

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

### Route linking Holt Path 16 with Holt Path 8 at Holt Manor (Field Corner Path)

#### Decision Report

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

#### 1.0 The Application

- Application number:** 2012/07 (NB Holt Parish Council has made an application for another footpath in the same field. This is the subject of a separate investigation and is application no. 2012/08)
- Application date:** 01 November 2012
- Applicant:** Holt Parish Council  
c/o Jennie Beale, Clerk  
50 Leigh Road  
Holt  
BA14 6PW
- Application to:** "A footpath 2 metres wide from the stile where footpath 8 meets Holt brook to the stile half way along footpath 16 the exact route is visible on the Google map attached."
- Width:** 2 metres
- Sch 14 Compliance:** Notice of application for Modification Order (Form 1)  
Certificate of Service of Notice of application to the following owners and occupiers (Form 3):  
Mr P Harris, Holt Manor, Holt, Wiltshire  
Approx. 1:10000 Plan showing claimed route  
Aerial photograph showing claimed route  
11 user evidence forms and maps
- Basis of Application:** That public rights exist and that the route should be recorded in the Definitive Map and Statement.
- Legal Empowerment:** Wiltshire Council is the surveying authority for the County of Wiltshire, excluding the Borough of Swindon. A surveying authority is the body responsible for the preparation and upkeep of the definitive map and statement of public rights of way.

The Wildlife and Countryside Act 1981 (c.69) s.53 (2)(b) applies:

As regards every definitive map and statement the Surveying Authority shall-

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence on or after that date, of any of the events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

The event referred to in subsection 2 above relevant to this case is:

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

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

Section 53(5) allows for any person to apply for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or(c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

## **2.0 Compliance of the application**

Section 53 (5) of the Wildlife and Countryside Act 1981 (WCA81) allows:

*(5) any person may apply to the authority for an Order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.*

Schedule 14 to this Act states:

### *Form of applications*

1. *An application shall be made in the prescribed form and shall be accompanied by –*
  - (a) *a map drawn to the prescribed scale and showing the way or ways to which the application relates and*
  - (b) *copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.*

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

This application comprised the below and is considered to be compliant with the legislation.

Notice of application for Modification Order (Form 1)  
Certificate of Service of Notice of application to the following owners  
and occupiers (Form 3):  
Approximately 1:1000 plan showing claimed route  
Aerial photographs showing claimed route  
11 witness evidence forms and maps

## 2.0 Land Ownership Details

2011 to date	Mr P Harris, Holt Manor
2002 to 2011	Mr Fisher formerly of Holt Manor
1996 to 2002	Mr and Mrs Giles Clarke formerly of Holt Manor
1991 to 1996	Mr Walter Spreckley formerly of Holt Manor

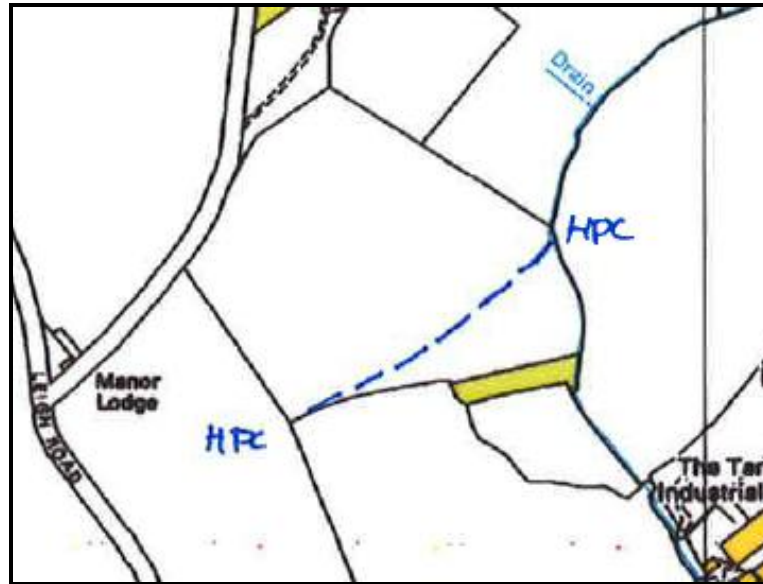
Early ownership of the land was with the Forster and Smith Barry family (c.1900 to 1960s).

## 3.0 Description of route

The route leads from a stile at a field boundary on Holt path no 16 across a field to a stile at the brook on Holt path no. 8. This is shown by the red pecked line on the 2006 aerial photograph below.



