

WILDLIFE AND COUNTRYSIDE ACT 1981 S.53

DECISION REPORT

**APPLICATION FOR AN ORDER TO ADD A FOOTPATH AT MEAN WOOD,
WHITEPARISH 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 Ascot Court, Aintree Avenue, White Horse Business Park, Trowbridge; please contact Sally Madgwick on 01225 713392.

1.0 Application

Application number: 2016/10

Application date: 27 October 2016

Applicant: Mrs Jane Lax, Mrs Patricia Woodruffe, Mr Christopher Baker,
Mrs Trudi Deane and Mr Paul Witcher
Abbotstone House
The Street
Whiteparish
Salisbury
SP5 2SH

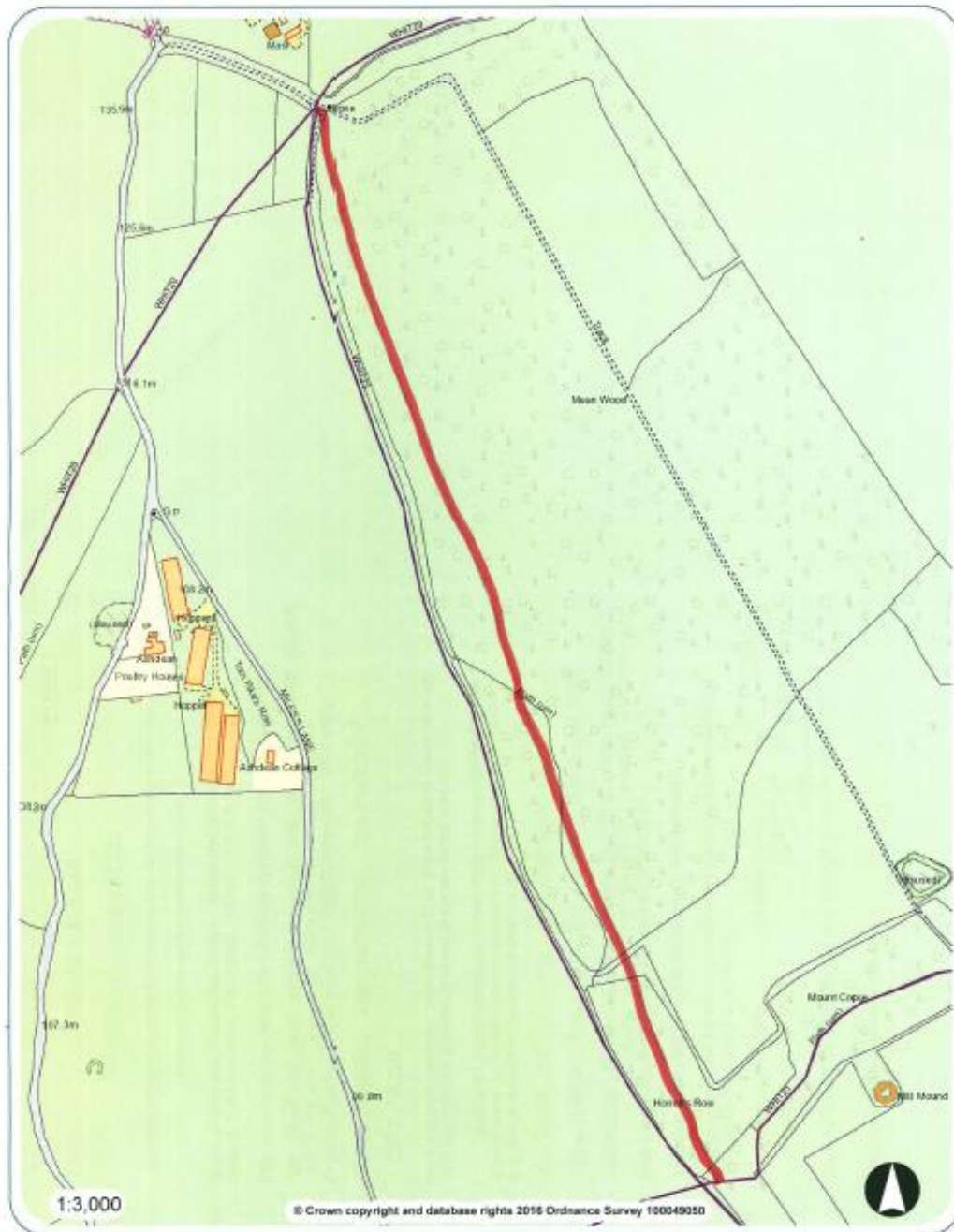
Application to: Add a footpath following route through the woods, reasonably straight but around trees and land features where necessary.

Width: Averaging one metre

Application comprises: Notice of Application for Modification Order (Form 1)
Notice of Certificate of Notice (Form 3) served on:
i) Mr B G Newman
Maydene
Forest Road
Hale
Fordingbridge
(Registered Land Registry Address)
ii) Mr B G Newman
Honeysuckle Lodge
Miles Lane
Whiteparish
SP5 2QU
(Home Address)
Map of the scale 1:3000 showing the applicant routes
25 User Evidence Forms (UEFs)

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.

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 This application served notice on the owner of the land, Mr Bradley Newman. It is understood that the shooting rights for land in the area (which includes Mean Wood) are rented to a shooting syndicate and have been for a period of at least 60 years. The terms of the rental are not known to the Council and it is not the case for the landowner that the syndicate is an occupier within the sense of Schedule 14 (2)(1) above. However, it is noted that notice was not served upon the shooting syndicate. It is further noted however that the shooting syndicate were aware of the application within the consultation period (which was extended at the landowners request) and members have responded fully to the initial consultation.

3.3 The failure to comply with the terms of paragraph 2 of Schedule 14 and its effect on an application were considered in the Court of Appeal in the case of *R (Warden and Fellows of Winchester College and Humphrey Feeds Limited v Hampshire County Council & SoSEFRA* [2008] EWCA Civ 431). Although the first and principal issue related to public vehicular rights the court considered the implications of the failure of the terms of paragraph 2 as a second issue. Dyson LJ considered that the matter rested on the consequences of the defect rather than requiring strict compliance.

“69 It is true that the certificate was not properly issued, but it does not follow that the consequent determination was invalid. In R v Soneji [2005] UKHL [2006] 1 AC 340 at [23], having reviewed the authorities on the distinction between mandatory and directory requirements, Lord Steyn said “the emphasis ought to be on the consequences of non-

compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.”

“70 Adopting that approach, I conclude that Parliament cannot fairly be taken to have intended that, if a paragraph 2(2) certificate is wrongly issued, it must follow that a determination on which it is based is invalid. The facts of the present case show that the better approach is to examine the consequences of the defect in the certificate. If they are serious and the defective certificate has caused real prejudice, then it may be that the determination of which it is based should be declared to be invalid. But in my judgement, on the facts of the case, the judge reached the correct conclusion on this issue and for the right reasons.”

- 3.4 Although the shooting syndicate would have been unaware of the application on the 27th October 2016 by at least the beginning of January 2017 they had been informed and members were responding to the Council’s initial consultation. Additionally the initial consultation period was extended until the end of January on the request of the landowner. It is therefore considered that no prejudice has been caused to any party as a result of any failure of the Certificate and accordingly Wiltshire Council will proceed with the determination of the application.

4.0 Land ownership details

The land is owned by Mr Bradley Gerald Newman and forms part of his farm called Upper Cowesfield Farm, Miles Lane, Whiteparish. The farm was bought by his father in the early 1950s and Mr Bradley Newman has been involved with the farm since the mid-1960s.

Mr Bradley Gerald Newman
Honeysuckle Lodge
Miles Lane
Whiteparish
SP5 2QU

5.0 Description of routes

The claimed route starts from footpath Whiteparish 21 (WHIT21) at Horrell’s Row and leads through woodland in a broadly northerly direction to its junction with footpath Whiteparish 20 (WHIT20) at the northern end of Mean Wood. Some users record stiles in place though it is noted that stiles are in place on WHIT20 and WHIT21 and that these may be the ones described.

- 5.1 The claimed route was fenced off and a considerable earth bund amassed at the northern entry point early in 2015.
- 5.2 The walked path was clearly defined in 2008, 2009 and 2013 (photographs supplied by the applicant and online at www.geograph.org.uk/photo/1053171 and 1053181) and the submission from the landowner’s agent, at paragraph 1.5 states:

For the avoidance of doubt, my client does not deny the existence of the Proposed Footpath. His objection is that any use of that path does not indicate any intent on his part to dedicate the land as highway.”

