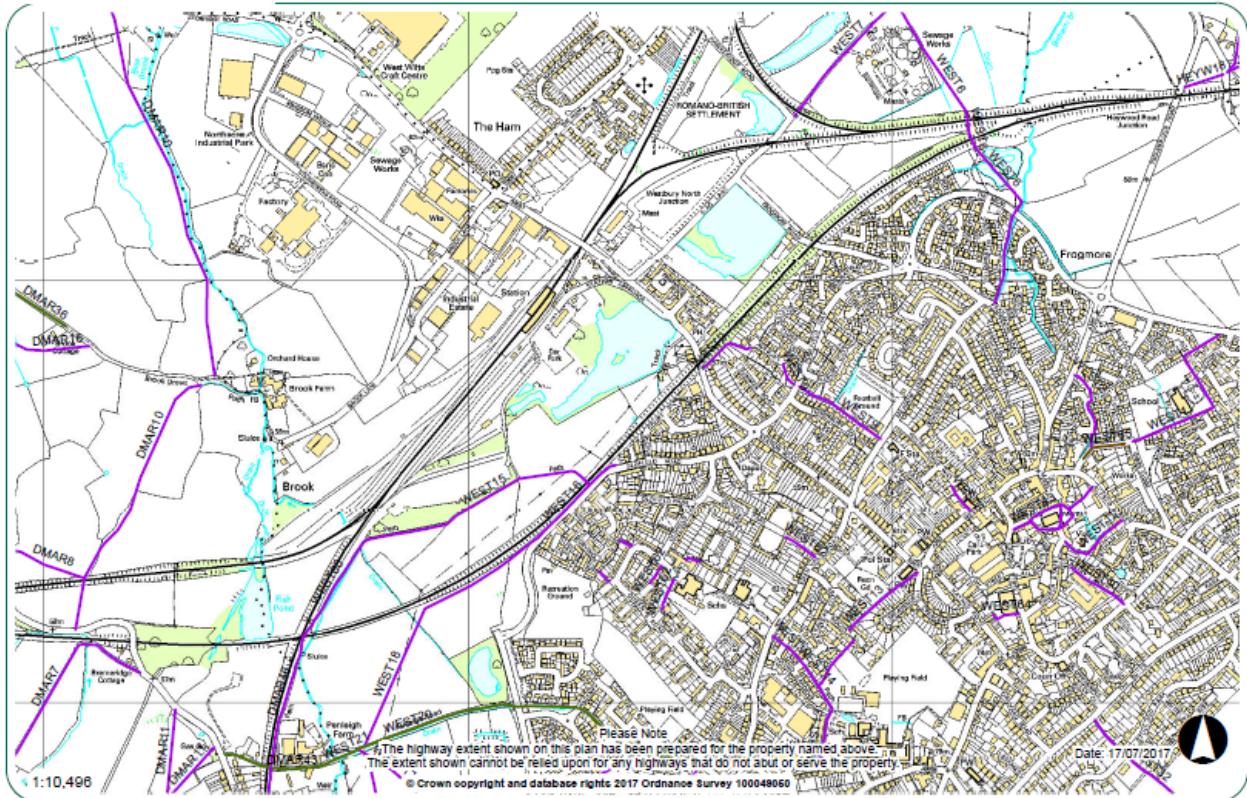
*On the 8<sup>th</sup> March 2017 Wiltshire Council received an application for an order to record a public footpath leading from footpath Westbury 15 leading north and north east along “the Cinder Track” to the car park at Westbury Station and then on past the station along Station Approach to join Station Road. A copy of the application plan is enclosed with the claimed footpath shown in pink. I have also attached a plan showing the wider network of public rights of way.*

*The application is supported by the evidence of 13 users of the path who claim to have used it on foot for a variety of periods between 1936 and 2016 in a manner that is ‘as of right’, that is, without permission, secrecy or force. All users recall seeing other members of the public using the path.*

*The Council is bound to consider all available relevant evidence and invites responses and evidence both in support and in opposition to the application. If you have already submitted a user evidence form you do not need to respond further though are welcome to if you have anything further to add.*

*Please ensure all responses have been received by the Council by 1700 on the 22<sup>nd</sup> September 2017.*





6.2 List of consultees:

- The Auto Cycle Union
- Open Spaces and Footpaths Society
- British Driving Society
- British Horse Society (national)
- British Horse Society (Wiltshire)
- Byways and Bridleways Trust
- Cycling Touring Club
- Trail Riders Fellowship
- Wiltshire Council Senior Rights of Way Warden – Paul Millard
- Westbury Town Council
- Wiltshire Council Councillor David Jenkins
- Wiltshire Bridleways Association
- The Ramblers
- Cllr Russell Hawker (applicant)
- Network Rail Infrastructure (London)
- Network Rail (Westbury)
- DB Cargo (UK) Ltd
- Square Bay (Westbury) LLP
- Ruth Vincent (witness)

Phyllis Harvey (witness)  
Ernest Clark (witness)  
Geoffrey Kingscott (witness)  
Simon Pond (witness)  
Martin Rogers (witness)  
Menna Milnes (witness)  
Patrick Stevenson (witness)  
Nic Cross (witness)  
Edwin Mead (witness)  
Stephen Hunt (witness)  
Merrilyn Richardson (witness)  
Peter Smith (witness)

## **7.0 Consultation responses**

### **7.1 Mr B Riley 20 July 2017**

*“The eight attached 1:2500 scale OS map extracts confirm the present line of the Cinder Path was first established between the revisions of 1899 and 1922, although parts of the path, or alternative routes, clearly existed before that.*

*A report dated 7 December 1904 by the Westbury Urban District Council Surveyor refers to “Footpaths affected by GWR plans: Brook House to Penleigh and Station Road to Dilton Marsh”. The latter could be a reference to your path. You would need to read the original report in the History Centre, Chippenham to find out more (Westbury UDC: Surveyor’s Reports 1901-1909, Ref. No G17/283/2). There should also be Railway deposited Plans and a Book of Reference available.*

*In 1933, the Westbury Loop Railway was opened. The History Centre should have copies of the Deposits and Plans. These plans may show the length running parallel with the railway, if so, the Book of Reference may indicate what its status then was.”*

### **7.2 Mr F Morland 30 August 2017**

*“The 1930 Act establishes that there were existing public rights of way over the lengths of two footpaths mentioned in Section 20(4)(a) and shown coloured brown between the points A and C and the points D and E respectively marked on the signed plan, which were extinguished by it.*

*So although the signed plan is silent on the point, the remainder of those footpaths continued as public rights of way after the Act was passed.*

*The question is - what were the original routes and extents of those public footpaths (and any others in the vicinity) and had any parts of them already been diverted or stopped up prior to the 1930 Act.*

*It seems almost certain that in order to construct the many additional railway lines and sidings required for its Westbury Engine Shed, completed and opened in 1915 (see Wilts VCH VIII, 171), the GWR would have had to follow a similar statutory procedure to that used later for the Westbury Avoiding Line.*

*The only plans, sections and books of reference deposited by the GWR around that time affecting Westbury are those shown in the catalogue of the Wiltshire Quarter Sessions records at the History Centre under reference A1/371/166MS in 1904.*

*Unfortunately, there were quite a number of GWR Acts passed in the period 1904-1915 and I have not yet come across any local reference sources indicating which (if any) of them authorised the construction of the Westbury Engine Shed.*

*However, it is probable that any such Act(s) would have contained clauses similar to those in the 1930 Act to divert or stop up public footpaths and rights of way in the vicinity.*

*So it may well be that some or all of the public footpaths and rights of way north of points C and E in the 1930 Act had already been changed by an earlier Act(s).*

*Incidentally, there are drawings of the Westbury Engine Shed dating from 1907 (see WSHC ref: 2515/403/2212). The contract for the construction of the Westbury Engine Shed was placed in October 1913 (see National Archives ref: RAIL 252/1759).*

### **7.3 D B Cargo (UK) Limited 04 September 2017**

*"Further to your letter of 18 July I note the content and plans. It seems that claims are being made for a footpath on land exclusively let to DB Cargo UK Ltd.*

*On behalf of DB Cargo UK Ltd I object to any public footpath across DB Cargo land as shown on the plan. There is no footpath as such but there is an important metalled road used for internal access linking different parts of the site. This roadway is used by Heavy Goods Vehicles for moving ballast and rail materials from a rail served strategic virtual quarry used to maintain railways in the surrounding area. This road is used by 60 commercial vehicles a day on a narrow lane with insufficient room for pedestrians on same road. This makes any use by third parties extremely dangerous and unsuitable on safety grounds. DB Cargo have now erected fencing to prevent this practise on safety grounds and prevent illegal trespass. There have been near miss incidents causing DB Cargo concern.*

*The route is an illegal short cut to the station and should not have footpath status. I assume your consultation includes Great Western who operate the station as their views should be taken on board. There are defined routes to the station which do*



*not include this illegal route. Users of the route are trespassing. The contact is Robert Jackson for the station.*

*In addition Network Rail are partners in the virtual quarry a key location for strategic railway maintenance in the South West. Please contact Peter Elliman on behalf of Network Rail.*

*In short there is great concern from DB Cargo, Network Rail and Great Western regarding such a route as it would interfere with commercial use of the site, is unsafe and just an illegal short cut.*

*Please register our strong objection to such a proposal. I hope this is sufficient to rebuff any such claims. If you would like a site visit to witness the situation this can be arranged with local DB contacts.”*

#### **7.4 Network Rail 11 September 2018**

*“ I refer to your letter dated 18<sup>th</sup> July 2017.*

*On behalf of Network Rail Infrastructure Limited, I wish to lodge an objection to the above mentioned application. The reasons for this objection are set out below.*

*The route shown coloured pink on the attached plan which is subject of the claim run along the Westbury Station Approach Road. This Roadway also forms the access into the depot and sidings. I therefore draw your attention to section 57 of the British Transport Commission Act 1949 which states that:*

*‘As from the passing of this Act no right of way as against the Commission [now Network Rail] shall be acquired by prescription user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot...premises of the Commission.’*

*On the basis of the above statutory provision the claim of a right of way through user is not valid and should be rejected.”*

#### **7.5 Robert Jackson – First Great Western 21 September 2018**

*“ First Great Western (GWR) is not supportive of the proposal.*

*Whilst we appreciate proposals may not be able to consider future development, but the key feature here is that future development will most likely create a new right of way. The development for the site owned by Square Bay is currently subject to a planning application.*

*In addition to this GWR believes your proposal imports a safety risk on the land which is leased to GWR as Station Facility Owner by Network Rail as Landlord.*

*Your line of the route does not take into account the fact there will be road traffic using the bays to the immediate north, taxi movement, buses using the area as a turning circle and heavy goods vehicle traffic to/from DB Cargo (which has historic rights to travel over the Station Approach and across the car park).*

*GWR cannot knowingly agree to a proposal that increases a safety risk – in this instance the risk being a pedestrian right of way cutting across the middle of a roadway.*

*Please also be aware that you would need to consider Railway regulatory procedures too. If for example your proposals resulted in a revision to the car park layout (i.e. a right of way being created) and/or resulted in a loss of parking bays – then under the provisions of the Railways Act 1993 (as amended from time to time), that you would have to go through the Minor Closure process (Minor Modification) to formally close any railway facilities (such as parking bays) and also a Station Change to obtain industry support and ORR approval for the scheme in general. You would need to have provision to compensate for any financial losses or costs (legal, operational and commercial) directly associated with your proposals that would be borne by any of the railway consultees.”*

## **7.6 Network Rail 14 September 2017**

In response to the case officer informing Network Rail that the Council was also considering pre-1949 Act evidence and inviting input:

*“In response to your query regarding the history of the site I can now offer you the following information in support of Network Rail Infrastructure’s objection to the above application.*

*The railway at Westbury was originally constructed under the powers of the Wilts Somerset & Weymouth Railway Act 1845 as amended by the Wilts Somerset & Weymouth (Amendment) Act 1846, both of which Acts incorporated the provisions of the Railway Clauses Consolidation Act 1845.*

*The plan accompanying the Parliamentary Bill for the 1846 Act (extract enclosed) shows the proposed centreline of the railway running along the alignment of the railway as constructed. The plan also shows the roadway now known as the B3097. I have annexed the referencing details of the roadway and the land over which the claimed route runs on the attachment.*

*Although the referencing details refer to footpaths, the alignment of these paths is not shown and they are purely referenced in private ownership. The railway line and station was subsequently constructed and opened for public use in 1848.*

*The Ordnance Survey map surveyed in 1884-85 (extract enclosed), clearly shows the station approach road upon its present day alignment. It does not indicate any way or footpath along the claimed route.*

*The Great Western Railway (No 1) Act 1894 authorised the construction of a new railway from Stert to Westbury. The Plan deposited with the Parliamentary Bill (extract enclosed) shows the roadway leading to the station in situ but offers no indication of any footpaths running through the site.*

*The claimed route running parallel to the B3097 would pass through enclosure 96 and/or 97 the referencing details of which are annexed to the plan.*

*The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot. Whilst not showing the station approach road the plan accompanying the Parliamentary Bill (extract enclosed) shows the lands in question to be purchased, the referencing details of which are annexed to the plan.*

*The 1899 – 1900 and 1902 Ordnance Surveys offer no additional information to the earlier surveys with no obvious footpaths along the claimed route. It also does not yet show the depot constructed.*

*The Great Western Railway (Additional Powers) Act 1905 authorised the purchase of additional lands at and near to the station. The plan accompanying the Bill (extract enclosed) includes land over which the claimed route is made. The referencing details are annexed to the plan.*

*You will also note that the plan is annotated as having the footpath running through enclosure 2 being diverted to run through enclosure 1. Section 53 of the Act authorised the stopping up and diversion of this footpath. The diverted footpath appears to follow the part of the route shown on the plan accompanying the application and annotated West 15.*

*I further attach a copy of Ordnance Survey plans from 1922. This plan shows the engine shed having been constructed upon the lands purchase under the 1905 Act. The plan clearly shows an annotated footpath network substantially similar to the path annotated West 15 on your plan. It is significant however that the way running along the claimed route is not similarly annotated.*

*The Great Western Railway Act 1930 authorised the construction of the Westbury Avoiding Line. The Plan accompanying the Parliamentary Bill shows the area of lands authorised for purchase (extract enclosed) through which the claimed route runs. The plan also shows the intended further diversion of the footpath running through the site which again is substantially similar to the route taken by West 15. There is no footpath shown running along the claimed route. Both the claimed route and the diverted footpath would both fall within enclosure 11 the referencing details of which I have annexed to the extract plan.*

*Finally I attach a copy of the Ordnance Survey of 1941 which is substantially similar to that of 1922 and offers no further evidence backing the claim of a right of way.*

*On the basis of all of this information it is evident that the claimed route was constructed part as access to the original railway station in 1848 and to serve the depot as the site developed over the years. Therefore Network Rail will rely upon*

*the previously stated Section 57 of the British Transport Commission Act 1949 to defeat this claim.”*

A copy of the above and the plans submitted are appended at **APPENDIX A**.

## **8.0 Officer’s Comments on initial consultation responses**

### **8.1 Mr B Riley**

The documents and references from Mr Riley have been inspected and are considered in this report at section 11.

### **8.2 Mr F Morland**

The documents and references from Mr Morland have been inspected and are considered in this report at section 11.

### **8.3 D B Cargo UK**

D B Cargo UK Ltd erected barriers to public use along the southern section of the claimed route. This was done to prevent public use which is referred to as “an illegal short cut to the station”. They also refer to public use as trespass. It is clear that neither Network Rail (the owner of the land) or DB Cargo UK (the tenant) do not regard the claimed path to the south of the station as a designated access route. However, matters relating to unsuitability or danger arising from other use are not relevant considerations under the Wildlife and Countryside Act 1981.

### **8.4 First Great Western**

Wiltshire Council cannot take into account any future development plans or alternative routes under the Wildlife and Countryside Act 1981, nor can it take into account considerations relating to suitability. It is clear from this response that Great Western Railway do not consider the southern part of the claimed route as being an access route to the station.

### **8.5 Network Rail**

Considerable historical information has been provided by Network Rail and this has been inspected and considered in this report at section 11. Network Rail do not consider there is any basis for public rights prior to 1949 and rely upon section 57 of the British Transport Commission Act 1949 to defeat the claim.

***57.** As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*

Whilst it is agreed that any acquisition by prescription is defeated by s.57, it is clear that this can only take effect from 1949 onwards.

## 9.0 General Context

The claimed route is a path that links Dilton Marsh and parts of Oldfield Road with Westbury Station and Station Road, it is clear that it has utility as a pedestrian route to the station and it also has utility as a through route to Station Road. The area is dominated by the railway and has been the subject of a considerable amount of change since the station was first opened in 1848 by the Wilts, Somerset and Weymouth Railway. A branch to Salisbury was opened in 1856 and by 1900 the Great Western Railway main line from London to the West Country also utilised the station. The Westbury avoiding line was built in 1929/1930 over land immediately south of the claimed route.

- 9.1 The claimed route leads around the perimeter of an area that was developed around 1915 to provide an engine shed and associated works for Great Western Railway; this area is still used for railway purposes and is leased to DB Cargo (UK) Ltd by the owners of the land, Network Rail.
- 9.2 Land to the north of the station was the site of Westbury Ironworks, the Great Western Iron Ore Smelting Company being formed to extract and smelt ore in 1857, by 1920 the works had stopped smelting and were sold in 1939.
- 9.2 The existence of the claimed route is well documented in plans and aerial photographs and the line of the path as it is today was clearly established at the time the engine shed was constructed. Specific documents have been investigated and will be presented in due course but it is noteworthy that the path is referred to in R J Cogswell's book "Westbury Ironworks" (1988) at pages 56 – 57. Mr Cogswell has clear recollections of the area and specifically the construction of the engine shed and alterations to the footpaths:

*"Those new fast trains were popular with the travelling public so more were added to the timetable, especially in summer. Freight traffic increased enormously too, particularly for perishable goods while every evening long trains took West Country milk up the line to London. The result of all this was that during the decade after 1900, Westbury with its direct connections not only with London and the far west but also to Bristol and from there South Wales and the north; even southwards – subject to the armed neutrality of the LSWR – with Southampton and Portsmouth – eventually to Brighton and Worthing. Thus Westbury became a railway town, the rail cross roads of the middle region of South-west England. And gained much in general prosperity thereby.*

*That however was only the beginning. As early as 25 February 1905, the Wiltshire Times was able to report that land was being surveyed for the building of a*

locomotive depot for GWR. After that came some years of rumour but in 1912 work preliminary to the building of the depot which railwaymen were to call "Westbury loco" began on a site on the town side of the main line railway yards and diagonally across from the ironworks. The land had been an outlying pasturage of Penleigh Farm and was, generally, some feet above the level of the existing rail tracks; therefore it had first to be brought to the level of the latter. That involved a huge amount of excavation all done by pick and shovel men with horses to haul away the excavated clay soil in skips on portable tramroads to be tipped into the western end of the station minehole. That very considerably altered the outline of the latter. The depot buildings, when they were put up were red brickwork, solid and well finished in GWR style. Besides an engine shed there was a workshop with machine tools and hoist for the lifting of engines for the changing of their wheels and so on; there was also a forge. All that machinery was driven by a steam engine supplied by a pair of locomotive type boilers. Outside was a full length turntable and an elevated coaling stage with water tank on top while close to it was a coal storage area with space for the contents of several hundred wagons. In addition, there were some miles of new rail tracks for service roads and sidings, even a reserved track for breakdown train vehicles and the local snow plough.

From ancient times the ground on which this complex was built in 1913/1914 had been crossed by a footpath from the town to Brook Mill, a mill for the fulling of cloth after weaving. The mill had a long history, Colt-Hoare records it as having changed hands in 1599. Therefore the path leading to it had been a clothier's path and as such it was a relic of the industrial history of Westbury. The mill was in full operation when the first railway line came to the town and as the path was there first, and in use, a level crossing was made for it over the tracks at a point close to the present South Junction, itself dating from 1851. Only the shell of the mill building and the waterways were left in the period now under review but the clothiers footpath remained although, by that time, only used for walks in the country and by ironworks quarry men living in Westbury on their way to Becketts and Bremeridge. The Westbury end of the footpath itself was a continuation of a lane through fields but now made up and named Oldfield Road which leads off Station Road.

After the GWR took over the ground public access, via the level crossing, to Brook Mill had to be maintained although the latter was only a ruin. This was very simply done by raising no objections to outsiders crossing the site as they pleased, even lingering or wandering about to see what was going on or – to use a modern expression – "inspecting progress". That was an opportunity which I and many others of all ages took full advantage of for more than a year. So the situation remained until the GWR made more permanent arrangements.

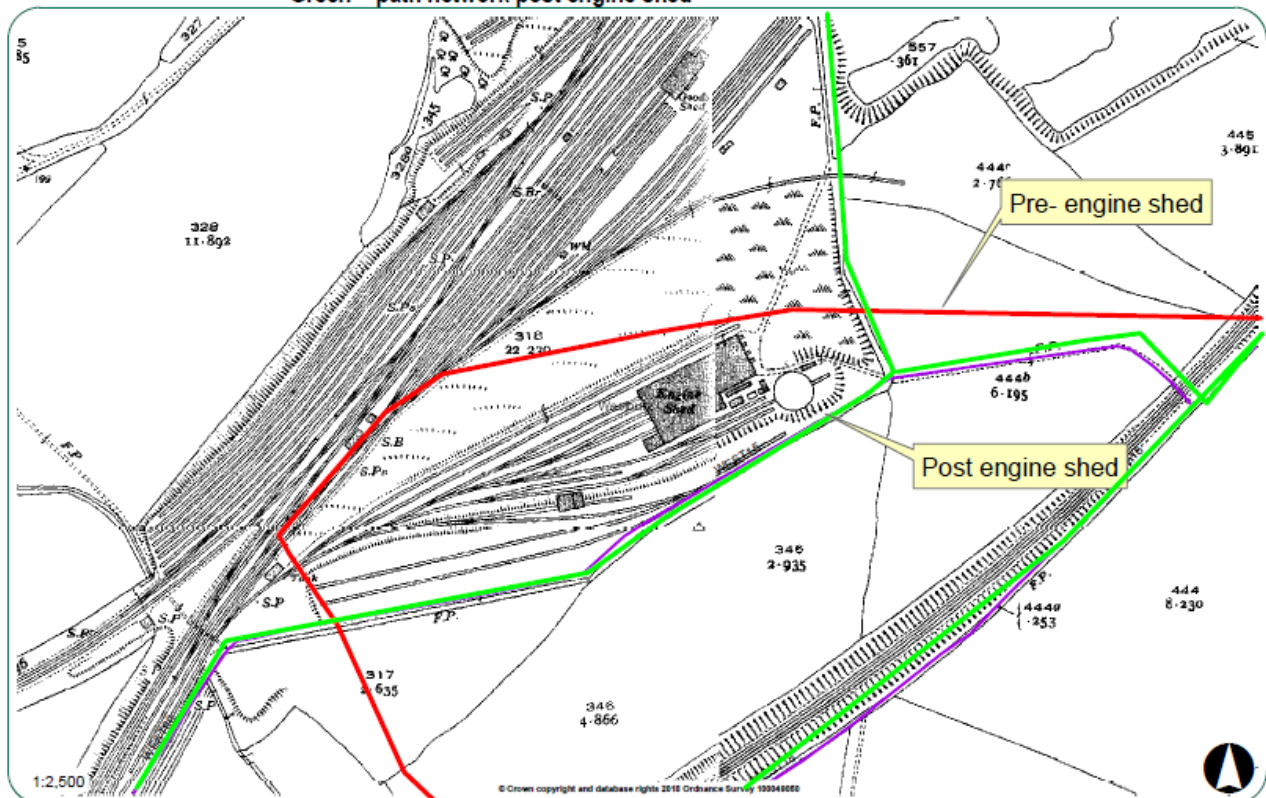
The arrangements made were that the lane – now Oldfield Road – and the path from its end across another field were surfaced with rolled in fly ash and the stiles across it replaced by kissing gates made wide enough for bicycles to be wheeled through.

**Elsewhere, an existing GWR owned footpath from the station to Dilton Marsh**

*and long known as Penleigh Footpath, was diverted across the, by then, filled in end of the Station Minehole to the kissing gate opposite to the pedestrian's entrance to the new depot. From where it continued on round to the old level crossing for Brook Mill, which had now been widened to cover six tracks and for which two new and very spacious stiles had by now been erected. ...”*

- 9.3 The plan shown below illustrates the effect of the Engine Shed development on the historic line of the footpath (shown in red). After the Engine Shed was built the paths shown in green reflects the path network (but also see alterations made in 1930).

Effect of the engine shed on the paths (based on paths marked on OS County Series maps)  
Purple = current rights of way  
Red = path network pre engine shed (1915)  
Green = path network post engine shed



- 9.4 The claimed route at this location has been in existence since the engine shed was built and was physically obstructed in 2016 by the erection of steel fencing and a bund across the path.
- 9.5 The claimed route in respect of the length from Station Road to the Station appears to date from the construction and opening of the station (1846 – 1848).

## 10.0 Historical Records

- 10.1 A route linking Dilton Marsh with Westbury can be seen on maps as a physical feature dating from the late 1800s to the present day (albeit with an altered route from 1915). Although it can be helpful to present these in chronological order to show the consistent recording of a way over time it does not allow for the need to

apply evidential weight to documents. For example although a way may appear on fifty commercial maps it does not necessarily carry as much evidential weight as if the way is shown in perhaps two publicly consulted documents or created, say, as the result of an Act of Parliament.

10.2 Therefore, in evaluating historical evidence it is necessary to recognise that differing weight must be given to different evidence. The following categorisation has been used;

Category A carries the highest weight and category F the lowest. This system of categorisation has been devised by officers with regard to The Planning Inspectorate’s Consistency Guidelines:

<http://www.planningportal.gov.uk/planning/countryside/rightsofway/guidance> (as revised to date of report) and Chapter 6 of the book ‘Rights of Way A Guide to Law and Practice – Fourth Edition’ by John Riddall and John Trevelyan.

Abbreviations: Wiltshire and Swindon History Centre, Chippenham (WSHC), The National Archive, Kew (TNA), House of Lords Record Office (HoL)

Category	May provide evidence for	Examples
A	Legal creation of a highway Reputation of a way as a highway Physical existence of a way Conclusive evidence of public rights	Inclosure Acts, awards and plans Orders creating, diverting or extinguishing highways Railway and canal acts and plans Definitive map and statement
B	Reputation of a way as a highway Physical existence of a way	Documents, maps plans drawn up as a result of legislation, consulted upon, but whose primary purpose was not to record public rights.  i.e. Tithe Commission, Inland Revenue Finance Act
C	Reputation of a way as a highway Physical existence of a way	Includes local government records (highway board, county council, parish council)
D	Reputation of a way as a highway Physical existence of way	Other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans, conveyances
E	Reputation of a way as a highway	Commercial maps, some Ordnance Survey records



	Physical existence of a way	
F	Reputation of a way as a highway Physical evidence of a way	Local repute, consultation responses

## 11.0 Category A Evidence

### 11.1 Inclosure Acts and Awards

Between 1545 and 1880 the old system of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners sought to improve the productivity of their land. The process of inclosure began by agreement between the parties concerned, although locally powerful landowners may have had significant influence on the outcome. By the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The process was further refined at the beginning of the nineteenth century with the passing of two main general acts, bringing together the most commonly used clauses and applying these to each local act unless otherwise stated.

- 11.2 The area of Westbury where the railway station is now situated was enclosed by Act of Parliament in 1808. The Act of Parliament was entitled “*An Act for Dividing and Allotting in Severalty the Open and Common Arable Fields, Common Downs, Common Meadows, Common Pastures and Commonable places within the Parish of Westbury in the County of Wilts.*” It is dated 1802 and was applied in conjunction with the 1801 “General Act” ( “An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure ; and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts”).
- 11.3 The Act empowered the Commissioners to create highways and to enclose and allot land (amongst other powers) and this was detailed in an Inclosure Award dated 29<sup>th</sup> July 1808. Wiltshire and Swindon History Centre (WSHC) Catalogue no. EA76.
- 11.4 Map B annexed to the award shows the land over which Westbury Station was subsequently built as being within parcel no. 376. The image below shows the land bordered by Brook Farm Road in the north and Perry Way to the east. The cross roads at the north eastern corner is where the Ham Post Office is today.

11.5

Position of Ham Post Office



11.6 The land is crossed by a public footway number CXXX11, Brook Footway.

*“CXXXII Brook Footway. One other public footway of the breadth of ffour ffet called Brook Footway numbered CXXXII in the Map B hereunto annexed branching out of Dyehouse Lane Road at or near a place called Cooks Styles ....”*

Brook Footway is the public footpath referred to in the extract from R J Cogswell’s book at paragraph 9.2 above.

11.7 This is the footpath that was, some 150 years later recorded in the definitive map and statement as Westbury footpath 15. However, the only route recorded in the award linking Dilton Marsh with this area is Penleigh Lane; there is no additional footpath shown that may coincide with the claimed footpath.

**11.8 Deposited Plans for Public Undertakings – Railway Plans**

Individual canal and railway schemes were promoted by Special Acts of Parliament. The process for Canal Schemes was codified by Parliamentary Standing Order in 1792 which was extended for railways in 1810. The Railway Clauses Consolidation Act 1845 was effective for the approval and construction of the railways at Westbury. The 1845 Act expanded the requirements laid down in 1810 with public rights of way which cross the route of the railway to be retained unless their closure has been duly authorised. Although it was not the primary purpose of the plans deposited with

Parliament to record public rights of way, they can provide good evidence in this context.

11.9 Clause 10 of the 1845 Act stated that certified true copies of the plans and books of reference (and alterations of) were to be received as evidence of the contents thereof. Clauses 46 – 51 details the crossing of roads and the construction of bridges.

11.10 There was no obligation in the 1845 Act to bridge footpaths where they crossed the line.

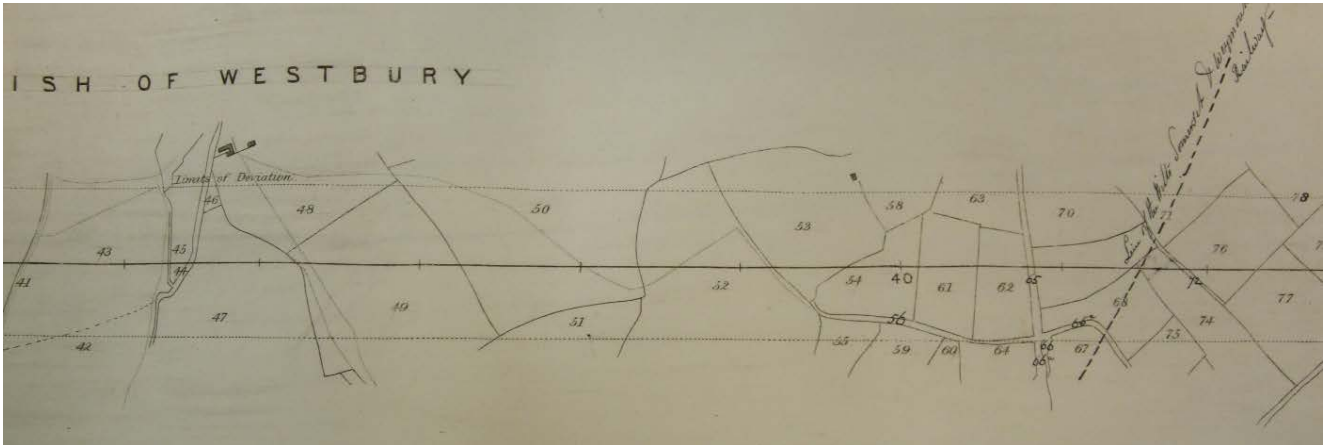
11.11 A considerable number of railway plans have been deposited with Parliament for the area around Westbury Station. Few of these have been constructed but these were subject to the same Parliamentary process as those that were built. All of the plans deposited are represented on the overview plan below. It can be seen from this that the line labelled 41 crosses the area of the claimed route and has been inspected.



**11.12 Direct Western Railway 1845 Deposited Plans and Book of Reference (WSHC Catalogue number A1/371/41 MS)**

These plans and Book of Reference were deposited with the Clerk of the Peace of the County of Wilts on November 30<sup>th</sup> 1845. The line was not built but the plans and book of reference are useful evidence for how the network of access routes across the land was at that time.

11.13 It is noted that the plans show “Line of the Wilts Somerset and Weymouth Railway” on a route that although consistent with the plan deposited at the time (A1371/36 – Wilts, Somerset and Weymouth Railway 1844) the line was subsequently built on a different alignment (A1/371/68). The original deposited plan showed the line through the parish of Westbury through the village of Westbury Leigh and the intersection of the present Station Road and Oldfield Road in Westbury. Accordingly, in interpreting plan A1/371/41 MS it is necessary to disregard the position shown for the Somerset and Weymouth line.



From the Book of Reference (modern reference in italics):

<u>No on plan</u>	<u>Description</u>
65	Parish Road ( <i>Station Road</i> )
64	Arable
63	Arable
62	Arable
61	Arable
60	Pasture
59	Arable
58	Pasture
56	Occupation Road ( <i>Sopps Lane- now Oldfield Road</i> )
55	Pasture
54	Arable
53	Pasture
52	Arable and foot path ( <i>FP WEST15</i> )
51	Pasture
50	Pasture and foot path ( <i>Awarded footpath Brook Footway</i> )
49	Pasture and foot path
48	Pasture and foot paths
47	Pasture
46	Alder Bed Wood
45	Meadow

<u>No on plan</u>	<u>Description</u>
44	Mill Stream ( <i>Biss Brook</i> )
...	
31	Road ( <i>Fairwood Road</i> )

11.14 The deposited plan is consistent in showing the historic Brook Footway (which was diverted when the engine shed was built at the beginning of the 20<sup>th</sup> century) but provides no evidence to support the claimed route as a historic north/south path.

11.15 **Wilts, Somerset and Weymouth Railway 1844** (WSHC cat ref. A1/371/36 and A1/371/68 for the line as built).

The railway at Westbury was originally constructed under the powers of the Wilts Somerset and Weymouth Railway Act 1845 as amended by the Wilts Somerset and Weymouth (Amendment) Act 1846. The line was completed in 1848. The line (or the limits of deviation) identified footpath crossing consistent with the historic awarded route (Brook Footway) and indeed, crossing at the level was provided for, but it is not possible to identify any further footpaths. For reference purposes enclosure number 253 contains the Parish Road that is now Station Road (B3097).

11.16 **Great Western Railway Stert to Westbury** (WSHC cat ref. A1/371/112).

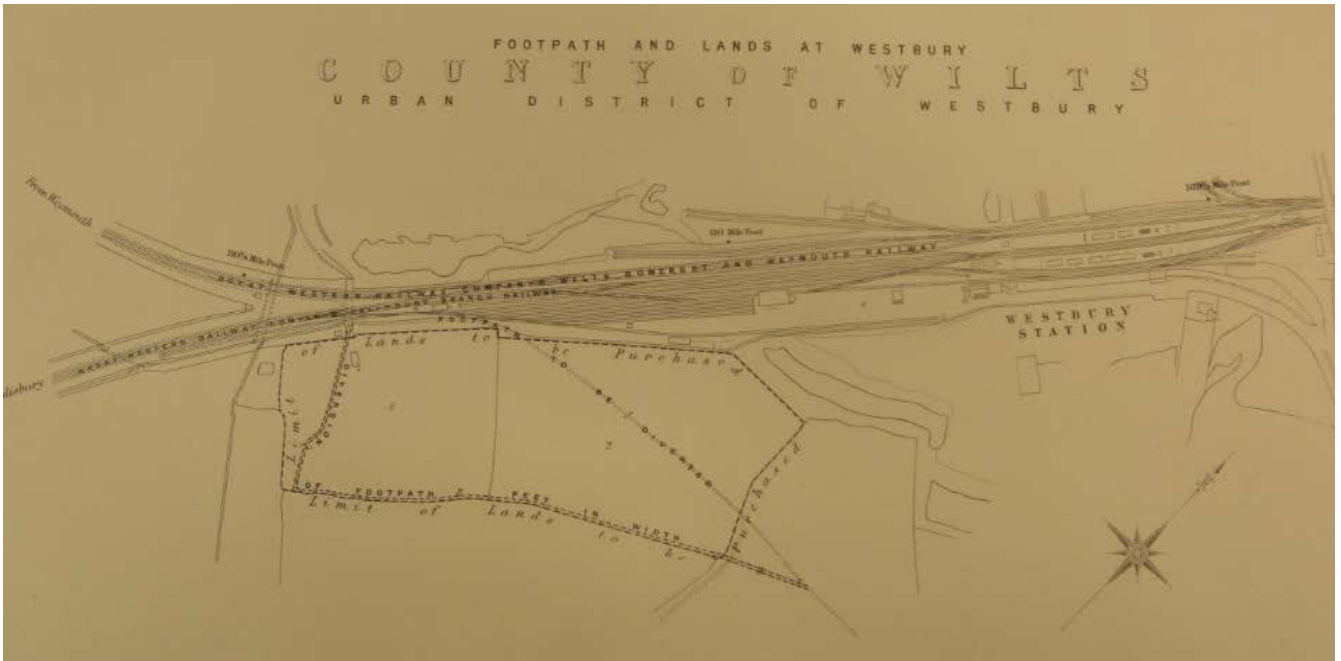
A further line leading eastwards from Westbury Station was authorised by The Great Western Railways (No 1) Act 1894. The deposited plan shows Station Approach already in position but no further evidence relating to footpaths in this area (i.e. the eastern end of the claimed route).

11.17 **The Construction of the Engine Shed**

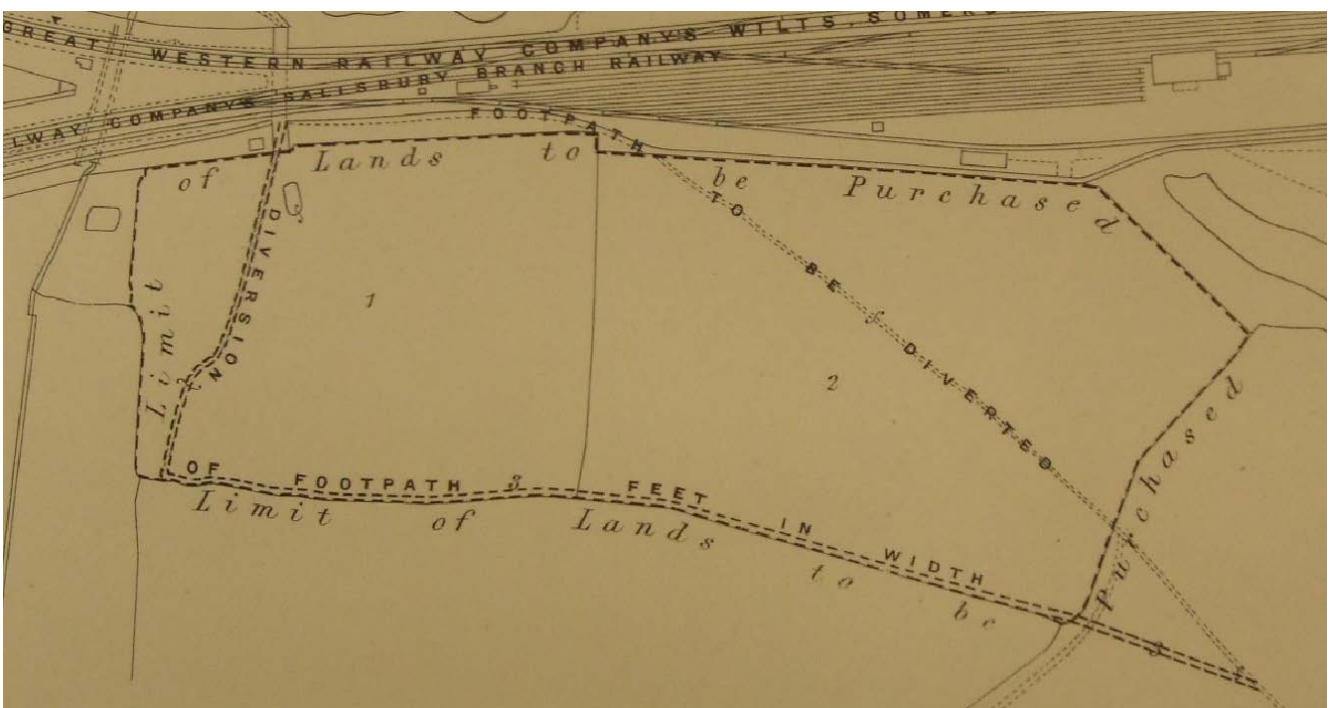
The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot and in 1904 a schedule and plans were deposited with the Clerk of the Peace with the intention that application be made to Parliament in their 1905 session to purchase land and divert public rights of way in a number of locations including Westbury.

11.18 **Great Western Railway (Additional Powers) Plans and Sections November 1904** (WSHC cat ref. A1/371/166).

The plans identifies land to be purchased at Pill, Bishopsworth and Westbury:



The plan clearly shows the line of the historic footpath (Brook Footway) to be diverted to a path around the perimeter of the proposed site:



The line of the claimed route is not shown.

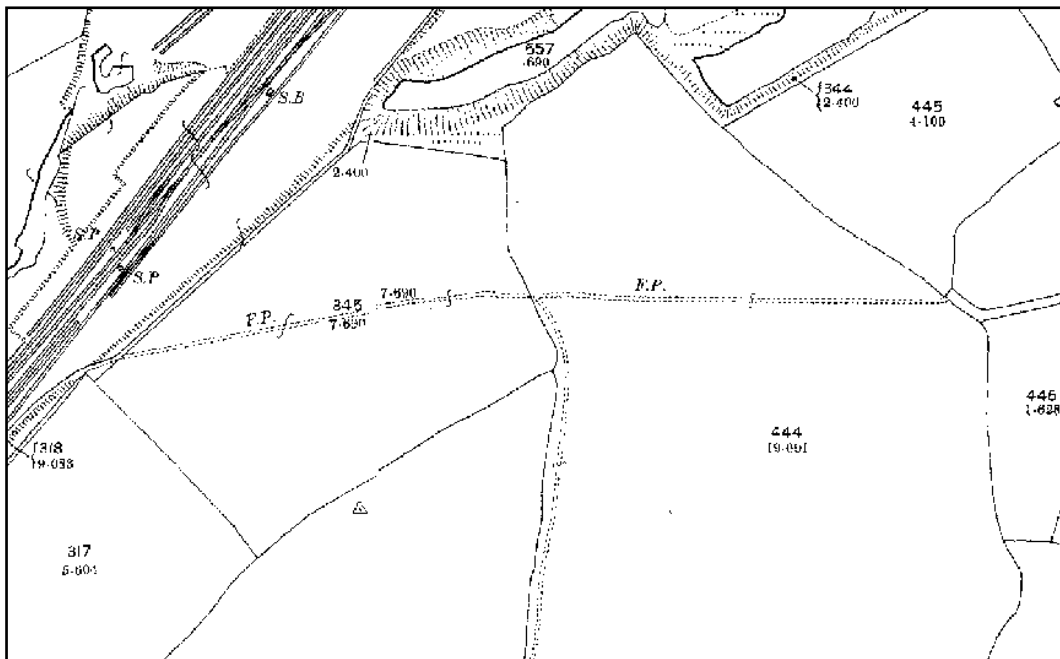
11.19 The application for additional powers extends to the Company (Great Western Railway) "with reference to new Railway Widening, Deviations and Alterations of Existing and Authorised Railways, Bridges and other Works, Roads, Footpaths and Lands in the Counties of Berks, Northampton, Oxford, Devon, Cornwall...Wilts..."

11.20 Application is made:

*“In the County of Wilts –*

*Certain lands in the parish and urban district of Westbury lying on and adjoining the south-eastern side of the Salisbury branch railway of the Company, and at and near to the junction of that branch railway with the Wilts, Somerset and Weymouth railway of the Company, and to empower the Company to stop up and extinguish all rights of way over the said lands, and in lieu thereof to make and maintain a new footpath crossing the Company’s said railways at or near the said junction at the south-eastern boundary of the Company’s property and terminating by a junction with the footpath intersecting the western and eastern boundaries of the field or enclosure No. 444 on the 25 inch Ordnance Map (2<sup>nd</sup> Edition 1901) of the said parish at a point 4 chains or thereabouts, east of the western boundary of the said field or enclosure.”*

Extract from the Ordnance Map 2<sup>nd</sup> Edition 1901 showing enclosure No. 444:



11.21 It is known that the Engine Shed was built (drawings related to the construction have been obtained from the National Railways Museum at York and will be discussed later in this report) by 1915.

## 11.22 Westbury Avoiding Line

Further additions to the railway network in this area occurred in the 1929/1930 with the construction of the Westbury Avoiding Line. Records relating to this have been viewed (WSHC Cat no. A1 371/173 MS 1929 and F1/500/2MS 1930).

11.23 **The Great Western Railway Act 1930** is entitled “An Act for conferring further powers upon the Great Western Railway Company in respect of their own undertaking and upon that company and the London Midland and Scottish Railway Company in respect of an undertaking in which they are jointly interested and for other purposes.” The Act addresses the construction of new railway lines, 1 deviation and 2 subways. The new railway in Westbury is referred to as Railway No. 2:

*“A railway (no.2) 2 miles 2 furlongs and 4 chains in length wholly in the county of Wilts commencing in the parish of Dilton Marsh in the rural district of Westbury and Whorwellsdown by a junction with the Company’s Wilts Somerset and Weymouth Railway and terminating in the parish and urban district of Westbury by a junction with the Company’s Stert and Westbury Railway:”*

11.24 A number of alterations to the rights of way network are provided for on page 25, s.20(4) – for the protection of Westbury Urban District Council:

*“(4) The council consent so far as their rights and interests are affected to the following provisions:*

*(a) Upon the Company providing a right of way along the southern boundary of the said Railway No. 2 between the points marked A and B on the plan signed by Raymond Carpmael on behalf of the Company and William Reginald Campbell Laverton on behalf of the Council (in this section referred to as “the signed plan”) all rights of way over so much of the two footpaths shown coloured brown on the signed plan as lies between the points A and C and D and E respectively marked thereon shall be extinguished;*

*(b) Upon the Company providing a right of way along the southern boundary of the said Railway No. 2 between the points F and G marked on the signed plan all rights coloured red on the signed plan as lies between the points G and H marked thereon shall be extinguished;*

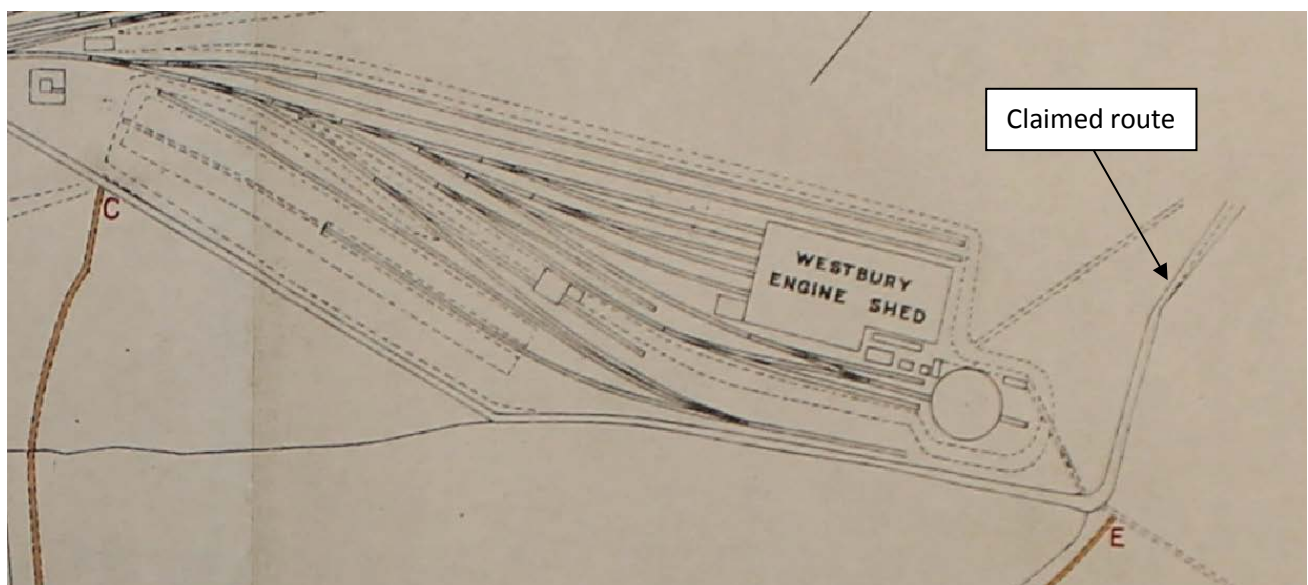
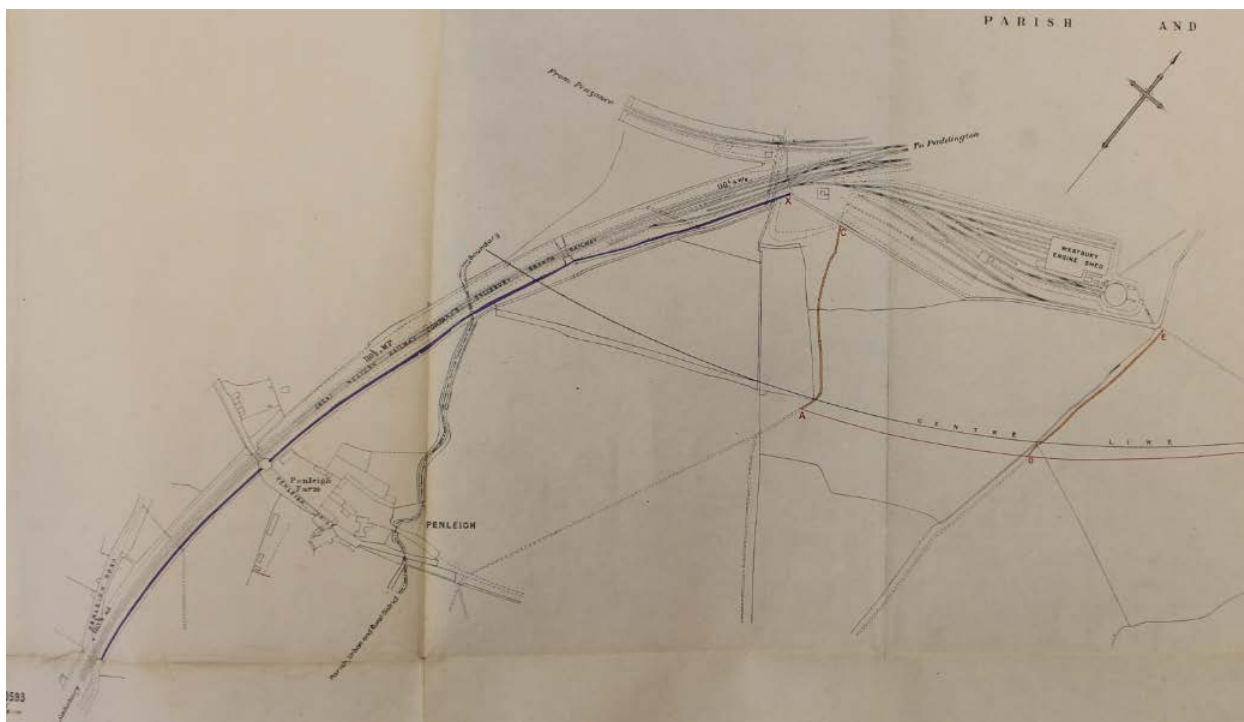
*(c) Upon the commencement by the Company of the construction of the said Railway No. 2 all rights of way over the footpath shown coloured blue on the signed plan shall be extinguished;*

*(d) The Company shall provide a subway under the said Railway No. 2 in the enclosure numbered on the said deposited plans 52 in the said parish and urban district at or near the point J on the signed plan such subway to be constructed with a span of not less than six feet and with a headway of not less than eight feet. Upon the completion of the said subway the Company may divert the footpath shown coloured green on the signed plan to such extent as may be reasonably necessary so that the same shall pass through the said subway and thereupon all rights of way over so much of the existing footpath as lies between the respective points of commencement and termination of such diversion shall be extinguished;*



(e) From and after the construction of the said Railway No. 2 the public shall have the right to use the footpath on the Company's property passing along the eastern side of the Company's Salisbury Branch Railway and coloured purple on the signed plan between Penleigh Road and the point X marked on the said plan and the said Railway No. 2 by means of a level crossing or footbridge as they may determine:

11.25 The plan accompanying the Act (WSHC cat. Ref no. 2525/bx10935) clearly shows the changes detailed above. These are reflected in the working copy of the definitive map today. The claimed route is shown as a continuation of the footpath marked in purple to point X (the Penleigh Path – Westbury 60) and footpath Westbury 15 towards the station but is unaffected by the 1930 Act being outside the lines of deviation or area of interest.

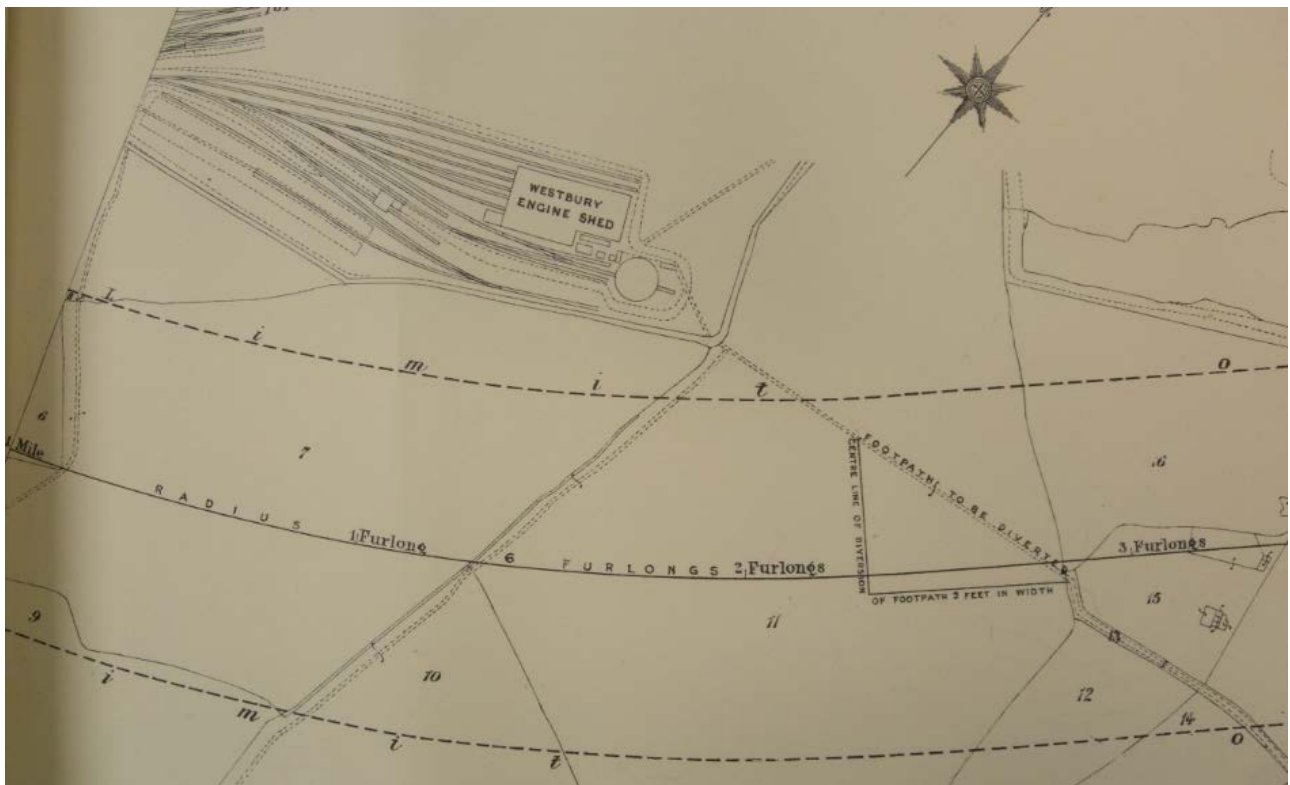


11.26 Deposited Plans for Railway no. 2 WSHC cat ref no. A1/371/173

The plans for the new railway authorised by the above 1930 Act were deposited with the Clerk of the Peace on the 29<sup>th</sup> November 1929 for Parliament to consider in its sessions of 1930. An overview plan clearly shows the line of the ‘avoidance line’ in red:



11.27 The detailed plan shows the claimed route and Engine Shed outside the Limit of Deviation. However, the claimed route is clearly represented as a part of the path network:



## 11.28 Category B Evidence

This category includes documents, maps plans drawn up as a result of legislation, consulted upon (i.e. in the public domain), but whose primary purpose was not to record public rights. i.e. the records of the Tithe Commission or the Inland Revenue.

## 11.29 Westbury Tithe Survey 1840 WSHC Cat ref no. TAWestbury

The purpose of the Tithe Survey was to survey lands that were liable to tithes and to commute these tithes (where a percentage of the products of the land were taken by the Church) to money payments or rent charges. This was enabled by the Tithe Commutation Act of 1836.

11.30 The Westbury Tithe Survey plan and apportionment document have been stamped as being received by the Tithe Commissioners on October 15<sup>th</sup> 1842. The survey pre-dates the railway. The purpose of the survey was to identify and catalogue land, specifically with a view to identifying land that was in agricultural production (since land that wasn't – i.e. houses or roads – was exempt from tithes). The Westbury tithe map records roads coloured sienna and un-numbered (so free from tithe) and it is possible to identify the road to Brook Mill and Sopps Lane (now Oldfield Road). However, no footpaths or bridleways are shown.

11.31 In the book entitled The Tithe Maps of England and Wales, Roger Kain and Richard Oliver record that the Westbury Tithe map shows a range of features (including foot and bridleways) that are not apparent on the copy held at the Wiltshire and Swindon History Centre. The maps inspected and described by Mssrs Kain and Oliver are the record copy plans held at The National Archive at Kew and may show greater refinement (though they would be expected to be copies of the essential information). In any event, the award of the Brook Foot Way at inclosure in 1808 and its recognition in the deposited plans associated with the railway provide compelling evidence for the existence of this footpath notwithstanding its apparent omission from the tithe map. A footpath leading across agricultural land is unlikely to have had an effect on the productivity of the land and omissions may well have been deliberate as their presence was irrelevant to the purposes of the Act.



**11.32 Inland Revenue Finance Act 1909/1910 records** WSHC Cat ref. No. L8.10.44

As a result of the Finance Act 1909/1910 the Inland Revenue conducted a valuation survey of all property for the purposes of imposing a tax on any increased value at the time of its subsequent sale. The Act proved unpopular and was substantively altered by repeal in 1920, however, the detailed survey of property remains as a record made at the time. Surveyors used Ordnance Survey maps as base maps (usually 1:2500 County Series maps revised in around 1899) and by use of colour detailed who owned what parcels of land or hereditaments.

11.33 The owners of land were able to claim exemptions from the tax for public rights of way (amongst other things) and public roads in the control of the highway authority were also exempt. Accordingly these records can be useful in rights of way cases.

11.34 All of the land affected by this application is shown coloured pink as part of hereditament 281. 281 includes the railway line and the station and comprises that land that forms the public undertaking that is the railway. No detail or annotation regarding the claimed route is shown.

**11.35 Category C Evidence**

These records relate to the reputation of a route as a public right of way and include local government records (highway board, County Council, Parish Council).

**11.36 Westbury Urban District Council Minutes 1901 – 1909** WSHC Cat. No. G17/283/2

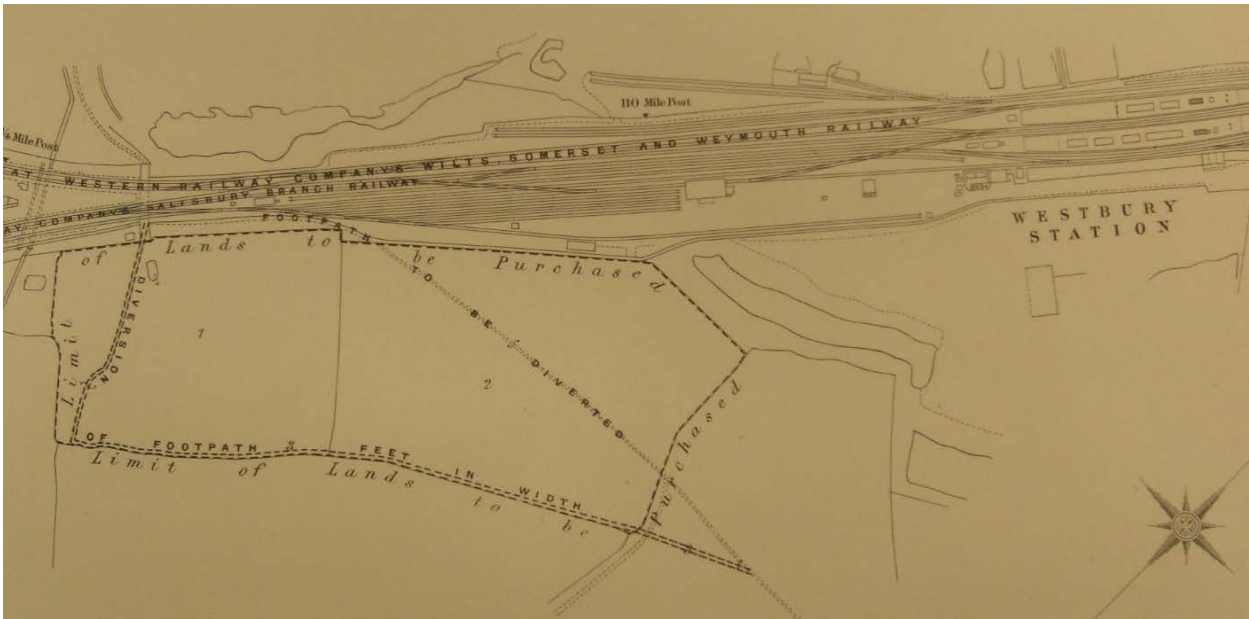
**07 December 1904 – Surveyors' report**

*“GWR Plans – I have examined the parliamentary plans deposited at the Clerk’s Office by the G.W. Railway Company, The boundary line shown as limit of land to be acquired by the Company encloses two public footpaths. One of these paths from Brook House to Penleigh is not shown to be interfered with. The other footpath from Station Road to Dilton Marsh is shown as proposed to be diverted. The diversion at one end is at the point where the order path referred to crosses the railway and extends towards the Station Road a distance of 1400 feet, in an easterly direction. To replace this path one is provided at the south boundary of the land acquired, 3 feet wide and inside the G.W. R. limit from the point at 1400 feet from the Railway a distance of 1400 feet about to intersect the path first referred to, at a point 500 feet from the crossing where diversion commences.*

*The alteration thus makes a difference of 500 feet in the length of the path from Station Road to Dilton Marsh and Bremeridge. This extra distance by which the other path from Penleigh House to Station Road is shortened.*

*I can find no reason why the Council should oppose the action of the G.W.R. company.”*

11.37 A copy of the Deposited Plan referred to can be seen below:



11.38 The claimed route is not shown. The underlying plan shows a path leading on the south side of the tracks which would, theoretically, permit access through from Dilton Marsh to the station (this path is also shown on early – pre 1922 – OS County Series maps) but no mention is made of this and it is unaffected by the proposed land purchase. It however clear that the path diverted to the west and south replaces the historic Brook Mill footpath across the site.

