
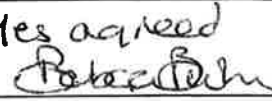
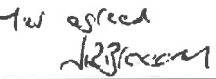


APPENDIX C – DECISION REPORT (29 NOVEMBER 2013)

COVERING PAGE FOR DECISION REPORT ON APPLICATION TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY – PURTON (OFF HOGGS LANE)

PLEASE SIGN OFF THE REPORT NEXT TO YOUR NAME

		Signature	Date Signed Off
To:	Sarah Marshall (Solicitor – Legal)		20 March 2014 Approved (subject to comments in email)
	Barbara Burke (Definitive Map and Highway Records Team Leader)	Yes agreed 	27/3/14
	Richard Broadhead (Rights of Way and Countryside Manager)	Yes agreed 	27/3/14
	Ian Brown (Head of Environment Services)	Copy for information only	—
	Tracy Carter (Associate Director – Environment and Leisure)	N/A	—
From:	Janice Green		
Date of report:	29 November 2013		
Return to:	Janice Green, Rights of Way (Ext. 13345)		

Nature of Report: This is a report from Janice Green (Case Officer) to Richard Broadhead (Officer with the relevant delegated powers).

Executive Summary:

Wiltshire Council are in receipt of an application, made under Section 53 of the Wildlife and Countryside Act 1981 and dated 1st August 2002, to add a footpath to the definitive map and statement of public rights of way, off Hoggs Lane, Purton. The application is supported by 14 user evidence forms and a petition signed by 62 individuals. Following an initial consultation carried out by Wiltshire Council in 2010, a further 8 witness evidence forms were received, along with landowner evidence forms completed by the present landowner and the previous landowner.

Following an assessment of the evidence, Officers are satisfied, on the balance of probabilities, 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...”

Officer's Recommendation:

That an order be made under Section 53 of the Wildlife and Countryside Act 1981, to record the claimed route, off Hogs Lane, Purton, as a footpath on the definitive map and statement of public rights of way and if no objections are received, Wiltshire Council may itself confirm the order as an unopposed order.

Decision Report

Wildlife and Countryside Act 1981 – Section 53

Application to Add a Footpath to the Definitive Map and Statement of Public Rights of Way – Purton (Off Hoggs Lane)

1. Purpose of Report

- 1.1. To determine an application, made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way at Purton, between Hoggs Lane and Footpath no's.110 and 112 Purton.

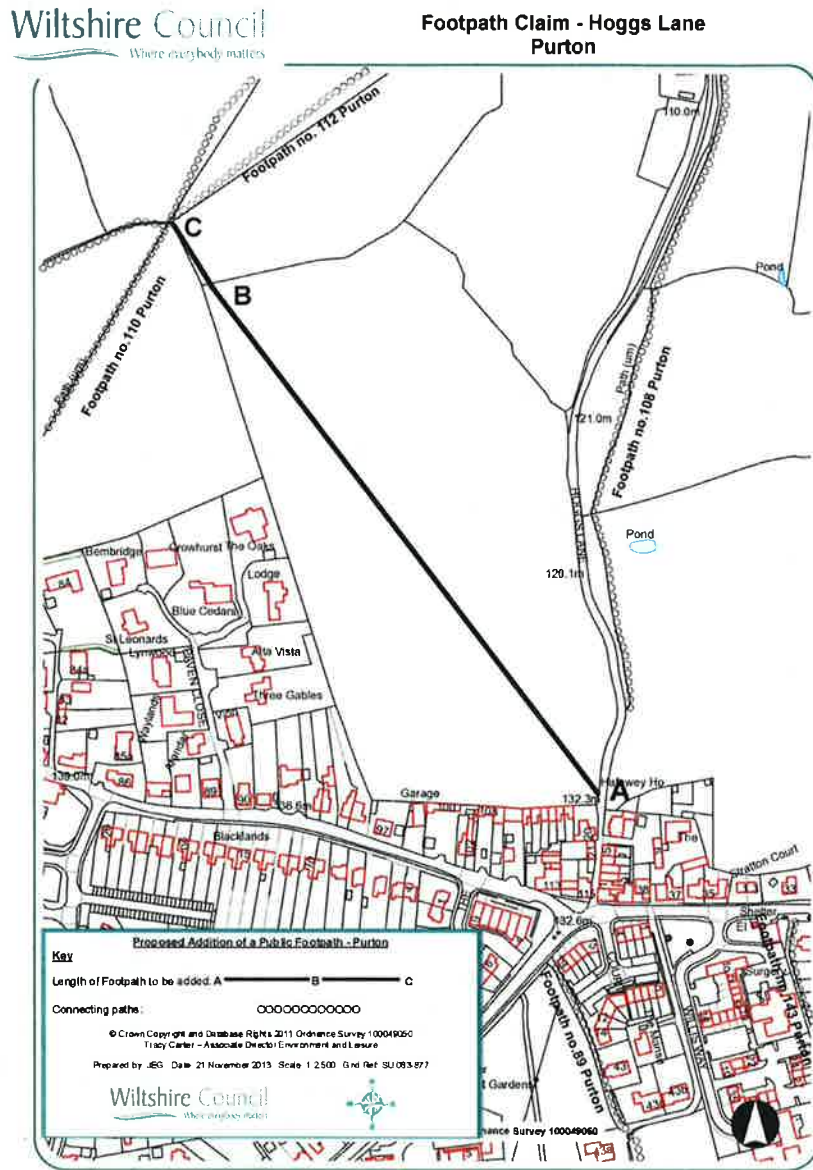
2. Location Plan

Wiltshire Council
Where everybody matters

Purton Location Plan



3. Application Plan



4. Photographs



*SU 0845-8756, looking north-west.
 Point A, Hoggs Lane entrance with
 chained and padlocked gate.*



SU 0845-8756, looking north-west.
Point A. An improvised barrier of metal and wood has been constructed adjacent to the gate. Alongside this construction is a section of ruinous wall, with a strand of barbed wire loosely strung across the top.



SU 0845-8756, looking south-east.
The metal barrier adjacent to the gate off Hoggs Lane, showing the ruinous section of wall adjacent, with a strand of barbed wire loosely strung across the top.



SU 0837-8764, looking north-west.
The claimed route leads through a field to the rear of properties at Pavenhill, presently used to graze horses.



SU 0821-8788, looking north-west.
Point B at Francomes Hill. Stile in the field boundary fence, temporarily repaired with twine to prevent stock escaping.



SU 0821-8788, looking north-north-west from point B (Francomes Hill).
The used route appears to have a metalled surface at this point.

5. Registered Landowner

- 5.1. Mr Graham Fletcher & Mrs Roseanne Fletcher
17 Sherford Road
Swindon
Wiltshire
SN25 3PR

6. Background

- 6.1. Wiltshire Council are in receipt of an application, made under Section 53 of the Wildlife and Countryside Act 1981, to add a footpath to the definitive map and statement of public rights of way, in the parish of Purton, between Hoggs Lane and Footpath no's 110 and 112 Purton. The application is dated 1st August 2002

and made by Mrs Patricia Vincent of Pavenhill, Purton, on the grounds that public footpath rights can be reasonably alleged to subsist over the claimed route, on the balance of probabilities, based on user evidence, and should be recorded within the definitive map and statement of public rights of way as such. The application form (which consists of forms 1 and 3) is accompanied by a plan drawn at a scale of 1:2,500, highlighting the claimed route and 14 user evidence forms, with maps. Also enclosed with the application was a petition:

“The field off Hoggs Lane is up for sale and does not show any right of way in this field. The undersigned have walked this path for the number of years stated and would like to keep the path for recreation and access to adjoining footpaths”.

The petition was signed by 62 people who also indicated for how many years they had individually used the route. The petition was originally submitted to Purton Parish Council by Mrs Vincent, on 27th March 2001, prior to the formal application to Wiltshire County Council. A further 8 evidence forms, with maps, were submitted after the making of the application.

- 6.2. The claimed route is located in the parish of Purton, which lies to the west of Swindon, between Cricklade to the north and Royal Wootton Bassett to the south. The claimed route leads from the field entrance in Hoggs Lane, at OS Grid Reference SU 0845-8756, in a north-westerly direction across a field to the rear of properties in Pavenhill, Purton, presently used for the grazing of horses, for a distance of approximately 390 metres, before continuing north-north-west alongside the field boundary for approximately 40 metres, to its junction with Footpath no's 110 and 112 Purton, at Francomes Hill, as shown on the application plan at 3 above, between points A, B and C.
- 6.3. Currently, at the Hoggs Lane entrance (point A), there is a chained and padlocked metal gate, adjacent to which there is an improvised barrier of metal and wood. Alongside this construction there is a ruinous section of wall with a strand of barbed wire loosely strung across the top, over which Officers believe the public to be accessing the claimed route. At point B there is a broken stile in the field boundary fence which has been temporarily repaired with twine. The level of grazing over the route means that there is no particularly defined route

on the ground in the southern field, however to the north of the stile located at point B, where the path leads north-north-west along the field boundary at Francomes Hill, to its junction with the Footpath no's 110 and 112 Purton, the path appears to have a metalled surface (please see photographs attached at 4).

- 6.4. Wiltshire Council undertook an initial consultation regarding the proposals in May 2010, with a closing date for any further evidence/information to be received by Friday 25th June 2010. A further 8 user witness evidence forms were returned to Wiltshire Council and the present owners and the son of the previous owner completed landowner evidence forms, as a result of this consultation. Please note that all correspondence relating to the claim is available to be viewed with the Rights of Way Team, Environment and Leisure, Wiltshire Council, Newbury House, White Horse Business Park, Trowbridge, Wiltshire, BA14 0BX.

7. **Main Considerations for the Council**

- 7.1. The definitive map and statement of public rights of way are conclusive evidence as to the status of the highways described, however this is generally without prejudice to the possible existence of higher rights / additional rights not recorded. Wiltshire Council is the Surveying Authority for the County of Wiltshire, excluding the Borough of Swindon. The Surveying Authority is the body responsible for the preparation and continuous review of the definitive map and statement of public rights of way. The Wildlife and Countryside Act 1981 section 53 (2) (b) applies:

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

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

and statement as appear to them to be requisite in consequence of that event.

7.2. The event referred to in subsection 2 (as above) relevant to this case is:

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

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

7.3. Section 53 (5) of the Act allows any person to apply for a definitive map modification order under subsection 2 (above), as follows:

“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.”

7.4. Schedule 14 of the Wildlife and Countryside 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.”

The prescribed scale is included in the *“Statutory Instruments 1993 No.12 Rights of Way – The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993”*, which states that *“A definitive map shall be on a scale of not less than 1/25,000.”*

7.5. The application to add a right of way to the definitive map of public rights of way, off Hoggs Lane, Purton, has been correctly made in the prescribed form and is accompanied by a map drawn at the scale of 1:2,500 and 14 witness evidence forms and the petition (plus 8 witness evidence forms submitted following the application).

7.6. Section 31 (as amended) of the Highways Act 1980, refers to the dedication of a way as a highway, presumed after public use for 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 a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

- (4) *In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in 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.”

7.7. Section 32 of the Highways Act 1980, states that the authority may consider a range of historical documents and their provenance:

“Evidence of dedication of a way as highway

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

8. Documentary Evidence

- 8.1. As part of Wiltshire Council's investigations, Officers have studied documentary evidence, including the provenance and purpose of the documents, to draw conclusions regarding the claimed route. Please see list of historical evidence and conclusions attached at Appendix 1 to this report.
- 8.2. The documents examined do not record the existence of the claimed route. This does not necessarily mean that the route does not exist and evidence of use must now be carefully examined in order to conclude whether or not public rights have been acquired and a public footpath can be said to subsist or be reasonably alleged to subsist, on the balance of probabilities.