### 3.1 Application map

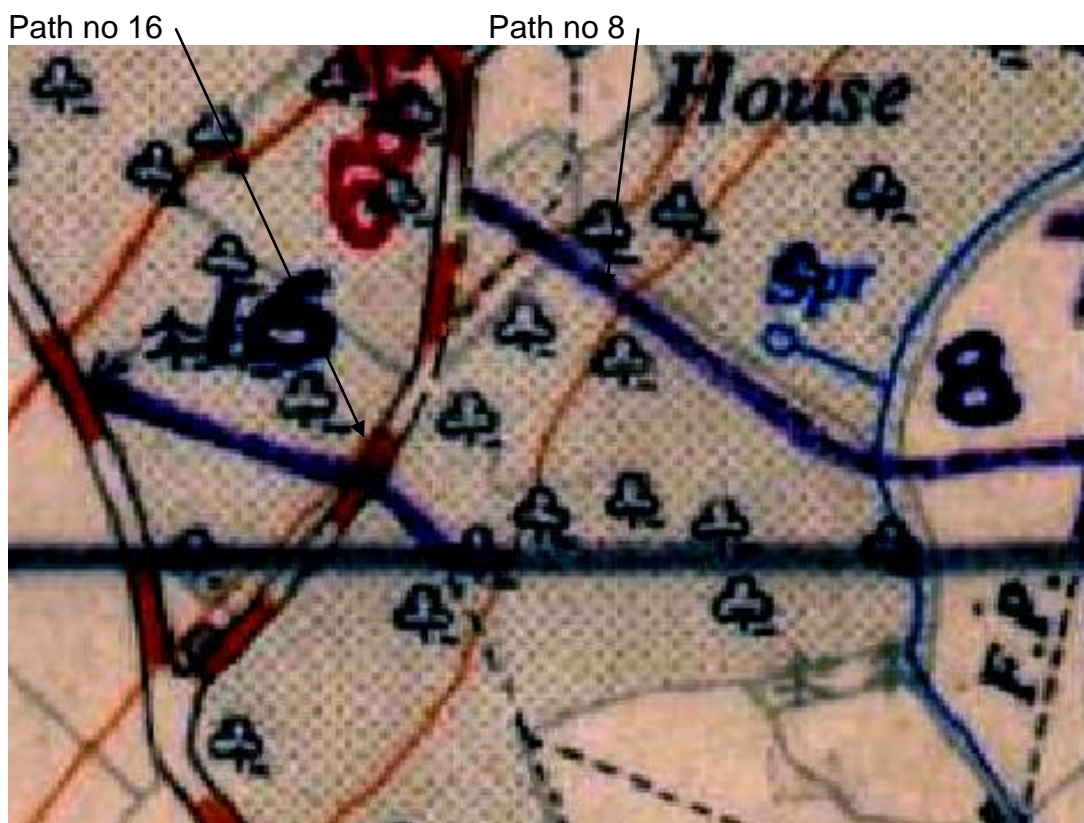


### 3.2 Definitive map and statement

Holt paths 8 and 16 were added to the Bradford and Melksham Rural District Council definitive map and statement dated 1952. Although both of these paths have had sections of them affected by diversion orders since that time it is only path number 8 that has been affected by a diversion order in the area of interest.

The original definitive map is as below (Holt has a 1:25000 map and a 1:10000 'insert' map):

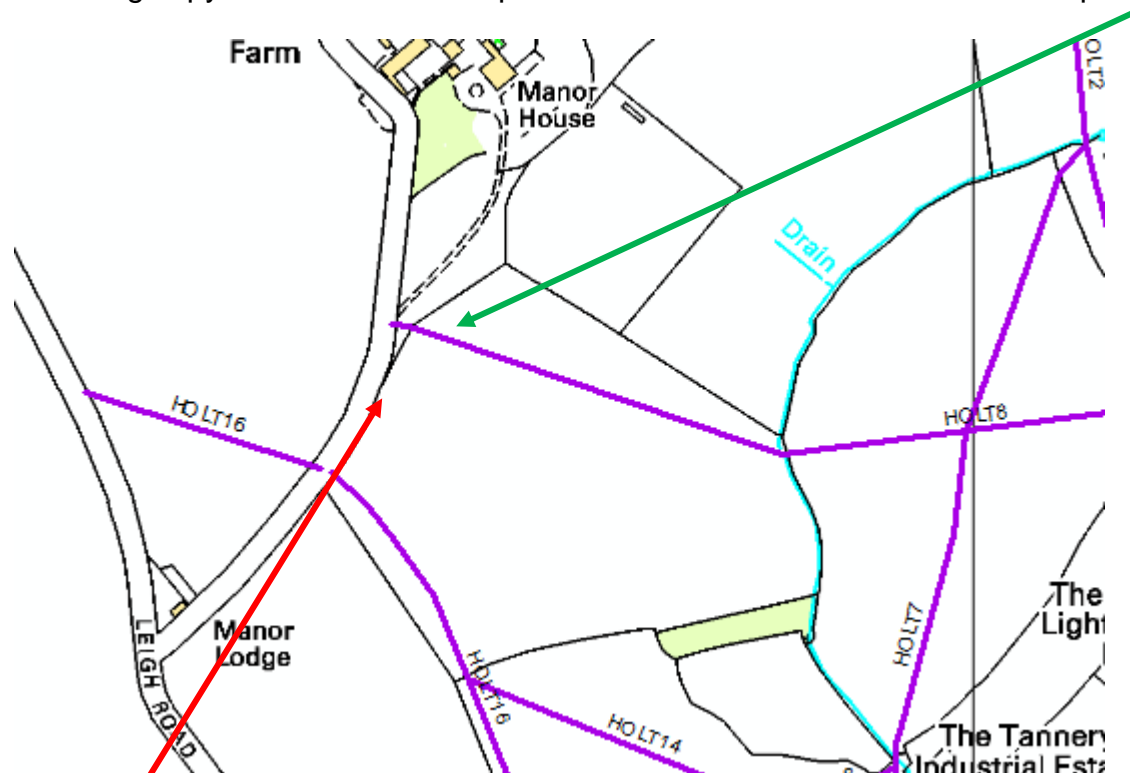
1. 1:25000 base map (expanded)



2. 1:10000 base map (expanded)



The current working copy of the definitive map shows the effect of the diversion of footpath 8:



The diversion order was confirmed in June 2005. As a result of this a new access point was installed at the Manor House end. Unfortunately this was installed in the wrong place (it was installed approximately 50 metres south west along the u/c 6020 (by farm access gate) instead of close to the Manor House gate as shown by the red arrow).