5.3 2009



5.4 2009



5.5 2008



5.6 2013

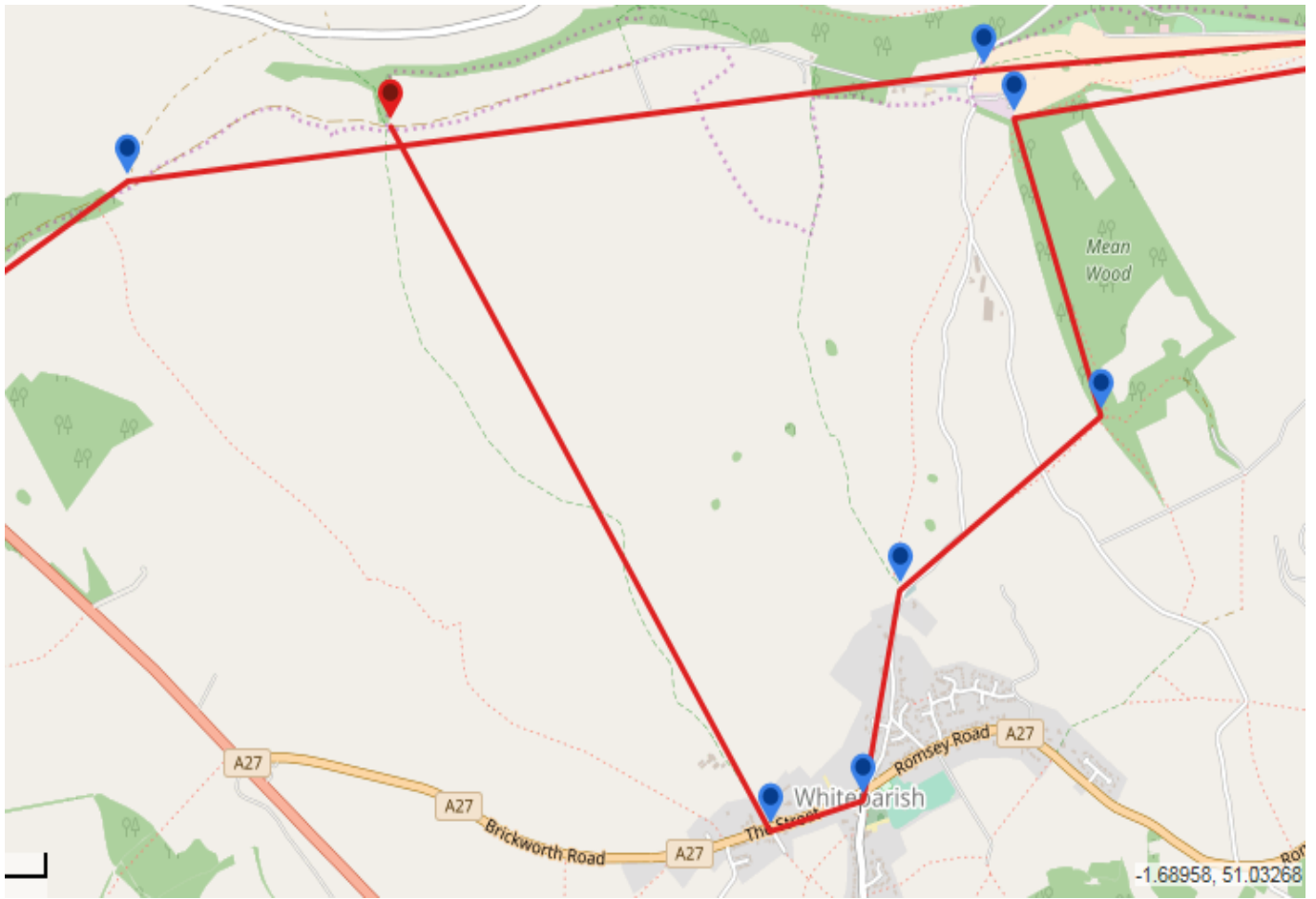


5.7 The claimed route is also featured as part of a promoted walk on the internet at <http://my.viewranger.com/route/details/MjNfNDE5Ng==>

“A fine walk starting from the folly on Pepperbox Hill takes you across to Dean Hill, with splendid views over the open countryside to the south-east of Salisbury, then through Mean Wood, which in springtime is thickly carpeted with bluebells, then on down to the village of Whiteparish. Stop here for refreshments from the village stores or one of two pubs and then, after a short walk through the village, it's back across fields and a gentle climb back to Pepperbox Hill.

Written for Walkingworld by Peter Harper”















A map clearly shows the route through Mean Wood:



5.8 The Walking World website records that the walk was revised in 2009 and that a number of people have used it:

<http://walks.walkingworld.com/walk/Pepperbox-Hill---Dean-Hill---Whiteparish---Pepperbox-Hill.aspx>

Respondent John Crisp recorded in 2015 that the described route through Mean Wood had been blocked.

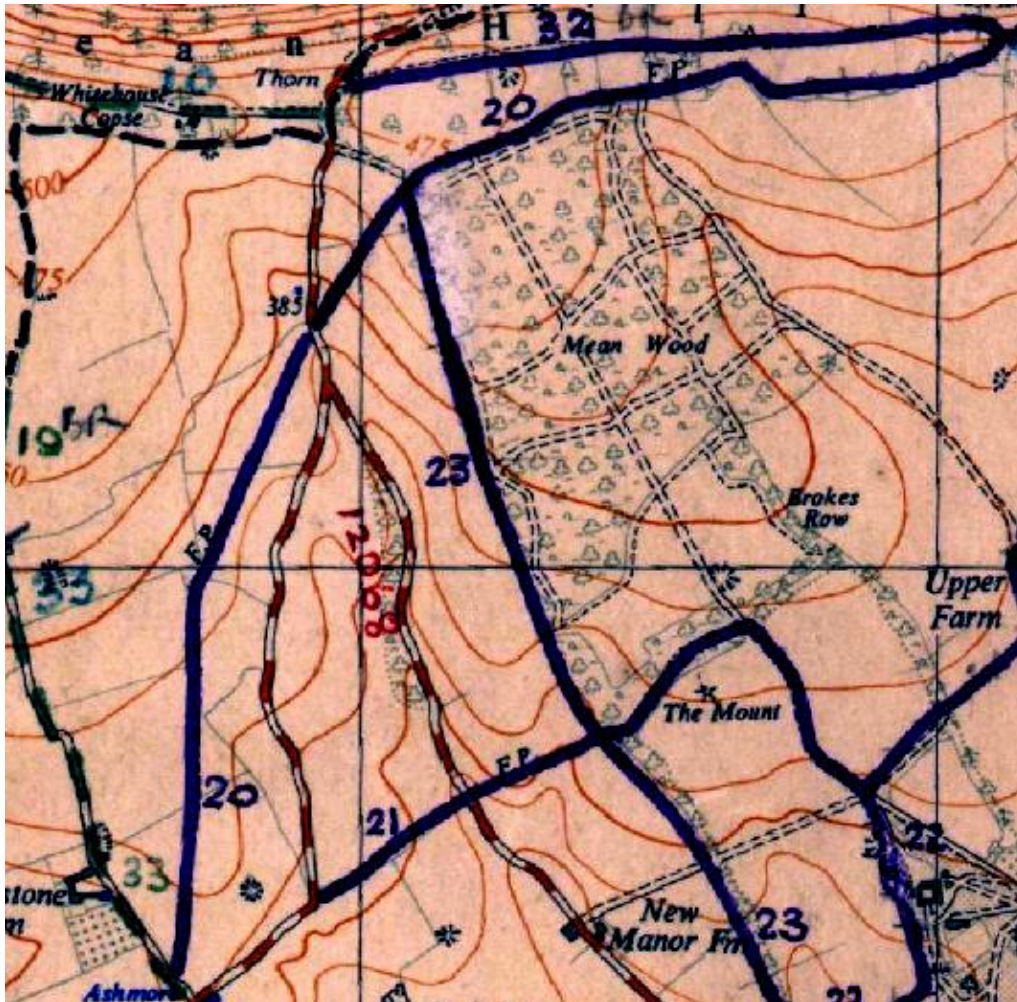
-  23/03/2015 - **John Crisp** 
 With our walking group, I have just completed this walk. Great ridge views across to Salisbury and as far as Southampton Docks and Fawley in the other direction. It is disappointing that the path into Mean Wood [Waymark 5] now only tracks north-east as the described route has been blocked with banks, ditches and barbed wire. We had to follow the edge of the wood[SSE] in the field. During our walk, in late March, we found that the fields, from Waymark 6 to 7 and leading back NW towards Waymark 10, after Whelpley Farm, had either been winter planted, seeded or harrowed. This made the route awkward to follow. The public houses in Whiteparish now only appear to open Thursdays to Sundays ...shame we were walking on Monday!
-
-  16/04/2012 - **Caroline Jones** 
 Did this walk yesterday and it was the prettiest of walks. The bluebells in the woods and the vibrant yellow of the rape seed. I would highly recommend this walk. Wonderful. Caroline
-
-  30/11/2010 - **Geoff Symons** 
 At WP9, the footpath goes along a gravel drive between two cottages. Passing further housing, the path continues between fields to a stile. This stile is of the ladder type, the fencing around the stile is very close mesh, which even my little terrier could not get through. So beware if you have a large dog, the only way over the style is to lift your dog over. The remainder of the walk is very dog friendly and the views from Dean Hill ridge are fantastic.
-
-  22/11/2010 - **elizabeth lloyd** 
 Just completed this walk, weather kind to us with sunshine so the views were amazing, great walk, a little muddy in places but nothing the correct footwear couldn't deal with.
-
-  09/11/2010 - **Walkingworld Administrator** 
 The problem that had existed just after WP9 has now been dealt with by the local authority PROW department. Our thanks to them for their work. They have asked us to mention that the driveway adjacent to the path at WP9 is private and cars should not be parked there. So, if you should decide to start the walk in Whiteparish, please bear this in mind. Adrian (Admin)
-
-  31/07/2010 - **Lyn Lovell** 
 Best walk yet! Only problem was that in Whiteparish the home owners have blocked off the footpath and filled with rubbish. Views were amazing. Dogs and children loved this walk
-
-  04/06/2009 - **Walkingworld Administrator** 
 This walk was revised and updated June 2009 by Peter.

