

DECISION REPORT
WILDLIFE AND COUNTRYSIDE ACT 1981 S.53

Purpose of Report

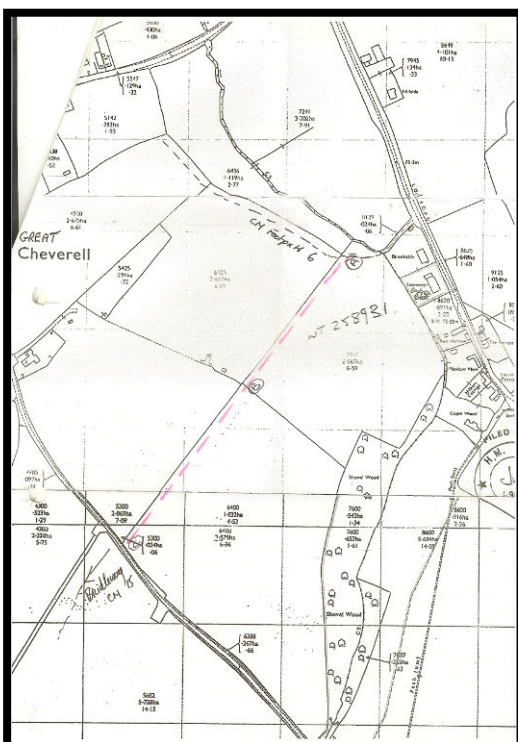
To: Consider an application to add a public footpath at Great Cheverell to the Definitive Map and Statement for the Devizes Rural District Council Area 1952.

1. Application Details:

Application number: 2009/05
 Application date: 28 October 2009
 Applicant: Brigadier Christie
 Manor House Farm
 Great Cheverell
 Devizes SN10 5YA

2. Application to: Add a public footpath to the Definitive Map and Statement for Devizes Rural District Council Area 1952. The claimed route is that length of path shown as a pink pecked line on the application plan (a copy of which is shown on page 2 of this report) leading in a westerly direction from Cheverell Magna Footpath 6 to unclassified road No.7086 (Known as School Lane or Garston Lane).

Copy of Application Map (reduced, not shown to scale)



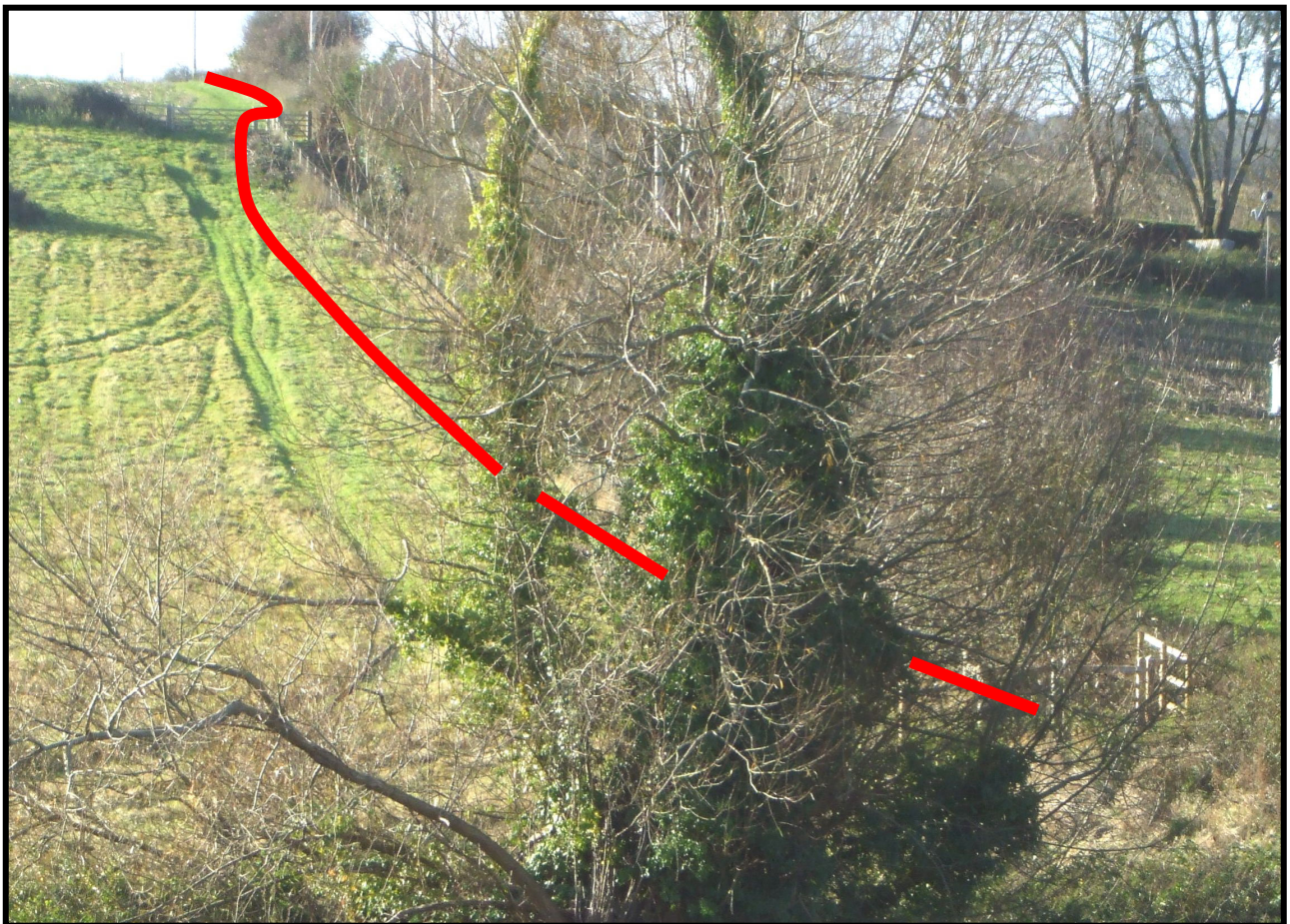
3. Contents of Application:

- Application for Modification Order (28/10/2009).
- Notice of Application for Modification Order (28/10/2009).
- Certificate of Service of Notice served on the landowner (29/10/2009).
- A map of appropriate scale (1:2,500).
- 27 supporting witness evidence forms.

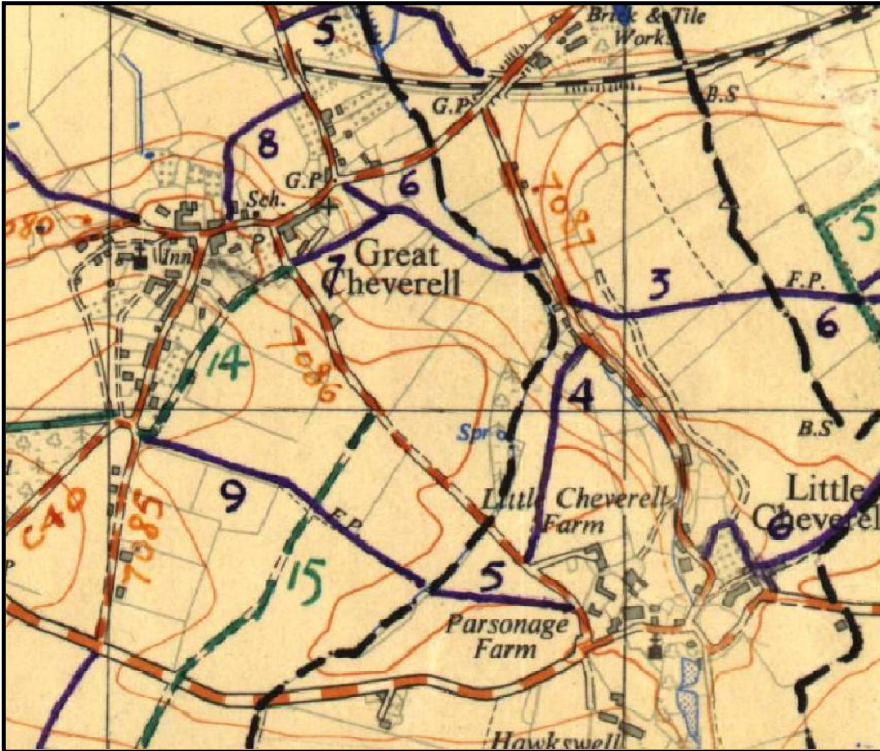
4. Basis of Application: That public rights exist over the claimed route that are not shown on the Definitive Map and Statement for Devizes Rural District Council Area 1952.