11.39 An earlier reference to Station Road Footpath was found (dated 02.10.1901) but this related to a path “on the Station Road” and referred to a grant from the County Council to lay asphalt on the Station Road. It is considered more likely than not that this refers to the existing highway that forms Station Road and is maintainable at public expense.

#### 11.40 **Category D Evidence**

This category includes other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans or conveyances.

#### 11.41 **Great Western Railway Records**

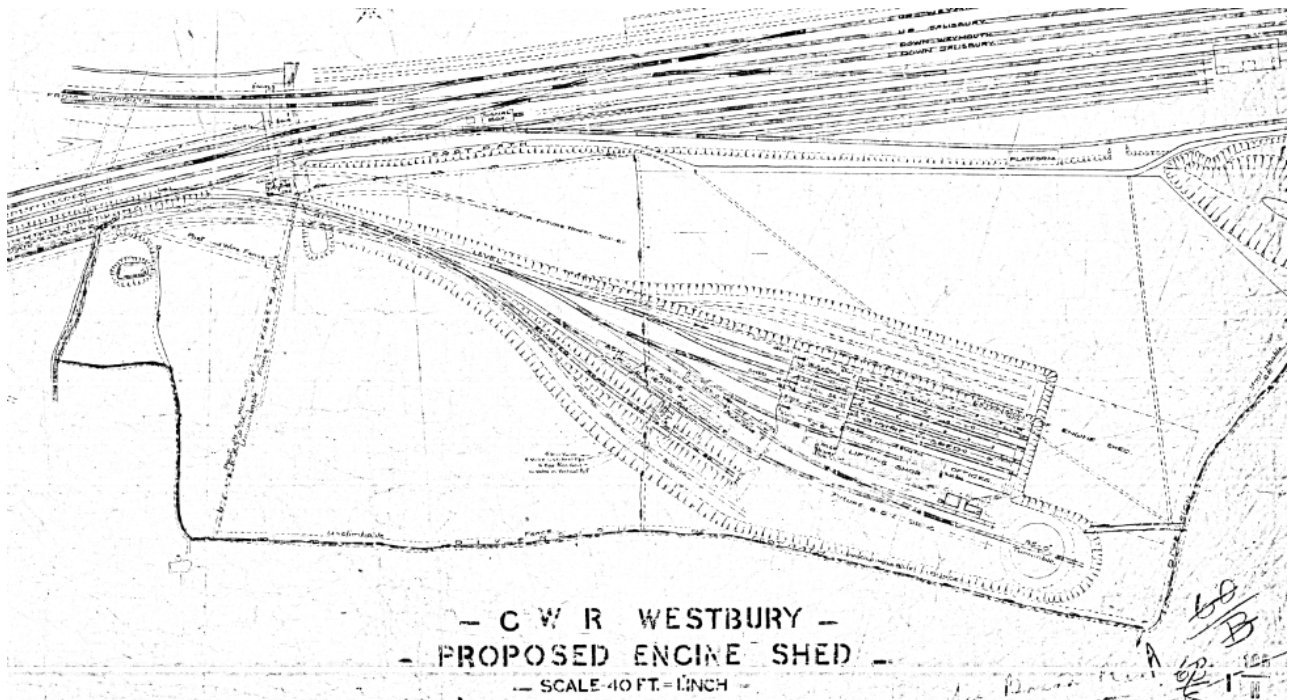
Documents that have been archived by Great Western Railway have been sourced from the Wiltshire and Swindon History Centre (General cat. No 2515) and the National Railway Museum at York.

#### 11.42 **G W R Westbury Proposed Engine Shed Plan** National Railway Museum 24079

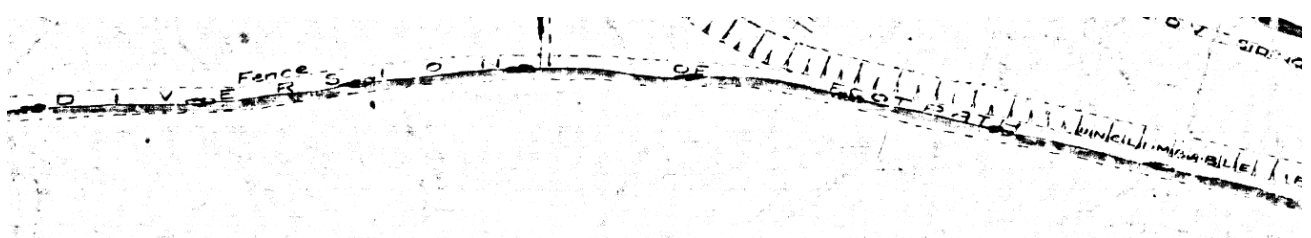
The plan is labelled “Drawing No. 1” and is drawn at the scale of 40 feet to one inch. It shows the area developed for the Engine Shed and includes considerable detail relating to the development including detail relating to an “Unclimbable Fence”

around the development separating it from the footpath labelled “Diversion of Footpath” and bounded for some of its length on the side furthest from the Engine Shed by a “Post and Wire” fence.

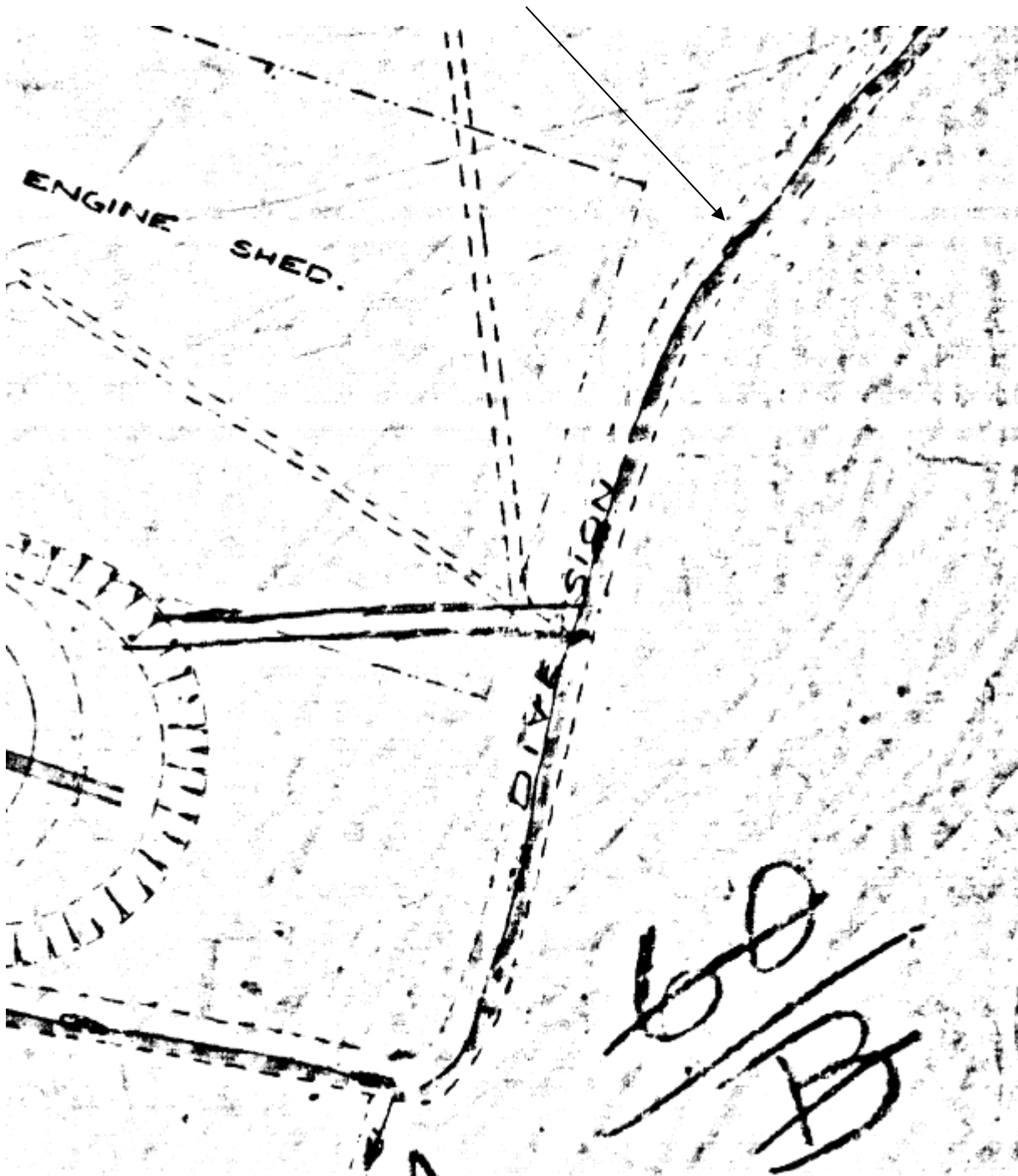
11.43 This plan shows the claimed footpath as part of the proposed diversions and the claimed route is labelled “Diversion of..” the words ‘footpath’ presumably appearing on the next sheet which has not been accessed.



The southern section of diverted footpath is marked:



11.44 The claimed route is shown as below:



11.44 The plan, insofar as the path network is concerned, reflects the network as built and not as represented on the 1904 Deposited Plan. It accords well with R J Cogswell's account of the development taking place.

11.45 **G. W. R. 2 Chain Survey 1933** WSHC Cat. No. 2515 250/452

This record is a highly detailed colour survey of the station and surrounds. It is a leather bound book containing a large scale plan and is entitled:

*G.W.R. – Westbury Station & Avoiding Line – 2 – Chain Survey 1933. Vol. 216 (Part 1.)*

It contains a memo:

*“GREAT WESTERN RAILWAY – MEMO to be affixed to each of the new Surveys.*

*This Plan is kept by the Heads of Departments for their own use only. It is not to be produced nor is any part of it to be copied for the information of Owners of adjoining property or others.*

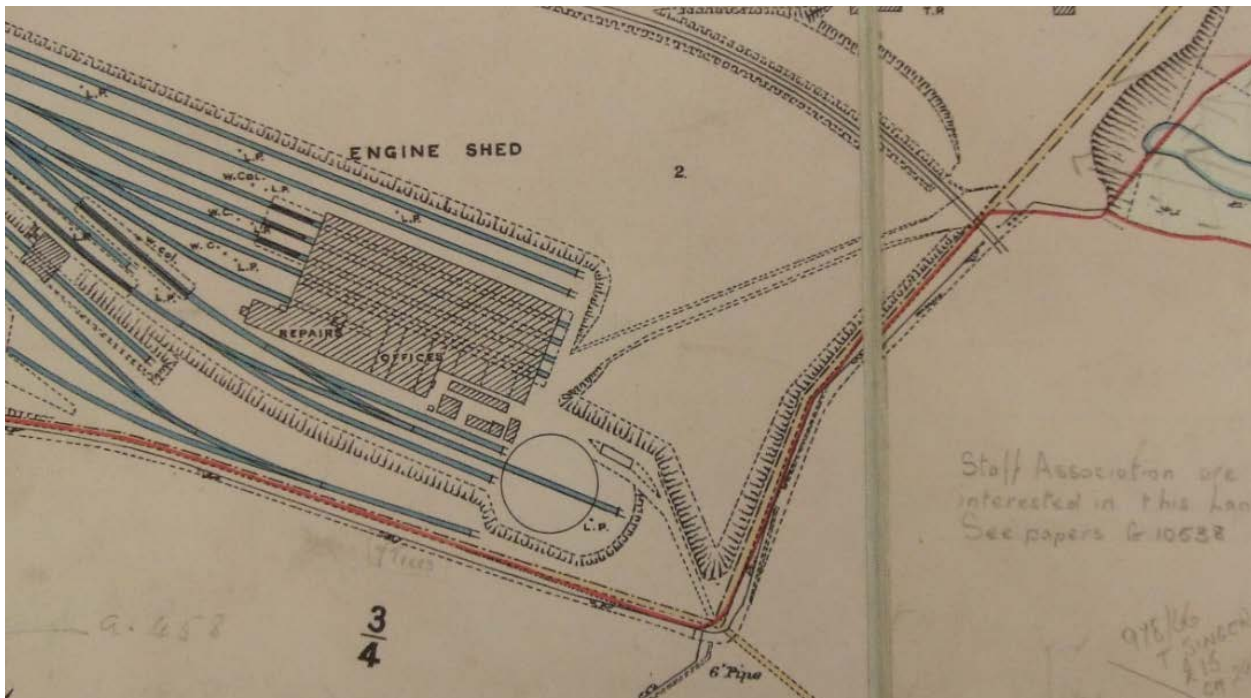
*Care has been taken to make the Plan as accurate as possible, but there is reason to doubt whether it can in all cases be relied upon.*

*If cases should arise as to the rights or title of the Company, the Plans to the Title Deeds must alone be relied upon to supply the necessary information.*

*F.R.E> Davis, Secretary February 1934.”*

It also contains a note: *“Rights of Way Con<sup>oe</sup> dated 28.7.1932...”*

11.46 The claimed route is shown coloured sienna in the same manner as the footpath network.

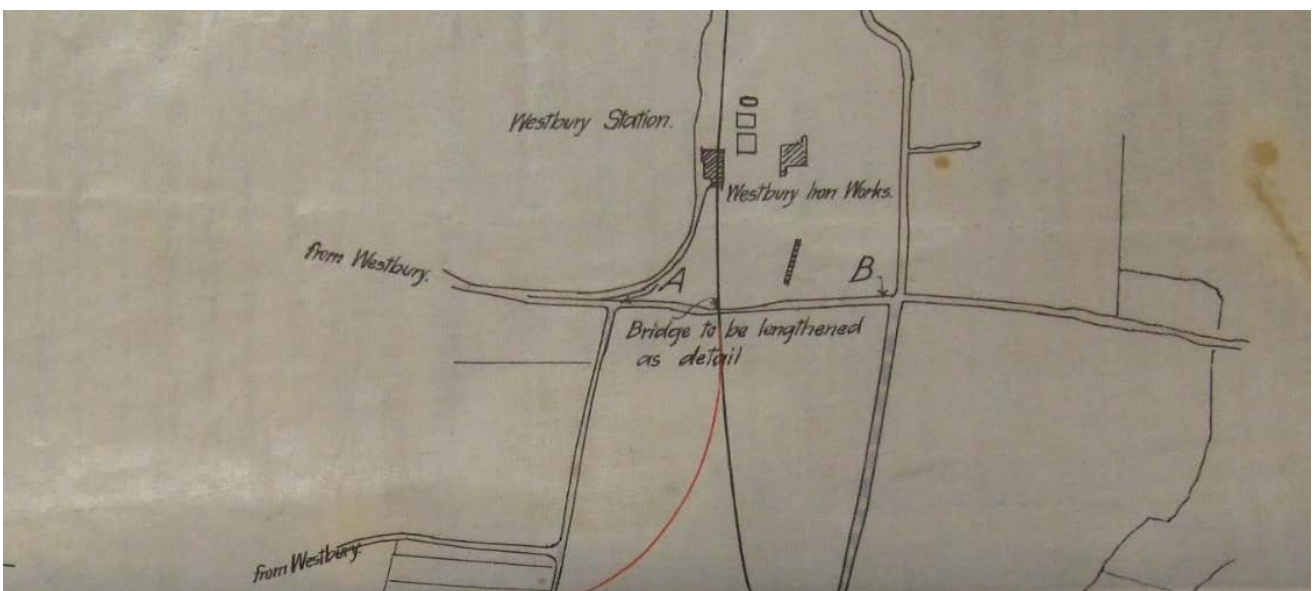






**11.47 Plans for Proposed Reconstruction and Lengthening of Bridge over Railway at Westbury Station** WSHC Cat. No. 1219/18

These plans are not dated however the overview plan shows the area around Station Approach. The claimed route (in respect of that section leading from Station Approach to station Road for pedestrian use) is not shown. It is possible that the bridge reconstruction works coincided with the provision of this additional access but this is not known. It is noted that the plans show Westbury Iron Works so it is assumed that they date from the 1930s or earlier.



**11.48 W. S. & W Westbury to Salisbury Plan c.1844** WSHC Cat. No 1780/26

This plan shows the lands to be purchased for the original railway. It is drawn at the scale of 4 chains to one inch by R Tarr and shows the land around the station "Station Ground" and surrounding fields. Roads are shown coloured sienna and the

footpath from Brook Mill leading over the proposed line (diverted when the Engine Shed was built) is shown but not labelled.

#### 11.49 **Category E Evidence**

This category of evidence includes commercial maps and plans including those of the Ordnance Survey.

#### **Ordnance Survey 1:2500 County Series mapping 1884 - 1939**

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. Sheets 44.7 and 44.8 cover the applicant route. 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”.

11.50 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.”

11.51 Ordnance Survey maps from 1888, 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.

11.52 However, surveyors were instructed to represent Footpaths with the letters F.P. and in his book *Ordnance Survey Maps a concise guide for historians* Richard Oliver states:

*“From 1883 onwards footpaths were shown by F.P., ‘the object of...F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic’. (SC, 16.2:83).*

*In 1893 it was specified that “all footpaths over which there is a well known and undisputed public right of way’ were to be shown and also ‘private footpaths through fields (but not in gardens)...if they are of a permanent character.....Mere convenience footpaths for the use of a household, cottage or farm or for the temporary use of workmen should not be shown..”*

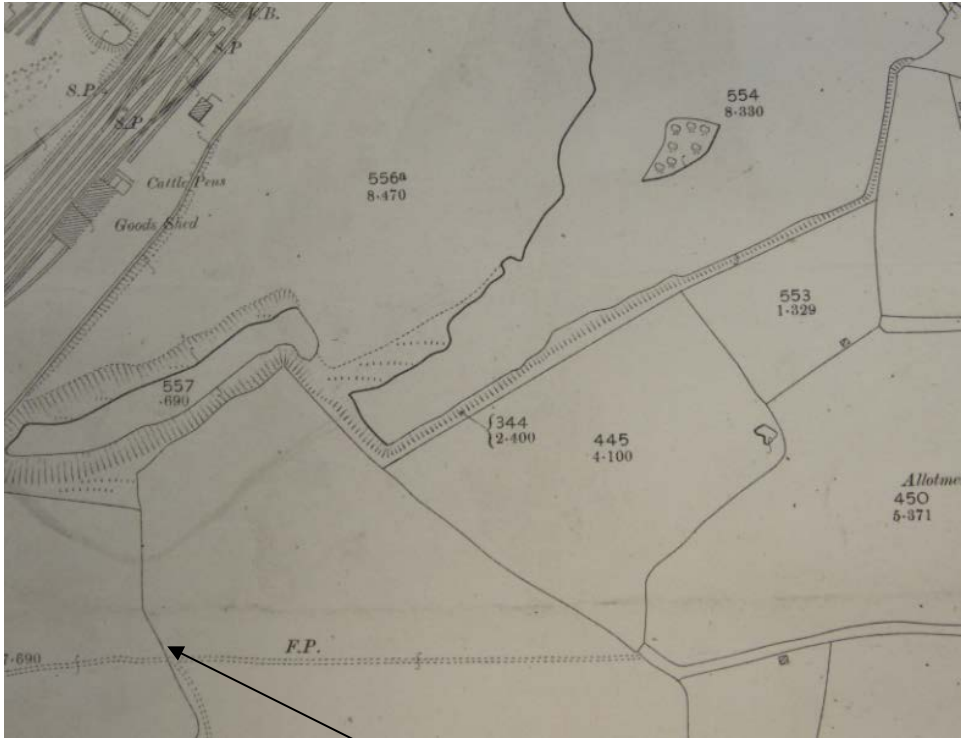
11.53 OS County Series 1:2500 Sheets 44.7 and 44.8 1884 survey



At the time of the survey a path extending north from the Brook Mill to Sopps Lane (awarded footpath) footpath is shown leading to the Station. The Southern intersection with the Brook Mill path is coincident with the claimed footpath though its line leads over the footprint of the land enclosed for the Engine Shed development some 20 years later.

11.54 OS County Series 1:2500 Sheet 44.8 Second Edition (revised 1899)

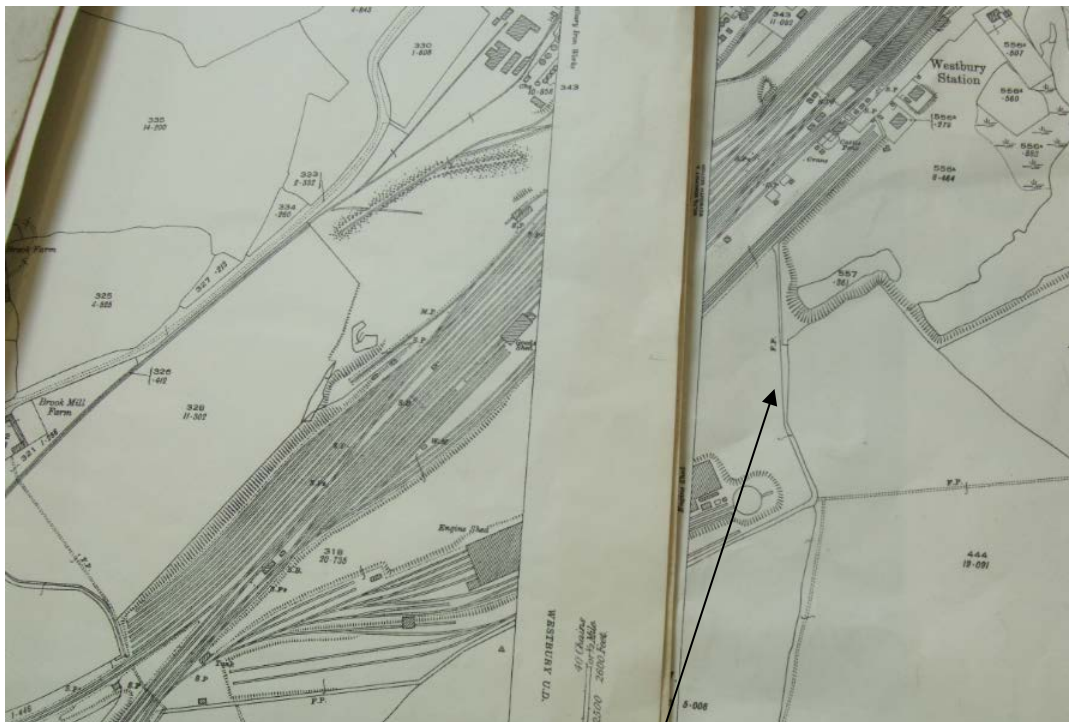
The map had been revised and no longer shows the footpath leading north through the quarry and to the Station. The shape of the quarry has also altered, however, the line of the Brook Mill footpath remains unaltered and again is recorded as "F.P."



Line of path revised not to be shown.

**11.55 OS County Series 1:2500 Sheets 44.7 and 44.8 Edition of 1924**

This map was revised in 1922. The claimed route is shown marked F.P. as well as Brook Mill footpath. The Brook Mill footpath is shown largely as diverted (there is a difference in the line at the western end) in the 1904 deposited plans.

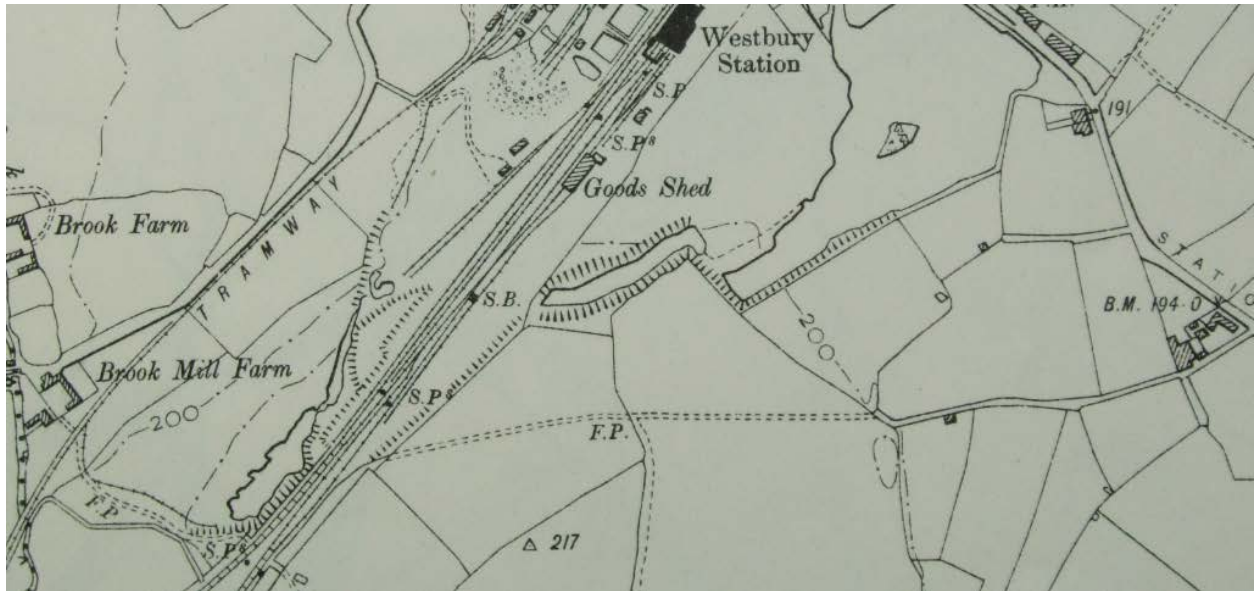


Claimed route

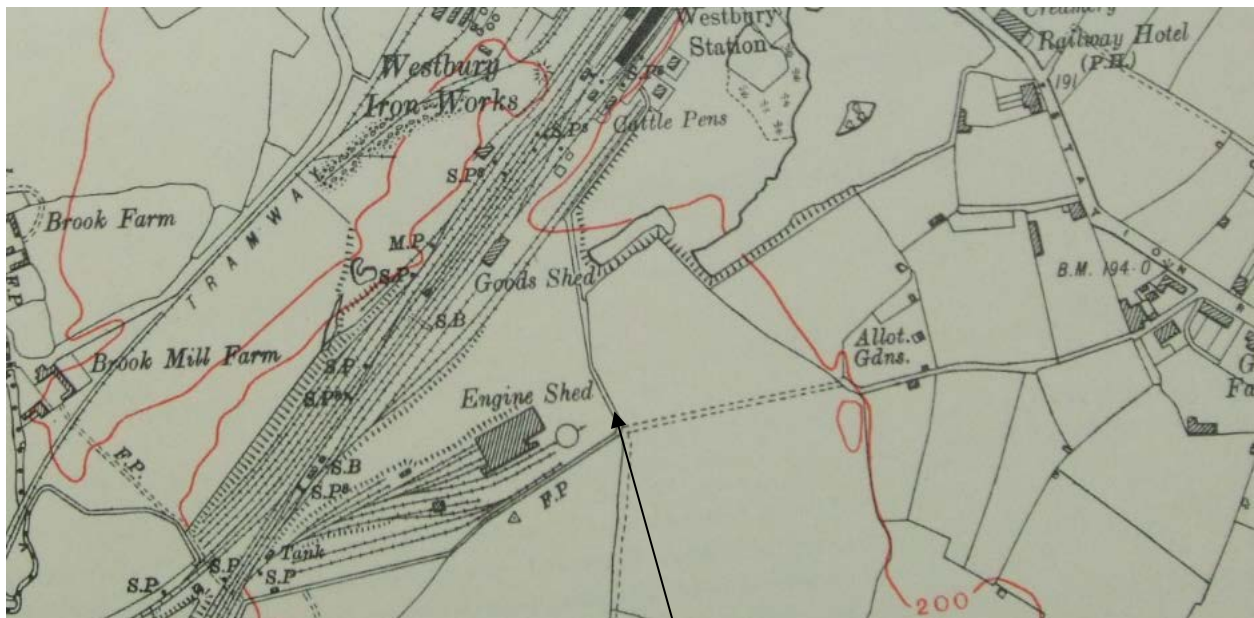
11.56 OS County Series 1:10560 Sheet 44

Although derived from the 1:2500 survey these plans are useful as they show the area on one map sheet making the effect of the Engine Shed on the area very clear:

1901 Edition



1926 Edition

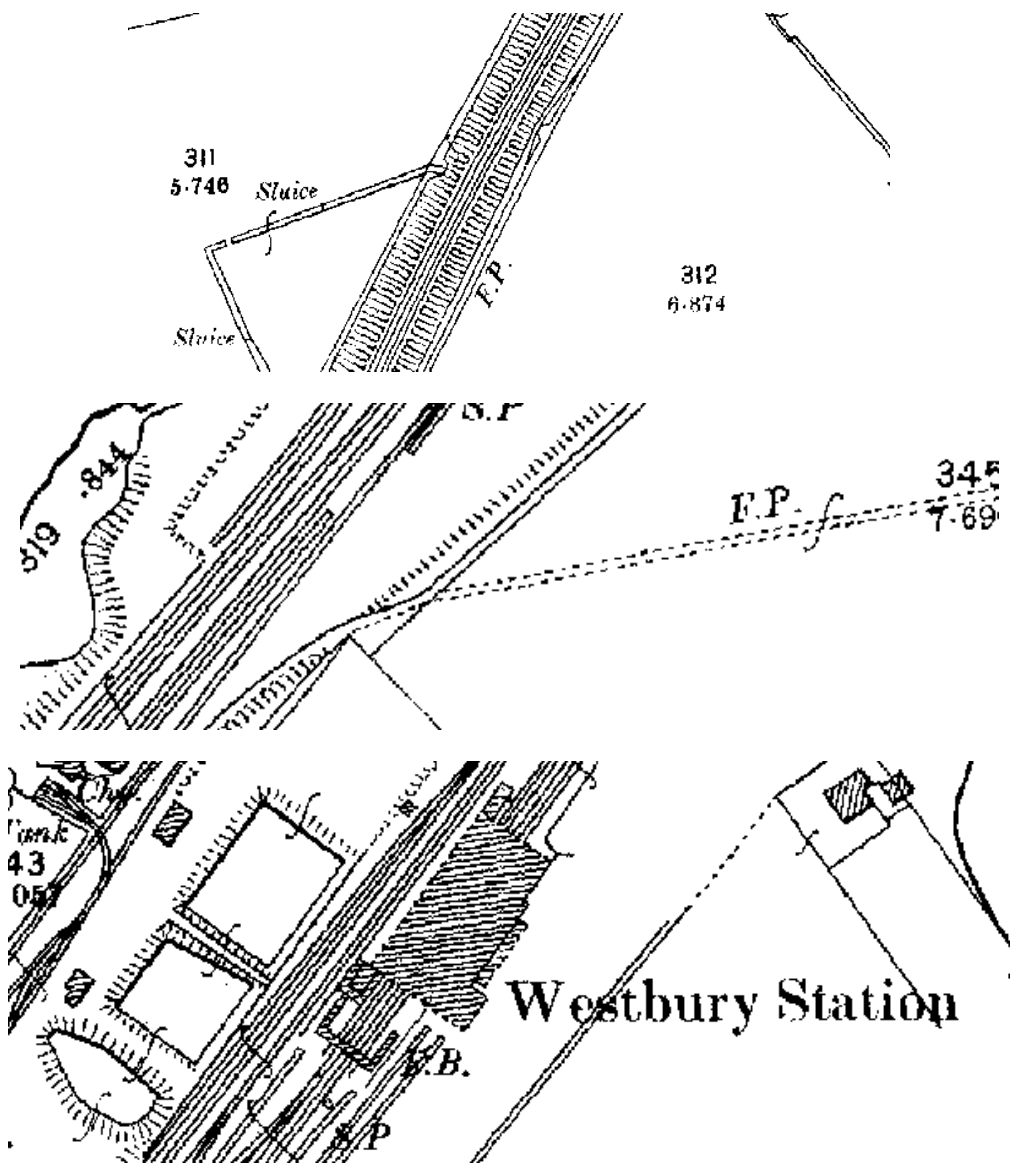


Claimed path

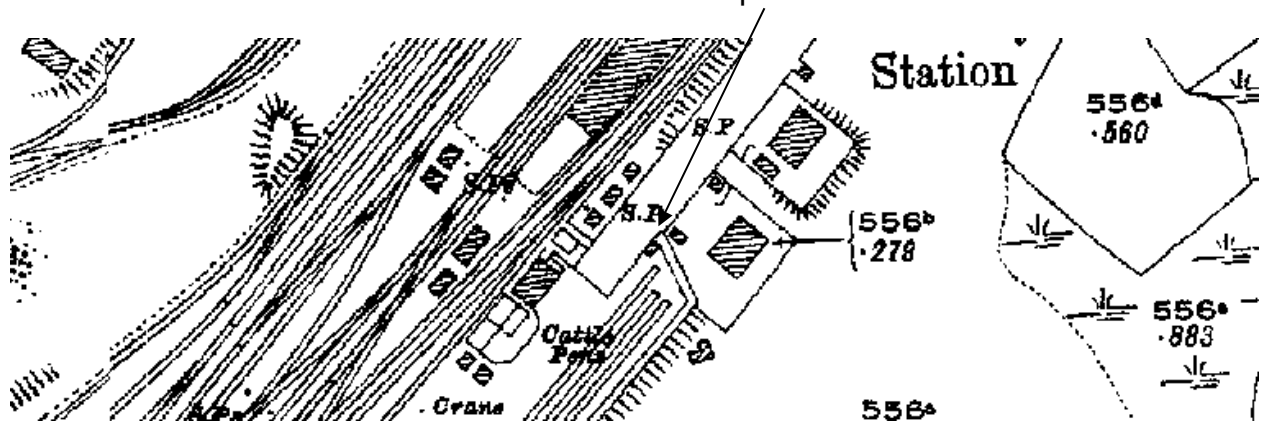
11.57 It is clear from OS maps that pre-date the Engine Shed that a footpath (marked 'F.P.')

It is clear from OS maps that pre-date the Engine Shed that a footpath (marked 'F.P.')

mapping shows that it would have been possible to walk from Dilton Marsh to Penleigh via Penleigh Lane and then north on a fenced path to Westbury Station. NB Dilton Halt was not open until 1937.



It is noted however that the label "F.P." does not extend beyond the Brook Mill footpath even though, according to the mapping, the route onwards was possible. It is noted that this route was not longer possible after the Engine Shed was built, the access constructed instead was the claimed path:



11.58 Ordnance Survey mapping therefore supports other evidence viewed. i.e. that the claimed route was only created when the Engine Shed was built (believed to have been finished in 1915). Although it appears likely that a fenced path existed to the south side of the tracks before this time it is known that no footpath existed in this direction before the railway was built and further, Ordnance Survey mapping cannot provide direct evidence of public use.

#### 11.59 **Category F Evidence – User evidence**

The application adduced 13 User Evidence Forms demonstrating use from 1936 to 2017. Of these 8 people had used the full route from Station Road past the station and onto Westbury path no. 15 south of the Engine Shed (i.e. use as a through route) and 5 people had used only that section between Westbury path no. 15 and the station. All believed their use to have been ‘as of right’ (that is without force, secrecy or permission) and none had been stopped or challenged until the bund and fence were erected across the path. A summary of the user evidence is appended at **APPENDIX B**.

11.60 Comments included:

1. 1989 – 2016 *“...it has since been used on a regular basis by those living in Dilton Marsh and Westbury Leigh to get to Westbury Station to catch the train as well as the railway workers using it.”*
2. 1936 – 1990s *“First used as a child “to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937.”*
3. 1956 – 2016 *“I have cousins older than myself who have used the path.”*
4. 1975 – 2016 *“Information passed on by local residents, some of them are in their eighties, confirm that the route has been used as long ago as the 1950s and 1960s in continuous fashion.”*
5. 2002 – 2016 *“The nearest alternative for pedestrians is Station road which is a much longer route from the Oldfield Park Estate and wider Westbury.”*
6. 1997 – 2017 *“Access along Station Road is possible though hazardous on foot under the railway bridge.”*
7. 1971 – 2016 *“It is useful for residents of Dilton Marsh and Westbury Leigh to be able to walk to Westbury Station on this route in order to catch a train. This is necessary because many trains do not stop at Dilton Marsh halt.”*
8. 1990 – 2016 *“As well as providing the most direct pedestrian route...this route (in conjunction) with the Cinder Track is of considerable historic importance with its strong links to Westbury’s railway and industrial heritage.”*

9. 1981 – 2001 *“In BR days and Railtrack and Network Rail the civil engineers used to maintain the footpath (cinder track).”*
10. 1950s to 2000s *“I have always believed the path was railway property.”*
11. 1970 – 2016 *“I believe the route provides a useful shortcut...it is a more pleasant, varied and safer walking route than by road.”*
12. 1972 – 2017 *“I understand that historically the “cinder track” was constructed to allow railway and other workers to walk to work. It came into use by the general public.”*
13. 1987 – 1997 *“My impression is that the footpath ran from Penleigh through to Westbury Station (why else would it exist) and the roadway...was constructed over the line of the footpath.”*

## **12 Consideration of the Evidence – Legal Empowerment**

12.1 Historical evidence may be considered by virtue of s.32 of the Highways Act 1980:

### **Highways Act 1980 Section 32 Evidence of dedication of way as highway**

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

12.2 Evidence of use may be considered under common law (i.e. where the landowner and has made an act of dedication or behaved in such a manner as to imply such an act and the public have accepted it by use) or by statute law (Section 31 of the Highways Act 1981).

### **Highways Act 1980 Section 31 Dedication of way as highway presumed after public use of 20 years**

*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 any 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 of 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 have 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 or statutory purposes to dedicate a way over the land as a highway if the existence of a highway would be incompatible with those purposes.*

NB The Growth and Infrastructure Act 2013 brought about alterations to s.31(6) extending the length of time that a deposit remains valid for from 10 years to 20 years.

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*).

### 12.3 The land over which the claimed route passes is affected by the **British Transport Commission Act 1949**.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*

### 13 Consideration of the Evidence

The evidence has been tabulated according to evidential weight as follows:

Category of Evidence	Document	What it shows	Evidence of public rights over claimed route
A	Westbury Inclosure Award 1808	Public footway awarded (Brook Footway), now footpath Westbury 15	None
A	Railway Plans A1/371/41 MS 1845	Brook Footway recorded	None
A	Railway Plans A1/371/36 and 68 1844	Crossing at the level for Brook Footway	None
A	Railway Plans A1/371/112 1894	Station Approach shown.	None
A	Railway Plans A1/371/166 1904 Relates to new engine shed	Diversion of Brook Footway shown. Claimed route not shown.	None
A	Railway Plans A1 371/173 MS 1929 and F1/500/2MS Westbury avoiding line. The Great Western Railway Act 1930	The Act allows the diversion of footpaths to the south of the Engine Shed. The claimed route is shown joining the public rights of way network but unaffected by the Act.	Evidence of existence of southern part of path joining the public rights of way network.
B	Westbury Tithe Survey 1840	No footways or paths shown in the area of interest (Brook Footway omitted)	None
B	Inland Revenue Finance Act 1909/1910	Land shown as part of the railway hereditament.	None
C	Westbury Urban District Council Minutes 1904 G17/283/2	No objection made to the plans to divert as a result of the 1904 deposited plans to build the engine shed. Diversion plan of Brook Footway as the 1904 Act.	None
D	GWR records National Railway Museum Drawing no 1 – engine shed	Plan of new engine shed shows claimed route with words “Diversion of...” alongside (text ends at page end). Other routes say “Diversion of footpath”.	Claimed route is shown as a diversion. Path joins footpath network.
D	GWR records 2 Chain survey 1933 WSHC 2515 250/452	Southern part of claimed route shown coloured sienna. Joining public footpaths also coloured sienna.	Coloured in the same way as public footpath network.

Category of Evidence	Document	What it shows	Evidence of public rights over claimed route
E	OS 1:2500 1884	Footpaths shown ("F.P") no engine shed. Path shown leading to the station from the south.	None (evidence of a path leading to the station from the south)
E	OS 1:2500 1924	Engine shed shown. Claimed route shown and marked F.P.	Claimed route shown and marked "F.P"
E	OS 1:10560 1926	Engine shed shown. Claimed route shown and marked F.P.	Claimed route shown and marked "F.P"
F	User evidence	Evidence of public use and repute from 1936 to 1990s.	One user pre 1949 Two users from the 1950s recall knowing of earlier use
F	R J Cogswell book	Recalls Engine Shed being built. Claimed route described as "an existing GWR owned footpath from the station to Dilton Marsh and long known as Penleigh Footpath was diverted across the, by then, filled in end of the Station Minehole to the kissing gate opposite to the pedestrian's entrance to the new depot.	Penleigh Footpath is likely to be path shown on pre-Engine Shed OS on GWR land. Diversion refers to claimed route (as is the only route linking Dilton Marsh with the station).

Consideration has been given to the following:

- i) Is the path a historic public right of way (pre-dating the railway) that has not been recorded in the definitive map?
- ii) If not, when was the path physically created?
- iii) Were public rights acquired over it prior to 1949?
- iv) Have, on the balance of probability, public rights been acquired over it post 1949?

### 13.1 i) Is the path a historic public right of way?

The claimed path was not awarded to the public as a footpath at the time of enclosure though the adjoining path, Brook Footway (now partially Westbury 15), was. The claimed path has not been recorded on any maps, plans or documents until the Engine Shed was proposed (between 1904 and 1915).

13.2 The claimed path did not pre-date the railway (1845) and did not pre-date the Engine Shed (1915).

**13.3 ii) When was the path physically created?**

The claimed path was created when the Engine Shed was built. This is evidenced by the eye witness account of R J Cogswell in his book 'Westbury Ironworks', by a G.W.R. plan for the 'proposed engine shed' and from Ordnance Survey mapping revised in 1922 from an 1899 revision. Some evidence exists that the path was surfaced by G. W. R. and maintained in more recent times by British Rail, Railtrack and Network Rail. The date of construction of the path is taken as 1915, the date on which the Engine Shed was completed though R J Cogswell recalls seeing the path being built a little earlier.

**13.4 iii) Were public rights acquired over it prior to 1949?**

Owing to the provisions of section 57 of the British Transport Commission Act 1949 no right of way by prescription or use can be acquired over land in the Commission's ownership where it forms an access or approach to any station or depot.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath or thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot or any dock or harbour premises of the Commission.*

13.5 The claimed route from both the south (Dilton Marsh) and the north (Station Road) have been used as access routes to the station. The route from the north is entitled "Station Approach" and although it is questionable whether the route to the station from the south was intended to be an access route to the station (since it is now closed to the public) it has, *de facto*, been used for this purpose and this is supported by evidence submitted in support of the application.

13.6 If the provisions of s.57 of the British Transport Commission Act 1949 are held to apply for the entire route it is necessary to consider whether public rights were acquired prior to 1949.

13.7 Section 16 of the Railway Clauses Consolidation Act 1845 permits any railway company to make any road or way as they think proper for the utilisation of the railway.

**Works to be executed.**

Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works; (that is to say,)

They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;

They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;

They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences, as they think proper;

They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and

They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:

Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers.

- 13.8 The question however is, whether the acquisition of public rights over that land was incompatible with the statutory purpose of the railway company. If public use is incompatible then s.31(1) of the Highways Act 1980 must fail. However, where public use is not incompatible with that statutory purpose then a right may be acquired.

#### Section 31(1) Highways Act 1980

*(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.*

- 13.9 In the case of *British Transport Commission v Westmorland County Council*; *British Transport Commission v Worcestershire County Council* [1957] 2 All ER 353 in the House of Lords it was held that the test whether a statutory corporation (i.e. the British Transport Commission) could validly dedicate to the public a right of way over their land was whether the dedication was compatible with the statutory purposes for which the corporation had acquired the land; the question of incompatibility was one of fact to be determined by a consideration of the probabilities reasonably foreseeable or of the likelihood whether the right of way would interfere with the adequate fulfillment of the statutory purposes.

13.10 Viscount Simmons in his leading judgement said:

*“Any examination of this question must begin with R v Inhabitants of Leake ((1883), 5 B & Ad 469), which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J in that case (ibid., at p 478):*

*“If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power.*

*Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though on one hand it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?”*

13.11 It is considered that the use of the land by the public on foot did not interfere with the statutory purpose of the railway (on the contrary it augmented it) and that public rights could have been acquired over it for the period 1915 to 1949 notwithstanding any other action to prevent it occurring.

13.12 There is some relevant evidence for this period. A G.W.R. drawing for the proposed engine shed describes it as a Footpath (though not a Public Footpath) and shows it connected to the public rights of way network with the word “diversion” on it. G.W.R. drawings produced as a “2 Chain Survey” in 1933 record the path as connecting to the public rights of way network in the same way as the track plan and proposed engine shed plan.

13.13 R J Cogswell describes the path in the period 1905 – 1915 as being:

*“...the arrangements made were that the lane – now Oldfield Road – and the path from its end across another field were surfaced with rolled-in fly ash and the stiles replaced by kissing gates made wide enough for bicycles to be wheeled through. Elsewhere a GWR owned footpath from the station to Dilton Marsh and long known as Penleigh Footpath, was diverted across the, by then, filled-in end of the Station Minehole to the kissing gate opposite to the pedestrians’ entrance to the new depot. From there it continued on round to the old level crossing for Brook Mill.”*

Underlining added to emphasise the reference to the claimed route.

- 13.14 Mrs P Harvey gave evidence of having used the route in the 1930s as a child “to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937.” Users from the 1950s both give evidence that suggests use before that time “I have cousins older than myself who have used the path” and “ I have always believed the path was railway property”.
- 13.15 It is a fact that since 1904 the land over which the path leads has been “railway property” (i.e. G.W.R., British Transport Commission, Rail Track and Network Rail).

#### **14.0 Legal and Financial Considerations**

- 14.1 The determination of Definitive Map Modification Orders (DMMOs) and the continual review of the definitive map are statutory processes for which financial provision has been made. In determining applications for DMMOs the Council is acting in pursuit of its statutory duty and cannot be challenged in so doing (subject to due process being followed).
- 14.2 If an order is made and advertised and no objections are forthcoming the Council will not incur any further costs beyond advertising the confirmation of the order. If the order attracts objections that are not withdrawn it must be forwarded to the Secretary of State for determination. It may be determined by written representations (no additional cost to the Council), a local hearing (additional costs to the Council in the region of £300) or a public inquiry (additional costs to the Council in the region of £4000).
- 14.3 If an order is not made and the application is refused, the applicant has a right to appeal to the Secretary of State for Environment, Food and Rural Affairs within 28 days of notification. If the appeal is upheld Wiltshire Council will be directed to make an order.

#### **15.0 Risk Assessment**

- 15.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety. These have been raised by D B Cargo UK Ltd who lease part of the claimed route, however, these concerns are not relevant to the recording of the route though would be likely to be considered for the management of the route in the event it was recorded as a public right of way.
- 15.2 The Council is the surveying authority for the County of Wiltshire (excluding the Borough of Swindon) and has a duty to keep the definitive map and statement under continual review (s.53(2)(b) WCA 81). There is therefore no risk associated with the Council pursuing this duty correctly.



15.3 If the Council fails to pursue this duty in this case it is liable to complaints being submitted through the Council's internal procedure leading to the Ombudsman. Ultimately a request for judicial review could be made.

## **16.0 Environmental Impact of the Recommendation**

16.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to the environment.

## **17.0 Equality Impact**

17.1 The character of the route will not alter with the making of an order to record the way as a public footpath. The legal right to pass and repass over the entire width will be protected which will ensure that obstructions and encroachments may be removed by Order of the Council. This could lead to greater accessibility.

## **18.0 Safeguarding Considerations**

18.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to safeguarding.

18.2 It is however noted that there are no considerations arising.

## **19.0 Public Health Considerations**

19.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to public health.

## **20.0 Relationship to the Council's Business Plan**

20.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. However, Wiltshire Council is committed to working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

## **21.0 Options to Consider**

- i) To make an Order to modify the definitive map and statement to show the claimed route as a public footpath
- ii) To make an Order to modify the definitive map and statement to show part of the claimed route as a public footpath
- iii) To refuse the application for an Order

## **22.0 Reason for Recommendation**

Section 53(3)(b) requires that on the balance of probability a presumption is raised that the public have enjoyed a public right of way over the land for a set period of

time. However, where historical evidence is considered the provisions of s.53(3)(c)(i) apply.

22.1 Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. This section allows for the consideration of common law and the inclusion of historical evidence and is the more commonly used section. It offers a two tier approach to the evaluation of the evidence with a lower bar set to make an Order ('a reasonable allegation') than to confirm one ('on the balance of probabilities').

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

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

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

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

22.4 Test B is the weaker test and only requires that on the balance of probabilities it is reasonably alleged that public rights subsist. This allegation may only be defeated at the order making stage by incontrovertible evidence.

22.5 Officers consider there are two key considerations here.

i) Was it legally possible for the public to acquire a right over the land?

ii) Is there a sufficiency of evidence to establish public use in a manner that was 'as of right'?

22.6 The landowner (Network Rail) relies on Section 57 of the 1949 British Transport Commission Act (the 1949 Act) to re-but the claim for public rights. This applies to land held after 1949 and to a route that forms an access or approach to any station or depot.

- 22.7 The northern leg of the claimed route (Westbury Station to Station Road) is the main access route to the station and is called “Station Approach”. It is very clear that this section of the path is affected by Section 57 of the 1949 Act. It is also clear that the route has always been “Station Approach” and as such has provided access for the services of the railway at the invitation of the railway. Such use would be ‘by right’ and not ‘as of right’. Neither statutory or common law dedication can occur under these circumstances.
- 22.8 There is clearly incontrovertible evidence that a public right cannot have been acquired over Station Approach. The situation with the section south from the station to Westbury 15 is less clear and relies on whether the route was provided as an access route for the public or whether public use was an act of trespass.
- 22.9 The southern leg of the claimed route (past the Engine Shed to the Station) has been used as an access route to the station but not named as such or signposted and promoted as such. As an access route to the station or the depot it is affected by Section 57 of the 1949 Act and public rights cannot be acquired post 1949.
- 22.10 Officers have some evidence of use of this route from 1915 (R J Cogswell), 1936 onwards (1 UEF) and, by repute, prior to the 1950s (2 UEFs). However, it cannot be ignored that when the public rights in this area were proposed to be diverted in the 1904 deposited plans (and again in 1930) the application route was not identified by either G.W.R. or, significantly, the Urban District Council. It was identified as a footpath diversion in the G.W.R. plans for the proposed engine shed (and built as per these plans) but this is not a document of significant evidential weight in the same way Deposited Plans or local authority records are. It may have reflected what was actually built but it does not reflect the public facing document that was the 1904 Act.
- 22.11 If it is accepted that the claimed route is an access route for the station then the application must fail as use cannot have been ‘as of right’ but by way of licence or permission from the landowner (the railway company) to access its facilities. This is reflected in the powers of the 1949 Act but is a general principle in the same way you would not acquire a public right of way across the forecourt of a shop you were visiting. Use of the path has only been within the period of GWR’s (and subsequent railway operators) ownership of the land. The tenant to some of the land (DB Cargo UK) considers public use to have been trespass. If the evidence supported that pre-1949 use was by trespass (i.e. not at the invitation of the railway company to use its premises, perhaps as a through route) then, if there was a sufficiency of evidence, it is considered that a reasonable allegation of public rights could be made.
- 22.12 Officers consider there is an insufficiency of evidence relating to the actual use of the applicant route in the period prior to 1949.
- 22.13 This insufficiency has meant it has been impossible for officers to judge whether the public only used the route for access to the station or as part of a wider walk.

22.14 For Test B (the weaker test) detailed at paragraph 22.2 to apply there must be a sufficiency of evidence to demonstrate to the owner of the land that a right was being asserted against him and was not merely an occasional act of trespass. The Council has before it some evidence of use prior to 1949, however, use at this level would be difficult to recognise as an assertion of a right against an undoubted back drop of GWR staff utilising the pedestrian access to the Engine Shed.

### **23.0 Recommendation**

**That the application for a definitive map modification order to record a public footpath from Westbury 15 along a “cinder track” north to join sidings yard lane (now blocked) along Station Approach to Station Road is refused.**

Sally Madgwick

Rights of Way Officer – Definitive Map

04 April 2018

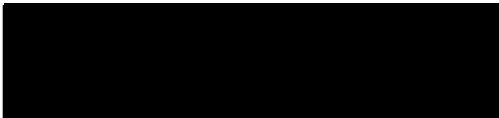


Sally Madgwick  
Rights of Way Officer  
Wiltshire Council  
Rights of Way & Countryside  
Waste & Environment  
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Wiltshire  
BA14 8JN



SN1 1BD

Tel



e-mail

Date 14<sup>th</sup> September 2017

**By E-Mail & Post**

**Y:Ref: SM/2017/01/West**

Dear Ms Madgwick

**Wildlife & Countryside Act 1981 s53**  
**Application for an Order to Record a Footpath at Westbury in the Definitive Map & Statement**

I refer to my letter dated 11<sup>th</sup> September 2017 and your emailed response of later the same day.

In response to your query regarding the history of the site I can now offer you the following information in support of Network Rail Infrastructure Limited's objection to the above application.

The railway at Westbury was originally constructed under the powers of the Wilts Somerset & Weymouth Railway Act 1845 as amended by the Wilts Somerset & Weymouth (Amendment) Act 1846, both of which Acts incorporated the provisions of the Railways Clauses Consolidation Act 1845.

The plan accompanying the Parliamentary Bill for the 1846 Act (extract enclosed) shows the proposed centreline of the railway running along the alignment of the railway as constructed. The plan also shows the roadway now known as the B3097. I have annexed the referencing details of the roadway and the land over which the claimed route runs on the attachment.

Although the referencing details refer to footpaths, the alignment of these paths is not shown and they are purely referenced in private ownership. The railway line and station was subsequently constructed and opened for public use in 1848.

The Ordnance Survey map surveyed in 1884-85 (extract enclosed), clearly shows the station approach road upon its present day alignment. It does not indicate any way or footpath along the claimed route.

The Great Western Railway (No 1) Act 1894 authorised the construction of a new railway from Stert to Westbury. The Plan deposited with the Parliamentary Bill (extract enclosed), shows the roadway leading to the station in situ but offers no indication of any footpaths running through the site.

The claimed route running parallel to the B3097 would pass through enclosure 96 and/or 97 the referencing details of which are annexed to the plan.

The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot. Whilst not showing the station approach road the plan accompanying the Parliamentary Bill (extract enclosed) shows the lands in question to be purchased, the referencing details of which are annexed to the plan.

The 1899-1900 and 1902 Ordnance Surveys offer no additional information to the earlier surveys with no obvious footpaths along the claimed route. It also does not yet show the depot constructed.

The Great Western Railway (Additional Powers) Act 1905 authorised the purchase of additional lands at and near to the station. The plan accompanying the Bill (extract enclosed) includes land over which the claimed route is made. The referencing details are annexed to the plan.

You will note that this is the first reference to any footpaths in this vicinity which come under the auspices of the Local Authority indicating public status.

You will also note that the plan is annotated as having the footpath running through enclosure 2 being diverted to run through enclosure 1. Section 53 of the Act authorised the stopping up and diversion of this

footpath. The diverted footpath appears to follow the part of the route shown on the plan accompanying the application and annotated West 15.

I further attach a copy of Ordnance Survey plans from 1922. This plan shows the engine shed having been constructed upon the lands purchased under the 1905 Act. The plan clearly shows an annotated footpath network substantially similar to the path annotated West 15 on your plan. It is significant however that the way running along the claimed route is not similarly annotated.

The Great Western Railway Act 1930 authorised the construction of the Westbury Avoiding Line. The Plan accompanying the Parliamentary Bill shows the area of lands authorised for purchase (extract enclosed) through which the claimed route runs. The plan also shows the intended further diversion of the footpath running through the site which again is substantially similar to the route take by West 15. There is no footpath shown running along the claimed route. Both the claimed route and the diverted footpath would both fall within enclosure 11 the referencing details of which I have annexed to the extract plan.

Finally I attach a copy of the Ordnance Survey of 1941 which is substantially similar to that of 1922 and offers no further evidence backing the claim of a right of way.

On the basis of all of this information it evident that the claimed route was constructed part as access to the original railway station in 1848 and to serve the depot as the site developed over the years. Therefore Network Rail will rely upon the previously stated Section 57 of the British Transport Commission Act 1949 to defeat this claim.

I trust the above narrative and enclosures are sufficient for your purposes. Please do not hesitate to contact me further should you require any further information.

Yours sincerely

  
Chris Smith  
Liability Negotiations Manager

*Western Route – A history of innovation, a future of opportunity*

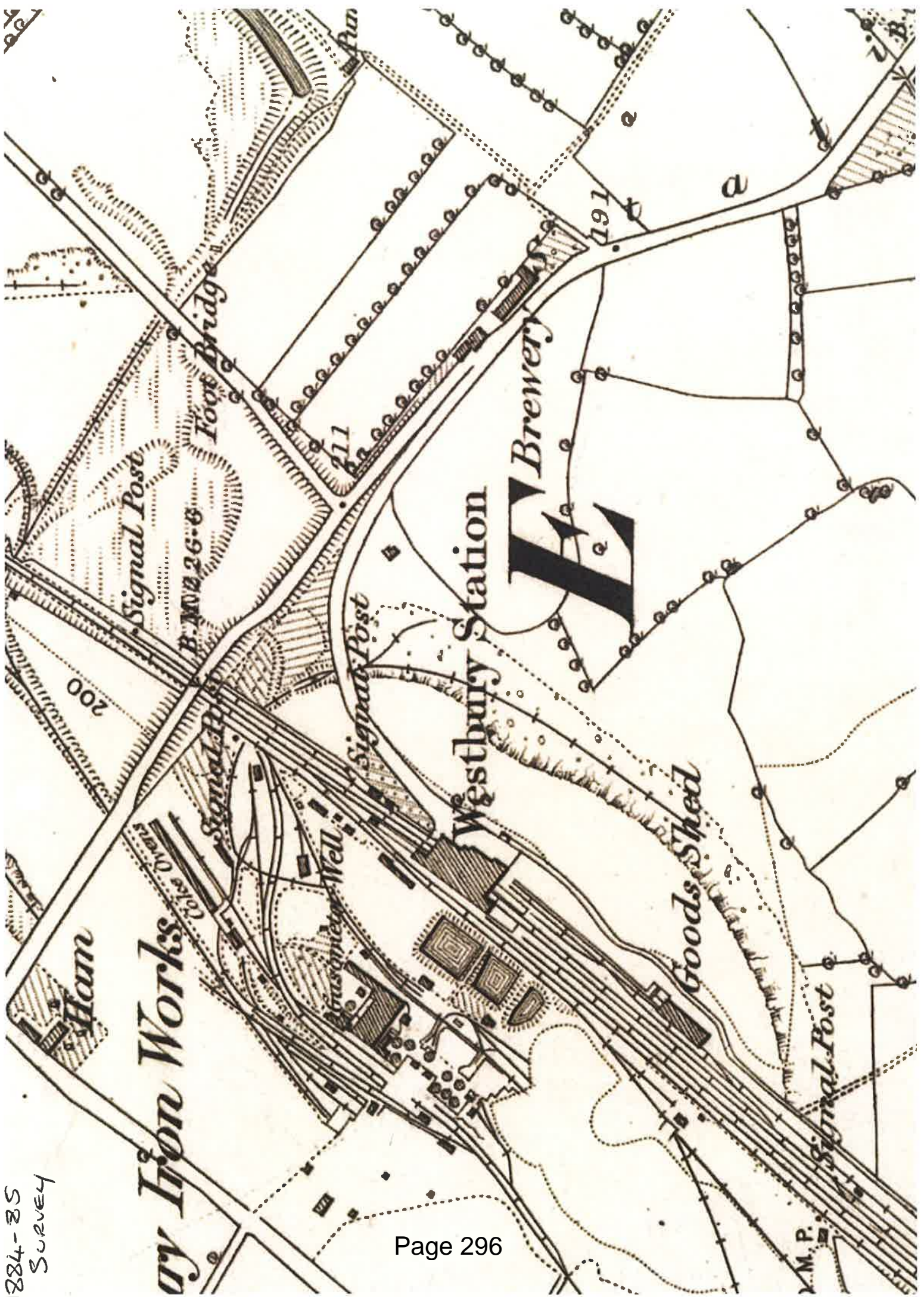
**Our Safety Vision - Everyone home safe, every day**





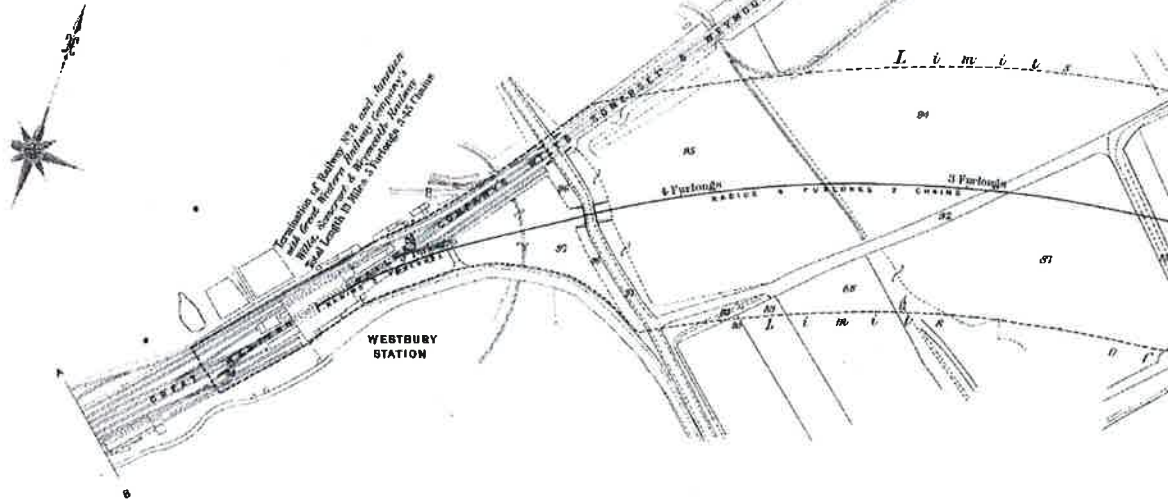
Enc No	Description	Owner	Lessee	Occupier
247	Pasture & footpath	William Beckett Turner	-----	John Owen
248	Pasture	Henry Gaisford Gibbs Ludlow	-----	William Bourne
250	Arable & Footpath	Reverend John Hooper	-----	John Bull
253	Parish Road	The Waywardens	-----	-----

1884-85  
SURVEY





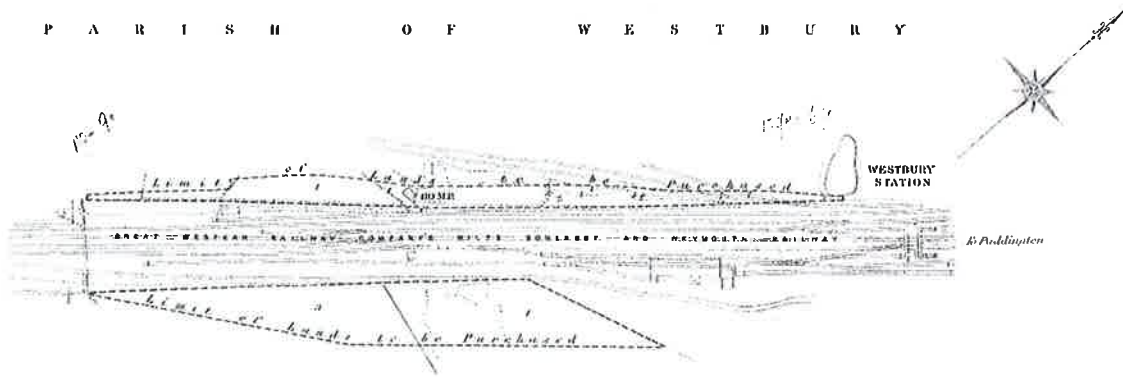
P A R T I I O F W E S T



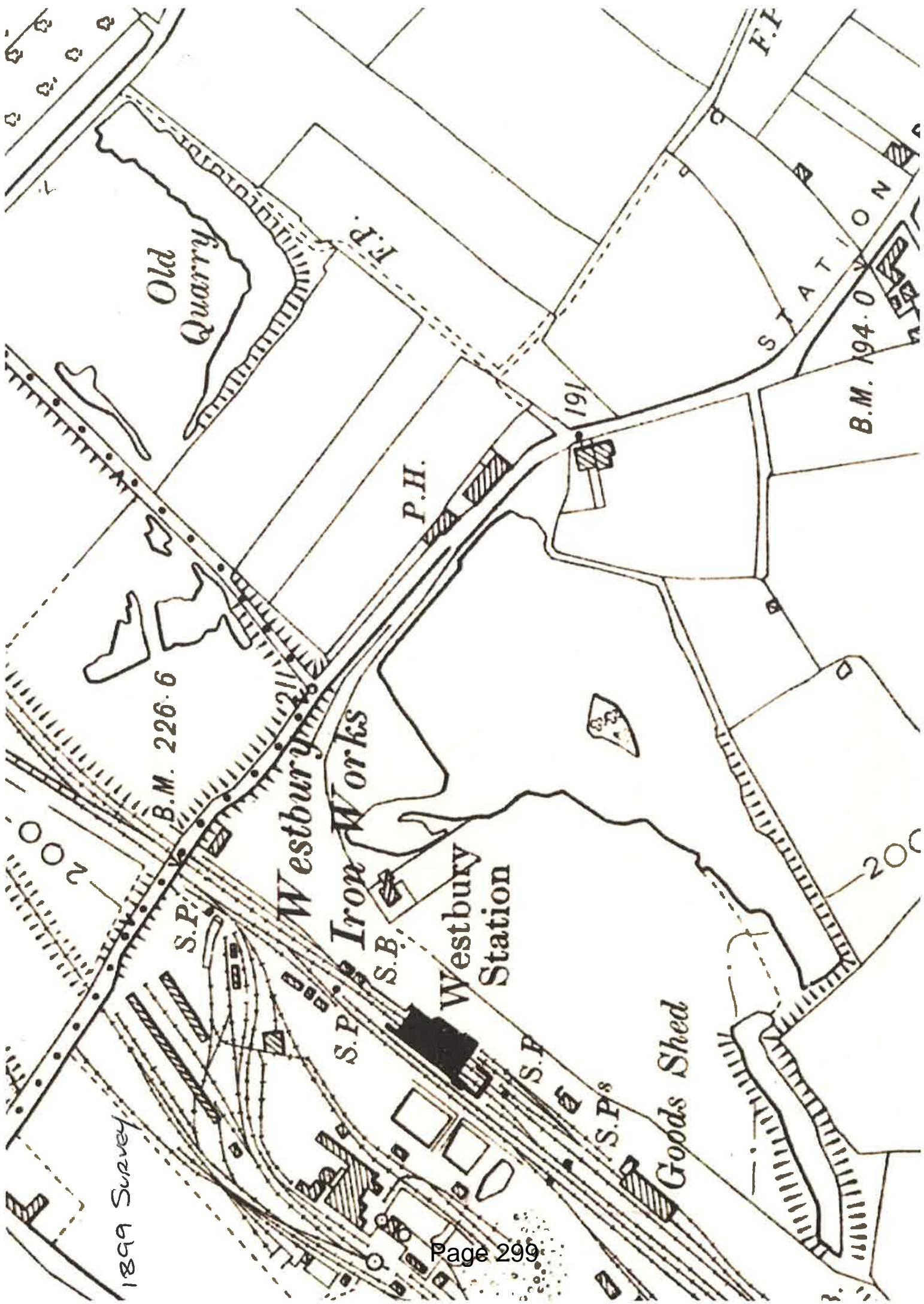
GRADIENTS OF EXISTING GREAT WESTERN RAILWAY COMPANY'S WILTS, SOMERSET & WEY

Enc No	Description	Owner	Lessee	Occupier
96	Embankment	Great Western Railway	-----	In Hand
97	Rough Land, Garden Ground, Road, Tramway, Telegraph Posts, Wires and Embankment	Great Western Railway	-----	Great Western Raiolway, Westbury Iron Company Limited & Charles Harris, Postmaster General

P A R I S H O F W E S T B U R Y



Enc No	Description	Owner	Lessee	Occupier
3	Field	Trustees of the will of the late Caroline Marie Vere Unwin Clarke	Westbury Iron Company Limited Alfred Ledbury	Alfred Ledbury
4	Field, Rough Ground & allotment Gardens	Trustees of the will of the late Caroline Marie Vere Unwin Clarke	Westbury Iron Company Limited Alfred Ledbury	Alfred Ledbury



1899 Survey

B.M. 226.6

B.M. 194.0

P.H.