6.0 Current Records – Definitive Map, Highway Record and aerial photographs

Definitive Map and Statement

The parish of Whiteparish is covered by the Salisbury and Wilton Rural District Council definitive map and statement dated 1952. The claimed route is not recorded in this document and was not the subject of a parish claim or any objection to its omission.

- 6.2 Adjoining rights of way were claimed by the parish council, are shown in the map and have remained unaltered to date. See extract from definitive map below (public footpaths are shown in purple):



6.3 The definitive statements for WHIT20, WHIT21 and WHIT23 are as follows:

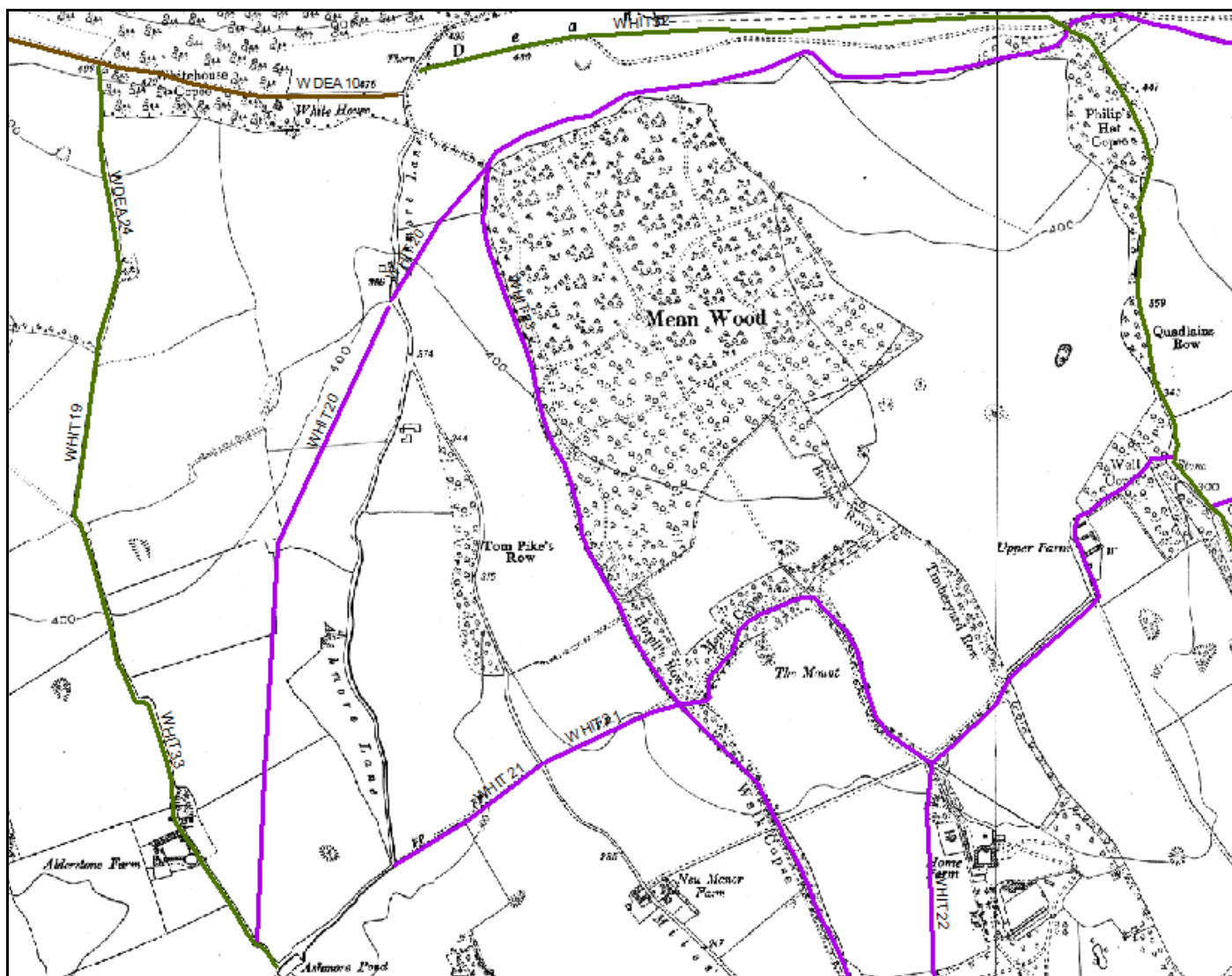
WHIT20 FOOTPATH. From Alderstone Lane, path No.33, opposite Ashmore Pond, leading north and north-east across Ashmore Lane, U/C 12025, and continuing east along the north side of Mean Wood, Philips' Hat Copse and Biddlesdown Bow to the Hampshire County boundary. Approximately length 3200 m

WHIT21 FOOTPATH. From Ashmore Lane, U/C 12025, leading north-east across Miles' Lane, U/C 12068, through Horell's Row and Mount Copse, then south-east to its junction with path No.22, north of Home Farm, then north-east and north to Upper Cowsfield Farm and north-east through Well Copse to path No.39 then, leaving path No.39 100 m to the south-east, continuing east-north-east up Yew Tree Hill and past Upper Barncroft Row, then south and east-north-east through Gatmore Copse to the Hampshire County boundary. Approximately length 4000 m Width 1.2 m

WHIT23 FOOTPATH. From Miles Lane, U/C 12068, at its junction with path No.22, leading north-west along the south side of Miles Lane for about 75 m then, across the Lane, north-east and generally north-west along Walk Copse, across path No.21 at the top of Horell's Row and continuing along the western side of Mean Wood to path No.20 at Dean Hill. Approximate length 1780 m Width 1.2 m

6.4 The working copy of the definitive map shows the surrounding network as below:

Footpaths = purple Bridleways = green Byways Open to All Traffic = brown



6.5 The route is not recorded in the Council's highway record though it is observed that a pathway through the wood is shown on the underlying map.

6.6 Owing to the dense tree canopy in this area aerial photographs are of no assistance.

7.0 Signs

No signs have been reported as being in place along the claimed route either directing walkers or prohibiting access in any way.

7.1 Footpath WHIT23 (leading parallel to the claimed route) was surveyed by the Ramblers Association volunteers for the benefit of Wiltshire County Council in September 2007. While walking WHIT23 alongside Mean Wood the surveyor observed that there were "Many unofficial/permissive paths in Mean Wood." A waymark and stile were in place at the cross roads with WHIT21.

7.2 These surveys undertaken in 2007 revealed that generally the rights of way network was well waymarked and provided for in the area. However, It is noted that the definitive line of WHIT20 is obstructed by paddock fencing and the public use an alternative route in this area.

8.0 Context of application

Mean Wood is an ancient woodland. Andrews and Dury's Map of Wiltshire dated 1773 records Miles Lane as a cul de sac and the route that is now footpath number 23 as the major route, a road leading past Mean Wood, past Cowesfield House and South to Testwood farm and onto Cowsfield Green.



8.1 The book, *Whiteparish – 100 years of an English Village* ISBN 0-9537744-0-6 records that Mean Wood was traditionally managed as coppice with standards. The widely spaced standards were planted amongst the coppice stools and provided long term timber requirements whilst the understory of hazel was coppiced on a 7 to 10 year rotation. The product of this was used for making thatching spars and hurdles and residues were made into faggots and used to fire a local bread oven. The practice of cutting hazel to ground level each year leads to the proliferation of ground flora such as bluebells and it is clear from the evidence of all parties that the bluebells in Mean Wood are a reason to visit in the spring.

- 8.2 The landowner, Mr Bradley Newman recalls that as late as the 1970s and 1980s a hurdle and spur maker (Mr Holland May) worked in the woods and he is also recalled by Mr Newman's son, Alexander.
- 8.3 A shooting syndicate has rented the shooting rights from the landowner for a period exceeding 60 years. Shooting takes place every 3 weeks from the 1st October until the 1st February and the whole wood is driven in a southerly direction. The Game Act of 1831 prevents shooting taking place on a Sunday. Objector Mr Gilbert Thompson states that he shoots over Mean wood every third Saturday in the season.