As a result of this there are now three access points to the field: 1) a stile at the end of Holt 8, 2) a kissing gate approximately 50 metres from it and 3) Jacob's Ladder stile and kissing gate on Holt 16 at the junction with the road u/c 6020 .



Manor House end of Holt 8(2007)

Permissive route 50 metres SW of Holt 8 (2011)

### 3.3 Aerial Photographs (OS copyright 100049050)

2001



2006



The worn route visible in this image corresponds with the application route.

2008



It is noted that the most worn route shown in the 2006 and 2008 photographs (not visible in the 2001 photograph) corresponds with the route enabled by the kissing gate installed 50 m to the SW of Holt path 8 and as shown in the photograph on page 6 of this report.



#### 4.0 Context of the Application and Historical Evidence

The land over which the claimed route leads lies to the south of Holt Manor and to the north west of the village of Holt. Holt is a largely linear village along the line of the B3107 and lies between the towns of Bradford on Avon and Melksham. The village had seen a steady increase in population numbers as follows:

Year	Population
1831	839
1901	915
1961	1278
1991	1458
2001	1532

The vast majority of the population of Holt lives to the south and south east of the claimed routes.

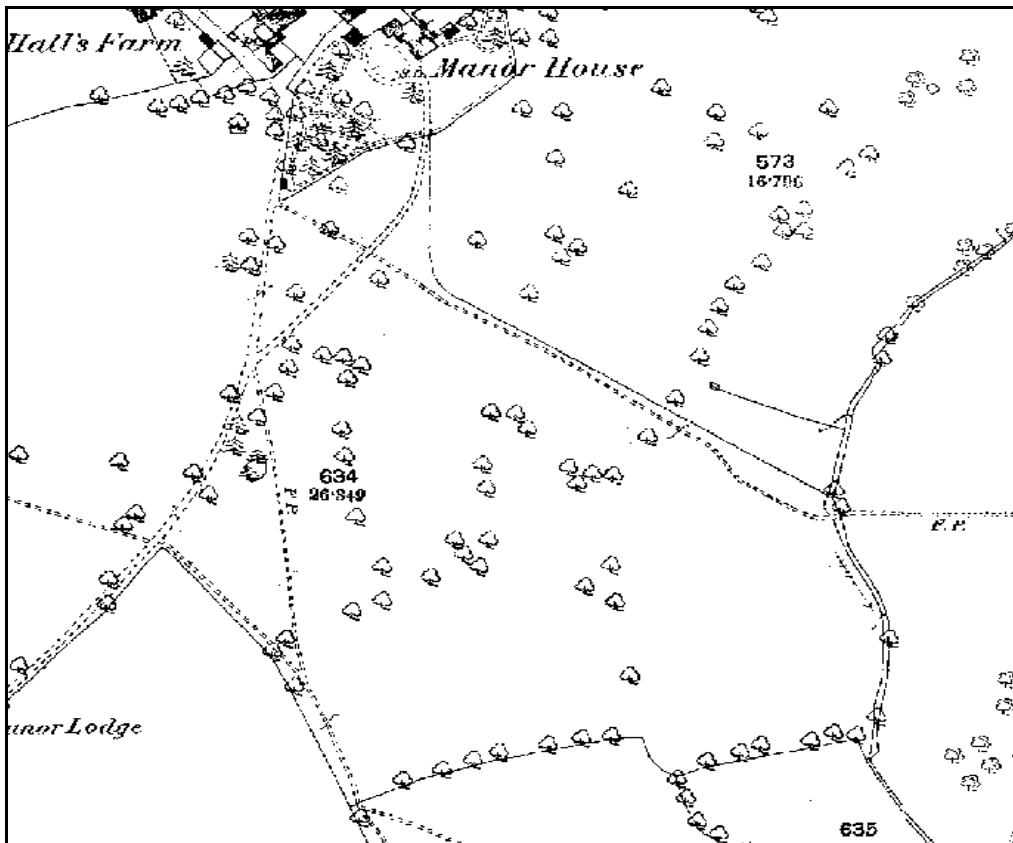
The One Inch to one mile Ordnance Survey map of c.1890 shows the Manor House and represents the area of land over which the claimed paths lead as parkland.