9. User Evidence

- 9.1. The application was accompanied by 14 witness evidence forms with maps attached and a petition signed by 62 people who had used the route for a various number of years. A further 8 evidence forms with maps were received by Wiltshire Council following receipt of the application (one form from Mrs Moira Hayward is duplicated). Landowner evidence forms were also completed by the present landowners Graham and Rosemary Fletcher (form dated 28th September 2002) and Mr Philip Akers, son of the former owner and tenant, Mr David Akers, (form dated 22nd October 2010).
- 9.2. Section 31 of the Highways Act 1980 deals with the dedication of a way as a highway, presumed where a way over land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. The way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Bringing into question

- 9.3. In order to demonstrate a 20 year user period, there must be a date upon which the use of the path by the public was brought into question.

- 9.4. In the case of R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA and R (on the application of Drain) (Appellant) v SSEFRA [2007], Lord Hoffman endorses Denning L J's interpretation of bringing into question contained in the case of Fairey v Southampton County Council [1956], and quotes him as follows:

"I think that in order for the right of the public to have been "brought into question", the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that it may be appraised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance by putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice; the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way.

But whatever the public do, whether they oppose the landowner's action or not, their right is "brought into question" as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way."

- 9.5. In the Godmanchester case, Lord Hoffmann says of Denning LJ's interpretation:

"As a statement of what amounts to bringing the right into question, it has always been treated as authoritative and was applied by the inspectors and the Court of Appeal in these cases."

- 9.6. With reference to the claimed route, at Hoggs Lane, Purton, the present landowners Mr Graham and Mrs Rosanne Fletcher have owned the land over which the claimed route passes, for 2 years prior to completing their landowner evidence form on 28th September 2002. Land registry records state that their freehold ownership commenced in May 2001. Within their evidence they advise that they erected notices stating that the way was not public in February 2001

(property conveyance can be a lengthy process and the landowners may have felt in a position to be able to erect signs in February preceding the commencement of their freehold). It is claimed that this notice was removed by vandals.

- 9.7. No evidence of the wording of this notice or photographs were submitted by the landowners and only one user makes reference to such a notice. Mr Peter Griffin in interview confirmed that he had seen a sign when the new owners (Mr and Mrs Fletcher) purchased the land, stating that there was no public access. Prior to this he had only seen signs preventing public access at the time of the foot and mouth crisis. Was this sufficient to bring home to the public that the land was private and there was no public right of way over the land? Denning L J (as quoted in the Godmanchester case) clearly states that challenge must be by *"...some means sufficient to bring it home to the public that he is challenging their right to use the way, so that it may be appraised of the challenge and have reasonable opportunity of meeting it..."* Only one witness recalls the notice and it is clear that public use continued after this time.
- 9.8. Additionally, in their landowner evidence Mr and Mrs Fletcher confirm that they closed the path in February 2001 with what was intended to be a permanent barrier at the Hoggs Lane entrance, (with the notices referred to at 9.6.), however this was removed by vandals. This was erected alongside the locked double gates to block a gap in the wall (they suggest that the wall had been demolished by members of the public). On a site visit in 2011, Officers recorded a barrier of wood and metal erected to fill the gap in the wall alongside the gates off Hoggs Lane, alongside which is a ruinous section of wall with a strand of barbed wire loosely strung across the top, by which Officers believe the public are accessing the route. In his landowner evidence form, Mr Philip Akers confirms that *"He (his father) always locked the gates but the walkers climbed over the wall."*
- 9.9. In interview Mrs Vincent recalled a *"long bar"* being erected when the wall and fence were broken. In her witness evidence form, Moira Hayward has confirmed that a piece of metal was put in and now she can no longer use this route due to the obstruction as she has difficulty walking. On the site visit in 2011, Officers

noted that the wall adjacent to the barrier was ruinous with a single strand of barbed wire loosely strung across the top which is easy to step over for an able bodied person and does not appear to prevent public access to the field, however it is considered that it would prevent less able bodied users from entering the field.

- 9.10. Prior to the ownership of Mr and Mrs Fletcher, the late Mr David Akers owned and tenanted the land for a number of years (25 years ownership and 10 years tenancy, no dates supplied). His son Mr Philip Akers, on 22nd October 2010 completed a landowner evidence form and claims that no signs were ever erected stating that the route was not public and to his knowledge there have never been any stiles or gates on the path during his fathers ownership and tenancy of the land. He also confirms that no section 31(6) plan and statement was deposited over this area to negate the landowners intention to dedicate rights of way, which has been confirmed by Officers.
- 9.11. Overall I consider that the erection of the notice and barrier in 2001, subsequently removed by vandals, was not sufficient to bring home to members of the public that the way was private. As Denning states in the Fairey case, challenge must be sufficient to bring home to the public that their right to use the way is being challenged, and also the public certainly did not acquiesce in any challenge, they continued to use the route, where Denning suggests that public acquiescence in this challenge tends to show that they have no right of way. Few of the witnesses have referred to the notice and barrier and these actions have not prevented public use of the route, therefore I consider them insufficient to bring the right of way into question.
- 9.12. Where there is no such defining event, under Section 31 (7) (a) of the Highways Act 1980, it is possible that the application may serve as the trigger to bring the use of the route into question and it is considered that this would be applicable here. The claim was perhaps triggered by a change of ownership of the land, the petition shows that path users had noted that there was no right of way recorded over the land at the point of sale and perhaps feared that a new ownership would lead to access being prevented sending the petition to the Parish Council in 2001 (when the land was for sale). However, the sale of the land is not in itself a

physical interruption to use of the land and for this reason the 20 year user period should be calculated retrospectively from the application date of 1st August 2002, i.e. the user period in question is 1982 - 2002.

Foot and Mouth signage

9.13 There are 4 claims that notices were erected on site in 2001 to close the path due to the foot and mouth outbreak from Mr Graham Price; Mr Peter Griffin; Mrs Patricia Vincent, who recalled that the notice was erected by the Parish Council although there had been no livestock in the field since about September 1999 and Mrs Deborah Wicks, who confirmed that she didn't use the route during the foot and mouth outbreak when official signs were put up notifying the closure of the footpath.

9.14. We have photographic evidence of the notice erected, which stated:

*“Wiltshire County Council
Advisory Notice
Please stay off this right of way during the
current outbreak of foot and mouth disease
Thank you for your co-operation”.*



9.15. This notice was erected either by Wiltshire Council, or the Parish Council (with signs provided by Wiltshire Council). These parties did not knowingly erect such notices on routes not recorded on the definitive map. Possibly due to the level of use it was presumed that the route was recorded on the definitive map and it would suggest that the landowner was aware of this use.

9.16. The closure of the footpath due to the foot and mouth crisis does not constitute an interruption to the period of continuous use (see Planning Inspectorate Advice Note 15, which concludes that a break in use solely because of the implementation of measures under the Foot and Mouth Order 1983, is unlikely to be classified as such an interruption, in the view of the Planning Inspectorate and DEFRA):

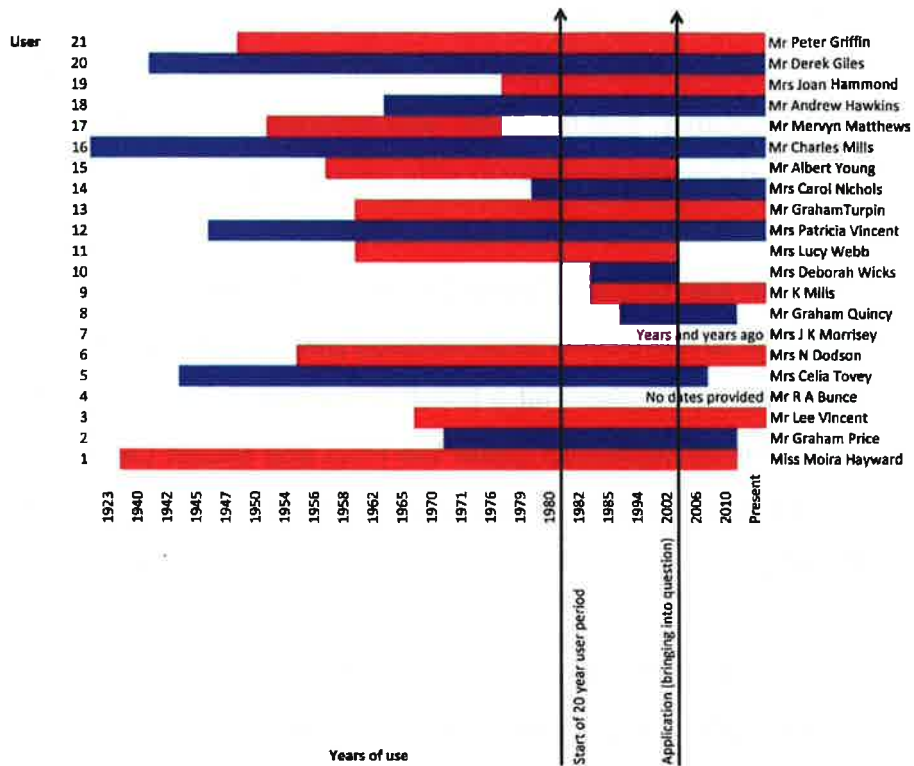
"...it does not seem that the temporary cessation of use of way solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classed as an "interruption" under section 31(1)."

9.17. The pictures show the claimed route at the Hoggs Lane entrance, showing the double closed gate (it is not possible to see if the gates are locked), a "For Sale" sign on the gates and a sign on the gate post advising the public not to use the right of way due to the outbreak of foot and mouth. The for sale sign dates these photographs to 2000, which coincides with the foot and mouth outbreak at this time.

Twenty year user

9.18. Please see the chart below which shows the level of user outlined within the 21 witness evidence forms:

Application to record a Public Footpath off Hoggs Lane, Purton
User Evidence



9.19. Two user evidence forms have been discounted, one gives no dates of use and one witness has simply underlined the dates given in the example on the witness evidence form. For the period of use in question i.e. 1982 – 2002, of the 21 witness evidence forms submitted, (one form is duplicated and two forms are discounted as above), 18 users have used the route during this 20 year period, 15 for the full 20 year user period without interruption. 15 users were still using the route after the time of application in 2002. The claimed route appears to have a long public user, with use established before the 20 year user period in question.

9.20. I have not included the results of the petition within the evidence chart above. Although 62 witnesses have signed the petition, they have indicated their length of use, but have not included the specific dates during which they have used the route. However the petition can give useful supporting evidence of levels of use, the longest user being 80 years, the least being 4 years.