191

Old Quarry

Westbury Iron Works

Westbury Station

Goods Shed

S.P.

S.B.

S.P.

S.P.

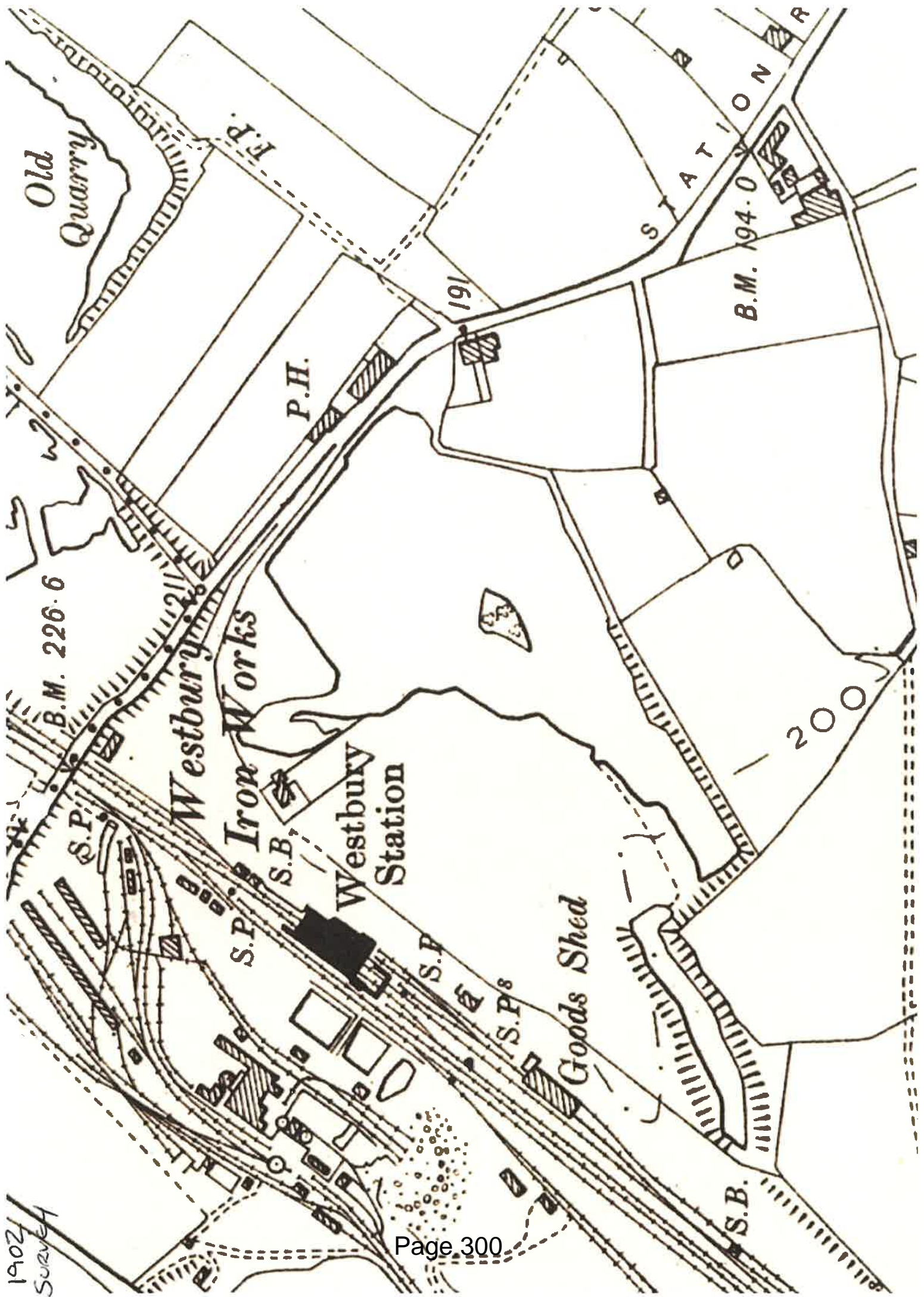
S.P.s

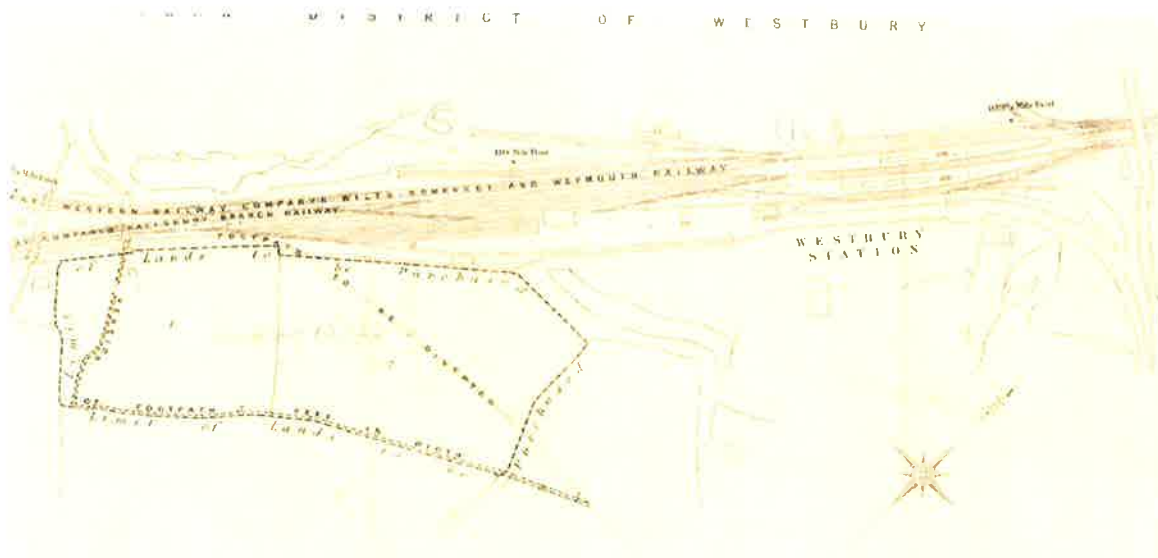
F.F.

F.F.

STATION

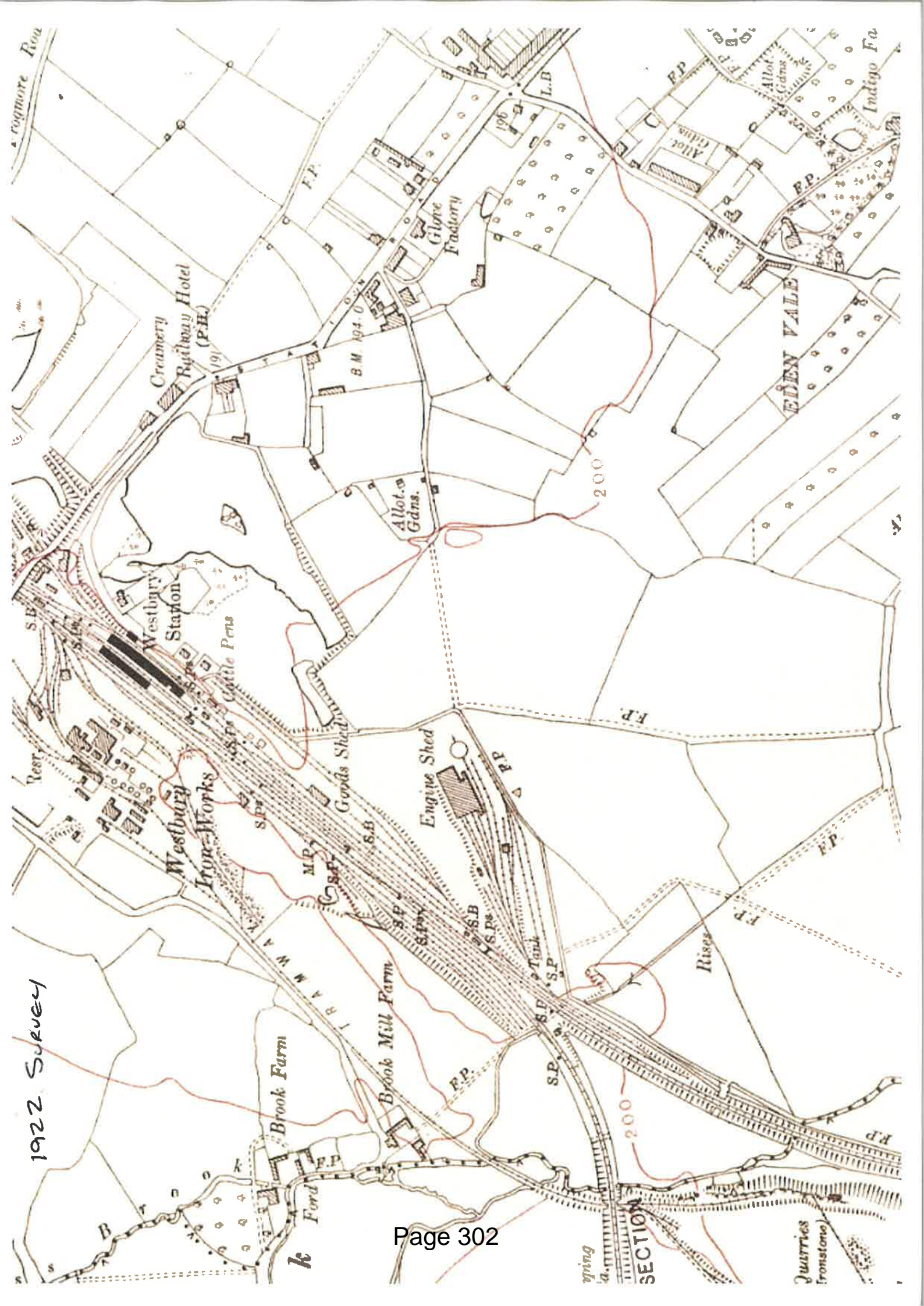
1902  
Survey

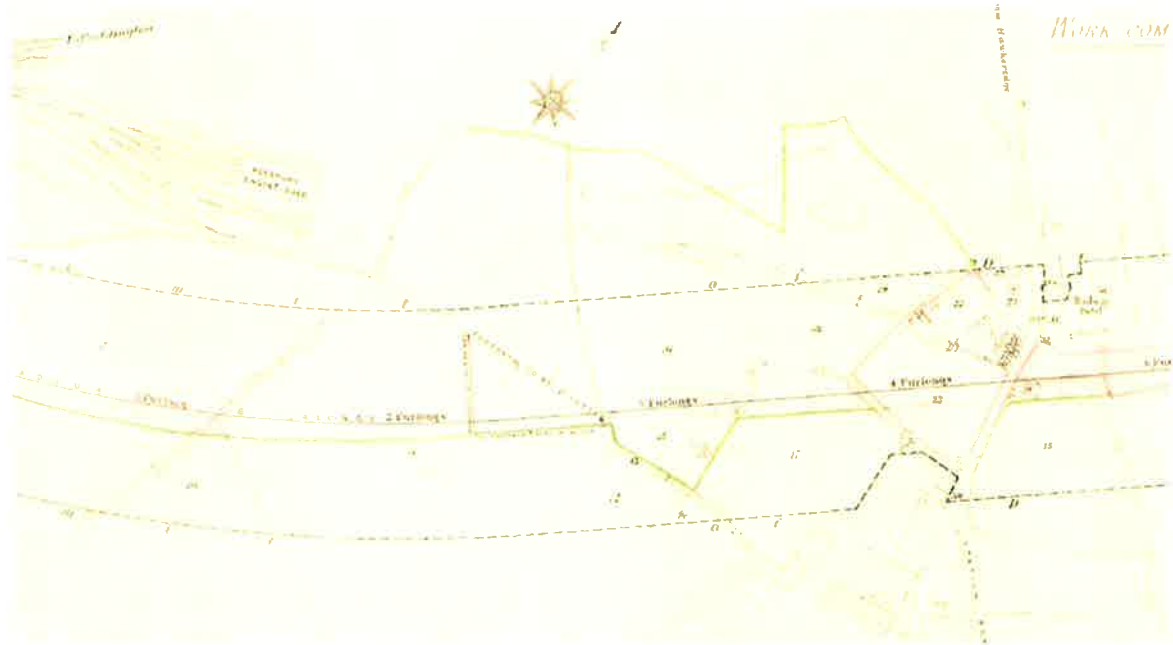




Enc No	Description	Owner	Lessee	Occupier
1	Field, Pond & Footpath	John James Unwin Clarke, John James Vere Unwin Clarke, William Henry Thodore Tyndale Powell John Alexander Tyndale Powell Mary Elizabeth Vere Powell	David Ledbury	David Ledbury
2	Field & Footpath	John James Unwin Clarke, John James Vere Unwin Clarke, William Henry Thodore Tyndale Powell John Alexander Tyndale Powell Mary Elizabeth Vere Powell, Westbury Urban District Council	David Ledbury	David Ledbury
3	Field & Footpath	William a Beckett	-----	Percy James Stafford

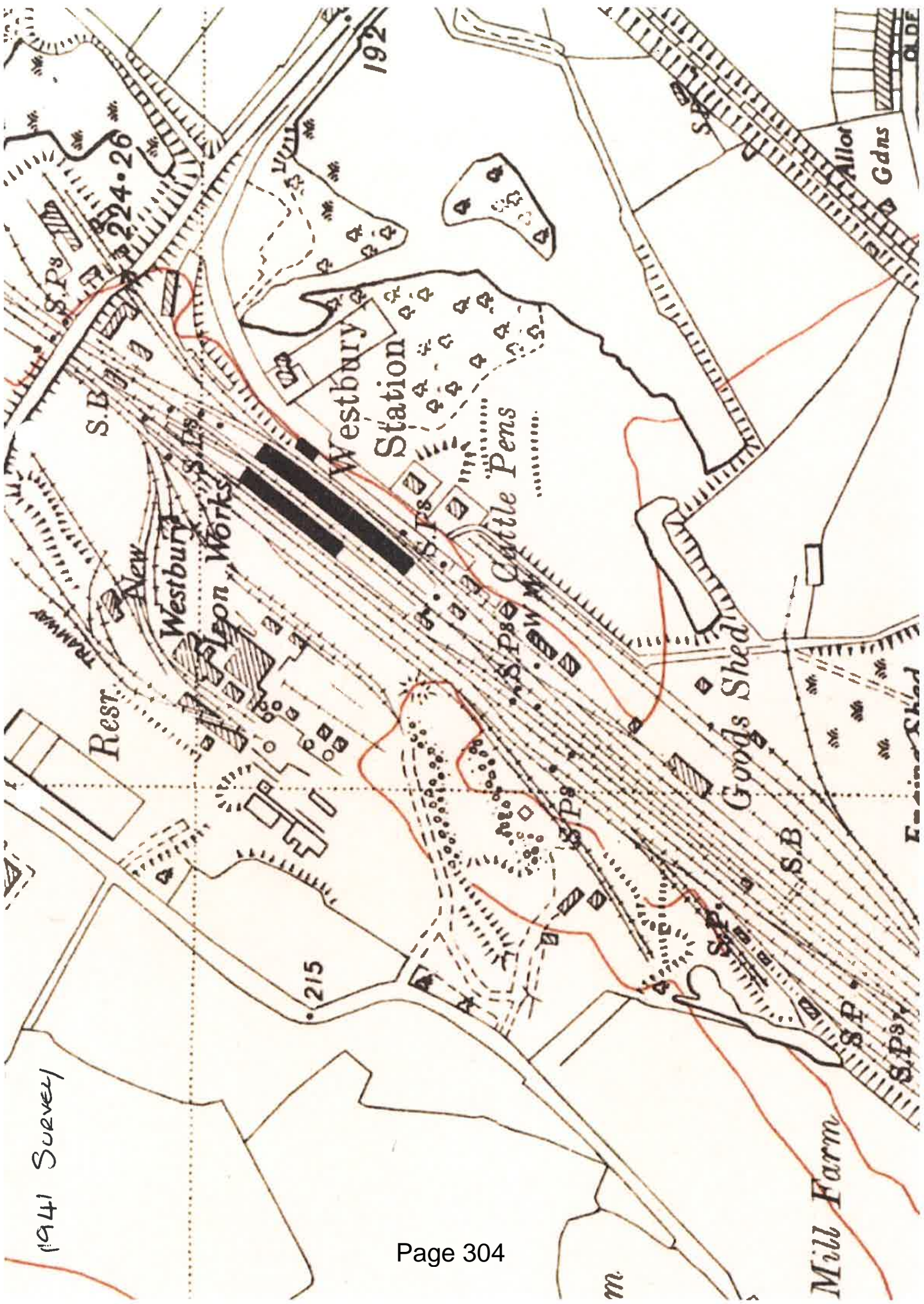
1922 Survey





Enc No	Description	Owner	Lessee	Occupier
11	Field, Footpaths & Ditch	Percy James Stafford	The New Westbury Iron Company Limited	The New Westbury Iron Company Limited, Percy James Stafford, Westbury Urban District Council

1941 Survey





## Summary of User Evidence – Provisional relevant period (subject to change) 1996 - 2016

No	Name	Years of Use	Comments
1	[REDACTED]	1989 – 2016	"...it has since been used on a regular basis by those living in Dilton Marsh and Westbury Leigh to get to Westbury Station to catch the train as well as the railway workers using it." NB lived away 1994 - 2015
2	[REDACTED]	1936 – 1990s	First used as a child "to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937."
3	[REDACTED]	1956 – 2016	"I have cousins older than myself who have used the path"
4	[REDACTED]	1975 – 2016	"Information passed on by local residents, some of them are in their eighties, confirm that the route has been used as long ago as the 1950s and 1960s in continuous fashion"
5	[REDACTED]	2002 – 2016	"The nearest alternative for pedestrians is Station Road which is a much longer route from the Oldfield Park estate and wider Westbury."
6	[REDACTED]	1997 – 2017	"access along Station Road is possible though hazardous on foot under the railway bridge."
7	[REDACTED]	1971 – 2016	"It is useful for residents of Dilton Marsh and Westbury Leigh to be able to walk to Westbury Station on this route in order to catch a train. This is necessary because many trains do not stop at Dilton Marsh halt."
8	[REDACTED]	1990 – 2016	"As well as providing the most direct pedestrian route....this route (in conjunction) with the Cinder Track is of considerable historic importance with its strong links to Westbury's railway and industrial heritage.."
9	[REDACTED]	1981 – 2001	"In BR days and Railtrack and Network Rail the civil engineers used to maintain the footpath (cinder track)."
10	[REDACTED]	1950s – 2000s	" I have always believed the path was railway property"
11	[REDACTED]	c.1970 – 2016	"I believe the route provides a useful shortcut...it is a more pleasant, varied and safer walking route than by road."
12	[REDACTED]	1972 – 2017	"I understand that historically the "cinder track" was constructed to allow railway and other workers to walk to work. It came into use by the general public."
13	[REDACTED]	1987 – 1997	"My impression is that the footpath ran from Penleigh through to Westbury Station (why else would it exist) and the roadway...was constructed later over the line of the footpath."

No.	Years of use	Years in rel. period	How used	How often?	Other users?	Challenges, permission or obstructions	Route claimed	Do you believe the landowner aware
1	27	1	Walking	Daily	Yes	Pile of ballast and notice in 2016	West 15 to station	Yes, frequently passed by vehicles
2	c.55	0	Walking	Every few months	Yes	No	Application route	Yes everyone knew that everybody walked it
3	60	20	Walking	Weekly	Yes	Gate at end of track at level crossing	West 15 to station	Yes people were using it all the time
4	41	20	Walking	Weekly	Yes	Earth mound in 2016	Application route	Yes clear evidence of an established thoroughfare
5	14	14	Walking	Daily	Yes	2m high pile of ballast in 2016. Small sign in 2016. Kissing gate at West 15 junction	Application route	Yes on most occasions would see other users
6	19	19	Walking	Every few months	Yes	Gravel/earth barrier 2016	Application route	Yes the route is open and easily observed
7	45	20	Walking	Every few months	Yes	Mound and fence 2016	West 15 to station	Yes must have known as steps were taken to prevent use
8	26	20	Walking	Monthly	Yes	Stone and rubble and then fence 2016	Application route	Yes, would have been clearly evident
9	20	5	Walking	Daily	Yes	Worked for landowner. No obstruction etc during years of use.	West 15 to station	Yes, landowners used to maintain the track
10	c.50	c.5	Walking	Monthly	Yes	No	West 15 to station	Yes, always presumed railway property

No.	Years of use	Years in rel. period	How used	How often?	Other users?	Challenges, permission or obstructions	Route claimed	Do you believe the landowner aware
11	46	20	Walking	Monthly	Yes	Heap of spoil in 2016	Application route	Yes, so many people
12	44	20	Walking	Weekly	Yes	Gates erected by Mr Singer	Application route	Don't know
13	10	1	Walking	Twice monthly	Yes	None	Application route	Yes, should have been obvious

### Widths

Person plus vehicle, car plus person, 1 metre, 3 to 15 metres, 2 to 5 metres, 1.5 to 5 metres, 4 to 5 feet, 2 metres then vehicle width, 2 metres, 4 to 6 feet, 4 to 18 feet, 3 to 6 feet and 4 feet to 4 yards.

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# Appeal Decision

**by Barney Grimshaw BA DPA MRTPI (Rtd)**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 14 April 2020**

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## **Appeal Ref: FPS/Y3940/14A/11**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Wiltshire Council not to make an Order under section 53(2) of that Act.
- The Application dated 8 March 2017 was refused by Wiltshire Council on 14 June 2018.
- The Appellant claims that a route running from footpath Westbury 15 to Station Road, Westbury should be added to the definitive map as a footpath.

**Summary of Decision: The appeal is allowed in part.**

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## **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. I attach a copy of a map showing the claimed route on which I have annotated several points (A-E) for reference purposes.

## **Main issues**

4. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates.
5. Some of the evidence in this case relates to usage of the claimed route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that 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 and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
6. Common law also requires me to consider whether the use of the route and the actions of the landowner have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred.

## **Reasons**

### ***Documentary Evidence***

7. The documentary evidence that is available indicates that the southern part of the appeal route has existed since around 1915 when an engine shed was constructed, possibly as a diversion of a footpath that existed before that date and is referred to in a book on the history of the site<sup>1</sup>.
8. The northern part of the route, known as Station Approach, appears to have existed since the time of the opening of the station in 1848.
9. A spur to the claimed route, a ramp between Station Road and Station Approach (Points B-C) has been included as a publicly maintainable highway in the council's highway records since 1974.
10. Great Western Railway (GWR) records from the time of the construction of the engine shed and from a survey in 1933 show the appeal route as a footpath linked to the public rights of way network. Plans related to proposed railway construction dated 1929 and 1930 also show the route. However, although these documents confirm the existence of a footpath at the dates they were prepared, they do not indicate whether there were any public rights over it.
11. Similarly, Ordnance Survey (OS) maps of 1924 and 1926 show the route but do not indicate its status.
12. The majority of the claimed route (A-B-D-E) has never been recorded as a public highway of any sort.

### ***Conclusions regarding the Documentary Evidence***

13. The existence of the claimed route since 1848 (A-B-D) and 1915 (D-E) is well documented but none of the available evidence indicates the existence of public rights over the route.
14. Accordingly, the determination of this appeal depends entirely on the evidence of public use of the claimed route that is available and whether this indicates that a public footpath can be presumed to have been dedicated in accordance with the provisions of the 1980 Act (statutory dedication) or inferred to have been dedicated at common law.

### ***Statutory Dedication***

15. Thirteen User Evidence Forms (UEFs) were submitted in support of the application describing use of the claimed route from 1936 until 2016 when the route was obstructed by a fence and bund.
16. On behalf of Network Rail, it is argued that a provision of the British Transport Commission Act 1949<sup>2</sup> (the 1949 Act) prevents the acquisition of rights of way over any road or footpath forming an access to a station as does the appeal route. However, it is pointed out by the appellant that the British Transport Commission was abolished in 1962 and it is argued that as a result this provision ceased to apply from that date. In my view this is not the case, the 1949 Act was amended by the Transport Act 1962 to make clear that the

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<sup>1</sup> Westbury Ironworks, 1988 – RJ Cogswell

<sup>2</sup> Section 57

provision related to property of the successor body, the British Railways Board, or any of its successors.

17. Whilst it seems clear that part of the appeal route forms an access to the station (Points A-D), the situation with the southern part of the route (Points D-E) is less clear. It appears from the UEFs that some people sometimes used this section to gain access to the station, but people also used it as part of a through route between Footpath 15 and Station Road. It is therefore not necessarily the case that the provisions of the 1949 Act apply to this section.
18. It is also possible that public rights over the whole route could have been established before 1949 so long as public use of the path was not incompatible with the statutory purpose of the railway company. I see no reason why such use would be incompatible but evidence of public use of the route before 1949 is very limited and not sufficient to raise a presumption that the route was dedicated as a public right of way.
19. In any event, section A-D of the claimed route, Station Approach, appears to have been specifically constructed by the railway company as the access to the station. In these circumstances it is arguable that use of it by the public was by invitation or permission of the company and not 'as of right' as required under the 1980 Act.
20. Section B-C of the claimed route is regarded as part of the highway, Station Road, by the highway authority and is included in the 1974 Highway Record. As such it already carries public rights and it would not be appropriate for it to be added to the definitive map.
21. Section D-E of the claimed route runs across the station car park and the access road to sidings and then along a 'cinder track' to join Footpath 15. It would appear that the cinder track section was constructed around the time of the building of the engine shed (1915), probably by the railway company. However, it is not known whether the path was constructed specifically as a means of access to the station.
22. The UEFs indicate that at least 6 people used the route throughout the 20 year period ending in 2016 when it was obstructed and a further 4 for some of that period. Almost all of these people claimed to have used the whole route at least sometimes although a few had also used the section D-E to get to the station.
23. I have seen no evidence of action taken by the landowner before 2016 which would indicate a lack of intention to dedicate it as a public right of way.

*Conclusions regarding statutory dedication*

24. Part of the claimed footpath has existed since around 1848 (Station Approach, A-B-D), part since around 1915 (D-E) and part since before 1974 (B-C).
25. Section B-C is part of the adopted highway which it would not be appropriate to also record on the definitive map. Section A-B-D was constructed specifically as the access to the station and its use since 1949 could not give rise to public rights being established over it in accordance with the provisions of the 1949 Act. There is very little substantive evidence of its use before 1949 and, in any event such use was effectively by permission rather than 'as of right'.
26. With regard to the section D-E the situation is less clear. It is not known whether this was constructed to provide a second access to the station and the

user evidence indicates that a significant number of people used it for other purposes in the 20 year period before it was obstructed in 2016. In these circumstances it is not in my view clear that the provisions of the 1949 Act apply to this section and it is reasonable to allege that a public footpath subsists over this section.

### **Common Law**

27. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
28. In this case, the evidence indicates that the public have used the claimed route over a lengthy period. However, parts of the route could not have acquired public rights as a result for reasons given above. As far as the remaining section is concerned (D-E) there appears to be no substantive evidence that the landowner intended to dedicate the route as a public right of way or to provide it as a secondary access to the station. In these circumstances, it would not be reasonable to infer that this section has been dedicated as a public footpath at common law.

### **Conclusion**

29. Having regard to these and all other matters raised in the written representations I conclude that the evidence that is available shows that on the balance of probabilities it is reasonable to allege that part of the claimed route is a public footpath. The appeal should therefore be allowed in part.

### **Formal Decision**

30. The appeal is allowed in part and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Wiltshire Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement to add a public footpath, running between Points D and E on the attached map. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.
31. Under normal circumstances the authority would be directed to make the necessary order within 3 months of this direction. However, as a result of the present situation of restrictions following the Covid-19 outbreak, exceptional circumstances have arisen and I therefore direct that the order should be made within 12 months of the date of this direction.

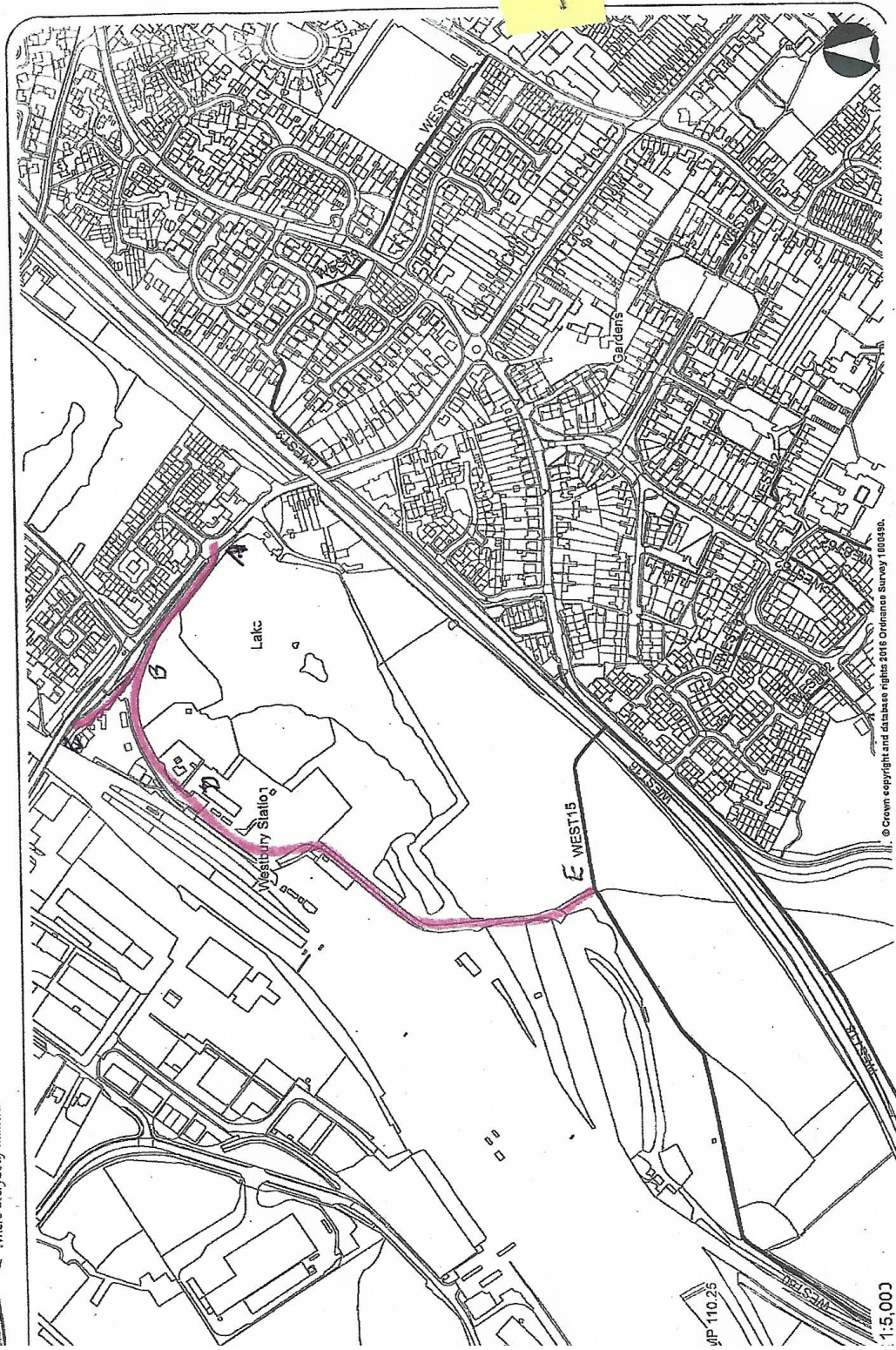
*Barney Grimshaw*

Inspector



Application to Add Public Footpath -  
Westbury Station

iltshire  
Where everybody matters



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**From:** [F.M](#)  
**To:** [Madgwick, Sally; rightsofway](#)  
**Subject:** Public Notice - Notice of Modification Order Section 53 of The Wildlife and Countryside Act 1981  
**Date:** 02 October 2020 15:45:06

---

Attention: S Madgwick, Rights of Way and Countryside, Wiltshire Council, Bythesea Road, Trowbridge, BA14 8JN

Reference: SAM/2017/01

Dear Definitive Map and Highway Records Manager,

I refer to the Public Notice which appeared on page 2 of the Friday, 7th August 2020 issue of The Warminster Journal newspaper.

Please accept this e-mail as my duly-made response to that Notice and as my duly-made representations relating to the Order made on 17 July 2020 referred to in that Notice.

Subject to the textual point below, I support the Order insofar as it adds a public footpath numbered Westbury 68 between points A and B (via point Y) to the relevant Definitive Map and Statement.

However, it represents only part of the route claimed, which connects the existing public footpath Westbury 15 at the Inspector's point E, via the Inspector's point D on Station Approach, to the public highway at the Inspector's point B on Station Approach and the Inspector's points A and C on Station Road.

If there are duly-made objections to the Order as made by Network Rail (or others) that the Order should not be confirmed on the grounds that it is an access to Westbury Station and/or its Goods Yard and hence prevented by Section 57 of the British Transport Commission Act 1949 (or other railway legislation), or on the grounds that it creates a cul-de-sac public path leading to a point that is not a public place, I would wish to make the case for the Order to be extended to include the whole of the claimed route, relying in particular on the user evidence of the through route and the very substantial documentary evidence presented with the claim but not adequately considered by the Inspector.

In respect of the text of the Order as made, while I agree that the Appeal Decision FPS/Y3940/14A/11 is dated 14 April 2020, I do not agree that that date is relevant for any other purpose. The relevant chronology (including the obstruction of the route in 2016) is set out at length in the evidence submitted in support of the application dated 8 March 2017 and in support of the appeal against the decision of Wiltshire Council not to make an Order dated 14 June 2018.

May I draw your attention to an Order Decision ROW/3208708 dated 18 July 2019

confirming the Conwy CBC (Footpath No. 73 in the Community of Conwy) DMMO 2016, a challenge to which by Network Rail was dismissed by the Administrative Court on 30 July 2020 (see Network Rail Infrastructure Ltd v Welsh Ministers [2020] EWHC 1993 (Admin)). Many of the facts in that case are similar to those here.

I reserve the right to amend these grounds and/or to add further grounds in the light of any fresh information that comes to hand or of the comments of others.

Meanwhile. as mentioned in the Public Notice, please send me by e-mail a copy of the order, the order plan and notice of making the order.

Yours sincerely,

Francis Morland

A solid black rectangular redaction box covering the signature area.

**BY EMAIL**

Ms S Madgwick  
Rights of Way and Countryside  
Wiltshire Council  
Bythesea Road  
Trowbridge  
BA14

Our ref: LGL/SJA/099161.02211

2 October 2020

Dear Ms S Madgwick

**Ref: SAM/2017/01**

**Wildlife and Countryside Act 1981 section 53**

**The Wiltshire Council Parish of Westbury Path no 68 Rights of Way Modification Order 2020**

We act for Network Rail Infrastructure Limited (**Network Rail**) in connection with the above matter.

Network Rail object to the confirmation of the Wiltshire Council Parish of Westbury Path no. 68 Rights of Way Modification Order 2020 (**the Order**). On referring the Order to the Secretary of State, please include a copy of this objection for their consideration.

This objection letter sets out the particulars of the grounds relied upon by Network Rail in its objection. It should be read together with the letters of objection already submitted by Network Rail objecting to the making of the Order, which are referenced below. Further details as to the case advanced by Network Rail, and evidence in support, will be provided in its statement of case and/or proof of evidence at the appropriate juncture.

## 1 Background

- 1.1 On 8 March 2017 Wiltshire Council (the **Council**) received an application to record a public footpath from footpath Westbury 15 leading along "the Cinder Track" to the car park at Westbury Station and on past the station along Station Approach to join Station Road. The application was supported by 13 users who claimed to use the route as of right between 1936-2016, when the route was blocked by a fence and a bund. The extent of the route the subject of the application is identified between points A, B, C, D, and E on the plan (**Document 1**).
- 1.2 On 11<sup>th</sup> September 2017 Network Rail objected to the making of the order on the basis that the route was not one which was available "as of right", confirming the route provided direct access to Westbury Station and beyond the station to a depot and sidings (**Document 2**). Therefore, pursuant to section 57 of the British Transport Commission Act 1949 (the **1949 Act**), no right of way could be acquired over that route. Please see further analysis below. A further letter of objection, which set

Rattagan Macchiavello Arocena ► Jiménez de Aréchaga, Viana & Brause ► Lee International ► Kensington Swan ► Bingham ► Cohen & Grigsby ► Sayarh & Menjra ► Larrain Rencoret ► Hamilton Harrison & Mathews ► Mardemootoo Balgobin ► HPRP ► Zain & Co. ► Delany Law ► Dinner Martin ► For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](http://dentons.com/legacyfirms)

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out the relevant history of the site, was submitted by Network Rail on 14<sup>th</sup> September 2017 (**Document 3**).

- 1.3 The Council refused the application on 14 June 2018. The reasoning for that refusal is set out comprehensively in the Council's report dated 4 April 2018 (**Document 4**) prepared by the Council's Right of Way Officer. The principal reasoning for the refusal was acceptance that pursuant to section 57 of the 1949 Act, after 1949 there was no legal ability to use the route leading to both the station and beyond to the depot, "as of right". Further, the Council concluded that there was insufficient evidence before 1949 such that it was reasonable to allege that any right of way existed before the 1949 Act came into force (i.e. applying the to the lower standard applicable to the making of orders – see section 3 below).
- 1.4 The applicant appealed the Council's refusal pursuant to paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the **1981 Act**). The Inspector considered that points B – C of the route, known as Station Approach, formed part of the publically maintainable highway and therefore should not be included on the definitive map and statement (para 25 of **Document 5**). He therefore dismissed the appeal in respect of that part of the route (para 30). The Inspector concluded Points A – B – D formed an access to the station and therefore its use since 1949 could not give rise to rights of way being established over it in accordance with section 57 of the 1949 Act. Given that there was very little evidence of its use before 1949, and any such use was by permission rather than as of right (para 25), he dismissed the appeal in respect of that part of the route (para 30).
- 1.5 However, the Inspector allowed the appeal in part and directed the Council to make an order relating to that part of the footpath known as the Cinder Track between points D (Westbury Station) and E (Path no. 15). The Inspector's reasoning for concluding that it was "reasonable to allege that a public footpath subsists over this part of the section" was as follows:
- (a) Unlike section A – B – D, it was "not known" whether section D – E was constructed to provide access to the station. Accordingly it was "not...clear" whether section 57 of the 1949 Act applied to this section (para 26).
  - (b) There was evidence of some people using the route for the 20 year period ending in 2016, some of whom used it to access the station, but others who used it for other purposes (paras 22 & 26).
  - (c) There was no evidence of action taken by the landowner before 2016 which would indicate a *lack* of intention to dedicate it as a public right of way (para 23).
- 1.6 However, it is also to be noted that the Inspector found "no substantive evidence that the landowner intended to dedicate the route as a public right of way" and therefore rejected, even on the lower standard, that it would be reasonable to allege that this section had been dedicated as a public footpath at common law (para 28).
- 1.7 The Council made the Order on 17 July 2020 (**Document 6**).
- 1.8 Network Rail object to the confirmation of the Order, and requires the Order to be referred to the Secretary of State for consideration.
- 2 Network Rail's land ownership**
- 2.1 Network Rail are the freeholder owners of the land over which Path No. 68 runs, as well as of the station, and relevant goods-yard and depots which the Cinder Track serves.

### 3 The test to be applied at the confirmation stage

- 3.1.1 When considering whether to *make* an order modifying an definitive map pursuant to section 53(3)(i) of the 1981 Act, the Council, and on appeal the Inspector, were (correctly) applying the test of whether a right of way was “reasonably alleged to subsist”.
- 3.1.2 The same test is not to be applied at the confirmation stage. As confirmed in *Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs*<sup>1</sup>, and upheld in *R. (on the application of Roxlena Ltd) v Cumbria CC*<sup>2</sup>, the test to be applied by the Secretary of State when confirming an order modifying the definitive map is a more stringent test, namely that the right of way subsists “on balance of probabilities”.

### 4 Grounds of objection

Network rail objects to the Order on the following grounds:

#### 4.1 Section 57 of the 1949 Act

4.1.1 Network Rail’s case on this ground, in summary, is:

- (a) Section 57 of the 1949 Act applies to land owned by Network Rail;
- (b) Section 57 of the 1949 Act prevents a right of way being established by user not only in relation to land forming an access or approach to a station, but also in respect of accesses or approaches to *inter alia* a goods-yard or depot.

#### ***Section 57 applies to land owned by Network Rail***

4.1.2 The Inspector who heard the initial appeal found that the 1949 Act applied to property owned by Network Rail, as a successor of the British Transport Commission (para 16). He was plainly right to do so.

4.1.3 Section 57 of the 1949 Act states:

*“As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.”*

4.1.4 Section 3(1) states:

*“The Commission” means the British Transport Commission and any reference to the Commission in relation to any functions of the Commission which are for the time being delegated to an executive in pursuance of section 5 of the Act of 1947 shall be construed as a reference to that executive”.*

4.1.5 Pursuant to Section 32 of the Transport Act 1962, and Paragraph 1 of Schedule 2 Part 3 states in relation to section 57 of the British Transport Commission Act 1949:

*“For references to the Commission there shall be substituted references to any of the Boards”*

---

<sup>1</sup> *Todd and Bradley v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450

<sup>2</sup> *R. (on the application of Roxlena Ltd) v Cumbria CC* [2019] EWCA Civ 1639

- 4.1.6 Under Section 1 of the Transport Act 1962, the "Boards" includes the "British Railways Board".
- 4.1.7 Articles 2 and 3 of the Railways Act 1993 (Consequential Modifications) (No. 2) Order 1999 provides that references to any of the Boards in Section 57 shall have effect as references to any successor of the British Railways Board. Network Rail is a successor of the British Railways Board.

**Section 57 applies not only to accesses to stations, but also in respect of accesses to goods-yards or depots**

- 4.1.8 As noted above, the Inspector who heard the initial appeal found that the effect of section 57 of the 1949 Act was to prevent a right of way being obtained over section A – B – D by use since 1949. This was because he was satisfied that section A – B – D constituted an access to a station.
- 4.1.9 In contrast he was "unclear" whether section D – E constituted an access to the station, and therefore did not refuse the appeal on the same basis.
- 4.1.10 The Inspector ignored, however, that whether or not section D – E constitutes an access to the station (and there is evidence that it was used as such<sup>3</sup>), it plainly does constitute an access to goods-yards and/or depots. The Cinder Track over which Path no. 68 runs serves a number of goods-yards and depots on land in respect of which Network Rail own the freehold. Network Rail Supply Chain Operations, in addition to Heavy Goods Vehicles used by Network Rail Maintenance and DB Cargo, use between 40 and 200 lorries per week.
- 4.1.11 Section 57 applies to any footpath "forming an access or approach" to a "station" or to a "goods-yard" and/or to a "depot". Therefore it is not necessary for the footpath to have been used only to access the station for section 57 to apply. Path no. 68 plainly constitutes – and is used as – an access the depot and goods yards, regardless of whether it consists, or has been used as, an access to the station.
- 4.1.12 It follows that, whether or not there has been use of the footpath by the public for the 20 year period to 2016, such use cannot have given rise to public rights of way over Path no. 68/section D – E, for the very same reason as the Inspector found in relation to sections A – B – D.

**4.2 Evidence of closures/evidence of a lack of intention to dedicate**

- 4.3 After the date of the inspector's decision, Network Rail were made aware of a GWR document dated 1911 by a Deeds department stamp and re-stamped in 1940 by the Divisional Engineers Office (**Document 7**).
- 4.4 Document 7 appears to show a footpath where part of Path no. 68 runs and records that "on Good Fridays barriers to be placed at the points A, B, C and D". Point C is on a section of Path no. 68 and point D is on Station Approach. From this, it is evident that GWR intended to exercise control over the route by closing it one day every year. The position has therefore moved on from the information available to the Inspector, who stated in relation to the route now known as Path no. 68 at paragraph 23 of the Decision (**Document 5**) "*I have seen no evidence of action taken by the landowner before 2016 which would indicate a lack of intention to dedicate it as a public right of way.*"

---

<sup>3</sup> Inspector's Decision, paras 17 and 26. Network Rail also maintain that, if it constitutes an access to the station – which is evidenced by the fact that it was used as such - then this is sufficient for the 1949 Act to apply. The fact that some people may have used it for "other purposes" such as a through route between Footpath 15 and Station Road does not negate this.



4.4.1 The evidence now available indicates that the landowner owner sought to exercise control over the route. This demonstrates a lack of intention by the owner to dedicate Path no. 68 as a public right of way.

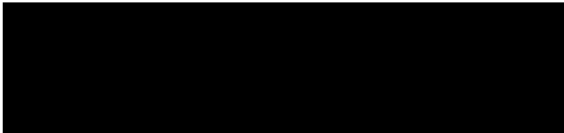
**5 Safety concerns**

5.1.1 Whilst we acknowledge that the suitability of the route is not a factor the Secretary of State can consider when determining whether to confirm the Order, Network Rail wish to highlight the critical safety issues which would be caused were the Order to be confirmed. Path no. 68 follows a narrow Heavy Goods Vehicle route, and does not include a designated footpath, leading to the risk of conflict between pedestrians and the considerable numbers of HGVs which use the route. These safety concerns are also noted by the operator of the freight yard DB Cargo, who we understand also intend to submit an objection.

5.1.2 Path no. 68 also connects into Path no.15, which uses a level crossing to connect to the south to Oldfield Road. Network Rail is concerned that this Order will lead to more pedestrians using the level crossing rather than taking alternative, safer routes.

5.1.3 These factors, while not relevant to the issue of whether the Order should be confirmed, do highlight the importance of closely examining whether the statutory requirements for modifying the definitive map and statement have been made out. For this reason, and due to the likely need for legal submissions to be made on the matters raised above, we request that a public inquiry be held into the confirmation of the Order.

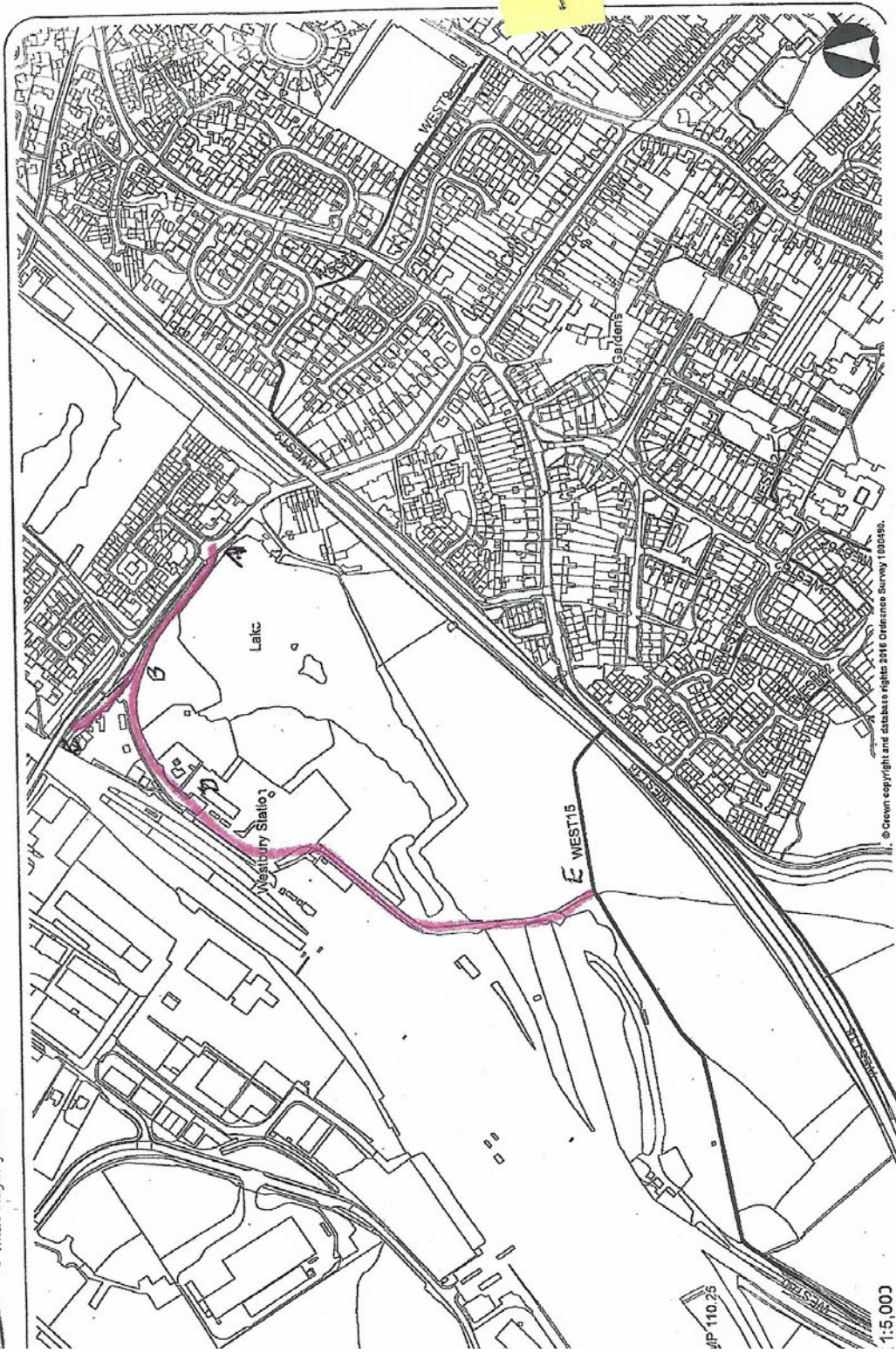
Yours sincerely



Dentons UK and Middle East LLP

Application to Add Public Footpath -  
Westbury Station

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Sally Madgwick  
Rights of Way Officer  
Wiltshire Council  
Rights of Way & Countryside  
Waste & Environment  
County Hall  
Bythesea Road  
[REDACTED]  
BA14 8JN

Western House  
1 Holbrook way  
Swindon  
SN1 1BD

Tel 01793 [REDACTED]

[REDACTED]  
[REDACTED]  
Date 11<sup>th</sup> September 2017

Y.ref: SM/2017/01/West

**By E-Mail & Post**

Dear Ms Madgwick

**Wildlife & Countryside Act 1981 s53**  
**Application for an Order to Record a Footpath at Westbury in the Definitive Map and Statement**

I refer to your letter dated 18<sup>th</sup> July 2017.

On behalf of Network Rail Infrastructure Limited, I wish to lodge an objection to the above mentioned application. The reasons for this objection are set out below.

The route shown coloured pink on the attached plan which is subject of the claim run along the Westbury Station Approach Road, This roadway also forms the access into the depot and sidings. I therefore draw your attention to section 57 of the British Transport Commission Act 1949 which states that:

*"As from the passing of this Act no right of way as against the Commission [now Network Rail] shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot ... premises of the Commission."*

On the basis of the above statutory provision the claim of a right of way through user is not valid and should be rejected.

I would be obliged if you could acknowledge receipt of this objection.

Should you require any further information regarding this objection please do not hesitate to contact me accordingly  
Yours sincerely,

**Chris Smith**  
*Liability Negotiations Manager*  
Western House | 1 Holbrook Way Swindon SN1 1BD  
[REDACTED]

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Date 14<sup>th</sup> September 2017

**By E-Mail & Post**

**Y:Ref: SM/2017/01/West**

Dear Ms Madgwick

**Wildlife & Countryside Act 1981 s53**  
**Application for an Order to Record a Footpath at Westbury in the Definitive Map & Statement**

I refer to my letter dated 11<sup>th</sup> September 2017 and your emailed response of later the same day.

In response to your query regarding the history of the site I can now offer you the following information in support of Network Rail Infrastructure Limited's objection to the above application.

The railway at Westbury was originally constructed under the powers of the Wilts Somerset & Weymouth Railway Act 1845 as amended by the Wilts Somerset & Weymouth (Amendment) Act 1846, both of which Acts incorporated the provisions of the Railways Clauses Consolidation Act 1845.

The plan accompanying the Parliamentary Bill for the 1846 Act (extract enclosed) shows the proposed centreline of the railway running along the alignment of the railway as constructed. The plan also shows the roadway now known as the B3097. I have annexed the referencing details of the roadway and the land over which the claimed route runs on the attachment.

Although the referencing details refer to footpaths, the alignment of these paths is not shown and they are purely referenced in private ownership. The railway line and station was subsequently constructed and opened for public use in 1848.

The Ordnance Survey map surveyed in 1884-85 (extract enclosed), clearly shows the station approach road upon its present day alignment. It does not indicate any way or footpath along the claimed route.

The Great Western Railway (No 1) Act 1894 authorised the construction of a new railway from Stert to Westbury. The Plan deposited with the Parliamentary Bill (extract enclosed), shows the roadway leading to the station in situ but offers no indication of any footpaths running through the site.

The claimed route running parallel to the B3097 would pass through enclosure 96 and/or 97 the referencing details of which are annexed to the plan.

The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot. Whilst not showing the station approach road the plan accompanying the Parliamentary Bill (extract enclosed) shows the lands in question to be purchased, the referencing details of which are annexed to the plan.

The 1899-1900 and 1902 Ordnance Surveys offer no additional information to the earlier surveys with no obvious footpaths along the claimed route. It also does not yet show the depot constructed.

The Great Western Railway (Additional Powers) Act 1905 authorised the purchase of additional lands at and near to the station. The plan accompanying the Bill (extract enclosed) includes land over which the claimed route is made. The referencing details are annexed to the plan.

You will note that this is the first reference to any footpaths in this vicinity which come under the auspices of the Local Authority indicating public status.

You will also note that the plan is annotated as having the footpath running through enclosure 2 being diverted to run through enclosure 1. Section 53 of the Act authorised the stopping up and diversion of this

footpath. The diverted footpath appears to follow the part of the route shown on the plan accompanying the application and annotated West 15.

I further attach a copy of Ordnance Survey plans from 1922. This plan shows the engine shed having been constructed upon the lands purchased under the 1905 Act. The plan clearly shows an annotated footpath network substantially similar to the path annotated West 15 on your plan. It is significant however that the way running along the claimed route is not similarly annotated.

The Great Western Railway Act 1930 authorised the construction of the Westbury Avoiding Line. The Plan accompanying the Parliamentary Bill shows the area of lands authorised for purchase (extract enclosed) through which the claimed route runs. The plan also shows the intended further diversion of the footpath running through the site which again is substantially similar to the route take by West 15. There is no footpath shown running along the claimed route. Both the claimed route and the diverted footpath would both fall within enclosure 11 the referencing details of which I have annexed to the extract plan.

Finally I attach a copy of the Ordnance Survey of 1941 which is substantially similar to that of 1922 and offers no further evidence backing the claim of a right of way.

On the basis of all of this information it evident that the claimed route was constructed part as access to the original railway station in 1848 and to serve the depot as the site developed over the years. Therefore Network Rail will rely upon the previously stated Section 57 of the British Transport Commission Act 1949 to defeat this claim.

I trust the above narrative and enclosures are sufficient for your purposes. Please do not hesitate to contact me further should you require any further information.