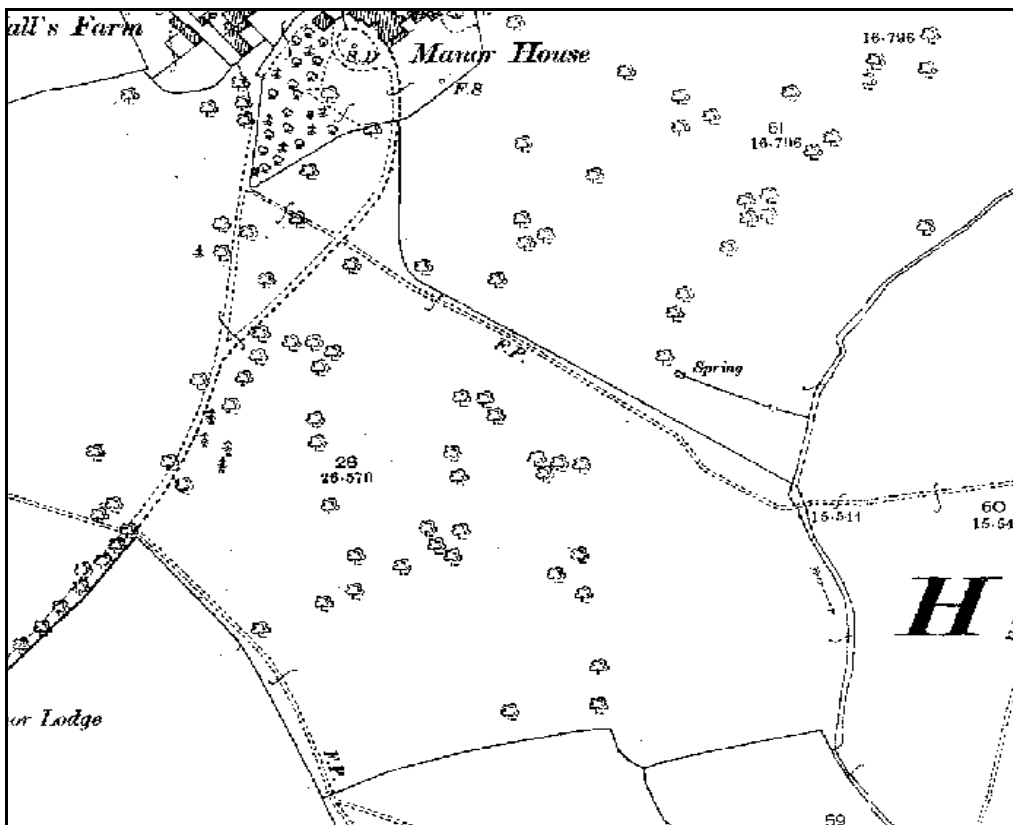
The County Series Ordnance Survey maps printed at a scale of 1:2500 have been viewed as they record the lines of historic paths. A disclaimer applies that the representation of paths is no indication of the existence of public rights, but like aerial photographs, these maps can be useful to gauge whether a visible path was present at the time of the survey.

Maps record a number of paths in this area (many of which are now recorded in the definitive map and statement as public rights of way) but none show paths on the line of the claimed route.

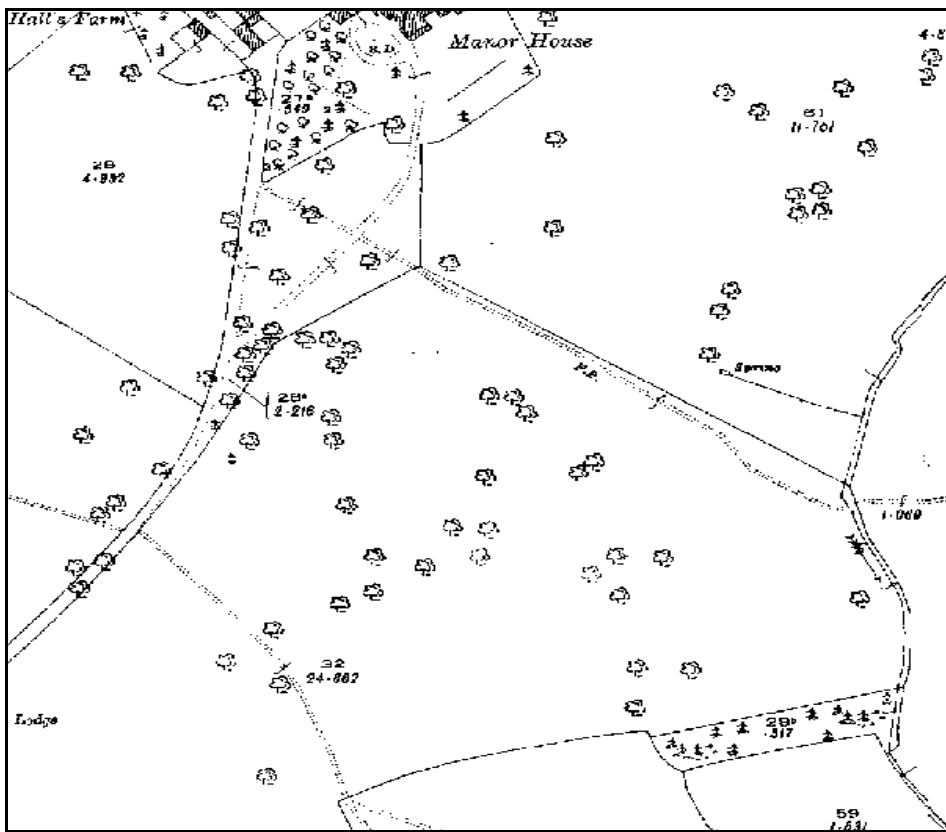
First Edition (c.1870)