9.21. In addition to their own use, witnesses refer to use with other family members and others seen using the route:

User	Used with family	Others seen
1	Yes - from a young age family used this path as an access to Upper Pavenhill to visit family and friends (also for recreation)	Yes - walking
2		Yes – lots of walkers
3		Yes – at least 1 person most times, sometimes see several people
4		
5	Yes	Yes – lots of walkers
6		Yes - walking
7	Yes – as a family walked many times across the fields and have never been stopped	Yes - walking
8		Yes – first used as saw others using the route from windows. Others seen frequently - walking
9		Yes – walking and cycling. Path is defined and people use it everyday
10		Yes - walking
11		Yes - walking
12	Walked as a child (55 years ago) (presumably with parents/family members)	Yes – 8 times out of 10 sees someone walking
13		Yes - many seen dog walking
14	Yes – used for recreation with friends	Yes – other regular walkers seen each day
15		Yes – it is a popular walk, meet other walkers on this path most times used
16		Yes – many seen, some walking with dogs
17		Yes - walking
18		Yes – walking dogs
19		Yes – walking dogs.
20	Used as a child (presumably with	Yes - walking

	parents/family members)	
21	Used as a child (presumably with parents/family members)	Yes – lots of people walking

9.22. 4 witnesses make reference to using the route with family/friends, 3 witnesses walked the route as a child (presumably with family, albeit prior to the more recent user period in question of 1982-2002), and all but one of the witnesses have seen others walking the route, including one witness who has seen others cycling the route. On a site visit in 2011, persons were observed by Officers walking the claimed route.

9.23. There is no statutory minimum level of user required to raise the presumption of dedication. The quality of the evidence, i.e. its honesty, accuracy, credibility and consistency, is of much greater importance than the number of witnesses. In *R (Lewis) v Redcar and Cleveland Borough Council* UKSC 11 (03 March 2010), a Town and Village Green registration case, Lord Walker refers to Mr Laurence QC who “...relied on a general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him...” Lord Walker goes on to quote Lindley L J in the case of *Hollins v Verney* [1884] giving the judgement of the Court of Appeal:

“...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.”

9.24. All of the witnesses are local inhabitants of Purton, however, use wholly or largely by local people may sufficient to show use by the “public”. The Planning Inspectorate Consistency Guidelines make reference to *R v Southampton (Inhabitants)* 1887, in which Coleridge LJ stated that “*user by the public must not be taken in its widest sense...for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.*”

9.25. On the balance of probabilities, the evidence suggests a route of long user by the public and the level of use was sufficient to make the landowners aware that a right was being asserted against them.

Gates and stiles

9.26. Prior to the new land ownership in 2001, the former landowners son, Mr Philip Akers, completed a landowner evidence form on behalf of his late father who owned the land over which the claimed route passes for 25 years and then 10 years as the tenant (no dates given). He states that in his fathers ownership and tenancy of the land, the gates at the Hoggs Lane end of the route were always locked, but that walkers accessed the claimed route by climbing over the wall. It was his understanding that the gates were locked to keep vehicles out and the cattle in (rather than to keep path users out). This is supported by 2 of the witnesses who mention problems with travellers. Mr Albert Young recalls that the gates at the Hoggs Lane end were locked when travellers became a very big problem and Mr Andrew Hawkins agrees that the double gates off Hoggs Lane were now locked due to travellers.

9.27. In interview Peter Griffin confirmed that 25-30 years ago there were wooden gates on the route and that the present gates were locked for the safety of stock, but users just climbed over it.

9.28. Mrs Vincent supports this in interview. She recalls a wooden gate when she was a child, with a wall and fence alongside which they climbed over and the gate was always easy to open. The present metal gates were erected when the wooden gate broke. These gates were only locked when stock were in the field and following the deterioration of the wall, no land management was carried out to repair it.

9.29. The photographs of the notice erected at the Hoggs Lane entrance to the route, dated 2000, preventing public access during the foot and mouth outbreak, also show a gap to the east of the gates with a broken down wall and a broken down fence post and what appears to be a trodden path alongside the gate, however from the angle of the photograph, it is very difficult to see if there was a gap

through which members of the public were accessing the route, or whether users stepped over/climbed part of the fence.

9.30. Users make the following references to gates and stiles:

10 references to the gates at Hoggs Lane, 7 references to locked gates at Hoggs Lane (one statement that the gates were not locked until the field went up for sale and two references to the gates being locked to prevent access to the field by travellers), 14 references to the stile at the top of Francombes Hill, 2 references to a stile at the Hoggs Lane end, 1 reference to a stile at Hoggs Lane end now broken and one reference to a stile at Hoggs Lane now removed and not replaced and 3 references to a stile at the junction with Purton 110/112 and 1 reference to a gateway at the junction with Purton 110/112.

9.31. There are differing opinions on whom erected the stile at point B: one claim that the stile with step was erected by locals due to the cattle, and one claim that it was erected by landowner (prior to the stile there was a fence or barbed wire at this point).

9.32. There appear to have been sheep in the field at some time and possible electric fencing. Mrs Moira Hayward claims that she changed her route only when the sheep were fenced in the field, at which time she walked around the perimeter. Mrs Deborah Wicks also makes reference to the sheep fencing, but that rubber piping was placed over the electric fence in order for the public to cross over it.

As of right

9.33. In order to establish a right of way, public use must be “as of right”, i.e. without force, without secrecy and without permission. The meaning of “as of right” was explored in the case of R v Oxfordshire CC ex parte Sunningwell Parish Council [1999] (town and village green registration). It had been considered in the case of Hue v Whiteley 1929, that the state of mind of users should be considered within the “as of right” test, however in Sunningwell Lord Hoffman doubted what Mr Justice Tomlin had meant by this and stated:

“My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J. In Hue v. Whiteley [1929] 1 Ch.440 has led the courts into imposing upon the time-honoured expression “as of right” a new and additional requirement of subjective belief for which there was no previous authority and which I consider to be contrary to the principles of English prescription. There is in my view an unbroken line of descent from the common law concept of nec vi, nec clam, nec precario to the term “as of right” in the Acts of 1832, 1932, and 1965.”

“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 this 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 the footpath will use it 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 early 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.”

- 9.34. It was held that use “as of right” does not require the public to believe they are using the way as of right.

Without force

- 9.35. Use by force would include breaking of locks, cutting of wire or passing over, through or around an intentional blockage such as a locked gate.
- 9.36. From the evidence given, it would appear that users did not use force to enter the route from the Hoggs Lane end, but simply climbed over what was there. It is not believed that climbing over the gate or the barrier to the east of the gate amounts to force. The landowner claims that the wall was demolished by

members of the public, however the landowner did not carry out any land management to prevent public access, i.e. maintaining fences/walls etc, this is confirmed by the user evidence provided by Mrs Patricia Vincent in interview. The landowner also claims that the notice advising that the route was not public and barrier erected in 2001, were removed by vandals, however again the landowner has taken no action to maintain the notice and barrier.

- 9.37. There is no other evidence to suggest that any means of force was used to access the field.

Without secrecy

- 9.38. It would appear that the witnesses used the route in an open manner and the landowner was aware of use, speaking to many path users. 19 users suggest that the owner was aware of use for a number of reasons: the presence of a well worn path; the number of people using the path and at any time of day; the owner built a proper stile (at Francombes Hill): farmer saw public when feeding animals; the path was obvious in all seasons, the path has always been used as a footpath; the field has been used for tobogganing in the winter and during the foot and mouth crisis notices were erected asking the public not to use the route.
- 9.39. In the landowner witness evidence form, Mr Philip Akers claimed that the route was used as a footpath and not as a general dog walk. He claims that his father saw people using the route on most days during his ownership and tenancy. He did not turn back or stop anyone using the route. This is confirmed by the user evidence forms with no accounts of users having been challenged when using the route.
- 9.40. The present landowners have confirmed that they have seen members of the public using the claimed route: around 10 people per day using the southern field and one person in the northern field. The current tenant of the field states that she has been persuaded so far to give free access to all of the land which she rents from Mr Fletcher. This has been against her wishes at times due to damage caused to fences and stiles and the upset caused to animals when the fields are used for tobogganing.

9.41. In the Sunningwell case, Lord Hoffman says that the use must have been open and in a manner that a person rightfully entitled would have used it, that is not with secrecy. He observes that Lord Blackburn, in discussing the dedication of a highway in *Mann v Brodie* [1885] *"...is concerning himself, as the English theory required with how the matter would have appeared to the owner of the land. The user by the public must have been, as Parke B said in relation to private rights of way in Bright v Walker 1 CM and R211, 219, 'openly and in a manner that a person rightfully entitled would have used it.'* The presumption arises, as Fry J said of prescription generally in *Dalton v Angus and Co App-Cass 740,773, from acquiescence.*" This would allow the landowner the opportunity to challenge the use, should they wish to do so.

Without permission

9.42. If express permission is given to use the route the user is not "as of right" however, in the case of implied permission, in *R (Beresford) v Sunderland CC* [2003], (town and village green registration case), Lord Scott stated that a licence to use the land could not be implied from the mere inaction of the landowner with knowledge of the use of his land:

"I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear 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"...But I am unable to accept either that an implied permission is necessarily in the same state as mere acquiescence or toleration or that an implied permission is necessarily inconsistent with the use being as of right. Indeed I do not for the reasons I have given, accept that even an express permission is necessarily inconsistent with use as of right."

9.43. Mr Philip Akers claims that his father did not require people to ask permission to use the route. Since their period of land ownership began in late 2000, Mr and Mrs Fletcher have never required anyone to seek permission (as per the landowner evidence form), to use the route and have confirmed that they have

granted free access to both of their fields to all local residents, against the wishes of their tenants. However, in his letter to Wiltshire Council, dated 22nd August 2002, Mr Fletcher states *"I believe that the current permissive use can continue to work for many years to the benefit of the whole community"*. This statement is at odds with the evidence in the landowner evidence form and that given by witnesses, the majority of whom have not sought permission to use the route. Relating this to the words of Lord Scott in the Beresford case, it would appear that the landowners were aware of use, but tolerated this use, which does not give rise to implied permission. Additionally there are no signs erected on site advising the public that the route is a permissive path only.

- 9.44. Only one user claims to have sought permission from the landowner. Mrs Patricia Vincent states that permission was sought from Mr David Akers, the previous owner, as she and her husband would look out and keep an eye on his cattle and telephone him if there were any problems as he lived 8 miles away. It is possible that this permission relates to use of the land for the purpose of looking after the cattle, rather than use of the claimed right of way.
- 9.45. Also Mr Charles Mills worked on the farm in question from 1929 to the early 1930's. His use of the route spans from about 1923 onwards. He used the route prior to beginning work on the farm and post working on the farm. It is possible to say that during his time working on the farm he had implied permission of the landowner for the purposes of carrying out his work.

The claimed route

- 9.46. All evidence forms show the same route claimed. Only a small number of users have varied this route. Mr Giles did not always use the same route as there are other routes that can be used to gain access to the same field; Mr Griffin changed his route 10 years ago (in 1992), he followed the tractor route, particularly once the grass got long; Moira Hayward confirmed that she changed her route when the sheep have been fenced and used a different route around the perimeter; Mr K Mills varied his route sometimes; Mr C Mills more or less used the same route; Patricia Vincent more or less used the same route but used a route from her garden into the field and Mr Graham Price has not always

used the same route, sometimes he accesses the field from a neighbours garden (at Pavenhill) to join the route in the middle of the field.

9.47. On the plan attached with the landowner witness evidence form, Mr Philip Akers shows the route on a slightly different alignment to the claimed route, showing a route which is closer to the field boundary and is further south-west.

9.48. All users have used the route on foot, only one witness recalls seeing someone cycling on the route, however this is the only reference to cycling. Therefore the route should be recorded as the status of footpath.