Yours sincerely,

**Chris Smith**  
*Liability Negotiations Manager*



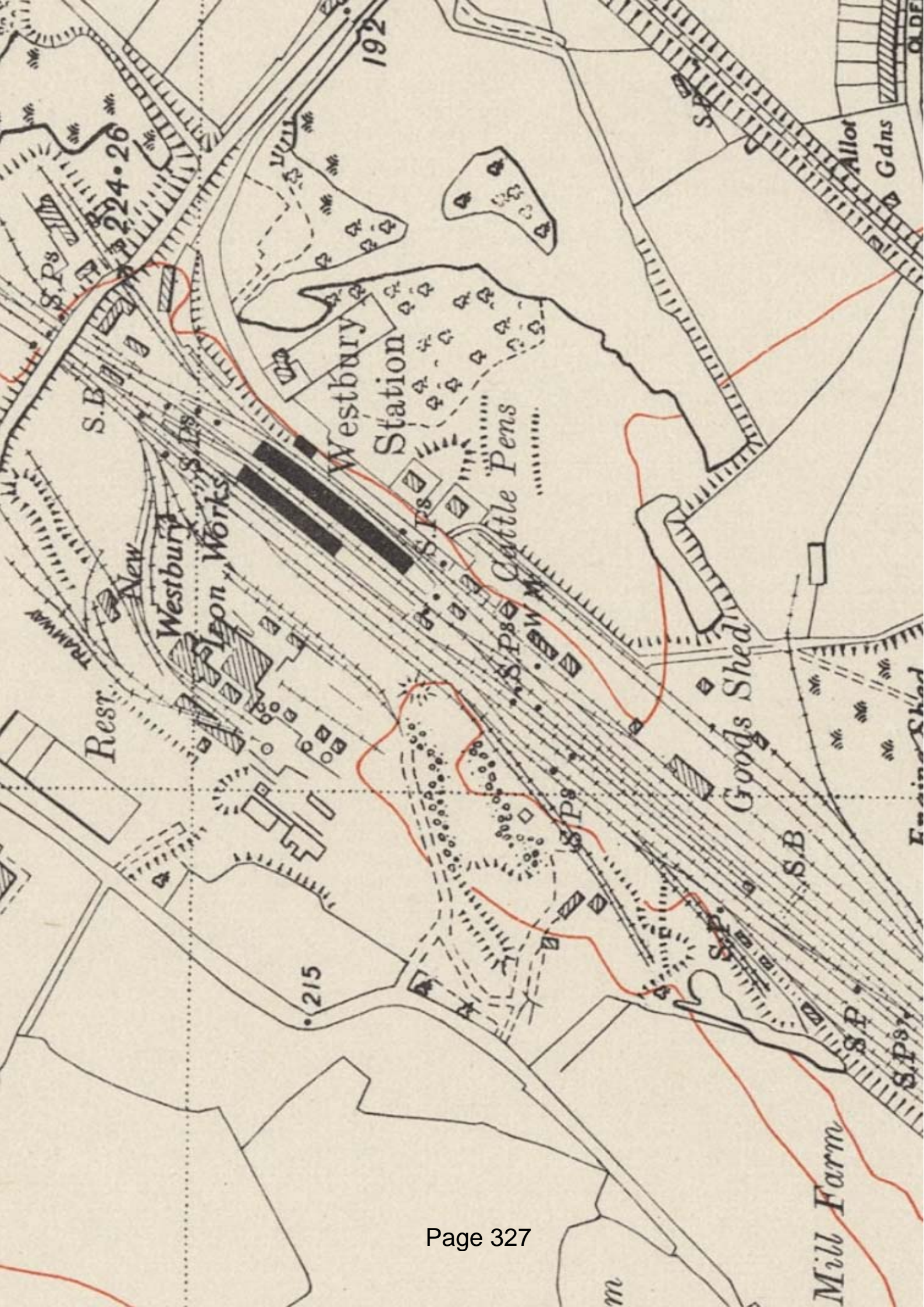
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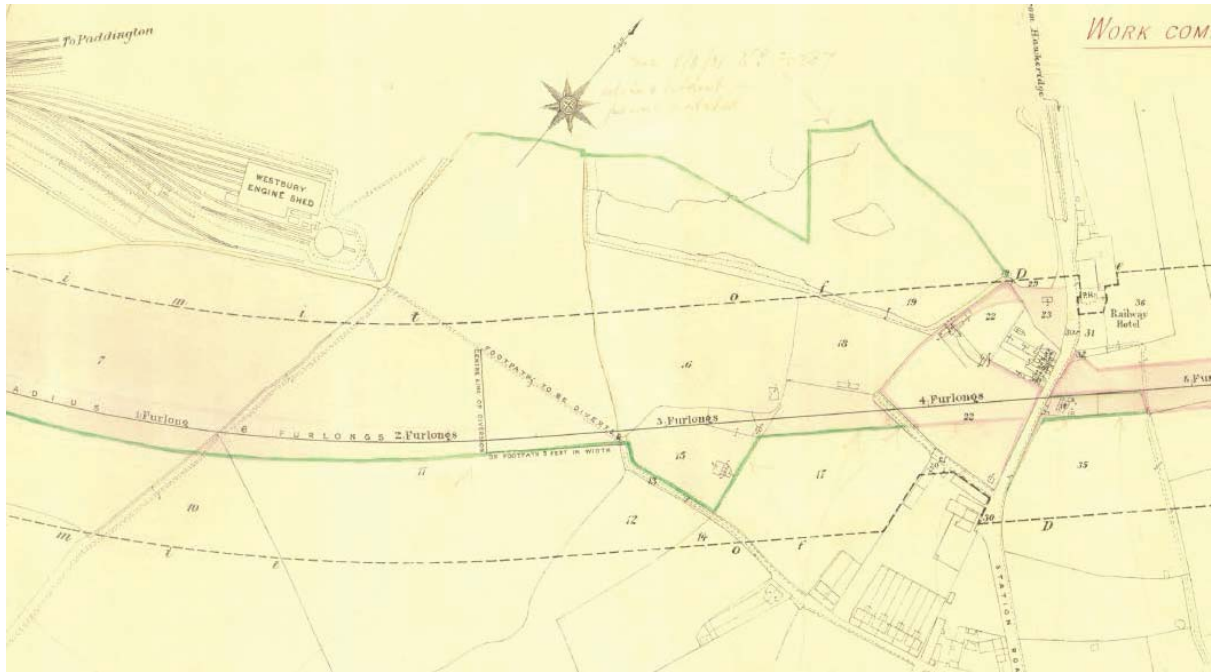
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Enc No	Description	Owner	Lessee	Occupier
247	Pasture & footpath	William Beckett Turner	-----	John Owen
248	Pasture	Henry Gaisford Gibbs Ludlow	-----	William Bourne
250	Arable & Footpath	Reverend John Hooper	-----	John Bull
253	Parish Road	The Waywardens	-----	-----





Enc No	Description	Owner	Lessee	Occupier
11	Field, Footpaths & Ditch	Percy James Stafford	The New Westbury Iron Company Limited	The New Westbury Iron Company Limited, Percy James Stafford, Westbury Urban District Council





Creamery  
Railway Hotel  
(P.H.)

Glove  
Factory

EDEN VALE

Westbury  
Station

Westbury  
Iron Works

Engine Shed

Brook Farm

Brook Mill Farm

k

Ford

200

200

Page 329

SECTION

Quarries  
(ironstone)

Rise

B.M. 104.0

196

L.B.

F.P.

F.P.

Indigo Fa

Alot.  
Gdns.

F.P.

F.P.

F.P.

F.P.

F.P.

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F.P.

Rest

S.B.

S.B.

S.B.

S.B.

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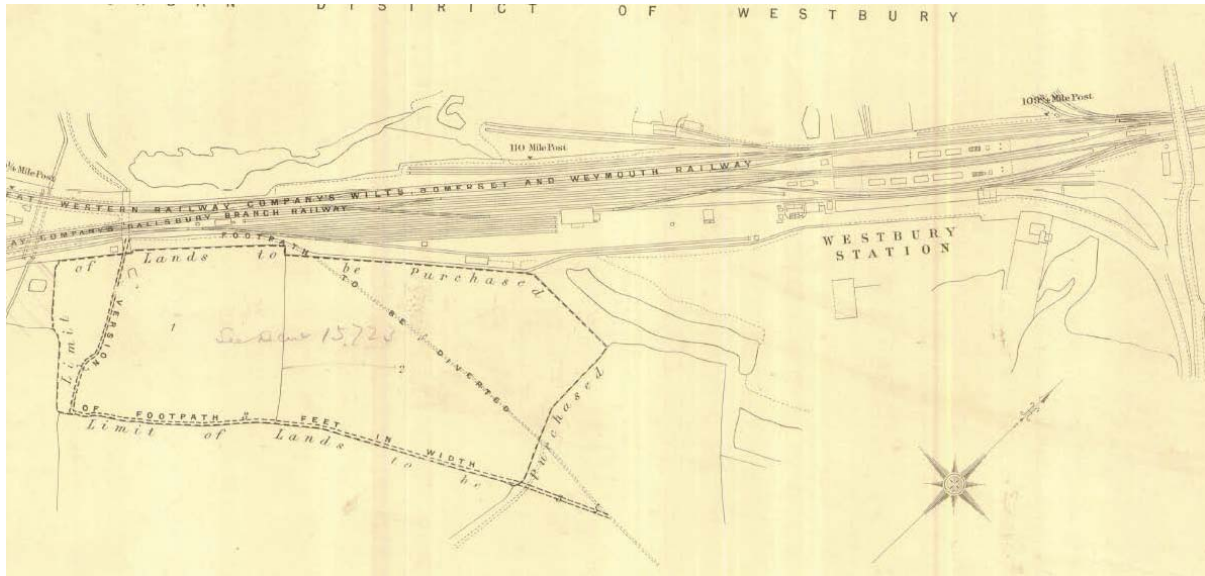
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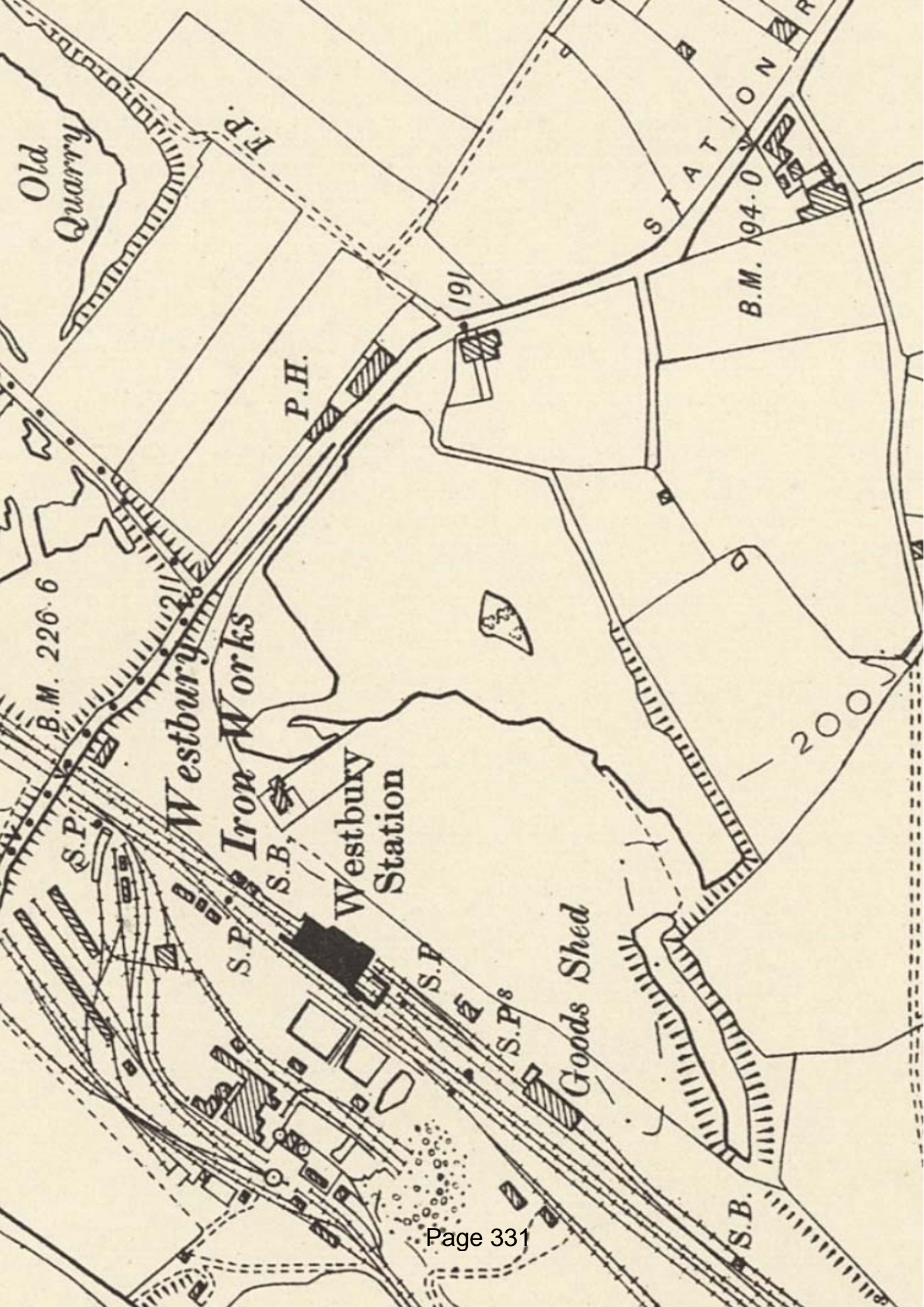
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Quarrying

Quarrying



Enc No	Description	Owner	Lessee	Occupier
1	Field, Pond & Footpath	John James Unwin Clarke, John James Vere Unwin Clarke, William Henry Thodore Tyndale Powell John Alexander Tyndale Powell Mary Elizabeth Vere Powell	David Ledbury	David Ledbury
2	Field & Footpath	John James Unwin Clarke, John James Vere Unwin Clarke, William Henry Thodore Tyndale Powell John Alexander Tyndale Powell Mary Elizabeth Vere Powell, Westbury Urban District Council	David Ledbury	David Ledbury
3	Field & Footpath	William a Beckitt	-----	Percy James Stafford



Old Quarry

F.P.

STATION

B.M. 194.0

191

P.H.

B.M. 226.6

Westbury Iron Works

200

S.P.

S.B.

Westbury Station

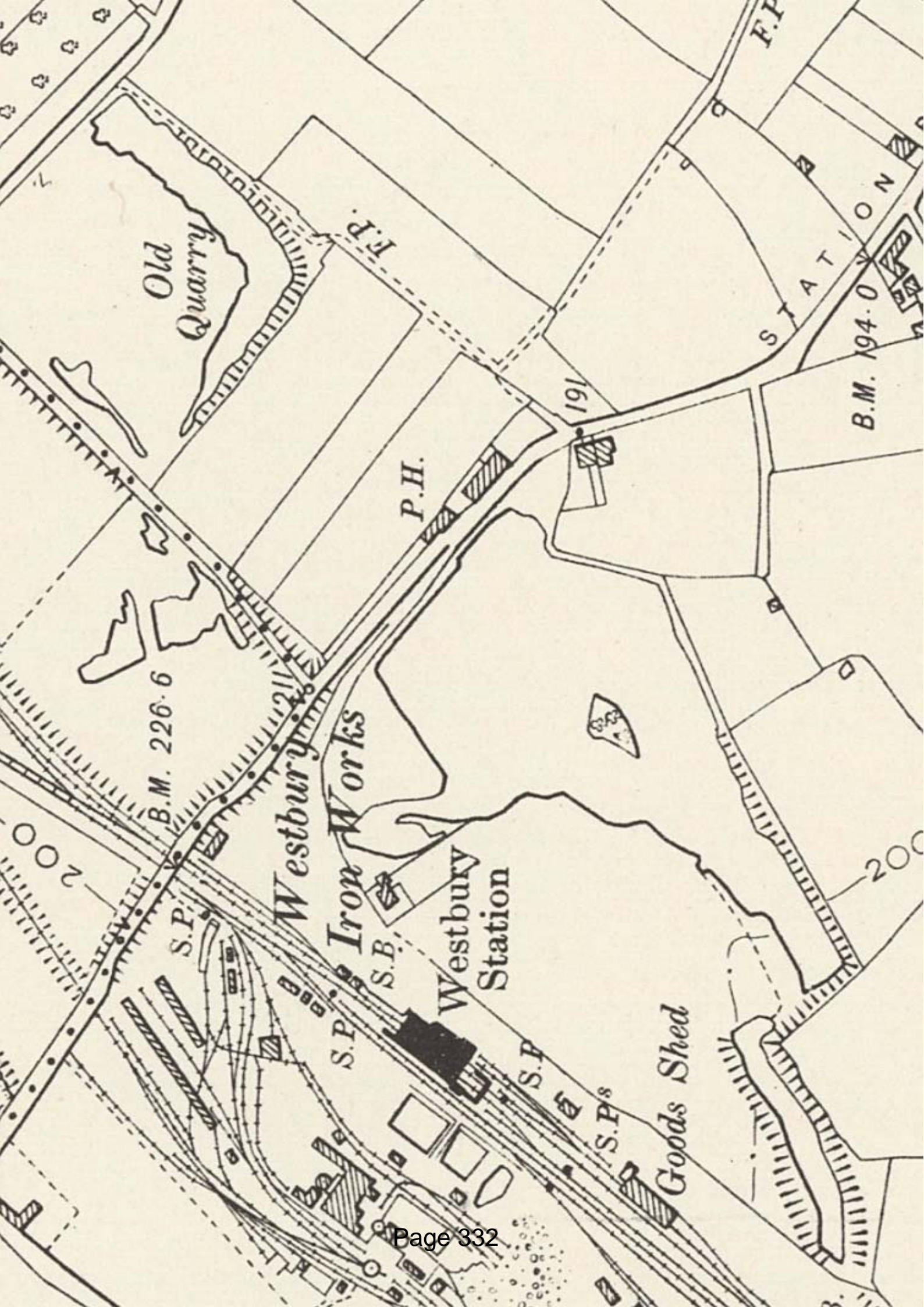
S.P.

S.P.

S.P.

Goods Shed

S.B.



Old Quarry

F.P.

STATION

B.M. 194.0

P.H.

191

B.M. 226.6

Westbury Iron Works

Westbury Station

S.P.

S.B.

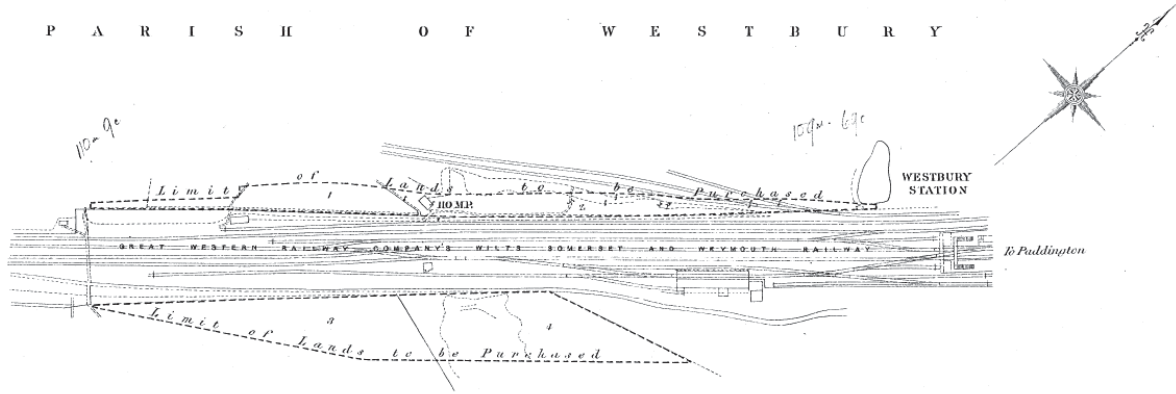
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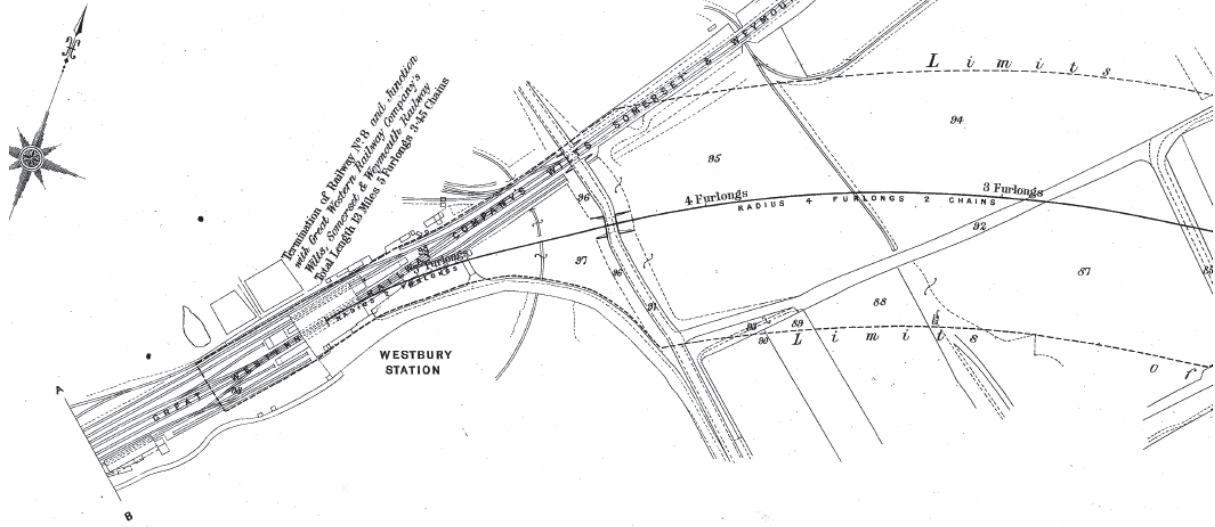
Goods Shed

P A R I S H O F W E S T B U R Y



Enc No	Description	Owner	Lessee	Occupier
3	Field	Trustees of the will of the late Caroline Marie Vere Unwin Clarke	Westbury Iron Company Limited Alfred Ledbury	Alfred Ledbury
4	Field, Rough Ground & allotment Gardens	Trustees of the will of the late Caroline Marie Vere Unwin Clarke	Westbury Iron Company Limited Alfred Ledbury	Alfred Ledbury

P A R I S H O F W E S T



GRADIENTS OF EXISTING GREAT WESTERN RAILWAY COMPANY'S WILTS, SOMERSET & WEI

Enc No	Description	Owner	Lessee	Occupier
96	Embankment	Great Western Railway	-----	In Hand
97	Rough Land, Garden Ground, Road, Tramway, Telegraph Posts, Wires and Embankment	Great Western Railway	-----	Great Western Raiolway, Westbury Iron Company Limited & Charles Harris, Postmaster General



*Lion Works*

*Ham*

*Signal Post*

*B.M. 26.6*

*Foot Bridge*

*Signal Post*

*Busshew Well*

*Westbury Station*

*Brewery*

*Goods Shed*

*Signal Post*

191

211

200

14 June 2018

Rights of Way and Countryside  
Waste and Environment  
County Hall  
Bythesea Road  
Trowbridge  
Wiltshire  
BA14 8JN

Mr Chris Smith  
Liability Negotiations Manager  
Western House  
1 Holbrook Way  
Swindon  
SN1 1BD

Your ref:  
Our ref: SM/2017/01/WEST

Dear Mr Smith

**Wildlife and Countryside Act 1981 s.53**

**Application for an Order to add a footpath to the definitive map and statement over land at Westbury**

Further to the application for a definitive map modification order to record a public footpath over part of land in which you have an interest at Westbury Station please find enclosed a copy of the Council's decision in respect of the application which has been refused.

Where an application has been refused I must make you aware that the applicant does have the right to appeal to the Secretary of State under paragraph 4(1) of schedule 14 to the Wildlife and Countryside Act 1981. Appeals must be made in writing to the Planning Inspectorate within 28 days of the date of this letter. If an appeal is made the Council has a duty to inform you.

If you have any queries relating to this application please do not hesitate to contact me.

Yours sincerely



Sally Madgwick  
Rights of Way Officer  
Direct Line: 01225 713392  
Sally.madgwick@wiltshire.gov.uk



## COVERING PAGE FOR DECISION REPORT

### WILDLIFE AND COUNTRYSIDE ACT 1981 s.53

#### Application for an Order to add a public footpath ("the Cinder Track" at Westbury Station) to the definitive map and statement

Name	Signature	Date	Approved Yes/No
Richard Broadhead Head of Service Rights of Way and Countryside	[Redacted]	11/04/2018	Yes
Tracy Carter Director Waste and Environment	[Redacted]	12.6.18.	Yes
From:	Sally Madgwick Rights of Way Officer		
Date of Report:	05.04.2018		
Return to:	Sally Madgwick (Ext. 13392)		

#### SUMMARY:

- Wiltshire Council has received an application for an order to add a footpath to the definitive map and statement at Westbury Station. The application is supported by 13 user evidence forms detailing use of the path back to 1936. Part of the path was in regular (and undisputed) use until 2017 when it was blocked by a fence and a bund and part of the path remains in use as part of Station Approach.
- The land over which the path leads is owned by Network Rail and has been part of the railway land since 1845 (the northern section including Station Approach) and c.1904 for the southern section.
- Network Rail object to the application on the grounds of s.57 of the British Transport Commission Act 1949 ("the 1949 Act") which prevents public rights being acquired over access routes to stations and depots.
- Officers have investigated a considerable amount of historic evidence relating to the southern section of the path (known as "the Cinder Track") which was formed when an Engine Shed was built and opened in 1915. The path is well documented as a physical feature since that time.
- It is accepted that evidence post 1949 is affected by the 1949 Act but that evidence pre-dating 1949 is relevant and may be held to apply. Use of the path was not incompatible with the statutory purpose of the railway.
- Although some evidence of public use at this time exists there is an insufficiency of either evidence of public use or evidence of whether the claimed route (southern section) was built as an access route to the station or the depot and whether public use was by licence (i.e. by right to access the station) or by way of trespass (i.e. 'as of right').

#### RECOMMENDATION

**That the application for an definitive map modification order to record a public footpath from Westbury 15 along a "cinder track" north to join sidings yard lane (now blocked) along Station Approach to Station Road is refused.**

Sally Madgwick  
Rights of Way

05 April 2018

**WILDLIFE AND COUNTRYSIDE ACT 1981 S.53**

**DECISION REPORT**

**WESTBURY STATION "CINDER TRACK"**

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

**1.0 APPLICATION**

Application number: 2017/01

Date of application: 08 March 2017

Applicant: Cllr Russell Hawker  
25 Caspian Gardens  
Westbury  
Wiltshire  
BA13 3GP

Application for: An Order modifying the definitive map and statement for the area by adding a footpath from footpath Westbury 15 along a "cinder track" north to join with sidings yard lane (now blocked) along Station Approach to Station Road.

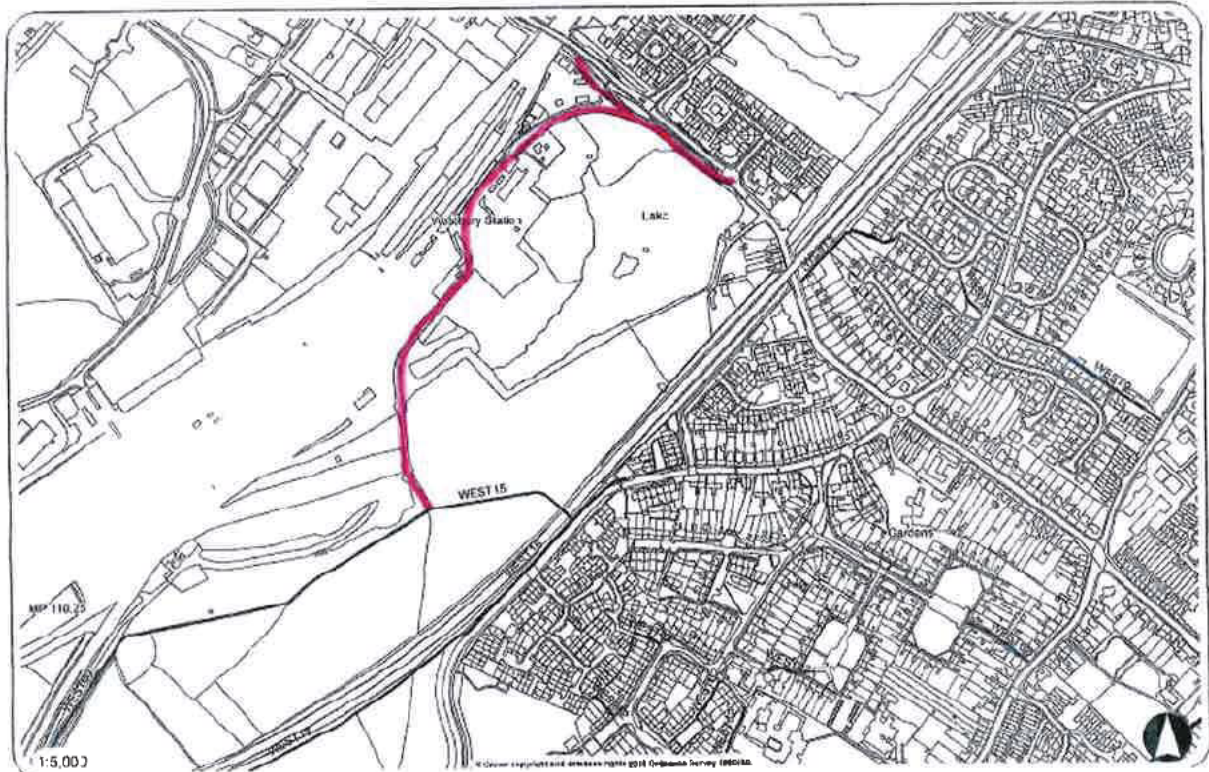
Application comprises: Form of Application for Modification Form 1  
Form of Certificate of Service of Notice of Application Form 3  
Notice served on:  
Network Rail Infrastructure Ltd  
DB Cargo Ltd  
Map to the scale 1:5000 showing claimed route highlighted in pink  
13 user evidence forms (UEFs)

## Application map

Wiltshire

Where we're made by 4000

### Application to Add Public Footpath - Westbury Station



## 2.0 Enabling Legislation

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

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

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

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

2.3 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;*

*(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*

*(iii) that there is no public 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.*

2.4 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 (below):

*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.*

2.5 Section 53(5) WCA 1981 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.

2.6 Schedule 14 to this Act states:

*Form of applications*

1. *An application shall be made in the prescribed form and shall be accompanied by –*

*(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and*

*(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.*

### *Notice of applications*

2. (1) *Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates*

*(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description "owner" or "occupier" of the land (describing it) and by affixing it to some conspicuous object or objects on the land.*

*(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.*

*(4) Every notice or certificate under this paragraph shall be in the prescribed form.*

2.7 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 ("the 1981 Act")

2.8 It is considered that this application was duly made in accordance with the provisions of Schedule 14 to the 1981 Act.

### **3.0 Land Ownership**

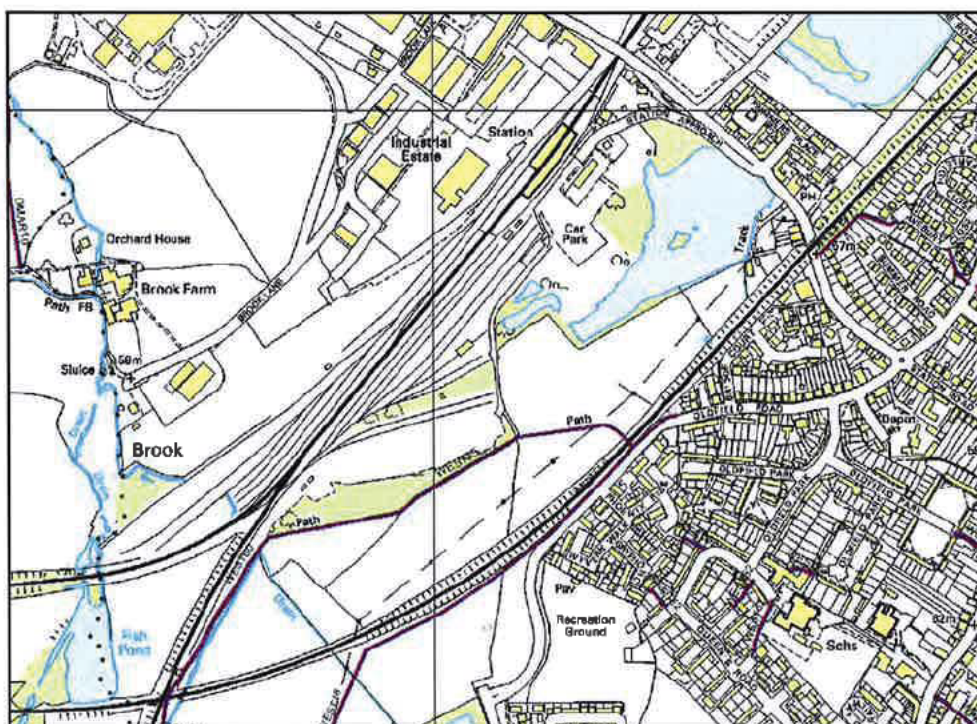
3.1 The land over which the claimed route leads is registered to DB Cargo (UK) limited and Network Rail. DB Cargo's land forms part of Registered Title no. WT210335 (Westbury Downside Sidings) and Network Rail's land forms the station car park and approach road. From 1905 to 1997 the whole of the land affected by the application to record a footpath appears to have been owned by first Great Western Railway, subsequently British Railways and Railtrack with the lease of title no. WT210335 passing to Mainline Freight Limited in 1996 (for a period of 125 years from 1994). DB Cargo (UK) Limited are registered as holding title absolute from 1997 onwards for the south western section of the route but have confirmed with officers that they only hold the lease, the land remaining in the ownership of Network Rail.

3.2 Adjoining land to the south and east of the claimed route is registered to a company called Square Bay (forming part of registered title WT282331).

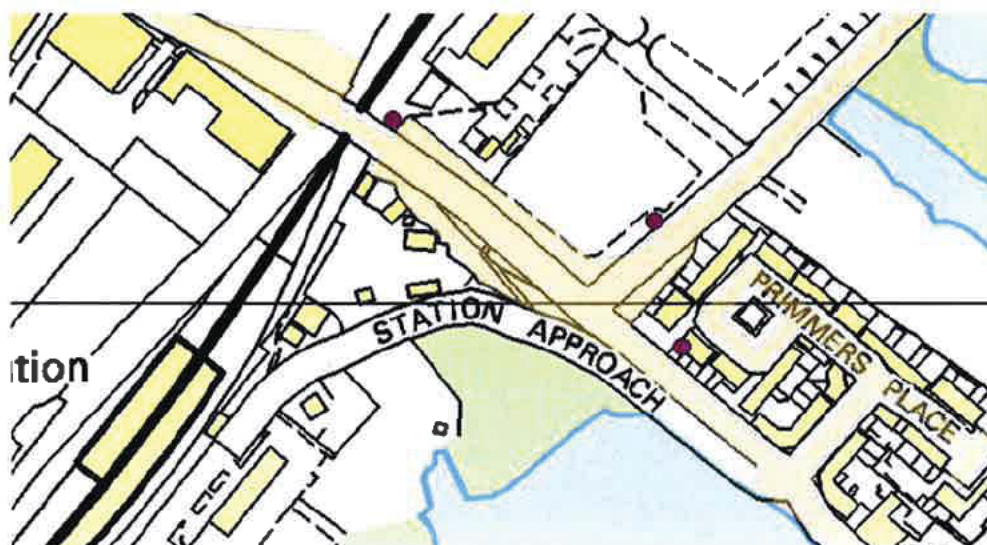
#### 4.0 Current Records

4.1 The claimed route is not recorded in the definitive map and statement. The spur of the claimed route leading beside Station Road is recorded as part of the highway maintainable at public expense in Wiltshire Council's Highway Record.

4.2 Extract from the working copy of the definitive map (footpaths = purple)



4.3 Extract from the Highway Record (publicly maintainable highway shaded sienna)



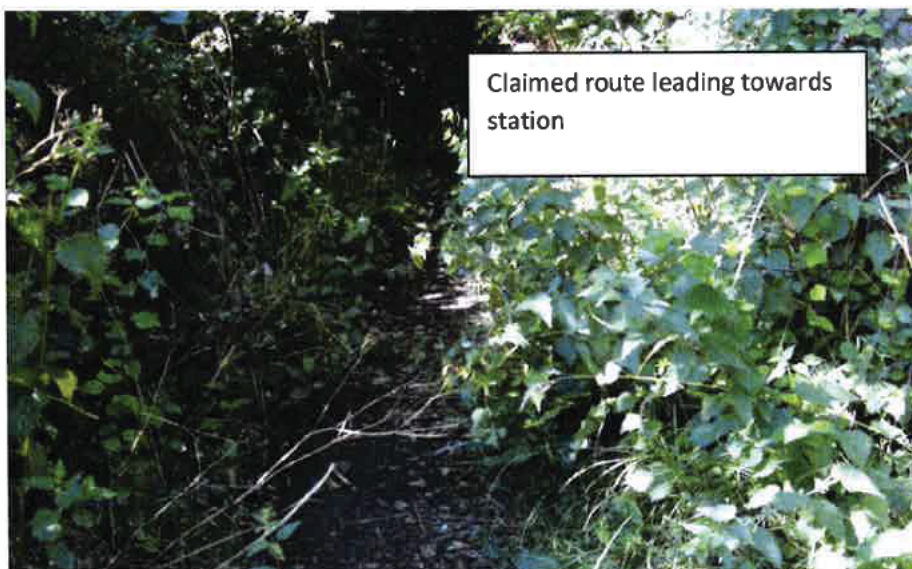
**5.0 Photographs (July 2017)**



Footpath 15 leading towards claimed route (bears right beyond hedge line)

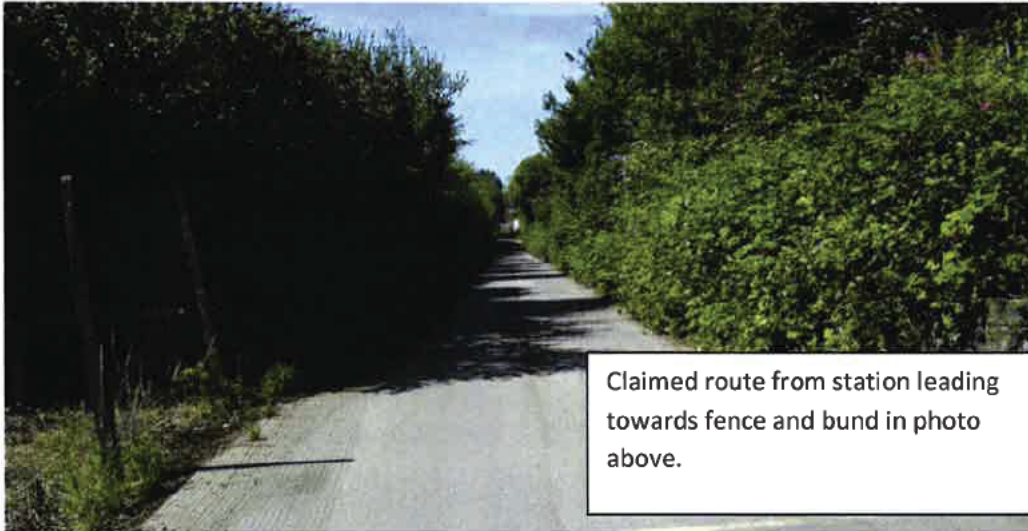


Gate to claimed path (turn right through gate) or to Footpath 15 (turn left through gate)

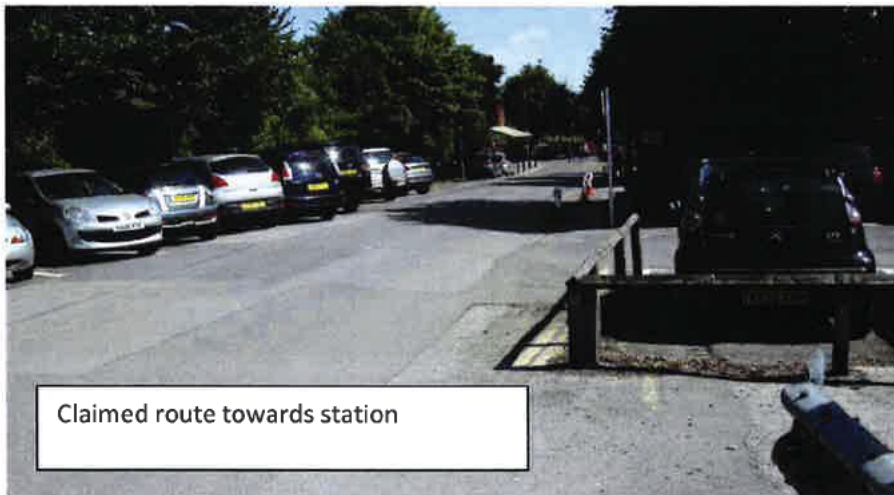


Claimed route leading towards station

Claimed route obstructed by bund and fence. Leads to the right towards the station.

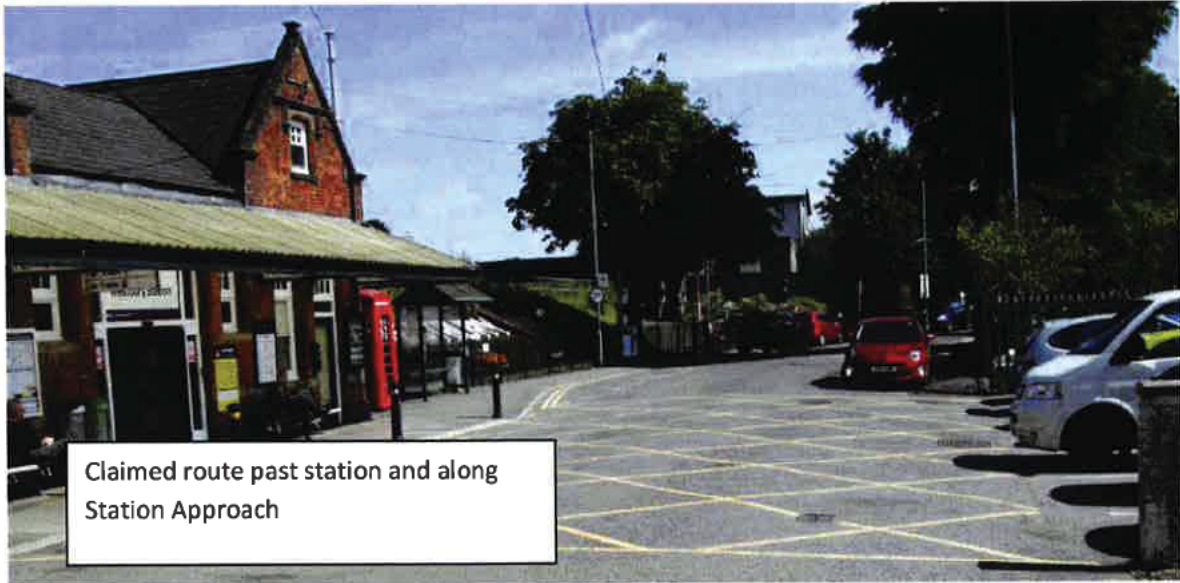


Claimed route from station leading towards fence and bund in photo above.



Claimed route towards station





Claimed route past station and along Station Approach



Claimed route along Station Approach

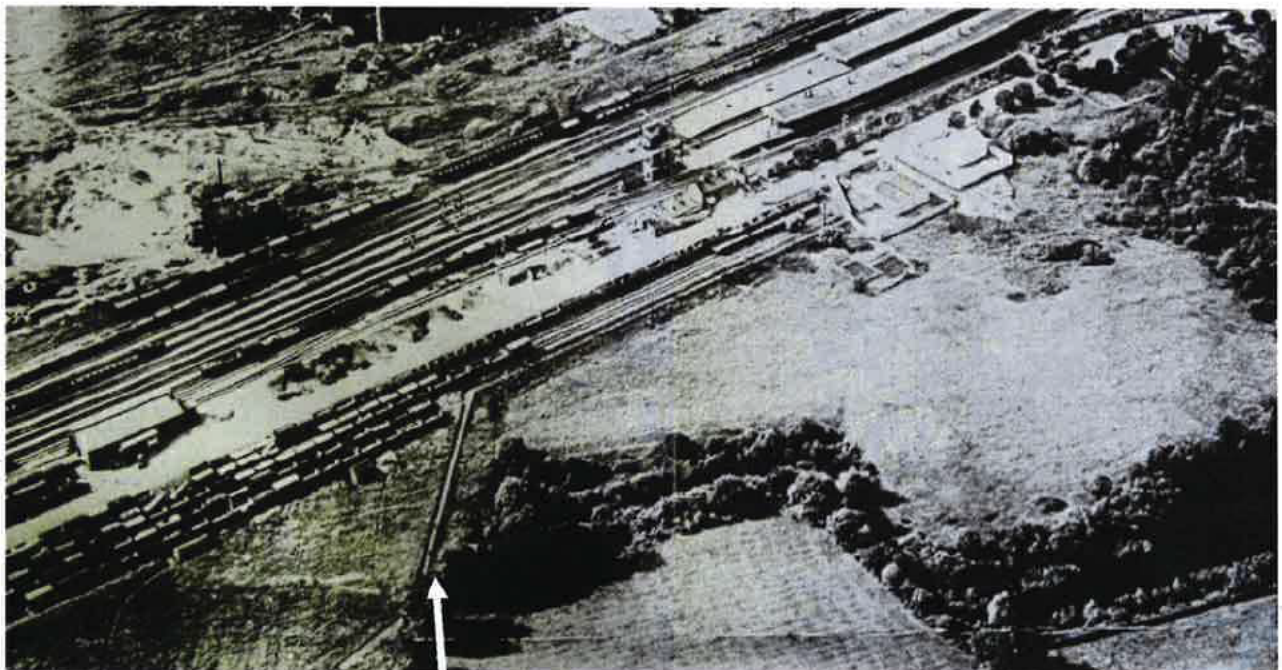


Station Approach junction with Station Road



## 5.2 Aerial photographs

1929 (Wiltshire and Swindon History Centre ref. 2233/200/2)



Claimed route is clearly shown.

Westbury Station "The Cinder Track"

2006



2014



## 6.0 Initial Consultation

6.1 The following letter and plan were circulated on the 18<sup>th</sup> July 2017:

### **Wildlife and Countryside Act 1981 s.53**

#### **Application for an order to record a footpath at Westbury in the definitive map and statement**

On the 8<sup>th</sup> March 2017 Wiltshire Council received an application for an order to record a public footpath leading from footpath Westbury 15 leading north and north east along "the Cinder Track" to the car park at Westbury Station and then on past the station along Station Approach to join Station Road. A copy of the application plan is enclosed with the claimed footpath shown in pink. I have also attached a plan showing the wider network of public rights of way.

The application is supported by the evidence of 13 users of the path who claim to have used it on foot for a variety of periods between 1936 and 2016 in a manner that is 'as of right', that is, without permission, secrecy or force. All users recall seeing other members of the public using the path.

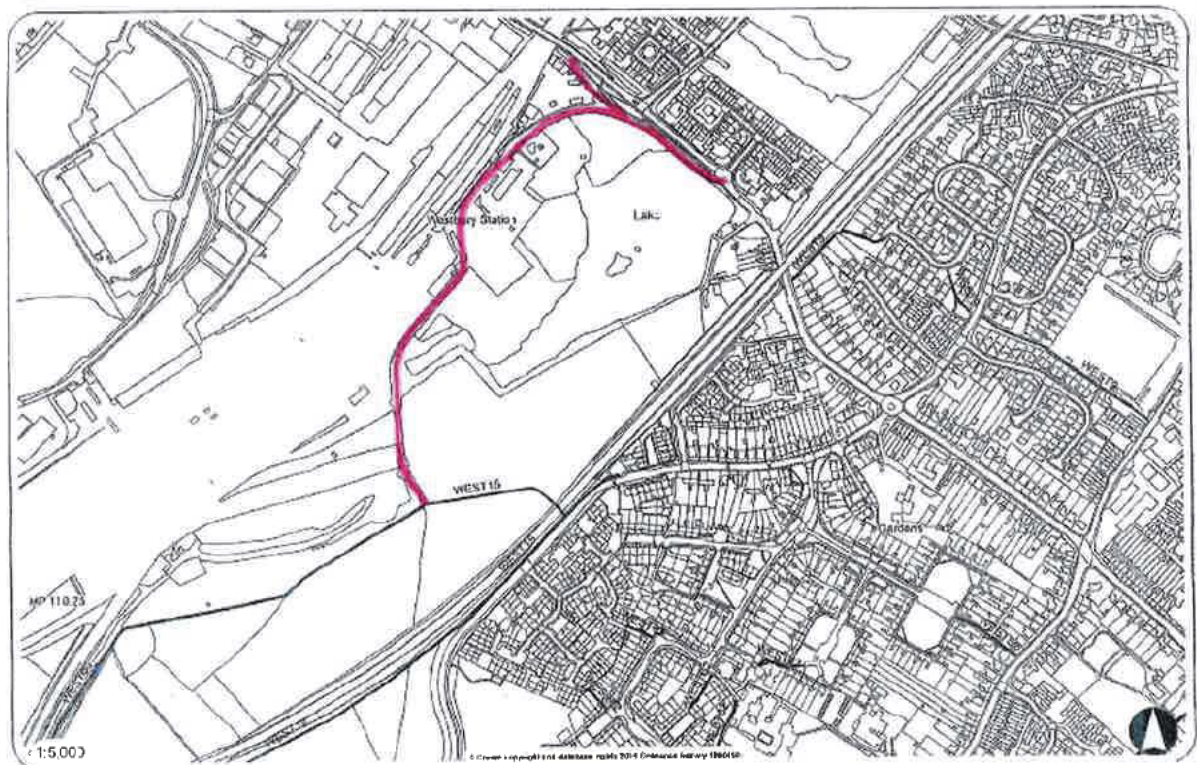
The Council is bound to consider all available relevant evidence and invites responses and evidence both in support and in opposition to the application. If you have already submitted a user evidence form you do not need to respond further though are welcome to if you have anything further to add.

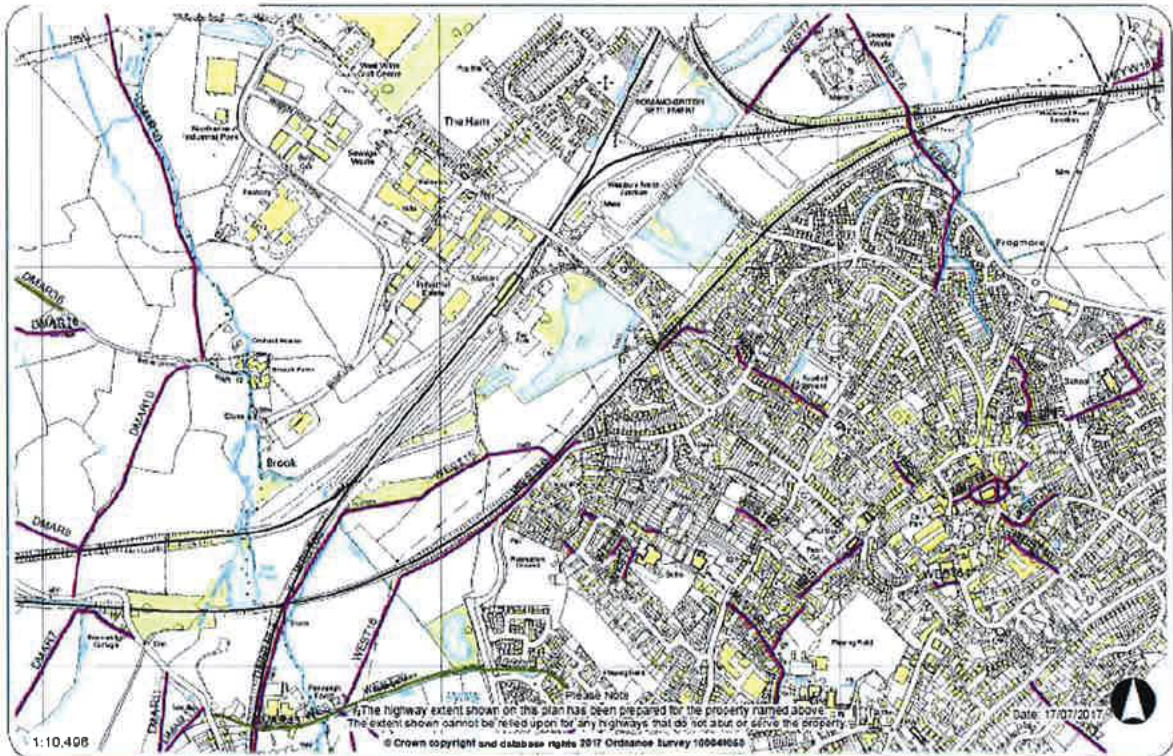
Please ensure all responses have been received by the Council by 1700 on the 22<sup>nd</sup> September 2017.

Wiltshire

Where necessary, details

#### Application to Add Public Footpath - Westbury Station





6.2 List of consultees:

- The Auto Cycle Union
- Open Spaces and Footpaths Society
- British Driving Society
- British Horse Society (national)
- British Horse Society (Wiltshire)
- Byways and Bridleways Trust
- Cycling Touring Club
- Trail Riders Fellowship
- Wiltshire Council Senior Rights of Way Warden – Paul Millard
- Westbury Town Council
- Wiltshire Council Councillor David Jenkins
- Wiltshire Bridleways Association
- The Ramblers
- Cllr Russell Hawker (applicant)
- Network Rail Infrastructure (London)
- Network Rail (Westbury)
- DB Cargo (UK) Ltd
- Square Bay (Westbury) LLP
- Ruth Vincent (witness)

Phyllis Harvey (witness)  
Ernest Clark (witness)  
Geoffrey Kingscott (witness)  
Simon Pond (witness)  
Martin Rogers (witness)  
Menna Milnes (witness)  
Patrick Stevenson (witness)  
Nic Cross (witness)  
Edwin Mead (witness)  
Stephen Hunt (witness)  
Merrilyn Richardson (witness)  
Peter Smith (witness)

## **7.0 Consultation responses**

### **7.1 Mr B Riley 20 July 2017**

*"The eight attached 1:2500 scale OS map extracts confirm the present line of the Cinder Path was first established between the revisions of 1899 and 1922, although parts of the path, or alternative routes, clearly existed before that.*

*A report dated 7 December 1904 by the Westbury Urban District Council Surveyor refers to "Footpaths affected by GWR plans: Brook House to Penleigh and Station Road to Dilton Marsh". The latter could be a reference to your path. You would need to read the original report in the History Centre, Chippenham to find out more (Westbury UDC: Surveyor's Reports 1901-1909, Ref. No G17/283/2). There should also be Railway deposited Plans and a Book of Reference available.*

*In 1933, the Westbury Loop Railway was opened. The History Centre should have copies of the Deposits and Plans. These plans may show the length running parallel with the railway, if so, the Book of Reference may indicate what its status then was."*

### **7.2 Mr F Morland 30 August 2017**

*"The 1930 Act establishes that there were existing public rights of way over the lengths of two footpaths mentioned in Section 20(4)(a) and shown coloured brown between the points A and C and the points D and E respectively marked on the signed plan, which were extinguished by it.*

*So although the signed plan is silent on the point, the remainder of those footpaths continued as public rights of way after the Act was passed.*

*The question is - what were the original routes and extents of those public footpaths (and any others in the vicinity) and had any parts of them already been diverted or stopped up prior to the 1930 Act.*

*It seems almost certain that in order to construct the many additional railway lines and sidings required for its Westbury Engine Shed, completed and opened in 1915 (see Wilts VCH VIII, 171), the GWR would have had to follow a similar statutory procedure to that used later for the Westbury Avoiding Line.*

*The only plans, sections and books of reference deposited by the GWR around that time affecting Westbury are those shown in the catalogue of the Wiltshire Quarter Sessions records at the History Centre under reference A1/371/166MS in 1904.*

*Unfortunately, there were quite a number of GWR Acts passed in the period 1904-1915 and I have not yet come across any local reference sources indicating which (if any) of them authorised the construction of the Westbury Engine Shed.*

*However, it is probable that any such Act(s) would have contained clauses similar to those in the 1930 Act to divert or stop up public footpaths and rights of way in the vicinity.*

*So it may well be that some or all of the public footpaths and rights of way north of points C and E in the 1930 Act had already been changed by an earlier Act(s).*

*Incidentally, there are drawings of the Westbury Engine Shed dating from 1907 (see WSHC ref: 2515/403/2212). The contract for the construction of the Westbury Engine Shed was placed in October 1913 (see National Archives ref: RAIL 252/1759).*

### **7.3 D B Cargo (UK) Limited 04 September 2017**

*"Further to your letter of 18 July I note the content and plans. It seems that claims are being made for a footpath on land exclusively let to DB Cargo UK Ltd.*

*On behalf of DB Cargo UK Ltd I object to any public footpath across DB Cargo land as shown on the plan. There is no footpath as such but there is an important metalled road used for internal access linking different parts of the site. This roadway is used by Heavy Goods Vehicles for moving ballast and rail materials from a rail served strategic virtual quarry used to maintain railways in the surrounding area. This road is used by 60 commercial vehicles a day on a narrow lane with insufficient room for pedestrians on same road. This makes any use by third parties extremely dangerous and unsuitable on safety grounds. DB Cargo have now erected fencing to prevent this practise on safety grounds and prevent illegal trespass. There have been near miss incidents causing DB Cargo concern.*

*The route is an illegal short cut to the station and should not have footpath status. I assume your consultation includes Great Western who operate the station as their views should be taken on board. There are defined routes to the station which do*

*not include this illegal route. Users of the route are trespassing. The contact is Robert Jackson for the station.*

*In addition Network Rail are partners in the virtual quarry a key location for strategic railway maintenance in the South West. Please contact Peter Elliman on behalf of Network Rail.*

*In short there is great concern from DB Cargo, Network Rail and Great Western regarding such a route as it would interfere with commercial use of the site, is unsafe and just an illegal short cut.*

*Please register our strong objection to such a proposal. I hope this is sufficient to rebuff any such claims. If you would like a site visit to witness the situation this can be arranged with local DB contacts."*

#### **7.4 Network Rail 11 September 2018**

*" I refer to your letter dated 18<sup>th</sup> July 2017.*

*On behalf of Network Rail Infrastructure Limited, I wish to lodge an objection to the above mentioned application. The reasons for this objection are set out below.*

*The route shown coloured pink on the attached plan which is subject of the claim run along the Westbury Station Approach Road. This Roadway also forms the access into the depot and sidings. I therefore draw your attention to section 57 of the British Transport Commission Act 1949 which states that:*

*'As from the passing of this Act no right of way as against the Commission [now Network Rail] shall be acquired by prescription user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot...premises of the Commission.'*

*On the basis of the above statutory provision the claim of a right of way through user is not valid and should be rejected."*

#### **7.5 Robert Jackson – First Great Western 21 September 2018**

*" First Great Western (GWR) is not supportive of the proposal.*

*Whilst we appreciate proposals may not be able to consider future development, but the key feature here is that future development will most likely create a new right of way. The development for the site owned by Square Bay is currently subject to a planning application.*

*In addition to this GWR believes your proposal imports a safety risk on the land which is leased to GWR as Station Facility Owner by Network Rail as Landlord.*



*Your line of the route does not take into account the fact there will be road traffic using the bays to the immediate north, taxi movement, buses using the area as a turning circle and heavy goods vehicle traffic to/from DB Cargo (which has historic rights to travel over the Station Approach and across the car park).*

*GWR cannot knowingly agree to a proposal that increases a safety risk – in this instance the risk being a pedestrian right of way cutting across the middle of a roadway.*

*Please also be aware that you would need to consider Railway regulatory procedures too. If for example your proposals resulted in a revision to the car park layout (i.e. a right of way being created) and/or resulted in a loss of parking bays – then under the provisions of the Railways Act 1993 (as amended from time to time), that you would have to go through the Minor Closure process (Minor Modification) to formally close any railway facilities (such as parking bays) and also a Station Change to obtain industry support and ORR approval for the scheme in general. You would need to have provision to compensate for any financial losses or costs (legal, operational and commercial) directly associated with your proposals that would be borne by any of the railway consultees.”*

## **7.6 Network Rail 14 September 2017**

In response to the case officer informing Network Rail that the Council was also considering pre-1949 Act evidence and inviting input:

*“In response to your query regarding the history of the site I can now offer you the following information in support of Network Rail Infrastructure’s objection to the above application.*

*The railway at Westbury was originally constructed under the powers of the Wilts Somerset & Weymouth Railway Act 1845 as amended by the Wilts Somerset & Weymouth (Amendment) Act 1846, both of which Acts incorporated the provisions of the Railway Clauses Consolidation Act 1845.*

*The plan accompanying the Parliamentary Bill for the 1846 Act (extract enclosed) shows the proposed centreline of the railway running along the alignment of the railway as constructed. The plan also shows the roadway now known as the B3097. I have annexed the referencing details of the roadway and the land over which the claimed route runs on the attachment.*

*Although the referencing details refer to footpaths, the alignment of these paths is not shown and they are purely referenced in private ownership. The railway line and station was subsequently constructed and opened for public use in 1848.*

*The Ordnance Survey map surveyed in 1884-85 (extract enclosed), clearly shows the station approach road upon its present day alignment. It does not indicate any way or footpath along the claimed route.*

*The Great Western Railway (No 1) Act 1894 authorised the construction of a new railway from Stert to Westbury. The Plan deposited with the Parliamentary Bill (extract enclosed) shows the roadway leading to the station in situ but offers no indication of any footpaths running through the site.*

*The claimed route running parallel to the B3097 would pass through enclosure 96 and/or 97 the referencing details of which are annexed to the plan.*

*The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot. Whilst not showing the station approach road the plan accompanying the Parliamentary Bill (extract enclosed) shows the lands in question to be purchased, the referencing details of which are annexed to the plan.*

*The 1899 – 1900 and 1902 Ordnance Surveys offer no additional information to the earlier surveys with no obvious footpaths along the claimed route. It also does not yet show the depot constructed.*

*The Great Western Railway (Additional Powers) Act 1905 authorised the purchase of additional lands at and near to the station. The plan accompanying the Bill (extract enclosed) includes land over which the claimed route is made. The referencing details are annexed to the plan.*

*You will also note that the plan is annotated as having the footpath running through enclosure 2 being diverted to run through enclosure 1. Section 53 of the Act authorised the stopping up and diversion of this footpath. The diverted footpath appears to follow the part of the route shown on the plan accompanying the application and annotated West 15.*

*I further attach a copy of Ordnance Survey plans from 1922. This plan shows the engine shed having been constructed upon the lands purchase under the 1905 Act. The plan clearly shows an annotated footpath network substantially similar to the path annotated West 15 on your plan. It is significant however that the way running along the claimed route is not similarly annotated.*

*The Great Western Railway Act 1930 authorised the construction of the Westbury Avoiding Line. The Plan accompanying the Parliamentary Bill shows the area of lands authorised for purchase (extract enclosed) through which the claimed route runs. The plan also shows the intended further diversion of the footpath running through the site which again is substantially similar to the route taken by West 15. There is no footpath shown running along the claimed route. Both the claimed route and the diverted footpath would both fall within enclosure 11 the referencing details of which I have annexed to the extract plan.*

*Finally I attach a copy of the Ordnance Survey of 1941 which is substantially similar to that of 1922 and offers no further evidence backing the claim of a right of way.*

*On the basis of all of this information it is evident that the claimed route was constructed part as access to the original railway station in 1848 and to serve the depot as the site developed over the years. Therefore Network Rail will rely upon*

*the previously stated Section 57 of the British Transport Commission Act 1949 to defeat this claim."*

A copy of the above and the plans submitted are appended at **APPENDIX A**.

## **8.0 Officer's Comments on initial consultation responses**

### **8.1 Mr B Riley**

The documents and references from Mr Riley have been inspected and are considered in this report at section 11.

### **8.2 Mr F Morland**

The documents and references from Mr Morland have been inspected and are considered in this report at section 11.

### **8.3 D B Cargo UK**

D B Cargo UK Ltd erected barriers to public use along the southern section of the claimed route. This was done to prevent public use which is referred to as "an illegal short cut to the station". They also refer to public use as trespass. It is clear that neither Network Rail (the owner of the land) or DB Cargo UK (the tenant) do not regard the claimed path to the south of the station as a designated access route. However, matters relating to unsuitability or danger arising from other use are not relevant considerations under the Wildlife and Countryside Act 1981.

### **8.4 First Great Western**

Wiltshire Council cannot take into account any future development plans or alternative routes under the Wildlife and Countryside Act 1981, nor can it take into account considerations relating to suitability. It is clear from this response that Great Western Railway do not consider the southern part of the claimed route as being an access route to the station.