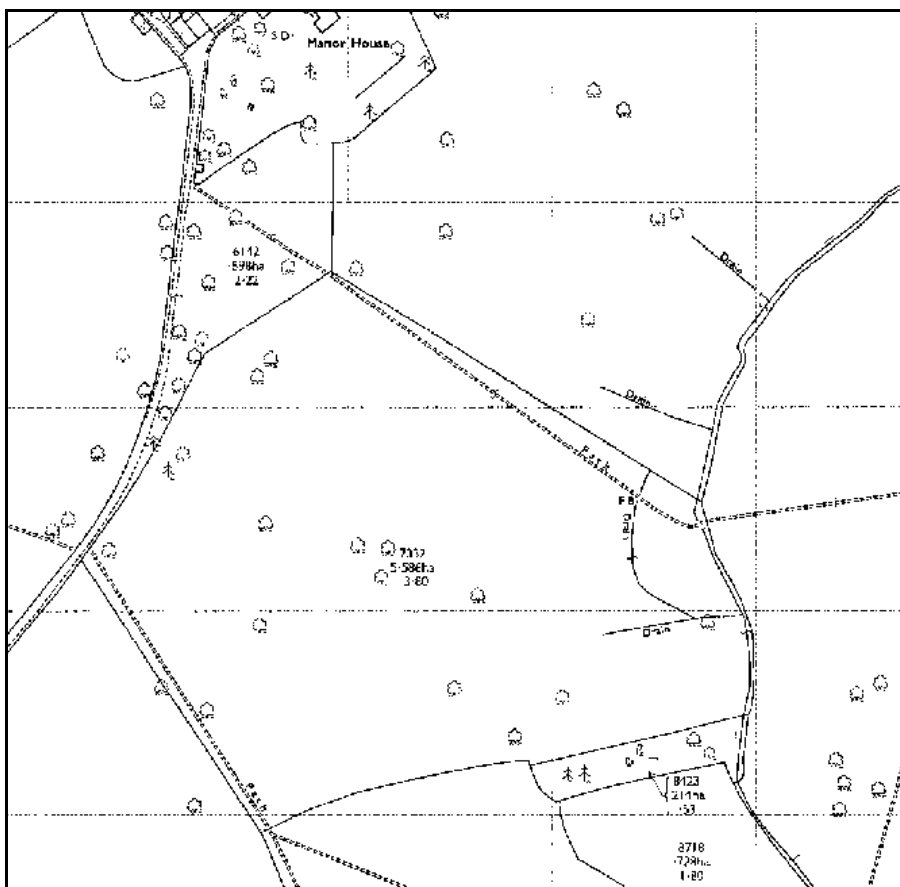
Second Edition 1901



**Edition of c.1924**



**National Grid Series 1:2500 c.1970**



## 5.0 Initial Consultation

An initial consultation was conducted between 15 March and 26 April 2013.

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

### ***Application for a definitive map modification order to add a public footpath over land south of Holt Manor***

*On the 1<sup>st</sup> November 2012 Wiltshire Council received an application for an order to add a footpath to the definitive map and statement over land south of Holt Manor. The application is supported by the statements of 11 members of the public who have used the route for varying lengths of time from 1935 to 2012. For the application to succeed it is necessary for that use to have been without interruption and ‘as of right’, that is, without permission, without force and without secrecy.*

*If you have any comment to make regarding this application or perhaps any additional evidence (which may include photographs) I would be pleased to receive it by 03 May 2013. If you have any queries please do not hesitate to contact me.*

*Wiltshire Council has received two applications (2012/07 and 2012/08) to record two paths over land at Holt Manor. The applications will be considered concurrently but it is important to note that the applications are distinct from each other and the evidence is individual to each.”*

The map below was circulated:



The following were consulted:

Mr P Harris (landowner)  
Auto Cycle Union (statutory consultee)  
Wiltshire Bridleways Association  
Cycling Touring Club (statutory consultee)  
British Horse Society (statutory consultee)  
Holt Parish Council (applicant and statutory consultee)  
Cllr T Carbin (Wiltshire Councillor)  
Wiltshire British Horse Society  
Byways and Bridleways Trust (statutory consultee)  
Wiltshire Council Senior Rights of Way Warden  
Wiltshire Ramblers  
Mr B Riley  
British Driving Society (statutory consultee)  
Mr P Smith (witness)  
Mr R Mizen (witness)  
Mr J Nibbs (witness)  
Mrs A Nibbs (witness)  
Mr R Moody (witness)  
Mr M Moyes (witness)  
Mrs P Earl (witness)  
Miss A Pryke (witness)  
Mr M Smith (witness)  
Mr P Ladd (witness)  
Mrs S Chapan (witness)

## **5.1 Initial Consultation Responses**

### **1. Mr P Harris** 02 April 2013 Notes from telephone call

- i) Mr Harris bought Holt Manor from Mr Fisher about 2 years ago. Mr Fisher had probably owned it for about 12 years and had bought it from Giles Clarke. Prior to this the Manor had belonged to Smith Barry, a son of Colonel Forster. This period was from around 1900 to the 1960s.
- ii) Mr Fisher had employed a full time land agent who lived on the estate and looked after land related business. Mr Harris would be getting a statement from him.
- iii) He had erected a fence across the field in July 2011 by Mr Harris as he had concerns about public safety and cattle attacks on footpaths.
- iv) The ROW warden for the area had put a kissing gate in the wrong place for the 2005 diversion of footpath 8 and had subsequently put a stile in the correct place by the Manor House gate.
- v) He doesn't have any memory of people walking the claimed routes but thinks they may have walked round the edges.