Width

9.49. In the making of an order to add a new footpath to the definitive map and statement of public rights of way, a width must be recorded within the definitive statement, based on evidence. There is no width recorded in documentary evidence as the route is not recorded in any documents examined by Wiltshire Council. The width must therefore be based on user evidence of the actual used width of the path. Witnesses have recorded the following path widths:

Witness	Width	Witness	Width
1	Normal path width Approx 1 metre	12	1 to 4 metres. It is unfenced
2	2 feet wide approx (0.61 metres)	13	Fences changed due to wear. Path width 2 metres
3	1.2 metres wide	14	Up to 2 metres
4		15	1 metre? Normal field footpath over pasture
5		16	1-4 metres
6	No specified width until the last 50 metres which is single track	17	No change

7	Approximately 2-3 metres	18	Approx 1 metre
8		19	Approx 1 metre
9	Approximately 2-3 metres	20	Half metre
10	Approx 1 metre	21	2 metres
11			

9.50. The witnesses give varying paths widths. Officers have therefore taken an average width from those users who provided width figures (based on the maximum extent given) which gives an average width of 1.82 metres to be recorded as the definitive width of the footpath.

Landowners Intention

9.51. Once use is established as of right, without interruption for a period of 20 years or more, there is a presumption that dedication has taken place, unless during the period this period, there was in fact no intention on the landowners part to dedicate the land as a highway. Intention to dedicate was discussed in the Godmanchester case, which is considered the authoritative case on this matter. In his leading judgement Lord Hoffman approved the words of Denning LJ in the Fairey case 1956:

“...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 public who use the path...that he had no intention to dedicate. He must, in Lord Blackburns words, take steps to disabuse these persons of any belief that there was a public right...”

In the same case, Lord Neuberger of Abbotsbury went further on this point:

“...the cogent and clear analysis of Denning LJ in Fairey v Southampton County Council [1956] 2 QB at 458, quoted by Lord Hoffman, clearly indicates that the intention referred to in the proviso to section 1(1) of the 1923 Act was intended to

be a communicated intention. That analysis was accepted and recorded in textbooks, and it was followed and applied in cases identified by Lord Hoffman by High Court Judges and by the Court of Appeal for the subsequent forty years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section (1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1980 Act.”

Lord Hoffman went on to say:

“I think 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 not 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.”

- 9.52. It is confirmed that no section 31(6) Highways Act 1980 deposit and plan has been lodged with Wiltshire Council by the present landowner, or previous landowners to negative their intention to dedicate.
- 9.53. The present landowners Graham and Rosanne Fletcher have owned the land from September 2000. They do not believe that the path is public and they have seen around 10 people a day using the southern field and 1 person a day using the northern field. They have made the following representations to the Council:

Correspondence from Mr Graham Fletcher to Wiltshire County Council, dated 22nd August 2002:

“We have recently received notice of an application to establish a public footpath across our field in Hoggs Lane.

I do not believe that this application is in the best interests of either ourselves or the residents of Purton.

We have tried as far as possible to maintain the ‘status quo’ where local people have free access to all parts of the field, subject to them not causing significant

damage to crops or harm to any animals. This has generally worked well with the existing use of paths which are kept to a width of less than 1 metre, and therefore do not greatly reduce the area available for agriculture.

If this legal application for a public footpath is progressed it will force us to take a completely different attitude to use of the fields. If passed it would set a precedent which could allow any other path (of which there are many) to become public property.

This would make use of the land for agricultural purposes no longer viable. We would therefore have no choice but to restrict public entry purely to the legally enforced area. All other points of entry would need to be closed.

The footpath was closed with a barrier last year due to the foot and mouth outbreak. This barrier was not removed by ourselves, and no notice was issued stating that the footpath had been reopened to the public. The barrier was forcibly removed by members of the public without authority, and therefore I do not consider that the path has been formally reopened.

We also believe that the footpath has been closed to the public at some other times during the last 20 years. It is however difficult to establish details of previous use of the field. The last owner is no longer living, and we cannot trust other local residents to give an unbiased opinion. We are endeavouring to find other sources of information, but it is difficult and time consuming obtaining reliable sources.

I believe that the current permissive use can continue to work for many years to the benefit of the whole community.

I would therefore ask you to refuse the application.”

Correspondence from Mr Graham Fletcher to Wiltshire County Council, dated 30th September 2002:

“Since I received your letter I have conducted a survey of people using the footpath. It appears that there are around 10 people who use part of the footpath on a daily basis, and another 10 who use part or all the path much less regularly. All of the daily users are dog owners, as are most of the less regular users. All of the daily users live within 200 yards of the field, as do most of the less regular users.

There are approximately 100 houses within the 200 yard radius. Of this number one would expect around one in five to have a dog, and it is reasonable to assume that most of these people would use this footpath either occasionally or regularly.

Statistically it has been shown that on average people move house every five years and that only one in ten remain in the same house for more than 20 years. It would be reasonable therefore to conclude that less than 10 percent of current users of this path (i.e. 2 people) have lived within walking distance of this path for 20 years.

It is therefore with some incredulity that I read your letter that 77 people have claimed to be users of the footpath over a period of 20 years. I have definite evidence that some of the people on this list have not even lived in Purton for 20 years.

If you are able to prove the validity of the applicants (perhaps using the electoral register), then we would be prepared to accept the Modification Order without objection subject to a maximum width of the footpath of 1 metre (this being the width currently in use)."

E-mail from Mr Graham Fletcher to Wiltshire Council, dated 23rd June 2010

"I am very much opposed to this application. I have granted free access to both my fields to all local residents. This has been very much against the wishes of my tenants.

There have been many cases of vandalism to fences and stiles. The ponies have also been distressed at times when large numbers of people have been present on the field such as when the snow was on the ground, and the field was used for tobogganing.

If this application is pursued I will take the following actions-

- 1. Access to all areas other than the public footpath will be denied.*
- 2. I shall be forced to close all private accesses on to the field in order to retain my legal rights of ownership of the land.*
- 3. I shall allow my tenant to erect a fence along the line of the footpath to prevent access to other areas.*
- 4. Anyone found using other parts of the fields will be asked to leave.*

5. *Tobogganing on the snow will be banned. Anyone doing so will be asked to leave.*

I am a reasonable person and have tried to act in the best interests of the local community.

If some people are intent on stealing this land from me then I shall be forced to defend my rights.

I hope that common sense will prevail and that everyone can continue enjoying this wonderful amenity."

E-mail from Mrs Margaret Entwistle – (Tennant of the land over which a footpath is claimed), to Wiltshire Council, dated 25th June 2010:

"Regarding the application for public footpath across the field which I rent off Hoggs Lane in Purton. I am opposed to this application as it will increase the number of people using this footpath route. I have been persuaded so far to give free access to all of the land which I rent from Mr Fletcher.

This has been against my wishes at times due to the damage caused to fences and stiles, and the upset caused to my animals when the field are used by tobogganing.

If this application is granted it will be necessary for me to erect a fence along the entire length of the footpath. This will cost in the region of £1000.00. I will expect the county council to contribute at least half the cost of this fence.

I will also expect the council to maintain all the fences and stiles on to or adjacent to the footpath. I hope that this will not be necessary and that people can continue to enjoy the freedom to use this area of the countryside."

9.54. In an e-mail dated June 2010, Mr Fletcher states *"I have granted free access to both my fields to all local residents"*. This is supported by the tenant whose e-mail dated June 2010 states *"I have been persuaded so far to give free access to all of the land which I rent from Mr Fletcher"*. This action appears to be inconsistent with lack of intention to dedicate.

9.55. In his letter dated 22nd August 2002, Mr Fletcher states *"I believe that the current permissive use can continue to work for many years to the benefit of the whole community."* There are no notices on site to advise the public that the path is permissive only and this statement contradicts the witness evidence statements,

in which none of the witnesses refer to permission being sought to use the path. Additionally in their landowner evidence form, Mr and Mrs Fletcher confirm that they have never required members of the public to seek permission to use the route. As we have seen in the words of Lord Scott in the Beresford case, where a landowner is aware of use, toleration cannot give rise to an implied permission.

- 9.56. Mr Fletcher also makes reference in his letter dated 22nd August 2002, to the path being closed at other times during the last 20 years, however no evidence on this point has been provided by the landowners, although it is acknowledged that this evidence is difficult to obtain and given the Fletcher's relatively short period of ownership prior to the claim.
- 9.57. The landowner does claim to have erected signs to advise that there was no public right of way in February 2001, and an intended permanent barrier at the Hoggs Lane entrance to prevent access, however the landowner admits that these were removed by vandals. Whilst sub-section 31(3) of the Highways Act allows the erection of such notices as evidence of a landowners non-intention to dedicate, it also requires that these notices are maintained after 1st January 1934, or any later date on which it was erected. It would appear that these notices have not been maintained once removed and did not come to the attention of the majority of path users (all but one). Section 31(5) of the same act advises that where such notices are torn down, the owner of the land may give notice to the appropriate council that the way is not dedicated as highway, which is (in the absence of proof to a contrary intention), sufficient evidence to negative the intention of the landowner to dedicate the land as a highway. The landowner did not take such action.
- 9.58. At present there is no evidence before the Council of the landowners non-intention to dedicate the land as a public right of way, to defeat the presumption that dedication as a public right of way has taken place.

Conclusion

- 9.59. In conclusion, the witness evidence points towards a well used route from Hoggs Lane, linking to the further rights of way network, Footpath no's 110 and 112 Purton. The previous landowner appears to have been aware of the public using

the route and taken no action to prevent or challenge this use. The present landowners also claim to be aware of the use and have taken little action to prevent or challenge use, i.e. sufficient to bring home to the user that their right to use the land is being challenged, i.e. to allow them to meet this challenge, as use continued following the erection of a barrier and notice in 2001 and users of the route only appear to have become aware that this was not a recorded right of way at the time of the sale of the land, i.e. the land being for sale without a recorded right of way over it, and this resulted in a petition to the Parish Council, on the grounds of public use of the route, on 27th March 2001.

- 9.60. The level of use does appear sufficient to make it clear to the landowner that a right is being asserted against them, to allow them to challenge this use. Therefore a presumption of dedication as a public right of way has taken place and there is insufficient evidence of the landowners non-intention to dedicate.

Common Law Dedication

- 9.61. Section 5 of the Planning Inspectorates Definitive Map Orders: Consistency Guidelines suggest that even where a claim meets the tests under Section 31 of the Highways Act 1980 for dedication under statute, there should be consideration of the matter at common law.
- 9.62. Dedication at common law may be considered where a way has been used by the public for less than 20 years. Where the origin of a highway is not known, its status at common law depends on the inference that the way was in fact dedicated at some time in the past. A highway can be created at common law by a landowner dedicating the land to the public for use as a highway and the public showing their acceptance of the route by using the way. Whilst the principles of dedication and acceptance remain in both statute and at common law, there is a significant difference in the burden of proof, i.e. at common law the burden of proving the owners intentions remains with the applicant. Whilst it is acknowledged that dedication of the route as a public highway may have taken place at common law at some time in the past, it is recognised that evidence of such dedication is difficult to obtain and it is then appropriate to apply Section 31 of the Highways Act 1980.

10. Safeguarding Considerations

- 10.1. Considerations relating to safeguarding anyone affected by the making and confirmation of an order made under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be confirmed based on the relevant evidence alone.

11. Public Health Implications

- 11.1. Considerations relating to the public health implications of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

12. Environmental Impact of the Proposal

- 12.1. Considerations relating to the environmental impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

13. Equalities Impact of the Proposal

- 13.1. Considerations relating to the equalities impact of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

14. Risk Assessment

- 14.1. Considerations relating to the health and safety implications of the making and confirmation of an order under Section 53(2) of the Wildlife and Countryside Act 1981, are not considerations permitted within the Act. Any such order must be made and confirmed based on the relevant evidence alone.