5. Description of Route: The claimed path is a grass and earth track bounded by hedgerow to the north-west and has an open field to the south-east. The width of the claimed route is stated in the application as being 4 metres in the south-west field and 10 metres in the north-east field. The claimed route has an approximate length of 360 metres.

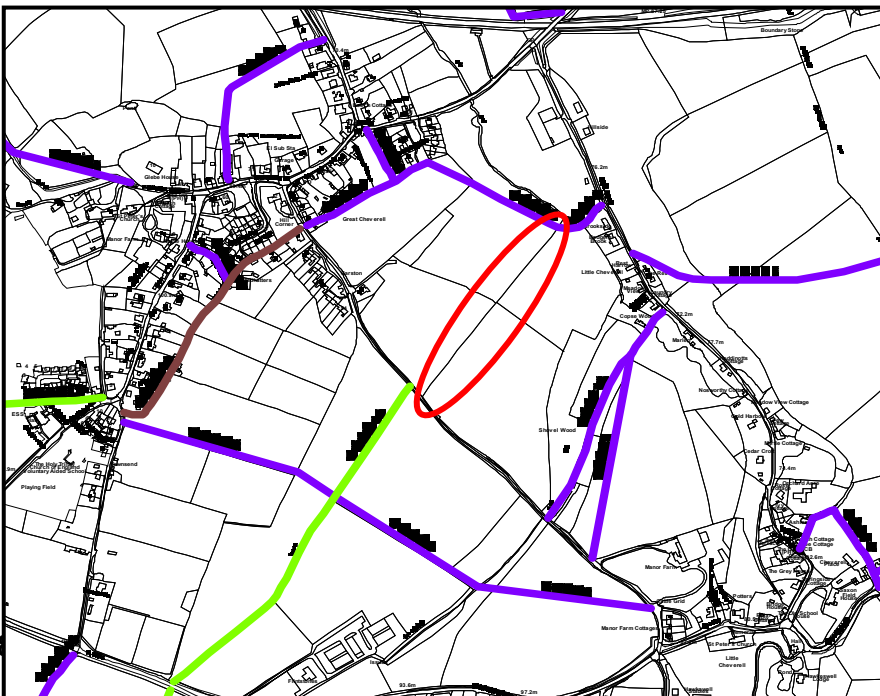
The approximate claimed route is indicated by a red line. Mr Kavanagh's field is in the foreground and Mr Alexander's field at the top of the photo, past the gate.



6. DEFINITIVE MAP



7. Current Electronic Working Copy of Definitive Map: Representation of public rights of way in this area from the working copy of the Definitive Map as at October 2010. [Blue = Footpath, Green = Bridleway, Brown = Byway]. This map has no legal status, but indicates the current extent of the public path network for working purposes. Location of claimed route circled in red.



Landowner	Address
Mr and Mrs Kavanagh	Meadow View, Low Road, Little Cheverell Wiltshire, SN10 4JZ
Mr F.W and Mr B Alexander	23 Brettingham Gate, Swindon, SN3 1NH

9. Background:

1.1 The Definitive Map and Statement was prepared under the 1949 National Parks and Access to the Countryside Act. This Act required the Definitive Map and Statement to be reviewed every five years. The Council is under a legal duty under Section 53 of the Wildlife and Countryside Act 1981 to determine any Definitive Map Modification applications submitted to them.

1.2 An application was received on 29 October 2009 by a member of the public, Brigadier I. Christie, to add a public footpath to the Definitive Map and Statement. The application is supported by 27 witness evidence statements. Apart from aerial photographs there has not been any other documentary evidence discovered supporting the application. The application is therefore mainly reliant on the user evidence, a summary of which is attached as **Appendix 1** to this report.

10. Dedication of way as highway presumed after public use of 20 years: The evidence submitted with the application must show, on the balance of probabilities, that the route has been used continuously by the public on foot 'as of right' (without force, secrecy or permission), for a period of time in excess of 20 years, sufficient to satisfy dedication as a public footpath under the 1980 Highways Act.

10.1 Section 31 of The Highways Act 1980 states:

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

(2) The period of 20 years referred to in 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

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

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as highway is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as highway.