9.0 Consultation

Wiltshire Council carried out an initial consultation into the application on the 15th November 2016 and extended the time allowed at the landowner's request to the end of January 2017.

The following letter was circulated:

“Wildlife and Countryside Act 1981 s.53

Application for an Order to add a public footpath at Mean Wood, Whiteparish to the definitive map and statement

Wiltshire Council has received an application for a definitive map modification order to add a public footpath to the definitive map and statement. The claimed route leads in a broadly north south direction through the woodland in a manner that is approximately parallel to the existing public footpath Whiteparish 23 and Mile's Lane to the west.

The application is supported by evidence of use submitted by 25 people who have used the route without force, secrecy or permission for varying amounts of time dating from 1969 to 2015 when it is alleged that access to the wood was physically prevented.

Before the Council makes a decision whether to make an Order or not it must consider all available relevant evidence and accordingly you are invited to submit any evidence or comments that you may have. Dated photographs are especially helpful as are recollections of notices, alterations to the route, challenges to use and so forth.

Please let me have your responses by the 30th December 2016. If you have any queries please do not hesitate to contact me.”

The application map shown at 1.1 was included.

- 9.2 The consultation was sent to the following:

The Auto Cycle Union	Commons, Open Spaces and Footpaths Society
Wiltshire Bridleways Association	Wiltshire Cycling Touring Club
British Horse Society	Whiteparish Parish Council
Wiltshire Councillor R Britton	Byways and Bridleways Trust
British Driving Society	Wiltshire Council Rights of Way Warden
Wiltshire Ramblers	The Applicants
Mr B G Newman	All users who have submitted user evidence forms

10.0 Consultation Responses – Appendix A

Considerably more responses to the initial consultation were received than were invited and many of those submitted in objection are of the same format and contain a large number of similar phrases and paragraphs. Accordingly copies of the correspondence are appended at Appendix A and key points are summarised below:

1) **Nick Cowen – Senior Rights of Way Warden**

Survey sheet dated 27th September 2007 for path no 23 west of Mean Wood submitted including a comment that there were “many unofficial/permissive paths in Mean Wood”

Correspondence dated 8th April 2015 relating to the blockage of a path in Mean Wood and a possible application to record it.

2) **Keith Hobbs, Whiteparish**

Moved to Whiteparish in early 1979 and locals recommended that he walked in Mean Woods. He and his family did (his daughter also rode a horse sometimes) and at no time during the many years did anyone stop or advise them they should not be there. Met other walkers. No signs. Less use in the 1990s and 2000s but still unhindered. Discovered route blocked in 2015/2016.

3) **Geograph website – paths in Mean Wood**

Clearly walked paths shown in photos submitted in 2008. Text states: “*although the path is shown at the woods edge on the map, it clearly runs some distance inside the wood.*”

4) **John Herrett, Whiteparish**

Photograph of the wood taken in 2009 showing section of path.

5) **Mr and Mrs J C d’Orville, Whiteparish**

Bought their house in 2000 and were told of the walk by the previous owner who had used the walk since 1968. Photograph of wood and path taken 2013.

6) **John Dunlop, Whiteparish**

Has used the path regularly since 1998. Sent photograph taken in 2004 of his daughter and a dog on the path.

7) **Jennifer Foster, Whiteparish**

Has used the path from 1986 and met no challenge or objection. Knows a great many other villagers use the path.

8) **Trudi Dean, Whiteparish**

Photographs submitted from April 2009 (Chris Baker), May 2008 and May 2013 (Sheila Harrison-King).

9) **Peter Claydon, Whiteparish**

Has lived in Whiteparish for 40 years and considers the landowner “has always shown the courtesy of permitting those who wished to walk through the private woodland known as Mean Wood..”

10) **Whiteparish Parish Council**

Unanimously objects to the application. Has always understood this was a permissive footpath.

NB – In December 2016 and again in March 2017 the case officer asked for any evidence (minutes etc) of the foundation for the Council’s understanding that the way was permissive. To date of report none has been submitted for the Council to consider.

11) **Peter Redhead, Whiteparish**

A neighbour of the landowner. Was given permission to walk the path in 1993. Understood it was well known as a permissive path.

12) **Emily Carey, Cowesfield, Whiteparish**

A neighbour of the landowner. Was given verbal agreement to use the path in November 2012 when she became aware of the path. Used the path weekly. Often encountered others and always asked if they had permission. No-one she asked confirmed they had the owner’s permission to use the path.

13) **Robert Carey, Cowesfield, Whiteparish**

Exactly as number 12 above.

14) **Sally Newman, Cowesfield, Whiteparish**

Moved to the village in 1993 and walked the path through Mean Wood. Was given verbal permission by the owners in 1993. Has never met walkers who stated it was a public right of way.

NB Shared surname but not related to the landowner.

15) **Christine Wood, Whiteparish**

Frequently walked the claimed path in the woods since 1976. Had the verbal permission of the landowner. Occasionally met others and some were unaware that the route was not a public right of way.

16) **Andrew Wood, Bournemouth**

Lived in Whiteparish from 1988 to 2006. Walked in the woods but his family had been given verbal permission to do so (see number 15 above). Last walked the path in October 2016.

17) **James Wood, Whiteparish**

Lived in Whiteparish between 1988 and 2006 and walked in the woods but his family had been given verbal permission by the landowner (see numbers 15 and 16 above). Last walked the path in December 2016.

18) **Dennis Wood, Whiteparish**

Frequently walked the claimed path in the woods since 1976. Access was by verbal permission of the landowner. Occasionally met others and some were unaware that the route was not a public right of way. Would refer users to the Whiteparish website for details of the location of public paths.

19) **Gilbert Thompson, London**

A member of the shooting syndicate since 1999 and shoots 'over Mean Wood' every third Saturday in the shooting season. Has never seen a member of the public on the path. Has concerns relating to safety.

20) **Elizabeth Davis, Fair Oak**

in Her husband was a leading member of the shoot for nearly 50 years until his death October 2016. The shoot is much more than 6 or 7 shoot days in the season. On those days about 25/30 people come together (with a large number of dogs) and walk through Mean Wood in an orderly manner. For the rest of the year the keeper supports the birds and the conservation of the area. Has seen walkers (though not many) and considers they disrupt the birds and the animals and pick and trample flowers. Has concerns about the loss of the shoot.

21) **Jonathan Davis, Pontypridd**

His father was a shoot member and he has been a frequent participant. Has moved away but still visits frequently. On only a few occasions has seen walkers on the path, the vast majority walk outside the wood on the definitive path. Has concerns about the future of the shoot and the impact on the land of the claimed path.

22) **Philip Curtis, Sherborne**

Lived in Whiteparish from 1977 to 1982. Throughout this time he walked through the woods with the verbal permission of the landowner. Doesn't recollect seeing anyone else. Knew only three properties who used the claimed path with the permission of the landowner. These were the Angels from Home Farm, the Woods at Mole End and Jack Chant who lived in a caravan at the landowner's property. On one occasion Jack Chant was assaulted when confronting poachers and this was

reported to the Police. The landowner was very concerned about access to his property.

23) **Geraldine Cobern, Cowesfield, Whiteparish**

Her family has lived at Home Farm since 1931 and she has used the claimed path since the 1950s (and rode a horse along it when she was younger). Her family were given verbal permission by the current owner's father. Would occasionally see other users on the path, mainly neighbours, who to the best of her knowledge had also been given permission to use the path.

24) **John Sherwood Webb, Southampton**

Has been involved with the shoot for 63 years. In all that time he has never met any members of the public in the area. Has concerns about opening up this part of the wood for reasons of safety and environmental protection. Is aware this is a permissive path.

25) **David Sutton, West Dean**

Is aware that the path is a permissive path. Has concerns about safety on shooting days, disturbance to wildlife and disturbance to game birds.

26) **Christopher Yates, Southampton**

Is a beater for the Whiteparish Shoot. Attends every Saturday between October and 1st February, this means he attends Cowesfield Farm and Mean Wood once every three weeks during that period.

Is aware that the claimed route is a permissive path. Has never seen anyone walking on the path.

27) **George Lazarus, Whiteparish**

Moved to the village 19 years ago and is a keen dog walker. Used the path and about 10 years ago met Mr Newman who told him the route was permissive. Permission was extended to Mr Lazarus and anyone with him. Only occasionally walks the route (perhaps twice a year) and doesn't recall meeting anyone.

28) **Tricia Baker, Sherfield English**

Owns the adjacent field. First walked the path in the mid 1980s when taken through by Mrs Newman. She was given permission by the Newmans and sometimes met her in there. Sometimes saw people in the woods but assumed they had permission too. Disputes the line of the definitive map footpath over her land.

29) **Thomas wood, Winchester**

As nos 16 and 17 though lived at home until 2007. Last used the path December 2016.

30) **Anonymous submission**

Extract from the Whiteparish Village Magazine March 2015 announcing that the “owner of Mean Woods now closing the permissible footpath through this particularly lovely stretch of woodland.”