15. Financial Implications

- 15.1. The determination of definitive map modification order applications and modifying the definitive map and statement of public rights of way accordingly, is a statutory duty for the Council, therefore the costs of processing such orders are borne by the Council. There is no mechanism by which the Council can re-charge these costs to the applicant.
- 15.2. Where a definitive map modification order is made and objections received and not withdrawn, the order falls to be determined by the Secretary of State. An Independent Inspector appointed on behalf of the Secretary of State will determine the order by written representations, local hearing or local public inquiry, each of which have a financial implication for the Council. If the case is determined by written representations the financial implication for the Council is negligible, however where a local hearing is held, the costs to the Council are estimated at £200 - £500 and a public inquiry could cost between £1500 - £3000 if Wiltshire Council supports the order (where legal representation is required by the Council) and around £300 if it does not support the order (where no legal representation is required by the Council as the case is presented by the applicant).

16. Legal Considerations

- 16.1. Where the Surveying Authority determines to refuse 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 an order.

17. Options Considered

- 17.1. Where the Council considers that there is sufficient evidence, on the balance of probabilities, for it to be alleged 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, restricted byway or a byway open to all traffic and

not sufficient of the landowners intention to dedicate, the Council must make an order to add the right of way to the definitive map and statement of public rights of way.

18. Reasons for Proposal

- 18.1. There is sufficient evidence for it to be reasonably alleged that a right for the public on foot subsists, on the balance of probabilities. There are 15 witnesses who have used the claimed route, as of right, for a period of at least 20 years from 1982 to 2002, the date of the public right to use the path being brought into question (i.e. the date of application), plus 3 other users who have used the route for part of this time period. This evidence is considered sufficient to bring home to the landowner that a public right is being asserted against them, allowing the landowner to challenge this, should they wish to do so.
- 18.2. The previous landowner did nothing to prevent public access and despite erecting notices and a barrier in early 2001, the present landowners have since that time done little or nothing to prevent public access and admit that they have granted free access to both of their fields to all local residents.
- 18.3. Therefore a public right is presumed to have been dedicated after the 20 year user and in the absence of evidence of the landowners non-intention to dedicate. Having investigated the available evidence, Officers are satisfied, on the balance of probabilities, that a public footpath can reasonably be alleged to subsist.

19. Proposal

- 19.1. That an order be made under Section 53 of the Wildlife and Countryside Act 1981, to record the claimed route off Hoggs Lane, Purton, as a footpath on the definitive map and statement of public rights of way and if no objections are received, Wiltshire Council may itself confirm the order as an unopposed order.

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

None.

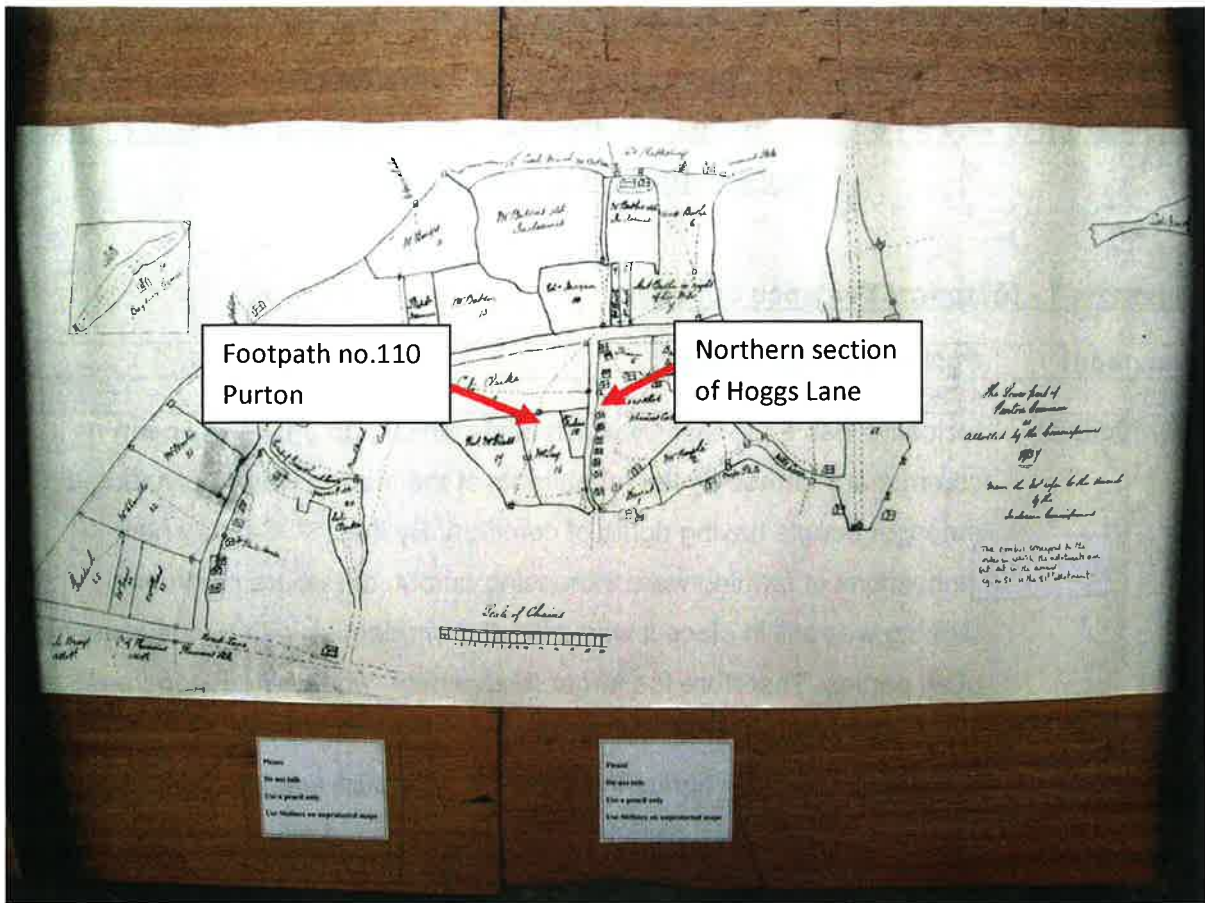
Decision Report

Wildlife and Countryside Act 1981 – Section 53

Application to Add a Footpath to the Definitive Map and Statement of Public Rights of Way – Purton (Off Hoggs Lane)

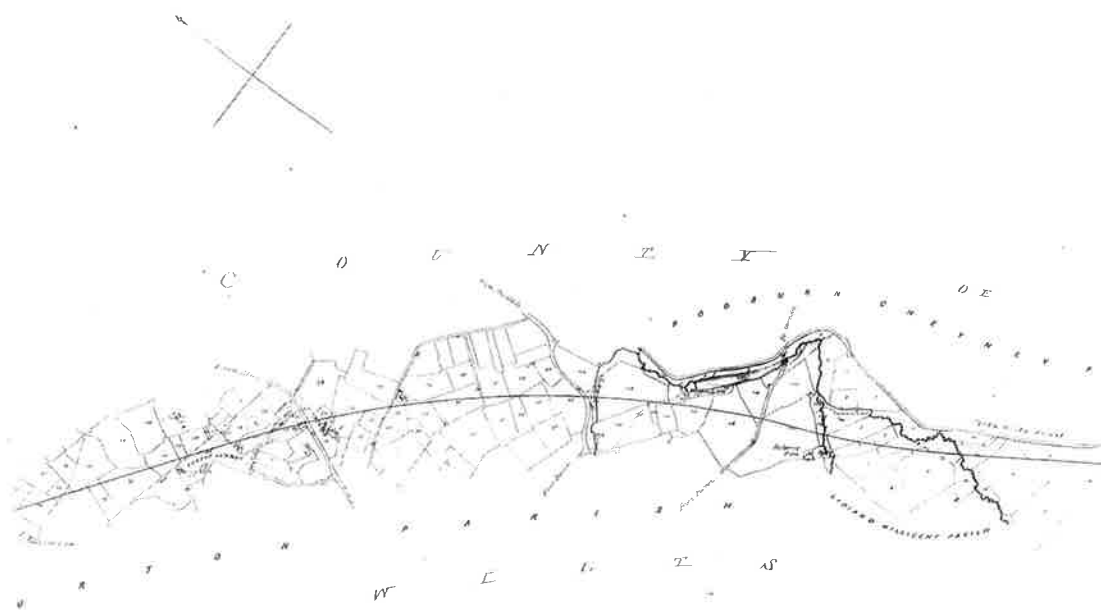
Appendix 1 - Historical Evidence Summary

Document	Purton Inclosure Award
Date	1738
Significance	<p>Inclosure was a process by which lands which had previously been communally farmed by the inhabitants of the manor, were redistributed amongst people having rights of common. By the 18th Century new innovations in farming were increasing output, but where communal farming was still in place it was difficult to modernise without the agreement of all parties. Therefore the larger landowners, who wished to increase the productivity of their land, set about obtaining parliamentary authority to redistribute property rights. Prior to 1801 inclosure was dealt with by local acts for specific areas, from which a local inclosure award was produced to allocate lands within the parish. (Post 1801 local acts generally operated with the Inclosure Consolidation Act of 1801.</p> <p>Inclosure award documents can provide strong evidence of the existence of public rights as the act gave the commissioners powers to set out, ascertain and appoint public and private roads, highways, bridleways and footways over the land to be enclosed.</p> <p>The Purton Inclosure Award is accompanied by 3 hand drawn map excerpts, 1) Plan of Purton Stoke Common as allotted by Inclosure Commissioners 1737 (to the north of Purton), 2) Part of the Upper part of Purton Common as awarded 1737 and 3) "<i>The Lower Part of Purton Common as allotted by the Inclosure Commissioners 1737 the plot nos refer to the Award by the Inclosure Commissioners</i>".</p>
Conclusion	<p>The plan covering the lower part of Purton Common is relevant, which clearly shows the northern section of Hoggs Lane, however the plan does not include lands as far south as the claimed route, therefore the claimed route is not shown on the map excerpts and is not referred to within the award. The land affected may not have been inclosed, or subject to old inclosures not part of this award. No information regarding the claimed route is gained from this document.</p>



Document	Quarter Sessions Records
Significance	<p>Quarter Sessions were minor criminal courts held at different locations throughout the county. They were also the administrative body of each county before the establishment of County Councils. The Highways Act of 1555 placed a duty to maintain public highways to a suitable standard, with the parish councils. If the parish failed to fulfil this duty it could be indicted for non-repair of highways. The indictment was expressed as a Grand Jury presentment, drafted by the Clerk of the Peace. These indictments are believed to be particularly reliable, as much importance was placed on the precise wording of the documents. It was difficult to introduce changes to a standard form and if the Counsel for the defence could find the slightest flaw in the indictment, the action could fail.</p>
Conclusions	<p>No reference to the claimed route has been discovered within the Quarter Sessions Records.</p>