### **8.5 Network Rail**

Considerable historical information has been provided by Network Rail and this has been inspected and considered in this report at section 11. Network Rail do not consider there is any basis for public rights prior to 1949 and rely upon section 57 of the British Transport Commission Act 1949 to defeat the claim.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*

Whilst it is agreed that any acquisition by prescription is defeated by s.57, it is clear that this can only take effect from 1949 onwards.

## 9.0 General Context

The claimed route is a path that links Dilton Marsh and parts of Oldfield Road with Westbury Station and Station Road, it is clear that it has utility as a pedestrian route to the station and it also has utility as a through route to Station Road. The area is dominated by the railway and has been the subject of a considerable amount of change since the station was first opened in 1848 by the Wilts, Somerset and Weymouth Railway. A branch to Salisbury was opened in 1856 and by 1900 the Great Western Railway main line from London to the West Country also utilised the station. The Westbury avoiding line was built in 1929/1930 over land immediately south of the claimed route.

- 9.1 The claimed route leads around the perimeter of an area that was developed around 1915 to provide an engine shed and associated works for Great Western Railway; this area is still used for railway purposes and is leased to DB Cargo (UK) Ltd by the owners of the land, Network Rail.
- 9.2 Land to the north of the station was the site of Westbury Ironworks, the Great Western Iron Ore Smelting Company being formed to extract and smelt ore in 1857, by 1920 the works had stopped smelting and were sold in 1939.
- 9.2 The existence of the claimed route is well documented in plans and aerial photographs and the line of the path as it is today was clearly established at the time the engine shed was constructed. Specific documents have been investigated and will be presented in due course but it is noteworthy that the path is referred to in R J Cogswell's book "Westbury Ironworks" (1988) at pages 56 – 57. Mr Cogswell has clear recollections of the area and specifically the construction of the engine shed and alterations to the footpaths:

*"Those new fast trains were popular with the travelling public so more were added to the timetable, especially in summer. Freight traffic increased enormously too, particularly for perishable goods while every evening long trains took West Country milk up the line to London. The result of all this was that during the decade after 1900, Westbury with its direct connections not only with London and the far west but also to Bristol and from there South Wales and the north; even southwards – subject to the armed neutrality of the LSWR – with Southampton and Portsmouth – eventually to Brighton and Worthing. Thus Westbury became a railway town, the rail cross roads of the middle region of South-west England. And gained much in general prosperity thereby.*

*That however was only the beginning. As early as 25 February 1905, the Wiltshire Times was able to report that land was being surveyed for the building of a*

locomotive depot for GWR. After that came some years of rumour but in 1912 work preliminary to the building of the depot which railwaymen were to call "Westbury loco" began on a site on the town side of the main line railway yards and diagonally across from the ironworks. The land had been an outlying pasturage of Penleigh Farm and was, generally, some feet above the level of the existing rail tracks; therefore it had first to be brought to the level of the latter. That involved a huge amount of excavation all done by pick and shovel men with horses to haul away the excavated clay soil in skips on portable tramroads to be tipped into the western end of the station minehole. That very considerably altered the outline of the latter. The depot buildings, when they were put up were red brickwork, solid and well finished in GWR style. Besides an engine shed there was a workshop with machine tools and hoist for the lifting of engines for the changing of their wheels and so on; there was also a forge. All that machinery was driven by a steam engine supplied by a pair of locomotive type boilers. Outside was a full length turntable and an elevated coaling stage with water tank on top while close to it was a coal storage area with space for the contents of several hundred wagons. In addition, there were some miles of new rail tracks for service roads and sidings, even a reserved track for breakdown train vehicles and the local snow plough.

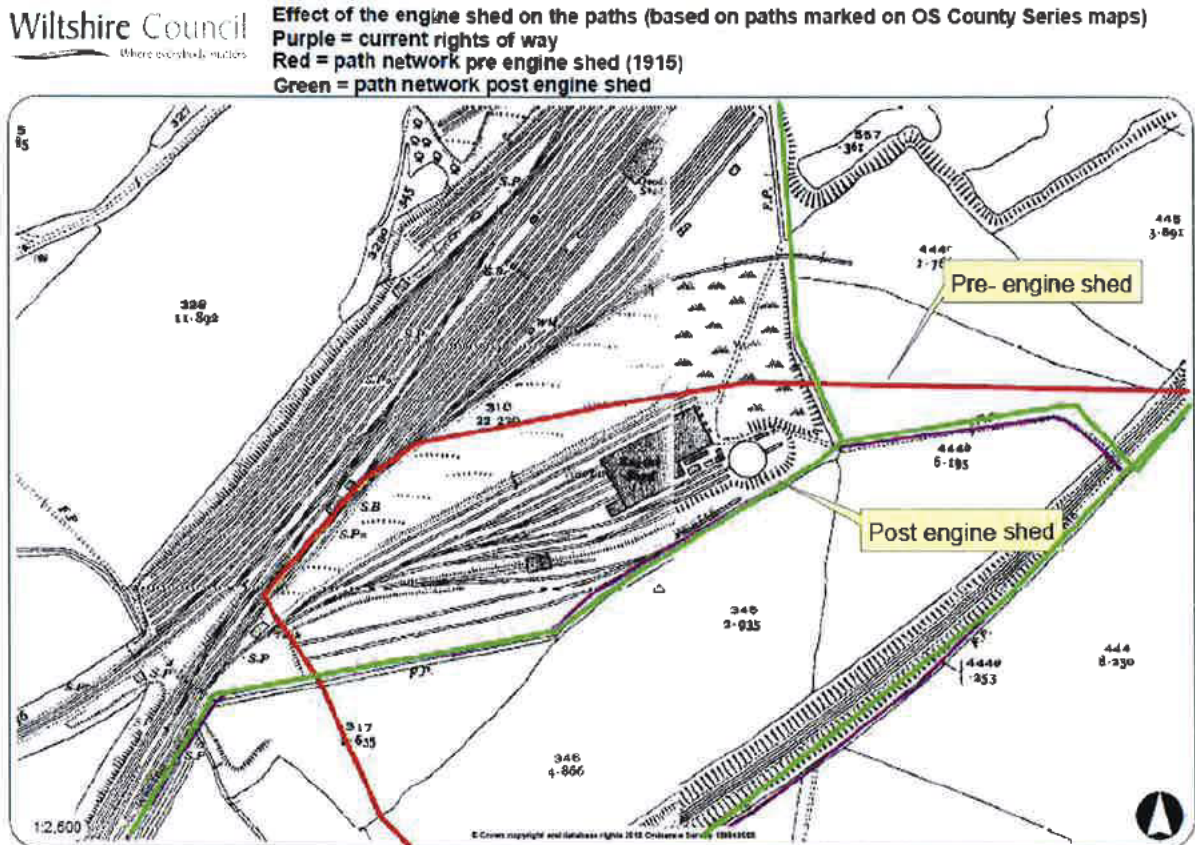
From ancient times the ground on which this complex was built in 1913/1914 had been crossed by a footpath from the town to Brook Mill, a mill for the fulling of cloth after weaving. The mill had a long history, Colt-Hoare records it as having changed hands in 1599. Therefore the path leading to it had been a clothier's path and as such it was a relic of the industrial history of Westbury. The mill was in full operation when the first railway line came to the town and as the path was there first, and in use, a level crossing was made for it over the tracks at a point close to the present South Junction, itself dating from 1851. Only the shell of the mill building and the waterways were left in the period now under review but the clothiers footpath remained although, by that time, only used for walks in the country and by ironworks quarry men living in Westbury on their way to Becketts and Bremeridge. The Westbury end of the footpath itself was a continuation of a lane through fields but now made up and named Oldfield Road which leads off Station Road.

After the GWR took over the ground public access, via the level crossing, to Brook Mill had to be maintained although the latter was only a ruin. This was very simply done by raising no objections to outsiders crossing the site as they pleased, even lingering or wandering about to see what was going on or – to use a modern expression – "inspecting progress". That was an opportunity which I and many others of all ages took full advantage of for more than a year. So the situation remained until the GWR made more permanent arrangements.

The arrangements made were that the lane – now Oldfield Road – and the path from its end across another field were surfaced with rolled in fly ash and the stiles across it replaced by kissing gates made wide enough for bicycles to be wheeled through. **Elsewhere, an existing GWR owned footpath from the station to Dilton Marsh**

*and long known as Penleigh Footpath, was diverted across the, by then, filled in end of the Station Minehole to the kissing gate opposite to the pedestrian's entrance to the new depot. From where it continued on round to the old level crossing for Brook Mill, which had now been widened to cover six tracks and for which two new and very spacious stiles had by now been erected. ..."*

- 9.3 The plan shown below illustrates the effect of the Engine Shed development on the historic line of the footpath (shown in red). After the Engine Shed was built the paths shown in green reflects the path network (but also see alterations made in 1930).



- 9.4 The claimed route at this location has been in existence since the engine shed was built and was physically obstructed in 2016 by the erection of steel fencing and a bund across the path.
- 9.5 The claimed route in respect of the length from Station Road to the Station appears to date from the construction and opening of the station (1846 – 1848).

## 10.0 Historical Records

- 10.1 A route linking Dilton Marsh with Westbury can be seen on maps as a physical feature dating from the late 1800s to the present day (albeit with an altered route from 1915). Although it can be helpful to present these in chronological order to show the consistent recording of a way over time it does not allow for the need to

apply evidential weight to documents. For example although a way may appear on fifty commercial maps it does not necessarily carry as much evidential weight as if the way is shown in perhaps two publicly consulted documents or created, say, as the result of an Act of Parliament.

- 10.2 Therefore, in evaluating historical evidence it is necessary to recognise that differing weight must be given to different evidence. The following categorisation has been used;

Category A carries the highest weight and category F the lowest. This system of categorisation has been devised by officers with regard to The Planning Inspectorate's Consistency Guidelines:

<http://www.planningportal.gov.uk/planning/countryside/rightsofway/guidance> (as revised to date of report) and Chapter 6 of the book 'Rights of Way A Guide to Law and Practice – Fourth Edition' by John Riddall and John Trevelyan.

Abbreviations: Wiltshire and Swindon History Centre, Chippenham (WSHC), The National Archive, Kew (TNA), House of Lords Record Office (HoL)

Category	May provide evidence for	Examples
A	Legal creation of a highway Reputation of a way as a highway Physical existence of a way Conclusive evidence of public rights	Inclosure Acts, awards and plans Orders creating, diverting or extinguishing highways Railway and canal acts and plans Definitive map and statement
B	Reputation of a way as a highway Physical existence of a way	Documents, maps plans drawn up as a result of legislation, consulted upon, but whose primary purpose was not to record public rights.  i.e. Tithe Commission, Inland Revenue Finance Act
C	Reputation of a way as a highway Physical existence of a way	Includes local government records (highway board, county council, parish council)
D	Reputation of a way as a highway Physical existence of way	Other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans, conveyances
E	Reputation of a way as a highway	Commercial maps, some Ordnance Survey records

	Physical existence of a way	
F	Reputation of a way as a highway Physical evidence of a way	Local repute, consultation responses

## 11.0 Category A Evidence

### 11.1 Inclosure Acts and Awards

Between 1545 and 1880 the old system of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners sought to improve the productivity of their land. The process of inclosure began by agreement between the parties concerned, although locally powerful landowners may have had significant influence on the outcome. By the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The process was further refined at the beginning of the nineteenth century with the passing of two main general acts, bringing together the most commonly used clauses and applying these to each local act unless otherwise stated.

- 11.2 The area of Westbury where the railway station is now situated was enclosed by Act of Parliament in 1808. The Act of Parliament was entitled "*An Act for Dividing and Allotting in Severalty the Open and Common Arable Fields, Common Downs, Common Meadows, Common Pastures and Commonable places within the Parish of Westbury in the County of Wilts.*" It is dated 1802 and was applied in conjunction with the 1801 "General Act" ("An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure ; and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts").
- 11.3 The Act empowered the Commissioners to create highways and to enclose and allot land (amongst other powers) and this was detailed in an Inclosure Award dated 29<sup>th</sup> July 1808. Wiltshire and Swindon History Centre (WSHC) Catalogue no. EA76.
- 11.4 Map B annexed to the award shows the land over which Westbury Station was subsequently built as being within parcel no. 376. The image below shows the land bordered by Brook Farm Road in the north and Perry Way to the east. The cross roads at the north eastern corner is where the Ham Post Office is today.



11.5

Position of Ham Post Office



11.6 The land is crossed by a public footway number CXXX11, Brook Footway.

*"CXXXII Brook Footway. One other public footway of the breadth of ffour ffeet called Brook Footway numbered CXXXII in the Map B hereunto annexed branching out of Dyehouse Lane Road at or near a place called Cooks Styles ...."*

Brook Footway is the public footpath referred to in the extract from R J Cogswell's book at paragraph 9.2 above.

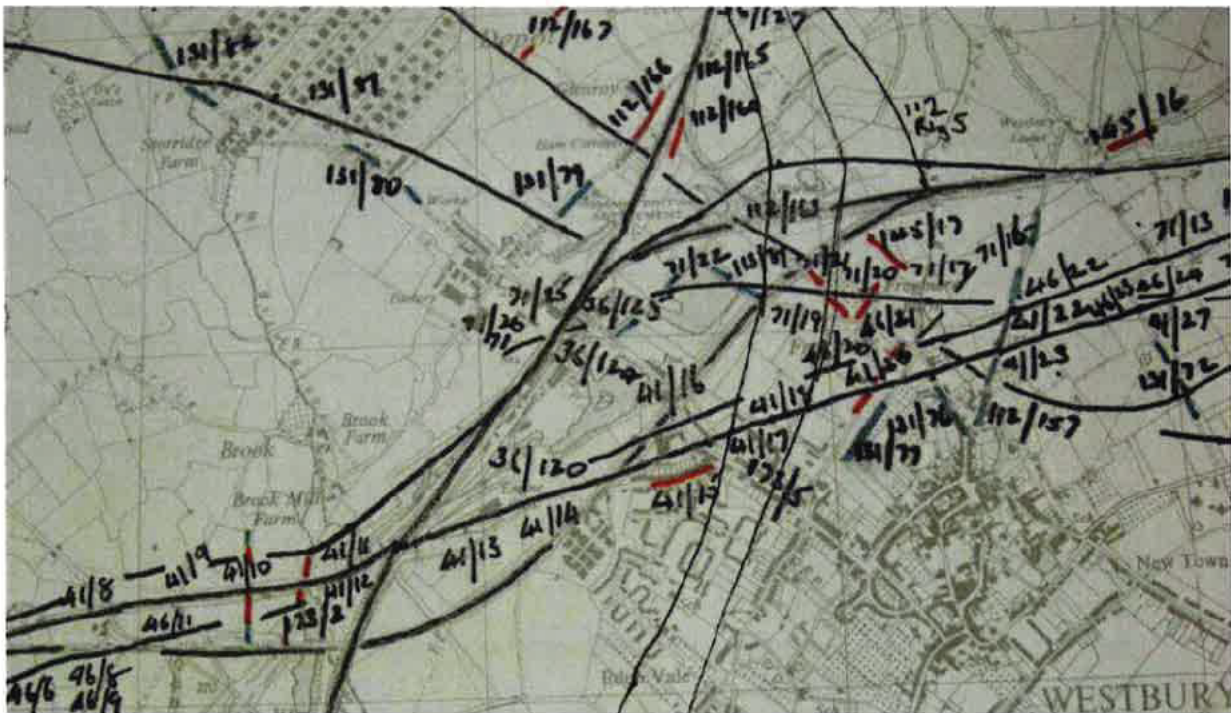
11.7 This is the footpath that was, some 150 years later recorded in the definitive map and statement as Westbury footpath 15. However, the only route recorded in the award linking Dilton Marsh with this area is Penleigh Lane; there is no additional footpath shown that may coincide with the claimed footpath.

### 11.8 Deposited Plans for Public Undertakings – Railway Plans

Individual canal and railway schemes were promoted by Special Acts of Parliament. The process for Canal Schemes was codified by Parliamentary Standing Order in 1792 which was extended for railways in 1810. The Railway Clauses Consolidation Act 1845 was effective for the approval and construction of the railways at Westbury. The 1845 Act expanded the requirements laid down in 1810 with public rights of way which cross the route of the railway to be retained unless their closure has been duly authorised. Although it was not the primary purpose of the plans deposited with

Parliament to record public rights of way, they can provide good evidence in this context.

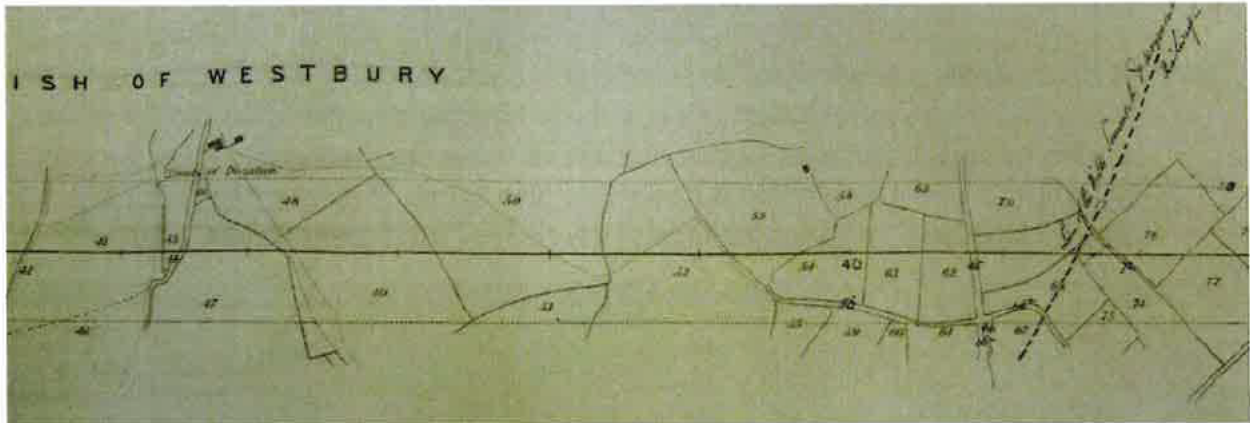
- 11.9 Clause 10 of the 1845 Act stated that certified true copies of the plans and books of reference (and alterations of) were to be received as evidence of the contents thereof. Clauses 46 – 51 details the crossing of roads and the construction of bridges.
- 11.10 There was no obligation in the 1845 Act to bridge footpaths where they crossed the line.
- 11.11 A considerable number of railway plans have been deposited with Parliament for the area around Westbury Station. Few of these have been constructed but these were subject to the same Parliamentary process as those that were built. All of the plans deposited are represented on the overview plan below. It can be seen from this that the line labelled 41 crosses the area of the claimed route and has been inspected.



**11.12 Direct Western Railway 1845 Deposited Plans and Book of Reference (WSHC Catalogue number A1/371/41 MS)**

These plans and Book of Reference were deposited with the Clerk of the Peace of the County of Wilts on November 30<sup>th</sup> 1845. The line was not built but the plans and book of reference are useful evidence for how the network of access routes across the land was at that time.

11.13 It is noted that the plans show "Line of the Wilts Somerset and Weymouth Railway" on a route that although consistent with the plan deposited at the time (A1371/36 – Wilts, Somerset and Weymouth Railway 1844) the line was subsequently built on a different alignment (A1/371/68). The original deposited plan showed the line through the parish of Westbury through the village of Westbury Leigh and the intersection of the present Station Road and Oldfield Road in Westbury. Accordingly, in interpreting plan A1/371/41 MS it is necessary to disregard the position shown for the Somerset and Weymouth line.



From the Book of Reference (modern reference in italics):

<b><u>No on plan</u></b>	<b><u>Description</u></b>
65	Parish Road ( <i>Station Road</i> )
64	Arable
63	Arable
62	Arable
61	Arable
60	Pasture
59	Arable
58	Pasture
56	Occupation Road ( <i>Sopps Lane- now Oldfield Road</i> )
55	Pasture
54	Arable
53	Pasture
52	Arable and foot path ( <i>FP WEST15</i> )
51	Pasture
50	Pasture and foot path ( <i>Awarded footpath Brook Footway</i> )
49	Pasture and foot path
48	Pasture and foot paths
47	Pasture
46	Alder Bed Wood
45	Meadow

<b>No on plan</b>	<b>Description</b>
44	Mill Stream ( <i>Biss Brook</i> )
...	
31	Road ( <i>Fairwood Road</i> )

11.14 The deposited plan is consistent in showing the historic Brook Footway (which was diverted when the engine shed was built at the beginning of the 20<sup>th</sup> century) but provides no evidence to support the claimed route as a historic north/south path.

11.15 **Wilts, Somerset and Weymouth Railway 1844** (WSHC cat ref. A1/371/36 and A1/371/68 for the line as built).

The railway at Westbury was originally constructed under the powers of the Wilts Somerset and Weymouth Railway Act 1845 as amended by the Wilts Somerset and Weymouth (Amendment) Act 1846. The line was completed in 1848. The line (or the limits of deviation) identified footpath crossing consistent with the historic awarded route (Brook Footway) and indeed, crossing at the level was provided for, but it is not possible to identify any further footpaths. For reference purposes enclosure number 253 contains the Parish Road that is now Station Road (B3097).

11.16 **Great Western Railway Stert to Westbury** (WSHC cat ref. A1/371/112).

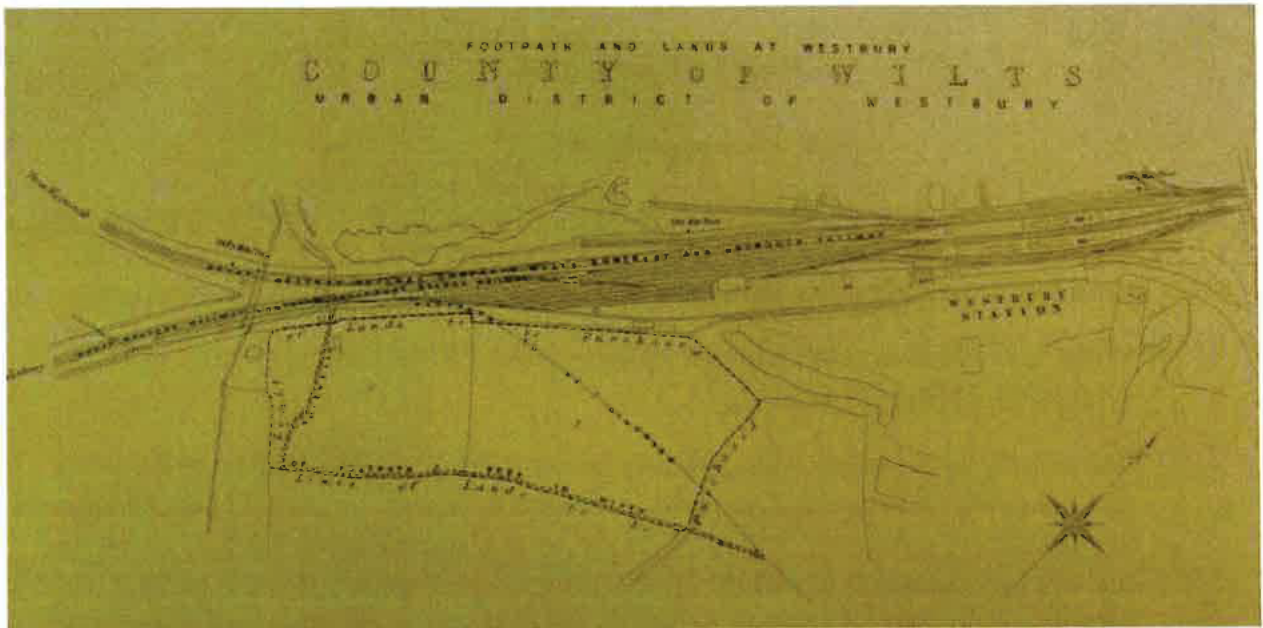
A further line leading eastwards from Westbury Station was authorised by The Great Western Railways (No 1) Act 1894. The deposited plan shows Station Approach already in position but no further evidence relating to footpaths in this area (i.e. the eastern end of the claimed route).

11.17 **The Construction of the Engine Shed**

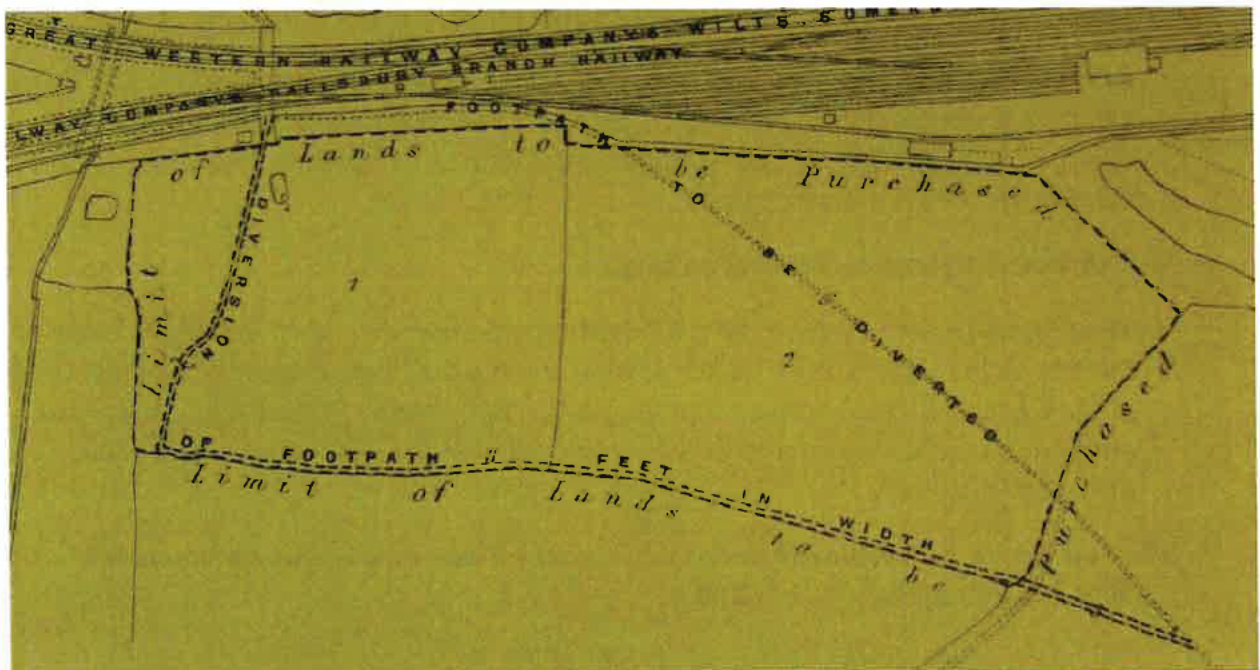
The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot and in 1904 a schedule and plans were deposited with the Clerk of the Peace with the intention that application be made to Parliament in their 1905 session to purchase land and divert public rights of way in a number of locations including Westbury.

11.18 **Great Western Railway (Additional Powers) Plans and Sections November 1904** (WSHC cat ref. A1/371/166).

The plans identifies land to be purchased at Pill, Bishopsworth and Westbury:



The plan clearly shows the line of the historic footpath (Brook Footway) to be diverted to a path around the perimeter of the proposed site:



The line of the claimed route is not shown.

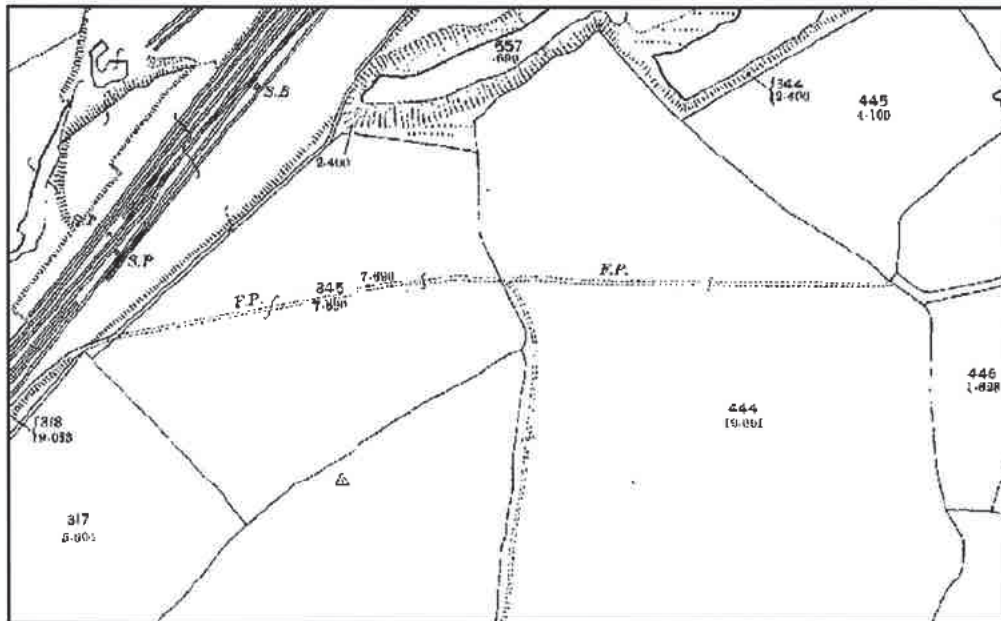
11.19 The application for additional powers extends to the Company (Great Western Railway) "with reference to new Railway Widening, Deviations and Alterations of Existing and Authorised Railways, Bridges and other Works, Roads, Footpaths and Lands in the Counties of Berks, Northampton, Oxford, Devon, Cornwall... Wilts..."

11.20 Application is made:

*"In the County of Wilts –*

*Certain lands in the parish and urban district of Westbury lying on and adjoining the south-eastern side of the Salisbury branch railway of the Company, and at and near to the junction of that branch railway with the Wilts, Somerset and Weymouth railway of the Company, and to empower the Company to stop up and extinguish all rights of way over the said lands, and in lieu thereof to make and maintain a new footpath crossing the Company's said railways at or near the said junction at the south-eastern boundary of the Company's property and terminating by a junction with the footpath intersecting the western and eastern boundaries of the field or enclosure No. 444 on the 25 inch Ordnance Map (2<sup>nd</sup> Edition 1901) of the said parish at a point 4 chains or thereabouts, east of the western boundary of the said field or enclosure."*

Extract from the Ordnance Map 2<sup>nd</sup> Edition 1901 showing enclosure No. 444:



11.21 It is known that the Engine Shed was built (drawings related to the construction have been obtained from the National Railways Museum at York and will be discussed later in this report) by 1915.

**11.22 Westbury Avoiding Line**

Further additions to the railway network in this area occurred in the 1929/1930 with the construction of the Westbury Avoiding Line. Records relating to this have been viewed (WSHC Cat no. A1 371/173 MS 1929 and F1/500/2MS 1930).

11.23 **The Great Western Railway Act 1930** is entitled "An Act for conferring further powers upon the Great Western Railway Company in respect of their own undertaking and upon that company and the London Midland and Scottish Railway Company in respect of an undertaking in which they are jointly interested and for other purposes." The Act addresses the construction of new railway lines, 1 deviation and 2 subways. The new railway in Westbury is referred to as Railway No. 2:

*" A railway (no.2) 2 miles 2 furlongs and 4 chains in length wholly in the county of Wilts commencing in the parish of Dilton Marsh in the rural district of Westbury and Whorwellsdown by a junction with the Company's Wilts Somerset and Weymouth Railway and terminating in the parish and urban district of Westbury by a junction with the Company's Stert and Westbury Railway:"*

11.24 A number of alterations to the rights of way network are provided for on page 25, s.20(4) – for the protection of Westbury Urban District Council:

*"(4) The council consent so far as their rights and interests are affected to the following provisions:*

*(a) Upon the Company providing a right of way along the southern boundary of the said Railway No. 2 between the points marked A and B on the plan signed by Raymond Carpmael on behalf of the Company and William Reginald Campbell Laverton on behalf of the Council (in this section referred to as "the signed plan") all rights of way over so much of the two footpaths shown coloured brown on the signed plan as lies between the points A and C and D and E respectively marked thereon shall be extinguished;*

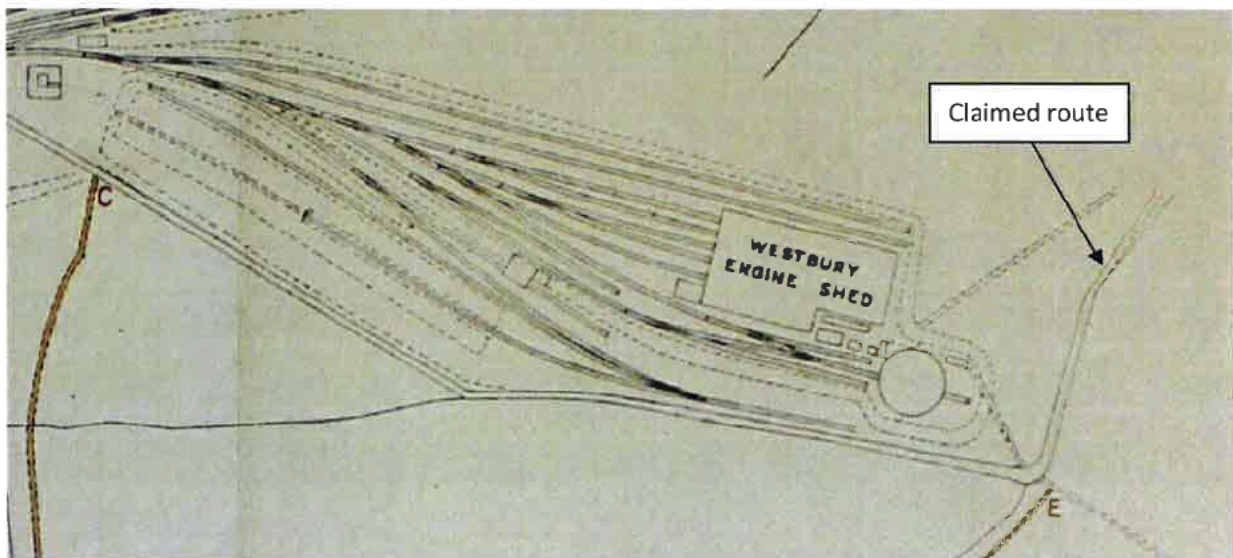
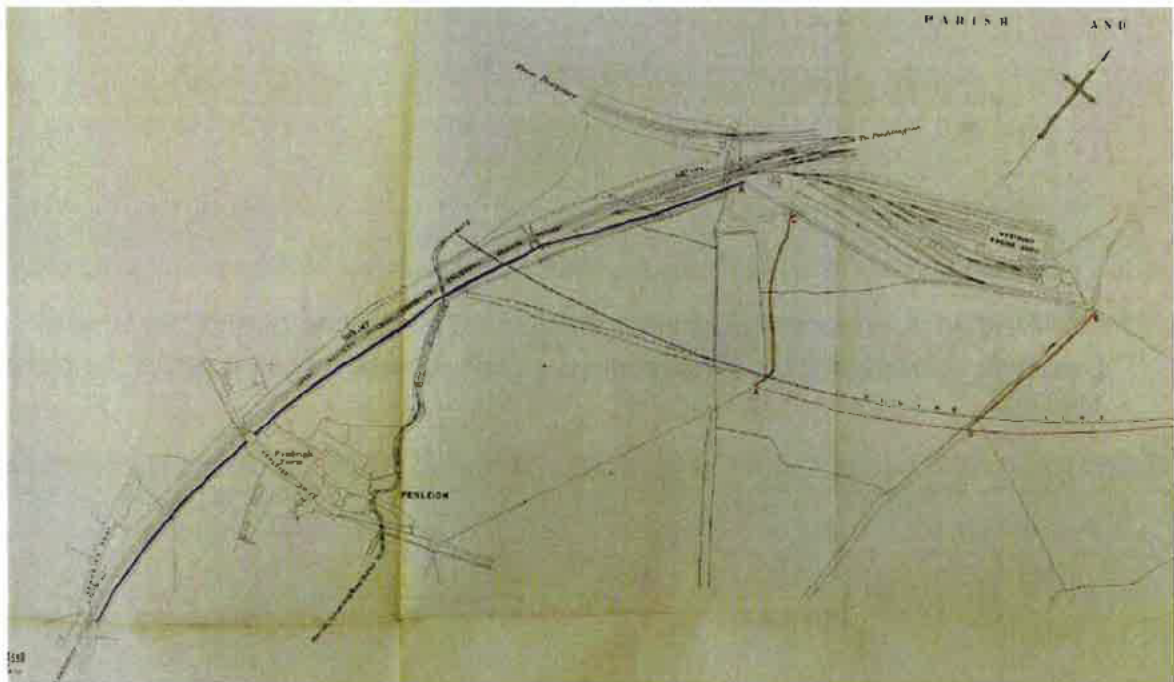
*(b) Upon the Company providing a right of way along the southern boundary of the said Railway No. 2 between the points F and G marked on the signed plan all rights coloured red on the signed plan as lies between the points G and H marked thereon shall be extinguished;*

*(c) Upon the commencement by the Company of the construction of the said Railway No. 2 all rights of way over the footpath shown coloured blue on the signed plan shall be extinguished;*

*(d) The Company shall provide a subway under the said Railway No. 2 in the enclosure numbered on the said deposited plans 52 in the said parish and urban district at or near the point J on the signed plan such subway to be constructed with a span of not less than six feet and with a headway of not less than eight feet. Upon the completion of the said subway the Company may divert the footpath shown coloured green on the signed plan to such extent as may be reasonably necessary so that the same shall pass through the said subway and thereupon all rights of way over so much of the existing footpath as lies between the respective points of commencement and termination of such diversion shall be extinguished;*

*(e) From and after the construction of the said Railway No. 2 the public shall have the right to use the footpath on the Company's property passing along the eastern side of the Company's Salisbury Branch Railway and coloured purple on the signed plan between Penleigh Road and the point X marked on the said plan and the said Railway No. 2 by means of a level crossing or footbridge as they may determine:*

11.25 The plan accompanying the Act (WSHC cat. Ref no. 2525/bx10935) clearly shows the changes detailed above. These are reflected in the working copy of the definitive map today. The claimed route is shown as a continuation of the footpath marked in purple to point X (the Penleigh Path – Westbury 60) and footpath Westbury 15 towards the station but is unaffected by the 1930 Act being outside the lines of deviation or area of interest.



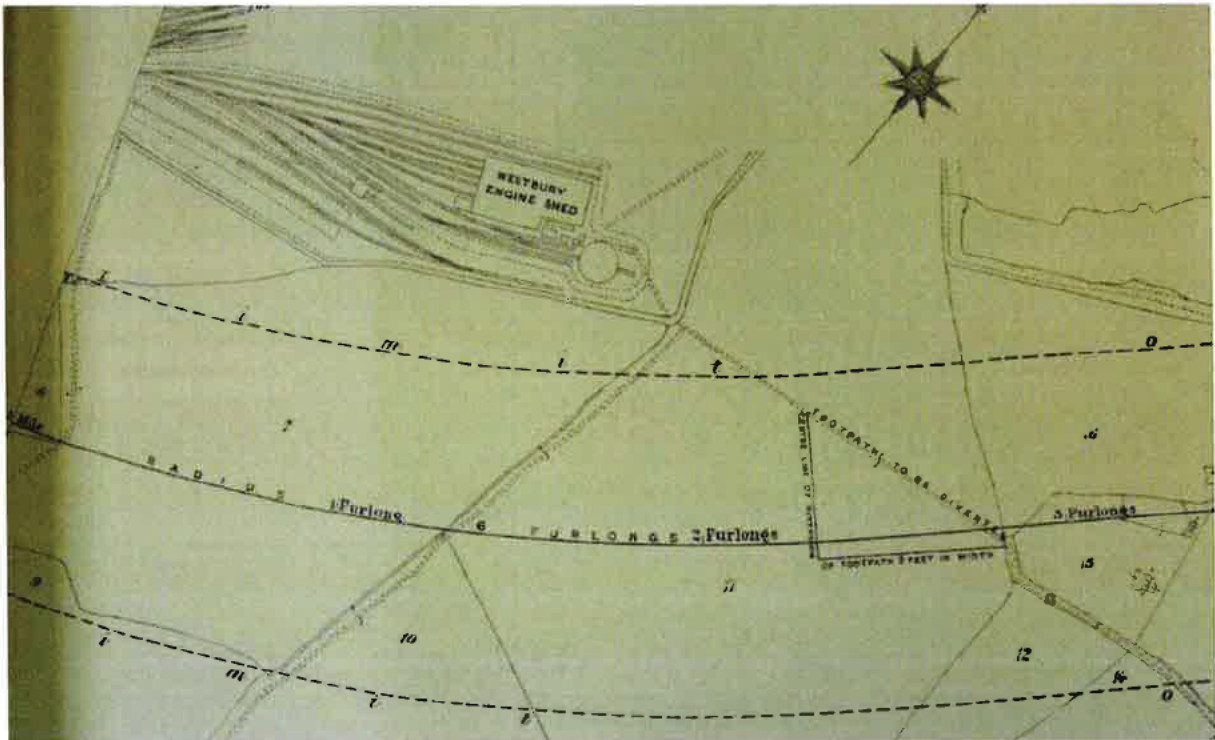


11.26 Deposited Plans for Railway no. 2 WSHC cat ref no. A1/371/173

The plans for the new railway authorised by the above 1930 Act were deposited with the Clerk of the Peace on the 29<sup>th</sup> November 1929 for Parliament to consider in its sessions of 1930. An overview plan clearly shows the line of the 'avoidance line' in red:



11.27 The detailed plan shows the claimed route and Engine Shed outside the Limit of Deviation. However, the claimed route is clearly represented as a part of the path network:



### 11.28 Category B Evidence

This category includes documents, maps plans drawn up as a result of legislation, consulted upon (i.e. in the public domain), but whose primary purpose was not to record public rights. i.e. the records of the Tithe Commission or the Inland Revenue.

### 11.29 Westbury Tithe Survey 1840 WSHC Cat ref no. TAWestbury

The purpose of the Tithe Survey was to survey lands that were liable to tithes and to commute these tithes (where a percentage of the products of the land were taken by the Church) to money payments or rent charges. This was enabled by the Tithe Commutation Act of 1836.

11.30 The Westbury Tithe Survey plan and apportionment document have been stamped as being received by the Tithe Commissioners on October 15<sup>th</sup> 1842. The survey pre-dates the railway. The purpose of the survey was to identify and catalogue land, specifically with a view to identifying land that was in agricultural production (since land that wasn't – i.e. houses or roads – was exempt from tithes). The Westbury tithe map records roads coloured sienna and un-numbered (so free from tithe) and it is possible to identify the road to Brook Mill and Sopps Lane (now Oldfield Road). However, no footpaths or bridleways are shown.

11.31 In the book entitled The Tithe Maps of England and Wales, Roger Kain and Richard Oliver record that the Westbury Tithe map shows a range of features (including foot and bridleways) that are not apparent on the copy held at the Wiltshire and Swindon History Centre. The maps inspected and described by Mssrs Kain and Oliver are the record copy plans held at The National Archive at Kew and may show greater refinement (though they would be expected to be copies of the essential information). In any event, the award of the Brook Foot Way at inclosure in 1808 and its recognition in the deposited plans associated with the railway provide compelling evidence for the existence of this footpath notwithstanding its apparent omission from the tithe map. A footpath leading across agricultural land is unlikely to have had an effect on the productivity of the land and omissions may well have been deliberate as their presence was irrelevant to the purposes of the Act.



**11.32 Inland Revenue Finance Act 1909/1910 records** WSHC Cat ref. No. L8.10.44

As a result of the Finance Act 1909/1910 the Inland Revenue conducted a valuation survey of all property for the purposes of imposing a tax on any increased value at the time of its subsequent sale. The Act proved unpopular and was substantively altered by repeal in 1920, however, the detailed survey of property remains as a record made at the time. Surveyors used Ordnance Survey maps as base maps (usually 1:2500 County Series maps revised in around 1899) and by use of colour detailed who owned what parcels of land or hereditaments.

11.33 The owners of land were able to claim exemptions from the tax for public rights of way (amongst other things) and public roads in the control of the highway authority were also exempt. Accordingly these records can be useful in rights of way cases.

11.34 All of the land affected by this application is shown coloured pink as part of hereditament 281. 281 includes the railway line and the station and comprises that land that forms the public undertaking that is the railway. No detail or annotation regarding the claimed route is shown.

**11.35 Category C Evidence**

These records relate to the reputation of a route as a public right of way and include local government records (highway board, County Council, Parish Council).

**11.36 Westbury Urban District Council Minutes 1901 – 1909** WSHC Cat. No. G17/283/2

**07 December 1904 – Surveyors' report**

*"GWR Plans – I have examined the parliamentary plans deposited at the Clerk's Office by the G.W. Railway Company, The boundary line shown as limit of land to be acquired by the Company encloses two public footpaths. One of these paths from Brook House to Penleigh is not shown to be interfered with. The other footpath from Station Road to Dilton Marsh is shown as proposed to be diverted. The diversion at one end is at the point where the order path referred to crosses the railway and extends towards the Station Road a distance of 1400 feet, in an easterly direction. To replace this path one is provided at the south boundary of the land acquired, 3 feet wide and inside the G.W. R. limit from the point at 1400 feet from the Railway a distance of 1400 feet about to intersect the path first referred to, at a point 500 feet from the crossing where diversion commences.*

*The alteration thus makes a difference of 500 feet in the length of the path from Station Road to Dilton Marsh and Bremeridge. This extra distance by which the other path from Penleigh House to Station Road is shortened.*

*I can find no reason why the Council should oppose the action of the G.W.R. company."*

11.37 A copy of the Deposited Plan referred to can be seen below:



11.38 The claimed route is not shown. The underlying plan shows a path leading on the south side of the tracks which would, theoretically, permit access through from Dilton Marsh to the station (this path is also shown on early – pre 1922 – OS County Series maps) but no mention is made of this and it is unaffected by the proposed land purchase. It however clear that the path diverted to the west and south replaces the historic Brook Mill footpath across the site.

11.39 An earlier reference to Station Road Footpath was found (dated 02.10.1901) but this related to a path “on the Station Road” and referred to a grant from the County Council to lay asphalt on the Station Road. It is considered more likely than not that this refers to the existing highway that forms Station Road and is maintainable at public expense.

#### 11.40 **Category D Evidence**

This category includes other maps and documents showing highways additional to or as a part of their purpose. Includes parish maps, estate plans or conveyances.

#### 11.41 **Great Western Railway Records**

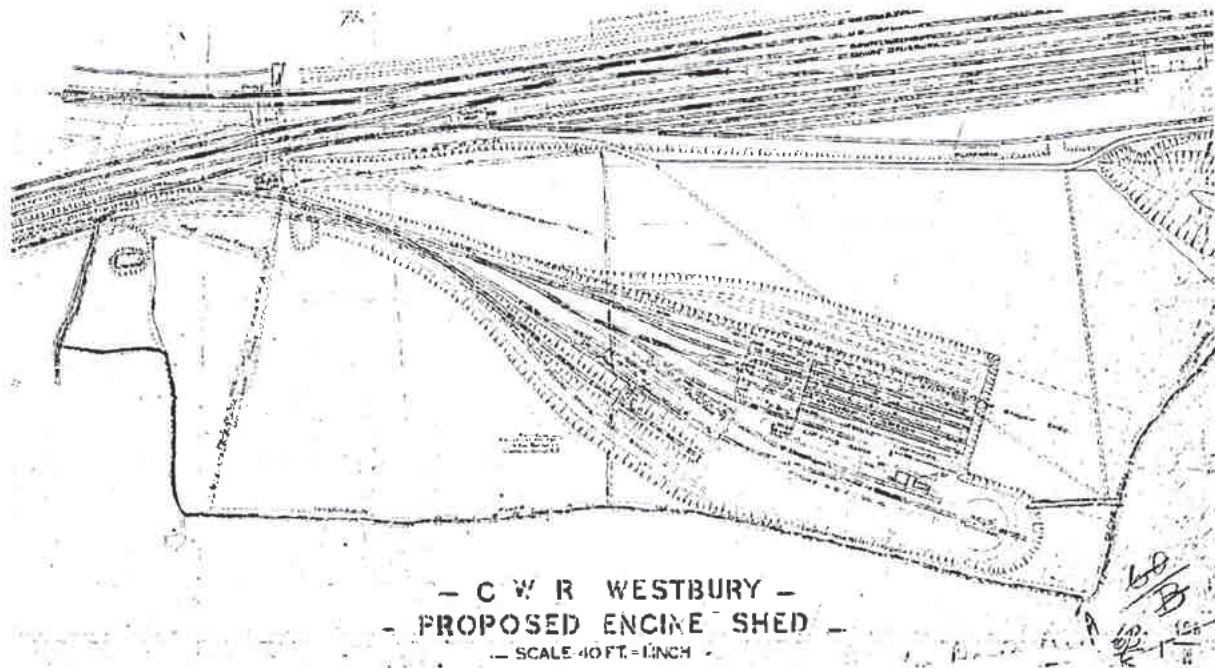
Documents that have been archived by Great Western Railway have been sourced from the Wiltshire and Swindon History Centre (General cat. No 2515) and the National Railway Museum at York.

#### 11.42 **G W R Westbury Proposed Engine Shed Plan** National Railway Museum 24079

The plan is labelled “Drawing No. 1” and is drawn at the scale of 40 feet to one inch. It shows the area developed for the Engine Shed and includes considerable detail relating to the development including detail relating to an “Unclimbable Fence”

around the development separating it from the footpath labelled "Diversion of Footpath" and bounded for some of its length on the side furthest from the Engine Shed by a "Post and Wire" fence.

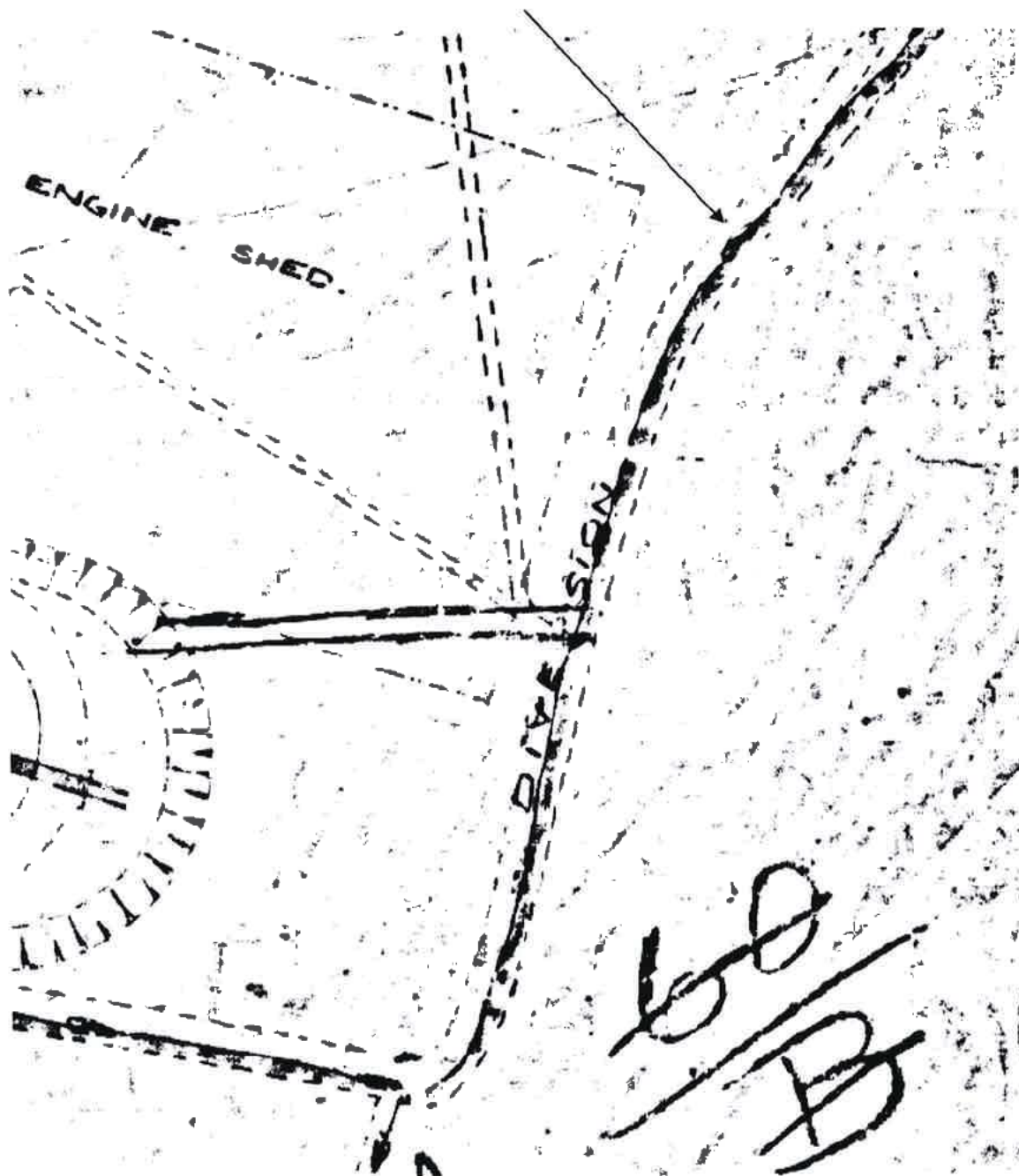
11.43 This plan shows the claimed footpath as part of the proposed diversions and the claimed route is labelled "Diversion of.." the words 'footpath' presumably appearing on the next sheet which has not been accessed.



The southern section of diverted footpath is marked:



11.44 The claimed route is shown as below:



11.44 The plan, insofar as the path network is concerned, reflects the network as built and not as represented on the 1904 Deposited Plan. It accords well with R J Cogswell's account of the development taking place.

11.45 **G. W. R. 2 Chain Survey 1933** WSHC Cat. No. 2515 250/452

This record is a highly detailed colour survey of the station and surrounds. It is a leather bound book containing a large scale plan and is entitled:

*G.W.R. – Westbury Station & Avoiding Line – 2 – Chain Survey 1933. Vol. 216 (Part 1.)*

It contains a memo:

*“GREAT WESTERN RAILWAY – MEMO to be affixed to each of the new Surveys.*

*This Plan is kept by the Heads of Departments for their own use only. It is not to be produced nor is any part of it to be copied for the information of Owners of adjoining property or others.*

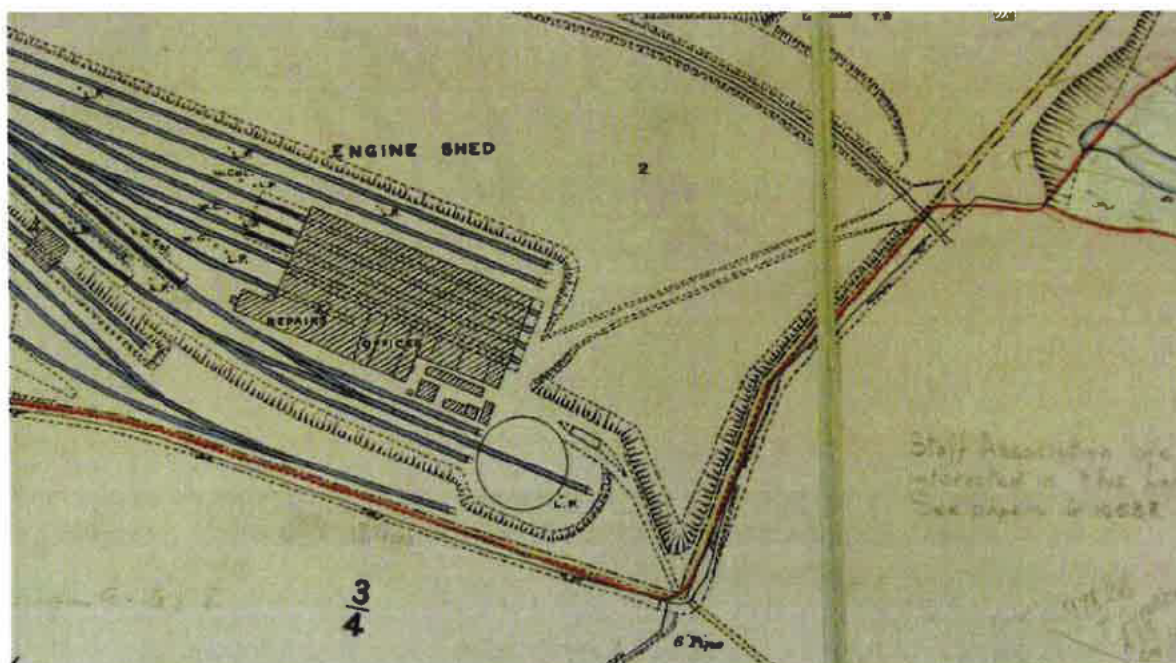
*Care has been taken to make the Plan as accurate as possible, but there is reason to doubt whether it can in all cases be relied upon.*

*If cases should arise as to the rights or title of the Company, the Plans to the Title Deeds must alone be relied upon to supply the necessary information.*

*F.R.E> Davis, Secretary February 1934.”*

It also contains a note: *“Rights of Way Con<sup>ce</sup> dated 28.7.1932...”*

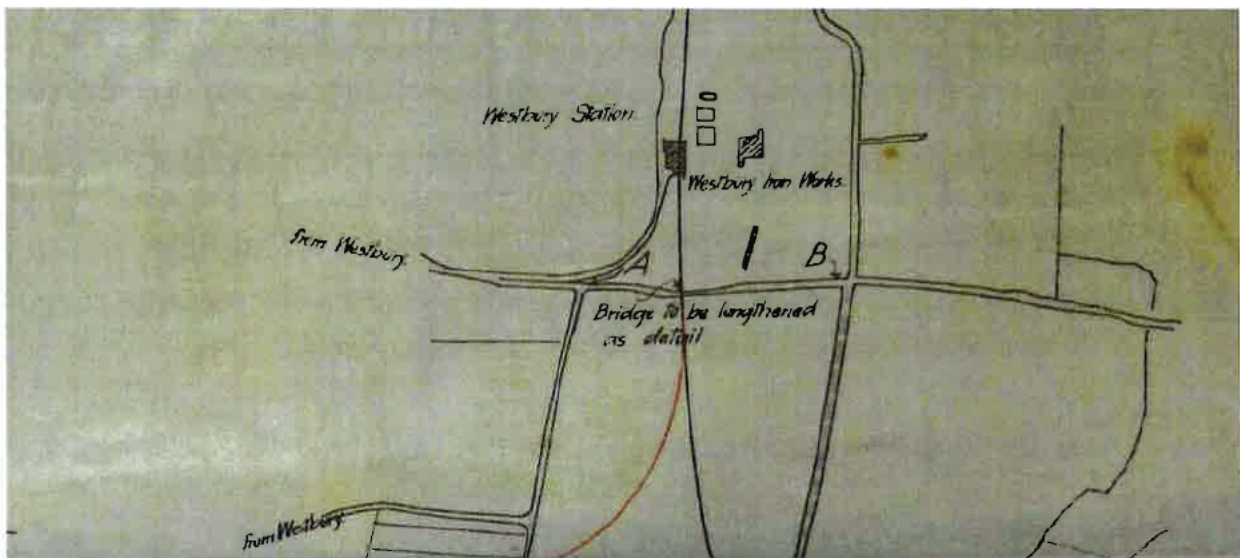
11.46 The claimed route is shown coloured sienna in the same manner as the footpath network.





**11.47 Plans for Proposed Reconstruction and Lengthening of Bridge over Railway at Westbury Station WSHC Cat. No. 1219/18**

These plans are not dated however the overview plan shows the area around Station Approach. The claimed route (in respect of that section leading from Station Approach to station Road for pedestrian use) is not shown. It is possible that the bridge reconstruction works coincided with the provision of this additional access but this is not known. It is noted that the plans show Westbury Iron Works so it is assumed that they date from the 1930s or earlier.



**11.48 W. S. & W Westbury to Salisbury Plan c.1844 WSHC Cat. No 1780/26**

This plan shows the lands to be purchased for the original railway. It is drawn at the scale of 4 chains to one inch by R Tarr and shows the land around the station "Station Ground" and surrounding fields. Roads are shown coloured sienna and the



footpath from Brook Mill leading over the proposed line (diverted when the Engine Shed was built) is shown but not labelled.

#### 11.49 Category E Evidence

This category of evidence includes commercial maps and plans including those of the Ordnance Survey.

#### Ordnance Survey 1:2500 County Series mapping 1884 - 1939

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. Sheets 44.7 and 44.8 cover the applicant route. 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".

11.50 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."

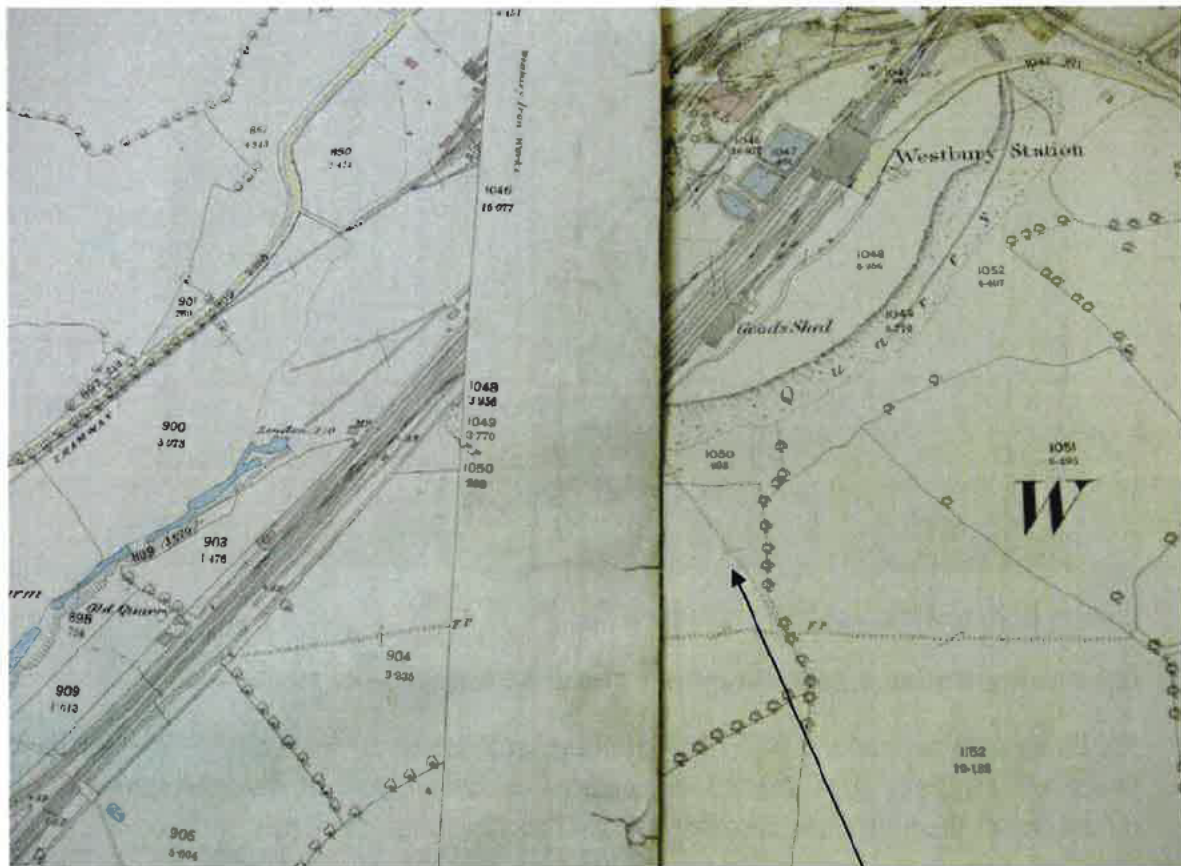
11.51 Ordnance Survey maps from 1888, although presenting an accurate representation of the landscape and its features do carry a disclaimer to the effect that the representation of any road or track is no evidence of a public right of way.