31) **Mark Bailey, Southampton**

A member of the Whiteparish shoot actively involved in the running of it for the last 8 years. Is aware the path is permissive. Has Mr Newman’s permission to walk the path as a member of the shoot. Has never seen anyone other than a shoot member use it. Has concerns about safety and wildlife disturbance.

32) **Jack Ward, Southampton**

Head beater for Whiteparish Shoot. Member since 2012. Heavily involved with the rearing of pheasants. Is aware this is a permissive path. Has only met one walker who complained about the shoot and he was advised “that it would be folly to carry on his walk and to take the public footpath”.

33) **Sean English, Landford**

Lived at Cowesfield farmhouse from 1973 until 1996. Used the path regularly. Mr Newman had given him permission but not on Saturdays during shooting season. Only met people who had permission to be there.

Became a member of the shooting syndicate and is responsible for managing one of the sites. The claimed footpath is used as a main drive on Cowesfield shoot days (which includes Mean Wood). The path is used by beaters and walking guns to drive the woods towards the southern end where the standing guns are positioned. Believes the claimed path would be detrimental to the future of the shoot and the wildlife. Is aware that out of control dogs have chased wildlife.

34) **Adam Wilson, Barford St Martin**

Member of the shoot for 4 years and an occasional guest before that. Is aware it is a permissive path. Has never seen a member of the public on the path. Presumes this is because they have heard the shooting or are aware the shoot is in there. Considers it potentially dangerous to record a public path here.

35) **Kay Lindars and Tony Kilby, Hamble**

Is aware this is a permissive path. Have been on the shoot for 5 years and have never seen anyone on the path other than shoot members. It would be dangerous. Looking at the Ordnance Survey maps they note that it appears there are ample public footpaths in the area already.

36) **Alan Clark, Romsey**

Knows that Mr Newman grants permission to use the path. Has used the path with the Scouts since the mid-1980s and with the Boys Brigade since the mid-1990s with Mr Newman's permission. Has also walked it with the church group from the early 1990s to 2014.

37) **Clive Jones, Lyndhurst**

Has walked the path on average of 6 times per year for over 30 years and has had the permission of Mr Newman. Has never seen anyone else in the woods. Considers there is a danger of harm to wildlife and that there is no need for another footpath.

38) **Burges Salmon acting for Bradley Newman**

Summary of key points:

- (a) That there was a s.31(6) deposit in 2012
- (b)(i) Evidence of permission by a large number of letters
- (b)(ii) Frequent and complete exclusion of members of the public when regular shoots occurred
- (b)(iii) Foot and mouth closures
- (b)(iv) Evidence of regular challenge and request to refrain from using the way
- (b)(v) Flaws in the evidence submitted

Does not deny the existence of the footpath.

Unauthorised users were regularly challenged.

Statement of Bradley Newman

- The wood is let to a shooting syndicate
- Jack Chant worked in the woods late 1960s onwards, Holland May worked in the wood in the 1970s and 1980s.
- Other people who challenged users include Captain Hamilton (1970 to 1990), Mrs Butler, Mr and Mrs Gallagher (1982 onwards).
- Walked there himself 1981 onwards. Hardly saw anyone. Challenged anyone he didn't know.
- The path moved in 2014.

Statement of Susan Newman

- Permission given to the hunt and the followers
- Hardly saw anyone
- Challenged anyone she didn't know

Statement of Lydia Newman (daughter) b. 1990

- Used the path several times per month, more in the bluebell season throughout her life.
- Only ever met one person who she challenged.

Statement of Alexander Newman (son) b.1981

- Lived at Honeysuckle Lodge 1981 to 2004
- Regularly walked Mean Wood. Remembers Holland May and Jack Chant working in the woods and re-directing people.
- Considers the Baker family were given permission.
- Walked the path monthly 1993 to 2004 and never met anyone on the path. Did see others in other parts of the wood and redirected them.
- Mr G Barrett and Mr M Barrett are gamekeepers for the shoot. Their role is to ensure walkers use the public rights of way. Has never seen anyone on the path but records "there have been occasions when people have been redirected back to the public footpath at other times".
- Mr M Barrett changed the route in 2014 to allow his bedridden grandmother to be driven through.

Statement of Jason Newman (son) b. 1982

- Used the path regularly – walked and rode
- After 2004 only about 10 times per year
- Has only ever seen people he knows on the path

Statement of Glen Barrett (Spare time gamekeeper)

- In charge of shoot days and day to day running of the shoot since 1986

- Syndicate has 14 paying guns. Members have permission to walk
- Never seen a walker in the woods during a drive
- Visits the wood 2 to 3 times per week and daily from July onwards.
- Has encountered walkers.

Statement of Michael Barrett

- Helped run the shoot from 1980
- Believes path was made by previous woodsmen
- The paths were opened up around 1998 for the Newmans to ride horses round. This made it easier for the uninvited to get in and use the paths
- Challenged around 2 per month
- Walked to the woods up to 3 x per week
- Did not see walkers

Additional Statements

Leo Randall

- Used path for 15 years about 2 or 3 times per week.
- Local people said it was permissive and on checking with the landowner he confirmed that he had given a general permission for the public to use the path.
- Supporters of the application said they met the landowner and he never objected to them being in the wood.
- The term permissive seems to have been dropped from the campaign

Lorraine Smith

- Used the path once a month from the early 1980s with friend from Whiteparish who have permission.

Helen Randall

- Used the path since 1978 about every 2 weeks. Had been given verbal permission.
- Saw other walkers on the path

Jane Glasgow

- Leader of the Boys Brigade.
- Had permission from Mr Newman to camp and walk with church groups in the bluebell season.
- Has used the path since the mid 1990s.

11.0 Historical Mapping and Records

In determining this application the Council must consider all relevant evidence available to it and this includes historical documents and plans. It is able to do this under Section 32 of the Highways Act 1980:

32. Evidence of dedication of way as highway

A court or other tribunal, before determining whether a way 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 circumstance, 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.

11.1 Andrews' and Dury's Map of Wiltshire 1773

This map covers the whole of the County at the scale of 1 inch to 2 miles and is based on an independent survey. The Wiltshire map doesn't have a key but Andrew's and Dury's contemporary County map for Hertfordshire does and it is clear that the features displayed on the Wiltshire map may be reasonably identified from the Hertfordshire's map's key. Roads are shown (fenced or unfenced) but footpaths and bridleways are not.

11.2 An extract showing Mean Wood is included in this report at page 12. The wood is shown adjoining a significant road which is now recorded as footpath Whiteparish 23. Miles Lane is shown as a cul-de-sac leading only to a dwelling or farm.

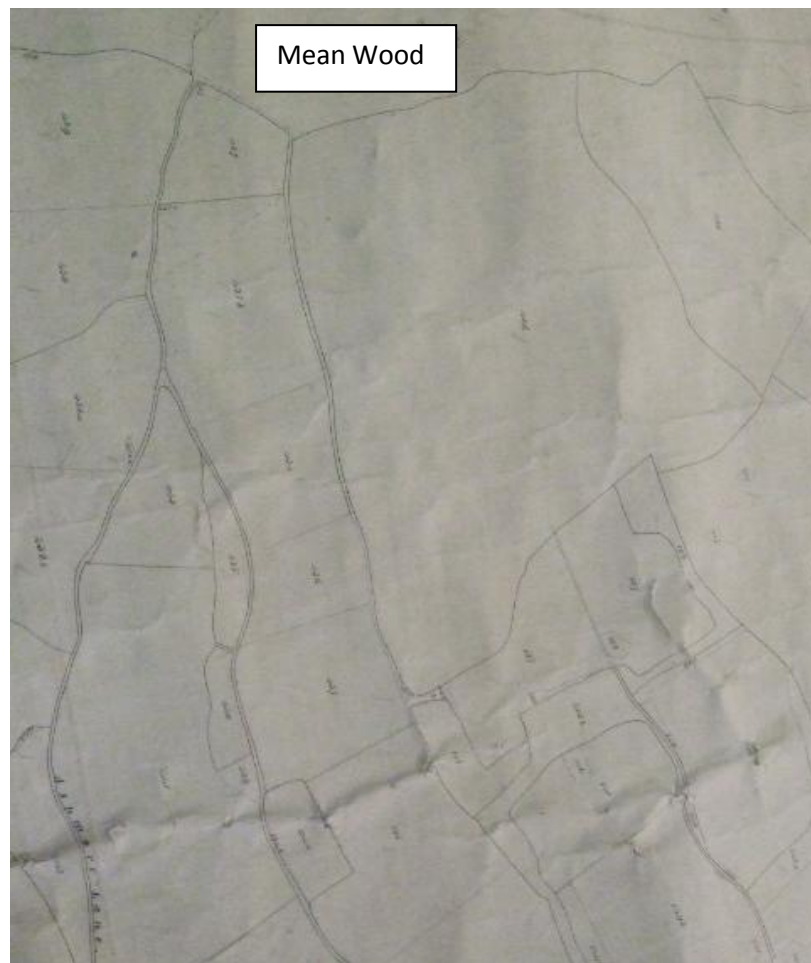
11.3 Whiteparish Tithe Survey – 1840/1841

By the early to mid 1800s it had become clear that system of paying tithes in kind to the church was not only cumbersome and archaic, it failed to embrace revenues from new forms of industry like mills, engineering works and textile industries. Although some parishes commuted their tithe payments to rent charges during the process of inclosure, these often failed to cover the whole parish or in some cases failed to address the matter at all. Accordingly the Tithe Commutation Act 1836 formalised and reformed the way in which the Church was financed on agricultural output. It required that where tithes were still relevant that those areas be surveyed and rent charges apportioned accordingly.