(6) An owner of land may at any time deposit with the appropriate council-

(a) a map of the land on a scale of not less than 6 inches to 1 mile and

(b) a statement indicating what ways(if any) over the land he admits to having been dedicated as highways;

And, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time –

(i) within ten years from the date of deposit

(ii) within ten years from the date on which any previous declaration was last lodged under this section, to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has

been dedicated as a highway since the date of the deposit, or since the date of the lodgement of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

(7) For the purpose of the foregoing provisions of this section, 'owner', in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above 'the appropriate council' means the council of the county, metropolitan district or London Borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the land is situated in the City, the Common Council.

(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an Order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public and statutory purposes to dedicate a way over the land as a highway would be incompatible with those purposes.

10.2 There is no statutory minimum level of user required for the purpose of Section 31 and the matter does not appear to have been tested in the courts. However, it is clear that the surveying authority must be satisfied that there was a sufficient level of use for the landowner to have been aware of it, and have had the opportunity to resist it if he chose.

11. The Calling into Question

11.1 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*). The period of 20 years

is taken as 20 years counted back from the date that the way was first called into question. There are two possibilities for this date

- i) The late summer of 2008 when the landowner erected fences and gates which partially obstructed access to the used route.
- ii) The application for a Definitive Map Modification Order (28 October 2009).

11.2 In late summer of 2008 gates and a fence were erected in the 'upper field' owned by Mr Kavanagh. The gates were erected across the way at each end of the field and a fence erected about 3 - 4 metres out from the centre of the hedge. The gates were not locked but the gates and fence narrowed the claimed route considerably. Three of the witnesses stopped using the route immediately, and although another two witnesses stopped using the way when it began to get overgrown in the spring of 2009, the majority of witnesses (19) continued to use the route through the summer of 2009. It would seem that the majority of the public who were using the route did not see the erection of the gates and fence as a challenge to public use therefore the submission of the application has been taken to be the relevant date for the calling into question of public rights. However, it can be seen from the graph of user evidence in **Appendix 1** that the above choices of a relevant date have no statistical impact on the evidence which sufficiently covers use spanning both of the above mentioned dates.

12. Legal Empowerment: Wiltshire Council is the Surveying Authority for the County of Wiltshire, excluding the Borough of Swindon. A Surveying Authority is the body responsible for the preparation and continuous review of the Definitive Map and Statement of public rights of way.

12.1 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:

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

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

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

An application shall be made in the prescribed form and shall be accompanied by –

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

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

13. Submitted Evidence:

13.1 The application, claiming continuous public use 'as of right' (see paragraph 11.1), which covers the relevant period 1988 - 2008 (see paragraph 9.2), is supported by 27 witness user evidence forms. A summary of the evidence forms is attached to this report as **Appendix 1**.

13.2 Ten of the witnesses claim to have been using the way at the start of the relevant period in 1988. By 2008, 26 witnesses were claiming use (see graph of user evidence in **Appendix 1**). Claimed use goes further back than the relevant period with seven of the witnesses claiming to have used the way in the 1970's, with one witness claiming to have used it as far back as 1946.

13.3 Witnesses indicate that use was open and the landowners must have been aware of the use as walkers use the path from dawn till dusk and workers in the fields have seen people using the way. All witnesses have stated that they had no permission to use the way. Use was claimed to have been without force. Therefore, according to the evidence submitted, the general use has been alleged to have been 'as of right' which is defined above in paragraph 11.1.