Document	Railway and Canal plans
Date	1835 and 1836
Significance	Railway and canal plans are also reliable documents as individual railway schemes were the subject of special acts of parliament, which required documents to be placed on deposit within the public domain. It was important for the railway developers to provide accurate information relating to their schemes in order to prevent opposition.
Conclusions	<p>The plan of the proposed railway from Cheltenham to Swindon 30th November 1835 has been examined. Only the northern section of Hoggs Lane is shown and recorded as "42 Occupation Road". The claimed route is south of the proposed railway and is therefore not shown on the map or recorded within the book of reference.</p> <p>The Cheltenham to Swindon Railway amended plans showing proposed deviations, 18th July 1836, records the north of Hoggs Lane in the same manner, however the claimed route is south of the proposed railway and is therefore not shown on the map or recorded within the book of reference (the book of reference shows details as per the 1835 book of reference).</p> <p>There are no canal plans deposited for the Purton area.</p>

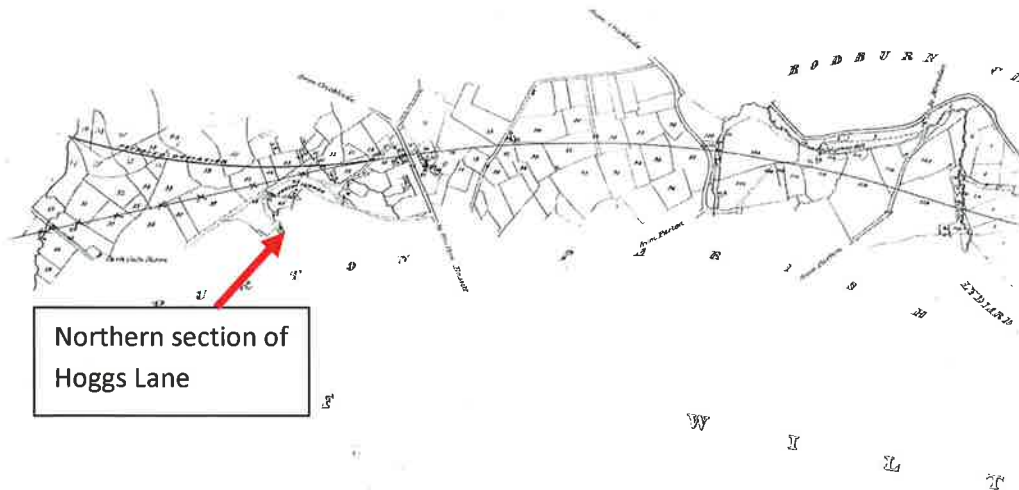


Plan of proposed railway from Cheltenham to Swindon 30th November 1835

Parish of Swanton continued

36 Acre	Joseph Seid	George Day
37 Acre	Do	Do
38 Acre	Robert Moton	Sam Holmes
39 Pasture	Do	Do
40 Acre	Do	Do
41 Acre	Abraham Peaty	Self
42 Occupation Road	Hoggs Lane	
43 House & garden	James Peary	James Keblewick
44 Acre	Thomas Peary	Self
45 Pasture	William Baker Bayley	Richard Row
46 Acre	Do	Do
47 Acre	Richard Jacob Moton	John Gough
48 Acre	Do	Do
49 Occupation Road		
50 Pasture	Do	Do
51 Acre	William Peary	Self
52 House & garden	Do	Self
53 Pasture	William Peary	John Gough

Book of Reference for proposed railway from Cheltenham to Swindon 30th November 1835



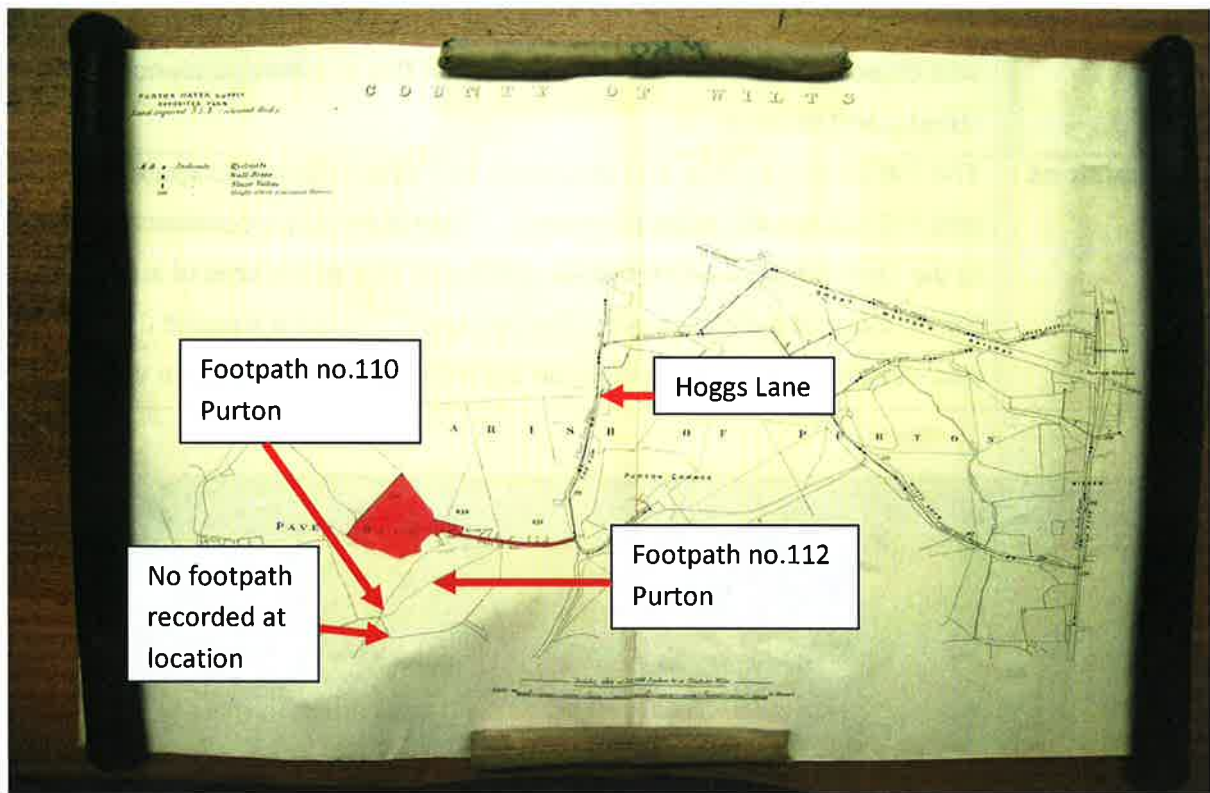
In evidence to an Act passed in the present Session of Parliament entitled "An Act for making a Railway from Cheltenham and from Gloucester to join the Great Western Railway near Swindon to be called the Cheltenham and Great Western Union Railway with a Branch to Cirencester".

I do hereby certify that this Plan or Plan to be one of the Plans or Plans required to be authenticated by the said Act.

Given under my hand this 16th day of July 1835.

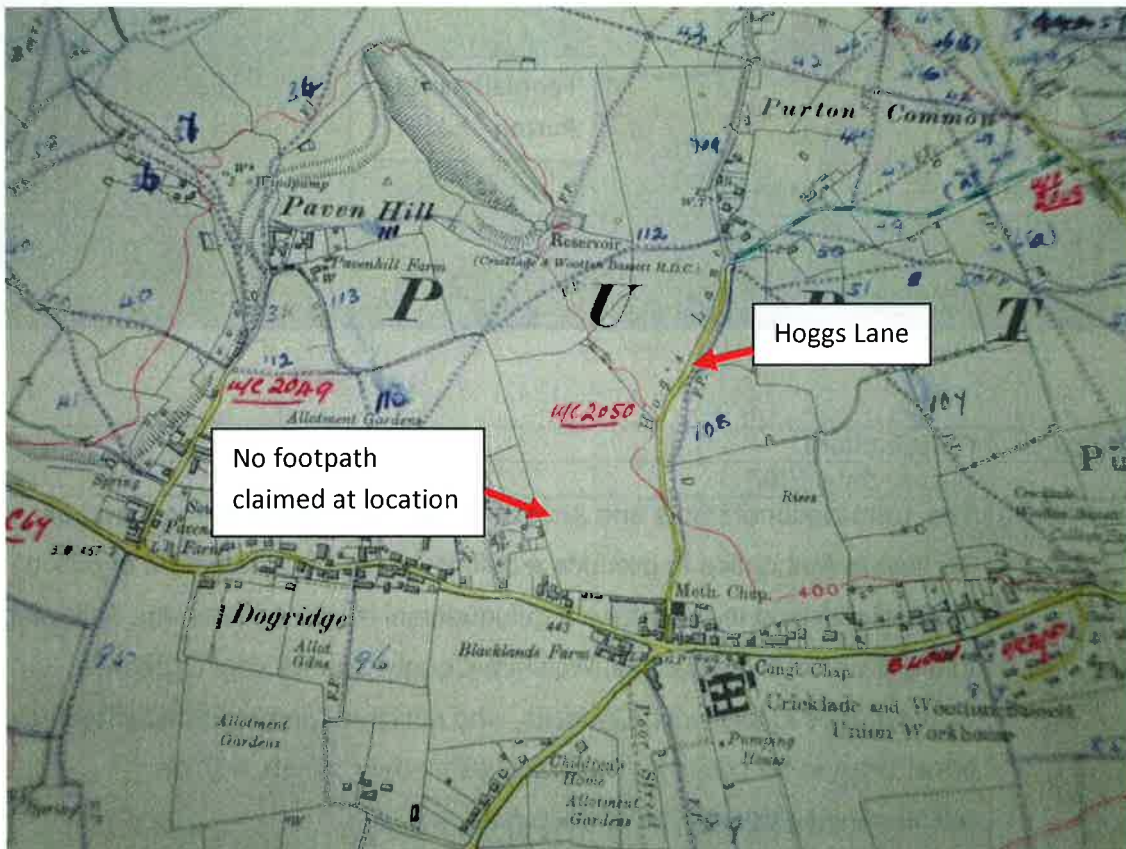
Plan of Cheltenham to Swindon Railway – amended plans showing proposed deviations 18th July 1836

Document	Purton Water Supply
Date	1896
Significance	These plans detail part of a proposed water supply to Purton, deposited with and signed by the Clerk of the Peace in 1896.
Conclusions	The northern part of the field though which the application route passes, is shown but the application route is not recorded. Other paths and tracks are shown, one track is highlighted and described as a right of way, but there is no indication as to whether this right of way or other tracks shown are public or private.



Document	Parish claim
Date	Survey date 1950
Significance	The 1949 National Parks and Access to the Countryside Act required all Surveying Authorities to produce a definitive map and statement of public rights of way and to undertake a quinquennial review of this map. Following this instruction to authorities, Wiltshire County Council sent Ordnance Survey maps to all Parish Councils, who surveyed and recorded what they considered to be public rights of way within their parish, with an accompanying description of each path.