11.4 Although the identification of public rights of way was in no way a function of the process, in many cases the accurate mapping of the area (in the case of Whiteparish at the scale of 6

chains to one inch) resulted in the identification of roads, bridleways and footpaths along with a variety of other topographical features including wells, quarries, pits and woods. The purpose of the survey was to identify land that was capable of production and apply a charge accordingly. Hence although most roads would have been exempt from tithes it is often found that footpaths and bridleways were not since it was perfectly feasible to graze cattle or take a hay crop from a field with a path through it.

- 11.5 The tithe map for Whiteparish is undated but is drawn by F J Kelsey of Salisbury and shows a variety of features including foot and bridleways, water bodies, houses, some building names, road names and a brick kiln. Parcels of land and some features are numbered and referred to and described in the accompanying tithe apportionment document.
- 11.6 Mean Wood is shown as parcel number 426, Mean Wood. It is a wood owned and occupied by Lady Selina Mary Freemantle. The woodland area does not extend to Miles Lane as it was shown by Andrews and Dury but instead is bounded by a track corresponding in part to the route of footpath Whiteparish 23 today.
- 11.7 It may be speculated that this track leads along the western edge of the woodland in a similar manner to the claimed route, it is not apparent from this map whether the track shown is within or outside of the woodland. This matter is clarified however by the Ordnance Survey County Series mapping considered at 11.9 onwards where it is shown as a wooded track between the woodland and the field.



11.8 No tracks or paths are shown within the wood.

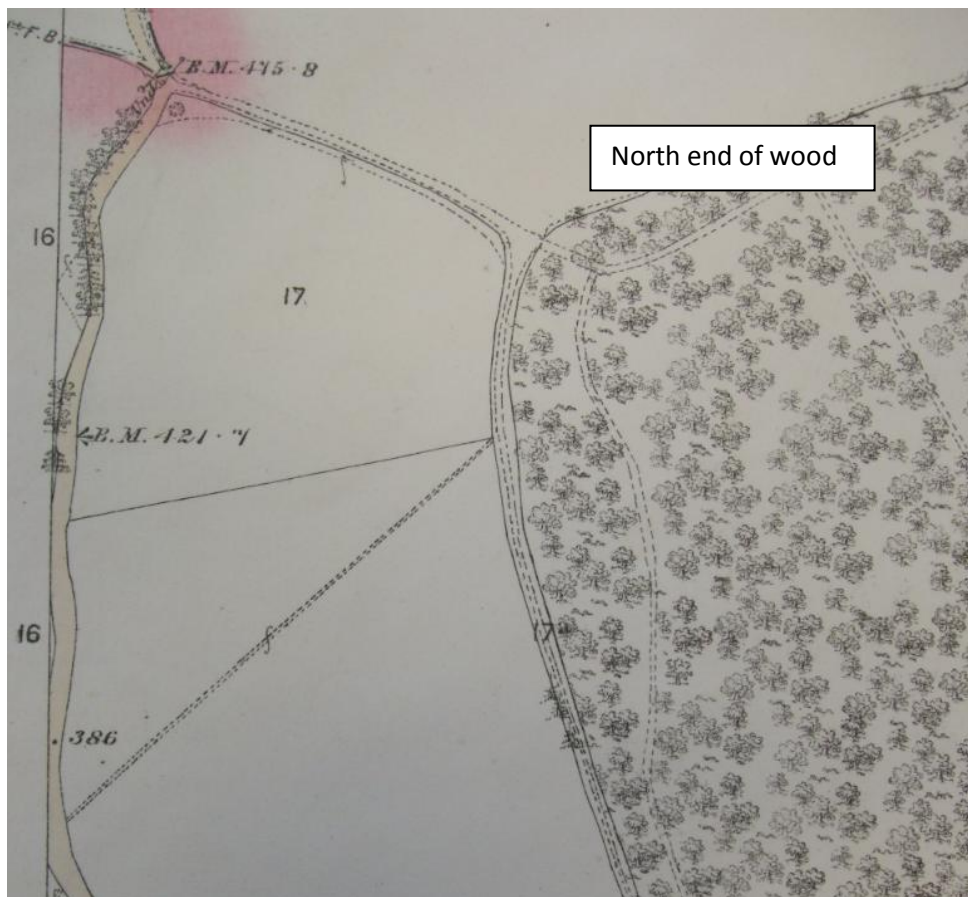
11.9 Ordnance Survey Maps – County Series

11.10 Ordnance Survey maps dating back to the latter part of the 19th century have been viewed.

11.12 Surveyors acted under a variety of instructions from the Ordnance Survey regarding the recording of roads and paths (though all of the maps viewed carry a disclaimer to the effect that the representation of any road or path is not necessarily indicative of public rights along it) and from 1882 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”* (From Southampton Circular 16.2.83). A further Circular in 1893 advised: *“Mere convenience footpaths for the use of a household, cottage or farm, or for the temporary use of workmen should not be shown, but paths leading to any well defined object of use or interest, as to a public well, should be shown.”*

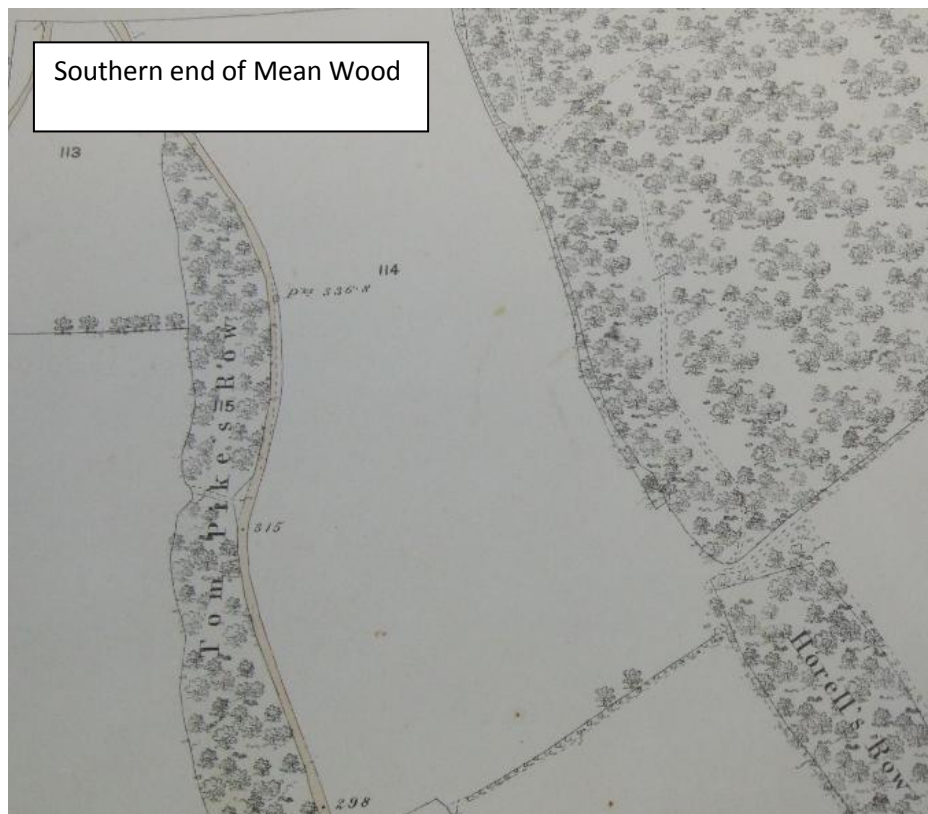
11.13 County Series Maps (25 inches to one mile) Sheets 72.8 and 72.12 dating from 1876 have been viewed and show a number of paths leading through Mean Wood including one which is similar if not the same as the claimed route. The letters F.P. do not appear along it.