14. Consultation and Further Discussion of Evidence: Prior to this report a public consultation was undertaken.

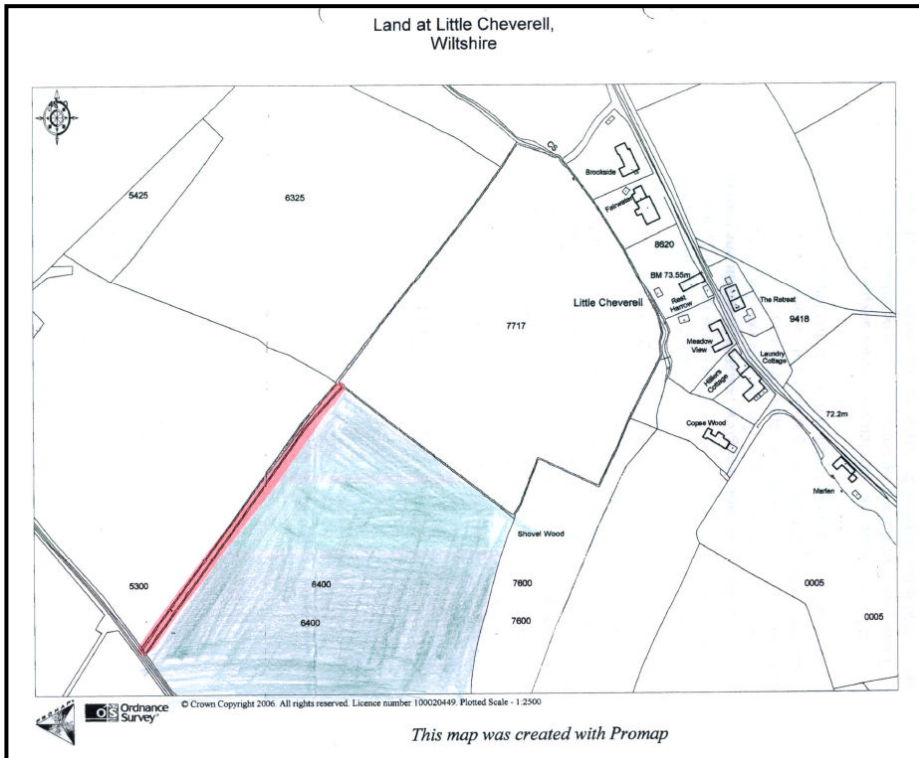
14.1 The consultation attracted four representations against the application from which seven main points of contention arose.

1. Shrubs and trees stopped people walking within a yard from the 'fence'.
2. Crops stopped people walking further out than a yard from the fence.
3. The public have only used the way to any extent since 2005.
4. Use of the way has been with permission.
5. Electrified sheep fencing has at times stopped people using the way.
6. Docks and thistles prevented use of one of the fields in 2005.
7. A dung-heap and a badger sett deterred and/or prevented use for many years.

These points were put to the witnesses for further comment. The seven points are shown below with Officer's comments on each point. Italics show relevant extracts from objector's written responses to the consultation.

POINT 1

Mr Alexander (landowner) states the following: “We understand that Brigadier Christie (and we assume all the other witnesses) agree that until four or five years ago when walking the field marked ‘6400’ (shaded blue) on the plan below, and owned by us, that they walked within about a yard from the fence, and not the existing path some four or five yards from the fence”.



Officer's Comments:- Brigadier Christie's written reply explains that Mr Alexander misunderstood him and Brigadier Christie says he did not walk within about a yard from the fence, indeed he claims it to have always been about 4 metres into the field. Several of the witnesses make the point that because of shrubs and trees along the centre of the old 'fence' line it would have been impossible to have walked within a metre of this line. The witness evidence indicates that the way was walked at various distances from the fence line up to a maximum of about 4 metres out into Mr Alexander's field and up to a maximum of about 10 metres out into Mr Kavanagh's field. A 2001 aerial photograph (Mapexplorer™) and a 2005 aerial photograph (Mapexplorer™) taken from the Wiltshire Council electronic mapping system suggest that a defined route was being used at the times that the photographs were taken (attached to this document as **Appendix 2**). The route is slightly less clear in Mr Kavanagh's field, but it can still be seen as a distinct path. One witness makes the point that the broken down remnant of what was once a fence with an intermittent row of shrubs is hardly straight enough to gauge the distance a path may be from it.

Evidence of one of the witnesses (Mr Manners) will be discounted from the Order decision due to his submission of conflicting maps of the route that he used.

POINT 2

Mr Alexander also states: *“Until 2003 it (the field shaded blue on the plan shown above) was farmed for a good many years to grow potatoes, and at this time the farmer ploughed as near to the fence as possible (within one yard) and grew potatoes to within one yard of the fence, and people never walked over the potatoes, they always walked in the last furrow, which was within a yard from the fence. It has therefore not been ten years since anyone has walked the land for more than a yard from the fence...”* Mr Howat (Farm Manager for the two fields 1987-2000) states: *“During that time we grew corn in both fields ploughing right up to the hedgerows at the edge of the field. I was not aware of any use of the claimed footpath or resultant crop damage.”*

Officer’s Comments: It is suggested by the landowner that up to the year 2003 people walked within a yard from the ‘fence’ in field 6400. The density of the hedgerow which consisted of shrubs and trees at that time can clearly be seen in the 2001 aerial photograph and would have made it very difficult to walk within a metre of the ‘fence-line’. This equally applies to ploughing within a metre of the ‘fence-line’. The witness testimony shows (rounded to the nearest half a metre) that in Mr Alexander’s field the mean distance claimed is 2.5 metres out from the hedge-line and the mean width claimed is also 2.5 metres. The 2001 photograph clearly shows a well defined track in Mr Alexander’s field that supports this evidence.