11.52 However, surveyors were instructed to represent Footpaths with the letters F.P. and in his book *Ordnance Survey Maps a concise guide for historians* Richard Oliver states:

*"From 1883 onwards footpaths were shown by F.P., 'the object of...F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic'. (SC, 16.2:83).*

*In 1893 it was specified that "all footpaths over which there is a well known and undisputed public right of way' were to be shown and also 'private footpaths through fields (but not in gardens)...if they are of a permanent character.....Mere convenience footpaths for the use of a household, cottage or farm or for the temporary use of workmen should not be shown.."*

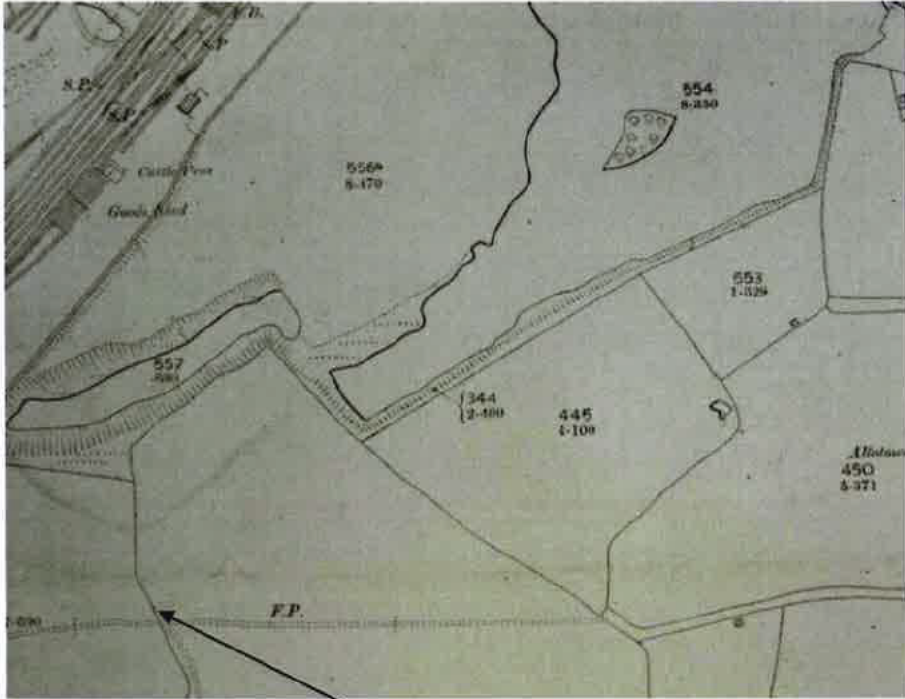
**11.53 OS County Series 1:2500 Sheets 44.7 and 44.8 1884 survey**



At the time of the survey a path extending north from the Brook Mill to Sopps Lane (awarded footpath) footpath is shown leading to the Station. The Southern intersection with the Brook Mill path is coincident with the claimed footpath though its line leads over the footprint of the land enclosed for the Engine Shed development some 20 years later.

**11.54 OS County Series 1:2500 Sheet 44.8 Second Edition (revised 1899)**

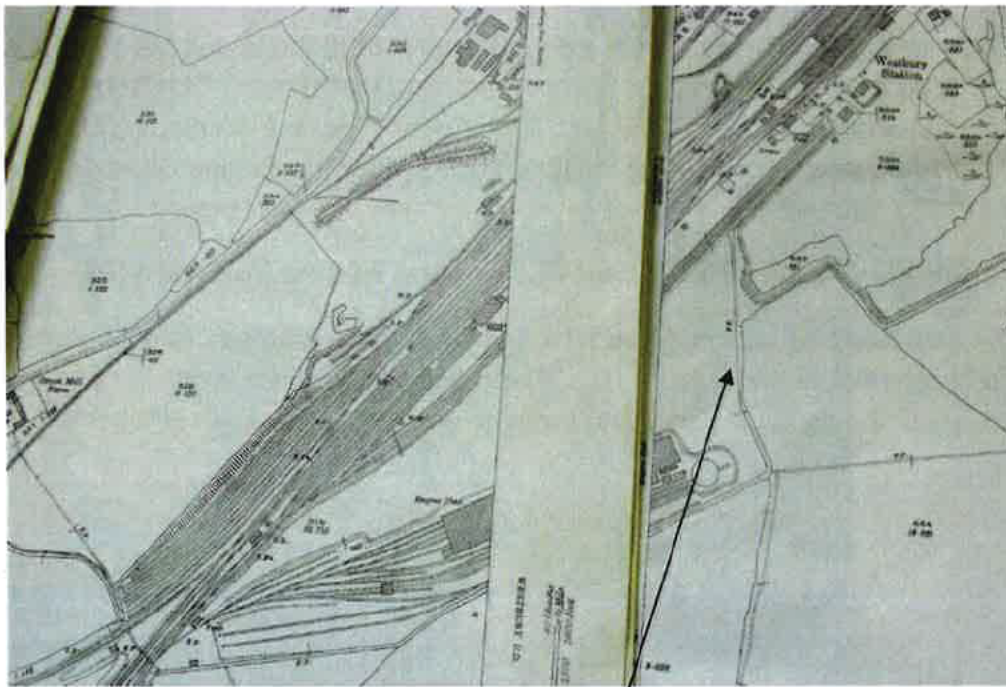
The map had been revised and no longer shows the footpath leading north through the quarry and to the Station. The shape of the quarry has also altered, however, the line of the Brook Mill footpath remains unaltered and again is recorded as "F.P.".



Line of path revised not to be shown.

**11.55 OS County Series 1:2500 Sheets 44.7 and 44.8 Edition of 1924**

This map was revised in 1922. The claimed route is shown marked F.P. as well as Brook Mill footpath. The Brook Mill footpath is shown largely as diverted (there is a difference in the line at the western end) in the 1904 deposited plans.

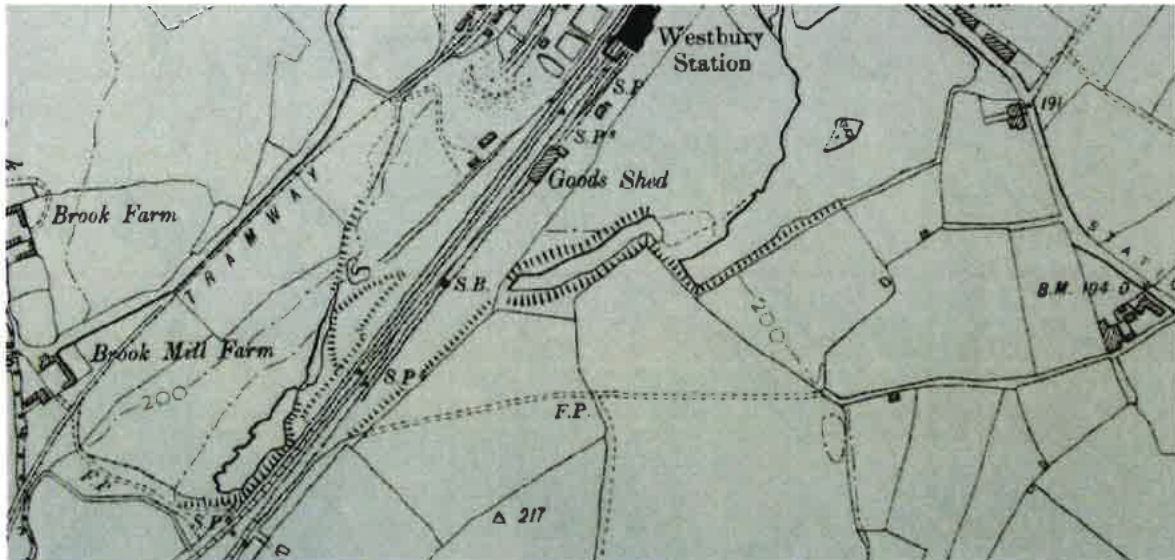


Claimed route

11.56 OS County Series 1:10560 Sheet 44

Although derived from the 1:2500 survey these plans are useful as they show the area on one map sheet making the effect of the Engine Shed on the area very clear:

1901 Edition

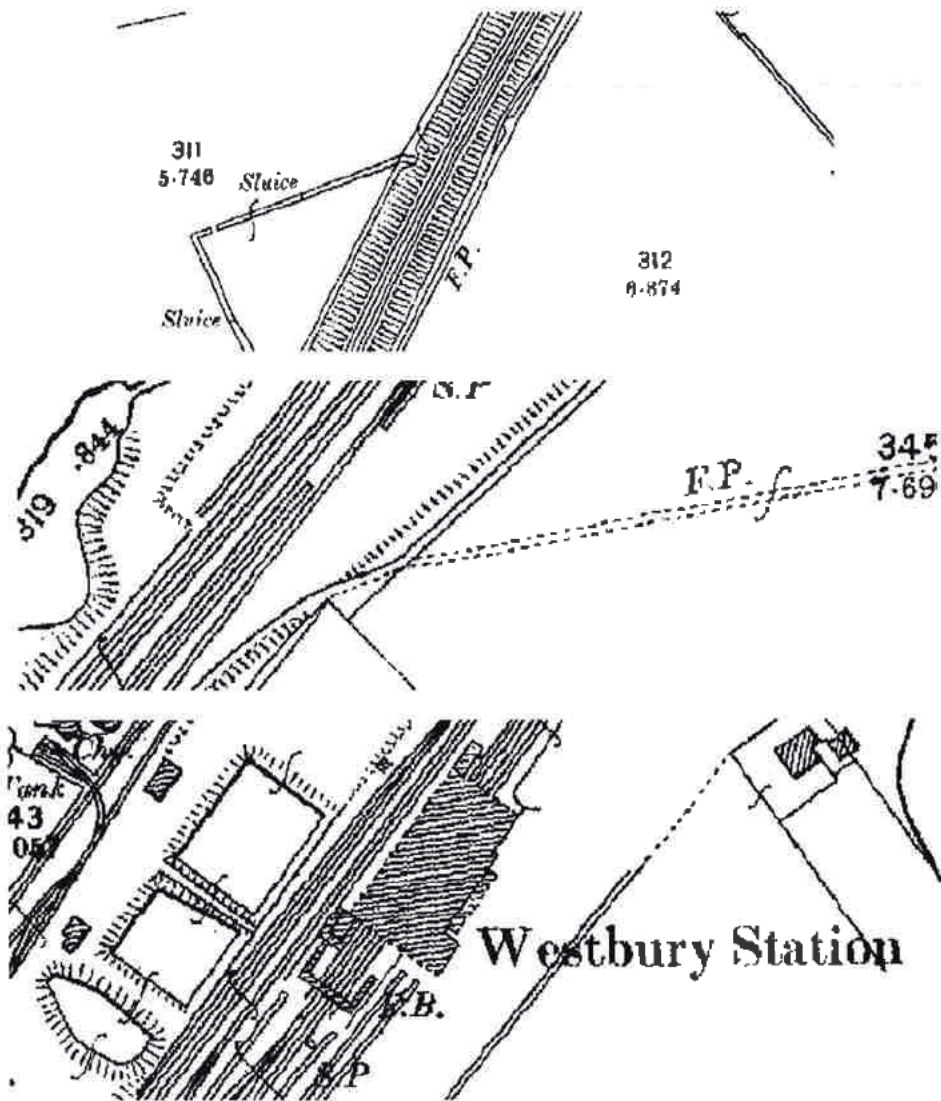


1926 Edition

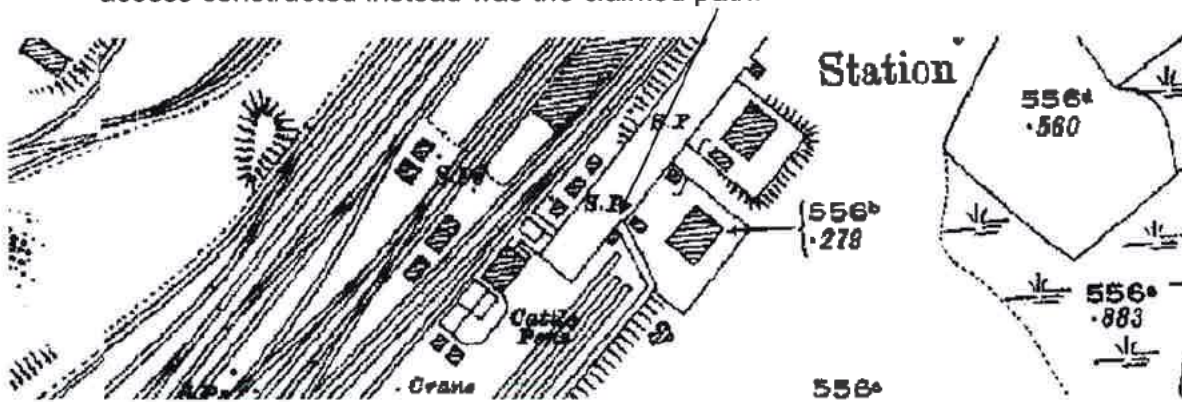


Claimed path

11.57 It is clear from OS maps that pre-date the Engine Shed that a footpath (marked 'F.P.') existed along the southern side of the tracks, mapping shows that it would have been possible to walk from Dilton Marsh to Penleigh via Penleigh Lane and then north on a fenced path to Westbury Station. NB Dilton Halt was not open until 1937.



It is noted however that the label "F.P." does not extend beyond the Brook Mill footpath even though, according to the mapping, the route onwards was possible. It is noted that this route was not longer possible after the Engine Shed was built, the access constructed instead was the claimed path:



11.58 Ordnance Survey mapping therefore supports other evidence viewed. i.e. that the claimed route was only created when the Engine Shed was built (believed to have been finished in 1915). Although it appears likely that a fenced path existed to the south side of the tracks before this time it is known that no footpath existed in this direction before the railway was built and further, Ordnance Survey mapping cannot provide direct evidence of public use.

#### 11.59 **Category F Evidence – User evidence**

The application adduced 13 User Evidence Forms demonstrating use from 1936 to 2017. Of these 8 people had used the full route from Station Road past the station and onto Westbury path no. 15 south of the Engine Shed (i.e. use as a through route) and 5 people had used only that section between Westbury path no. 15 and the station. All believed their use to have been 'as of right' (that is without force, secrecy or permission) and none had been stopped or challenged until the bund and fence were erected across the path. A summary of the user evidence is appended at **APPENDIX B**.

#### 11.60 Comments included:

1. 1989 – 2016 *"...it has since been used on a regular basis by those living in Dilton Marsh and Westbury Leigh to get to Westbury Station to catch the train as well as the railway workers using it."*
2. 1936 – 1990s *"First used as a child "to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937."*
3. 1956 – 2016 *"I have cousins older than myself who have used the path."*
4. 1975 – 2016 *"Information passed on by local residents, some of them are in their eighties, confirm that the route has been used as long ago as the 1950s and 1960s in continuous fashion."*
5. 2002 – 2016 *"The nearest alternative for pedestrians is Station road which is a much longer route from the Oldfield Park Estate and wider Westbury."*
6. 1997 – 2017 *"Access along Station Road is possible though hazardous on foot under the railway bridge."*
7. 1971 – 2016 *"It is useful for residents of Dilton Marsh and Westbury Leigh to be able to walk to Westbury Station on this route in order to catch a train. This is necessary because many trains do not stop at Dilton Marsh halt."*
8. 1990 – 2016 *"As well as providing the most direct pedestrian route...this route (in conjunction) with the Cinder Track is of considerable historic importance with its strong links to Westbury's railway and industrial heritage."*

9. 1981 – 2001 *"In BR days and Railtrack and Network Rail the civil engineers used to maintain the footpath (cinder track)."*
10. 1950s to 2000s *"I have always believed the path was railway property."*
11. 1970 – 2016 *" I believe the route provides a useful shortcut...it is a more pleasant, varied and safer walking route than by road."*
12. 1972 – 2017 *" I understand that historically the "cinder track" was constructed to allow railway and other workers to walk to work. It came into use by the general public."*
13. 1987 – 1997 *"My impression is that the footpath ran from Penleigh through to Westbury Station (why else would it exist) and the roadway...was constructed over the line of the footpath."*

## **12 Consideration of the Evidence – Legal Empowerment**

- 12.1 Historical evidence may be considered by virtue of s.32 of the Highways Act 1980:

### **Highways Act 1980 Section 32 Evidence of dedication of way as highway**

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

- 12.2 Evidence of use may be considered under common law (i.e. where the landowner and has made an act of dedication or behaved in such a manner as to imply such an act and the public have accepted it by use) or by statute law (Section 31 of the Highways Act 1981).

### **Highways Act 1980 Section 31 Dedication of way as highway presumed after public use of 20 years**

*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 any 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 of 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 have 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 or statutory purposes to dedicate a way over the land as a highway if the existence of a highway would be incompatible with those purposes.*

NB The Growth and Infrastructure Act 2013 brought about alterations to s.31(6) extending the length of time that a deposit remains valid for from 10 years to 20 years.

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*).

12.3 The land over which the claimed route passes is affected by the **British Transport Commission Act 1949**.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.*

### 13 Consideration of the Evidence

The evidence has been tabulated according to evidential weight as follows:

Category of Evidence	Document	What it shows	Evidence of public rights over claimed route
A	Westbury Inclosure Award 1808	Public footway awarded (Brook Footway), now footpath Westbury 15	None
A	Railway Plans A1/371/41 MS 1845	Brook Footway recorded	None
A	Railway Plans A1/371/36 and 68 1844	Crossing at the level for Brook Footway	None
A	Railway Plans A1/371/112 1894	Station Approach shown.	None
A	Railway Plans A1/371/166 1904 Relates to new engine shed	Diversion of Brook Footway shown. Claimed route not shown.	None
A	Railway Plans A1 371/173 MS 1929 and F1/500/2MS Westbury avoiding line. The Great Western Railway Act 1930	The Act allows the diversion of footpaths to the south of the Engine Shed. The claimed route is shown joining the public rights of way network but unaffected by the Act.	Evidence of existence of southern part of path joining the public rights of way network.
B	Westbury Tithe Survey 1840	No footways or paths shown in the area of interest (Brook Footway omitted)	None
B	Inland Revenue Finance Act 1909/1910	Land shown as part of the railway hereditament.	None
C	Westbury Urban District Council Minutes 1904 G17/283/2	No objection made to the plans to divert as a result of the 1904 deposited plans to build the engine shed. Diversion plan of Brook Footway as the 1904 Act.	None
D	GWR records National Railway Museum Drawing no 1 – engine shed	Plan of new engine shed shows claimed route with words “Diversion of...” alongside (text ends at page end). Other routes say “Diversion of footpath”.	Claimed route is shown as a diversion. Path joins footpath network.
D	GWR records 2 Chain survey 1933 WSHC 2515 250/452	Southern part of claimed route shown coloured sienna. Joining public footpaths also coloured sienna.	Coloured in the same way as public footpath network.

Category of Evidence	Document	What it shows	Evidence of public rights over claimed route
E	OS 1:2500 1884	Footpaths shown ("F.P") no engine shed. Path shown leading to the station from the south.	None (evidence of a path leading to the station from the south)
E	OS 1:2500 1924	Engine shed shown. Claimed route shown and marked F.P.	Claimed route shown and marked "F.P"
E	OS 1:10560 1926	Engine shed shown. Claimed route shown and marked F.P.	Claimed route shown and marked "F.P"
F	User evidence	Evidence of public use and repute from 1936 to 1990s.	One user pre 1949 Two users from the 1950s recall knowing of earlier use
F	R J Cogswell book	Recalls Engine Shed being built. Claimed route described as "an existing GWR owned footpath from the station to Dilton Marsh and long known as Penleigh Footpath was diverted across the, by then, filled in end of the Station Minehole to the kissing gate opposite to the pedestrian's entrance to the new depot.	Penleigh Footpath is likely to be path shown on pre-Engine Shed OS on GWR land. Diversion refers to claimed route (as is the only route linking Dilton Marsh with the station).

Consideration has been given to the following:

- i) Is the path a historic public right of way (pre-dating the railway) that has not been recorded in the definitive map?
- ii) If not, when was the path physically created?
- iii) Were public rights acquired over it prior to 1949?
- iv) Have, on the balance of probability, public rights been acquired over it post 1949?

**13.1 i) Is the path a historic public right of way?**

The claimed path was not awarded to the public as a footpath at the time of enclosure though the adjoining path, Brook Footway (now partially Westbury 15), was. The claimed path has not been recorded on any maps, plans or documents until the Engine Shed was proposed (between 1904 and 1915).

13.2 The claimed path did not pre-date the railway (1845) and did not pre-date the Engine Shed (1915).

**13.3 ii) When was the path physically created?**

The claimed path was created when the Engine Shed was built. This is evidenced by the eye witness account of R J Cogswell in his book 'Westbury Ironworks', by a G.W.R. plan for the 'proposed engine shed' and from Ordnance Survey mapping revised in 1922 from an 1899 revision. Some evidence exists that the path was surfaced by G. W. R. and maintained in more recent times by British Rail, Railtrack and Network Rail. The date of construction of the path is taken as 1915, the date on which the Engine Shed was completed though R J Cogswell recalls seeing the path being built a little earlier.

**13.4 iii) Were public rights acquired over it prior to 1949?**

Owing to the provisions of section 57 of the British Transport Commission Act 1949 no right of way by prescription or use can be acquired over land in the Commission's ownership where it forms an access or approach to any station or depot.

*57. As from the passing of this Act no right of way as against the Commission shall be acquired by presecrption or user over any road footpath or thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods yard wharf garage or depot or any dock or harbour premises of the Commission.*

13.5 The claimed route from both the south (Dilton Marsh) and the north (Station Road) have been used as access routes to the station. The route from the north is entitled "Station Approach" and although it is questionable whether the route to the station from the south was intended to be an access route to the station (since it is now closed to the public) it has, *de facto*, been used for this purpose and this is supported by evidence submitted in support of the application.

13.6 If the provisions of s.57 of the British Transport Commission Act 1949 are held to apply for the entire route it is necessary to consider whether public rights were acquired prior to 1949.

13.7 Section 16 of the Railway Clauses Consolidation Act 1845 permits any railway company to make any road or way as they think proper for the utilisation of the railway.

**16 Works to be executed.**

Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works; (that is to say,)

They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;

They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;

They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences, as they think proper;

They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and

They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:

Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers.

- 13.8 The question however is, whether the acquisition of public rights over that land was incompatible with the statutory purpose of the railway company. If public use is incompatible then s.31(1) of the Highways Act 1980 must fail. However, where public use is not incompatible with that statutory purpose then a right may be acquired.

**Section 31(1) Highways Act 1980**

*(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.*

- 13.9 In the case of *British Transport Commission v Westmorland County Council; British Transport Commission v Worcestershire County Council* [1957] 2 All ER 353 in the House of Lords it was held that the test whether a statutory corporation (i.e. the British Transport Commission) could validly dedicate to the public a right of way over their land was whether the dedication was compatible with the statutory purposes for which the corporation had acquired the land; the question of incompatibility was one of fact to be determined by a consideration of the probabilities reasonably foreseeable or of the likelihood whether the right of way would interfere with the adequate fulfillment of the statutory purposes.

13.10 Viscount Simmons in his leading judgement said:

*“Any examination of this question must begin with R v Inhabitants of Leake ((1883), 5 B & Ad 469), which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J in that case (ibid., at p 478):*

*“If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power.*

*Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though on one hand it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?”*

13.11 It is considered that the use of the land by the public on foot did not interfere with the statutory purpose of the railway (on the contrary it augmented it) and that public rights could have been acquired over it for the period 1915 to 1949 notwithstanding any other action to prevent it occurring.

13.12 There is some relevant evidence for this period. A G.W.R. drawing for the proposed engine shed describes it as a Footpath (though not a Public Footpath) and shows it connected to the public rights of way network with the word “diversion” on it. G.W.R. drawings produced as a “2 Chain Survey” in 1933 record the path as connecting to the public rights of way network in the same way as the track plan and proposed engine shed plan.

13.13 R J Cogswell describes the path in the period 1905 – 1915 as being:

*“...the arrangements made were that the lane – now Oldfield Road – and the path from its end across another field were surfaced with rolled-in fly ash and the stiles replaced by kissing gates made wide enough for bicycles to be wheeled through. Elsewhere a GWR owned footpath from the station to Dilton Marsh and long known as Penleigh Footpath, was diverted across the, by then, filled-in end of the Station Minehole to the kissing gate opposite to the pedestrians’ entrance to the new depot. From there it continued on round to the old level crossing for Brook Mill.”*

Underlining added to emphasise the reference to the claimed route.

- 13.14 Mrs P Harvey gave evidence of having used the route in the 1930s as a child “to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937.” Users from the 1950s both give evidence that suggests use before that time “I have cousins older than myself who have used the path” and “ I have always believed the path was railway property”.
- 13.15 It is a fact that since 1904 the land over which the path leads has been “railway property” (i.e. G.W.R., British Transport Commission, Rail Track and Network Rail).

#### **14.0 Legal and Financial Considerations**

- 14.1 The determination of Definitive Map Modification Orders (DMMOs) and the continual review of the definitive map are statutory processes for which financial provision has been made. In determining applications for DMMOs the Council is acting in pursuit of its statutory duty and cannot be challenged in so doing (subject to due process being followed).
- 14.2 If an order is made and advertised and no objections are forthcoming the Council will not incur any further costs beyond advertising the confirmation of the order. If the order attracts objections that are not withdrawn it must be forwarded to the Secretary of State for determination. It may be determined by written representations (no additional cost to the Council), a local hearing (additional costs to the Council in the region of £300) or a public inquiry (additional costs to the Council in the region of £4000).
- 14.3 If an order is not made and the application is refused, the applicant has a right to appeal to the Secretary of State for Environment, Food and Rural Affairs within 28 days of notification. If the appeal is upheld Wiltshire Council will be directed to make an order.

#### **15.0 Risk Assessment**

- 15.1 Section 53 of the Wildlife and Countryside Act 1981 (WCA 81) does not provide for consideration of issues relating to health and safety. These have been raised by D B Cargo UK Ltd who lease part of the claimed route, however, these concerns are not relevant to the recording of the route though would be likely to be considered for the management of the route in the event it was recorded as a public right of way.
- 15.2 The Council is the surveying authority for the County of Wiltshire (excluding the Borough of Swindon) and has a duty to keep the definitive map and statement under continual review (s.53(2)(b) WCA 81). There is therefore no risk associated with the Council pursuing this duty correctly.

15.3 If the Council fails to pursue this duty in this case it is liable to complaints being submitted through the Council's internal procedure leading to the Ombudsman. Ultimately a request for judicial review could be made.

#### **16.0 Environmental Impact of the Recommendation**

16.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to the environment.

#### **17.0 Equality Impact**

17.1 The character of the route will not alter with the making of an order to record the way as a public footpath. The legal right to pass and repass over the entire width will be protected which will ensure that obstructions and encroachments may be removed by Order of the Council. This could lead to greater accessibility.

#### **18.0 Safeguarding Considerations**

18.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to safeguarding.

18.2 It is however noted that there are no considerations arising.

#### **19.0 Public Health Considerations**

19.1 Section 53 of the Wildlife and Countryside Act 1981 does not provide for consideration of issues relating to public health.

#### **20.0 Relationship to the Council's Business Plan**

20.1 Consideration of the Council's Business Plan is not relevant to the application of s.53 of the Wildlife and Countryside Act 1981. However, Wiltshire Council is committed to working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

#### **21.0 Options to Consider**

- i) To make an Order to modify the definitive map and statement to show the claimed route as a public footpath
- ii) To make an Order to modify the definitive map and statement to show part of the claimed route as a public footpath
- iii) To refuse the application for an Order

#### **22.0 Reason for Recommendation**

Section 53(3)(b) requires that on the balance of probability a presumption is raised that the public have enjoyed a public right of way over the land for a set period of



time. However, where historical evidence is considered the provisions of s.53(3)(c)(i) apply.

- 22.1 Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. This section allows for the consideration of common law and the inclusion of historical evidence and is the more commonly used section. It offers a two tier approach to the evaluation of the evidence with a lower bar set to make an Order ('a reasonable allegation') than to confirm one ('on the balance of probabilities').
- 22.2 In considering the evidence under section 53(3)(c)(i) there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw*(1994) 68P & CR 402 (*Bagshaw*):
- Test A: Does a right of way subsist on the balance of probabilities? This requires the authority to be satisfied that there is clear evidence in favour of public rights and no credible evidence to the contrary.
- Test B: Is it reasonable to allege that on the balance of probabilities a right of way subsists? If the evidence in support of the claimed paths is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the authority should find that a public right of way has been reasonably alleged.
- 22.3 To confirm the Order, a stronger test needs to be applied; that is, essentially that contained within Test A. In *Todd and Bradley v SoSEFRA* [2004] EWHC 1450 (*Admin*). Evans-Lombe J found that the appropriate test for confirmation is the normal civil burden of proof that such a way subsists on the balance of probabilities.
- 22.4 Test B is the weaker test and only requires that on the balance of probabilities it is reasonably alleged that public rights subsist. This allegation may only be defeated at the order making stage by incontrovertible evidence.
- 22.5 Officers consider there are two key considerations here.
- i) Was it legally possible for the public to acquire a right over the land?
  - ii) Is there a sufficiency of evidence to establish public use in a manner that was 'as of right'?
- 22.6 The landowner (Network Rail) relies on Section 57 of the 1949 British Transport Commission Act (the 1949 Act) to re-but the claim for public rights. This applies to land held after 1949 and to a route that forms an access or approach to any station or depot.

- 22.7 The northern leg of the claimed route (Westbury Station to Station Road) is the main access route to the station and is called "Station Approach". It is very clear that this section of the path is affected by Section 57 of the 1949 Act. It is also clear that the route has always been "Station Approach" and as such has provided access for the services of the railway at the invitation of the railway. Such use would be 'by right' and not 'as of right'. Neither statutory or common law dedication can occur under these circumstances.
- 22.8 There is clearly incontrovertible evidence that a public right cannot have been acquired over Station Approach. The situation with the section south from the station to Westbury 15 is less clear and relies on whether the route was provided as an access route for the public or whether public use was an act of trespass.
- 22.9 The southern leg of the claimed route (past the Engine Shed to the Station) has been used as an access route to the station but not named as such or signposted and promoted as such. As an access route to the station or the depot it is affected by Section 57 of the 1949 Act and public rights cannot be acquired post 1949.
- 22.10 Officers have some evidence of use of this route from 1915 (R J Cogswell), 1936 onwards (1 UEF) and, by repute, prior to the 1950s (2 UEFs). However, it cannot be ignored that when the public rights in this area were proposed to be diverted in the 1904 deposited plans (and again in 1930) the application route was not identified by either G.W.R. or, significantly, the Urban District Council. It was identified as a footpath diversion in the G.W.R. plans for the proposed engine shed (and built as per these plans) but this is not a document of significant evidential weight in the same way Deposited Plans or local authority records are. It may have reflected what was actually built but it does not reflect the public facing document that was the 1904 Act.
- 22.11 If it is accepted that the claimed route is an access route for the station then the application must fail as use cannot have been 'as of right' but by way of licence or permission from the landowner (the railway company) to access its facilities. This is reflected in the powers of the 1949 Act but is a general principle in the same way you would not acquire a public right of way across the forecourt of a shop you were visiting. Use of the path has only been within the period of GWR's (and subsequent railway operators) ownership of the land. The tenant to some of the land (DB Cargo UK) considers public use to have been trespass. If the evidence supported that pre-1949 use was by trespass (i.e. not at the invitation of the railway company to use its premises, perhaps as a through route) then, if there was a sufficiency of evidence, it is considered that a reasonable allegation of public rights could be made.
- 22.12 Officers consider there is an insufficiency of evidence relating to the actual use of the applicant route in the period prior to 1949.
- 22.13 This insufficiency has meant it has been impossible for officers to judge whether the public only used the route for access to the station or as part of a wider walk.

22.14 For Test B (the weaker test) detailed at paragraph 22.2 to apply there must be a sufficiency of evidence to demonstrate to the owner of the land that a right was being asserted against him and was not merely an occasional act of trespass. The Council has before it some evidence of use prior to 1949, however, use at this level would be difficult to recognise as an assertion of a right against an undoubted back drop of GWR staff utilising the pedestrian access to the Engine Shed.

### **23.0 Recommendation**

**That the application for a definitive map modification order to record a public footpath from Westbury 15 along a “cinder track” north to join sidings yard lane (now blocked) along Station Approach to Station Road is refused.**

Sally Madgwick

Rights of Way Officer – Definitive Map

04 April 2018



Sally Madgwick  
 Rights of Way Officer  
 Wiltshire Council  
 Rights of Way & Countryside  
 Waste & Environment  
 County Hall  
 Bythesea Road  
 Trowbridge  
 Wiltshire  
 BA14 8JN



SN1 1BD

Tel

e-mail

Date

14<sup>th</sup> September 2017

By E-Mail &amp; Post

Y:Ref: SM/2017/01/West

Dear Ms Madgwick

**Wildlife & Countryside Act 1981 s53**  
**Application for an Order to Record a Footpath at Westbury in the Definitive Map & Statement**

I refer to my letter dated 11<sup>th</sup> September 2017 and your emailed response of later the same day.

In response to your query regarding the history of the site I can now offer you the following information in support of Network Rail Infrastructure Limited's objection to the above application.

The railway at Westbury was originally constructed under the powers of the Wilts Somerset & Weymouth Railway Act 1845 as amended by the Wilts Somerset & Weymouth (Amendment) Act 1846, both of which Acts incorporated the provisions of the Railways Clauses Consolidation Act 1845.

The plan accompanying the Parliamentary Bill for the 1846 Act (extract enclosed) shows the proposed centreline of the railway running along the alignment of the railway as constructed. The plan also shows the roadway now known as the B3097. I have annexed the referencing details of the roadway and the land over which the claimed route runs on the attachment.

Although the referencing details refer to footpaths, the alignment of these paths is not shown and they are purely referenced in private ownership. The railway line and station was subsequently constructed and opened for public use in 1848.

The Ordnance Survey map surveyed in 1884-85 (extract enclosed), clearly shows the station approach road upon its present day alignment. It does not indicate any way or footpath along the claimed route.

The Great Western Railway (No 1) Act 1894 authorised the construction of a new railway from Stert to Westbury. The Plan deposited with the Parliamentary Bill (extract enclosed), shows the roadway leading to the station in situ but offers no indication of any footpaths running through the site.

The claimed route running parallel to the B3097 would pass through enclosure 96 and/or 97 the referencing details of which are annexed to the plan.

The Great Western Railway Act 1899 authorised the purchase of additional lands at the site of the depot. Whilst not showing the station approach road the plan accompanying the Parliamentary Bill (extract enclosed) shows the lands in question to be purchased, the referencing details of which are annexed to the plan.

The 1899-1900 and 1902 Ordnance Surveys offer no additional information to the earlier surveys with no obvious footpaths along the claimed route. It also does not yet show the depot constructed.

The Great Western Railway (Additional Powers) Act 1905 authorised the purchase of additional lands at and near to the station. The plan accompanying the Bill (extract enclosed) includes land over which the claimed route is made. The referencing details are annexed to the plan.

You will note that this is the first reference to any footpaths in this vicinity which come under the auspices of the Local Authority indicating public status.

You will also note that the plan is annotated as having the footpath running through enclosure 2 being diverted to run through enclosure 1. Section 53 of the Act authorised the stopping up and diversion of this

footpath. The diverted footpath appears to follow the part of the route shown on the plan accompanying the application and annotated West 15.

I further attach a copy of Ordnance Survey plans from 1922. This plan shows the engine shed having been constructed upon the lands purchased under the 1905 Act. The plan clearly shows an annotated footpath network substantially similar to the path annotated West 15 on your plan. It is significant however that the way running along the claimed route is not similarly annotated.

The Great Western Railway Act 1930 authorised the construction of the Westbury Avoiding Line. The Plan accompanying the Parliamentary Bill shows the area of lands authorised for purchase (extract enclosed) through which the claimed route runs. The plan also shows the intended further diversion of the footpath running through the site which again is substantially similar to the route take by West 15. There is no footpath shown running along the claimed route. Both the claimed route and the diverted footpath would both fall within enclosure 11 the referencing details of which I have annexed to the extract plan.

Finally I attach a copy of the Ordnance Survey of 1941 which is substantially similar to that of 1922 and offers no further evidence backing the claim of a right of way.

On the basis of all of this information it evident that the claimed route was constructed part as access to the original railway station in 1848 and to serve the depot as the site developed over the years. Therefore Network Rail will rely upon the previously stated Section 57 of the British Transport Commission Act 1949 to defeat this claim.

I trust the above narrative and enclosures are sufficient for your purposes. Please do not hesitate to contact me further should you require any further information.

Yours sincerely,

  
Chris Smith  
Liability Negotiations Manager

*Western Route – A history of innovation, a future of opportunity*

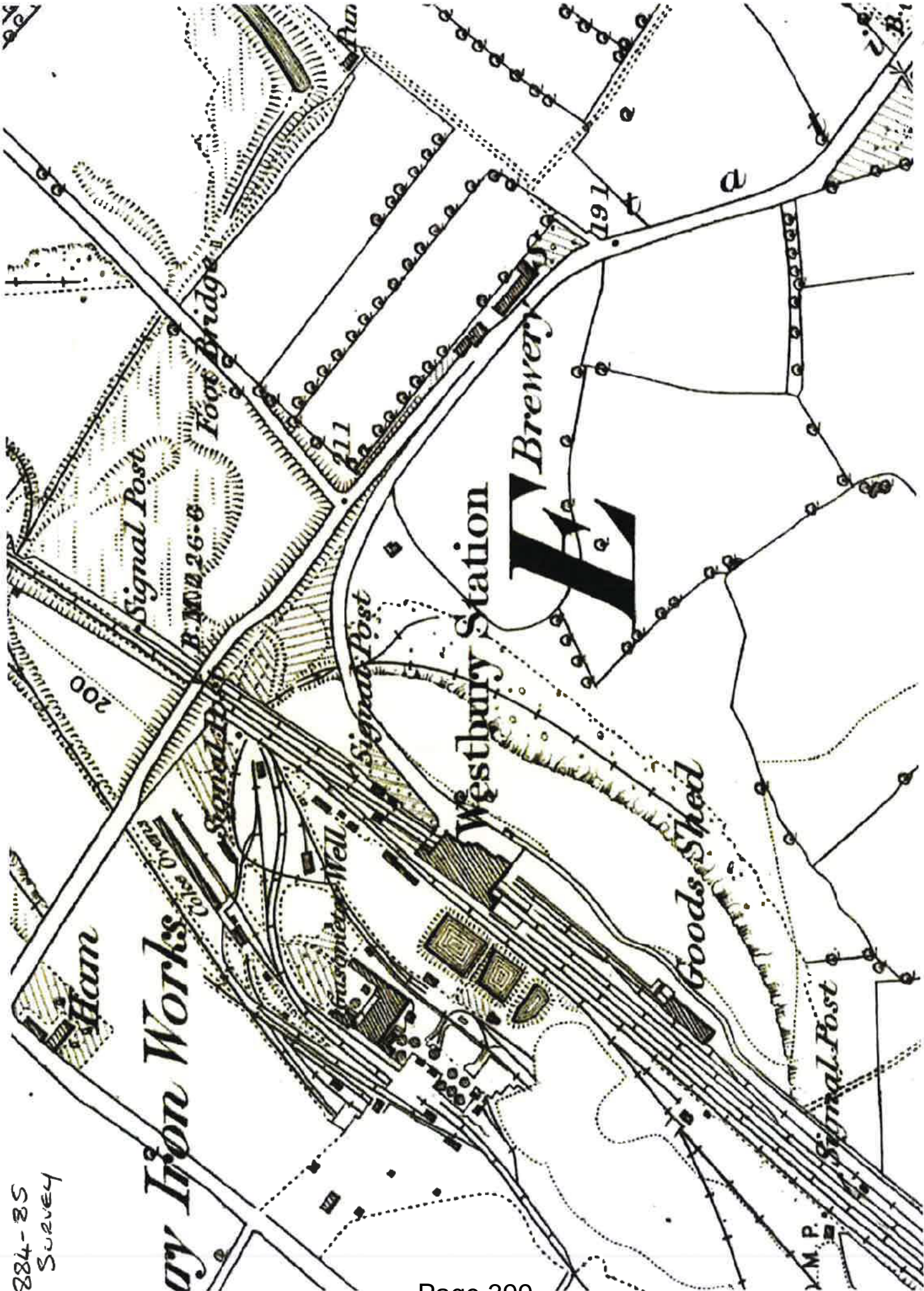
**Our Safety Vision - Everyone home safe, every day**



1846 Act



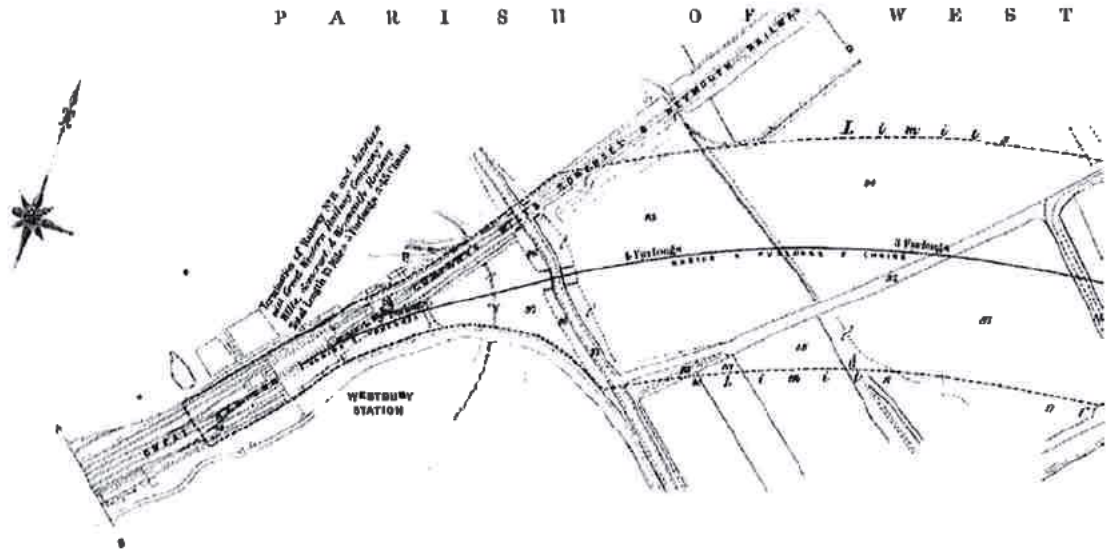
Enc No	Description	Owner	Lessee	Occupier
247	Pasture & footpath	William Beckett Turner	-----	John Owen
248	Pasture	Henry Gaisford Gibbs Ludlow	-----	William Bourne
250	Arable & Footpath	Reverend John Hooper	-----	John Bull
253	Parish Road	The Waywardens	-----	-----



1884-85  
Survey

1894 ACT

P A R T I I I O F W E S T

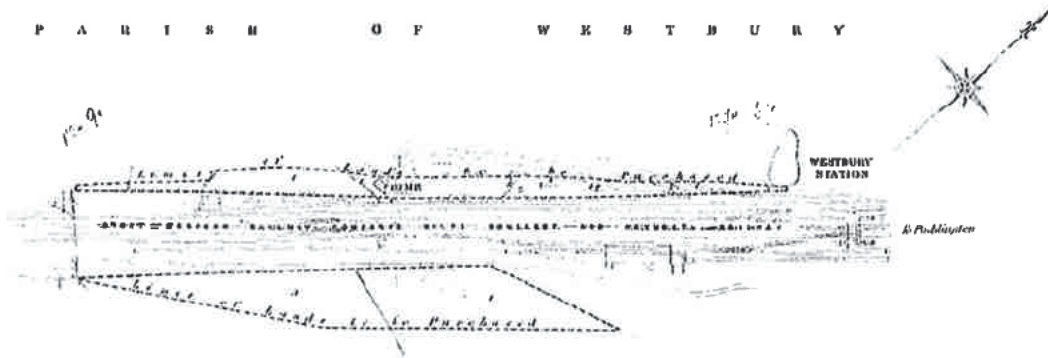


GRADIENTS OF EXISTING GREAT WESTERN RAILWAY COMPANY'S WILTS, SOMERSET & WEY

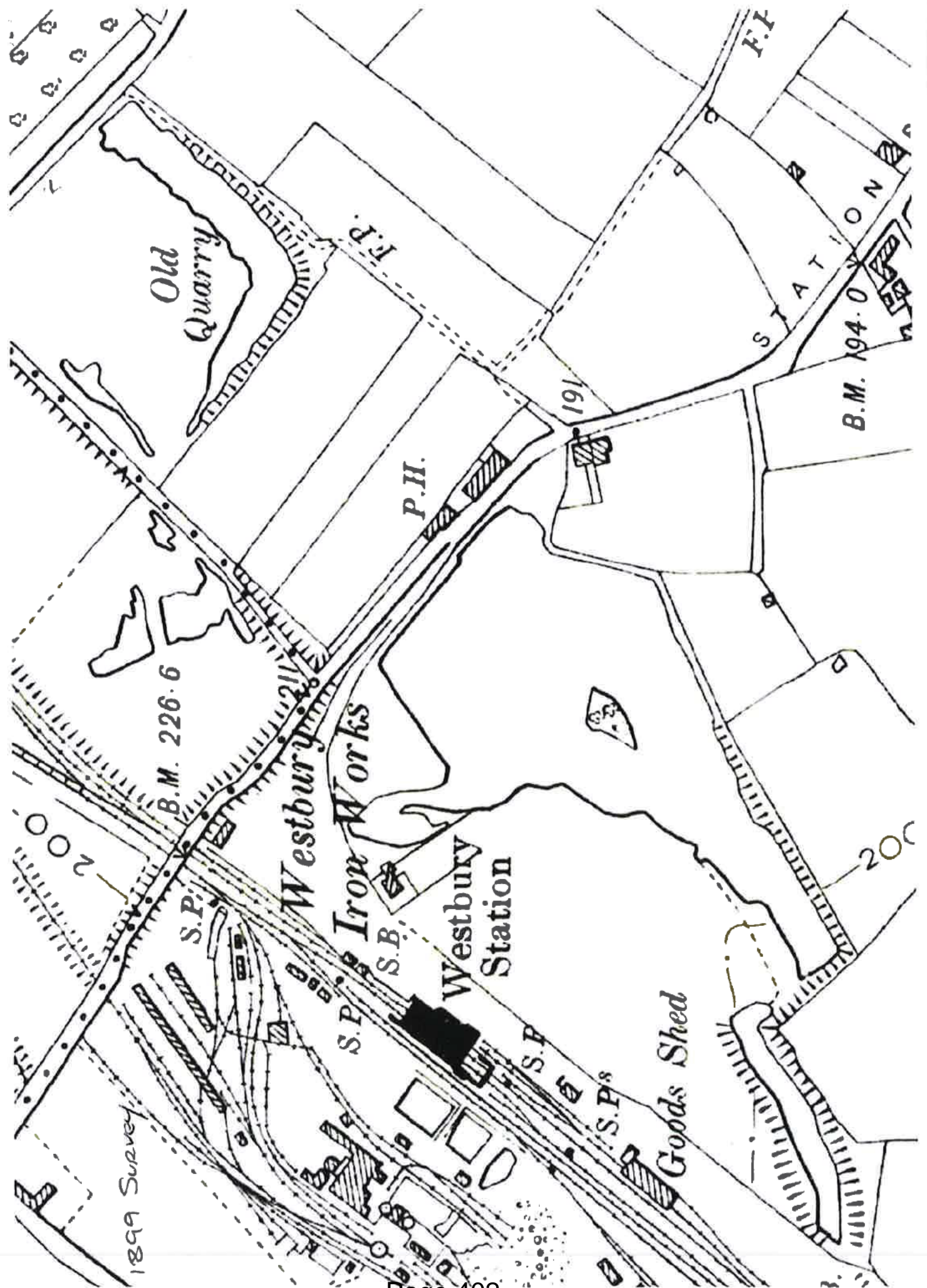
Enc No	Description	Owner	Lessee	Occupier
96	Embankment	Great Western Railway	-----	In Hand
97	Rough Land, Garden Ground, Road, Tramway, Telegraph Posts, Wires and Embankment	Great Western Railway	-----	Great Western Railway, Westbury Iron Company Limited & Charles Harris, Postmaster General

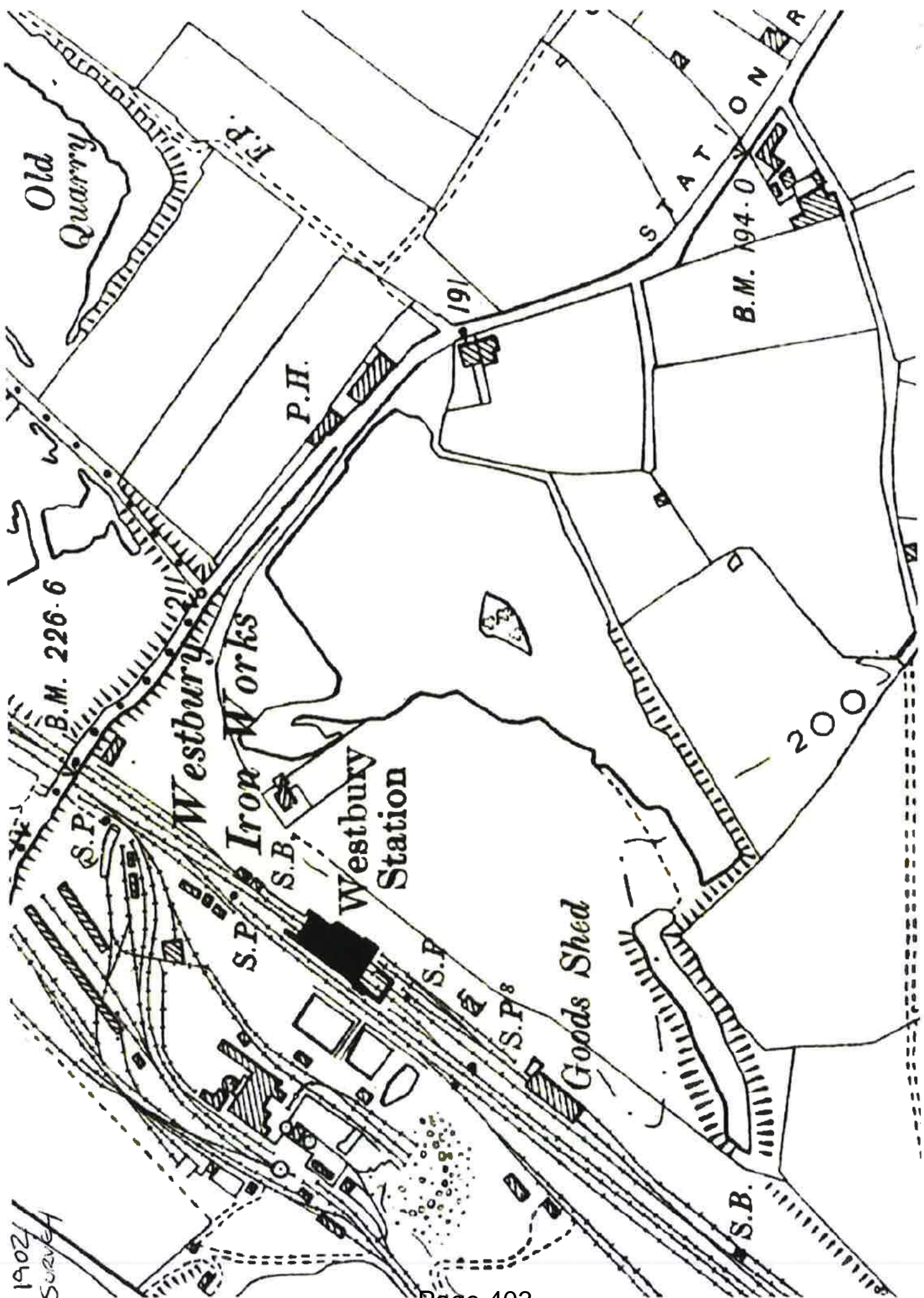


P A R I S H O F W E S T B U R Y



Enc No	Description	Owner	Lessee	Occupier
3	Field	Trustees of the will of the late Caroline Marie Vere Unwin Clarke	Westbury Iron Company Limited Alfred Ledbury	Alfred Ledbury
4	Field, Rough Ground & allotment Gardens	Trustees of the will of the late Caroline Marie Vere Unwin Clarke	Westbury Iron Company Limited Alfred Ledbury	Alfred Ledbury



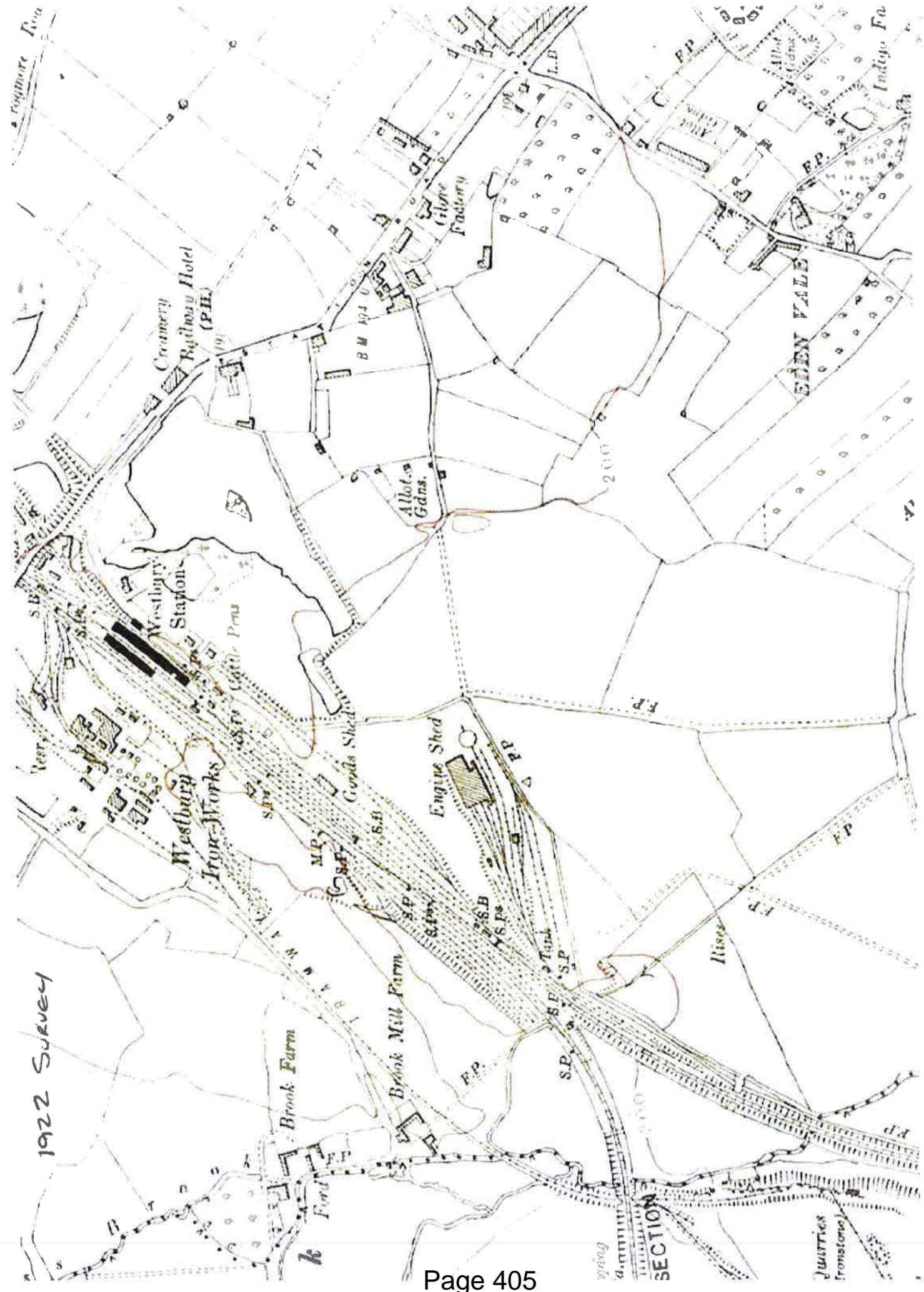


1902  
Surveyed

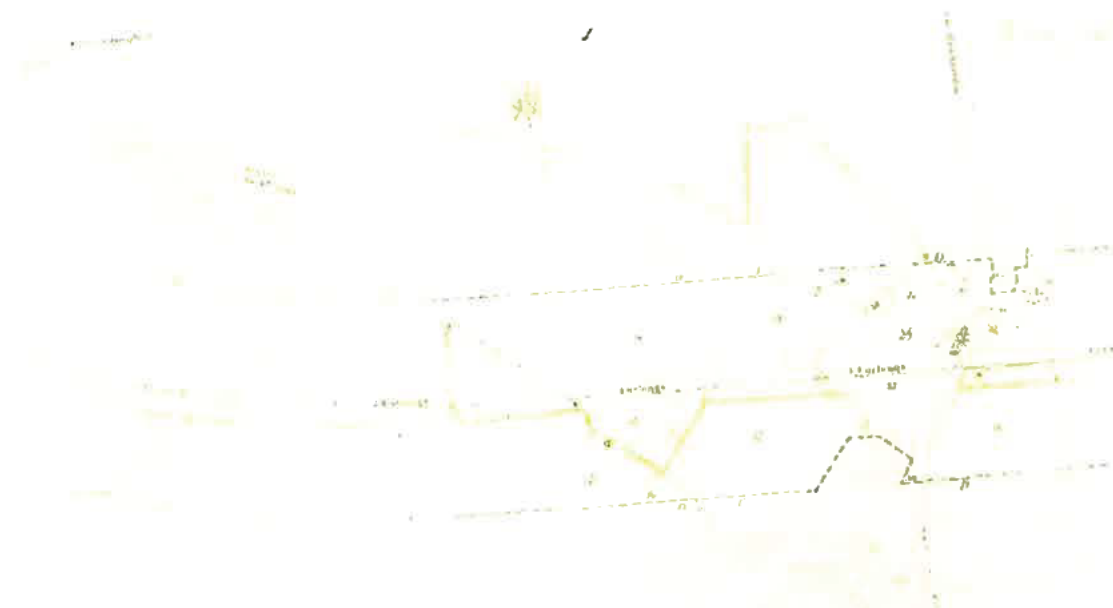
UNWIN CLARKE COMPANIES LIMITED OF WESTBURY



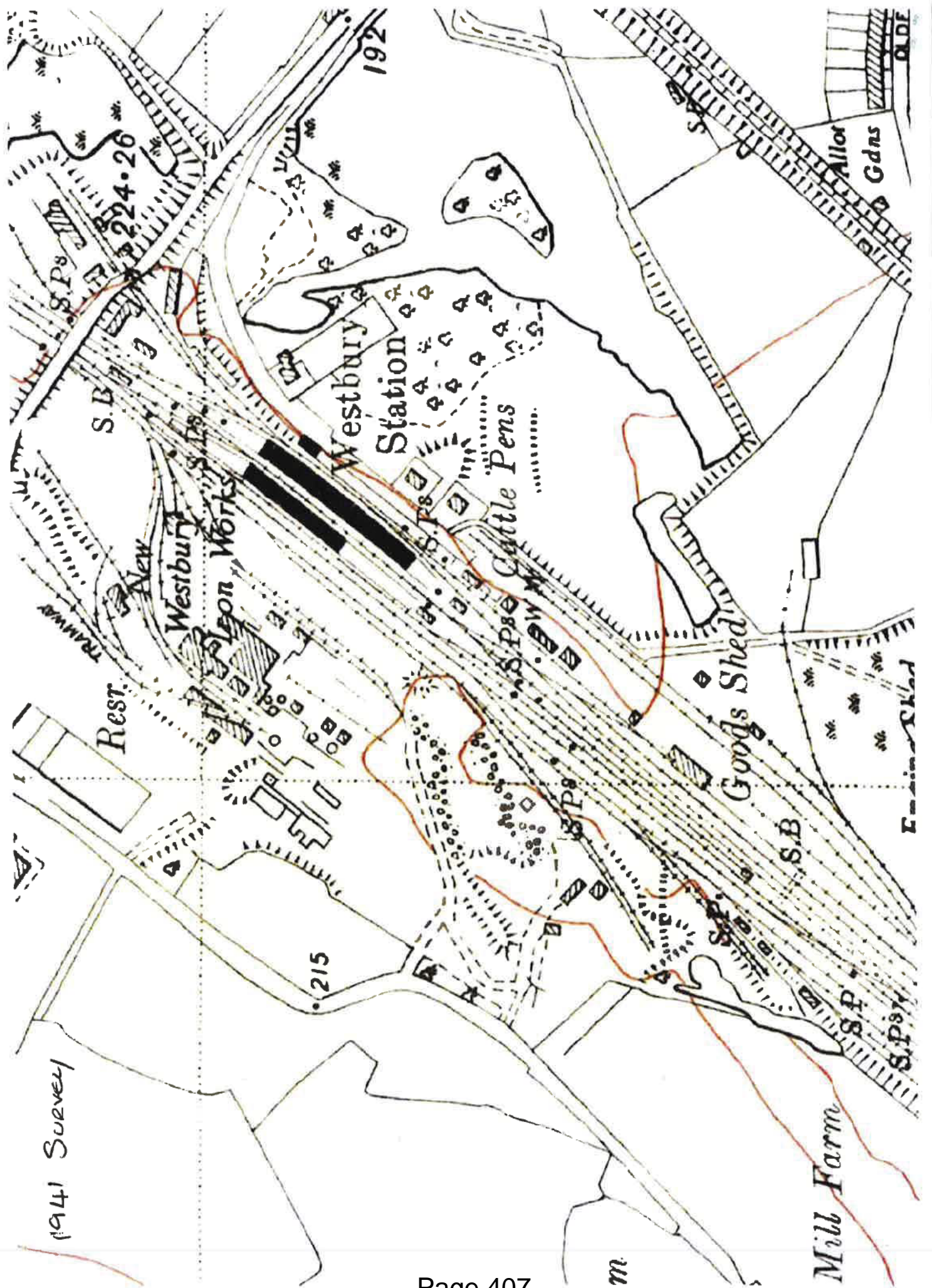
Enc No	Description	Owner	Lessee	Occupier
1	Field, Pond & Footpath	John James Unwin Clarke, John James Vere Unwin Clarke, William Henry Thodore Tyndale Powell John Alexander Tyndale Powell Mary Elizabeth Vere Powell	David Ledbury	David Ledbury
2	Field & Footpath	John James Unwin Clarke, John James Vere Unwin Clarke, William Henry Thodore Tyndale Powell John Alexander Tyndale Powell Mary Elizabeth Vere Powell, Westbury Urban District Council	David Ledbury	David Ledbury
3	Field & Footpath	William a Beckitt	-----	Percy James Stafford



1922 Survey



Enc No	Description	Owner	Lessee	Occupier
11	Field, Footpaths & Ditch	Percy James Stafford	The New Westbury Iron Company Limited	The New Westbury Iron Company Limited, Percy James Stafford, Westbury Urban District Council



1941 Survey

## Application 2017/01 Westbury

## Summary of User Evidence – Provisional relevant period (subject to change) 1996 - 2016

No	Name	Years of Use	Comments
1	Ruth Vincent	1989 – 2016	"...it has since been used on a regular basis by those living in Dilton Marsh and Westbury Leigh to get to Westbury Station to catch the train as well as the railway workers using it." NB lived away 1994 - 2015
2	Phyllis Harvey	1936 – 1990s	First used as a child "to walk to Westbury Station from Dilton Marsh, prior to Dilton Halt opening in 1937."
3	Ernest Clark	1956 – 2016	"I have cousins older than myself who have used the path"
4	Geoffrey Kingscott	1975 – 2016	"Information passed on by local residents, some of them are in their eighties, confirm that the route has been used as long ago as the 1950s and 1960s in continuous fashion"
5	Simon Pond	2002 – 2016	"The nearest alternative for pedestrians is Station Road which is a much longer route from the Oldfield Park estate and wider Westbury."
6	Martin Rogers	1997 – 2017	"access along Station Road is possible though hazardous on foot under the railway bridge."
7	Menna Milnes	1971 – 2016	"It is useful for residents of Dilton Marsh and Westbury Leigh to be able to walk to Westbury Station on this route in order to catch a train. This is necessary because many trains do not stop at Dilton Marsh halt."
8	Patrick Stevenson	1990 – 2016	"As well as providing the most direct pedestrian route....this route (in conjunction) with the Cinder Track is of considerable historic importance with its strong links to Westbury's railway and industrial heritage.."
9	Nic Cross	1981 – 2001	"In BR days and Railtrack and Network Rail the civil engineers used to maintain the footpath (cinder track)."
10	Edwin Mead	1950s – 2000s	" I have always believed the path was railway property"
11	Stephen Hunt	c.1970 – 2016	"I believe the route provides a useful shortcut...it is a more pleasant, varied and safer walking route than by road."
12	Merrily Richardson	1972 – 2017	"I understand that historically the "cinder track" was constructed to allow railway and other workers to walk to work. It came into use by the general public."
13	Peter Smith	1987 – 1997	"My impression is that the footpath ran from Penleigh through to Westbury Station (why else would it exist) and the roadway...was constructed later over the line of the footpath."