First Edition printed with 1883 corrections:



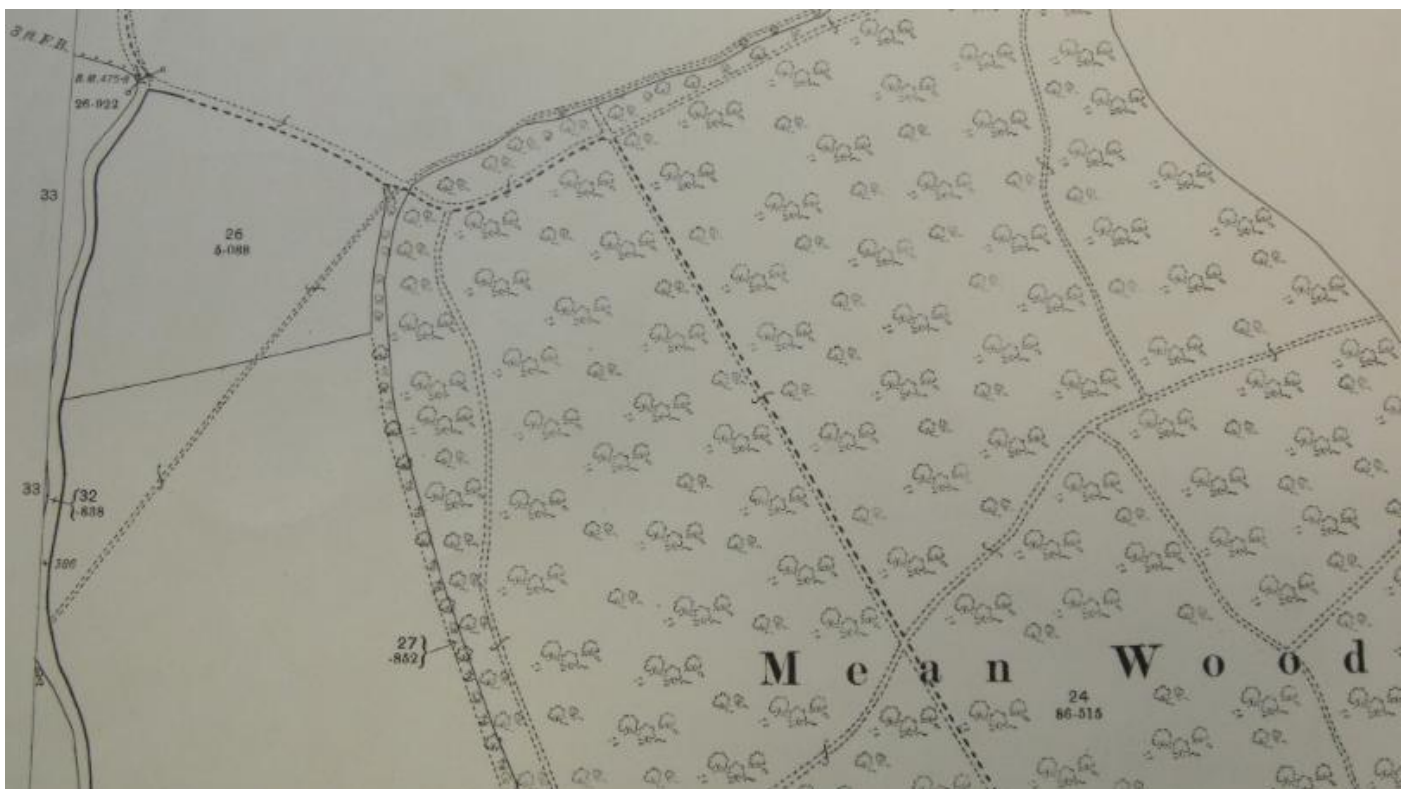
The track is not recorded as wooded on this edition but is corrected on later editions (and the adjoining sheet) to show the track as being wooded.

First Edition 1876 survey:



NB the path to the west of the wood is shown inside the wooded area on this map.

11.14 Second Edition Revised 1900





The western track is shown as wooded. No continuation track is recorded in Horrell's Row.

11.15 Editions of 1925 (sheets 72.8 and 72.12) show the tracks, paths and woods in the same way.

11.16 Ordnance Survey maps of this period may be regarded as being representative of the topographical detail at the time of the survey (and revision where appropriate), in fact, they have been held to be a model of planimetric accuracy. However, it is noted that they merely serve to show that there was a path there, not to give an indication as to whether the paths were publicly or privately used.

11.17 **Ordnance Survey County Series 1:10560 scale Sheet 72**

These maps are derived from the 1:2500 (25 inches to one mile) maps discussed above. As such they offer no further unique evidence but are useful in this case as they show the whole of the course of the claimed route on one map sheet.



11.18 **Finance Act 1909/1910** L8/1/182 and L8/10/72 (WSHC cat. no.)

The Finance Act 1909/1910 required that a detailed survey of all property in the country be surveyed and valued. A tax was then payable on any increase in property values when they were sold. The Act proved unpopular and was repealed by 1920, however, the Inland Revenue had carried out its surveys and valuations by this time and their data provides a useful record of how land was valued at that time and of whether any deductions for public rights of way, roads or easements had been claimed or applied. The valuer for Whiteparish was a local man, Mr W C Page and it certainly reasonable to assume that his local knowledge would have enhanced the accuracy of his survey.

11.19 The survey resulted in base maps (the Ordnance Survey's 1:2500 County Series Second Edition sheets were used) being coloured and numbered as hereditaments. Details of the hereditaments were then recorded in a valuation book. Both of these records have been viewed for Whiteparish.

11.20 Mean Wood is shown coloured pink as part of Hereditament 132 owned and occupied by William Frederick Lawrence and the western track and land west to Miles Lane is coloured yellow and numbered 85, also listed as owned and belonging to William Frederick Lawrence, though part of a different farm holding. No deductions for rights of way are shown for any parts of these hereditaments. However, the valuation book does not record any deductions for any other hereditaments in Whiteparish (even though there would have been historic public rights of way there at this time) and accordingly no evidential weight can be put on this record.

11.21 **Parish Council Minutes and Sales Particulars**

Parish Council minutes from 1945 to 1962 (WSHC cat. no. 1980) have been read but no mentions found relating to paths at Mean Wood. Officers have requested that later records (which have not been submitted to the County Archive) and minutes are searched for references to the woodland (since it is the parish council's case that they always knew the claimed path to be permissive) but at date of report, no response has been forthcoming from the parish clerk.

11.22 Sales particulars relating to the sale of Cowesfield House and 123 acres in 1949 have been viewed but the sale plan shows the land offered for sale stopping to the south of Mean Wood. WSHC cat. No 3382/108

11.23 Officers conclude that whilst the historic evidence viewed is supportive of the existence of a path through the woods the same as, or similar to the claimed route (at least as far south as Horrell's Row), little or no evidential weight may be placed upon it for the purposes of this application. It is further noted that no parties doubt the existence of the claimed route, this being detailed explicitly in the landowner's objection.

12.0 Considerations based on evidence of use

Summary of User Evidence – Appendix B

12.1 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 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 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*).

12.2 The date when use was brought into question

Although use of the path was physically prevented early in 2015 when barbed wire was erected across the ends of the path and an earth bund was built at the northern end, it is considered that use was actually called into question by the deposit of a statement, plan and statutory declaration made under s.31(6) of the Highways Act 1980 lodged with Wiltshire Council, by the landowner, in February 2012.

12.3 There is no evidence of any other event that called the use into question and accordingly the relevant period for the consideration of s.31(1) of the Highways Act 1980 has been taken as from 1992 to 2012.

12.4 **S.31(5) or (6) deposits.**

Although Wiltshire Council holds records of landowner deposits dating back to the Rights of Way Act of 1932 the only deposit that has been identified relates to the deposit of a statement and plan on the 9th February 2012 and a statutory declaration and plan on the 17th February 2012 under Section 31(6) of the highways Act 1980. They were made by the landowner (Mr Bradley Newman) and both identify all of the land affected by the claimed route. The declaration is clear in its purpose of demonstrating that no additional rights of way had been dedicated in the period 9th to 17th February 2012. Officers consider them to be duly made and to be sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways.

12.5 **Signs and notices**

No party claims to have seen or erected signs or notices on the land in the period 1992 to 2012.

12.6 **Locked Gates**

No party claims to have locked or encountered any barriers to access including locked gates in the period 1992 to 2012.

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

13.1 **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*".

13.2 There appears to be little conflict of evidence over the course of the claimed route. Some users only claim to have used some of the route (witnesses 3, 6, 8, 9 and 25) and some witness have drawn a route slightly to the west of the claimed route. However, this is almost certainly a consequence of the lack of definition on the background mapping used as more detailed maps do show a defined path that has been in existence over the majority of the claimed route since the late 1800s.

13.3 Additionally photographs submitted by users show a clearly defined track and the landowner, in his submission at page 2 para 1.5 states:

“For the avoidance of doubt, my client does not deny the existence of the Proposed Footpath. His objection is that any use of that path does not indicate any intent on his part to dedicate the land as highway”.

13.4 Officers are satisfied that the claimed route is of such character that it is capable of being recorded as a public highway.

14.0 Have the public used the route?

There are 25 witnesses who have submitted user evidence forms. None claim to have been an employee or tenant of Mr Newman’s 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’.”