### **2. Mr P J Ladd** 12 April 2013

*"I enclose photographs of my family, together with some visiting American friends enjoying climbing on a large fallen tree.*

*That tree is a few metres from the proposed route of the footpath shown on the map as dotted line A to B.*

*I moved back to Holt 6 years ago. My grandchildren have since that date regularly played in that tree and used the footpath to get there. The photo proves that the footpath was in regular untrammelled use and was taken in 2011."*

The photographs show people in and around a large tree which is along the route near the northern end. They are close up pictures and do not show the path.

### **3. Mr Giles Clarke** 23 April 2013

*"My wife Judy and I owned the freehold of Holt Manor, Holt from 1996 – 2002 and I am the Lord of the Manor still.*

*I have been shown a copy of your letter to Mr Moyes dated 15 March 2013 ref SN/PC123 with public footpath plans attached.*

*I confirm that throughout our ownership the public used these footpaths and we made no objections since these are clearly of immensely long habitual use."*

Officers responded to Mr Clarke and enclosed a copy of the consultation plans for 2012/07 and 2012/08. Mr Clarke responded on 29 April 2013:

*"I confirm that the footpaths marked A to B on each plan are the ones to which I refer."*

### **4. Mr Martin Moyes** 19 April 2013

*"I refer to your letter dated 15 March 2013.*

*I am aware that there are two applications regarding Rights of Way across the one field. I have walked both routes and have similar but not identical comments, so please forgive the repetition.*

*We moved in to Holt in August 1982 and, as country lovers and walkers, explored the footpaths around this community. However it was not until 1983 when we acquired our first pet dog, Bonnie, that we became regular walkers of the local footpaths. For a shorter walk, a favourite route was out of the village on Holt 17 and Holt 8, then along route A to B as per your map and returning via Holt 16.*

*We walked this route regularly until our last pet, Meg, died in 2005 and since then just very occasionally when the fancy took us.*

*Never – a word that I am using carefully and after some thought – did we encounter any obstruction of this route, any sign preventing or limiting its use, nor did we receive any word from the occupiers of Holt Manor suggesting that we restrict our activities in any way.*

*I note that, although the two ends of this route are exactly as per your attached map, the specific route that we took between them did vary a little due to the copse roughly halfway. This lack of an absolutely exact route means that it does not show up well on aerial photographs. I would however be content with whatever route is provided between the two specified ends points as long as it is reasonably direct and does indeed cross the field rather than skirting it . . . I say this because part of the pleasure of walking this route is simply being in that lovely open space and enjoying the views of Holt and beyond – unusual in such a generally flat terrain. Walking the field boundaries is no substitute.*

*The Spreckleys occupied Holt Manor in the early 1990s and in 1993 I directed an outdoor production of Macbeth at Holt Manor – with their kind permission and support. I clearly remember Mr Spreckley encouraging me to walk to Holt Manor across the fields rather than driving.*

*Through Robert Floyd of Great Chalfield, I have been in contact with Giles Clarke – the occupier of Holt manor from the mid-1990s for some 8 or 9 years – and he will be contacting you separately to confirm the freedom he gave to walkers across the field in question.*

*There were times when there was stock in the field and it would have been unwise or wrong to walk there with a dog – but that was always my decision and I do not recollect and sign of obstruction at such times.*

*I hope this is helpful, and please contact me if anything is unclear or if I can help further in any way.”*

An aerial photograph was enclosed showing the route between pecked lines:



## **5. Mr P Harris 14 May 2013**

*“With reference to your letter of 26<sup>th</sup> March 2013.*

*(1) We became the owner of the affected land 31<sup>st</sup> May 2011.*

*(2) The fencing was erected July 2011.*

*(3) Mr Giles Clarke till approx 13yrs ago, Mr Anthony Fisher May 31<sup>st</sup> 2011. Mr Hillier of Norbin Farm, Box, Wiltshire*

*Since we have resided at Holt Manor we have never seen people walking the routes suggested, tracks have never been established, refer to statement of Mr Philip Holmes. Prior to erection of fences people were observed going off footpath but never on a set path, when ever able people were spoken to. There is no need for these extra footpaths as access is already catered for. Given the Parish Councils strong views on keeping the landscape clean, and the need if these footpaths are granted to fence them in due to cattle in the fields, the application will seriously affect the views and the farmers use of the fields. This is a vindictive application and must be seen as such. It has taken the Parish Council 15 months to decide the erected fencing has stopped them walking somewhere they should not. It is interesting to note you cannot walk footpath 16 due to it being blocked off by electric fencing yet no one complains.”*

Mr Harris also submitted 2 aerial photographs dated 1999 and 2008, an example of a cattle attack on a walker to highlight the danger to the public of using paths with cattle in them and copies of submissions from Mr P Holmes, a former estate manager and Mr Hillier, the agricultural tenant.