No.	Years of use	Years in rel. period	How used	How often?	Other users?	Challenges, permission or obstructions	Route claimed	Do you believe the landowner aware
1	27	1	Walking	Daily	Yes	Pile of ballast and notice in 2016	West 15 to station	Yes, frequently passed by vehicles
2	c.55	0	Walking	Every few months	Yes	No	Application route	Yes everyone knew that everybody walked it
3	60	20	Walking	Weekly	Yes	Gate at end of track at level crossing	West 15 to station	Yes people were using it all the time
4	41	20	Walking	Weekly	Yes	Earth mound in 2016	Application route	Yes clear evidence of an established thoroughfare
5	14	14	Walking	Daily	Yes	2m high pile of ballast in 2016. Small sign in 2016. Kissing gate at West 15 junction	Application route	Yes on most occasions would see other users
6	19	19	Walking	Every few months	Yes	Gravel/earth barrier 2016	Application route	Yes the route is open and easily observed
7	45	20	Walking	Every few months	Yes	Mound and fence 2016	West 15 to station	Yes must have known as steps were taken to prevent use
8	26	20	Walking	Monthly	Yes	Stone and rubble and then fence 2016	Application route	Yes, would have been clearly evident
9	20	5	Walking	Daily	Yes	Worked for landowner. No obstruction etc during years of use.	West 15 to station	Yes, landowners used to maintain the track
10	c.50	c.5	Walking	Monthly	Yes	No	West 15 to station	Yes, always presumed railway property

No.	Years of use	Years in rel. period	How used	How often?	Other users?	Challenges, permission or obstructions	Route claimed	Do you believe the landowner aware
11	46	20	Walking	Monthly	Yes	Heap of spoil in 2016	Application route	Yes, so many people
12	44	20	Walking	Weekly	Yes	Gates erected by Mr Singer	Application route	Don't know
13	10	1	Walking	Twice monthly	Yes	None	Application route	Yes, should have been obvious

## Widths

Person plus vehicle, car plus person, 1 metre, 3 to 15 metres, 2 to 5 metres, 1.5 to 5 metres, 4 to 5 feet, 2 metres then vehicle width, 2 metres, 4 to 6 feet, 4 to 18 feet, 3 to 6 feet and 4 feet to 4 yards.



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# Appeal Decision

**by Barney Grimshaw BA DPA MRTPI (Rtd)**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 14 April 2020**

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## **Appeal Ref: FPS/Y3940/14A/11**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Wiltshire Council not to make an Order under section 53(2) of that Act.
- The Application dated 8 March 2017 was refused by Wiltshire Council on 14 June 2018.
- The Appellant claims that a route running from footpath Westbury 15 to Station Road, Westbury should be added to the definitive map as a footpath.

**Summary of Decision: The appeal is allowed in part.**

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## **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. I attach a copy of a map showing the claimed route on which I have annotated several points (A-E) for reference purposes.

## **Main issues**

4. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates.
5. Some of the evidence in this case relates to usage of the claimed route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that 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 and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
6. Common law also requires me to consider whether the use of the route and the actions of the landowner have been of such a nature that the dedication of the route by the landowners as a public right of way can be inferred.

## **Reasons**

### ***Documentary Evidence***

7. The documentary evidence that is available indicates that the southern part of the appeal route has existed since around 1915 when an engine shed was constructed, possibly as a diversion of a footpath that existed before that date and is referred to in a book on the history of the site<sup>1</sup>.
8. The northern part of the route, known as Station Approach, appears to have existed since the time of the opening of the station in 1848.
9. A spur to the claimed route, a ramp between Station Road and Station Approach (Points B-C) has been included as a publicly maintainable highway in the council's highway records since 1974.
10. Great Western Railway (GWR) records from the time of the construction of the engine shed and from a survey in 1933 show the appeal route as a footpath linked to the public rights of way network. Plans related to proposed railway construction dated 1929 and 1930 also show the route. However, although these documents confirm the existence of a footpath at the dates they were prepared, they do not indicate whether there were any public rights over it.
11. Similarly, Ordnance Survey (OS) maps of 1924 and 1926 show the route but do not indicate its status.
12. The majority of the claimed route (A-B-D-E) has never been recorded as a public highway of any sort.

### ***Conclusions regarding the Documentary Evidence***

13. The existence of the claimed route since 1848 (A-B-D) and 1915 (D-E) is well documented but none of the available evidence indicates the existence of public rights over the route.
14. Accordingly, the determination of this appeal depends entirely on the evidence of public use of the claimed route that is available and whether this indicates that a public footpath can be presumed to have been dedicated in accordance with the provisions of the 1980 Act (statutory dedication) or inferred to have been dedicated at common law.

### ***Statutory Dedication***

15. Thirteen User Evidence Forms (UEFs) were submitted in support of the application describing use of the claimed route from 1936 until 2016 when the route was obstructed by a fence and bund.
16. On behalf of Network Rail, it is argued that a provision of the British Transport Commission Act 1949<sup>2</sup> (the 1949 Act) prevents the acquisition of rights of way over any road or footpath forming an access to a station as does the appeal route. However, it is pointed out by the appellant that the British Transport Commission was abolished in 1962 and it is argued that as a result this provision ceased to apply from that date. In my view this is not the case, the 1949 Act was amended by the Transport Act 1962 to make clear that the

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<sup>1</sup> Westbury Ironworks, 1988 – RJ Cogswell

<sup>2</sup> Section 57

provision related to property of the successor body, the British Railways Board, or any of its successors.

17. Whilst it seems clear that part of the appeal route forms an access to the station (Points A-D), the situation with the southern part of the route (Points D-E) is less clear. It appears from the UEFs that some people sometimes used this section to gain access to the station, but people also used it as part of a through route between Footpath 15 and Station Road. It is therefore not necessarily the case that the provisions of the 1949 Act apply to this section.
18. It is also possible that public rights over the whole route could have been established before 1949 so long as public use of the path was not incompatible with the statutory purpose of the railway company. I see no reason why such use would be incompatible but evidence of public use of the route before 1949 is very limited and not sufficient to raise a presumption that the route was dedicated as a public right of way.
19. In any event, section A-D of the claimed route, Station Approach, appears to have been specifically constructed by the railway company as the access to the station. In these circumstances it is arguable that use of it by the public was by invitation or permission of the company and not 'as of right' as required under the 1980 Act.
20. Section B-C of the claimed route is regarded as part of the highway, Station Road, by the highway authority and is included in the 1974 Highway Record. As such it already carries public rights and it would not be appropriate for it to be added to the definitive map.
21. Section D-E of the claimed route runs across the station car park and the access road to sidings and then along a 'cinder track' to join Footpath 15. It would appear that the cinder track section was constructed around the time of the building of the engine shed (1915), probably by the railway company. However, it is not known whether the path was constructed specifically as a means of access to the station.
22. The UEFs indicate that at least 6 people used the route throughout the 20 year period ending in 2016 when it was obstructed and a further 4 for some of that period. Almost all of these people claimed to have used the whole route at least sometimes although a few had also used the section D-E to get to the station.
23. I have seen no evidence of action taken by the landowner before 2016 which would indicate a lack of intention to dedicate it as a public right of way.

*Conclusions regarding statutory dedication*

24. Part of the claimed footpath has existed since around 1848 (Station Approach, A-B-D), part since around 1915 (D-E) and part since before 1974 (B-C).
25. Section B-C is part of the adopted highway which it would not be appropriate to also record on the definitive map. Section A-B-D was constructed specifically as the access to the station and its use since 1949 could not give rise to public rights being established over it in accordance with the provisions of the 1949 Act. There is very little substantive evidence of its use before 1949 and, in any event such use was effectively by permission rather than 'as of right'.
26. With regard to the section D-E the situation is less clear. It is not known whether this was constructed to provide a second access to the station and the

user evidence indicates that a significant number of people used it for other purposes in the 20 year period before it was obstructed in 2016. In these circumstances it is not in my view clear that the provisions of the 1949 Act apply to this section and it is reasonable to allege that a public footpath subsists over this section.

### **Common Law**

27. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
28. In this case, the evidence indicates that the public have used the claimed route over a lengthy period. However, parts of the route could not have acquired public rights as a result for reasons given above. As far as the remaining section is concerned (D-E) there appears to be no substantive evidence that the landowner intended to dedicate the route as a public right of way or to provide it as a secondary access to the station. In these circumstances, it would not be reasonable to infer that this section has been dedicated as a public footpath at common law.

### **Conclusion**

29. Having regard to these and all other matters raised in the written representations I conclude that the evidence that is available shows that on the balance of probabilities it is reasonable to allege that part of the claimed route is a public footpath. The appeal should therefore be allowed in part.

### **Formal Decision**

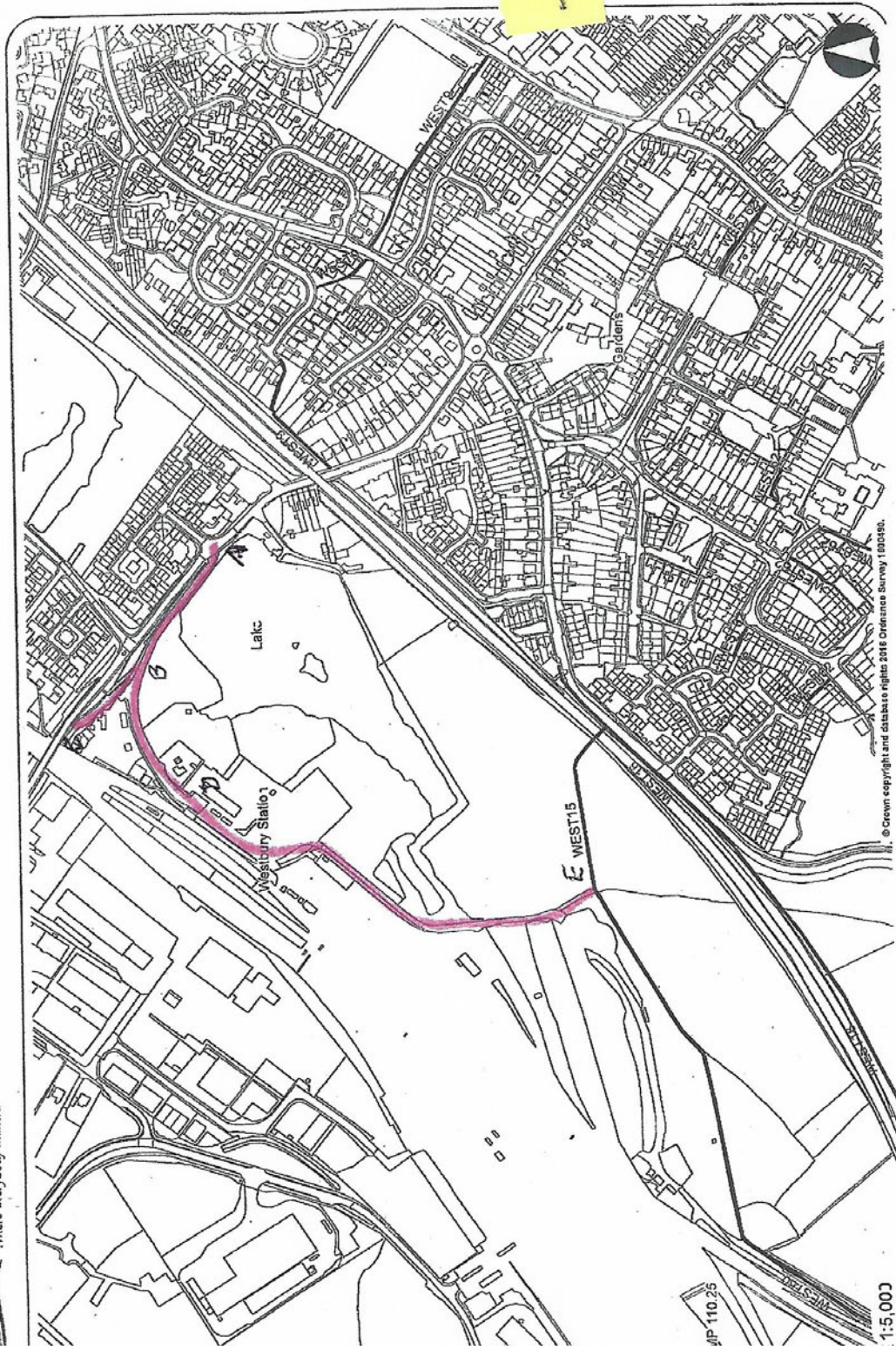
30. The appeal is allowed in part and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Wiltshire Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement to add a public footpath, running between Points D and E on the attached map. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.
31. Under normal circumstances the authority would be directed to make the necessary order within 3 months of this direction. However, as a result of the present situation of restrictions following the Covid-19 outbreak, exceptional circumstances have arisen and I therefore direct that the order should be made within 12 months of the date of this direction.

*Barney Grimshaw*

Inspector

Application to Add Public Footpath -  
Westbury Station

iltshire  
Where everybody matters



**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE DEFINITIVE MAP AND STATEMENT FOR THE WESTBURY URBAN DISTRICT COUNCIL DATED 1953 AS MODIFIED UNDER THE PROVISIONS OF THE WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL PARISH OF WESTBURY PATH No. 68 RIGHTS OF WAY MODIFICATION ORDER 2020**

This order is made by Wiltshire Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") as directed by an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs that the Definitive Map and Statement for the Westbury Urban District Council dated 1953 as modified under the provisions of the Wildlife and Countryside Act 1981 because it appears to require modification in consequence of the occurrence of events specified in section 53(3)(c)(i) of the Act, namely 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;

The Authority have consulted with every local authority whose area includes the land to which this order relates.

The Wiltshire Council hereby order that:

1. For the purposes of this Order the relevant date is the 14<sup>th</sup> April 2020
2. The Definitive Map and Statement for the Westbury Urban District Council dated 1953 as modified under the provisions of the Wildlife and Countryside Act 1981 shall be modified as described in Parts I and II of the Schedule and shown on the plan attached to the Order.
3. This Order shall take effect on the date it is confirmed and may be cited as the Wiltshire Council Parish of Westbury Path No. 68 Rights of Way Modification Order

THE COMMON SEAL of }  
WILTSHIRE COUNCIL was }  
hereunto affixed this }  
17<sup>th</sup> day of July 2020 }



in the presence of:

*M. E. Veeber*  
Team Leader (Legal)

92080



## SCHEDULE

### PART I

#### MODIFICATION OF DEFINITIVE MAP

<b>Parish</b>	<b>Path No</b>	<b>Description of footpath to be added</b>	<b>Modified under Section 53(3) as specified</b>
Westbury	68	FOOTPATH leading from point A to point B as shown by a bold black broken line on the plan attached hereto.  Width: Point A to Point Y = 2 metres Point Y to Point B = 3.7 metres  Approximate length = 450 metres	53(3)(c)(i)

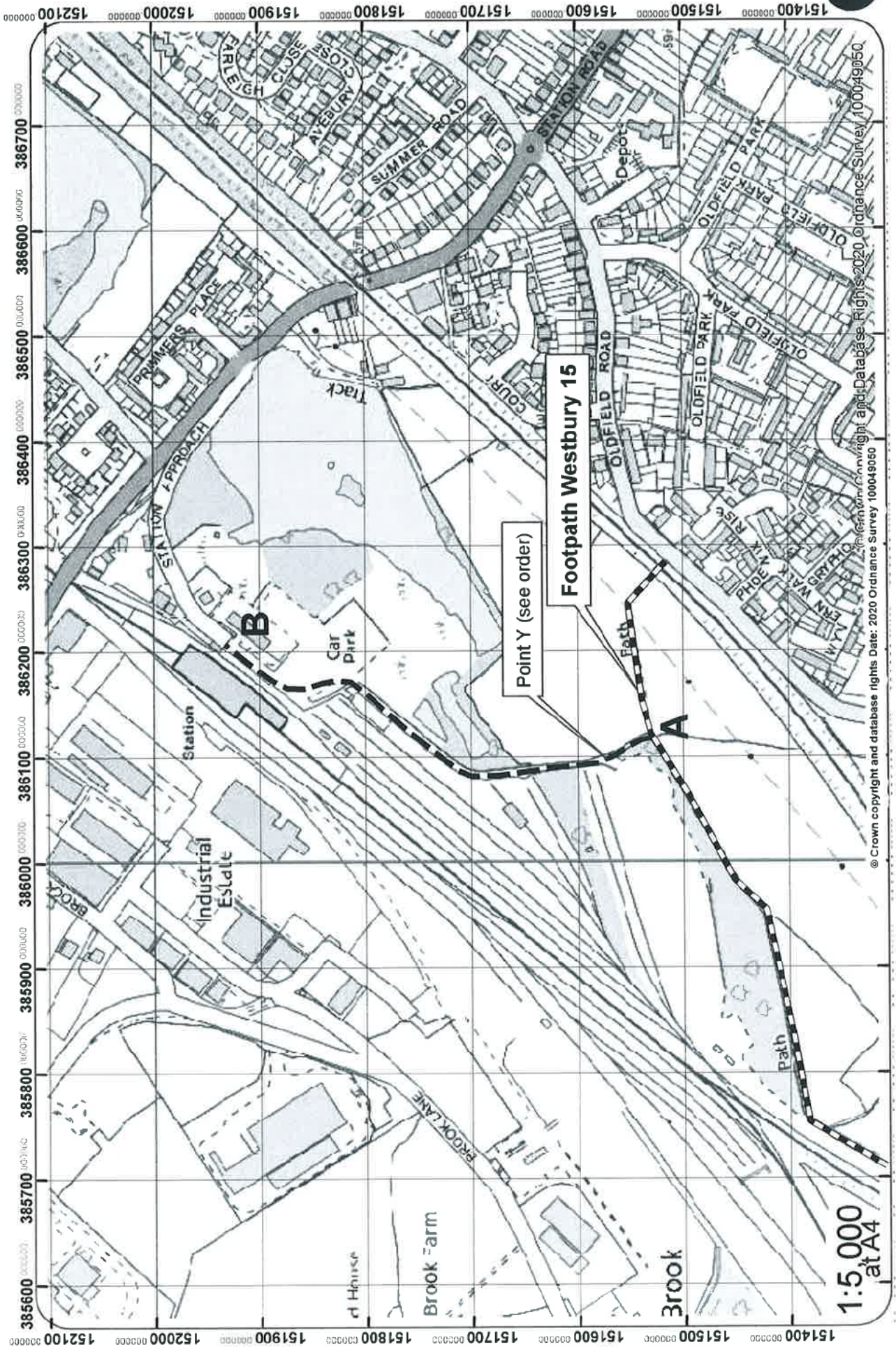
## SCHEDULE

### PART II

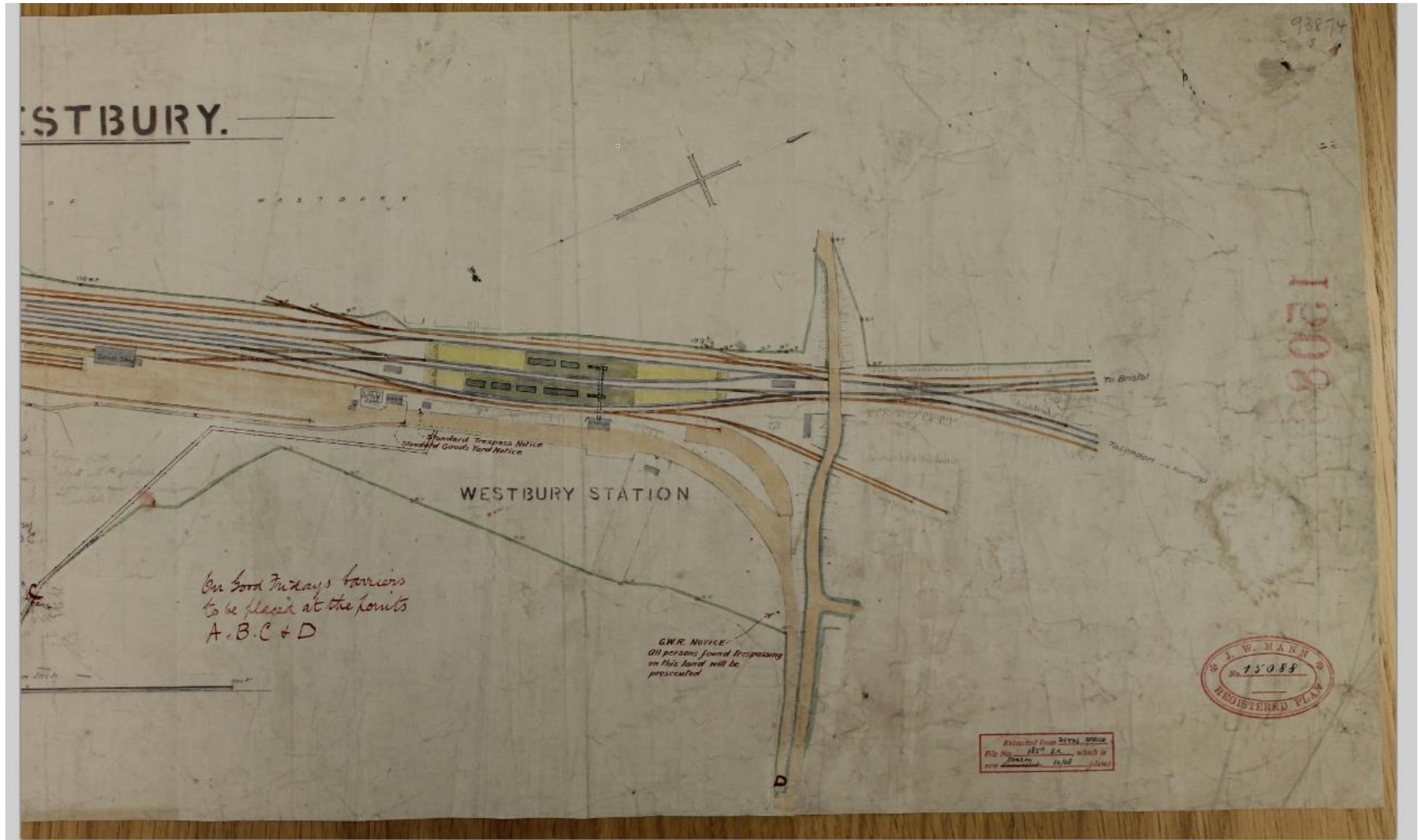
#### MODIFICATION OF DEFINITIVE STATEMENT

<b>Parish</b>	<b>Path No</b>	<b>Description of path</b>	<b>Modified under Section 53(3) as specified</b>
Westbury	68	FOOTPATH leading from Westbury Path no. 15 at OS Grid reference ST8612 5153 in a north north west and north east direction to the station car park where north north east and north east to join Station Approach at OS grid reference ST 8621 5193.  Width ST8612 5153 to ST8610 5157 = 2 metres ST8610 5157 to ST 8621 5193 = 3.7 metres	53(3)(c)(i)

Westbury 68 Order Plan  
Footpath to be added A - - - - - B



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LB & Co

Received  
21.09.2020.

S Madgwick  
Rights of Way and Countryside  
Wiltshire Council  
Bythesea Road  
Trowbridge  
BA14 8JN

Email: sally.madgwick@wiltshire.gov.uk

Your ref: 2017/01 Westbury

17 September 2020

Dear Madam

**Wildlife and Countryside Act 1981 section 53**  
**The Wiltshire Council Parish of Westbury Path no 68 Rights of Way Modification Order 2020**

We act for DB Cargo (UK) Limited ('DB Cargo'), which company has received notification from Wiltshire Council dated 24 July 2020 that the Council has been directed by an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs ('the Secretary of State') to make the above order ('the Order').

DB Cargo wish to object to the making of the Order and therefore it shall be referred to the Secretary of State together with this objection.

DB Cargo is the UK's largest rail freight operator and a railway undertaking which is regulated by the Office of Rail and Road and is a successor to British Railways pursuant to the Railways Act 1993, originally as 'English, Welsh and Scottish Railway'. DB Cargo operates sidings adjacent to the railway station at Westbury and the claimed public footpath runs directly through its freight transhipment operation.

It is noted that on 14 June 2018 the Council refused the application for the modification of the Definitive Map and Statement under the provisions of the Wildlife and Countryside Act 1981 and thus the application was dealt with by way of appeal against the Council's decision not to make the modification order. The appointed Inspector, after considering the written representations submitted, allowed the appeal in respect of part of the route for which the application was made, being – on the balance of probabilities in the Inspector's conclusion - a public footpath running between Points D and E on the map attached to his decision letter dated 14 April 2020. The Order now defines this route as a footpath running between points A to B on the Order Plan, being of varying widths as described.



Point A of the claimed footpath A – B is a junction with Footpath Westbury 15 and Point B joins the Westbury railway station car park and the access road to the sidings operated by DB Cargo. The route is shown on relevant documents as listed by the Inspector in his decision letter but route A – B has never been recorded as a public right of way.

Users who completed User Evidence Forms have given evidence that route A - B has, as a matter of fact, been used to gain access to the station (please refer to paragraphs 22 and 26 of the Inspector's decision notice). Thus, not only does route A – B physically link to the station and is shown to do so in historical documents, but it has been used as a route to the station within its history.

The Inspector considered an objection made on behalf of Network Rail, where it was argued that Section 57 of the British Transport Commission Act 1949 ('the 1949 Act') prevents the acquisition of rights of way over any road or footpath forming an access to a station, as does route A – B (which was part of the appeal route). The Inspector correctly rejected a counter-argument that the 1949 Act did not apply because the British Transport Commission had been abolished in 1962 and thus Section 57 of the 1949 Act ceased to apply from that point. He stated that the British Railways Board and its successors continued to take the same interest in property through the provisions of the Transport Act 1962.

Indeed, Part III of the Transport Act 1962 contains the provision in relation to Section 57 of the 1949 Act: "For references to the Commission there shall be substituted references to any of the Boards", where "Boards" is defined under Part I to include the British Railway Board. Subsequent legislation has transferred functions to other bodies, with Network Rail and DB Cargo being the relevant owners for the purpose of present considerations.

However, the Inspector then considered the appeal case in relation to points A – B (as they now are, formerly D – E) and came to a conclusion that we submit is an error of law when he found (a) that "*In these circumstances it is not in my view clear that the provisions of the 1949 Act apply to this section [of the route D- E, now A- B...]*" ... and (b) that therefore (given user evidence to demonstrate the requirements of Section 31 Highways Act 1980 over a relevant period) "*it is reasonable to allege that a public footpath subsists over this section [of the route D- E, now A – B]*". [Paragraph 26 of the Inspector's decision.]

Paragraphs 21 and 26 of the decision notice discuss whether the relevant part of the route (now points A – B) was constructed to provide a second access to the station ie whether it was constructed specifically as a means of access to the station. The inspector concludes that this is not known. He reasons, wrongly in our submission, that "...some people sometimes used this section to gain access to the station, but people also used it as part of a through route between Footpath 15 and Station Road. *In these circumstances it is not in my view clear that the provisions of the 1949 Act apply to this section.*" [our italics.] This is the reasoning he employed to conclude that a right of way could in fact be dedicated over route A – B notwithstanding his acceptance that Section 57 of the 1949 Act is capable of being applied.

Section 57 of the 1949 Act provides:

"As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission."



Our submission is that Section 57 as drafted is quite clear: it applies to any road, footpath, thoroughfare or place which was then or in the future the property of the British Transport Commission (and now successors in title) which forms "an" access or approach to any station, goods yard etc then there could be no dedication. There is no qualifying wording to state that this road/footpath etc must be the sole access to such station etc nor – importantly - does it state that the road/footpath etc must be *exclusively* used for access etc to the station. All that is required is that it forms an access to the station etc. which route A – B in fact does as is accepted by the Inspector and user evidence.

Therefore the evidence provided by members of the public who used the route for purposes other than gaining access to the station in order to demonstrate dedication at common law or by the operation of Section 31 Highways Act 1980 has no relevance to a determination of whether Section 57 applies to the present circumstance of whether the definitive map should be modified to include the new footpath. The Inspector concluded that in his view it was not clear that Section 57 applied. That view is unsupportable under the wording of the legislation.

That being the case, it is not possible because of operation of Section 57 of the 1949 Act for the dedication of the public footpath to have been made and thus for the definitive map to be modified to reflect such a public right of way.

For this reason, DB Cargo object to the Order and trust that this matter is concluded quickly because of the potential adverse implications for safe operation and the additional and unacceptable burden for the company in regulating use of the site.

Kindly acknowledge receipt.

Yours faithfully

CBP Co Limited

LB & Co Limited

**REPORT FOR WESTERN AREA PLANNING COMMITTEE**

**19/10805/FUL**

<b>Date of Meeting</b>	9 June 2021
<b>Application Number</b>	19/10805/FUL
<b>Site Address</b>	Land to East of Trowbridge Rugby Club, Hilperton BA14 6JB
<b>Proposal</b>	New sports facility to include a new fenced and floodlit 3G artificial grass pitch and a new pavilion providing inclusive ancillary facilities to support the pitch, together with new community coaching and education rooms and a training room/gym for use by football rugby club users. A new access road and additional parking is also proposed.
<b>Applicant</b>	Trowbridge Town Council
<b>Town/Parish Council</b>	Hilperton CP
<b>Electoral Division</b>	Hilperton Division - Councillor Ernie Clark
<b>Grid Ref</b>	388273 - 159501
<b>Type of application</b>	Full Planning
<b>Case Officer</b>	Steven Sims

**Reason for the application being considered by Committee**

Councillor Ernie Clark has requested that this application be called-in for the elected members of the Western Area Planning Committee to determine should officers be minded to support the application.

Cllr Clark has identified the following matters for the committee to consider:

- The loss of grade 1 / 2 agricultural land
- The highway impacts (and the efficacy of the current no right turn is questioned)
- The need for advanced road signage
- Surface water flood risk

**1. Purpose of Report**

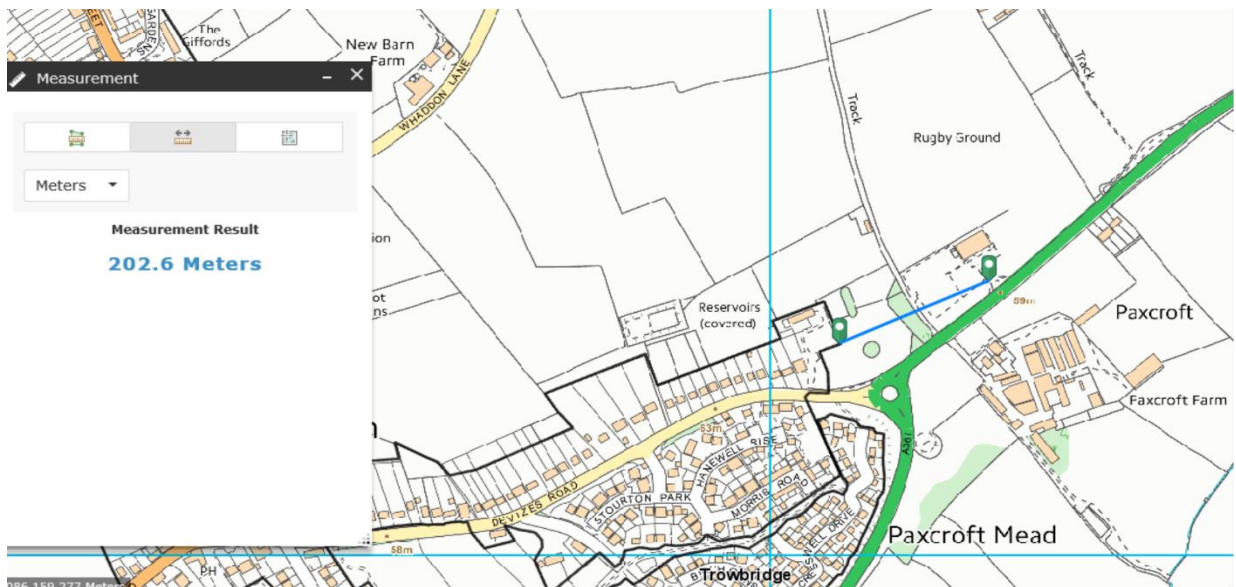
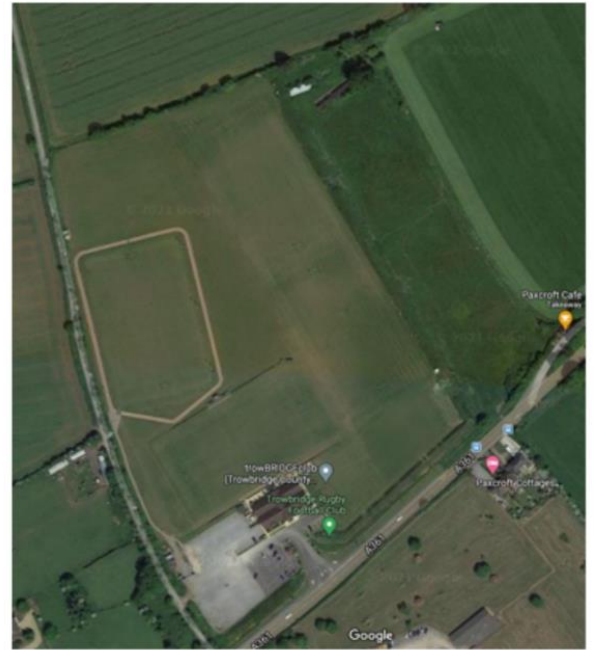
The purpose of the report is to assess the merits of the application proposal against the policies of the development plan and other material considerations and to consider the recommendation that the application be approved.

**2. Report Summary**

- Principle of development (including loss of agricultural land)
- Impact on the character of the area
- Ecology issues
- Highway issues
- Impact on the living conditions of neighbouring residents
- Archaeology issues
- Drainage issues

**3. Site Description**

The site is located outside any settlement boundary and is within the open countryside and just over 200 metres to the east of Hilperton's defined village limits and about 2.8km from the town centre of Trowbridge. It is adjacent to and accessed from the rugby club. The site forms an area of land of approximately 3.5 ha which is designated grade 2



The view included below was taken from Paxcroft Cottages on the A361 looking north and captures the southern end of the application site and is framed by native trees aligning the road edge to the east. A post and rail fence is visible in the foreground as well as the rugby club pavilion to the north-west and the existing earth bund in the middle distance. An ash tree partially obscures the rugby pitch posts and its floodlighting in the view below. In the centre of the view, a telegraph pole and substation are visible.





Directly to the west of the site (and shown below) the site abuts the Trowbridge Rugby Football Club which was originally granted planning permission for a rugby ground including clubhouse, groundman's store, sports pitches with floodlighting and associated landscape bunding, access and parking under application reference W/05/00822/FUL - which obtained renewed permission on 26 September 2012 under W/12/01169/FUL. Subsequent permission was granted under refs: 14/02933/FUL for 2x 5 metre floodlights at the site entrance and under 17/04354/FUL, permission was granted for the construction of a 440m long, 3m wide path/training track around perimeter of floodlit pitch, consisting of geotechnical membrane covered with 125mm deep type 1 stone, topped with 25mm deep "Redgra" type cinder finish dressing contained by wooden edging.

The completed development is shown in the photo below - with the photo taken from the byway (HILP21) which runs roughly north-south and is accessed via the A361. 2 pairs of semi-detached properties are located on the opposite side of the A361 (as shown below).



The site is partially enclosed to the south and north by hedgerows and trees with an earth bund found along the site's western and southern boundaries. In the far north reaches of the identified site, there are several stables which are in a poor state of repair. Whilst the area of land where the stables are located is not identified for redevelopment, the applicant is committed to undertake demolition works to remove the redundant structures.



Photo of existing stables

From further along HILP21, there is a partial view of the application site looking south-east - a view that also picks up part of the rugby club facility and its floodlights (as shown below). However as far as the application site is concerned, the majority of the site is obscured behind the existing line of mature vegetation that lines the field boundary and would be retained. Trees within the north of site are visible sitting within the mass of vegetation which creates embodies a rural character from this vantage. There is more commentary and officer appraisal on landscape character impacts within section 9 of this report.



The site is of archaeological interest and within the Avon Vale Countryside Character Area. The site lies within the yellow zone of the Trowbridge Bat Mitigation Strategy (TBMS) but outside the core areas for the three SAC protected bat species to which the TBMS is written to protect. With the yellow zone, the Council has identified the potential for development to lead to an increase in recreational pressures at protected woodlands and for great care to be taken in appraising bat habitat impacts. However, after much negotiation, the Council's ecologist and Natural England are satisfied that this development would pose a low risk to bats and it has been concluded that this development would not result in harm to the Bath and Bradford on Avon Bat SAC. This is further explored within the ecology section of this report.

#### 4. Planning History

W/05/00822/FUL - Proposed rugby ground including clubhouse, groundman's store, sports pitches with floodlighting and associated landscape bunding, access and parking - Approved 28.07.2010

W/12/01169/FUL - Proposed rugby ground including clubhouse, store, sports pitches with floodlighting and associated landscape bunding, access and parking - Approved 25.10.2012

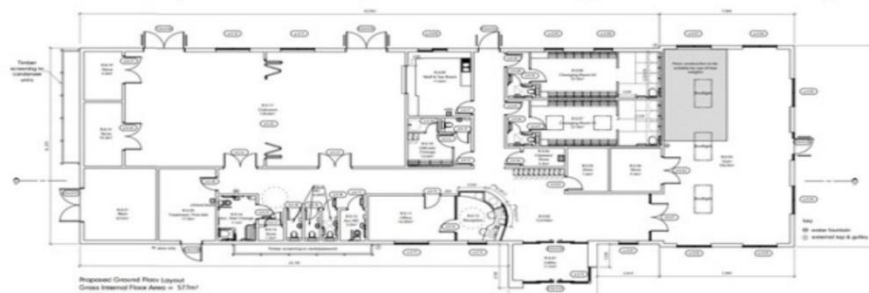
13/05726/ADV - 2no. free standing entrance signs - Consented 06.11.2013

14/02933/FUL - Erection of two 5 metre lights at the entrance to the site - Approved 12.06.2014

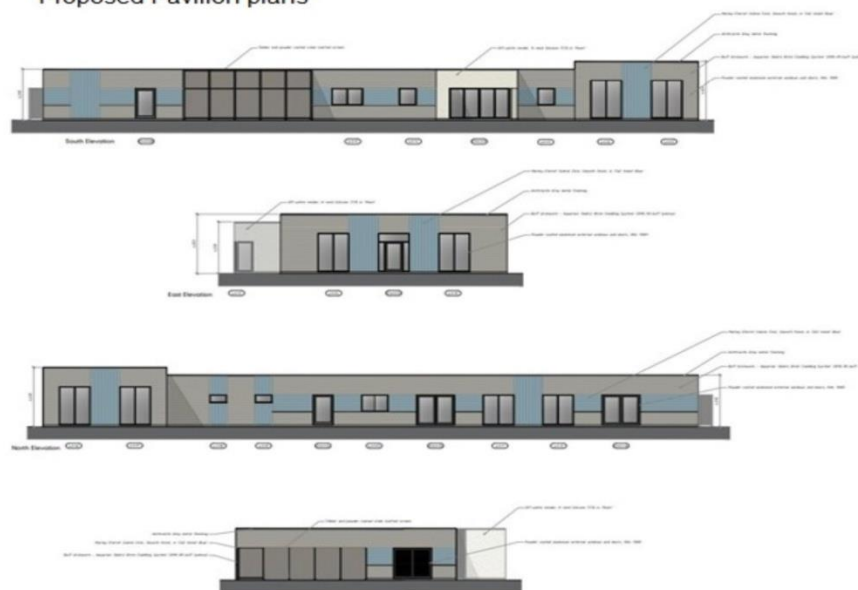
17/04354/FUL - Construction of a 440m long, 3m wide path/training track around perimeter of floodlit pitch, consisting of geotechnical membrane covered with 125mm deep type 1 stone, topped with 25mm deep "Redgra" type cinder finish dressing contained by wooden edging. - Approved 13.07.2017

#### 5. The Proposal

This is a full application seeking planning permission for a new pavilion and a 3G artificial grass pitch (AGP). The scheme includes the erection of a new pavilion to provide a clubroom, changing rooms, gym, treatment room and other ancillary facilities. The proposed building would measure 47.9 metres by 14.5 metres and would be 4.7 metres high at its highest point (see plans below). The proposed external elevations would consist of an off-white render, buff brickwork, timber and powder coated steel slatted screens and Marley Eternit Cedral Click, smooth finishes (coloured violet blue) (see elevations below).



Proposed Pavilion plans



The application also proposes:

- The formation of a 3G artificial grass pitch measuring 106m by 70m
- The erection of a 4.5-metre-high mesh ball stopping fence painted moss green around the pitch
- The provision of 6no. 15-metre-high masts mounted with directional LED lights
- A relocated playground area
- Additional landscaping including tree planting, hedgerow, grassland and meadow area and extension of the southern bund across the south boundary
- A new access off the existing rugby club access from the A361
- New parking provision for 158 motor vehicles
- Additional cycle parking - all of which is illustrated in the proposed site layout plan included below:



The application is lodged and supported by Trowbridge Town Council and has the prospect of funding which includes financial support from the Football Foundation. The site sits adjacent to the existing rugby club which is served by an engineered highway

access which includes the provision of a no right turn for vehicles approaching from the east.

## **6. Planning Policy**

Wiltshire Core Strategy (WCS) 2015 and in particular: Core Policy 1: Settlement Strategy; Core Policy 2: Delivery Strategy; Core Policy 29: Spatial Strategy: Trowbridge Community Area; Core Policy 50: Biodiversity and Geodiversity; Core Policy 51: Landscape; Core Policy 52: Green Infrastructure; Core Policy 57: Ensuring High Quality Design and Place Shaping; Core Policy 58: Ensuring the Conservation of the Historic Environment; Core Policy 60: Sustainable Transport; Core Policy 61: Transport and New Development; and, Core Policy 67: Flood Risk

West Wiltshire Leisure and Recreation DPD - Adopted February 2009 (saved policies) LP1: Protection and enhancement of existing open space or sport and recreation provision; and, LP5: New sport and recreation facilities

The made Hilperton Neighbourhood Plan 2017-2026

Wiltshire Local Transport Plan 2011-2026 and The Trowbridge Bat Mitigation Strategy (TBMS) SPD (February 2020)

The National Planning Policy Framework (2019) (The Framework) and in particular chapters 2. Achieving sustainable development; 8. Promoting healthy and safe communities; 9. Promoting sustainable transport; 12. Achieving well-designed places; 15. Conserving and enhancing the natural environment; and, 16. Conserving and enhancing the historic environment

## **7. Summary of Consultation Responses**

Hilperton Parish Council: Objects - Comments dated 17 December 2019 -

‘This application was intended to be considered at the Parish Council’s meeting on the 17th December. However, parish councillors spoke of their inability to access the plans on line in relation to the application, or print them, and it had to be agreed that until the plans could be accessed, the Parish Council would have to defer discussion. There has obviously been a problem with Wiltshire Council’s website, and the inability of anyone to be able to download anything of importance regarding this application.’

Comments dated 20 January 2020 (note: the following comments were taken from Hilperton Parish Council’s published online minutes of the Parish meeting as no comments were sent to the case officer except for those listed above) –

‘It was agreed that an objection should be made to this application on the following grounds:-

- a) Increased traffic volume through the village, with particular emphasis on Devizes Road, and traffic speed.
- b) Overall lack of public transport serving the application site, especially in the evenings and on Sundays. Whilst Paxcroft Mead was well served with pedestrian and cycle paths, this did not extend to the application site.
- c) Concern over inadequate archaeological and geographical assessments on the site.

It should be added that the Parish Council recognised the need for additional sporting facilities serving the community, if its concerns could be addressed.'

Wiltshire Council Leisure Services: Supportive and confirmed that this project is key to the Wiltshire Playing Pitch Strategy adopted Feb 2017 in terms of the need for and under provision of full-size FA compliant 3GATP's within West Wiltshire and Wiltshire as a whole and assist in the Councils Stronger, Healthier Communities agenda.

Sport England: No objection

Wiltshire Council Highways Team: No objection subject to conditions

Wiltshire Council Archaeology: No objection subject to conditions

Wiltshire Council Landscape Officer: Supportive subject to conditions

Wiltshire Council Drainage Team: No objection subject to condition

Wiltshire Council Public Protection Team: No objection

Wiltshire Council Waste Management Team: No comment

Wiltshire Council Ecology: No objection subject to conditions

Natural England: No objection

## **8. Publicity**

The application was publicised by the display of a site notice and individually posted out notification letters sent to neighbouring/properties within close proximity of the site. As a result of this publicity 10 letters of representation - **all in support** of the application were received with the comments being summarised as follows:

Trowbridge currently lacks high quality sports facilities and this facility will be a great asset including the 3g pitch which will open up an all year-round sporting offer.

The site has excellent access and would adjoin the existing rugby club.

This scheme is long overdue, and people would be more encouraged to take up sports and be more active.

## **9. Planning Considerations**

### **9.1 Principle of development**

Paragraph 91 of the NPPF states that planning policies and decisions should aim to achieve healthy, inclusive and safe places which, amongst others, enable and support healthy lifestyles, especially where this would address identified local health and well-being needs, for example through the provision of, amongst others, sports facilities. NPPF Paragraph 92 supports the provision of social, recreational and cultural facilities and services in response to community needs, and planning policies and decisions should, respond positively to the provision and use of shared spaces, community facilities such as meeting places and sports venues. The NPPF goes on to state that policies should take into account and support the delivery of local strategies to improve

health, social and cultural well-being for all sections of the community; and NPPF paragraph 96 identifies the importance of bolstering access to a network of high quality open spaces and supporting development opportunities that encourage new sporting and recreational facilities sport in recognition of its importance for the health and well-being of our local communities.

Saved policy LP1 of the West Wiltshire Leisure and Recreation DPD 2009 seeks to promote and provide high value open space and recreation offer while saved policy LP5 sets out a policy support for new sport and recreation facilities provided it satisfies an identified need and development is located at the most accessible location possible. In addition, the L&R DPD identifies and encourages new sports provision in Trowbridge.

The application site comprises approximately 3.5 hectares of agricultural land which is categorised as agricultural land grade 2. Grade 2 agricultural land is identified as being very good quality agricultural land' categorised as land with minor limitations which affect crop yield, cultivations or harvesting. A wide range of agricultural and horticultural crops can usually be grown. On some land within this agricultural land grade, there may be reduced flexibility due to difficulties with the production of the more demanding crops, such as winter harvested vegetables and arable root crops, however the level of yield is generally high but is likely to be lower or more variable than grade 1 land.

Paragraph 174 of the NPPF advises planning policies and decisions should contribute to and enhance the natural and local environment by recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services including the economic and other benefits of the best and most versatile agricultural land. Natural England's Technical Advice Note TIN049 titled: 'Agricultural Land Classification: protecting the best and most versatile agricultural land' explains that:

*"the Agricultural Land Classification (ALC) provides a method for assessing the quality of farmland to enable informed choices to be made about its future use within the planning system."*

As stated above the site is located on land classified as grade 2 agricultural land and although it is recognised that the proposed development would result in the loss of very good quality agricultural land, the loss must be weighed up against the public benefits of providing new sporting facilities which must form part of the planning balance. Furthermore, experience of previous planning appeals suggests that loss of such land is only normally seen to be an inherent significant objection where the area involved is much larger than is the case here.

There are no objections to the scheme from Sport England who have advised that the development is supported by both the Rugby Football Union (RFU) and Football Association (FA). In addition, Sport England and the Council's leisure team have confirmed that there is a lack of football pitch / training ground provision in the Trowbridge area and have identified a clear need for new delivery of sports facilities to serve Trowbridge and the community area.

As far as the principle of development is concerned, officers have concluded that significant weight should be afforded to the community benefits that this proposed

development will offer and whilst some grade 2 agricultural land would be lost in the process, the proposed facility would deliver and maximise synergies created and shared through sharing a boundary and access with the rugby club (on land to the immediate west) and that the proposal would respond to an identified local sporting need, which officers consider outweighs the negatives associated to losing 3.5 hectares of grade 2 land. Officers are satisfied that this significantly application complies with the adopted and saved policies of the Core Strategy and West Wiltshire Leisure and Recreation DPD and the NPPF.

## **9.2 Impact on the character of the area**

Adopted Wiltshire Core Strategy Core Policy 51 titled: 'Landscape' sets out that new development should protect, conserve and where possible, enhance landscape character and must not have a harmful impact upon landscape character. Core Policy 57 titled: 'Ensuring High Quality Design and Place Shaping' requires a high standard of design for all new development which should respond positively to the existing townscape and landscape.

The application site extends to approximately 3.5 hectares of agricultural land located on the eastern edge of Hilperton; and, is located in the open countryside but adjacent to the existing rugby club facility served off the A361. The bulk of the site comprises of semi-improved grassland with several areas of shrub on site mainly along the southern and nothing boundaries with two parallel hedgerows and a number of mature trees and a bund being located along the western and southern boundary.

The immediate character of the area beyond the sports facility, is set by relatively large fields bordered by hedgerows, and in places, there is some dispersed hedgerow and sporadic trees as shown below.



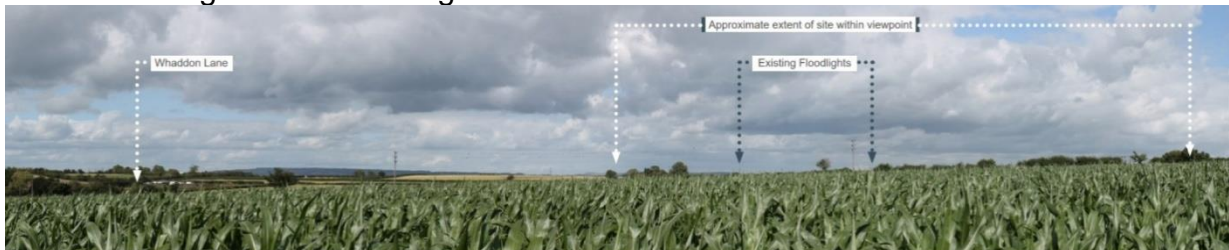
The application comprises the erection of a new sports pavilion, provision of a 3G artificial grass pitch which would have a 4.5-metre-high fence around the pitch and six



15-metre-high LED floodlights and additional parking for 158 cars/motor vehicles. When viewed from the east the development would be partially viewed against the backdrop of the existing rugby club and additional proposed landscape planting along the eastern boundary of the site would to a degree, buffer some of the visual and landscape impacts. As seen in the photo below taken from the east of the site, there would be additional screening along the eastern boundary, however it is recognised that elements of the scheme including the pavilion, fence around the pitch and flood lights would be visible to some degree when viewed from the east. This impact on landscape would lessen as the boundary treatment matures over time.



The proposed development includes significant new planting in the southern land parcel of the site that would provide more landscape screening and also act as an area of ecological enhancement and betterment. The proposed pavilion would be set back from the highway and would be partially screened from the west by the existing rugby club facility and club house. As seen in the photo below the rugby club is located behind the tree lined hedgerow in the foreground.



The image below is a view of the site from the northeast looking southwest towards the site which would be partially screened by the existing tree lined hedge row bordering the north of the site and by additional screening along the eastern boundary.



The proposed 15-metre-high floodlights would be visible from the surrounding countryside and when lit, they would be quite conspicuous. However, the applicant's Landscape and Visual Impact Assessment has been carefully appraised by officers, including the Council's landscape officer, and it has been concluded the 15m columns and floodlights would be seen in the context of the existing floodlights at the adjacent Trowbridge Rugby Club Site and the lighting would be for a limited period which has been the subject of significant officer negotiation and appraisal, and can be controlled by planning condition. In terms of minimising light spill and light pollution, the proposed floodlighting would be directed downwards towards the playing pitch surface, and has been designed to avoid sky glow resulting in low vertical overspill, and would be used only when necessary, which justifies an appropriately worded planning condition.



View of site from south looking north

There would be some minor adverse visual effects as a consequence of the floodlighting. However, the negative impacts would be mitigated as far as possible and as required by policy, through the provision of additional landscape planting in the southern extent of the site adjacent the highway, and use of planning conditions. Additional hedge planting and some tree planting would be provided along the eastern boundary of the site which would filter views to an extent. Officers are confident that the extent of the adverse visual impacts, including the floodlighting, would not be widespread and there would be only limited to minor adverse harm in landscape terms, and that the harm must be countered by the public and community benefits the sporting facility would deliver, and after a lengthy officer negotiation and appraisal of this application, officers have reached the conclusion that the level of landscape harm would not be significant enough to warrant a reason for refusal.

Although officers accept that this development would bring about a significant change to the character and appearance of the area, no objection has been raised by the Council's landscape officer, subject to the imposition of planning conditions to secure the landscape planting, and restricting the reasonable use of the floodlighting (that has been informed by the use and application of a planning condition for the neighbouring rugby club site).

With the necessary mitigation and use of planning conditions, and the support of the Council's landscape officer, this development is considered compliant with Council policies CP51 and CP57 and the NPPF

### **9.3 Ecology Issues -**

Adopted Wiltshire Core Strategy Core Policy 50 titled: 'Biodiversity & Geodiversity' requires all development proposals to demonstrate how they protect features of nature conservation and geological value as part of the design rationale. There is an expectation that such features shall be retained, buffered, and managed favourably in order to maintain their ecological value, connectivity and functionality in the long-term. Furthermore, the policy specifies that all development should seek opportunities to

enhance biodiversity. Major development in particular, must include measures to deliver biodiversity gains through opportunities to restore, enhance and create valuable habitats, ecological networks and ecosystem services.

In relation to the Bath and Bradford on Avon Bats SAC, the Council has identified a potential for new forms of certain types of development to lead to an increase in recreational pressures within woodlands located to the south Trowbridge and reducing bat habitat in an identified zone beyond the woodlands. The application site lies outside the core area for Bechstein's bats as defined by the Bat SAC Guidance (dated September 2015) and after a considerable amount of officer review, it has been concluded (with the agreement of Natural England) that this development would not lead to material harm to bat interests (subject to the imposition of planning conditions). The habitat and exposed position of the application site is such that it is not good quality for any of the SAC species either for foraging or commuting and therefore is highly unlikely to be 'essential' to any individual bats. Whilst some bats may make use of the site in passing, it is more likely to be the well-established hedgerows especially along Whaddon Lane (to the west of the rugby club) that will be regularly used. The land parcel within the site which is currently occupied by redundant stables (which is not identified for redevelopment) is also likely to have some value to bats, and the applicant's commitment to avoiding development in this area is supported by officers.

On the plan below, the horseshoe bat core area can be seen on the western (left hand side), the lesser core area on the eastern (right hand side by the A350 Semington roundabout) and the Bechstein bat core area on the southern side (semi circle at foot of map). The most obvious bat flight route in the vicinity of the application site is along Whaddon Lane which is lined on both sides by tall well-established hedgerows. However, the existing Rugby club which lies immediately to the east of Whaddon Lane has floodlighting (controlled by condition) which illuminates the lane at certain times - which is a prevailing temporary circumstance and material consideration in the assessment of this current application.



Bats do fly through the winter when the weather warms up enough for insects to be available, but it is not considered at all likely that bechstein bats or horseshoe bats would move out of the immediate environs of their hibernation site during February. If the weather is unseasonably warm, they would stick to the habitat closest to the roost to which they would go back to. By March, periods of warmth are inevitable and it's

possible that conditions would allow bats to return to spring and summer roosts in this period. If Whaddon lane is illuminated, then the bats would be looking for other routes.

This application is supported and accompanied by an ecological assessment and arboricultural impact assessment along with a lighting strategy and accompanying landscape strategy plan. An extended phase 1 habitat survey was also carried out - all of which have been carefully appraised by officers. The habitat survey was extended to include a search for incidental evidence of protected/notable fauna and an assessment of the site's potential to support protected/notable fauna. Specific consideration was given to birds, bats, amphibians (including Greater Crested Newts (GCN)) and reptiles.

The proposed development would result in part of the western boundary bund (which comprises rough grassland/ scrub) being removed. In addition, the artificial 3G pitch and hard surfacing would replace at least half of the existing semi-improved grassland, and more than half of the remainder would be sown with wildflower seed and planted with scrub and trees. A new reed bed soakaway would be provided for treating foul water and there would be a new meadow and tree planting on the southern boundary and new tree planting on the eastern boundary of the site which would deliver ecology betterment. The existing mature trees on site would be retained.

The site provides suitable habitat for amphibians including great crested newts (GCN) and there is a pond located approximately 450 metres from the site, however there is no evidence of newts being found on the site. The dilapidated stable buildings located in the northern section of the site are mainly in a poor state of repair and there are a number of nearby mature trees that may be suitable for roosting bats, but the development proposals deliberately avoid identifying that area for redevelopment, which is supported in ecology terms.

Modelling work undertaken by Surfacing Standards Ltd, revealed light spill from floodlighting would exceed 50 lux along the eastern hedgerow which could limit its use as a bat flight path in the future. This hedgerow is however quite dispersed and is not as well established or continuous compared to the hedging that abuts Whaddon Lane and other nearby fields, which have much more bat flight path value and appeal. An amended landscape strategy plan demonstrated that the potential impacts would be significantly mitigated during the main season when bats are active by applying a planning condition. The northern hedgerow would not be substantively affected by the proposed floodlighting.

While this application contributes some enhancement of the habitats on the site and potentially may result in the eastern dispersed hedgerow having little potential for bat flight path routes, it needs to be fully recognised that this site is already significantly degraded in terms of commuting routes and is too exposed and lacks significant tree cover to provide substantial bat foraging value, other than to be used at emergence times for specific insect species. The most likely habitat to be of value for bats is found in the northern part of the site which is not identified for redevelopment. The dilapidated buildings serve no useful function for the development and these would be removed, and there is no ecology-based opposition to such a plan.

The proposed floodlighting would result in some negative impacts on traversing bats however this can be mitigated to an acceptable level by the imposition of a condition. It

should also be appreciated that the immediate locality has floodlit sports pitches at the rugby club site (which are subject to planning conditions) and the highly prized hedgerow in ecology terms are found along Whaddon Lane and beyond rather than the eastern site partially hedged boundary. A Landscape Ecological Mitigation Plan (LEMP) is considered necessary to secure the details of the long-term ecological management of the site; and another planning condition is deemed necessary to restrict any additional lighting without the requisite application consent.

The Council's ecologist has concluded that the development would not lead to adverse effects on protected species and features of nature conservation subject to the imposition of conditions.

#### **9.4 Highway Issues**

Paragraph 103 states that *"Significant development should be focused on locations which are or can be made sustainable, through limiting the need to travel and offering a genuine choice of transport modes. This can help to reduce congestion and emissions, and improve air quality and public health. However, opportunities to maximise sustainable transport solutions will vary between urban and rural areas, and this should be taken into account in both plan-making and decision-making"*. This is reflected within Core Policy 60 titled: 'Sustainable Transport' and CP61 titled: 'Transport and New Development' of the WCS which seeks to ensure that new development is located at sustainable locations and are designed to encourage and maximise the use of sustainable transport facilities. Core Policy 61 also seeks to ensure that all new development is capable of being served by safe access to the highway network.

The proposed development proposes the creation of a new internal access off the existing access that serves the rugby club (served off the A361) and a 158-motor vehicle car park would be provided. The existing access off the A361 directly to the south of the site would be closed. The Council's highway officer has confirmed that the proposed development can be safely accommodated and accessed from the existing rugby club access, which is a simple priority junction with the A361 - which prohibits vehicles turning right into the site from the east. Visibility at the highway access is good and meets the guidance set out in Design Manual for Roads and Bridges (DMRB). The access width is also adequate and includes the provision of a wide pedestrian refuge/splitter island.

The application is supported by a detailed Transport Statement which has been appraised by the highway officers who have raised no highway-based objections. The highway officer is reported as confirming that;

*"the TA includes count surveys of the existing conditions and trip generation and assignment work for the proposed development. During the peak periods of site usage, which appear to be generally 5-6pm weekdays and 1-2pm weekends, a maximum of 47 two-way trips are anticipated. Whilst the TRICS analysis only retrieved three representative sites, which is not extensive, I am satisfied that the methodology used is sound and that the outputs can be considered to provide a robust assessment of the likely traffic generated by the proposals. The junction has also been subject to a capacity assessment, including applying a five-year growth factor and it is clear from this that the junction will operate well within capacity, with little to no queuing expected"*.