	<p>Parish Councils were required to convene a meeting at which the public rights of way information, to be provided to Wiltshire County Council, was agreed locally. This information was to form the basis of the definitive map and statement of public rights of way which was published and advertised between 1952 and 1953, depending upon the Rural District or Urban District area.</p> <p>Each stage of the process, i.e. the publication of the draft map and the provisional map was advertised and there was opportunity for comment and objection to the inclusion or non-inclusion of a path; its provisionally recorded status and route.</p> <p>This was a public process and if the recording or non-recording of a route was objected to there would be evidence of this in correspondence and subsequent reviews.</p>
Conclusions	<p>The Parish survey map and statement for Purton records footpath no's. 110 and 112 but not the application route. There is no correspondence relating to the claimed route and it can be concluded that at the time of survey the Parish Council did not consider the claimed route to be a public right of way and despite public consultation, no objection to its non-inclusion was made.</p>

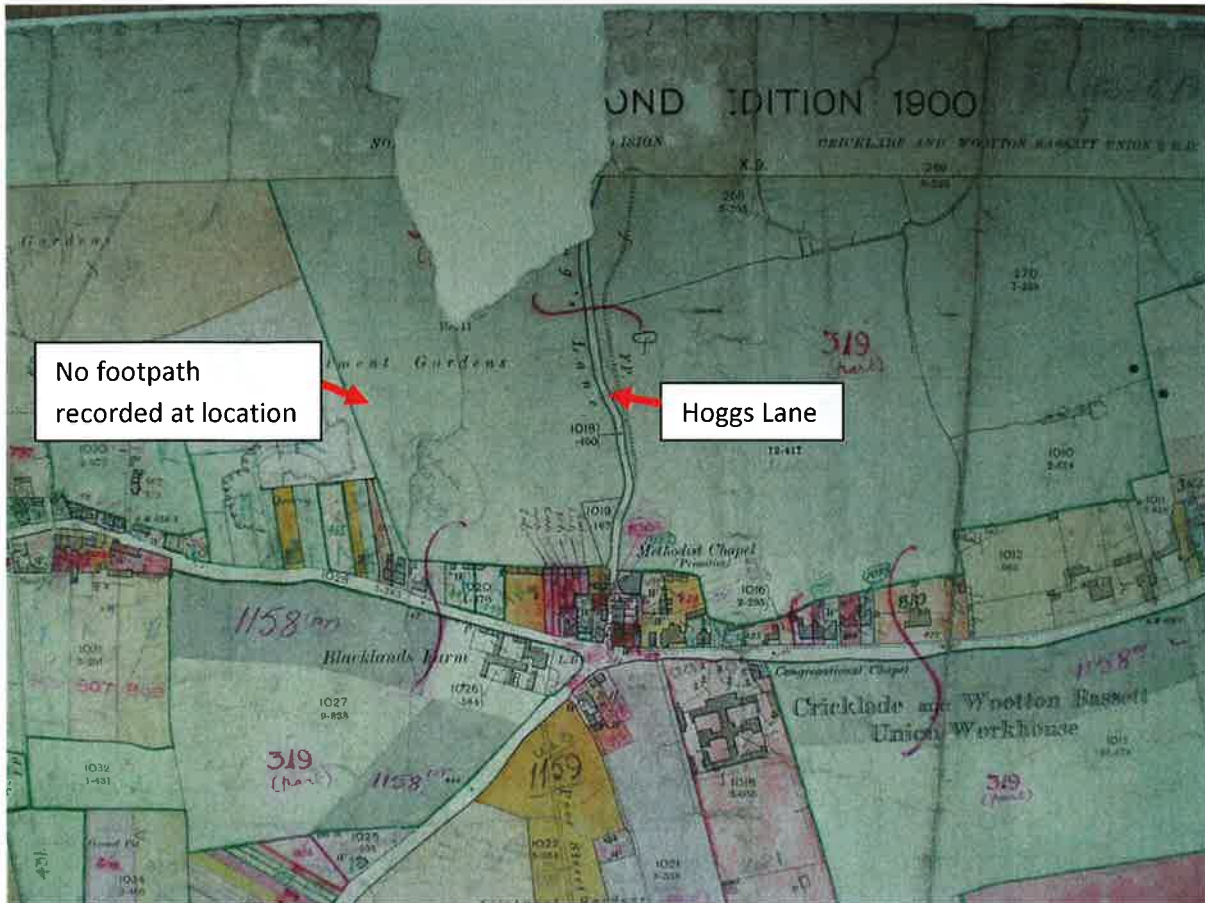


Document	Tithe Award – Purton
Date	1840
Significance	<p>Parishioners once paid tithes to the church and its clergy in the form of payment in kind, for example grain comprising an agreed proportion of the annual profits of cultivation or farming. This form of payment gradually began to be replaced by monetary payment and this was formally recognised by the Tithe Commutation Act of 1836 which regularised this system.</p> <p>Although the tithe map and award was not produced for the purposes of recording highways, the commissioners did have an interest in recording them as they could provide information on map orientation and plot boundaries and the presence of a highway could also affect the productivity of land.</p>
Conclusions	<p>Within the Purton Tithe Award Hoggs Lane is shown coloured sienna and the relevant plot number is 955, recorded as Francombe Hill and described as “<i>arable</i>”. There is no reference to the claimed footpath over this land, i.e. that at the time of compilation of the document, landowners, occupiers and Tithe Commissioners did not record a public right of way. It should also be noted that the existing Footpaths 110 and 112 Purton, which are recorded within the inclosure award map, are not recorded within the tithe award.</p> <p>Perhaps the existence of these rights of way did not affect the productivity of the land and the Commissioners did not record them for this reason. This document should be considered alongside other documentary evidence.</p>



Document	Finance Act 1910
Date	1910
Significance	The 1910 Finance Act required the Valuation Department of the Inland Revenue to carry out a survey of all hereditaments, for the purposes of levying a tax upon the value of land. It has been referred to as the “Second Domesday” as it was such a comprehensive record of land and there were criminal sanctions for the falsification of evidence. Rights of way across land could be excluded from the land as a tax benefit. Land holdings (hereditaments) are illustrated on OS base maps, coloured, numbered and referred to in the books of reference which accompany the maps. As rights of way could decrease the value of the land we would expect them to be shown excluded from the hereditament, or a deduction made for rights of way within the book of reference.
Conclusions	The field through which the claimed route leads is part of hereditament 319 which is recorded as “ <i>House, Buildings and Land. Blacklands Farm</i> ”, within the Book of Reference. The application route is not shown on the base map, however there are deductions made for rights of way or user over this parcel of land, however there are footpaths shown on the map elsewhere within the hereditament, it is possible that the deductions for rights of way

refer to routes other than the claimed route.



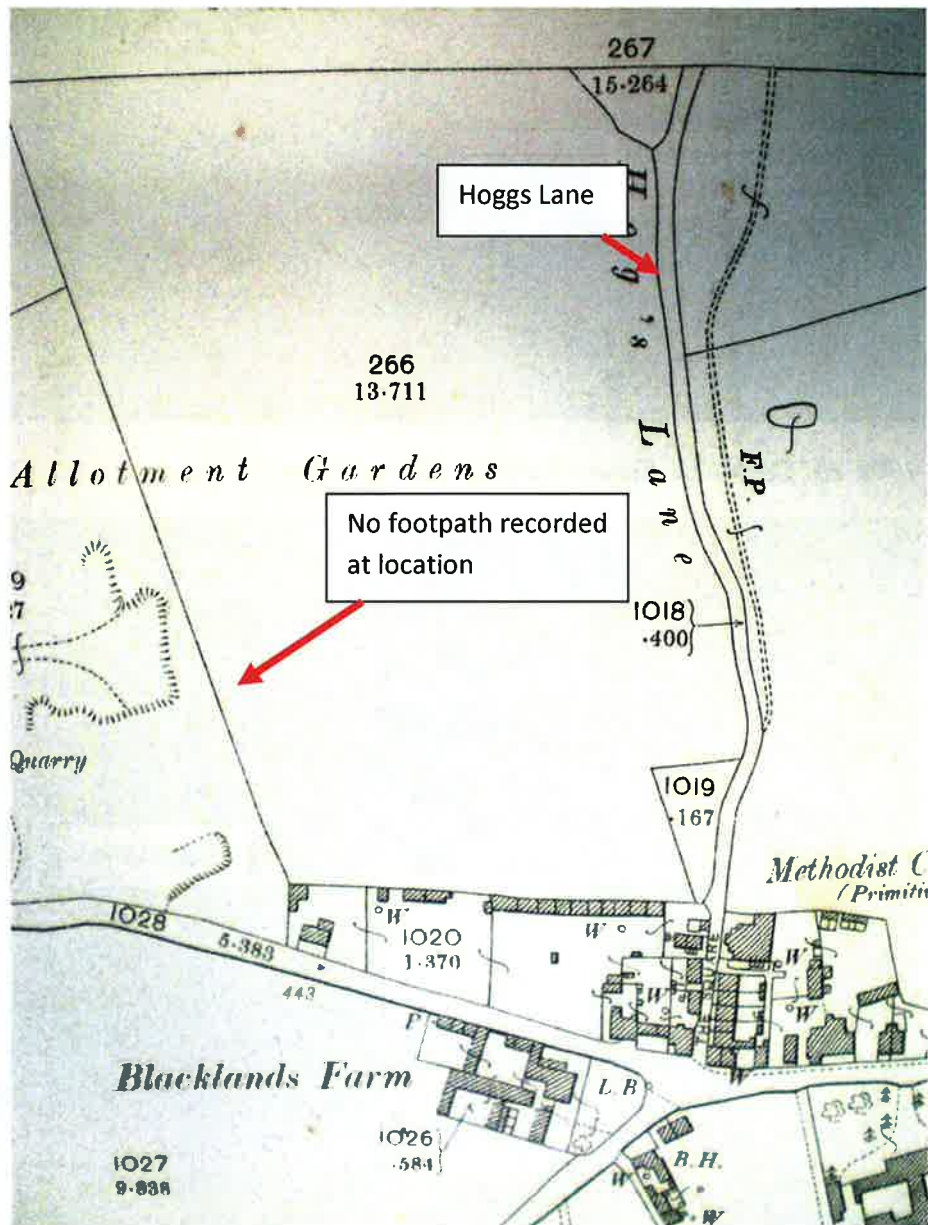
Document	Highway Board Records
Date	1929
Significance	In 1929 County Councils took on responsibility for maintaining highways from the Highway Boards which were administered by the Rural or Urban District Councils. Before the Highway Boards came into being, parishes were responsible for maintaining the highways in their area. The compilation of the takeover maps was not a process undertaken in the public domain and the recording of highways relied upon routes which Surveyors either had a record or memory of maintaining.
Conclusions	No reference to the claimed route is made within the Highway Board records. The application route was not discussed at the meetings of the Highway Boards, however the plans were not produced with public consultation and therefore there was no opportunity for public objection to the recording or non-recording of routes.