## **6. Mr Hillier submitted 14 May 2013 sent to Mr Harris 13 April 2013**

*“I understand that there are ongoing discussions with regards to two footpaths below Jacobs Ladder which is situated at Holt Manor Bradford Road Holt.*

*This is farm land that I am a tenant and have used for livestock purposes in past and intend to do so in the future. The two footpaths in question I have never seen being used once in all the years I have farmed the land.*

*Given that this land is agriculture land in a organic conservation at present, if these proposed plans go ahead the land will become unworkable in farm management terms and be detrimental to the environment in terms of not complying to the government standards for organic farmed land.*

*Finally there has never been any visual marks of use to the land in question.”*

## **7. Mr Philip Holmes submitted 14 May 2013 dated 06 April 2013**

*“To whom it may concern: For approximately 10 years until 31<sup>st</sup> July 2011, I was employed as a full time estate manager by the former owner of Holt Manor. My duties included the maintenance of the property and the grounds. My wife and I lived at the Dower House at Holt Manor. Inspection of the fields and fencing was carried out on a regular basis, also mowing of the verges alongside the road. At no time do I recall any person or persons walking the 2 routes suggested, in fact if I had it was my duty to inform them that they were trespassing and must stick to the official paths. At no time was a trodden path visible during employ. The former owner did have me erect a gate for the farmer to use near to the Manor, which the public did use to create unofficial path which has a notice informing the public of such. At times people would walk away from the official paths, but never on a regular basis.”*



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

The evidence submitted with the application suggests that the route has been used by the public since 1935; the route does not appear to have a historical context and/or evidence of public use in earlier times and I am mindful that either the principles of dedication at common law (the principal of long term use by the public and either acceptance by the landowner by making no objection if such use is considerable or perhaps by an express dedication) or those laid out by statute in s.31 of The Highways Act 1980 need to be found to apply for the application to succeed. Whilst the dedication of this route may have occurred at common law at some time in the past, it is recognised that such a dedication is difficult to determine and hence it is considered appropriate to apply section 31 of The Highways Act 1980.

Section 31 of The Highways Act 1980 states:

### **31. Dedication of way as highway presumed after public use of 20 years**

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

*(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes –  
(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and  
(b) has maintained the notice after the 1<sup>st</sup> January 1934, or any later date on which it was erected.*

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

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

*(6) An owner of land may at any time deposit with the appropriate council-  
(a) a map of the land on a scale of not less than 6 inches to 1 mile and  
(b) a statement indicating what ways (if any) over the land he admits to having been dedicated as highways;*

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

- (i) within ten years from the date of deposit*
- (ii) within ten years from the date on which any previous declaration was last lodged under this section,*

*to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the*

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

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

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

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

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

NB The Growth and Infrastructure Act 2013 brought about alterations to s.31(6). However, this application pre-dates these changes and they have not been incorporated here.

Section 31(1) requires that the use by the public must have been as of right without interruption for a full period of 20 years.

The term 'as of right' is considered to mean without force (*nec vi*), without secrecy (*nec clam*) and without permission (*nec precario*).

## **6.0 Consideration of all evidence**

### **6.1 Calling into question**

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

7 User evidence forms with individually annotated maps were provided to support the application. This evidence is summarised at **Appendix A**. No users record anything to challenge their use until a fence was erected across the route in 2011. Hence it is considered that the 20 year relevant period for the application of s.31(1) is from 1991 to 2011.

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

*" It should first be noted that s.31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires 'sufficient evidence' that there was no such intention. In other words, the evidence must be inconsistent with an intention to*

*dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J, in Billson's Case [R v S of S for the Environment ex p. Billson [1999] QB374] it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience".*

The evidence provided shows 7 members of the public used the claimed route for various lengths of time and with varying frequency between 1940 and 2011. The evidence gives that all of these used the claimed route for the entire 20 year period before the erection of the fencing (notwithstanding that Mr Moyes thought the fencing was erected in 2010) and that all had seen other people walking along the route.

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

## **6.2 Without permission**

No witnesses claim to have sought or been given permission. The landowner between the years 1996 and 2002 was aware of the use by the public and made no objection. This tolerance of the use may not be seen as implied permission.

It is also noted that implied permission is not necessarily fatal to a claim based on use by the public that is 'as of right'. In a recent case involving a village green the question of whether implied permission would be fatal to user 'as of right' was considered by the House of Lords in *R(Beresford) v Sunderland City Council [2004] 1 AC 889 (paras 5,6 and 7)* Lord Bingham says:

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

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

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

Additionally Mr Moyes recalls being encouraged to walk across the fields to Holt Manor in 1993 by the then owner, Mr Spreckley. There does not appear to be any suggestion of permission but it is not clear what routes Mr Spreckley was encouraging Mr Moyes to use and little weight may be given to this evidence one way or the other.