14.1 All of the users who completed UEFs live in the parish of Whiteparish, a parish with a population of around 1400 residents during the relevant period. Additionally there is evidence of use by the wider public detailed at the Walking World website (given here at para. 5.8) and recorded by a member of the public in 2008 on the Geograph website (see Appendix 1) and www.geograph.org.uk/photo/1053181 *“Path, Mean Wood - Although the path is shown at the woods edge on the map, it clearly runs some distance inside the wood”.*

14.2 It is noted that the Parish Council object to the application and state that they consider the path to have been permissive. However, it has not been made clear to officers how this was known to the parish council and has not been evidenced in parish council minutes for the relevant period, or beyond.

14.3 Officers are satisfied that the claimed route has been used by the public.

15.0 Is there a sufficiency of use for the full 20 years?

15.1 All of the 25 users have used the claimed route during the period 1992 to 2012 with 8 of them having used it for the full 20 years. 2 of these appear to have only used part of the claimed route. 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)).”*

15.2 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)."

15.3 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."

15.4 There can be little doubt in this case that the evidence adduced by the applicant could have been supplemented had there been any way of knowing who had followed the online walking route recommended by Walking World on the internet.

15.5 Witnesses opposing the order detail a mixed picture of use which appears to be a reasonable reflection of a range of experiences and use during different times of the day, week and year. For example:

Bradley Newman – Hardly saw anyone

Susan Newman – Hardly saw anyone

Lydia Newman – Met one person

Alexander Newman – Never met anyone

Jason Newman – Only ever saw people he knew

Glen Barrett (shoot member) – Never saw anyone in the wood on shoot days but challenged walkers in the wood at other times

Michael Barrett (shoot member) – Did not see walkers when shooting but challenged walkers in the wood around twice per month.

Leo Randall – Saw other users

Emily Carey – Often encountered others

Robert Carey – Often encountered others

Sally Newman – Never met anyone who said it was a PROW

Dennis Wood – Occasionally met others

Gilbert Thompson (shoot member) – Never saw a member of the public

Elizabeth Davis (Shoot member) – Has seen some walkers
Jonathan Davis (Shoot member) – On a few occasions has seen walkers
Geraldine Cobern – Occasionally saw others
John Sherwood Webb (shoot member) – Has never met any members of the public
Tricia Barker (owns adjacent field) – Sometimes saw others
Mark Bailey (shoot member) – Never seen anyone other than shoot members
Jack Ward (shoot member) – Has only met one walker who complained about the shoot
Adam Wilson (shoot member) – Has never seen the public on it.
Kay Lindars (shoot member) – has never seen anyone using the path other than shoot members
Clive Jones (walks the area about 6 times per year) – Has never seen anyone

15.6 It is noted that it is likely that during a shoot (every third Saturday October to February) members of the public (especially those with dogs or children) would be likely to avoid the area generally.

15.5 Officers consider there is a sufficiency of use for the full 20 years 1992 to 2012.
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16.0 Whether use was interrupted

No users report their use being interrupted. It is possible that had they tried to walk the claimed route on a shoot day when the shoot was in progress in this area of the wood they may have met with an interruption to use in the form of a challenge. However, no shoot members or organisers claim this happened and given the relative infrequency of the shoots, the limited time of the day that they cover, the time of year that they take place in (it is likely that there is less recreational walking in the winter) and the likelihood of people avoiding the area generally when the shoot was on means that there can have been no effective interruption caused. Mssrs Barrett, who clearly have a close involvement with the wood and the shoot confirm that they didn't see walkers in the wood or on the path on during a shoot.

16.1 One witness (Mrs Emily Carey) opposing the application claims to have challenged walkers she saw in the wood and other witnesses (Mssrs M and G Barrett) recall challenging people in the wood though had never encountered anyone on the path during a drive for the shoot. Mr Woods also made users aware that the path was not a public right of way. However, it is not clear whether in so doing he challenged their use or was merely being informative based on what was shown on the map.

16.2 The landowner, Mr Newman, considers that the exclusion of members of the public from Mean Wood (and all public footpaths) during the Foot and Mouth outbreak in 2001 is an interruption to use.

16.3 The Planning Inspectorate's Advice Note 15 makes it very clear that this is not the case.

“9. Against this background, it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an “interruption” under section 31(1).”

16.2 Officers consider there was no effective interruption to use in the period 1992 to 2012.

17.0 Whether use was as of right – without secrecy, force or permission

17.1 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.

17.2 Use of the claimed route has not been carried out in secret. There has been a general awareness of use of the route and it would have been indistinguishable to anyone whether a user had permission or did not (i.e. there was no formal permit or badge issued for those with permission).

17.3 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 locked gate. Additionally, use of a path even though 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.

17.4 There has been no evidence of force being used.

17.5 Permission

Use cannot be considered to be ‘as of right’ if it has been carried out with the permission of the landowner.

17.6 If there is express permission to use a route then the use is not ‘as of right’ and public rights will not have been acquired.

17.7 None of the 25 users of the path who support the application record having sought, or been given permission to walk the claimed route. However, a considerable number of responses have been received by people who did use the route with the express permission of Mr Newman.

17.8 Those who used it with permission appear to fall into three categories. Some are family members (Mr and Mrs Newman and their children), some are members of the Whiteparish shoot (who appear to have permission to enter the woods as a result of this) and others are local people given express permission (including neighbours and a local church group).

- 17.9 Permission has also been granted to groups (for example the Scouts or the Boys Brigade) to use the woods though this is likely to have been a more general permission rather than specifically just to walk the claimed route.
- 17.10 In some instances there is a direct conflict whereby Mr and Mrs Baker claim to have walked the path in the woods without permission and Mr Newman claims to have granted them permission to walk there.
- 17.11 The response from the parish council is that they had considered the path to be permissive but they have been unable to provide any evidence to support how they, as an elected body that has changed over time, were aware of this.
- 17.12 There is no evidence of any signs having been erected on the route to indicate that use was by a revocable permission and all permissions given appear to have been verbal. While this is almost certainly a fair reflection of how things were, officers consider that Mr Newman failed to make the permissive nature of the path, as he saw it, known to the relevant audience. That is, the users of the path. It was not until 2012 that Mr Newman clarified his lack of intention to dedicate.
- 17.13 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."

17.14 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 (19th 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.”

17.15 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 Newman 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 woods (though it is not clear whether this was a permission for general access to the wood or only to the claimed route) 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).

17.16 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....”

17.17 Officers consider that whilst some permission had been granted to some people it was not sufficient to make the public at large (including those following the walk promoted nationally online) using the path aware that the landowner considered it to be a permissive route. Use was predominantly not by permission or licence.

18.0 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.

18.1 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.”

18.2 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.

19.0 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’ and as discussed at section 17 of this report.

19.1 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 demonstrate acceptance by the public.

19.2 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."

19.3 Although Mr Newman may have demonstrated some tolerance to use there have been no positive acts of dedication (for example the erection of stiles) and there have been some acts of granting permission.

20.0 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.

20.1 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').

20.2 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.

- 20.3 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.
- 20.4 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.
- 20.5 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 examination under cross examination. Only the deposit made by Mr Newman in 2012 may be viewed to be incontrovertible and accordingly the relevant period of 1992 to 2012 applies for the evaluation of evidence of use.
- 20.6 The Council is bound to follow Test B as detailed above.

21.0 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...”

- 21.1 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 statutory requirement contained within s.31(1) of the 1980 Act has been met.

22.0 Legal and financial considerations and risk assessment

- 22.1 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 is six months into this one year period.
- 22.2 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.
- 22.3 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.
- 22.4 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).

23.0 Equality impact

- 23.1 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 landowner as appropriate.

24.0 Relationship to Council's business plan

- 24.1 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.

25.0 Safeguarding considerations

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

26.0 Public Health Implications

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

27.0 Options to consider

- 27.1 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.

28.0 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 the period 1992 to 2012.

28.1 There is a clear conflict of evidence relating to just one issue and that is whether the use by the public has been 'as of right' as it is the landowner's view that use has been with his permission. It is a logical step to say that where use continued with denied or revoked permission, that use would have been by force. It is agreed that where use is by permission or by force a claim that a public right had been acquired would fail.

28.2 However, 25 people have provided evidence that they didn't have permission to walk the path and didn't use force to do so. There were no signs to deter or inform them, in the period 1992 to 2012 the land was unprotected by any deposits under s.31(6) and the walk was promoted on a walking website and clearly used. It is difficult to see how they would have known that the landowner required them to have permission to walk that way if they did not know him or were a member of the shooting syndicate.

28.3 It is the view of officers that notwithstanding Mr Newman'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.

28.4 There is no incontrovertible evidence to defeat this application 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.

28.5 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."

29.0 Recommendation

That an Order be made under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to record a public footpath at Mean wood, Whiteparish and that if no objections are received (or any so made are withdrawn) that the Order be confirmed.

Sally Madgwick

Rights of Way Officer – definitive map

26 April 2017

Appendix A Consultation responses

Appendix B Summary of user evidence