POINT 3

Mr Kavanagh (landowner since 4 April 2007) states: *“(Public have used the way) but only to any extent since 2005 when the lower field was put into set aside but even then only when cultivation of the top field and grazing in both fields allowed.”* **Officer’s Comments:** There are twenty seven witness evidence forms supporting the application indicating sufficient public use over the relevant twenty year period. Although the application states a claimed width of 10 metres in Mr Kavanagh’s field, the applicant points out in further correspondence (22 November 2010) that he is not expecting the path to be 10 metres wide but 10 metres from the boundary/hedge in Mr Kavanagh’s field and around 4 metres from the boundary in Mr Alexander’s field. The witness testimony taken as a whole shows (rounded to the nearest half a metre) that in Mr Kavanagh’s field the mean distance claimed is 3.5 metres out from the hedge-line and the mean width claimed is also 3.5 metres. The 2001 photograph mentioned in Point 2 above shows that the track is further out when it reaches Mr Kavanagh’s field. This supports the user evidence.

POINT 4

Mr Kavanagh also states: *“We have since our ownership made it clear to anyone using the claimed footpath that they may do so but that it is not a public right of way. We have made this clear to any interested parties as well”.* **Officer’s Comments:** All 27 witnesses that have supplied evidence deny being told by the landowners before or during the relevant twenty year

period that the way was not a public right of way. There is no evidence to show that any of the witnesses were given express permission by the landowners to use the way. There is no evidence which shows that notices indicating that the route is not a public right of way have ever been erected on or near the way and visible to users of the way. None of the witnesses used force and all have used it openly. Therefore, any use claimed seems to have been 'as of right' or *nec vi, nec clam, nec precario* (without force, without secrecy, without licence).

POINT 5

Mr Fielding (farmer who wintered ewes from 2000-2008 for periods of 4-6 weeks in each of the two fields) states: *"Over that period I always had electrified sheep fencing right up to the northwest boundary or hedgerow of the field leaving no room for access over the claimed footpath. Given that I often went straight from one field to the other in succession, this means that the claimed footpath in its entirety would have been impassable for 10-12 weeks at a time. Officer's*

Comments: The recent judgement in the Supreme Court by Lord Hope, Lord Rodger, Lord Walker, Lord Brown and Lord Kerr in the case of R(on the application of Lewis) v Redcar and Cleveland Borough Council and another [2010] UKSC 11 addresses whether use by the public could be 'as of right' if they didn't exercise that right when the land was being used for another purpose. The case in question related to a town and village green application where the public had not been using the land when golfers were using it as a golf course.

The judgement found that users had exhibited courtesy and common sense in not interfering with the golfers and that it was not inconsistent with their use of the land 'as of right' as it did not constitute an interruption.

Although the periods of time when the route was unavailable to the public was much longer in this case (4-6 weeks at a time during the winters of 2000-2008), the open nature of the surrounding land would have made it a very small diversion to take if a walker found their usual walk barred by electric sheep fencing and did not want to intrude out of politeness and respect for the landowner. The witness evidence suggests that any temporary electric fencing to control sheep proved to be no deterrent to a few of the people using the way. However, some of those that were deterred found a close temporary detour and others went a different way altogether. Overall, this shows that at least some use of the way is claimed to have continued during these temporary periods of controlled grazing. However, Mr Pearce and Mr Fielding (farmers of the fields during the relevant period) have stated that the sheep fencing was of the orange mesh type and 1m high which would mean anyone who did get over it would have had to have been very agile and very determined. Mr Fielding said the fencing was right up tight to the hedge and he used to turn off the electricity when he had to cross the fencing. Mr Pearce said that the flexi netting was two or three feet from the hedgerow otherwise it was possible it would short out.