### 6.3 Without interruption

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

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

- (3) Where the owner of the land over which any such way as aforesaid passes –*  
*(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and*  
*(b) has maintained the notice after the 1<sup>st</sup> January 1934, or any later date on which it was erected.*

No evidence of such notices has been discovered.

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

No evidence of such notices has been discovered.

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

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

- (6) An owner of land may at any time deposit with the appropriate council-*  
*(a) a map of the land on a scale of not less than 6 inches to 1 mile and*  
*(b) a statement indicating what ways(if any) over the land he admits to having been dedicated as highways;*  
*And, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time –*  
*(iii) within ten years from the date of deposit*  
*(iv) within ten years from the date on which any previous declaration was last lodged under this section,*

*to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the*

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

NB The Growth and Infrastructure Act 2013 amended this section of s.31. However, the alterations post date this application and have not been included here.

Officers have searched archive deposits dating back to 1932 and no deposit, statement or statutory declaration has been made affecting the claimed route for the period 1932 to 2011.

#### **6.4 Without secrecy**

No users claim to have used the path in secret and the evidence of Mr Giles Clarke is clear that he was aware of the use by the public. The routes are not visible from the Manor House but may be seen from the public road just south west of the Manor House gates.

#### **6.5 Without force**

No users claim to have used force to access the claimed routes. None would have been necessary as access was possible at either end from either the stile known as Jacob's Ladder or path number 8.

#### **6.6 The character of the way**

It is a requirement of s.31(1) that the way may be any way "*other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication*". Examples of ways that may not be of such character include ways where public use is specifically prohibited (for example a motorway) or a discontinuous length of highway wholly unconnected with the highway network. There is however no requirement that a way must be of utility value or perhaps provide a shorter or more direct route. A way may be a cul-de-sac and may end at a place of public resort.

Lightman J in *Oxfordshire County Council v Oxford City Council* ([2004] Ch253) said that the true meaning and effect of the exception of "a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication" is that "the user must be as a right of passage over a more or less defined route and not a mere and indefinite passing over land". The exception could also apply to routes that did not connect to highways or lead to a place of popular resort.

#### **6.7 Subjective belief**

It is sometimes suggested that anyone using the land would have known it was private and that they were not using a public right of way and hence their use cannot be considered to have been 'as of right'.

It is a feature of public rights of way in England and Wales that they pass over land that is in private ownership; that is, that the public has a right, in law, to pass and repass over a defined route on land that is privately owned.

Neither is the state of mind of the user a consideration, all that may be considered is whether that use has gone on, without permission, without force and without secrecy. This point was

addressed by Lord Hoffman in the House of Lords in the case of Regina v Oxfordshire County Council and others ex parte Sunningwell Parish Council [2000] 1 AC 335. In his judgement Lord Hoffman dismisses any additional requirement of subjective belief for the satisfaction of 'as of right':

*"In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in any way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like Steed when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr J G Ridall's article "A False Trail" in [1997] 61 The Conveyancer and Property Lawyer 199."*

## **7.0 Widths, Conditions and Limitations**

The majority of users consider the width of the path to be 2 metres. The limitations are associated with the existing rights of way and not the claimed route and no users record any on the claimed route. There are therefore no conditions or limitations associated with the route claimed.

## **8.0 Decision**

Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an order should be made if the Authority discovers evidence, which, when considered with all other relevant evidence available to them, shows that, on the balance of probabilities, a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates.

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

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

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

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

There has been no incontrovertible evidence adduced or discovered in relation to this claim and the evidence of the 11 witnesses is at least a reasonable allegation that public right subsist..

There is however credible evidence that the use by the public has been light (as given by witness forms) though aerial photographs do show a worn path on this route unlike application 2012/08. Additionally the evidence given by Mr Holmes cannot be ignored. Mr Holmes was the full time estate manager from 2001 to 2011 and cannot recall any users on the route. It would be difficult to apply Test A without further testing of the evidence under cross examination.

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

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

## **9.0 Legal Considerations and Risk Assessment**

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

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

If the order, when made and advertised receives objections which are duly made it must be forwarded to the Secretary of State for determination. Through their agent, the Planning Inspectorate (PINS), the order may be determined by way of written representations (no additional cost to the Council), a local hearing (cost £200 to £500) or a public inquiry (cost £5000 to £10000 if Wiltshire Council supports the order; around £300 if it does not).

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

## **10.0 Equality Impact**

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

## **11.0 Other Considerations**

The route claimed by the applicant has not been available to the public since late in 2011. Officers have considered whether it would be appropriate to negotiate access while the application is being considered or the provision of a permissive route. In this case the landowner has provided an alternative route around the field edge, this is signed as a permissive route and appears to be used by the public. The landowner had also made an application for a public path order which would dedicate the new route to the public. However, this proposal produced very strong objection from local people and has now been withdrawn. The permissive route is however currently still available and offers the public a route away from grazing cattle.

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

the statute. Determination of the two applications (2012/07 & 08) at Holt Manor would clarify where public rights subsist and would assist greatly both the public and the landowner

## **12.0 Recommendation**

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

Sally Madgwick  
Rights of Way Officer

21 May 2013