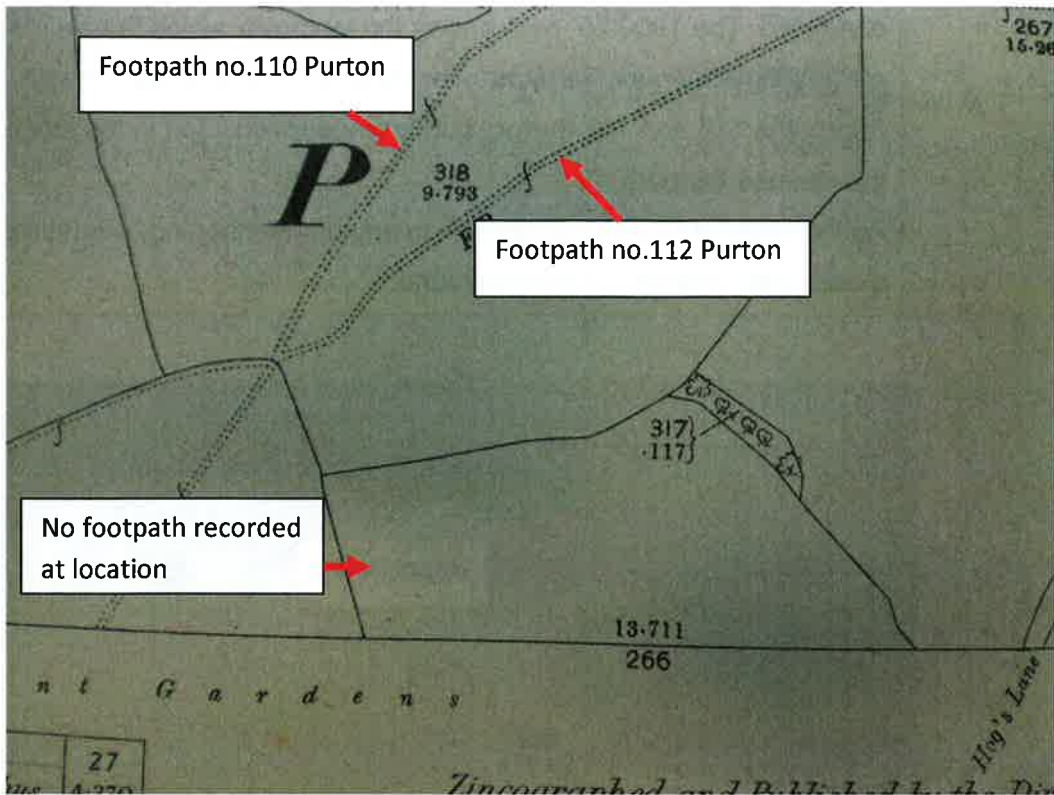
Document	Ordnance Survey Maps
Date	1887, 1900 and 1923
Significance	The Ordnance Survey was founded in 1791 due to the demand from the military for accurate maps of Southern England, in preparation for the Napoleonic War. In time the Ordnance Survey developed a range of maps varying in scale and level of detail to meet the changing needs for accurate and updated maps of the country. The maps are produced from new surveys and are topographical, showing only physical features visible to the surveyor at the time of survey. These maps do not prove the legal status of routes shown. Officers have examined Ordnance Survey maps from 1900 and 1923 (25 inches to one mile) and 1887 (6 inches to one mile).
Conclusions	The application route is not shown on any of the Ordnance Survey maps

examined. The 1900 25" map shows the land over which the claimed route passes as "Allotment Gardens". The maps examined record Hogs Lane, Footpaths 110 and 112 Purton, but no route is recorded in the location of the claimed footpath.

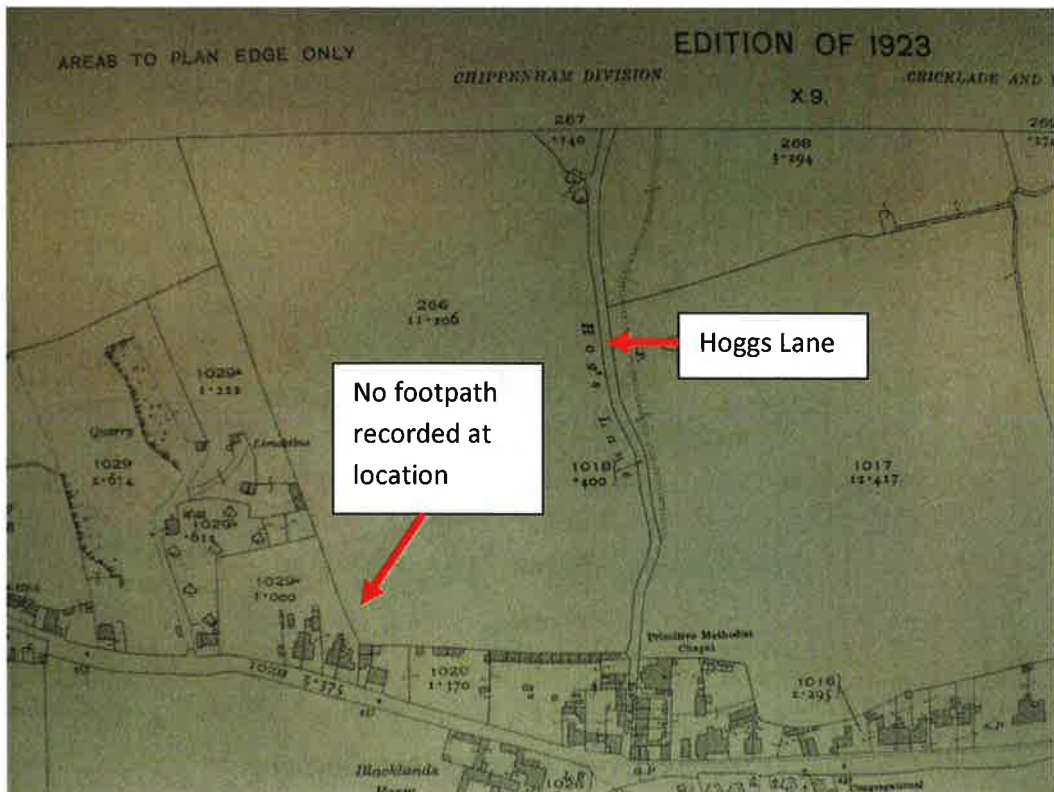
As the claimed route is not shown on any of the mapping, it is unlikely that a path was in evidence on the ground.



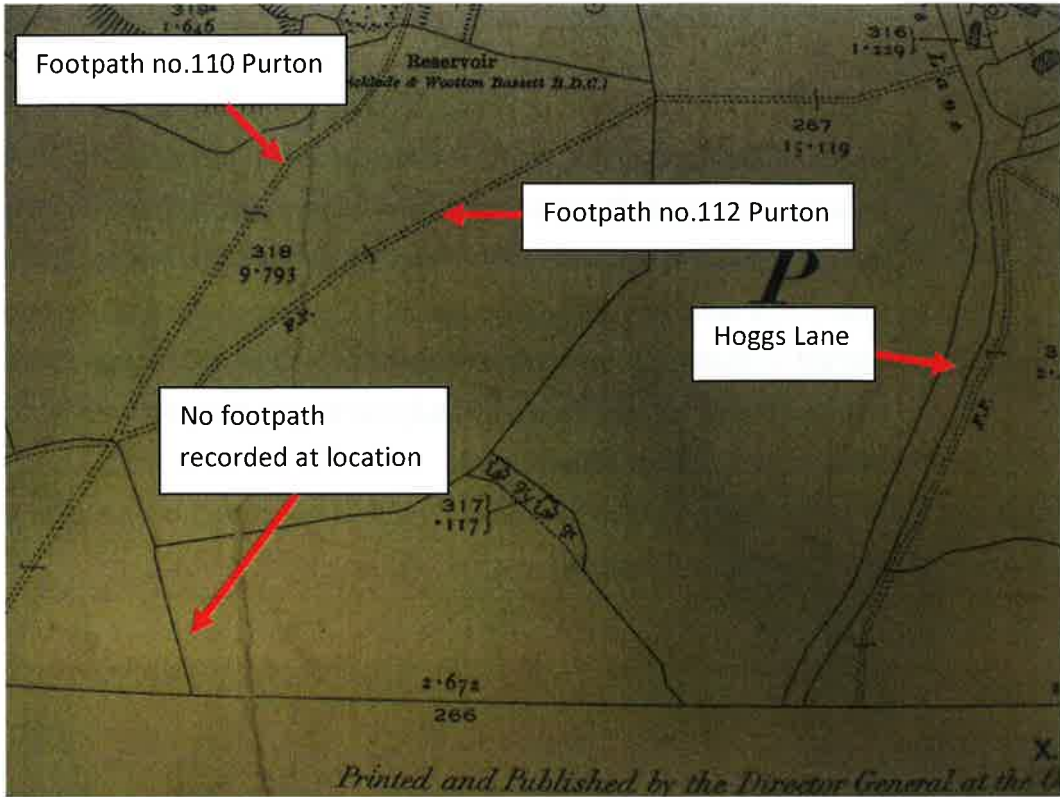
1900 25" Ordnance Survey Map (southern section)



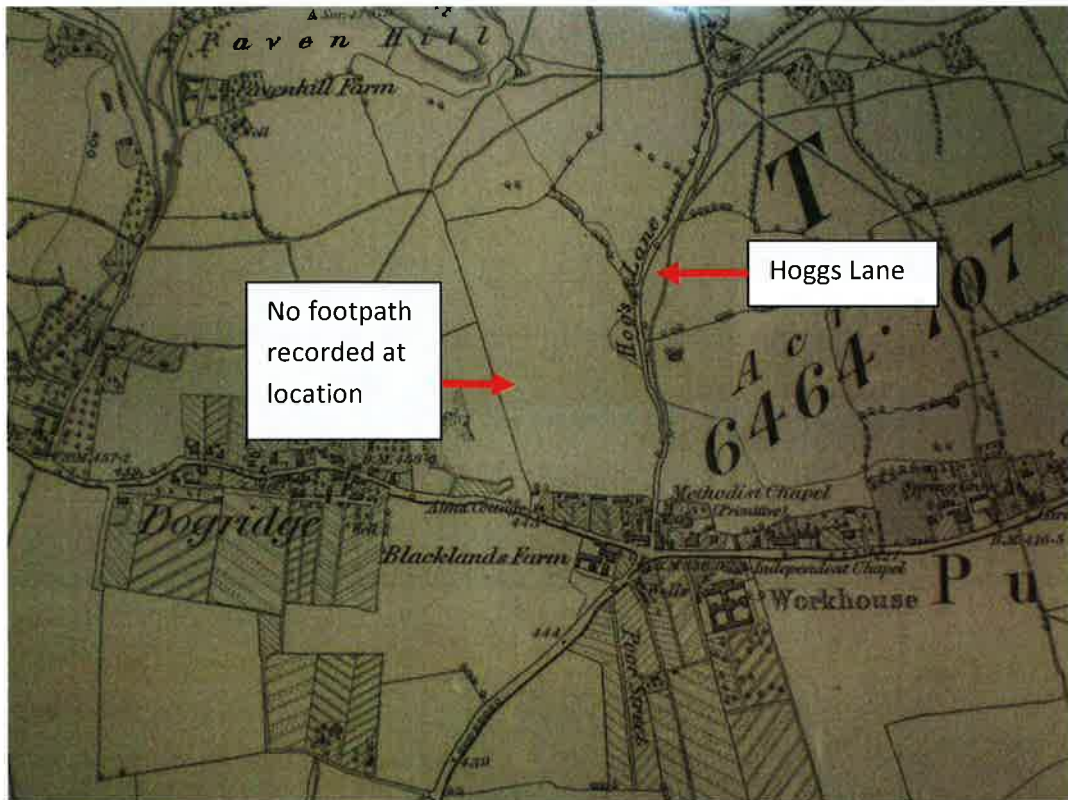
1900 25" Ordnance Survey Map (northern section)



1923 25" Ordnance Survey Map (southern section)



1923 25" Ordnance Survey Map (northern section)



1887 6" Ordnance Survey Map

Document	Andrews & Dury's Map of Wiltshire
Date	1773
Significance	Andrews and Dury's map of Wiltshire dated 1773 is a commercial map based on original survey. Commercial maps were produced for profit and intended for sale to the whole of the travelling public at the time. This and the constraints of the scale of the map made it unlikely that footpaths and bridleways would be shown. Additionally the map makers would not have wished to encourage trespass onto private land or encourage vehicles onto a footpath which could cause difficulty for the landowners from whom the map makers sought subscriptions.
Conclusions	Therefore as expected the claimed route is not shown on this plan and this document is inconclusive.