D.E.F.R.A.'s Rights of Way Advice Note 15 on the Planning Inspectorate website states that *'Over a period of 20 years or more there may well be periods when, for a variety of reasons, a way has not been used. In cases where a landowner's ability to dedicate has not been removed it would be reasonable for an Inspector to take the view that, in a period of 20 years or more, periods of non-use of a way may occur'*. Talking about closures for Foot and Mouth the advice note says *'against this background, it does not seem that the temporary cessation of use of ways ... could be classified as an "interruption" under section 31(1)'*. Closing orders for Foot and Mouth occurred in Wiltshire in March and re-openings occurred in May and June which is a longer length of time than the claimed way was obstructed by sheep pens. Therefore, it is likely that the sheep pens were not sufficient to constitute an interruption of continual use of the way for the meaning of the Act, especially in the light of some users claiming to have still used the way during those times.

POINT 6

Mr Pearce who was the farmer of the two fields from 2005-2008 states in a letter: *"...during 2005 prior to our tenancy the field was not cropped at all and became (so) overgrown with docks, thistles and undergrowth, that no one could walk dogs etc at all."* Mr Pearce said during an interview that when he was farming, grass and maize were grown but it was possible that people walked through the maize close to the edge although he had not done this himself. **Officer's Comments:** The witness evidence claims that the presence of docks and thistles in the field did not prevent use of the path and it seems that it would still have been possible for people to use the way, even with maize planted in Mr Alexander's field.

POINT 7

Mr Cope who is a local resident states that: *"The large badger sett in the gateway at the top of the field had many entrances and caused difficulty for implements and anyone on foot and the supposed footpath could not continue west because the field was bounded by a large dung heap for many years – a perfect undisturbed home to breeding wagtails and deterrent for walkers!"* **Officer's Comments:** Aerial photographs and various letters from witnesses commenting on points raised by objectors indicate that there were no dung heaps or badger setts actually on the claimed route. It is also clear from the user evidence submitted and further correspondence that the closeness of either of these to the claimed route have proved no deterrent to the use of the way.

15. Options considered: To Make an Order or not to make an Order.

15.1 If an Order is made there will be a 42 day statutory objection period. If no objections are received the Order may be confirmed by Wiltshire Council and the footpath will be added to the Definitive Map and Statement. If there are objections, the Order must go together with the objections and representations to the Secretary of State for the Environment, Food and Rural

Affairs for a decision on whether or not to confirm the Order. This may be at a local Public Inquiry, a Hearing, or by written representations although a local Public Inquiry is the most likely method.

15.2 If an Order is not made there is a 28 day statutory period in which the Applicant may appeal to the Secretary of State against the Council's decision not to make an Order. On appeal, the Secretary of State has the power to instruct the Council to make an Order. If there are then objections to the making of the Order, the same course of action is followed as outlined in the preceding paragraph.

16. Risk Assessment: If an Order is made and confirmed as an unopposed Order by Wiltshire Council administration costs would be in the region of £700. If the Council sends the Order to the Secretary of State the confirmation would be decided either by written representations, a Hearing or a local Public Inquiry. On top of administration costs, written representations would result in minimal further cost to the Council, a Hearing would cost an extra estimated £850.00 and a local Public Inquiry in the region of an extra £2,500. Budgetary provision has been made to cover these costs.

17. Environmental impact: There is no foreseen environmental impact in making and confirming an Order.

18. Conclusion: Section 53 (3) (c) (i) 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 a right of subsists or is reasonably alleged to subsist over land in the area to which the map relates'*. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of R v Secretary of State ex parte Mrs 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 me 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 path is finely balanced but there is no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then I should find that a public right of way has been reasonably alleged."

The Oxford English Dictionary describes incontrovertible as not able to be denied or disputed. In this case, points of objection are in fact disputed by the witnesses. Although the claimed width of the route varies and is under dispute and uninterrupted use is also disputed, on the balance of

probability the evidence shows that, in the absence of incontrovertible evidence to the contrary, it is reasonably alleged that twenty use 'as of right' has occurred between points A and B on the application plan, therefore the criteria for making an Order has been met (see paragraph 12.1 above) and the Authority is under a duty to make an Order. The claimed width of the way varies, with different witnesses claiming between one and ten metres. The average claim is 2.5 metres wide in Mr Alexander's field and 3.5 metres wide in Mr Kavanagh's field.

19. Recommendation: That Wiltshire Council makes an Order to record the way onto the Definitive Map and Statement for Devizes Rural District Council Area 1952 with the status of public footpath with an approximate length of 360 metres and with a width of 2.5 metres in Mr Alexander's field and with a width of 3.5 metres in Mr Kavanagh's field.

Tim Chinnick
Rights of Way Officer (Definitive Map Section),
Wiltshire Council
29 March 2011