It merits reporting here that the Council's highways team previously requested the provision of a ghost island right turn lane for the rugby club development in 2005 and 2012, however, the trip analysis evidence for the rugby club development demonstrated that this would not be required. The subsequent access design incorporated a banned right turn in to the site, which consequently requires vehicles travelling from an eastern direction are required to do a U-turn at the nearby roundabout. This appears to work effectively and acceptably mitigates the safety issues that would result if right turners stopped and turned on the busy and fast A361.

The recorded accident data base in the vicinity of the rugby club access does not suggest that there is a problem with the existing arrangements, and there is no empirical evidence to support any requirement for a ghost island right turn lane and the appraised impacts of the projected additional traffic volume would not result in severe highway network impacts. The highway officer is satisfied that the existing arrangements appear to work adequately and that they will continue to do so if this development proposal is implemented in full.

The site is located at a sustainable location just outside the village of Hilperton and adjacent to an existing sports facility served off the A361. The site is within a reasonable walking/cycling distance of Hilperton and within reasonable cycling distance of Trowbridge with the town centre being approximately 2.8km distant. The site is accessible by public transport with a bus stop located near to the site along the A361 (approximately 120 metres from the rugby club entrance) although it is recognised that the bus operating times do not extend into the evening. This issue of lack of public transport serving the application site, especially during the evening, has been highlighted as a possible limitation for some people, however the applicant has no control over local public transport strategy, and officers do not consider this limitation to be substantive grounds to refuse planning permission.

In terms of trip generation an assessment has been made and it is concluded a maximum of 46 vehicle arrivals would be generated during the weekday evening peak hour (7:00-18:00 hours) and 47 arrivals/47 departures during the weekend peaks (13:00-14:00 hours). It is therefore considered that the existing access to the rugby club can accommodate the additional traffic proposed. In addition, the internal site layout has been formalised so that Trowbridge RFC car park users give-way to the new access road extending to the application site preventing traffic from queuing back to the A361 during busy periods.

The proposals also include the provision of an additional 158 car parking spaces, which have been designed for use for both the proposed development and any overspill from the existing rugby club. This level of car parking is considered adequate and there does appear to be peak time parking issues for the existing rugby club, which has required the formation of an overspill car park. This additional car parking provision within the site would help to mitigate these existing issues, as well as provide sufficient capacity for the proposed development.

The highway officer is supportive of the additional 11 cycle parking spaces to be provided adjacent to the new pavilion (although these should ideally be covered), and no highway objection is raised about the floodlighting proposal given its separation from the highway.

On the basis of the above, the proposed development is supported in highway terms with no severe highway impacts or safety concerns being found, and that the existing access arrangements serving the rugby club (and this site) are adequate and no further highway reengineering works to the A361 are deemed as being necessary.

### **9.5 Impact on the living conditions of neighbouring residents**

Adopted Wiltshire Core Strategy Core Policy 57 titled: 'Ensuring High Quality Design and Place Shaping' requires a high standard of design for all new development and have regard to the compatibility of adjoining buildings and uses and the impact on the amenities of existing occupants. The policy also seeks to secure appropriate amenity safeguards and minimise privacy, overshadowing and pollution detriment (e.g. light intrusion and noise).

The nearest residential properties to the application site are located at No.61 to 62B Paxcroft which are located about 135 metres to the south of the proposed pavilion and approximately 60 metres to the south/southeast of the proposed car park. Although it is recognised there would be additional vehicle movements to and from the site and use of the proposed car park and sporting facilities would result in additional noise and light pollution, officers are satisfied that the calculated separation distances are adequate to prevent adverse harm.

The A361 main carriageway which passes the two properties will contribute traffic noise levels that would exceed the projected vehicle movements at the application site; and, with the additional landscape planting being proposed along with the recommended planning conditions, officers are satisfied that the scheme would not result in significant impacts on the living conditions of neighbouring residents in terms of their amenities, privacies, exposure to noise.

Officers recognise that there would be some additional light pollution from use of the proposed floodlighting, however after careful analysis, officers are satisfied that given the separation distance involved and the application of planning conditions, the floodlighting would not result in substantive harm to the living conditions of the residents of these noted nearby properties.

In light of the above, officers are satisfied that the scheme would not have a significant adverse impact on the living conditions of neighbouring residents and the proposal is considered policy compliant.

### **9.6 Archaeology Issues**

The application is accompanied by an Archaeological Statement produced by BWB dated October 2019 which was thoroughly reviewed by the Council's archaeologist who confirmed that the evaluation report identifies that in the north eastern part of the site, an ovoid enclosure with internal features exist which may well date from the late prehistoric era. However, the precise function and character of this enclosure is still uncertain, as is the archaeological potential immediately to the North West and south east of it. The south west part of the site (evaluated in 2004) also appears to contain at least one possible ring ditch as well as further enclosures and linear features. It has also

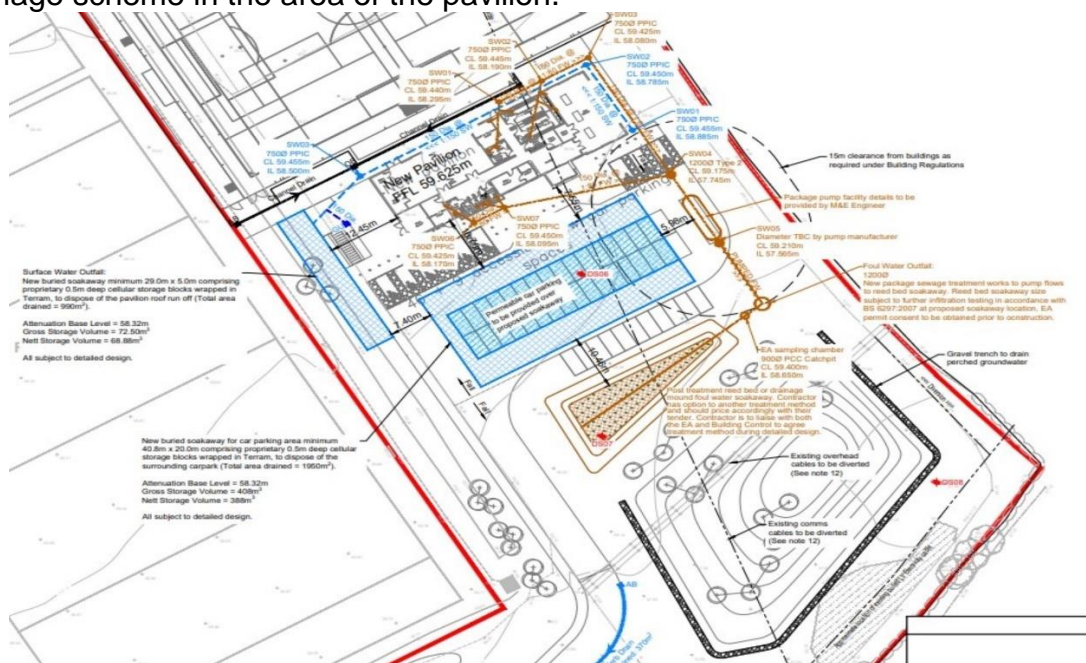
been confirmed to that the whole of the ovoid enclosure should be excavated prior to any development commencing (i.e. the land identified within the archaeology evaluation as Trenches 3 and 7) along with parts of the site in the south west.

The Council's archaeologist has concluded that a condition should be imposed to secure approval of an archaeological mitigation strategy via a Written Scheme of Investigation (WSI) and to secure the implementation of that strategy via the secured programme of fieldwork and also to secure the post-excavation analysis of the results along with the preparation of suitable reports to be approved by the archaeological advisors to Wiltshire Council.

With the recommended imposition of an archaeology related planning condition, NPPF and adopted Wiltshire Core Strategy local policies would be satisfied.

### 9.7 Drainage Issues

A package sewage treatment plant would be installed to treat the foul water from the proposed pavilion building before it is discharges to a drainage mound or reed bed soakaway. There are no public sewers or watercourses within the vicinity of the development and consequently, soakaways are identified to be used for the discharge of surface water. It is noteworthy to mention that the existing Rugby Club Pavilion is also drained via a soakaway for surface water; therefore, the proposed drainage strategy is considered in keeping with the existing wider site strategy. The Council's drainage officer reports no objection recognising that the site is at relatively low risk in terms of occupation and ground water flood risk subject to the imposition of planning conditions requiring further details on the finalised surface water drainage arrangements in order to ensure the site is adequately drained. The attached plan below details the proposed drainage scheme in the area of the pavilion.



### 9.8 Other issues

In response to the raised point about there being a need for directional signage, a planning informative is recommended so open up a dialogue between the applicant and the highways authority to discuss any necessity for additional signage.



## **10. Conclusion (The Planning Balance)**

The application site is located within the open countryside but adjacent to an existing sports facility that is considered to be a sustainable location accessed directly off the A361. The proposed development for new sports facilities complies with the adopted Wiltshire Core Strategy and the saved policies contained within the West Wiltshire Leisure and Recreation DPD as well as being policy compliant with the NPPF.

The development would result in some limited negative impacts through the loss of 3.5 hectares of grade 2 agricultural land, and the development, especially the provision and use of the floodlights would result in minor adverse harm to the landscape character. However, these negative impacts can be reduced in severity by landscape planting mitigation and use of robust planning conditions, especially in terms of restricting the use of the floodlights. The planning balance also needs to weigh up the local community and public health benefits that the development would deliver, which in the opinion of officers, outweighs the identified levels of harm noted above.

There would also be some neutral impacts, pursuant to the impacts on third parties, domestic amenities, ecology matters, land drainage and highway impacts. Vehicle access and the parking arrangements are considered acceptable and through the application and adherence to the recommended planning conditions listed below, officers are satisfied that this development would not lead to any substantive negative consequences.

In terms of the positives, this proposal would deliver additional sporting facilities with a 3G pitch to address an identified shortfall in the Trowbridge community area and further encourage people to live a healthier lifestyle as well as promoting and securing social benefits, which in the opinion of officers deserves significant weight in the planning balance.

This application was lodged to the Council in November 2019 and has been subject to significant officer negotiation and appraisal. The committee call-in reasons have been robustly appraised and as cited above, officers have concluded that subject to the imposition of the conditions set out below, approval is recommended.

## **11. RECOMMENDATION APPROVE subject to conditions**

1.The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

REASON: To comply with the provisions of Section 91 of the Town and Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.

2.The development hereby permitted shall be carried out in accordance with the following approved plans:

Site location plan scale 1:1000 dwg no. 170815-029.03

Site plan proposed scale 1:1000 dwg no. 170815-330.04

Pavilion layout - proposed scale 1:100 dwg no. 170815-326.03

Pavilion elevations - proposed scale 1:100 dwg no. 170815-328.03  
Landscape strategy scale 1:1000 dwg no. 359-P-006 rev B  
Hard works plan 1 of 2 scale 1:250 dwg no. 359-P-001 rev A  
Hard works plan 2 of 2 scale 1:250 dwg no. 359-P-002 rev A  
Planting plan 1 of 3 scale 1:250 dwg no. 359-P-003 rev B  
Planting plan 2 of 3 scale 1:250 dwg no. 359-P-004 rev B  
Planting plan 3 of 3 scale 1:250 dwg no. 359-P-005 rev C  
AGP development layout scale 1:500 dwg no. 18-0108 BM25583 0346 03 rev 1  
AGP elevations scale 1:200 dwg no. 18-0108 BM25583 0346 05 rev 1  
AGP elevations and fence/enclosure/mast details scale 1:100 dwg no. 18-0108 BM25583 0346 06 rev 1  
AGP proposed pitch scale 1:250 dwg no. 18-0108 BM25583 0346 02 rev 1  
Drainage strategy scale 1:500 dwg no. TRC-BWB-DGN-XX-DR-C-500 rev P8  
Proposed earthworks strategy scale 1:500 dwg no. TRC-BWB-DGN-XX-DR-C-630 rev P5  
Proposed external works finished levels scale 1:500 dwg no. TRC-BWB-DGN-XX-DR-C-600 rev P5  
Foodlighting design by Surfacing Standards Ltd publication dated 18.09.2020, project LSUK005

REASON: For the avoidance of doubt and in the interests of proper planning.

3.No development shall commence on site except for site clearance, ground investigation and demolition works, until further ground remediation and infiltration soakaway testing works have been undertaken and the findings have been submitted to and approved in writing by the Council along with the finalised soakaway design details to verify that the designed soakaways are suitable for the development.

If the infiltration test results or site groundwater levels demonstrate that soakaways are not appropriate, an alternative method of surface water drainage shall be designed, submitted to and approved in writing by the Local Planning Authority prior to any operational development commencing pursuant to the pavilion and pitch. Thereafter, any approved drainage scheme shall be completed prior to the development being brought into use.

REASON: To ensure that the development can be adequately drained without increasing flood risk elsewhere.

4.None of the development hereby approved shall commence on site (including demolition, ground works or vegetation clearance) until a Construction Environmental Management Plan (CEMP) has been submitted to and approved in writing by the local planning authority. The CEMP shall include, but not necessarily be limited to, the following:

1.A method statement for vegetation clearance, including the times when an Ecological Clerk of Works will be on site to supervise the works.

2.A plan showing 'no-go' areas which will be fenced off from contractors for the entire duration of the construction works.

3.A method statement for the demolition and/or removal of buildings in the north of the site including surveys required before demolition, times when an Ecological Clerk of

Works will be on site to supervise the works and provision of the mitigation which will be provided in the event bat roosts are found.

4.Measures, including surveys, mitigation and translocation, which will be undertaken to ensure risks to other protected species are identified and adequately reduced across the site before construction commences and throughout the construction period.

The approved CEMP shall be adhered to and implemented throughout the construction period in accordance with the approved details. A report prepared by a competent person(s), certifying that the required mitigation and/or compensation measures identified in the CEMP have been completed to their satisfaction, shall be submitted to the Local Planning Authority within 3 months of the date of substantial completion of the development or at the end of the next available planting season, whichever is the sooner.

REASON: To ensure adequate protection, mitigation and compensation for protected species, priority species and priority habitats.

5.No development hereby approved shall commence (save for ground clearance, site enabling, and demolition works) until:

a) A written programme of archaeological investigation, which should include on-site work and analysis, publishing and archiving of all archaeological findings, has been submitted to and approved by the Local Planning Authority; and that the approved programme of archaeological work has been carried out in accordance with the approved details.

REASON: In order that the development is undertaken in an acceptable manner, to enable the recording of any matters of archaeological interest.

6.Prior to the development hereby approved being brought into use, a Landscape and Ecological Management Plan (LEMP) shall be submitted to and approved in writing by the Local Planning Authority. The LEMP shall include:

A. A plan identifying the location and specific management aims for each identifiable landscape area.

B. 1-5 year and long-term maintenance requirements for each identifiable landscape area which demonstrate how the Landscape Strategy will be achieved after the initial 12-month planting contract.

C. Any requirements for replanting where planting stock becomes diseased or dies after the initial 12-month planting contract.

Annual and five-year work schedule capable of being rolled forward,

The LEMP shall be implemented in full in accordance with the approved details and shall endure for the lifetime of the development.

REASON: In order that the development is undertaken in an acceptable manner and to ensure adequate protection, mitigation and compensation for protected species, priority species and priority habitats.

7.The development hereby approved shall not be brought into use until the vehicular access, turning area and parking spaces have been completed in accordance with the details as shown on the approved plans. Thereafter, the aforesaid provision shall be maintained and retained for the lifetime of the development.

REASON: To ensure that adequate provision is made for parking within the site in the interests of highway safety.

8.The development hereby approved shall not be brought into use until the cycle parking facilities as shown on the approved plans have been provided in full and are available for use. Thereafter, the cycle parking facilities shall be maintained and retained for such use for the lifetime of the development.

REASON: To ensure that satisfactory facilities for the parking of cycles are provided and to encourage travel by means other than the private car.

9. The floodlighting hereby approved shall only be used between the hours of 15:00 and 22:00.

REASON: In order to minimise light pollution and nuisance and to protect and safeguard rural setting and any protected species.

NOTE: This condition is consistent with the approved decision issued for the adjoining rugby club site floodlighting (as granted by applications W/05/00822/FUL and W/12/01169/FUL).

10. No external lighting shall be installed on the site until detailed plans showing the type of light appliance, the height and position of the fitting, the illumination levels and light spillage levels in accordance with the appropriate Environmental Zone standards as set out by the Institute of Lighting Professionals in their publication GN01:2020, 'Guidance for the Reduction of Obtrusive Light' (ILP, 2020), and have been submitted to and approved in writing by the Local Planning Authority

REASON: In the interests of the amenities of the area, to minimise unnecessary light spillage above and outside the development site and to core bat habitat meets the requirements of the Trowbridge Bat Mitigation Strategy.

Note: This condition will be discharged when a post-development lighting survey conducted in accordance with section 8.3.4 of the Trowbridge Bat Mitigation Strategy has been submitted to the Local Planning Authority demonstrating compliance with the approved lighting plans, having implemented and retested any necessary remedial measures.

11.The development hereby approved shall be completed in accordance with the Landscape Strategy (Urban Wilderness 359-P-006 Rev B), the Planting Plans 1 (Rev B), 2 (Rev B), and 3 (Rev C) (Urban Wilderness 359-P-003-005); and, the floodlighting design (Surfacing Standards Ltd publication dated 18.09.2020, project LSUK005)

REASON: To ensure adequate protection and mitigation for protected species, priority species and priority habitats.

12. No sound reproduction or amplification equipment (including public address systems and loudspeakers) which would be audible at the site boundaries, shall be operated on the site, unless approved in writing by the local planning authority.

REASON: To define the terms of this permission and to safeguard the rural setting and nearby amenities.

13. All soft landscaping comprised in the approved details of landscaping shall be carried out in the first planting and seeding season following the first occupation of the building(s) or the completion of the development whichever is the sooner. All shrubs, trees and hedge planting shall be maintained free from weeds and shall be protected from damage by vermin and stock. Any trees or plants which, within a period of five years, die, are removed, or become seriously damaged or diseased shall be replaced in the next planting season with others of a similar size and species, unless otherwise agreed in writing by the local planning authority. All hard landscaping shall also be carried out in accordance with the approved details prior to the occupation of any part of the development or in accordance with a programme to be agreed in writing with the Local Planning Authority.

REASON: To ensure a satisfactory landscaped setting for the development and the protection of existing important landscape features.

14. Any on site works undertaken in relation to trees shall be carried out in strict accordance with section 4 of the Arboricultural Impact Assessment Report produced by BWB (dated November 2019) and protective fencing shall be erected prior to any operational development commencing on the site in accordance with the approved details. The protective fencing shall remain in place for the entire development phase and until all equipment, machinery and surplus materials have been removed from the site. Such fencing shall not be removed or breached during the construction operations.

REASON: In order that the development is undertaken in an acceptable manner and to enable the Local Planning Authority to ensure the retention of trees on the site in the interests of visual amenity.

15. Prior to bringing the development into use the applicant shall submit details of stopping up the existing field access served off the A361 and shown on approved plan drawing 170815-330.04 which shall require the written approval of the Council and thereafter, the stopping up of the field access shall be carried out in accordance with the approved details within 2 months of the site being brought into use.

REASON: To define the terms of this permission and in the interests of highway safety.

**Planning Informatives:**

1. Should the applicant wish to apply to vary the floodlighting condition as referenced above, the applicant would be required to undertake additional protected species surveys and light impact assessments in accordance with the TBMS

requirements and appropriate future standards of the Institute of Lighting Professionals (or its equivalent) and/or adopted policy.

2. The applicant is advised to consider the provision of additional road signage and to liaise with the Council's highways team where necessary, to assist with directing visitors to and from the site.



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## REPORT FOR THE WESTERN AREA PLANNING COMMITTEE

APPLICATION 20/08785/FUL

<b>Date of Meeting</b>	9 June 2021
<b>Site Address</b>	Land at 66A Westbury Leigh, Westbury BA13 3SQ
<b>Proposal</b>	Demolition of the existing building. Construction of 4 new dwellings (revised scheme following the withdrawal of application reference 19/09803/FUL for 5 dwellings)
<b>Applicant</b>	Mr Daniel Reed
<b>Town / Parish Council</b>	Westbury Town Council
<b>Electoral Division</b>	Westbury East – Cllr Gordon King
<b>Grid Ref</b>	386275 - 150084
<b>Type of Application</b>	Full Planning Application
<b>Case Officer</b>	Jemma Foster

### Reason for the application being considered by Committee

This application has been ‘called in’ for the Western Area Planning Committee to determine at the request of the elected local ward member, Cllr Gordon King should officers be minded to support the application so that the elected members can consider the following material matters:

- The scale of the development
- The visual impact upon the surrounding area
- The relationship to adjoining properties
- The design, bulk, height and general appearance of the proposal
- The environmental or highway impact
- The car parking
- The extent of community concern and to open this application to public debate.

### 1. Purpose of Report

The purpose of this report is to assess the merits of the proposal against the policies of the development plan and other material considerations and to consider the recommendation that the application should be approved subject to conditions.

### 2. Report Summary

The key determining planning issues are considered to be:

- The Principle of Development;
- Impact upon the Area and wider landscape;
- Heritage Matters;
- Highway Impacts;
- Biodiversity Matters.
- Neighbouring Impacts

### 3. Site Description

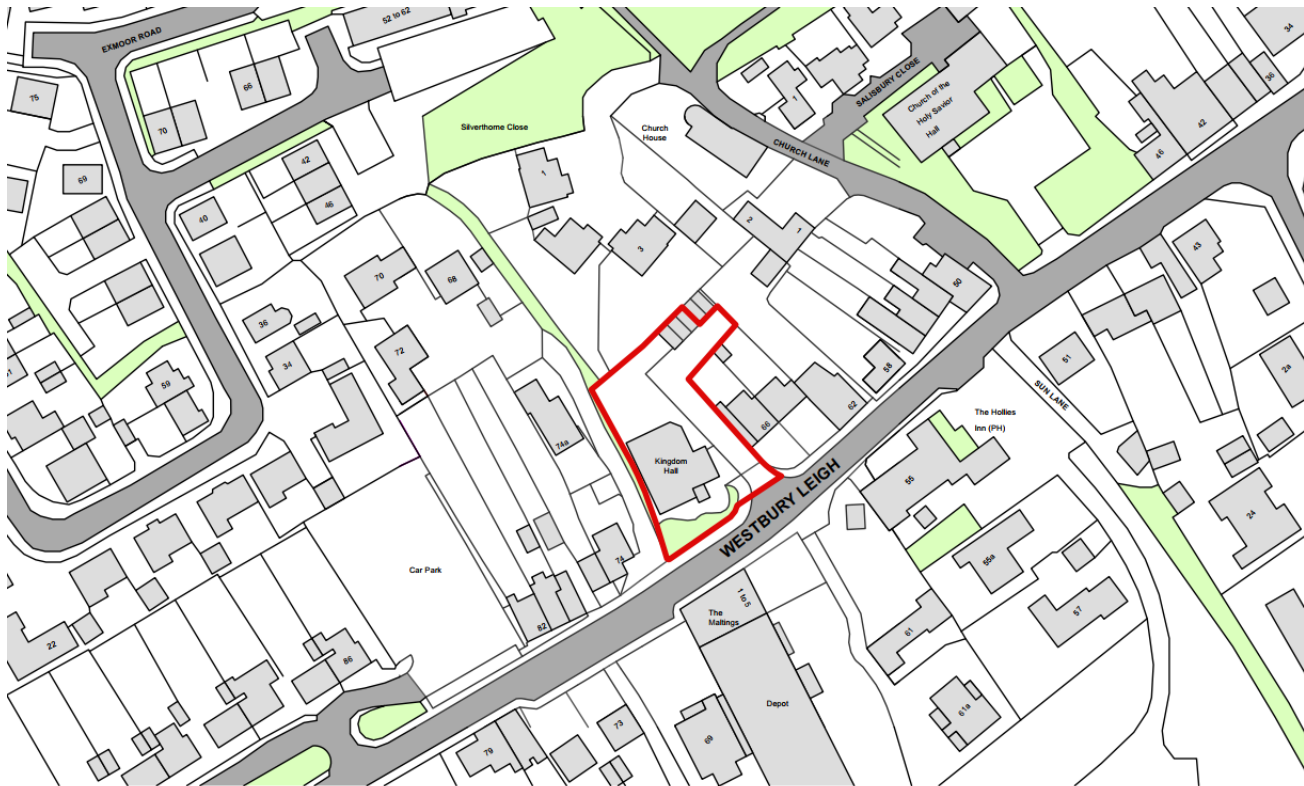
The site that is the subject of this application is located within the town policy limits of Westbury and is found on the north side of Westbury Leigh Road (a C class adopted public highway). There is an existing single storey detached flat roofed building on the site known as the Kingdom Hall of Jehovah’s Witnesses – which was originally built as a place of worship in 1976 and was extended and altered in 1991 to its current form on a site extending to 695m<sup>2</sup> (which equates to 0.17 acres/0.69 ha).

The existing 223sqm building (shown below) comprises a main hall, 2 reception rooms, toilet facilities and a kitchen. There is an area of enclosed garden to the front and garaging and a gated car park (as shown in the second photo below) located to the rear of the site that can accommodate up to 11 car parking spaces.



The existing Kingdom Hall is not listed but the application site is located within 50m of two grade II listed buildings namely: The Hollies Inn which is a 2-storey building located to the south east of the site and the

Malthouse at the Maltings which is a very prominent 2 and 3 storey rectangular building located to the south of the site - with both listed properties located on the opposite side of Westbury Leigh Road that are clearly notated on the location plan below.



A view along Westbury Leigh Road with The Hollies Inn above left and the Malthouse in the distance. The photograph also reveals that the immediate site surrounds has a varied character in terms of building size and design.

On the next page, this report includes two photographs of this site with the first (dating from around the 1920s) which reveals the housing that previously occupied the site immediately opposite the Malthouse.



The current site looks like this:



#### 4. Planning History

W/76/00015/HIS - Demolish existing buildings - erect new building for Religious worship - Approved

W/91/00100/FUL - Extension and alteration to a place of worship - Approved with Conditions  
19/09803/FUL - Demolition of the existing building. Construction of no.5 new dwellings – Withdrawn

### 5. The Proposal

This application seeks full planning permission for the erection of a terrace of three 3-bedroom, two-storey (with a room in the roof) dwellings to be constructed along the site frontage and a one two-storey 4-bedroom property to be constructed at the rear of the site with associated parking, turning and landscaping. The original proposal was illustrated by the following elevations:



Amended plans were received in March 2021 which were subject to a fresh consultation exercise being for 21 days. The changes included within the revised plan submission included the following:

- The deletion of one residential unit (from 5 to 4 units) and removal of dormers on front roof plane.
- Lowering the ridge height for the terraced block and setting it further back into the site.

The revised proposed elevations that are reported to committee for consideration are:

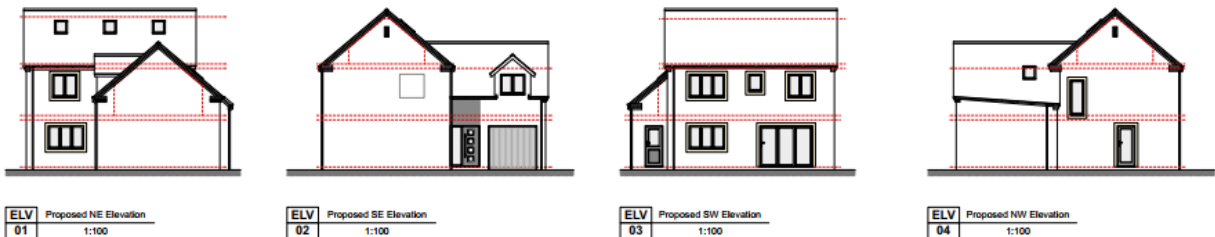




The proposed terrace fronting Westbury Leigh Road is illustrated as follows:



The proposed single dwelling to the rear is shown below.



The proposed new development in footprint terms comprises 228sqm, 4.5sqm more than what presently exists on the site (refer back to the previous aerial photo and proposed plans). The scheme proposes the

removal of the conifer, silver birch, eucalyptus, prunus, acer and rowan trees at the site frontage and a telegraph pole in the site's southern corner is proposed to ensure service connection continuation.



The site is located in flood zone 1 – a site with the lowest risk of flooding.

## 6. Planning Policy

The Wiltshire Core Strategy (adopted Jan 2015):

CP1 – Settlement Strategy, CP2 – Delivery Strategy, CP32 – Spatial Strategy Westbury, CP57 – Ensuring High Quality Design and Place Shaping, CP58 – Ensuring the Conservation of the Historic Environment, CP60 – Sustainable Transport, CP61 – Transport and New Development, CP64 – Demand Management, CP67 – Flood Risk

Saved Policies for the West Wiltshire District Local Plan (1st Alteration): U1a Foul Water Disposal.

Other Considerations:

- The Wiltshire Waste Core Strategy (adopted 2009) - Policy WCS6 - Waste Reduction and Auditing
- The Wiltshire Local Transport Plan (LTP) and Car Parking Strategy
- National Planning Policy Framework 2019 (NPPF) and Planning Practice Guidance (PPG)
- Circular 06/2005 – Biodiversity and Geological Conservation
- “The Setting of Heritage Assets: Historic Environment Good Practice Advice in Planning 3” (HE GPA3)

## 7. Consultations

Westbury Town Council - Objects to the amended plans (as summarised below):

- The height of the proposed buildings would not be sympathetic to the site.
- The proposed development is excessive for this constrained site and the development by virtue of its size, mass and bulk, would dominate and erode the character of the surroundings.
- The proposed removal of an important row of trees would be harmful to the street scene, its visual setting, and the distinctive identity of the local community.
- The development would not comply with the Council's Core Strategy policy in terms of delivering high quality development and place shaping. The scheme would erode rather than enhance the unique and separate identity of Westbury Leigh.

- The access to the highway network is tight and restricted which adds weight to the weight of arguing that this development constitutes an overdevelopment of a constrained site making access to and egress from the public highway problematic in several scenarios.
- Lack of garden and amenity space. The present public health crisis has underlined the importance of outside space.

Wiltshire Council Highways – No objection subject to conditions

Wiltshire Council Drainage - No objection subject to conditions

Wiltshire Council Conservation Officer - No objection

## **8. Publicity**

The application was advertised by a site notice and neighbour notification letters. The deadline for any correspondence was 1st April 2021. 11 letters of objection have been received on the amended plans and 24 letters of objection were received on the as submitted plans. The comments made on the amended plans are as follows and are in addition to the comments below:

### Principle of Development

- Too many dwellings proposed at this site. The site could accommodate two additional dwellings, not four.
- The revised plans still constitute as site overdevelopment

### Impact upon the area

- One larger property to the rear instead of 2 smaller ones does not overcome the previously raised concerns
- Now that the terrace has been moved back why do the existing trees have to be removed?
- The dormer windows should be flat velux style which would be more in-keeping with the area

### Impact on Amenity

- The larger dwelling to the rear would cause more overshadowing and overlooking then the previous plan.
- The larger dwelling has a side window that would look directly into the gardens of the proposed terrace and the dormer windows in the terrace would overlook the 4-bedroomed property.

### Access

- How would the proposed garage attached to the 4-bedroom property be used and accessed?

### Other Matters

- When gas is phased out how would the occupiers find alternatives?
- Should permission be granted, there should be a condition imposed requiring\_5 swift bricks to be included in the development

In addition to the above, 24 letters of objection were received on the originally submitted planning submission which was subject to the following summarised public comments:

### Principle of development

- This is an overdevelopment of the site

### Impact on the area



- The size (3-storeys) and design of the proposed dwellings are too high and would not be in keeping with the local area
- Significant trees located along the road frontage would be removed and their replacement with apple trees is not realistic
- The proposed front terrace would be positioned forward of the existing building line
- There would be a loss of biodiversity and habitat

#### Impact on neighbouring amenity

- The development will overshadow neighbouring properties and their gardens
- The proposed dwellings will be overbearing as our land is already 4-5ft lower than the proposed site
- Gardens are too small
- There will be overlooking to neighbouring gardens especially from plots 4 and 5
- More dwellings will mean more noise
- Concerned about demolition of the site and the possibility of asbestos being in the existing building
- The occupiers of number 61 have their primary amenity space at the front which will be completely compromised

#### Highways

- Access is too narrow
- Parking will create problems for residents already living in the area
- The access also serves other properties and therefore parking should be made available for the existing houses
- Parking spaces are narrow so you cannot open car doors making them unusable
- Concerned with excess water running down to the lower properties
- More dwellings will result in an increase in traffic
- Cars associated with the development will need to reverse up and out onto the main road causing congestion
- There are no electric charging points for electric cars
- How will the refuse lorry access the site
- There are already problems with drainage on the site

#### Other Matters

- Westbury does not have the infrastructure for more dwellings
- The loft area is to be used as a bedroom – where will future occupiers store anything especially as there is no garage or shed
- The properties have grass and therefore need 4 recycle bins and not the 2 shown
- No provision for solar panels
- The site owner has no legal access to the private road they want to use
- The existing garages are owned by neighbours – how can the site owner develop this area of land if they don't own it
- There are bats in the area and no surveys have been submitted
- Will asbestos be removed in line with the relevant legislation
- No planning notices have been erected for this application
- Unacceptable that no site visit is being undertaken by Council Officers
- Comments on the last application should be forwarded onto this current application
- The wall holding back the kingdom hall against Silverthorne close is in a poor state of repair and bows into my garden and is likely to collapse with any additional weight.
- The plans do not have a scale on them so how can they be measures

## **9. Planning Considerations**

Section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 require that the determination of planning applications must be made in accordance with the Development Plan, unless material considerations indicate otherwise.

### **9.1 The Principle of Development**

The site is located within the Market Town of Westbury where under CP1 and CP2, additional residential development is acceptable in principle. Core Policy 49 sets out to protect community facilities and the supporting WCS text in paragraph 6.71 includes places of worship as a community facility – which falls under the new Use Class of F1(f) (previously known as a Class D) uses for public worship or religious instruction.

Adopted Wiltshire Core Strategy Core Policy 49 states that: *Proposals involving the loss of a community service or facility will only be supported where it can be demonstrated that the site/building is no longer economically viable for an alternative community use. Preference will be given to retaining the existing use in the first instance, then for an alternative community use. Where this is not possible, a mixed use, which still retains a substantial portion of the community facility/service, will be supported. Redevelopment for non-community service/ facility use will only be permitted as a last resort and where all other options have been exhausted. In order for such proposals to be supported, a comprehensive marketing plan will need to be undertaken and the details submitted with any planning application. Only where it can be demonstrated that all preferable options have been exhausted will a change of use to a non-community use be considered.*

The application is supported by a letter produced by Kavanaghs (a residential and commercial agent) which asserts that:

- Kavanaghs were instructed by the Jehovah Witnesses to find purchasers for their sites in Westbury and Devizes due to a nationwide policy to reduce overheads by merging Kingdom Halls within large towns.
- Site marketing commenced in 2018 with online advertising, local press publications and a 'for sale' sign being displayed at the site property.
- The site was advertised as a place of worship (its lawful use) as well as for potential reuses as commercial and community uses as well as for alternative development.
- There were 20 viewings and 5 firm offers were made.
- The majority of the offers were received from community groups, but these offers fell away as they could not raise the funds.
- The applicant for this application made an offer in April 2019 which was completed in November 2019.

On review of the details provided by Kavanaghs, there is sufficient evidence to demonstrate that the site was placed on the open market and was given every reasonable opportunity for another religious or community group to purchase the site, but as the record reveals, whilst express interest and offers were made by others, these did not proceed. Officers are satisfied that the terms of CP49 have been met and this application proposal to deliver 4 residential properties is policy compliant.

### **9.2 Impact upon the character and appearance of the area**

Westbury Leigh is an area of Westbury that is characterised by different building design, heights, styles and materials with dwellings/buildings largely fronting the pavement/public highway. The area immediately surrounding the application site is characterised by dwellings set back somewhat from the road frontage.

To visually illustrate the above, the following photos of the surrounding area are included on the next page.



The existing building set some 7m back from the highway, is single storey and flat roofed that does not contribute positively to the character and appearance of the street scene. Its juxtaposition with the prominent 2/3 storey listed Malthouse (shown below) creates an awkward and somewhat harmful setting impact on the nearby heritage asset, although it does further demonstrate the varied built forms of development.



The proposed terrace of three dwellings being set back from the street frontage by 5 metres would create much more of an active street scene frontage than what currently exists, and the 2-storey terraced form would not harm the setting of the nearby asset. Indeed, by reference to the previous historic photograph included earlier within this report, officers are of the view that this development would re-introduce a form of development that was previously a recognised existing characteristic and having a 2-storey built form on the opposite side of the road to the Malthouse is considered acceptable.

Officers report no objection to the proposed siting of the terrace which would sit well alongside the buildings found along the northern side of Westbury Leigh Road with the site positioned between No.66 which is stepped back from the road frontage by approximately 9.5 metres and No.74 which is stepped back approximately 2.5 metres. The plan below shows that the terrace would occupy a space that would be read as a transition between No.66 and No.74 and it would not lead to any demonstrable harm.



The proposed terraced would be constructed using a combination of red multi and buff face brickwork with the joints being hidden by a down pipe, under a slated roof with grey coloured fenestration. These materials can be found within the existing street scene and as such are considered to be appropriate to this location.

The proposed terrace would measure just over 9.5 metres in height, 8.5 metres wide and 16 metres in length. Due to the set back nature of the existing nearby properties (except the Maltings), the height of the proposed terrace would not lead to harmful overbearing impacts.

The proposed single residential plot located at the rear of the site is considered to be appropriate in terms of its location as there are other single dwellings found at the rear of existing dwellings that front Westbury

Leigh Road – such as the 2-storey dwelling at No. 74a (which was approved in 2001 under W/01/02078/FUL and its siting and proximity to this application is shown on the previous plan insert).

This proposed single dwelling forming part of this application would measure just over 8 metres in height and would be constructed using the same materials.

Should members be minded to approve this application, it is recommended that planning conditions are imposed to protect the character and appearance of the street scene and to protect the setting of nearby historic buildings and to require the applicant to submit further details of any fences, walls or gates for the written approval of the local planning authority prior to construction. Other conditions are recommended which are found within section 11 at the end of this report.

It is fully appreciated by officers that this development would bring about a significant change to the street scene and immediate character of Westbury Leigh Road, but officers are of the view the development would not be harmful and would add to the existing variety of building design, and as such, officers argue that the development would comply with the relevant criteria of CP57 and the NPPF.

### **9.3 Impact upon the setting of the nearby listed building (heritage asset)**

Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires ‘*special regard*’ to be given to the desirability of preserving a listed building or its setting. Paragraph 193 of the NPPF states that “*when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset’s conservation. ... This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.*”

The following points are taken from the Historic England document “The Setting of Heritage Assets: Historic Environment Good Practice Advice in Planning 3” (HE GPA3) that are considered to be particularly relevant:

HE GPA3 Part 1:

*“The NPPF makes it clear that the setting of a heritage asset is the surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset.”*

*“The extent and importance of setting is often expressed by reference to visual considerations. ...views of or from an asset will play an important part...”*

*“While setting can be mapped in the context of an individual application or proposal, it cannot be definitively and permanently described for all time as a spatially bounded area or as lying within a set distance of a heritage asset. This is because the surroundings of a heritage asset will change over time.”*

*“The importance lies in what the setting contributes to the significance of the heritage asset or to the ability to appreciate that significance.”*

The application site is located opposite the Grade II listed building at The Maltings and there is another nearby Grade II listed public house at The Hollies further to the east of the site. The settings of these two protected buildings must be taken into account as part of the assessment of this application.

The existing building on the site is a flat roofed single storey structure and the Council’s Conservation Officer is of the view that it does not contribute positively to the setting of the heritage assets. The one virtue in this

regard is that it is a low-level building that does not have much presence within the street, but there is no heritage-based reason to oppose the proposal demolition of the existing building.

The proposed replacement terrace of a two-storey form would be of a height that would be in keeping with neighbouring and other domestic buildings along the street, and the Council's Conservation Officer considers the form and scale of the proposal to be acceptable. The Conservation Officer is also of the opinion that the proposed design, detailing and use of materials would be in-keeping with the immediate area and would not result in demonstrable harm to the setting of the listed buildings. The Conservation Officer did express a preference of the front roof elevation of the terrace having fewer rooflights but asserted that this preference would not warrant a reason to refuse the application.

The Conservation Officer also confirmed that the proposed detached dwelling located to the rear of the site by reason of its location would not have any impact on the setting of the listed buildings.

In sum, the proposal would not cause any harm to the heritage assets and the proposal complies with the relevant WCS policies namely: CP57 and CP58, as well as Historic England's guidance contained within "The Setting of Heritage Assets: Historic Environment Good Practice Advice in Planning" and the NPPF.

#### **9.4 Highway and Drainage Impacts**

Two parking spaces would be provided for each of the proposed 3-bed dwellings and three parking spaces would be proposed for the 4-bed dwelling. One additional visitor car parking space would be proposed with each measuring 2.5 metres by 5 metres (which exceeds the Council's minimum parking space standards) and therefore complies with the Wiltshire Parking Strategy.

The proposed access and off-street turning area is acceptable and the Council highway officer has raised no objections subject to the imposition of planning conditions which are considered appropriate and necessary (refer to section 11 of this report).

The proposed garage should be subject to a planning condition restricting its use and to prevent it being converted to habitable accommodation without separate future consent to ensure that the proposed parking spaces are maintained in accordance with the adopted Core Strategy requirements and to satisfy the Council's Parking Strategy.

Officers acknowledge that local objections have been received regarding how vehicles would access the parking spaces citing potential conflicts, however the submitted plans reveal that the spaces could be accessed without unreasonable manoeuvres and there would be no highway harm, and as mentioned above, the Council's highway officer raises no objection. The development is found to be compliant with NPPF para 109 and WCS core policies 60, 61 and 64.

Additional local concerns have been raised regarding the loss of three garages. However, the three existing garages (which are shown on a previous set of plan and photos inserts within this report) do not meet modern car parking standards and are not used for parking purposes. The agent has confirmed that 1 of the garages was previously acquired by a homeowner who lived on a nearby street who already has on-plot parking and a garage. The garage at the rear of this application site was instead used for storage purposes. The 2 remaining garages were owned by a neighbour who is currently having three parking spaces formed at their property; and again, the garages were only used for storage purposes.

In terms of drainage, the site is located in Flood Zone 1 and is not prone to flooding. The applicant proposes to discharge the site's associated surface water via on site infiltration and foul sewerage would be disposed of via the main sewer. The Council's Drainage Officer has confirmed having no objection subject to a planning condition pursuant to ground investigations, infiltration details and the finalised soakaway design, which can be secured by an appropriate suspensive condition. Wessex Water have raised no objections to the proposal.

### **9.5 Ecology/Biodiversity Impacts**

Local objections have cited that bats use the garages that are identified for demolition. There is however no evidence to support the claims, but bats and their roosts are protected by law and it would be illegal to disturb, harm, obstruct, damage or obstruct them and as such, a planning informative is recommended to accompany any planning permission to ensure the applicant is fully aware of their legal responsibilities and to seek the advice of a licensed ecologist should any bats be located or found on the site during the course of any enabling or site clearance work.

It is fully appreciated that paragraph 170 of the NPPF requires planning decisions to contribute and enhance the natural environment by *inter alia*, protecting and enhancing valued landscapes, sites of biodiversity or geological value, providing net gains for biodiversity and preventing new development from materially contributing to and exacerbating pollution.

The existing building occupies 223.5m<sup>2</sup> of the current site, and the proposed four dwellings would have a comparable footprint of 228m<sup>2</sup> (an increase of only 4.5m<sup>2</sup>) The proposal would result in reducing the amount of tarmac and area of hardstanding which would be replaced with green space (domestic gardens) which would deliver some natural environment biodiversity net gains.

The application includes the proposed felling of six trees along the site frontage to accommodate the proposed development – which would have a limited impact on the street scene but it is important to appreciate that the trees are not protected by TPO; could be removed at any time without the need of any consent from the Council, and are not of sufficient quality to be worthy of protection – they appear to post-date the construction of the Hall. The applicant has accepted the need for compensatory tree planting and proposes the planting of apple trees within the proposed domestic garden. Whilst the loss of the six trees constitutes a detrimental aspect of the application proposal, officers do not consider it would be reasonable to base this as a refusal reason given the lack of any tree protection controls and the compensatory tree planting part of the proposal.

To ensure that this proposed new landscaping features are provided, a planning condition is considered necessary to secure its delivery and net biodiversity gains. Subject to conditions, the proposal is considered Compliant with CP50 and paragraph 170 of the NPPF.

### **9.6 Neighbouring Impacts**

The single dwelling to the rear of the site would be located approximately 2.5 metres from the site's northern boundary and approximately 4 metres from the site's western boundary. Its proposed garage would be approximately 6.5 metres high to the ridge and 5 metres to the eaves and would be offset from the northern boundary. Further along the site's northern boundary (as shown in plan and photos previously), there are three single storey garages, which would be removed as part of the site's redevelopment which would include a new boundary fence measuring approximately 2m with landscape planting to create a new boundary treatment with the neighbouring properties shown below.



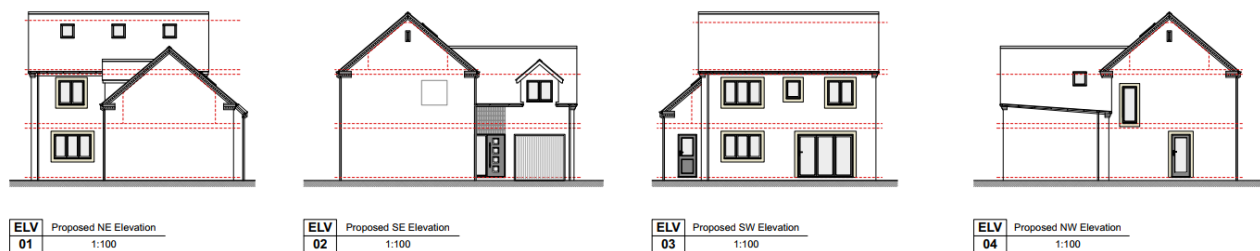
The gardens of No. 2 and 3 Silverthorne Close are approximately 1-1.5m below the level of this application site. The application is supported by plans confirming the existing and proposed floor levels which reveal that the existing levels would more or less remain albeit with a very modest increase of 10cm along the northern site boundary.



The above photo shows the bottom of the garden of No.2 Silverthorne Close. The far southern reaches of the garden of No. 2 (including the greenhouse and the intervening garden up to the site boundary) is not



considered an area of garden that offers significant privacy for its owners and officers are satisfied that the proposed redevelopment of the application site would not materially harm the living conditions enjoyed at No.2 or No.3 Silverthorne Close – with the latter property having a heavily vegetated site boundary – which is partially seen in the above photo.



The proposed elevations of the single dwelling at the rear of the site would have a window at the first-floor level serving a stair well and a door serving the kitchen on ground floor on the north-west façade as shown below which would not result in harmful impacts to the neighbours at No’s 2 and 3 Silverthorne Close, by virtue of the upper floor window not serving a habitable room and the separation distances to the neighbouring properties. However, officers acknowledge that the window by being close to the common boundary may lead to the possibility of some transient overlooking so it is considered appropriate to condition the window to be obscure glazed.

The door by reason of it being located at ground floor is considered not to result in overlooking concerns. The properties at Silverthorne Close are located to north of the proposed site and as such, their gardens would experience some overshadowing during the day. The fence on the boundary measures approximately 2 metres high and therefore 6 metres of the main part of the proposed dwelling would be visible from the neighbouring gardens. The eaves of the proposed garage would measure about 5 metres from the ground level and then the roof slopes away from the neighbouring garden which would reduce any overshadowing and overbearing impacts.

The extent of overshadowing to the 2 neighbouring gardens would be experienced from approximately midday onwards and would be most acute during mid-winter, but the impacts would be temporary and not of a level that would substantiate a reason for refusal. Officers are also of the view that the areas of neighbouring garden that would be most affected (i.e. the land nearest the common boundary) does not have high amenity or privacy value.

The NE elevation would have a window at first floor level which would serve a bedroom along with 3 rooflights in the loft area that would serve a playroom. The bedroom window would predominantly look along the access road to the garage although some overlooking could occur towards the end of the garden of No.66 Westbury Leigh, but it is considered that the level of overlooking would be limited and would not warrant a refusal reason. The rooflights would be positioned in excess of 1.7 metres above the internal floor level, which is sufficient to guard against overlooking harm to any neighbouring properties.

The proposed SW elevation is shown to have three windows at the first-floor level. One would serve a bathroom and the remainder would serve bedrooms. These windows would primarily face the garden of the proposed property but would look towards No. 74A. The distance between the proposed rear elevation and the western boundary at its closest point measures between 3 and 5 metres. This boundary has vegetation/trees outside of the applicants’ control. The distance between the SW elevation and No. 74A is approximately 10 metres which includes an access road. No.74A has a number of windows on its side

elevation. Two at ground floor level, one of which is obscure glazed and three at first floor level. It is considered that due to the distance between the two properties and the existing boundary treatment there would be no significant overlooking from the proposed first-floor windows in the SW elevation of the proposed dwelling, and there would be no material overshadowing or overbearing issues that would warrant a refusal reason.

The proposed SE elevation is shown to have one window above the proposed attached garage that would look southwards up the main access road which could provide some oblique overlooking of the garden of No.66 Westbury Leigh. However, by reason of its location, the angled view and the separation distance, it is considered that it would not result in any harm.

The proposed terrace would be set back from the main highway and would be positioned about 15.5 metres from the Malthouse which is located opposite the site (as shown in previous photos), and the proposed terrace would have similar ground levels to what exists at present. There are windows at ground floor and first floor at the Maltings which face the site that appear to serve residential properties. Due to the distance between the existing and proposed dwellings and with Westbury Leigh Road in between, officers are satisfied that the terrace development would not lead to harmful neighbouring impacts.

The SW and NE elevation of the proposed terrace would have windows on its gables that would serve a stairwell and a downstairs toilet. To safeguard future amenities, it is considered reasonable to secure by condition obscure glazing of the downstairs toilet windows. The stairwell on the NE elevation would look towards the garden of No.66 and is also recommended to be obscure glazed. The stairwell window on the SW elevation would face towards No.74 which has an existing obscure glazed window on its site elevation.

The windows to the rear of the terraced dwelling would be positioned approximately 11 metres from the proposed new internal plot boundary with the proposed single dwelling which is considered sufficient to safeguard neighbouring amenity.

Overall, it is considered that the proposed development would not result in neighbouring amenity issues or concerns for future occupiers that would warrant a refusal reason. Officers are of the view that it is necessary to impose a condition removing Permitted development rights for additional windows, rooflights or dormers to protect the future amenity of existing neighbours.

Bin storage space is shown on the plans which is deemed adequate. Building for Life 12 (BFL12) suggests that rear gardens should be at least equal to the ground floor footprint of the dwelling, whilst Wiltshire Council do not have a prescriptive plan policy on space standards for gardens, the BFL12 provides a good rule of thumb. The proposal would provide a mix of 4 housing options with varying garden sizes that are deemed sufficient to meet different household needs at this urban location.

Concerns have been raised regarding the demolition works and possible presence of asbestos. This matter would be a matter for other legislation and any asbestos found must be undertaken by a licensed contractor holding a license issued by the Health & Safety Executive. A planning informative can be imposed to record the necessity of safe on-site working operations.

## **9.7 Other Matters**

Additional public concerns received relate to the lack of site visits. The application was submitted during the pandemic lockdown when planning case officers were advised to reduce the number of site visits. The case officer has however visited this site many times and although the first site notice was erected a week after

the consultation letters were sent out, the consultation deadline was extended. Another expressed concern raised related to there being no measurements annotated on the published plans, but the plans include a scale bar which allow the plans to be accurately measured electronically. The site ownership has also been contested but the applicant has confirmed they own all of the land outlined in red on the location plan and have declared by signing Certificate A on the planning application form that the application is completely accurate.

Some of the raised third-party concerns are not material planning considerations and as such, they cannot be taken into consideration or influence the assessment of this application. These include the use of gas in the dwellings and future utility need connections, the provision of internal storage, the lack of provision for solar panels and future structural concerns.

## **10. Conclusion**

The application site is located within the market town of Westbury and is considered a highly sustainable location whereby residential infill development is supported in principle. The negotiated finalised proposal is considered acceptable in policy terms that would add variety to the street scene and housing options. Officers are satisfied that the development would not result in material harm in terms of heritage impacts, highway interests, drainage and ecology matters, and the impacts to neighbours. Subject to planning conditions, this application is recommended for approval and officers maintain that the application complies with the relevant policies of the Local Plan and the Framework.

## **11. Recommendation - Approve the application subject to the following planning conditions**

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### **Conditions: (11)**

- 1 The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

REASON: To comply with the provisions of Section 91 of the Town and Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.

- 2 The development hereby permitted shall be carried out in accordance with the following approved plans:

Drawing 841:03B (Existing & Proposed Location & Site Plan) received 03.03.2021

Drawing 841:01 (Existing Building) received 09.10.2020

Drawing 841:02A (Existing Levels) received 05.05.2021

Drawing 841:12B (Proposed Elevations and Floor Plans for Detached House) received 02.03.2021

Drawing 841:05D (Proposed Plans and Elevations of Terrace) received 02.03.2021

Drawing 841:11 (Proposed Eaves Heights) received 30.11.2020

Drawing 841:07E (Proposed Street Scene) received 02.03.2021

Drawing: 841:10A (Proposed Stormwater Drainage) received 03.03.2021

Drawing 841:04F (Proposed Site Plan with Vehicle Tracking) received 11.05.2021

REASON: For the avoidance of doubt and in the interests of proper planning.

- 3 No development shall commence on site, except for enabling works and ground investigations and remediation, until detailed infiltration testing and soakaway design in accordance with BRE 265 and Wiltshire Council's Surface Water Soakaway Guidance have been submitted for the written approval of the LPA to verify that soakaways would be suitable for the development. If the infiltration test results demonstrate that soakaways are not appropriate, an alternative method of surface water drainage with the requisite details, shall be submitted to and approved in writing by the Local Planning Authority; and in either case, the approved drainage systems shall be installed and completed prior to the occupation of the development.

REASON: To comply with Core Policy 67: Flood Risk within the Wiltshire Core Strategy (adopted January 2015) and to ensure that the development can be adequately drained without increasing flood risk to others.

- 4 No development shall commence on site until a scheme for the discharge of surface water from the site, including sustainable drainage systems, drainage drawings, calculations and all third party approvals, has been submitted to and approved in writing by the Local Planning Authority in consultation with the Lead Local Flood Authority.

REASON: To comply with Core Policy 67: Flood Risk within the Wiltshire Core Strategy (adopted January 2015) and to ensure that the development can be adequately drained without increasing flood risk to others.

- 5 No development beyond slab level shall commence on site until the details (with samples made available on the site) of the materials to be used for the external walls, roofs, porches and windows/doors have been submitted to and approved in writing by the Local Planning Authority. Thereafter, the development shall be carried out in accordance with the approved details.

REASON: In the interests of visual amenity and the character and appearance of the area.

- 6 No gates, fences, walls or other means of enclosure, shall be erected on site until the details have been submitted to and approved in writing by the Local Planning Authority. Thereafter, the development shall be carried out in accordance with the approved plans and be maintained in perpetuity.

REASON: to maintain the character and appearance of the area.

- 7 All the compensatory tree planting and soft landscaping proposals forming part the approved plans shall be implemented and completed during the first planting and seeding season following the first occupation of the building(s) or the completion of the development whichever is the sooner. All shrubs, trees and hedge planting shall be maintained free from weeds and shall be protected from damage by vermin and stock. Any trees or plants which, within a period of five years, die, are removed, or become seriously damaged or diseased shall be replaced in the next planting

season with others of a similar size and species, unless otherwise agreed in writing by the local planning authority.

REASON: To ensure a satisfactory landscaped setting for the development and the protection of existing important landscape feature

- 8 None of the dwellings hereby approved shall be occupied until the access, turning area and parking spaces have been completed in accordance with the details shown on the approved plans. Thereafter, the areas shall be maintained for those purposes for the lifetime of this development.

REASON: In the interests of highway safety.

- 9 None of the dwellings hereby approved shall be occupied the following windows shall be glazed with obscure glass only to an obscurity level of no less than level 4 and the windows shall be permanently maintained with obscure glazing in perpetuity:

- The dormer windows in the north west elevation serving the bathrooms as shown on Drawing 841:05D;
- The windows in the south west and north east elevation serving the downstairs WC and the stairwell window on the north eastern elevation shown on drawing number 841:05D;
- The stairwell window on the north western elevation shown on Drawing 841:12B

REASON: In the interests of residential amenity and privacy.

- 10 Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended by the Town and Country Planning (General Permitted Development) (Amendment) (No.3) (England) Order 2020 (or any Order revoking or re-enacting or amending that Order with or without modification), the garage hereby approved shall be retained for vehicle parking and shall not be converted to habitable accommodation.

REASON: To secure the retention of adequate parking provision, in the interests of highway safety.

- 11 Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended by the Town and Country Planning (General Permitted Development) (Amendment) (No.3) (England) Order 2020 (or any Order revoking or re-enacting or amending that Order with or without modification), no windows, dormer windows or rooflights, other than those shown on the approved plans, shall be inserted in the dwellings hereby approved.

REASON: In the interests of residential amenity and privacy and the character and appearance of the area.

## INFORMATIVES TO APPLICANT:

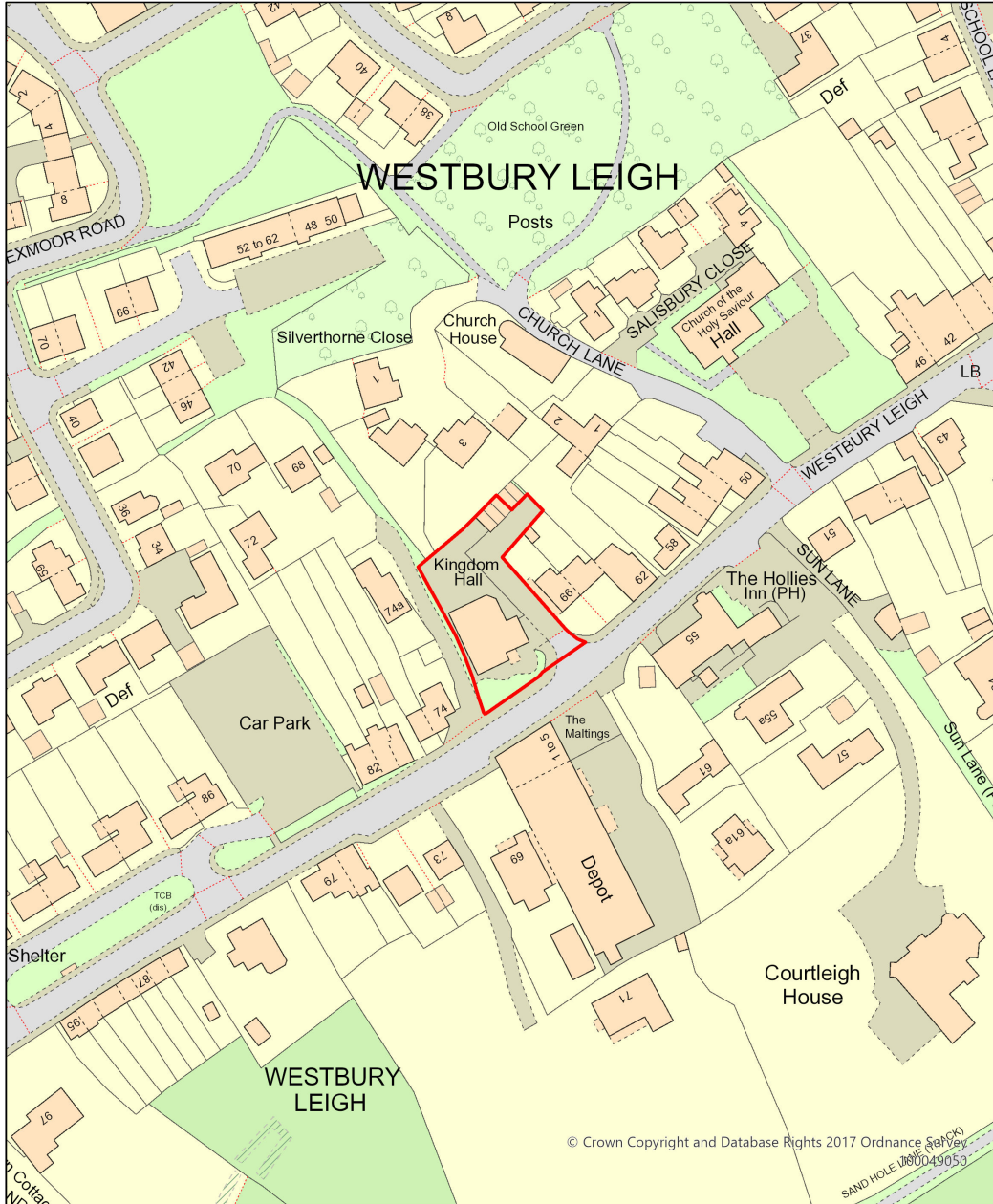
1. The applicant is advised that the development hereby approved may represent chargeable development under the Community Infrastructure Levy Regulations 2010 (as amended) and Wiltshire Council's CIL Charging Schedule. If the development is determined to be liable for CIL, a Liability Notice will be issued notifying you of the amount of CIL payment due. If an Additional Information Form has not already been submitted, please submit it now so that we can determine the CIL liability. In addition, you may be able to claim exemption or relief, in which case, please submit the relevant form so that we can determine your eligibility. The CIL Commencement Notice and Assumption of Liability must be submitted to Wiltshire Council prior to commencement of development. Should development commence prior to the CIL Liability Notice being issued by the local planning authority, any CIL exemption or relief will not apply and full payment will be required in full and with immediate effect. Should you require further information or to download the CIL forms please refer to the Council's website

<https://www.wiltshire.gov.uk/dmcommunityinfrastructurelevy>

2. Bats and their roosts are protected by law and it is illegal to disturb, harm, obstruct, damage or obstruct them. If there is any evidence of bats found on site, all works on site should cease and advice should be sought for a licensed ecologist.

3. The applicant should note that the works hereby approved involve the removal and disposal of asbestos and should only be removed by a licenced contractor. Asbestos waste is classified as 'special waste' and as such, can only be disposed of at a site licensed by the Environment Agency. Any contractor used must also be licensed to carry 'special waste'.

4. The applicant is encouraged to install 5 integral swift nest bricks in this development as an ecological enhancement measure. Suggested locations would be 3 integral bricks in the north east gable end of the block of three houses and 2 bricks in the western elevation of house no.5 and should be installed/made available prior to the first occupation of the development hereby approved.



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